The University of Notre Dame Australia Law Review

Volume 17 Article 7

31-12-2015

From Cause to Responsibility: R2P as a Modern Just War

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FROM CAUSE TO RESPONSIBILITY: R2P AS A MODERN JUST WAR

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Abstract

This article examines the relationship between just war theory and the modern principle of responsibility to protect (R2P). In the absence of the principle's clear use as a justification for the use of force, this article considers two situations which prompted debate about the applicability of the principle - the UN Security Council authorised no-fly-zone in Libya in 2011 and the decision not to use force in Syria in 2012. The article's core message is that the debates about R2P suggest that rather than view R2P as a 'new' principle of international law, it should be viewed as a modern incarnation of the historic principles of just war. The just war criteria of 'just cause' and 'proportionality' remain the guiding standards by which an exercise of R2P will be judged. R2P remains a developing principle and, the absence of state practice in this area means that states wanting to intervene to protect foreign populations from atrocities are left without clear legal justification for such action. In the absence of UN Security Council authorisation, use of force under the banner of R2P remains contentious. In the absence of a clear legal status, consideration of R2P's just war origins in the context of recent discourse is helpful in understanding when such force may be legitimate.

I INTRODUCTION

Acts which are now labelled as 'genocide' and 'crimes against humanity' by the modern world[1] are not confined to the annals of history. The general prohibition on the use of force, found in the *Charter of the United Nations* ('*UN Charter*'), sought to protect humanity from the 'scourge of war' and ensure that military force would not be used 'save in the common interest'.[2] The *UN Charter* therefore confined the use of force to a limited number of exceptions.[3] Such exceptions have proved insufficient in responding to and preventing atrocities. Responsibility to protect ('R2P') is the latest international development which attempts to respond to and end such occurrences.[4] R2P encompasses a wide range of possible actions including aid, early warning mechanisms, other non-military measures designed to compel compliance, and at times the use of force.[5] R2P as a legal justification for military intervention to bring an end to such atrocities, particularly in the absence of United Nations Security Council ('UNSC') authorisation, however remains controversial.[6] This article places R2P within the context of

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1 See Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (Yale University Press, 2007).

2 *Charter of the United* Nations, preamble.

3 *Charter of the United Nations* arts 2(4), 51.

4 Stevie Martin, 'Sovereignty and the Responsibility to Protect: Mutually Exclusive or Co-Dependent?' (2011) 20(1) *Griffith Law Review* 153, 153-4.

5 See *Report of the Secretary-General - Early Warning, Assessment and the Responsibility to Protect*, UN GAOR, 64th sess, Agenda Items 48 and 114, UN Doc A/63/864 (14 July 2010).

6 See, eg, John Janzekovic, *The Use of Force in Humanitarian Intervention: Morality and Practicalities* (Ashgate, 2008) 103. See also Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Ashgate, 2005) 124 ff, for a concise discussion of the retaliation/anticipatory self-defence arguments put forward by the US in 2002/3.

just war theory and suggests that, while the absence of sufficient state practice and clear *opinio juris* leave the legal status of R2P-motivated military action unclear, such action can be located in the long history of just war. Consequently, just war provides a framework for understanding where R2P military action may be legitimate.

The primary justification of R2P relies on the acceptance that if modern state-sovereignty is *limited* rather than *absolute*, then the guiding principle of non-intervention may be overcome upon a state abusing its citizens. Whilst individual states can intervene without the imprimatur of the UNSC, such as when it is deadlocked or hampered by political machinations, such intervention must still comply with the original just war framework. This is one of the offered interpretations of the R2P principle.

The alternative justification, unrelated to sovereignty, suggests that a state's use of force without UNSC approval fulfils a secondary responsibility to international peace and security under the *UN Charter*. The state practice for this possibility becoming customary law through R2P is an evolution of humanitarian intervention, such as occurred in Kosovo. Force in this manner must still be conducted as a last resort, with just cause, be proportionate to the harm being done and have a reasonable chance of success. It must not be undertaken lightly and the responsibility is still limited to what is required to bring an end to the wrongful act; this is traceable to the past theory of just war.

In Part II the existing framework for the use of force is briefly discussed; in particular, the *UN Charter* system which limits the circumstances in which states may lawfully resort to force, and prima facie makes unlawful the use of force in the absence of either self-defence or an UNSC resolution. Part III offers a brief explanation of just war theory and ties the traditional rationales legitimising use of force to the modern framework, including both R2P and its pre-cursor, humanitarian intervention. Part IV considers the role R2P played in two contemporary uprisings: in Libya, 2011; and in Syria, 2012/2013. Finally Part V concludes that the current use of force under the banner of R2P, is the best option to allow the prevention of future atrocities, even if the principle is still evolving.

II EXISTING LEGAL FRAMEWORK FOR THE USE OF FORCE

In one sense, the law regarding use of force is relatively straight forward. The *UN Charter* ensures all states are equally sovereign,[7] with art 2(4) specifying a general prohibition against using force to interfere in the territorial integrity and political independence of a state.[8] This basic rule precludes both the United Nations ('UN') and member states 'interven[ing] in matters which are essentially within the domestic jurisdiction' of the state in question.[9] The prohibition on the use of force is also a part of customary international law.[10] This prohibition is subject to two clear exceptions: firstly, the enforcement of international peace and security as authorised by the UNSC; and secondly, the right of self-defence. The parameters and extent of the exceptions remain less certain.

[7] *Charter of the United Nations* art 2(1).
[8] Ibid art 2(4).
[9] Ibid art 2(7).
[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement)* [1986] ICJ Rep 14, 100.

The UN mandate includes maintenance of international peace and security, and human rights promotion.[11] The *UN Charter* gives the UNSC primary responsibility for maintaining international peace and security.[12] A range of methods short of force can be used to achieve this,[13] but ultimately, the UNSC can authorise the use of force where appropriate.[14] Given that all states upon becoming party to the *UN Charter* agree to settle their disputes peacefully,[15] UNSC guided action should only come into effect where states are unable to resolve disputes themselves.

The UNSC's responsibility is to 'maint[ain] … international peace and security'[16] and it has given 'threats to international peace' an ever-broadening definition.[17] Gross violations of human rights, including genocide and crimes against humanity have been recognised as threats to international peace and security, and as a consequence fall within the UNSC's mandate.[18] In determining whether to use force in response to these threats, the UNSC has no explicit *Charter* limitations on when it may do so, aside from a general requirement to act in accordance with the 'Purposes and Principles of the United Nations'.[19] Since the UNSC lacks its own forces, it falls to member states to facilitate and implement UNSC action to maintain or restore international peace and security.[20] It is important to note that the *UN Charter* lacks set legal obligations to protect and enforce human rights.

In addition to use of force authorised by the UNSC there is a second widely accepted exception to the use of force prohibition. This is self-defence as authorised under art 51 of the *UN Charter*. Derived from a pre-UN customary law right,[21] self-defence in international law is limited by the *Caroline* criteria of proportionality, necessity and immediacy;[22] meaning, action taken is confined to defence and not retribution. The question as to whether the *UN Charter's* right of self-defence replaces the customary right, or runs concurrently, is outside the ambit of this article.[23]

Running parallel to the *UN Charter* restrictions are the rules of international humanitarian law ('IHL'). IHL requires that upon use of force being undertaken, states must abide by four core

[11] *Charter of the United Nations* art 1.
[12] Ibid art 24.
[13] Ibid art 33, 39. These include facilitating peaceful dispute settlement between states and taking preventative or enforcement action before use of force.
[14] Ibid art 42.
[15] Ibid art 2(3).
[16] Ibid art 24(1).
[17] Klinton Alexander, 'NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval' (2000) 22 *Houston Journal of International Law* 403, 412.
[18] See, eg, SC Res 1675, UN SCOR, 5430th mtg, UN Doc S/Res/1675 (28 April 2006).
[19] *Charter of the United Nations* art 24(2).
[20] Ibid art 2(5).
[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement)* [1986] ICJ Rep 14.
[22] See Letter from Mr Webster, US Secretary of State to Lord Ashburton, 6 August 1842 <http://avalon.law.yale.edu/19th_century/br-1842d.asp>.
[23] Much of the debate has arisen in the context of discussing the lawfulness of anticipatory self-defence (ie, prior to the existence of an armed attack, but with a view to preventing an imminent one). See, eg, Michael J Glennon, 'Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2001) 25(2) *Harvard Journal of Law & Public Policy* 539, 553-56.

principles which will limit their available military action.[24] This is applicable whether or not use of force occurs via self-defence or on another basis. The four IHL principles limit the action taken to only that which is necessary to achieve the specific objective,[25] designed only to cause harm which is proportionate to the military objective,[26] is not unnecessarily cruel or inhumane[27] and which at all times distinguishes between civilians and combatants.[28] Like the *Caroline* criteria, these guiding principles, particularly the first two, suggest war's legality cannot be determined by only looking at whether the initial reason is 'valid'. For example, the lawfulness of UNSC authorised military action could be undermined if the military objectives were not of sufficient gravity to justify the injuries that a particular form of use of force would inevitably produce.

Although it would be naïve to suggest regard for the UN system's rules was solely responsible for the lack of a 'World War' post-1945,[29] it is clear that respect for the UNSC action and self-defence as exceptions to use of force have been integral. If it is argued however, that the *UN Charter* offers comprehensive coverage of the law regarding use of force, it raises the important question of what recourse exists as an alternative where the UNSC fails to act in defence of human rights abuses occurring within a state's sovereign borders. Since the UNSC's creation it has never directly authorised use of force in order to prevent or stop genocide or crimes against humanity. The atrocities which were allowed to occur in Rwanda and the former Yugoslav Republics, resulted from the failure of non-forceful methods, combined with political deadlocks and preference for state sovereignty, constraining the UNSC from adequately fulfilling its mandate to protect international peace and security.[30]

A consequence of the UNSC failures in the 1990s was the renewed debate over the scope of exceptions to the general prohibition on the use of force when the UNSC fails to act. First, humanitarian intervention, and then R2P, arose as explanations for how states may legitimise

[24] It is not the purpose of this article to provide an extensive review of IHL principles, nor to argue their customary international law status. Extensive discussion and evidence of the customary status of the IHL rules can be found in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005). The sources in the following footnotes are indicative only.

[25] See, eg, *Charter of the International Military Tribunal at Nuremburg* art 6; *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 27, 54.

[26] See, eg, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979), art 51(5)(b).

[27] See, eg, *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001)*, opened for signature 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983), preamble.

[28] See, eg, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979), art 48.

[29] The politics of 'mutually assured destruction' and non-legal considerations influencing the decisions of the major powers, must be acknowledged as having a significant role in keeping the majority of conflicts as *de facto* engagements between the major powers; rather than a direct US/USSR war. A concise discussion of many of these factors can be found in David S Painter, *Cold War: An Interdisciplinary History* (Routledge, 1999).

[30] For discussions of the various measures and developments which ultimately led to the failure of the UN to prevent atrocities, see, eg, Alan J Kuperman, *Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings, 2001), especially Chs 4, 7; Adam Roberts, 'NATO's "Humanitarian War" over Kosovo' (1999) 41(3) *Survival* 102, 103-4; C Guicherd, 'International Law and the War in Kosovo' (1999) 41(2) *Survival* 19, 27.

using force in defence of the world's most helpless and victimised. The two approaches to use of force outside of UNSC authorisation are inherently linked, but offer slightly different rationales. Humanitarian intervention, as understood in the 1990s, has largely been replaced by R2P when states seek to justify their use of force against those who commit atrocities.[31] The remainder of this article examines how humanitarian intervention and R2P fit within the tradition of just war, and how through this, R2P can be seen as having a legal basis in the modern international system. The article also discusses the effect of a changed definition of sovereignty, including its effect on statehood.

III THEORETICAL AND LEGAL JUSTIFICATIONS

A *Just War Theory*

Just war theory predates the modern UN system, and also predates the Westphalian system of states.[32] Just wars' influence continues to be seen within the modern international legal rules governing the use of force. It is acknowledged that just war is not a monolithic tradition, as it has appeared in various forms throughout history.[33] This article does not purport to be a comprehensive study of just war, with this brief historical context seeking only to point to the coherent core of just war theory, suggesting there are circumstances where it is *legitimate* for states to use force, notwithstanding the plethora of other obligations states have acquired. The question in modern times has shifted from *legitimate* to *legal.*[34] Despite this shift, modern international law's prohibition on the use of force (and the limited exceptions) clearly find their roots in just war theory.

Just war theory is based on the premise that there is no absolute right to wage war. Just war requires that states resorting to use of force must only do so within certain constraints; both with regard to the reasons for going to war and the manner in which that war is conducted.

Just war requires use of force by states to be justified against certain criteria. The authority making the decision to use force[35] needs to base it on just cause undertaken to advance a good

[31] See, eg, Janzekovic, above n 6. See also Maogoto, above n 6, for a concise discussion of the retaliation/anticipatory self-defence arguments put forward by the US in 2002/3.

[32] For a concise explanation of the development of the principle of just war from antiquity to modern times, see, eg, Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33(4) *American Journal of International Law* 665.

[33] Ibid.

[34] The concepts of legitimate and legal are not always clearly distinguishable. In this article, legal is used to refer to those actions which comply with the formal legal rules of the international system. An action which is legitimate is one which is morally and ethically defensible. In international law, actions viewed as 'illegal but legitimate' may result in widespread acceptance of the action and lack of enthusiasm for legal sanction for the technically illegal act. For a good discussion of this admittedly controversial division, see Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, 2002) 174-91.

