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An Analysis of the Intervention in Libya

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CONTENTS

Part B: Regime Change and Libya Intervention

I. Preface

In the twentieth century around 40 million people were killed in wars. In the same century around 170 million people were killed by their own government.[1] The 1994 Rwandan genocide killed at least 800.000 people.[2] The war in the former Yugoslavia killed at least 250.000. Many other conflicts such as in Haiti, Sierra Leone, Liberia and Congo killed millions, and approximately 90 percent of the victims of these past conflicts were civilians.[3] These statistics bring credence to Bellamy's assertion that: 'The most violent conflicts in the world today are civil wars, often involving government-sponsored atrocities against non-combatants.'[4]

After the end of the cold war, expectations were high that humanitarian interventions would be more effectively facilitated by collective actions of the United Nations (UN) Security Council (SC). Those expectations were severely disappointed in several cases. International disagreement on the issue of humanitarian intervention was demonstrated when the UNSC failed to take action to prevent the planned genocide in Rwanda in 1994, followed by the lack of intervention to protect civilians in Srebrenica, as well as the failure to authorise military intervention in Kosovo in 1999. Today, a declining number of armed conflicts are inter-state; instead we face the problem of a proliferation of internal armed conflicts with a rising number of civilians becoming victims of mass murder, rape or ethnic cleansing.[5]

As a response to the demand for international unity on questions relating to humanitarian intervention, the Canadian Prime Minister, Jean Chrétien, announced at the UN Millennium Assembly in 2000 that an independent International Commission on Intervention and State Sovereignty (ICISS)[6] would be established. The mandate of the Commission was

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[1] BELLAMY, Alex J. (2006): Just wars. From Cicero to Iraq. Cambridge/Malden (Polity Press), 199.

[2] See e.g. UNSC Report 1257 (1999): Of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda. S/1999/1257 of 16 December 1999 (Enclosure).

[3] BELLAMY, Alex J. (2006), 199.

[4] Ibid.

[5] See e.g. PAYANDEH, Mehrdad (2012): "The United Nations, Military Intervention, and Regime Change in Libya" in: Virginia Journal of International Law, 52 /2, 364.

[6] International Commission on Intervention and State Sovereignty (ICISS) (2001a): The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty. Ottowa (International Development Research Centre). See also BELLAMY, Alex J. (2009): Responsibility to Protect. The Global Effort to End Mass Atrocities. Cambridge/Oxford (Polity Press), 35 ff. The Commission was established on initiative of the Canadian officials Don Hubert, Heidi Hulan and Jill Sinclair responding to former UN Secretary General Kofi Annan's call to resolve the tension between sovereignty and human rights. For political reasons it was agreed that the commission should work outside the UN, it was therefore sponsored by Canada. The first meeting of the study group took place in 1999 and the first ICISS roundtable was held in January 2001. The name of the Commission was changed from Foreign Minister of Canada Lloyd Axworthy's proposed name 'International Commission on Humanitarian Intervention' to 'International Commission on Intervention and State Sovereignty' driven by concerns about the politically controversial language of 'humanitarian intervention'. The Commission was co-chaired by former Australian Foreign Minister Gareth Evans and by

> '[…] to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty […] and to develop a global consensus on how to move from polemics […] towards action […]'.[7]

The final Report of the Commission entitled 'The Responsibility to Protect', and its supplementary volume, 'Research, Bibliography, Background', introduced the concept of Responsibility to Protect (hereafter, R2P), and can be seen as an attempt to institutionalise a normative framework clarifying when forceful intervention in a sovereign state may be morally and legally legitimate.

This thesis intends to critically examine the concept of R2P, an emerging principle of international law,[8] which reconceptualises humanitarian intervention and its relation to regime change. Furthermore, this thesis will aim to investigate whether the intervention in Libya was an example of the correct implementation of the R2P doctrine. This will require an assessment of whether forceful regime change is a necessary correlative of successful R2P policy, i.e. is regime change a *conditio sine qua non* of R2P?

Mohamed Sahnoun a former Algerian diplomat and assisted by ten other commissioners: Gisèle Coté-Harper (Canada), Lee Hamilton (USA), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel Ramos (Philippines), Cornelio Sommaruga (Switzerland), Eduardo Stein (Guatemala), Ramesh Thakur (India/Australia).

[7] ICISS (2001a), 2.

[8] See BELLAMY, Alex J. (2009), 4. As illustrated by Bellamy, the term used when referring to R2P includes a particular judgement on the status of R2P. Bellamy argues that the term '*concep*t' merely referrers to an abstract idea, not an agreed principle or norm. Therefore it is inappropriate to use the term in reference to R2P, as R2P has already been accepted as something more than only an idea (in reference to the UN 2005 World Summit Outcome). R2P is also often referred to as an emerging '*principle*' of international law. Bellamy qualifies the term '*principle'* as the recognition of something having a status of sufficient consensus of functioning as a foundation for action. The third term used when talking about R2P is a '*norm*', which Bellamy defines as 'collective understanding of the proper behaviour of actors'. Within this thesis R2P will be referred to the terms '*principle'* or '*doctrine'*. The author's decision to refer R2P to these terms is based on pragmatic reasons, as those are the terms which are most commonly associated with R2P and are frequently used by the ICISS, the UN High-Level Panel on Threats, Challenges and Change, governments and NGOs. Additionally, in the author's view these terms refer best to the current status of recognition of R2P.