[35] This will become significant when considering the lawfulness of R2P when it is not exercised by the United Nations. For Augustine and succeeding theorists, authority was generally tied to the sovereign or government. See, eg, John J Davenport, 'Just War Theory, Humanitarian Intervention, and the Need for a Democratic Federation' (2011) 39(3) *Journal of Religious Ethics* 493, 512.

intention.[36] Further, the 'just cause' had to be one of 'substantial importance',[37] suggesting the choice to use military action in order to advance this good intention, must be of sufficient weight that such an extreme response was necessary and proportionate to the cause.[38] Brown has suggested this proportionality criteria is paramount in understanding and maintaining, the legitimacy of any use of force.[39] In applying this principle to World War I, Biggar explains the rationale for needing proportionality in a more pragmatic manner; 'if the violence used is not proportionate to one's purported end, then there is prima facie reason to doubt what is purported.'[40]

A good cause alone is therefore insufficient, if one is to accept Augustine's starting point of pacifist inclination.[41] War, Augustine suggested, is only legitimate when a wrong has been perpetrated by the opposing side, 'a wrong so grievous that neither the wrongdoer nor their victims would be well served by leniency.'[42] Augustine also pointed to additional criteria to be assessed in determining whether a war is just. Most notably the criteria includes the need for war to be a 'last resort' and that there be a good 'prospect of success'; ie, a fight which cannot be won, cannot achieve the underlying good cause.[43] According to Steinhoff these additional criteria are most helpfully considered as sub-conditions of the 'just cause' and 'proportionate response' criteria:

> Whether a war is proportionate also depends on what other means are available and how likely they are to achieve the positive results that the war is supposed to bring about. Thus, one can only determine whether there is a just cause by considering these other criteria.[44]

Whether one views these additional criteria as distinct or subsidiary, it is clear the core characteristics of Augustine's just war theory are found as common threads through later theorists, who sought to reconcile the prima facie wrongfulness of war, with the apparent continued recourse to war in the face of real or perceived injustice. Francisco Suarez, for example, writing a millennium after Augustine, explained:

> [N]ot every cause [is] sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion. For it would be contrary to reason to inflict very grave harm because of a slight injustice.[45]

The proportionality of the 'war' response will always be situation specific; dependent on the seriousness of the offence, the availability of alternative mechanisms and the likelihood of a swift and satisfactory conclusion to the conflict. Even the most serious of causes must only

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[36] For a discussion on the development of the concept of just cause and right intention see David D Corey and Daryl J Charles, *Just War Tradition: An Introduction* (ISI Books, 2012) 1-22.
[37] Jean Bethke Elshtain, 'Just War and Humanitarian Intervention' (2001) 17 *American University International Law Review* 1, 7.
[38] Uwe Steinhoff, 'Just Cause and Right Intention' (2014) 13(1) *Journal of Military Ethics* 32, 34-35.
[39] Gary D Brown, 'Proportionality and Just War' (2003) 2(3) *Journal of Military Ethics* 171, 174.
[40] Nigel Biggar, *In Defence of War* (Oxford University Press, 2013) Chs 2, 4.
[41] Steinhoff, above n 38, 34-35; John Mark Mattox, *St Augustine and the Theory of Just War* (Continuum International Publishing, 2006) 60-61.
[42] Corey and Charles, above n 36, 58.
[43] Ibid.
[44] Steinhoff, above n 38, 33-6.
[45] Francisco Suárez, *Selections from Three Works of Francisco Suarez, vol 2* (Clarendon Press, 1944) 816.

warrant resorting to war with due consideration to the impact and consequences of that action. In modern parlance: 'Don't barge in and make a bad situation worse'.[46]

As international law and theory shifted towards what is now recognised as 'modern' international law, Hugo Grotius offered the most comprehensive analysis of how just war remains relevant to the sovereign state system. This resulted from the basic principle of non-intervention being the basis of the Westphalian peace, as opposed to merely being a reflection of it. While Grotius owes much to his predecessors,[47] his *De Jure Belli ac Pacis* (*The Law of War and Peace*) remains influential in understanding the appropriate scope of war. This can be largely attributed to Grotius' attempt to shift the discussion from a theological to a secular basis, and from a moral to a legal framework.[48]

It should be noted that Grotius also emphasised the formalities of war, which was later linked to the post-Westphalian European positivist's focus on form over substance.[49] Certainly the trend in the years, even centuries, following from Grotius' writings was dominated by an emphasis on positivism. States were led by 'Machiavellian princes…driven by "reason of State"',[50] and within this framework, sovereigns gave little or no consideration to wars' 'justice' or 'morality'.[51] Grotius, however, did devote attention to causes which could legitimately justify a formal warfare declaration, whilst warning that in the absence of authoritative bodies to judge the legitimacy of the claim to justice, law could do little to *in fact* stop illegitimate wars from being waged.[52]

Grotius identified exemplar circumstances of 'just causes' for armed conflict, with the first two being self-defence and recovery of land. More interestingly for this article, however, are the other 'just causes' which legitimise the use of force, including where a State has failed to meet its international legal obligations, and punishment of wrongdoing within the law of nature;[53] provided that the crimes in question were 'heinous and manifest'.[54] Grotius did not expressly include wars of liberation, as subjected populations were not his concern.[55] Although,

[46] Elshtain, above n 37, 8.
[47] The extent of Grotius' reliance (direct or indirect) on theorists such as Francisco Suarez, Franciscus de Vitoria and Alberico Gentili (among others) is unclear – but has been addressed in later commentaries on his work. See, eg, Renee Jeffery, *Hugo Grotius in International Thought* (Palgrave Macmillan, 2006) 27-8. (Jeffrey provides a literature review of other scholars on this point).
[48] Ibid 28; Michael Walzer, *Arguing about War* (Yale, 2004) 5; James Turner Johnson, *Ethics and the Use of Force: Just War in a Historical Perspective* (Ashgate, 2011) 83-4.
[49] Robert J Delahunty and John Yoo, 'From Just War to False Peace' (2012) 13(1) *Chicago Journal of International Law* 1, 19; Robert J Delahunty and John Yoo, 'Making War' (2007) 93 *Cornell Law Review* 123, 142-43; Steven Forde, 'Hugo Grotius on Ethics and War' (1998) 92(3) *The American Political Science Review* 639, 645.
[50] Walzer, above n 48, 5.
[51] Delahunty and Yoo, 'From Just War to False Peace', above n 49, 25.
[52] Ibid 18-19; G I A D Draper, 'Grotius' Place in the Development of Legal Ideas about War' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford University Press, 1992) 177, 201.
[53] For a concise overview of Grotius' causes see Jeffery, above n 47, 40; Christoph Stumph, 'Hugo Grotius: Just War Thinking Between Theology and International Law' in Heinz-Gerhard Justenhoven and William A Barbieri (eds), *Arbeiten zur Kirchengeschichte, Volume 120: From Just War to Modern Peace Ethics* (Walter de Gruyter, 2012) 197, 407-410; Draper, above n 52, 194-96.
[54] Grotius, cited in Jeffery, above n 47, 48.
[55] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International War* (Oxford, 2002) 15.

interestingly, Grotius did allow for 'private' war to be conducted, for example by the Dutch East India Company against those who would wrongfully deprive them of property.[56] Even though Grotius was wary of extending international law's applicability to those fighting against an unjust sovereign, he did concede international law would legitimise humanitarian wars.[57] Such wars would be limited to the most extreme cases. Where one sovereign had violated the rights of his subjects it was 'open to another sovereign to assert the rights of the oppressed subjects and intervene on their behalf.'[58]

Theorists both prior to and post Grotius have emphasised the universal character of natural law, and the fundamental rights of humankind which it protects.[59] It then follows, if one recognises the common humanity which forms the basis of the law of nature as the basis of the international legal regime, a war which is conducted in defence of those subject to the most heinous of atrocities, would be not only just in a moral sense,[60] but legal justice would permit, and perhaps demand it.[61] Of course all are wary to emphasise that the offence must be one of the most extreme sort to justify intervening in the affairs of a sovereign state.[62] Even prior to formalising the rules on use of force post-1945, reliance on 'humanitarian intervention' to legitimise military action was rare, and reserved to the most shocking of atrocities.[63]

B *Just War Theory and the Modern Rules*

If one accepts that the two core elements of just war theory are just cause, including but not limited to the rescue of people abused by their sovereign, and proportionality, including likelihood of success, then the modern rules governing use of force can be explained as a modernisation of the just war theory. The theorists discussed in the previous section were, as Grotius acknowledged, operating within an international order where 'informal' mechanisms were no more than political negotiations lacking formal mechanisms for dispute settlement.[64] Consequently, the justifications for entry into war, can be seen as taking into account the absence of viable alternatives for resolving conflicts and disputes. At the same time, the act of warfare still imposes the proportionality requirement, suggesting that law would not legitimise the use of force for any and all insults to the rights of a sovereign.[65]

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[56] Jeffery, above n 47, 37; Patrick A Messina and Craig J N de Paulo, 'The Influence of Augustine on the Development of Just War Theory' in Craig J N de Paulo (ed), *Augustinian Just War Theory and the Wars in Afghanistan and Iraq: Confessions, Contentions, and the Lust for Power* (Peter Lang Publishing, 2011) 23, 46-48; Draper, above n 52, 204.

[57] Chesterman, above n 55, 15.

[58] Ibid.

[59] Stumph, above n 53, 202-6.

[60] Jeffery, above n 47, 42; Draper, above n 52, 204.

[61] Jeffery, above n 47, 42; Draper, above n 52, 204.

[62] Chesterman, above n 55, 15-16; Stumph, above n 53, 197, 211.

[63] Garret provides an excellent overview of pre-20th century intervention highlighting how just war theory *did* extend past 'mere' theory, albeit its application was tempered by the geo-political interests of the applicable state powers. Recognised examples of action based largely on humanitarian concerns include: European powers' intervention in Greece after the violent suppression of independence movements (1827); French led action following the massacre of Maronite Christians in Ottoman Lebanon/Syria (1860); Russian intervention in the Balkans following particularly violent atrocities by Turkish troops in Bulgaria (1870s); the US in response to Spanish Concentration Camps in Cuba (1889). See Stephen A Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (Greenwood Publishing, 1999) 10-14.

[64] Delahunty and Yoo, 'From Just War to False Peace', above n 49, 18-19.

[65] Jeffery, above n 47, 48.

Modern international law provides alternatives not previously available to sovereign states existing before the 20th century. There is also the requirement introduced from art 2(3) of the *UN Charter* of a formal obligation to make use of the non-forceful dispute resolution mechanisms. Further, while 'right authority' was only briefly acknowledged as part of just war theory in the preceding section, this is because there was previously little or no debate about where such authority lay. At most, there is some debate over whether 'just war' would entitle a population to rise up against the oppressive sovereign, as opposed to the right of another sovereign to intervene to protect the other sovereign's population.[66] Notwithstanding this debate, it is clear that, by and large, historic authority lay with the sovereign, and in the post-Westphalian era this was more specifically the sovereign state.

The modern rules governing use of force add an interesting dimension to the application of just war theory. This will be specifically discussed with regard to humanitarian intervention, but in short the UNSC has been introduced as a clear authority beyond that of the sovereign state. This is due to the wide acceptance of states to *UN Charter* terms granting power to the UNSC. The more controversial question, is the extent that the *UN Charter* has led to the UNSC effectively *replacing* the sovereign state as the 'right authority' for use of force within the international system.

The UNSC clearly has significant power to authorise use of force within the scope of its Chapter VII powers. It is equally clear that force has been exercised without UNSC authorisation, and prior to the example of Kosovo, such action faced relatively little sanction.[67] Krisch suggests that while the legal rules within the *UN Charter* have not changed since 1945, '[t]he relatively strong defence of the norm prohibiting intervention without [UNSC] authorisation represents a significant shift in the parameters of the use of force since the Cold War.'[68] This is in part attributable to the political ideology stalemate that occurred during the Cold War.

C *'Humanitarian Intervention'*

In one sense, the post-1945 approach to the use of armed force can be seen as a modern adaptation of the 'just war' theory into a legal framework. By narrowing 'just causes' to self-defence and the maintenance of international peace and security, whilst maintaining the requirements of proportionality and necessity, just war could be said to be synonymous with legal war. The pre-UN theorists however, were working in a situation in which the sovereign, and later the sovereign state, was the only actor of any importance. Thus, while 'right authority' warranted mere mention in the above section, it becomes a matter of importance when considering whether force can be used for humanitarian purposes without UNSC authority.

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[66] See, eg, R J Vincent, 'Grotius, Human Rights, and Intervention' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford University Press, 1992) 241, 248.

[67] See for example the list provided by Holzgreffe which includes 'the United States in the Dominican Republic (1965); India in East Pakistan (1971); Vietnam in Kampuchea (1978 – 93); Tanzania in Uganda (1979); ECOWAS in Liberia (1990 – 95': JL Holzgrefe, 'The Humanitarian Intervention Debate' in J L Holzgreffe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003) 15, 46.

[68] Nico Krisch, 'The Security Council and the Great Powers' in Vaughan Lowe et al (eds), *United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (Oxford University Press, 2008) 133, 149.

Although there is no formal legal definition of humanitarian intervention[69] Murphy has put forward a helpful working definition. Humanitarian intervention is the threat or use of force by a state, collective of states, or an international organization for the primary purpose of protecting the target state's nationals from widespread deprivations of internationally recognised human rights.[70] The contentious element of course is intervention *outside of UN authority.* The doctrine of humanitarian intervention emerged from the impracticalities of UNSC mandated action where decisions to take action 'lack[ed] principled coherence'[71] and failed to prevent atrocities in places such as Rwanda and the former Yugoslavia. The UK Foreign and Commonwealth Office in 1992 set out the criteria for circumstances where humanitarian intervention could be legitimate.[72] The criteria includes: the situation is compelling and urgent; the state in which the atrocities have occurred is unwilling or unable to act; there is no alternative to external intervention; and intervention is proportional and necessary.[73] These criteria – presented as representing an exceptional but legal standard[74] - bear stark similarity to the elements of just war. In the absence of clear state practice in this area, the arguments supporting humanitarian-based action appear to derive from the historic just war obligation to protect populations from catastrophes.[75] The question remains whether the modern development of the UNSC has provided a finite answer with regard to 'authority'. The humanitarian intervention criteria are similar to the common understanding of R2P's third 'pillar' discussed below.

Much of the debate about humanitarian intervention arose after its use in response to the Kosovo crisis in the late 1990s. Following the breakup of the Socialist Federal Republic of Yugoslavia ('SFRY') Kosovo was retained as an autonomous province of Serbia (at the time part of the Federal Republic of Yugoslavia, the successor to the SFRY).[76] Conflict arose between the local, ethnically Albanian population and the Serbian regime which, by 1997 had implemented a policy of repression and utilised force against both the Kosovar 'freedom fighter/terrorist'[77] movement seeking autonomy, and the local civilian population.[78]

In 1998 there was a UNSC resolution, labelling what was occurring in Kosovo a humanitarian catastrophe, and an ongoing threat to international peace and security, but without authorising

[69] Dorota Gierycz, 'From Humanitarian Intervention (HI) to Responsibility to Protect (R2P)' (2010) 29(2) *Criminal Justice Ethics* 110, 111.
[70] Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, 1996) 11-12.
[71] Erik A Heinz, *Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Intervention* (State University of New York Press, 2009) 64.
[72] (1992) 63 *British Yearbook of International Law* (Oxford University Press) 824-825; Foreign Affairs Committee, House of Commons Paper 235-iii, Session 1992-1993 (1992) 85, 92 both discussed in Evidence to Select Committee on Foreign Affairs, House of Commons, Parliament of the United Kingdom, published by order of 23 May 2000 [29]-[30] (Professor Ian Brownlie).
[73] Ibid; see also Susan J Atwood, 'From Just War to Just Intervention' (2003) 19(1) *New England Journal of Public Policy* 55, 58-9.
[74] UN SCOR, 54th sess, 3988th mtg, UN Doc S/PV.3988 (24 March 1999), 12 (UK).
[75] Atwood, above n 73, 57-8.
[76] See for discussion, Mohammed Taghi Karoubi, *Just or Unjust War?* (Ashgate, 2004) 176-81.
[77] The debate over terminology can be left to other authors. Contemporaneous reports tended to prefer the terminology of 'terrorist' but 'freedom fighter' became the norm as the extent of the Serbian oppression and atrocities became known. A brief 1998 comment on the BBC news website points to the problematic and changing 'classification' of the KLA. Nened Sebac, 'The KLA – Terrorists or Freedom Fighters', *BBC World News* (online), 28 June 1999 <http://news.bbc.co.uk/2/hi/europe/121818.stm>.
[78] For discussion, see also Karoubi, above n 76, 182-4.

express actions to control the situation.[79] The resolution led to certain NATO members intervening on humanitarian grounds,[80] bombing areas of Kosovo in an effort to prevent any further influx of soldiers harming ethnic Albanians in the area.[81] The UNSC was *unsuccessful* in passing a resolution declaring NATO's action, which constituted use of force, as illegal,[82] but did further authorise states to intervene to try and create peace.[83]

Particular concern was expressed regarding the Kosovo intervention and several states warned that the humanitarian necessity of the Kosovo intervention ought not to imply the establishment of a legal precedent – placing the action as a necessary but exceptional circumstance.[84] Other states however, justified the humanitarian intervention as compatible with the principles and purposes of the UN when exercised solely for the prevention of human rights abuses.[85] Adding to this, Sir Hersch Lauterpacht had previously postulated a right of armed humanitarian intervention, where 'a State renders itself guilty of cruelties … in such a way as to deny [its nationals] their fundamental human rights and to shock the conscience of mankind'.[86] In accordance with the *ICJ Statute* for determining sources of international law, teachings of the most highly qualified publicists are relevant in identifying and understanding international law,[87] and in regards to this article, key to establishing how R2P use of force may be legitimate.

The *UN Charter* describes the UNSC as having the 'primary' responsibility to act in the interests of international peace and security.[88] As mentioned previously, art 39 of the *UN Charter*, gives the UNSC the power to determine what international threats are. The International Court of Justice ('ICJ') has also found that art 24 which confers primary responsibility on the UNSC, does not confine *all* actions for maintaining international peace and security to the UNSC's 'primary' responsibility.[89] The article's power is primary as opposed to exclusive; however, only the UNSC can legally require states to use force against another state.[90]

[79] SC Res 1203, UN SCOR, 3937th mtg, UN Doc S/RES/1203 (24 October 1998).
[80] See, eg, Stephen Hall, *Principles of International Law* (LexisNexis, 4th ed, 2014) 457; Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' (2003) 85 (852) *International Review of the Red Cross* 807, 821.
[81] Paul Williams, J Ulbrick and Jonathan Worboys, 'Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis' (2012) 45 *Case Western Reserve Journal of International Law* 473, 478.
[82] Hall, above n 80, 457.
[83] See Jonathan Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93(4) *The American Journal of International Law* 834, 835.
[84] The relevant discussions of the German Bundestag are addressed by B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10(1) *European Journal of International Law* 1, 12-13.
[85] See the discussions in A Cassese, 'A Follow Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*' (1999) 10(4) *European Journal of International Law* 791, 793-94, 797-99.
[86] Hersch Lauterpacht (ed), L Oppenheim, *International Law, A Treatise* (Longmans, 8th ed, 1955) 312.
[87] *Statute of the International Court of Justice* art 38(1)(d).
[88] *Charter of the United Nations* art 24.
[89] *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 163.
[90] Ibid. UNSC ordered force can occur via art 42 of the *UN Charter*, which gives the UNSC authority to require member states to take action, including use of force, to maintain international peace and security upon peaceful methods having failed. There are, admittedly, practical and logistical difficulties with *requiring* states to provide tangible military support and the UNSC has tended towards 'authorising' rather than 'requiring' in its various resolutions. See, eg, SC Res 794, UN SCOR, 47th Sess, 3145th Mtg, UN Doc SC/RES/794 (3 Dec 1992).

It has been acknowledged by the ICJ that the *UN Charter* never intended to embody every essential principle of international law[91] and the discussion above suggests there is the argument (albeit contested) that armed intervention was permissible in circumstances of UNSC identified atrocities; due to the UNSC only having a 'primary', not 'sole' role. In this context, humanitarian use of force becomes more grounded through being based on sovereign responsibility, or more particularly, on the failure of the sovereign to meet its responsibilities both to the population in preventing atrocities, and the international community, upon threats to international peace and security.

In 1999, commenting on the legality of the Kosovo intervention, Cassese suggested that it would be 'judicious to await any repetition of such actions under the same conditions and exigencies' before concluding whether humanitarian intervention had developed into a new exception to the general prohibition on the (non-UNSC authorised) use of force.[92] The state practice necessary for identifying a customary rule in this area remains unclear and 15 years after Kosovo the situation remains much discussed, but has not yet been 'settled'. While the *opinio juris* clearly points to a limited allowance for use of force when a state has exceeded its scope of 'sovereignty' by abusing its population, the matter of 'without UNSC authorisation' is largely untested.

Notwithstanding the argument that gross violations of fundamental rights will undermine a state's claim to sovereignty, interpretation of art 2(4) can change over time as the world develops, and if only UNSC *identified* threats, combined with a deadlocked Council, were acted on, then the *UN Charter* would not be undermined via R2P use of force extended from humanitarian intervention. Legitimate action would still be constrained by the just war principles of necessity and proportionality (as the exercise of self-defence is similarly constrained, despite the lack of express criteria within the *UN Charter* itself, as discussed above). This utilises a permissive interpretation of the *UN Charter* and is consistent with the language used in art 2(4), as no direct threat is made to a state's sustained territory or political independence.[93] For those who insist on a restrictive interpretation in line with the *travaux préparatoires*, which sought to completely constrain force except where clearly allowed by the *UN Charter*, then the argument below of evolved sovereignty still ensures R2P has a future.[94] Additionally, departure from a restrictive interpretation of the *UN Charter* is further supported if the 'secondary' responsibility is acted upon only in the case of a UNSC deadlock.[95] Such action is arguably still consistent with the purposes of the *UN Charter*, in particular when giving consideration to the preamble which affirms human rights and preventing war for future generations.[96] In addition to the UNSC only being given 'primary' responsibility, this adds further to the interpretative basis for justifying a departure from restrictive interpretation, coupled with global developments.

D *Responsibility to Protect*

[91] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement)* [1986] ICJ Rep 14, 96.
[92] Cassese, above n 85, 797.
[93] Hall, above n 80, 429.
[94] Ibid.
[95] That is, it would be precluded where the UNSC has taken definitive, albeit non-forceful action.
[96] See *Charter of the United Nations* preamble; Jasmeet Gulati and Ivan Khosa, 'Humanitarian Intervention: To Protect State Sovereignty' (2013) 41(3) *Denver Journal of International Law and Policy* 397, 400.

The mass killings in Srebrenica and Rwanda occurred under the watch of the UN, highlighting the collective inadequacies in international institutions.[97] This criticism also came from within the UN itself, particularly by the then Secretary-General Kofi Annan.[98] Consequently, a 2001 Commission, the International Commission on Intervention and State Sovereignty ('ICISS') set up by Canada, developed R2P [99] to improve the flaws in traditional UNSC action and Humanitarian Intervention. [100] In querying how intervention can occur without violating State sovereignty, the ICISS concluded that sovereignty included a *responsibility* to protect.[101] The ICISS alluded to just war's 'just cause' threshold when it identified a test of serious and irreparable harm being imminent or occurring, and that the force must be the last course of action.[102] A UN special report adopted this idea of R2P, reinforcing that modern sovereignty now includes obligations to protect the people's welfare, and that UN collective security means the international community shares *responsibility* in ensuring this; as opposed to a humanitarian intervention '*right*' to intervene.[103]

A 2005 World Summit outcome, was R2P's clear and unanimous acceptance by UN members through a General Assembly resolution.[104] Drawing on the ICISS report, the UN further clarified the 'just cause' test by limiting R2P to four crimes – genocide, war crimes, ethnic cleansing and crimes against humanity,[105] as opposed to the ICISS' more general threshold test.[106] The United Nations General Assembly ('UNGA') accepted responsibility to assist in accordance with *UN Charter* provisions, such as through the UNSC.[107] The challenge of understanding R2P in the contemporary context is that, despite the unanimous acceptance that all states via the UNSC and UNGA have a *responsibility* to act,[108] the resolution was silent on what to do should the UNSC fail to meet that responsibility.[109]

In early 2009, a UN Secretary-General report transformed R2P's discourse into the aforementioned three 'pillars' of R2P. For the first pillar, protection, the responsibility falls primarily upon the state. The second, international assistance, should occur upon state failure. The third, international intervention, must be timely and decisive, with peaceful means utilised initially.[110] In late 2009 an UNGA resolution acknowledged the importance of this report in

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[97] *Report of the Secretary-General - Implementing the Responsibility to Protect*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) 5 [5].
[98] Ibid.
[99] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, 2001).
[100] Gulati and Khosa, above n 96, 397.
[101] International Commission on Intervention and State Sovereignty, above n 99, 17.
[102] Ibid 31-7.
[103] High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 21-2 [29]-[34].
[104] See *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 16th sess, Agenda Items 46 and 120, UN Doc A/Res/60/1 (24 October 2005) [138]-[139].
[105] Ibid [138].
[106] Aidan Hehir, 'NATO's "Humanitarian Intervention" in Kosovo: Legal Precedent or Aberration?' (2009) 8(3) *Journal of Human Rights* 245, 251.
[107] *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 16th sess, Agenda Items 46 and 120, UN Doc A/Res/60/1 (24 October 2005), [139].
[108] Ibid [138]-[139].
[109] Ibid.
[110] See *Report of the Secretary-General - Implementing the Responsibility to Protect*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009).

developing R2P, even though it did not *expressly* accept the finer details in the report.[111] The UNGA did however state their continued consideration for R2P, recalling the 2005 resolution. The 2009 report emphasised that the UN R2P use of force, pursuant to the 2005 Summit outcome, should be channelled through the UNSC.[112]

Essentially, R2P is the term given to viewing sovereignty as *including* the responsibility each state has to protect its population from mass atrocities. Deng suggested that failure to realise this responsibility, including a failure to seek and accept assistance, places on the international community an obligation to 'find a way of intervening to provide the needed assistance';[113] as opposed to intervening upon a right. UNGA resolutions are not binding, but given the original 2005 UNGA unanimous support and UNSC resolutions having regularly referenced R2P,[114] discourse places R2P into the category of an 'emerging norm' of international law; without, however, the level of certainty sufficient to comfortably represent a clear exception to the general prohibition. Member state responses to the 2009 report show political division on R2P's scope and implementation.[115] Subsequent analysis will show that only R2P's first pillar has reached customary law status, with the others still developing.

The mentioned elements of when humanitarian intervention can occur, are in essence the same as R2P's three pillars (in particular the third pillar); with criticism capable of being directed at R2P for its similarities, depending on one's perspective. R2P adds an obligation on the international community to provide peaceful assistance, otherwise not present in the previously existing humanitarian intervention doctrine.[116] As mentioned above, this article will only focus on use of force under R2P, although it is in essence the same as humanitarian intervention. The subtle distinctions however enable R2P to improve on humanitarian intervention in theory, even if presently lacking state practice on this new argument. R2P essentially acknowledges a legal test for humanitarian intervention,[117] with the shift to sovereign responsibility allowing the intervention, instead of blocking it.

E *The Integrity of Sovereignty as an Alternative Justification for R2P*

As stated, R2P has been recognised and conceptualised outside of the UNGA resolution as part of modern sovereignty, with the international community having a secondary responsibility to assist.[118] If states have a globally agreed duty to protect their citizens from heinous crimes, to the extent the duty becomes an element of statehood, then a breach would result in a loss of

[111] *The Responsibility to Protect*, GA Res 63/308, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/RES/63/308 (7 October 2009).
[112] *Report of the Secretary-General - Implementing the Responsibility to Protect*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) 4 [1]-[2].
[113] Francis Deng, 'From Sovereignty as Responsibility to the Responsibility to Protect' (2010) 2 *Global Responsibility to Protect* 353, 354-5.
[114] See, eg, SC Res 1674, UN SCOR, 5430th mtg, UN Doc S/RES/1674 (28 April 2006); SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011); SC Res 1975, UN SCOR, 6508th mtg, UN Doc S/RES/1975 (30 March 2011); SC Res 2121, UN SCOR, 7042nd mtg, UN Doc S/RES/2121 (10 October 2013).
[115] See David Berman and Christopher Michaelsen, 'Intervention in Libya: Another Nail in the Coffin for the Responsibility-to-Protect?' (2012) 14(4) *International Community Law Review* 337, 358.
[116] Hall, above n 80, 460.
[117] Kioko, above n 80, 809.
[118] See, eg, International Commission on Intervention and State Sovereignty, above n 99; *Report of the Secretary-General - We the Peoples: The Role of the United Nations in the Twenty-First Century*, UN GAOR, 45th sess, Agenda Item 49(b), UN Doc A/54/2000 (27 March 2000).

sovereignty. Redefining sovereignty allows broad R2P use of force to occur, as this avoids any conflict with the *UN Charter* relating to state domestic affairs, territorial integrity and political independence. Despite lacking state practice and clear *opinio juris*, states can pursue this argument legally.

International sovereignty is not law-based but a source of law itself.[119] Also, sovereignty is not a matter of degree, but a result.[120] Since the UN's formation, the world has continued to develop, with international standards and benchmarks needing to be subject to new interpretations and reforms,[121] where there are no viable alternatives for resolving conflicts. State practice is relevant to treaty interpretation, which includes the *UN Charter*.[122]

Sovereignty is an essential structural part of the modern state system.[123] If interpretation of sovereignty has changed, then sovereignty is not as inviolate as it was in the Westphalian system.[124] The UNSC resolutions referenced above mentioning this state responsibility, can be used to evidence this. Crawford has explained 'statehood' as a form of standing within the international legal system.[125] States are presumed to have various rights and responsibilities as opposed to statehood creating or proving such rights.[126] In international law there is no general entitlement to sovereignty; [127] recognition is not a condition for statehood in international law, as an entity is recognised because it is a state.[128] International sovereignty requires recognition from other states to participate in the international community.[129] If enough states view sovereignty as failed, due to an element of statehood failing, the 'state' is no longer able to rely on sovereignty as the basis of its territorial independence; thus the R2P use of force would not contravene the art 2(4) prohibition.

Countries such as China, Pakistan and Sudan have opposed the implementation of R2P, using the concept of sovereignty to criticise it.[130] Despite this, it is clear the modern international system in which R2P's critics (and supporters) are operating under, no longer supports a concept of sovereignty which implies absolute power, as was proposed by 16th century theorists.[131] The modern concept of sovereignty is capable of complementing intervention.[132] Regional bodies such as the African Union, have recognised that whilst there is the principle

[119] Oxford Public International Law, *Max Planck Encyclopaedia of Public International Law*, (April 2011) Sovereignty, 'International Law and International Relations' [90].
[120] Ibid [80].
[121] Oxford Public International Law, *Max Planck Encyclopaedia of Public International Law*, (March 2010) Territorial Integrity and Political Independence, 'International Law and International Relations' [57].
[122] Nigel Rodley and Basak Cali, 'Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law' (2007) 7(2) *Human Rights Law Review* 275, 279.
[123] Robert Jennings, 'Sovereignty and International Law' in Gerard Kreijen et al (eds), *State, Sovereignty, and International Governance* (Oxford Scholarship, 2012) 27, 27.
[124] Williams, Ulbrick and Worboys, above n 81, 481.
[125] James Crawford, *The Creation of States in International Law* (Oxford University Press, 2007) 44.
[126] Ibid.
[127] Ibid 89.
[128] Ibid 93.
[129] Danny Auron, 'The Derecognition Approach: Government, Illegality, Recognition, and Non-Violent Regime Change' (2013) 45 *George Washington International Law Review* 433, 464.
[130] Martin, above n 4, 172-3.
[131] Arjun Chowdhury and Raymond Duvall, 'Sovereignty and Sovereign Power' (2014) 6(2) *International Theory* 191, 193-96.
[132] See, eg, Ramesh Thakur and Thomas Weiss, 'R2P: From Idea to Norm – and Action?' (2009) 1(1) *Global Responsibility to Protect* 22, 41; Martin, above n 4, 153.

of non-interference and prohibition on use of force, there is also a right to intervene for grave human rights matters.[133] This recognition was triggered by the same humanitarian disasters as the R2P principles' formulation,[134] acknowledging that not taking action on human rights matters solely on the principle of non-intervention, is flawed.[135] Whilst this does not use the new wording of 'responsibility' it is evidence of state practice to make the intention acceptable, and that not taking action on human rights matters solely on the principle of non-intervention is flawed.[136]

R2P indicates that when a state is unwilling or unable to exercise its responsibility as the principal caretaker of its citizens, it loses its right to this primacy and therefore sovereignty.[137] Sovereignty's new formulation is rooted in the reality of today's global interdependence.[138] This creates a different type of sovereignty than the one which was a barrier to intervention during the 19th and 20th centuries.[139] While states have yet to clearly utilise this argument, given the nature of sovereignty's definition, and that acts which are viewed as 'violations' can still be used as the basis for becoming an international norm,[140] it is an important R2P legal argument to note.

This present conceptualisation of sovereignty is not dissimilar to the just war theory postulated by Grotius, focusing on preventing the wrongdoing of heinous and manifest crimes, and the enforcement of unfulfilled obligations, being legitimate 'just causes' for use of force. This view of legitimisation of action provides a basis for use of force via R2P, conceptualised outside of the UNGA resolution, by tying sovereignty to the obligation to protect one's people from harm where the subjected population faces serious circumstances. This conception of sovereignty also improves upon the theory of just war as formulated in the past, due to the judicial international institutions now in operation. Both the ICJ and the International Criminal Court ('ICC') exist to examine questions of legitimacy for any just force taken under R2P; albeit the ICJ ultimately lacked jurisdiction when the pre-R2P NATO action was challenged[141] and the ICC's jurisdiction for crimes of aggression is not yet in force. The proportionality and necessity criteria to intervene under this modern sovereignty is explored more fully in the next section, where state-specific situations are analysed.

Overall, sovereignty can only be justified as long as the basic right to life is preserved.[142] Arguably, R2P does not breach sovereignty and the *UN Charter*, as force is used to protect 'sovereignty' from consistent violations of the ruling authority.[143] Observing sovereignty

[133] *Constitutive Act of the African Union*, opened for signature 11 July 2000, OAU Doc (entered into forced 26 May 2001) art 4(f)-(j).
[134] See Kioko, above n 80, 812.
[135] Ibid 817.
[136] Ibid.
[137] Auron, above n 129, 457.
[138] Thakur and Weiss, above n 132, 31.
[139] Martin, above n 4, 154.
[140] Rodley and Cali, above n 122, 297.
[141] *Legality of Use of Force (Serbia and Montenegro v Belgium) (Serbia And Montenegro v Canada) (Serbia And Montenegro v France) (Serbia And Montenegro v Germany) (Serbia And Montenegro v Italy) (Serbia And Montenegro v Netherlands) (Serbia And Montenegro v Portugal) (Serbia And Montenegro v United Kingdom)(Preliminary Objections)* [2004] ICJ Rep 279.
[142] John Merriam, 'Kosovo and the Law of Humanitarian Intervention' (2001) 33(1) *Case Western Reserve Journal of International Law* 111, 116.
[143] Gulati and Khosa, above n 96, 412.

philosophically, it is possible to draw the conclusion that sovereigns cannot go against the basic objective of their power, which is to protect the life of people, as a type of social contract.[144] Even philosophers such as Locke and Rousseau, who viewed the state as having unlimited power, tempered this to the extent it is legitimately exercised.[145] R2P 'sovereignty' has old roots, with states needing to respect the rights of their citizens to ensure non-intervention, as articulated by academics in the early 1900s.[146] While it may lead to the UNSC being less willing to call something a threat to peace and security, the threshold to intervene under R2P is arguably high as demonstrated in the discussion on Libya and Syria below.[147]

IV PRACTICAL IMPLEMENTATION

The structure of the UNSC has allowed and resulted in its actions (or inactions) to be politically motivated.[148] One permanent UNSC member vetoing a substantive matter resolution makes the resolution ineffective. Often used during the Cold War along political lines,[149] the veto prevented sanctioned action on humanitarian issues;[150] this remains true in the present day.[151] While a version of R2P received collective global acceptance in 2005, it has failed to be put into effective implementation.[152]

The following analysis of the uprisings in Libya and Syria demonstrates how UN-authorised 'R2P' has had limited use and why it is unlikely to be exercised again soon.[153] The UNGA version of R2P, unlike the ICISS', does not include an agreement that the UNSC five permanent members will not veto humanitarian issues, nor does it include specific approval of UNGA or regional organisations taking direct action if the UNSC fails to take action.[154] Arguably to cover the whole R2P concept the UN needs to take further steps,[155] expanding

[144] Ibid 407.
[145] Martin, above n 4, 182.
[146] Ibid 158.
[147] Thakur and Weiss, above n 132, 29.
[148] Navi Pillay, 'Maintenance of International Peace and Security' (Statement to the Security Council Open Debate, 21 August 2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14958&LangID=E>.
[149] For a brief discussion of the use of the veto see Emma McClean, *Hard Evidence: Who Uses Veto in the UN Security Council Most Often – and for What?* (1 August 2014) The Conversation <http://theconversation.com/hard-evidence-who-uses-veto-in-the-un-security-council-most-often-and-for-what-29907>.
[150] Ibid.
[151] See Richard Galpin, 'Ukraine Crisis: Russia Isolated in UN Crimea Vote', *BBC World News* (online), 15 March 2014 <http://www.bbc.com/news/world-europe-26595776>. This source outlines the situation where there was an inability among the UNSC to resolve the tension between Russia and Ukraine over Crimea considering Russia's permanent UNSC placement. Whilst this was not a case of R2P, Crimea is a clear and recent example of how a permanent UNSC member's veto power can be used to manipulate proceedings if the state has a vested self interest in the outcome.
[152] See Howard Adelman, 'Refugees, IDPs and the Responsibility to Protect (R2P): The Case of Darfur' (2010) 2(1) *Global Responsibility to Protect* 127, 129.
[153] It is acknowledged that there are other case examples than Syria and Libya which can be used to discuss R2P.
[154] See, eg, Oxford Public International Law, *Max Planck Encyclopaedia of Public International Law*, (October 2010) Responsibility to Protect, 'Use of Force, War, Peace and Neutrality' [5]; Martin, above n 4, 165-6; International Commission on Intervention and State Sovereignty, above n 99, 53.
[155] Oxford Public International Law, *Max Planck Encyclopaedia of Public International Law*, Responsibility to Protect, above n 154, [22].

their 'watered down' version.[156] This is needed, as without an effective, agreed, non-contentious way to manage and intervene when genocide, war crimes, crimes against humanity and ethnic cleansing occur, further atrocities will continue to be committed, undermining the ability of R2P to fulfil its purposes.

A *The Libyan Civil War*

1 *The Situation*

In what was termed the 'Arab Spring', autocratic regimes were overthrown throughout the Middle East and northern Africa by civilian uprisings starting from 2010.[157] This occurred in a bid to overthrow political suppression and fulfil socio-economic demands.[158] In mid-February 2011 protests started in Libya, and by March the rebellion was a full scale armed conflict.[159] Those involved in the uprising clashed with the military forces of Libya's then de facto leader, Colonel Muammar Gaddafi,[160] already known for his oppressive regime.[161]

Libya's situation devolved rapidly.[162] Gaddafi's use of force against the uprising far exceeded the suppression of contemporaneous protests in other states, with indiscriminate shelling of urban centres occurring early on.[163] Within a month the Human Rights Council ('HRC') set up an International Commission of Inquiry into the situation.[164] It recommended that UNGA suspend Libya's HRC membership.[165] The Arab League suspended Libya's membership to their own organisation.[166] These actions were based on grave concern over the increasingly

[156] Alex Bellamy, 'Realizing the Responsibility to Protect' (2009) 10(2) *International Studies Perspectives* 111, 111.
[157] See, eg, Rama Mani and Thomas Weiss, 'R2P's Missing Link, Culture' (2011) 3 *Global Responsibility to Protect* 451, 541-2; Nathan Busch and Joseph Pilat, 'Disarming Libya? A Reassessment after the Arab Spring' (2013) 89(1) *International Affairs* 451, 451.
[158] See, eg, El Hassan Bin Talal and Rolf Schwarz, 'The Responsibility to Protect and the Arab World: An Emerging International Norm?' (2013) 34(1) *Contemporary Security Policy* 1, 5-6; Benedetta Berti, 'Forcible Intervention in Libya: Revamping the 'Politics of Human Protection'?' (2014) 26(1) *Global Change, Peace & Security* 21, 25.
[159] See, eg, John Cerone, 'Expanding the R2P Tool-Kit: New Political Possibilities and Attendant Legal Uncertainties' (2012) 18(2) *ILSA Journal of International & Comparative Law* 531, 532; Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime change in Libya' (2011) 52 *Virginia Journal of International Law* 355, 372.
[160] Cerone, above n 159, 532; Payandeh, above n 159, 372.
[161] See, eg, *Advance Unedited Version: Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human rights law in the Libyan Arab Jamahiriya*, UN GAOR, 17th sess, Agenda Item 4, UN Doc A/HRC/17/44 (1 June 2014) 3; Payandeh, above n 159, 372; Human Rights Watch, 'Libya: Words to Deeds – The Urgent Needs for Human Rights Reform' (2006) 18(1) *Human Rights Watch* 1.
[162] Zachary Hingst, 'Libya and the Responsibility to Protect: Building Block or Roadblock?' (2013) 22 *Transnational Law & Contemporary Problems* 227, 251.
[163] Berti, above n 158, 27.
[164] *S-15/1.Situation of Human Rights in the Libyan Arab Jamahiriya*, HRC Res S-15/1, UN GAOR, 15th sess, A/HRC/RES/S-15/1 (3 March 2011) 2 [11].
[165] See, eg, ibid [14]; *UN Human Rights Council Recommends Suspension of Libya* (25 February 2011) United Nations Human Rights: Office of the High Commission for Human Rights <http://www.ohchr.org/EN/News Events/Pages/HRCSpecialSessionLibya.aspx>.
[166] Spencer Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13(1) *Melbourne Journal of International Law* 59, 63.

violent treatment of the Libyan people, with mass killings, arbitrary arrests and torture being reported.[167]

UNSC Resolution 1970 passed on 26 February 2011[168] acknowledged the HRC and regional organisation's condemnation.[169] It demanded that the violence end and the legitimate demands of the population be fulfilled.[170] The UNSC viewed the violence as one of international concern and sought to bring an end to the violence by instituting an arms embargo,[171] travel ban,[172] asset freeze,[173] and for the matter to be referred to the ICC.[174] The resolution was passed unanimously.[175] The resolution's IHL reference confirmed the rebellion had progressed to an armed conflict.[176] In referring the situation to the ICC, the UNSC demonstrated a willingness to convey that crimes against humanity were possibly being committed by an acting state leader.[177]

By this point in time the forces opposing Gaddafi had organised into the National Transitional Council ('NTC').[178] In March the UNGA suspended Libya's HRC membership,[179] and the ICC opened their investigation.[180] The African Court of Human and People's Rights condemned the situation, making provisional measures that fighting should cease.[181] With Gaddafi's call for extermination of the opposition,[182] the League of Arab States and the African Union condemned the violations of human rights and IHL in Libya,[183] as did Libyan rebel leaders.[184] With non-military measures failing to protect Libyans, the Arab League called for a no fly zone to be implemented on 12 March.[185] On 17 March the UNSC passed Resolution 1973,[186] implementing a no fly zone,[187] and authorising member states and regional organisations to take 'all necessary measures' to protect civilians and civilian populated areas

[167] *UN Human Rights Council Recommends Suspension of Libya* (25 February 2011), above n 165.
[168] SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011).
[169] Ibid Preamble para 3.
[170] Ibid 2 [1].
[171] Ibid 3 [9].
[172] Ibid 4 [15].
[173] Ibid 4 [17].
[174] Ibid 2 [4].
[175] See, eg, ibid; Cerone, above n 159, 541.
[176] Cerone, above n 159, 541.
[177] Talal and Schwarz, above n 158, 8.
[178] Hingst, above n 162, 245.
[179] *Suspension of the Rights of Membership of the Libyan Arab Jamahiriya in the Human Rights Council*, GA Res 65/265, UN GAOR, 65th sess, 76th mtg, Agenda item 117, UN Doc A/RES/65/265 (1 March 2011) [1].
[180] Cerone, above n 159, 543.
[181] Ibid 548-9.
[182] Berti, above n 158, 27.
[183] SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011).
[184] Berti, above n 158, 28.
[185] See, eg, *The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level: The implications of the current events in Libya and the Arab position* (12 March 2011) International Coalition for the Responsibility to Protect, [1] <http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english(1).pdf>; SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011); 'Arab states seek Libya no-fly zone', *Al Jazeera* (online), 12 March 2011 <http://www.aljazeera.com/news/africa/2011/03/201131218852687848.html> .
[186] SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011). This resolution is what has formed the discussion on R2P use of force occurring in Libya and will be explored fully later in this article.
[187] Ibid 3 [8].

from attack by Libyan State troops, upon notifying the UN Secretary-General; with the exclusion of placing foreign occupation forces in Libyan territory.[188]

Within two days of Resolution 1973, NATO began bombing Libyan Government positions from which attacks upon civilians were imminent;[189] NATO activities in Libya throughout the ongoing months, were known as operation 'Unified Protector'.[190] NATO, acting with Morocco, Jordan, Qatar and the United Arab Emirates,[191] remained in close contact with the UN and other regional organisations during its intervention.[192] At its commencement, action mainly consisted of air attacks on tanks, artillery and units in front line combat.[193] In the next two months wider attacks on command and control centres were required to prevent government attacks on Libyan people.[194] In the course of these events, UNSC Resolution 2009 established the United Nations Support Mission in Libya ('UNSMIL') under the leadership of a special representative to the Secretary-General to help restore order, rule of law, political dialogue and public services;[195] in addition to starting to lift the arms embargo and asset freezes.[196] It also recognised the NTC as the official representative of Libya.[197] By October the ousted Gaddafi had been killed as a result of the fighting.[198] The UNSC made 31 October the expiry date for Resolution 1973's no-fly zone and state permission to protect civilians by any means necessary.[199]

While the 'forceful' intervention was relatively limited in time, the UNSC remained concerned about Libya's situation, receiving regular updates as the 2012 interim government and subsequent Tobruk Government sought to re-establish a functioning society.[200] In 2012 the UNSC expressed concern about reprisals and called on the Libyan authorities to take steps to prevent this, stressing that they had the primary responsibility to ensure this.[201] The UNSMIL, whose mandate had been continually renewed to try to help the situation,[202] had repeatedly expressed concerns about the instability caused by resurgent conflict.[203] The increased

[188] Ibid 3 [4].
[189] Zifcak, above n 166, 65.
[190] See, eg, Operation Unified Protector Final Mission Stats: Fact Sheet (2 November 2011) North Atlantic Treaty Organization <http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf>; Rachel Mourad, 'The Use of Air Power as a Coercive Instrument: Lessons from Operation Unified Protector' (2014) 194 *Australian Defence Force Journal* 31, 36. The operation would later end on 31 October 2011.
[191] Talal and Schwarz, above n 158, 9.
[192] Ibid.
[193] Zifcak, above n 166, 65.
[194] Ibid.
[195] SC Res 2009, UN SCOR, 6620th mtg, UN Doc S/RES/2009 (16 September 2011) 3 [12].
[196] Ibid 4 [13]-[16].
[197] See, eg, ibid; Zifcak, above n 166, 67.
[198] See, eg, Ramesh Thakur, 'R2P after Libya and Syria: Engaging Emerging Powers' (2013) 36(2) *The Washington Quarterly* 61, 69; Payandeh, above n 159, 380.
[199] SC Res 2016, UN SCOR, 6640th mtg, UN Doc S/RES/2016 (27 October 2011) 2-3 [5]-[6].
[200] See, eg, *Advance Unedited Version: Report on the International Commission of Inquiry on Libya*, UN GAOR, 19th sess, Agenda Item 4, A/HRC/19/68 (8 March 2012) 9-10 [35]-[44]; *Human Rights Violations and War Crimes Committed by Both Sides – The Latest Report on Libya* (8 March 2012) United Nations Human Rights: Office of the High Commission for Human Rights <http://www.ohchr.org/EN/NewsEvents Pages/LibyaReport .aspx>.
[201] SC Res 2040, UN SCOR, 6733rd mtg, UN Doc S/RES/2040 (12 March 2012) 3 [4].
[202] See, eg, ibid 3 [7]; SC Res 2040, UN SCOR, 6733rd mtg, UN Doc S/RES/2040 (12 March 2012) 3-4 [6]-[7].
[203] See also *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN SCOR, UN Doc S/2012/675 (30 August 2012) 2-4 [5]-[18].

intensity in fighting in 2014 had dire effects on civilians[204] and worsened the political situation.[205] In 2014 when UNSMIL had to remove all personnel,[206] there was repeated targeting of foreign representatives, especially in the Benghazi area.[207]

In the lead up to the 2014 violence there was ongoing, widespread abuse, attributed to the militias and armed groups throughout the State, which in the preceding three years had failed to be held to account.[208] There were reports of abductions, torture and killings taking place, without State protection being provided;[209] these occurred mainly on the basis of political perspectives and backgrounds.[210] Indiscriminate bombings (as under Gaddafi) was also occurring.[211] The UNSC's approach in late 2014 had been to deplore the violence, calling for an immediate ceasefire, and encouraging the African Union and Arab League to try and construct a political dialogue.[212] The UNSC aimed to use sanctions to create stability,[213] by re-enforcing previous travel and asset bans on certain Libyan people and assets, in addition to arms restrictions.[214] While the level of violence fell short of necessitating (as yet) further use of force authorisation, the UNSC has remained engaged with the situation and is bringing non-forceful pressure to bear on the Tobruk Government[215] (in its attempt to realise its responsibility for the whole of the Libyan population).

2 *Requisite Seriousness*

[204] United Nations Support Mission in Libya, *Overview of Violations of International Human Rights and Humanitarian Law during the Ongoing Violence in Libya* (United Nations Office of the High Commissioner for Human Rights, September 2014) 2.
[205] *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN SCOR, UN Doc S/2014/131 (26 February 2014) 1 [2].
[206] United Nations Support Mission in Libya, *Overview of Violations of International Human Rights and Humanitarian Law during the Ongoing Violence in Libya*, above n 204, 3.
[207] *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN SCOR, UN Doc S/2014/131 (26 February 2014) 14-15 [79].
[208] *Libya: 'Rule of the Gun' Amid Mounting War Crimes by Rival Militias* (30 October 2014) Amnesty International <http://www.amnesty.org/en/news/libya-rule-gun-amid-mounting-war-crimes-rival-militias-2014-10-30>.
[209] See *Libya must Protect Demonstrators from 'Out of Control' Militias or Risk New Bloodshed* (21 November 2013) Amnesty International <http://www.amnesty.org/en/news/libya-must-protect-demonstrators-out-control-militias-or-risk-new-bloodshed-2013-11-21>.
[210] *Libya: 'Rule of the Gun' Amid Mounting War Crimes by Rival Militias* (30 October 2014), above n 208.
[211] See, eg, *Libya: Indiscriminate shelling of civilian areas in Tripoli and Benghazi amounts to war crimes* (6 August 2014) Amnesty International <http://www.amnesty.org/en /news/libya-indiscriminate-shelling-civilian-areas-tripoli-and-benghazi-amounts-war-crimes-2014-08-06>; Amnesty International, *Libya: Rule of the Gun – Abductions, Torture and Other Militia Abuses in Western Libya* (Amnesty International, 2014) 6; United Nations Support Mission in Libya, *Overview of Violations of International Human Rights and Humanitarian Law during the Ongoing Violence in Libya*, above n 204, 3.
[212] SC Res 2174, UN SCOR, 7251st mtg, UN Doc S/RES/2174 (27 August 2014) Preamble para 4.
[213] Ibid Preamble para 9.
[214] Ibid 2 [4]-[5].
[215] See, ibid 2 [3]. It is acknowledged that there is contention amongst political commentators over who indeed 'rules' Libya, see Frederic Wehrey and Wolfram Lacher, *Libya's Legitimacy Crises: The Danger of Picking Sides in the Post-Qaddafi Chaos* (6 October 2014) Foreign Affairs <http://www.foreignaffairs.com/articles/142138/frederic-wehrey-and-wolfram-lacher/libyas-legitimacy-crisis>; Amnesty International, above n 211, 5; Rebecca Murray, 'Libya: A tale of two governments', *Al Jazeera* (online), 4 April 2015 <http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html>.

While the UNSC did not expressly rely on R2P to legitimise its authorisation of force in Libya, this situation has been called a 'textbook illustration' justifying R2P.[216] An examination of the reasons for the intervention suggest just war's criteria influenced both the decision to intervene and the widespread acceptance of the legitimacy of the UNSC's decision. The crimes and atrocities that occurred are not detailed in full below, but are evidenced through the conclusions provided by international assessments,[217] which give way to the following discussion of R2P's authority to intervene.

In Resolutions 1970 and 1973 the UNSC recognised Libya's situation as a continuing threat to international peace and security.[218] The ICC referral also demonstrated how serious the situation appeared. Whilst the UNSC had power to authorise force immediately, it clearly sought non-forceful resolution measures prior to Resolution 1973. It was only once Gaddafi concretely demonstrated that he had no intention of abating his attacks, that the UNSC viewed forceful intervention as a legitimate course of action.[219] As Gaddafi's words and actions escalated, calls to hunt down and execute protestors, 'door to door', 'house to house' and the labelling of opponents as 'cockroaches', reminiscent of the Rwandan genocide, convinced the global community that the threat was serious enough to warrant action.[220]

After force was authorised, the serious threat faced by the Libyan population became increasingly evident, allowing the continued involvement of international troops. In Resolution 1973 the UNSC acknowledged that the actions of troops under Gaddafi, consisting of widespread and systematic attacks, may have amounted to crimes against humanity.[221] The ICC Prosecutor reported in May 2011 that based on available information there were reasonable grounds to believe crimes against humanity and war crimes had been committed, and were continuing despite the UN-authorised force.[222] The ICC later issued warrants for the arrest of Gaddafi and others during the fighting.[223] The ICC Prosecutor's view was echoed by the Commission of Inquiry report in June 2011 which reported violations by the Gaddafi regime.[224]

Post-Gaddafi's fall, the International Commission of Inquiry in 2012 independently found through retrospective analysis that wide ranging human rights violations did systemically occur

[216] Thakur, above n 198, 61.
[217] For a full discussion of the offences alleged and the supporting evidence please see the following sources, *Advance Unedited Version: Report on the International Commission of Inquiry on Libya*, UN GAOR, 19th sess, Agenda Item 4, A/HRC/19/68 (8 March 2012); *Advance Unedited Version: Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, UN GAOR, 17th sess, Agenda Item 4, UN Doc A/HRC/17/44 (1 June 2014).
[218] Talal and Schwarz, above n 158, 9.
[219] Williams, Ulbrick and Worboys, above n 81, 487.
[220] Zifcak, above n 166, 60.
[221] SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011).
[222] Cerone, above n 159, 550.
[223] Ibid 552.
[224] See, eg, *Advance Unedited Version: Report of the High Commission under Human Rights Council resolution S-15/1*, UN GAOR, 17th sess, Agenda Items 2 and 4, UN Doc A/HRC/17/45 (7 June 2011) 7 [22]-[24]; *Advance Unedited Version: Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, UN GAOR, 17th sess, Agenda Item 4, UN Doc A/HRC/17/44 (1 June 2014) 3; Cerone, above n 159, 552.

under Gaddafi forces in 2011.[225] The Commission also independently found that abuses were still rampant in 2012, with the distinction that they were no longer part of a system of brutality directed by the central government.[226] The conditions, with 2014 resurgent fighting in Libya, have not improved, with inhumane treatment of those in custody or in proximity to the fighting.[227]

3 *Authority to Intervene*

A wide range of mechanisms were employed in responding to Libya in 2011, before the ultimate use of force.[228] Peaceful methods had failed with Gaddafi and led to Libya openly refusing to cooperate with calls from the international community to cease violence and respect human rights and international law.[229] The eventual use of force resulted in Libya challenging the traditional notion of sovereignty.[230] This part of the article seeks to analyse R2P's role in UNSC Resolution 1973, and what R2P action was justified outside the scope of the UNGA version.

In the case of Libya, UNSC action was taken. The basis for that action remains contested. Some have stated that R2P's role has been over exaggerated in regards to what occurred in Libya.[231] Whether or not the UNSC was using its general authority,[232] R2P was a consideration, even if not exclusive.[233] The resolution's preamble referenced R2P, but not in the substantive section.[234] It confirmed the Libyan government's responsibility to protect Libyan citizens.[235] Demonstrating R2P's first pillar is part of state practice, and considering its implementation, also *opinio juris* forming customary law. The resolution was silent as to states acting on R2P's later pillars.[236]

Whilst China and Russia did not veto the Libyan resolution there was political tension, with abstentions from the resolution.[237] They cited the Arab League's support for the resolution as

[225] See, eg, *Advance Unedited Version: Report on the International Commission of Inquiry on Libya*, UN GAOR, 19th sess, Agenda Item 4, A/HRC/19/68 (8 March 2012) 6-15 [15]-[81]; *Human rights violations and war crimes committed by both sides – the latest report on Libya* (8 March 2012), above n 200.
[226] See, eg, *Advance Unedited Version: Report on the International Commission of Inquiry on Libya*, UN GAOR, 19th sess, Agenda Item 4, A/HRC/19/68 (8 March 2012) 5 [11]; *Human rights violations and war crimes committed by both sides – the latest report on Libya* (8 March 2012), above n 200.
[227] See United Nations Support Mission in Libya, *Torture and Deaths in Detention in Libya* (United Nations Office of the High Commissioner for Human Rights, October 2013).
[228] Cerone, above n 159, 552.
[229] See, eg, SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) 2 [1]; Justin Morris, 'Libya and Syria: R2P and the Spectre of the Swinging Pendulum'(2013) 89(5) *International Affairs* 1265, 1971; Berti, above n 158, 30.
[230] Christian Henderson, 'The Arab Spring and the Notion of External State Sovereignty in International Law' (2014) 35 *Liverpool Law Review* 175, 177.
[231] See Morris, above n 229, 1265.
[232] Hall, above n 80, 461.
[233] Berti, above n 158, 25.
[234] See SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011).
[235] Ibid Preamble.

[236] See, eg, ibid; Hall, above n 80, 461; Andrew Garwood-Gowers, 'China and the "Responsibility to Protect": The Implications of the Libyan Intervention' (2012) 2(2) *Asian Journal of International Law* 375, 385.
[237] John Western, 'Protecting States or Protecting Civilians: The Case for R2P' (2011) 52(2) *The Massachusetts Review* 348, 348.

integral to them adopting this position.[238] In the context of understanding 'right authority', the consideration of other sources for support is interesting. It is absurd to suggest that China and Russia were looking to the Arab League for 'authority' to approve the use of force, but the consideration of regional organisations being better placed to understand the necessities of the crisis does suggest that there is a division between legitimacy and legality.

Non-veto powers such as Germany, Brazil and India also abstained from the Libyan resolution, for reasons including interpretation.[239] This leads to the conclusion states were hesitant in how R2P was implemented, but accepted the importance of doing something to protect another state's civilians.[240] This explains the absence of R2P third pillar language in the resolution which utilised any means necessary to protect civilians. However, it is worth noting, the no fly zone use of force part of the resolution, in receiving support from the populace themselves, as well as the wider Arab world,[241] showed a global support for R2P and a change in regional dynamics.[242] This occurred despite a 'culture' of interference not being accepted historically.[243] This resulted in the first UN mandated military intervention against a 'sovereign' state against the will of the state's leader.[244]

The NATO-led intervention never reached the stage of 'boots on the ground',[245] but use of force was not outside the scope of the resolution as long as it served the purpose of protecting civilians. This could be argued as R2P's third pillar;[246] even if not the UNSC's explicit intent, the authorised use of force was clearly informed by just war principles, and in the modern context suggested that the UNSC was implementing the third R2P pillar. A consideration is whether, pursuant to the first argument relating to R2P postulated above, UNSC acknowledgment could have allowed R2P intervention more broadly, as existing outside of the UNGA version. This consideration, outlined below, is followed by whether sovereignty had also failed therefore still allowing intervention.

It is important to note, that regardless of one's opinion on whether NATO's action was within the scope of the resolution, or a broader part of R2P, NATO was still constrained by proportionality and necessity. At the time initial action was taken, NATO's response raised questions of proportionality and timeliness,[247] with some members of the global community feeling the resolution generally went beyond what was acceptable.[248] The harshest criticism accused NATO's military campaign of desiring regime change, since, in practice, it allowed the Libyan opposition advantageous conditions to capture Gaddafi.[249]

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[238] Minerva Nasser-Eddine, 'How R2P failed Syria' (2012) 28 *Flinders Journal of History and Politics* 16, 20.
[239] Ibid.
[240] Ibid 20-1.
[241] See, eg, Mani and Weiss, above n 157, 452; SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011); Talal and Schwarz, above n 158, 8.
[242] Talal and Schwarz, above n 158, 8.
[243] Mani and Weiss, above n 157, 451.
[244] Morris, above n 229, 1271.
[245] Zifcak, above n 166, 69.
[246] Nasser-Eddine, above n 238, 18.
[247] Ibid 21.
[248] See Alex De Well, 'African Roles in the Libyan Conflict of 2011' (2013) 89(2) *International Affairs* 365, 367; Eki Omorogbe, 'The African Union, Responsibility to Protect and the Libyan Crisis' (2012) 59(2) *Netherlands International Law Review* 141, 142.
[249] Nasser-Eddine, above n 238, 21.

The issue with disputing the legitimacy of force taken under the resolution, is whether the wording 'under threat of attack' in paragraph four of the resolution, allowed the resolution to be interpreted overall as defending civilian populated areas not under 'imminent' attack. This, in combination with 'all necessary measures', was quite broad.[250] Additionally, stating 'civilian populated areas' created a natural tendency for the intervention to favour one side of the conflict in terms of the use of force direction.[251] Whilst one could go into the minutia of the distinction between civilians and the insurgent rebel combatants,[252] and when NATO armed the rebels compared to when the arms embargo eased, there was no paucity of information of what Gaddafi had previously directed towards those who confronted him. Given that the information on crimes against humanity and war crimes occurring under Gaddafi surfaced when NATO expanded their action, coupled with the call for more to be done by those opposing Gaddafi, arguably there was a necessity for NATO's expanded actions, as proportional to the threat of Gaddafi if he re-gained territory during the fight.[253] NATO therefore remained focused on halting civilian suffering.[254]

R2P occurred in the use of force taken in Libya, and the following seeks to highlight that even if this was outside the scope of the resolution, it was still justifiable under R2P. The UNSC in their primary responsibility to act, found that Libya's situation was a continuing threat to international peace and security.[255] As previously detailed, the art 2(4) exception, under art 24, is not exclusive in nature. This allowed NATO's action to fall under a secondary responsibility given the status the UNSC provided Libya, if the resolution's scope was overstepped. This permissive interpretation means the *UN Charter* was not undermined, in bringing about the resolution of atrocities occurring in the situation.

NATO's wide interpretation concerning operation Unified Protector has clearly caused tension with sovereignty's traditional conception,[256] with long lasting political consequences of what has been called the widest possible interpretation of Resolution 1973.[257] This leads to the more polemical argument that NATO's actions were warranted under R2P regardless of a resolution. The regime change allegations directed at NATO became more prominent when further force was used to 'protect future generations from tyranny'.[258] However, pursuant to the argument outlined earlier, sovereignty is not absolute in nature; a state requires the ability to perform the basic functions associated with statehood,[259] with R2P thus not breaching sovereignty but enhancing it.[260] The regime change accusations are less convincing if the basic duty of a sovereign to guarantee for the population 'a system of law and order that is responsive to the national population's needs for justice and general welfare', is recalled.[261] Regime change, although not the core of a R2P/just war intervention, is not an unpredictable outcome and

[250] Ibid 20.
[251] Berti, above n 158, 32.
[252] Payandeh, above n 159, 386.
[253] This is not to say those opposing Gaddafi had not themselves engaged in questionable behaviour, but they had not reached the requisite level of last resort seriousness, which Gaddafi previously had.
[254] Berti, above n 158, 29.
[255] SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) Preamble.
[256] Nasser-Eddine, above n 238, 19.
[257] Zifcak, above n 166, 70.
[258] See ibid 66.
[259] Hingst, above n 162, 238.
[260] Thakur, above n 198, 63.
[261] Deng, above n 113, 366.

makes such intervention controversial.[262] Regime change ought not to be attributed to the use of force *per se*, but instead is a reflection of the extreme failure (indeed the refusal) of the Gaddafi regime to meet the basic obligations of sovereignty, as evidenced by the presence of atrocities. This meant that there was no political integrity to violate and it was also not at odds with the UN Charter.

Objections to 'humanitarian intervention' type action often have a political grounding,[263] with traditional state sovereignty being valued by weaker powers.[264] The Libyan situation demonstrated recognition of limited, rather than absolute sovereignty. The international intrusion retained the just war requirement of proportionality by paralleling the failure of the Libyan regime and constraining the extent of force to the minimum required to allow Libya to re-assert its (atrocity-free) sovereignty. Human Rights Watch and the International Commission of Inquiry in Libya have both acknowledged that NATO followed IHL,[265] carrying out actions to avoid civilian casualties.[266] Whilst this has not helped to lessen the view of certain states being resistant to implementing R2P on the misconception it interferes with sovereignty,[267] NATO's action has added to state practice for intervention when the responsibility to react calls for it.

The above discussion provides an appropriate analysis of R2P in 2011 Libya. However, as mentioned Libya's current situation is far from a state of peace, with accountability and human rights acknowledgment. Whilst the UNSC has in its acknowledgement of the continually deteriorating situation in Libya, made the point to reaffirm Libya's independence and territorial integrity,[268] whether R2P becomes applicable to present day Libya, is dependent on whether peaceful means have been exhausted in necessitating a use of force. Similarly, the state would appear to have demonstrated a complete lack of willingness to attempt to protect its people and reform the situation. The exhaustion of these aspects has not yet occurred to the same extent of failure as seen in the past; thus it does not yet authorise a repeat of R2P intervention. The current divide in Libya may reach the requisite level of seriousness, but to date, there is a distinction between violent clashes in Libya, compared to Gaddafi's call for extermination in Benghazi.

R2P adds a layer of political and moral commitment to principles already existing in international law.[269] R2P sceptics and decision makers motivated by self-interest politics have tried using the narrow R2P role the UNSC debatably allowed in Libya to de-legitimise the concept.[270] Regardless of the UNSC perspective, R2P was warranted in Libya and in its legacy

[262] Thakur, above n 198, 61.
[263] Ibrahim Gassama, 'Dealing with the World as it is: Reimaging Collective International Responsibility' (2013) 12(4) *Washington University Global Studies Law Review* 695, 716.
[264] Nasser-Eddine, above n 238, 23; Deng, above n 113, 362-64.
[265] See, eg, Berti, above n 158, 33-34; *Advance Unedited Version: Report on the International Commission of Inquiry on Libya*, UN GAOR, 19th sess, Agenda Item 4, A/HRC/19/68 (8 March 2012) 18 [89].
[266] See, eg, *Advance Unedited Version: Report on the International Commission of Inquiry on Libya*, UN GAOR, 19th sess, Agenda Item 4, A/HRC/19/68 (8 March 2012) 17 [89]; *Human rights violations and war crimes committed by both sides – the latest report on Libya* (8 March 2012) above n 200.
[267] See, eg, Martin, above n 4, 156; Ben Clarke and Jackson Maogoto, *Nutshell: International Law* (Thomson Reuters, 2nd ed, 2009) 49.
[268] *Statement of the President of the Security Council*, UN SCOR, 7083rd mtg, UN Doc S/PRST/2013/21 (16 December 2013).
[269] Garwood-Gowers, above n 236, 378.
[270] Morris, above n 229, 1266.

one cannot expect 'change to occur overnight'. There is no doubt that disagreement over the Libyan resolution's scope has significantly attributed to the inability to reach consensus on civilian protection issues in Syria,[271] upon the civil unrest starting with the 'Syrian Uprising'. R2P is the most comprehensive effort so far to deal with the worst crimes humanity is capable of. It should be acknowledged that development of norms is not always a linear process[272] and that despite the following discussion, R2P still has potential.

B *The Syrian Uprising*

1 *The Situation*

In 2011 coinciding with the 'Arab Spring', there was the start of civil unrest in Syria.[273] The Assad Government initially sought to limit the protests, but by mid-April 2011 the crisis was evident.[274] The attempt to silence protestors via military force failed to bring an end to the civil unrest, as the protests spread throughout the country.[275] Further, it was suspected extremist elements were seeking to inflame tensions, 'mingling with the demonstrators and using the demonstrations to attack security personnel and damage Government property.'[276] Unable to distinguish between extremists and civilians (and arguably making little effort to do so), Assad's forces appeared to have responded with an increased use of force against the protestors *en masse*, even when there was no apparent threat.[277]

The Human Rights Council's Commission of Enquiry on the Syrian Arab Republic concluded there was strong evidence of human rights and humanitarian violations including, but not limited to, arbitrary military attacks against un-armed civilians, raids on hospitals and mosques, deprivation of basic utilities (in particular water and communications) and the blocking of access to medical assistance.[278] The UNSC, whilst clearly having the first responsibility to respond to the crisis at an international level, had trouble moving past discussion on the matter. Whilst all members expressed their 'concern'[279] about the crisis, it was clear they differed on what 'responsibility' the UN, on behalf of the international community, had to act.[280] This stalemate on the appropriate scope of international response undermined diplomatic efforts to

[271] Garwood-Gowers, above n 236, 376.
[272] Morris, above n 229, 1278.
[273] This section on Syria only addresses the civil populace uprising and does not touch on the more recent developments surrounding the Islamic State (IS; also known as ISIS, ISIL or Daesh). The situation with IS in Syria could also be subject to analysis under R2P. At present an analysis would face difficulties given the paucity of the information on the Syrian government's defence capability, but should greater clarity become available, R2P implications should be considered. It is worth noting that this is an important area under the doctrine to be addressed given the ICISS report which helped formulate R2P, confined its analysis to action taken by states, as opposed to terrorist non-state actors.
[274] Zifcak, above n 166, 74.
[275] Ibid.
[276] See the comments made by India's UNSC member in UN SCOR, 66th sess, 6524th mtg, UN Doc S/PV.6524 (27 April 2011) 8.
[277] Human Rights Watch, *We Live As in War: Crackdown on Protestors in the Governorate of Homs* (November 2011) <http://www.hrw.org/sites/default/files/reports/syria1111webwcover.pdf>.
[278] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN GAOR, 21st sess, Agenda Item 4, UN Doc A/HRC/21/50 (16 August 2012).
[279] Zifcak has provided an overview of the key expressions of concern. See Zifcak, above n 166, 75-6, or refer to UN SCOR, 66th sess, 6524th mtg, UN Doc S/PV.6524 (27 April 2011).
[280] Zifcak, above n 166, 76.

negotiate a peaceful outcome. Persistent use of the veto[281] meant that it was not until 2014 that a resolution was passed that specifically responded to the humanitarian crisis and called for accountability.[282]

2 *Requisite Seriousness*

The experience of the humanitarian crisis in Syria raises important questions about the level of seriousness required to trigger the responsibility to protect. The Syrian crisis demonstrates that a long, protracted conflict in which crimes against humanity are likely to be occurring raises R2P, but only at the level of the first pillar (that of state responsibility). It is clear neither state practice nor *opinio juris* exists to legitimise military intervention unless a significant event, development or escalation occurs and, is likely to continue, pushing the situation from a mere crisis to something much more.

One must also recall that military intervention is only legitimate under R2P where non-military options have failed, or are unlikely to be successful. The challenge posed by Syria is that the success (or lack) of the peaceful means for resolving the humanitarian crisis can be tied to the lack of international support behind those peaceful means. The implication being that in the absence of a willingness to resort to force when peaceful measures fail, those responsible for the crisis lack motivation to change their behaviour.

Two periods of time can be compared to demonstrate the need for a significant change to raise the possibility of military force as a means of protection. The first was in August 2012, when Kofi Annan announced that he was stepping down as Peace Envoy following the failure of his 6-point peace plan. At this point more than 10,000 people (mostly civilians) had been killed over approximately 17 months.[283] At this point, the international community was faced with the possibility that peaceful means which appeared to be viable had been exhausted. Annan had been appointed as the joint Arab League/United Nations Peace Envoy in February/March 2012 and his peace plan had received overtures of intended good-faith engagement from the participants, in particular the Assad regime.[284] The United Nations Supervision Mission in Syria ('UNSMIS') was established as an unarmed peacekeeping mission in April 2012, in support of Annan's plan, with a mandate to 'monitor a cessation of armed violence in all its forms by all parties'.[285] However, within a matter of months it was evident that the parties' commitment to the peace process was limited. In July 2012, Russia and China vetoed a proposed UNSC Resolution which intended to place weight (sanctions) behind the peace process and send 'a clear signal to all parties that their commitments [to the peace process] were binding'.[286]

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[281] For discussion of veto use on this matter see, eg, Andrew Garwood-Gowers, 'The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?' (2013) 36(2) *University of New South Wales Law Journal* 594, 611; Williams, Ulbrick and Worboys, above n 81, 475.

[282] SC Res 2165, UN SCOR, 7216th mtg, UN Doc S/RES/2165 (14 July 2014).

[283] Kofi Annan, (Opening Remarks delivered Press Conference, Geneva, 2 August 2012) <http://www.un.org/apps/news/infocus/Syria/press.asp?NewsID=1245&sID=41>.

[284] Joe Sterling, 'Activists: No signs Syria carrying out peace plan', *CNN* (online), 28 March 2012 <http://edition.cnn.com/2012/03/28/world/meast/syria-unrest/>.

[285] SC Res 2043, UN SCOR, 6756th mtg, UN Doc S/RES/2043 (21 April 2012) [6].

[286] See comments made by the United Kingdom's UNSC member, Sir Mark Lyall Grant, in UN SCOR, 67th sess, 6810th mtg, UN Doc S/PV.6810 (19 July 2012) 2.

The reasons for the repeated exercise of the veto regarding Syria are complex and multi-faceted.[287] What is clear, however, is that the lack of substantive support behind the peace plan undermined its efficacy. Annan explicitly attributed its failure to the persistent UNSC divisions,[288] and the lack of international commitment to resolve the humanitarian crisis.[289] Whatever the reasons for the consistent exercise of the veto within the UNSC,[290] the effect was that it appears to have left the Assad regime confident that intervention (forceful or otherwise) would not occur.

Despite the overt failure of the peace process and the scope of the continued violence in Syria, it is likely that August 2012 did not meet the requisite level of seriousness to legitimise use of force under R2P. The reason was that the criteria of necessity (exhaustion of, or unlikely success of non-forceful means) could not be met. While the attempted non-forceful measures had *in fact* been unsuccessful in resolving the crisis, this was not because peaceful measures were unsuitable. Annan in his resignation statement said:

> The bloodshed continues, most of all because of the Syrian government's intransigence … Without serious, purposeful and united international pressure, including from the powers of the region, it is impossible for me, or anyone, to compel the Syrian government in the first place, and also the opposition, to take the steps necessary to begin a political process.[291]

It is important here to distinguish between the 'humanitarian necessity' which triggers intervention of the non-forceful kind under the principle of R2P and the just war criteria of necessity (and proportionality) which determines whether the *use of force* is the legitimate form of intervention in response to a particular humanitarian crisis. The two are intertwined, but the significant concern is the latter. There was little dispute, even from those exercising the veto, that a humanitarian crisis was occurring.[292] The debate concerned who was to blame and what action was appropriate.

Far from legitimising the use of force, it is clear that there was a strong position that peaceful measures *could* be successful if supported by the UNSC. In addition to the Kofi Annan plan and UNSC supported UNSMIS, a range of non-forceful political and economic measures were being attempted by individual states,[293] regional organisations,[294] and other organs of the UN.[295] Whilst these measures proved ineffective in bringing an end to the crisis, in August of

[287] See, eg, Garwood-Gowers, above n 281, 598-9; Zifcak, above n 166, 82-5.
[288] Annan, above n 283.
[289] Rob Dickinson, 'Responsibility to Protect: Arab Spring Perspectives' (2014) 20 *Buffalo Human Rights Law Review* 91, 116-17.
[290] Discussed below.
[291] Annan, above n 283.
[292] See the commentary from the various representatives following the exercise of the veto in July 2012. UN SCOR, 67th sess, 6810th mtg, UN Doc S/PV.6810 (19 July 2012).
[293] Many examples are available and published by the various governments, see generally Canada: *Syria* (25 July 2014) Foreign Affairs, Development and Trade Canada <http://www.international.gc.ca/sanctions/syria-syrie.aspx?lang=eng>.
[294] The European Union's sanctions as applied in the UK can be found at: *Guidance: Embargoes and Sanctions on Syria* (4 June 2013) Department for Business, Innovation & Skills, Foreign & Commonwealth Office and Export Control Organisation <https://www.gov.uk/sanctions-on-syria>.
[295] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN GAOR, 21st sess, Agenda Item 4, UN Doc A/HRC/21/50 (16 August 2012).

2012, and with the lack of overt Syrian condemnation from China and Russia, it would appear that they were more viable options than using force.[296]

The lack of necessity for *force* in August 2012 is further supported by the lack of overt enthusiasm for such measures amongst the international community. In seeking to establish evidence of state practice and *opinio juris* with regard to R2P the key factor is not that states *did not* use force at this time, but that force was not a widely supported option. The proposed resolutions tended to be rejected because they 'failed to adequately address violence emanating from Syrian opposition groups, did not explicitly rule out military intervention, and would not help to resolve the situation on the ground'.[297]

The lack of enthusiasm for military measures could be attributed to the international community preferring a Russian and Chinese supported outcome.[298] It could also be said to reflect the presumption against the use of force in the international system and the reality that once started, armed force changes the situation without necessarily resolving it.[299] Force may indeed 'inflame, rather than improve [the situation]' and worsen the harm for those most at risk.[300] Consequently, while the Syrian situation in August 2012 may have been sufficiently serious to warrant forceful intervention, the non-forceful measures had not been given the opportunity to succeed and thus force at this point would likely not meet the just war criteria.

The second incident that could have potentially triggered use of force was the confirmation of the use of chemical weapons within Syria in August-September 2013.[301] Unlike 2012, the spectre of military action was present in 2013 and (despite claims to the contrary) likely played a role in gaining Syrian agreement and cooperation with the negotiated measures.[302]

The involvement of chemical weapons in the conflict had long been characterised by US President Obama as a 'red line.'[303] In August 2012 (prior to allegations of chemical weapon usage) he stated:

> I have, at this point, not ordered military engagement in the situation. But the point that you made about chemical and biological weapons is critical … We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is [when] we start seeing a whole bunch of chemical

[296] Dickinson, above n 289, 116-18.
[297] Garwood-Gowers, above n 281, 612.
[298] Nasser-Eddine, above n 238, 23-4.
[299] Thakur, above n 198, 73.
[300] Alex Bellamy, *Responsibility to Protect* (Polity Press, 2009) 132.
[301] United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, *Report on the Allegations of the Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, UN GAOR, 67th sess, Agenda Item 33; UN SCOR, UN Docs A/67/997 and S/2013/553 (16 September 2013) 8 [27]-[30].
[302] Assad has denied that his decision to join the *Chemical Weapons Convention* was influenced by the threat of force, 'Assad to destroy chemical weapons 'in a year'', *Al Jazeera* (online), 19 September 2013 <http://www.aljazeera.com/news/middleeast/2013/09/201391902218736482.html >.
[303] President Barak Obama, 'Remarks by the President to the White House Press Corps' (Press Release, 20 August 2012) <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>; Confirmed at a press conference in 2013 at around the time of the allegations of chemical weapons use 'Remarks by President Obama and Prime Minister Reinfeldt of Sweden in Joint Press Conference' (Press Conference, 1 September 2013) <http://www.whitehouse.gov/the-press-office/2013/09/04/remarks-president-obama-and-prime-minister-reinfeldt-sweden-joint-press->.

> weapons moving around or being utilized. That would change my calculus. That would change my equation.[304]

In August 2013 it was confirmed that chemical weapons had been used in Syria, and had been used against civilians. Whilst the UN Mission Reports did not explicitly attribute their use to the Assad regime,[305] many other sources did.[306] The Assad regime's offered explanation, accepted by Russia, was that insurgents had used the chemical weapons, but conceded the Government did hold previously denied stockpiles of chemical weapons.[307] Even on the interpretation of the information that is most generous to the Assad regime, they admitted to the possession of chemical weapons stockpiles[308] and conceded that chemical weapons had been used in the conflict, whilst denying direct responsibility for their use.[309] This at least suggests that the Assad regime had lost control over their territory to an extent that they were unable to protect the citizens subject to the attack.

The chemical weapons evidence in turn served to demonstrate the Syrian crisis had escalated beyond the already recognised civilian tragedy that had persisted since 2011. Those in favour of utilising use of force to intervene and bring an end to the conflict pinpointed this as evidence of a significant escalation. Further, unlike 2012, an increasing number of states and organisations called on the UNSC to take definitive action, up to and including the use of force,[310] with some indicating a willingness, even a responsibility, to act notwithstanding the absence of an authorisation.[311] The requisite level of seriousness required to legitimise force was, therefore, at least closer than it had been 12 months previously. The issue of authority in the absence of a UNSC resolution is discussed below. Here, the question must be asked, if over 100,000 deaths occur over a two year period, and there is evidence of state willingness to use chemical weapons against the civilian population (or failure to prevent the use of chemical weapons against the civilian population), is not sufficiently serious to justify use of force under R2P, then what is?

Key to understanding the requisite level of seriousness (necessity and proportionality) criteria, is remembering that R2P is *not* punitive. The call for military action must be viewed within

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[304] President Barak Obama, 'Remarks by the President to the White House Press Corps' (Press Release, 20 August 2012) http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>. See, eg, French Defence Ministry trans, *Syria/Syrian chemical programme – National executive summary of declassified intelligence* (3 September 2013) French Diplomatie <http://www.diplomatie.gouv.fr/en/IMG/pdf/Syrian_Chemical_ Programme.pdf>.

[305] United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, *Report on the Allegations of the Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, UN GAOR, 67th sess, Agenda Item 33; UN SCOR, UN Docs A/67/997 and S/2013/553 (16 September 2013) 8 [27].

[306] A brief overview of the situation can be found in John Irish and Warren Strobel, 'Special Report: Syria – A Chemical Crime, a complex reaction', *Reuters* (online), 17 September 2013 <http://www.reuters.com/article/2013/09/17/us-syria-diplomacy-special-report-idUSBRE98G0CT20130917>.

[307] Sam Dagher and Laurence Norman, 'Syria Says it has Chemical Weapons', *Wall Street Journal* (online), 24 July 2013 <http://online.wsj.com/articles/SB10000872396390443437504577544632378473006>.

[308] Ibid.

[309] 'Assad denies responsibility for chemical attack in CBS interview', *Aljazeera America* (online), 8 September 2013 <http://america.aljazeera.com/articles/2013/9/8/assad-deniesresponsibilityforchemicalattackincbsinterview.html>.

[310] *US, Germany hit out at chemical weapons use in Syria* (26 August 2013) Deutsche Welle <http://www.dw.de/us-germany-hit-out-at-chemical-weapons-use-in-syria/a-17045985>.

[311] See, eg, the comments by William Hague in an interview on BBC Radio, reported in ibid.

the context of the regime's *continuing* failure to protect civilians and the seriousness of the threat against them. Consequently, the specific examples of the use of chemical weapons are significant in as much as they represent that the risk to civilians had escalated with the parties to the conflict both in possession of and willing to use chemical weapons.

Chemical weapons fall into the category of 'weapons of mass destruction' and it has been suggested, their use against populations can be distinguished from the broader humanitarian crisis when assessing the necessity and proportionality of action.[312] The use of such weapons draws analogies to genocide and crimes against humanity because their use represents a 'singular disrespect for human life.'[313] Then Australian Prime Minister Kevin Rudd drew analogies with two of the 1990s' most visible failures of the international system to 'protect', Srebrenica and Rwanda.[314]

The ultimate form of the non-forceful resolution to the threatened use of force - which focused on removing the ability for such weapons to be used again - further supports the suggestion that the use of chemical weapons against civilians reached the requisite level of seriousness to legitimise military action. The Russian-negotiated accession of Syria to the *Convention on Chemical Weapons*[315] and the entry of inspectors from the Organisation for the Prohibition of Chemical Weapons ('OPCW') were viewed as removing the threat of further chemical weapons use, or at least greatly decreasing the likelihood of further use. [316] Almost immediately the threat of military action ceased. The attacks on civilians and the mass humanitarian crisis did not. The 2013 agreement did not end the conflict and international oversight may have deterred further use of chemical weapons, but it did not halt the suffering. The responsibility to protect the Syrian citizens did not end with the chemical weapons agreement. However, keeping in mind the risk of escalation which could result from military action, a peaceful settlement was clearly preferable.

Further, the Assad regime's co-operation on this one point, albeit against the backdrop of potential intervention should they not accede, suggested a willingness to more comprehensively engage with the international community. The regime reluctantly opened its borders to UN officials and the scrutiny/destruction of their chemical weapons stockpile. Consequently, whilst the humanitarian necessity remained present, the temporary success of non-forceful means *in relation to this specific form of escalation* made military intervention less necessary as a form of resolution.

3 *Authority to Intervene*

From the beginning of the Syrian crisis it has been absolutely clear that there would be no UNSC authorisation to utilise military force in Syria. R2P's current implementation limits

[312] Thomas H Lee, 'The Law of War and the Responsibility to Protect Civilians' (2014) 55(2) *Harvard International Law Journal* 251, 314.
[313] Ibid.
[314] K Rudd quoted by Emma Griffiths and Rosanna Ryan, 'Kevin Rudd talks Syria with Barack Obama as campaign focus turns to national security', *ABC News* (online), 27th August 2013 <http://www.abc.net.au/news/2013-08-27/rudd-reveals-conversation-with-obama-in-lowy-institute-speech/4914324>.
[315] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).
[316] SC Res 2118, UN SCOR, 7038th mtg, UN Doc S/Res/2118 (27 September 2013).

were demonstrated by China and Russia vetoing any R2P military intervention in Syria (and many non-military strategies).[317] The reasons for this refusal to implement R2P are multifaceted and complex. Most interesting are the stated ideological objections to international intervention within the borders of a sovereign state and the concern over the establishment of a precedent legitimising future action.

Before examining the ideological reasons for the blocking of the UNSC resolutions, self-interest, in particular Russia's long-standing relationship with the Assad regime,[318] must be acknowledged as playing a role in the decision not to support R2P interventions. The economic and political interests of the veto powers surely influenced their decision not to support intervention. This long-standing relationship, and recognition of the risks associated with international military intervention likely motivated the negotiations that led to a successful resolution to the chemical weapons crisis.[319] Whilst the situation-specific interests of the veto powers will remain a barrier to UNSC authorisation of R2P's effective use in the future, this is hardly a new phenomenon and is the reason that considering the legitimacy of non-UNSC authorised use of force is particularly important. The concern is whether the refusal to support action is merely self-interested or reflects a broader ideological concern with putting the principle into practice.[320]

Countries, including South Africa and Russia, were particularly critical of authorising R2P force in Syria, seeking to avoid any action which could allow an attempt at 'regime change' by Western States.[321] Heavy criticism of the Assad regime and implied support for the opposition raised concern that there was an ulterior motive to the call for forceful measures.[322] R2P operates on the presumption of state sovereignty, reserving the first responsibility to each state to respond to threats within their own borders. The anti-interventionists were wary about taking action within the borders of Syria which could expressly or impliedly affect the sovereignty of the state.[323] As discussed above, the failure of a regime to the extent of permitting (or failing to respond to) crimes against humanity within their borders, legitimises international scrutiny and even intervention, proportionate to their failure. Non-consensual intervention implies either a presumed global secondary responsibility for the crisis or complete failure of the regime as part of sovereignty. Either implication would suggest regime change was at least desirable if not inevitable.

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[317] Williams, Ulbrick and Worboys, above n 81, 475.
[318] Ibid 489.
[319] The need to recognise and negotiate a solution in the context of the Russia-Syria relationship was discussed in Caitlin Alyce Buckley, 'Learning from Libya, Acting in Syria' (2012) 5(2) *Journal of Strategic Security* 81, 91. For a brief but useful overview of the Russia-Syria relationship see Konstantin von Eggert, 'Why Russia is Standing by Syria's Assad', *BBC World News* (online), 15 June 2012 <http://www.bbc.com/news/world-europe-18462813>; Holly Yan, 'Syria allies: Why Russia, Iran and China are standing by the regime' *CNN* (online), 30 August 2013 <http://edition.cnn.com/2013/08/29/world/meast/syria-iran-china-russia-supporters/>.
[320] Thakur, above n 198, 71.
[321] Berman and Michaelsen, above n 115, 356. See for a broader discussion of this concern outside of the context of Syria, Mohammed Ayoob, 'Third World Perspectives on Humanitarian Intervention and International Administration' (2004) 10(1) *Global Governance* 99.
[322] 'World powers pledge aid to rebels at Friends of Syria conference in Qatar', *ABC News* (online), 23 June 2013 <http://www.abc.net.au/news/2013-06-22/us-secretary-of-state-john-kerry-calls-for-support-to-end-syria/4774040>.
[323] Morris, above n 229, 1274-76.

The anti-interventionists' concerns are not without merit. While state authorities tended to focus on the undeniable humanitarian crisis, there was also clear advocacy in favour of delegitimising the Assad regime,[324] although care was taken not to advocate regime change.[325] The language of 'punishment' in many reports further reflected the suggestion that any use of force, while justified by R2P, may have had alternative motivations.[326] Such language and apparent motivations also could be said to have impacted on the willingness of the Assad regime to co-operate and accept non-forceful international assistance.

Further, a lesson learned from the Libyan intervention was that even where the UNSC authorises only minimal intervention, once military action is occurring it can rapidly open the door to more extensive change.[327] An initial series of targeted military strikes may be the *intended* scope of action (eg, destruction of storage facilities or delivery mechanisms in order to bring an end to the means of the worst atrocities without regime change), but the likelihood of escalation and broader military action is high.

R2P imposes a significant burden of proof on the international community at large (and those advocating intervention specifically) to demonstrate the manifest failure of the state to meet its sovereign obligations. While there remain concerns that pseudo-imperialistic tendencies could lead to R2P's misuse in promoting Western interests and Western desire for regime change,[328] these are arguably mitigated by the need for significant evidence from bodies beyond the interventionists' own intelligence services.[329] Ideally, individual states would not need to rely on R2P to justify their own action. The culmination of evidence (of both cause and proportionality) would compel the UNSC to take action. R2P is not a *panacea* for UNSC inaction. Instead it asks the international community, not merely those currently members of the UNSC, to refrain from treating the intervening state as a wrongdoer.

In Syria, repeated reports from UN and other agencies pointed to the failures of the Syrian State to meet its obligations. At the very least the Assad regime had, as mentioned above, 'manifestly failed to protect'.[330] Refusal to support UNSC action on the grounds of Syrian (Assad)

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[324] One of the more cogent arguments on this point is put forward by Joshua Meir Freedman, 'Don't let Assad sign the Chemical Weapons Convention on Syria's behalf', *Al Jazeera* (online), 29 September 2013 <http://www.aljazeera.com/indepth/opinion/ 2013/09/don-let-assad-sign-chemical-weapons-convention-syria-behalf 201392981058347857.html>.

[325] President Obama, for example, said: 'I don't think we should remove another dictator with force -- we learned from Iraq that doing so makes us responsible for all that comes next. But a targeted strike can make Assad, or any other dictator, think twice before using chemical weapons.' President Barak Obama, 'Remarks by the president in Address to the Nation on Syria' (Press Release, 10 September 2013) <http://www. whitehouse.gov/the-press-office/2013/09/10 /remarks-president-address-nation-syria>.

[326] See, eg, Steve Holland and Susan Cornwell, 'As Obama pushes to punish Syria, lawmakers fear deep U.S. involvement', *Reuters* (online), 2 September 2013 <http://www.reuters.com/article/2013/09/02/us-syria-crisis-usa-idUSBRE97T0NB20130902>; Jamie Tarabay, 'Obama's Syria conundrum: How to 'punish' Assad regime', *Al Jazeera America* (online), 28 August 2013 <http://america.aljazeera.com/articles/2013/8/28/obama-s-syria-conundrum.html>.

[327] Hugh Breaky, 'The Responsibility to Protect: Game Change and Regime Change' in Angus Francis, Vesselin Popovski and Charles Sampford (eds), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (United Nations University Press, 2012) 11, 27-31.

[328] See, eg, the discussions in Edward Newman, 'R2P: Implications for World Order' (2013) 5(3) *Global Responsibility to Protect* 235, 248-49.

[329] Williams, Ulbrick and Worboys, above n 81, 492; Newman, above n 328, 249-51.

[330] Adama Dieng, 'Statement by the Special Adviser of the Secretary-General on the Prevention of Genocide, Adama Dieng, on the situation in Syria' (Press Release, 20 December 2012) <http://www.un.org/en/

sovereignty alone appears to reject the very nature of R2P as universal in its scope. However, given the widespread acceptance of the principle in the early-mid 2000s, it is difficult to argue that the UNSC lacks authority to intervene contrary to the will of the Government that has failed so manifestly to protect its citizens.[331]

The UNSC veto problem,[332] demonstrates why further evolution of R2P is necessary.[333] Even the UNSC in a 2014 Resolution, did not go past recognising R2P's first pillar (that Syrian authorities have primary responsibility for citizen protection).[334] While recognising Syria's situation as destabilising the region, a humanitarian crisis, and that there were breaches of international law, the UNSC deferred from making more definitive statements with regard to the international community's responsibilities in relation to the crisis or the regime's failure, legitimising intrusion into its sovereign autonomy.[335] This demonstrates that the other two pillars of R2P had not yet reached sufficient state support to be representative of customary international law.

In assessing whether intervention could have occurred at either of the points above (or could occur in future) under the two interpretations of R2P, it is important to note that in relation to Resolution 2139 'sole protection' was not used to describe the Syrian State's protection role. The activities described in UNSC resolution's preamble,[336] were also likely to fall into R2P's ascribed crimes under the *Rome Statute*.[337] The UNSC has been willing to state that occurrences in Syria 'may' be classed as war crimes and crimes against humanity;[338] this muted language is appropriate given the role international courts now possess.

Russia, in particular, has blocked any attempts to expressly attribute responsibility to the Assad regime, preferring to emphasise the allegations against those who the regime are fighting.[339] While it is almost certain that atrocities have been undertaken by those fighting the regime, surely by this point, with over 150,000 dead and millions displaced,[340] the direct responsibility of the Assad regime becomes redundant in assessing what action the international community ought to take. The regime's failure to bring an end to the suffering *and* their failure to seek substantive assistance under the second pillar undermines their sovereign claim to non-interference and legitimises strong international action of some kind; even if military action is not seen as the appropriate action to take.

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preventgenocide/adviser/pdf/OGPRtoP%2020%20December%20Statement%20on%20Syria%20-%20ENGLISH.pdf>.

[331] Breaky, above n 327, 26.

[332] Williams, Ulbrick and Worboys, above n 81, 476.

[333] Ibid 489.

[334] SC Res 2139, UN SCOR, 7116th mtg, UN Doc S/RES/2139 (22 February 2014) [9].

[335] See ibid.

[336] Ibid [9].

[337] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 7-8.

[338] SC Res 2139, UN SCOR, 7116th mtg, UN Doc S/RES/2139 (22 February 2014) [2].

[339] See comments made by Russia's representative, Vitaly Churkin in UN SCOR, 66th sess, 6627th mtg, UN Doc S/PV.6627 (4 October 2011).

[340] See, eg, Syrian Observatory for Human Rights <http://syriahr.com/en/>; 'Activist Group says Syria war killed 150,000', *Al Jazeera* (online), 1 April 2014 <http://www.aljazeera.com/news/middleeast/2014/04/activist-group-says-syria-war-killed-150000-201411154045956896.html>.

Under the present system, disagreement and deadlock, such as for Syria, is the likely norm.[341] It is logically inconsistent to recognise on one hand that the international community has responsibility to respond to atrocities, and on the other hand, prevent its members from responding. Reliance on the UNSC as the sole authority for R2P action will stagnate the development of the principle and atrocities will continue unabated.

An interesting aside, which is beyond the scope of this article, is that little consideration appears to have been given to the extent to which the actions of those who advocated intervention in Syria could constitute a threat to use force. The art 2(4) prohibition is, of course, on the *threat* as much as the *use* of force. Consequently, if the use of force in 2013 would have exceeded the limits of R2P, so too would the threat have been unlawful.[342] Whilst there is a concern with coercing a state to respond, raising the possibility of using force as a means of international (humanitarian) law enforcement, without parallel action (gathering of troops) to add weight to the oral threat, would appear not to fall within the threshold.[343] In addition, the perceived absence of any weight behind the 2012 Annan Peace Plan is, as mentioned above, a key explanation for its failure. On the other hand, the likelihood that the US and its allies would act without UNSC authority certainly played a role in achieving an outcome in 2013. Thus, while non-intervention is still the norm in R2P the door to non-UNSC sanctioned action is slowly creeping open.[344]

V CONCLUSIONS

R2P developed in response to the failure of legal mechanisms to adequately prevent and respond to atrocities in the late 20th and early 21st centuries. The political machinations and self-interest, combined with the availability of political veto, means the UNSC has a history of failing to protect civilian populations suffering at the hands of violent regimes. Given that UNSC reform is unlikely, the R2P process allows states to legitimise their use of force against those responsible for the most heinous of rights abuses, with the requirement that abuses be of a requisite level of seriousness, and that use of force be reserved as a last resort. As a standard of legitimacy rather than legality, states intervening under the banner of R2P are faced with the challenge of providing the international community with sufficient evidence to justify the action as sufficiently necessary; both in terms of cause and the scope of response.

In Libya, the developing principle of R2P would appear to have influenced the UNSC decision to act, but that decision - and indeed R2P's exact role - remains controversial. When faced with the Syrian crisis, the UNSC was hampered by political interests and a reticence to 'act against' the sovereignty of the Syrian regime. The UNGA 'Uniting for Peace' procedures established in 1950,[345] allow the UNGA to recommend appropriate collective measures in response to situations of international peace and security where political deadlock has prevented the UNSC from acting.[346] However, the procedure cannot direct action to be taken,

[341] Garwood-Gowers, above n 281, 595.
[342] MA Myers, 'Deterrence and the threat of force ban: Does the UN Charter Prohibit some Military Exercises' (1999) 162 *Military Law Review* 132; Oscar Schachter, 'Rights of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1625-27.
[343] Myers, above n 342, 143.
[344] International Commission on Intervention and State Sovereignty, above n 99, 31.
[345] *Uniting for Peace*, GA Res 377(V)A, UN GAOR, 5th sess, Agenda Item 68, UN Doc A/Res/377(V)A (3 November 1950).
[346] Ibid, preamble.

nor can it 'authorise' such action.[347] Affirmation by the UNGA would certainly give specific action 'a high degree of legitimacy',[348] but as yet does not change the legality of a particular use of force. Further, the UNGA method comes with its own challenges and was criticised by the ICISS, as the required two thirds majority is politically unlikely if there is a UNSC deadlock or veto.[349] Further, the R2P *responsibility* is imposed on all states – not on the institution of the UNGA.

R2P's creation highlighted a division between *legitimate* and *legal* action. R2P, as adopted formally by the global community in the World Summit outcome, requires UNSC approval and has resulted in a negative impact on the doctrines' development; as was highlighted by analysing the Libyan civil war and the Syrian uprising. Only R2P's first pillar, that primary responsibility lies with the state, is consistently accepted internationally. While just war theory was ostensibly replaced when the *UN Charter* supplanted debates on the legality of use of force, this article has demonstrated that just war theory remains relevant in guiding state actions in the absence of clear legal rules. In the context of the UNSC's recognised limitations in responding to atrocities, just war principles provide guidance for the appropriateness of non-UNSC authorised R2P intervention. Placing the *responsibility* (as opposed to a *right*) to act within the existing context of just war theory, demonstrates that proportionality and last resort have remained constant factors in the legitimisation of humanitarian-motivated military action. These factors remain relevant within the present UN system, with states formally obliged to seek peaceful resolution before utilising a use of force exception. Bearing in mind that it was preventable atrocities and the global community's inaction which triggered the creation of the R2P concept initially, the continued occurrence of such atrocities suggests that states need to take further steps forward.

The modern reality of global state interdependence requires that states should utilise intervening force acceptable within the UN system when required, either through being a secondary authority or when the breaching 'state' no longer meets the requirements of sovereignty in the UN system. States are operating in an uncertain international environment in which the legal rules – including those regarding the use of force - are evolving. While it is easy to say that the *UN Charter* system places a strong legal prohibition on the use of force, subject only to defined exceptions, the reality is somewhat less clear. Action is taken within a spectrum not merely of legality but *legitimacy* and R2P operates to give an intervening State's actions more or less legitimacy. It remains to be seen whether R2P will ultimately gain certainty as a legal principle. Lacking a clear, authoritative statement of R2P as a legal exception to the general prohibition, it is necessary to look to the dual elements of customary international law to determine R2P's status. Whilst not yet clearly meeting the standard of *opino juris* the state practice seen in Kosovo and the changed political dynamics seen supporting the initial intervention in Libya, show that R2P has growing recognition. It is clear that, as with the just war principle, R2P currently serves to guide decisions on the legitimacy of action. It is equally clear that through its continued use and relevance to crimes occurring today, there is a strong foundation for R2P to develop into a true exception to the prohibition

[347] For discussion of the potential and problems of 'Uniting for Peace' in the context of Syria, see, eg, Andrew J Carswell, 'Unblocking the UN Security Council: the Uniting for Peace resolution' (2013) 18(3) *Journal of Conflict & Security Law* 453.
[348] International Commission on Intervention and State Sovereignty, above n 99, 53.
[349] Ibid.

on the use of force, allowing the possibility of force in response to heinous crimes – with or without UNSC authorisation.