II. Structure and Scope of the Thesis

As the title suggests, the present thesis focuses on the aspect of military intervention. R2P is a highly political subject and at the same time is often described as a developing international legal norm. This thesis does not intend to conduct an in-depth legal assessment of R2P and the associated legal issues. Rather, it aims to combine the legal examination of the principle with the political and theoretical debate within International Relations and Realpolitik. It needs to be stressed that it is not within the scope of this thesis to analyse economic, political or diplomatic measures, although these measures are closely related to the ultimo ratio of military intervention and are important contents of R2P. Nevertheless, the author narrowed the field of analysis to military measures due to the chosen case study.

This thesis is divided in two main parts. **Part A** will analyse the developing human protection doctrine, R2P, including its political and legal development, its origins, as well as its present content and implementation. In addition to the examination of the legal issues surrounding R2P, this thesis will consider the approaches of some of the leading academics and practitioners specialising in the emerging R2P doctrine. Part A is subdivided into five parts.

Part B will look at the background giving rise to the Libya intervention and subsequent regime change and the link between R2P and forceful regime change. It will discuss whether military intervention for the purpose of human protection is aligned *per se* to regime change. Part B will analyse the implementation of R2P as well as examining the question of the legality and legitimacy of forceful regime; both generally and in the context of Libya. More precisely, the Resolutions of the UNSC, as well as the positions and approaches of the main actors involved in the Libya intervention, will be considered. Part B is subdivided in three parts.

A. Responsibility to Protect

A. Structure

Part A of this thesis is dedicated to a political and legal assessment of the doctrine of military intervention on the grounds of human protection. Part ***one***, entitled **Genealogy and Theoretical Background of R2P (1.),** starts by laying down the theoretical basis and origin of R2P, namely the *Just War Doctrine (1.1.).* The second chapter then debates the differentiation between *Humanitarian Intervention and R2P (1.2.).* Afterwards *Humanitarian Intervention (1.3.)* as such is outlined.

Part ***two,*** named **The ICISS Report on R2P (2.)**, introduces the doctrine of R2P as stipulated by the ICISS Report as well as new achievements within the intervention debate for a human protection purpose. The first chapter is called *Core Principles and Foundations of R2P (2.1.)*; it outlines the Report and its core assumption. Further, the *Scope and Title of the Doctrine (2.1.1.)* are debated in the second chapter. The following chapter outlines the *Genealogy of R2P (2.2.).* The final section presents the *Institutionalisation of R2P (2.3).*

Part ***three*** deals with the **Legal Questions (3.)** surrounding R2P. At the beginning *Human Rights (3.1.)* are discussed. Further, the conflict between military intervention on humanitarian grounds and the *Prohibition of Armed Force in International Law (3.2.)* is illustrated. The third chapter then debates the *Principles of Non-interference (3.3.1.) and Sovereignty (3.3.2.)* in regard to R2P. What needs to be clarified is that state sovereignty as such is not analysed explicitly concerning its changing nature, as such detailed legal analysis would exceed the scope of this thesis. The basic legal constructs and issues related to state sovereignty and R2P are illustrated. The final chapter presents a *Conclusion (3.4.)* from the judicial perspective concerning the legitimacy of military intervention under international law in special regard on the above mentioned prohibition and principles.

Part ***four*** then focuses on the **Responsibility to React According to the ICISS (4.)**. Hence the concept of military intervention as stipulated by the ICISS Report is outlined more closely. The first chapter assesses the *Responsibility to React (4.1.)* outlining under which circumstances military intervention for human protection can be justifiable. The second and final chapter of part four then deals with the difficult question of the *Right Authority (4.2.).*

Part ***five,*** entitled **R2P and International Relations Theory (5.),** outlines four major theories of International Relations and their standpoints towards R2P, namely *Realism (5.1.)*, *Liberalism (5.2.)*, *Cosmopolitanism (5.3.)* and the *English School (5.4.).* Moreover, the final chapter of this section entitled *Conclusion (5.5.)* considers the arguments against and in favour of R2P, the danger of abuse and the doctrine's dilemma of selectivity, which has been especially demonstrated recently with the lack of intervention in Syria.

1. Genealogy and Theoretical Background of R2P

1.1. Just War Doctrine

This chapter will outline a doctrine which deals with the question of evaluating the moral legitimacy of war or military intervention. The just war doctrine is rich in diversity, rooted in Christianity, and spans a tradition of 200 years. The debate on humanitarian intervention and R2P is closely related to the just war doctrine, as the just war criteria have been adopted in the ICISS final Report on R2P.[9] Therefore, the just war doctrine is the theoretical basis of humanitarian intervention and R2P and still is strongly associated with today's debate on R2P. It is not within the scope of this thesis to chart the evolution of the just war doctrine in depth, but it is important to illustrate its general history and content.

The just war doctrine is essentially about evaluating the legitimacy of the use of force.[10] The origin of the just war tradition lies in the *jus ad bellum* doctrine of early European civilisation which already included the core elements of modern just war theories. Today's *jus ad bellum* doctrine comprises seven criteria.[11] The *right intention* is the first criteria, which stipulates that the use of force must be motivated by just intentions. Furthermore, only a *just cause*, namely to correct or prevent grave injustice, can legitimise the use of force. The *principle of proportionality* must be adhered as well, meaning that the benefits of using force must outweigh the injustice. Additionally, the use of force must always be the *last resort* and shall therefore only be used if all peaceful means are exhausted or are not viable. Furthermore, recognised public authority must authorise the use of force which is referred to as the criteria of *right authority*. The *likelihood of success* must also be considered. Finally, there has to be *proper declaration*: The use of force must be publicly declared and publicly justified.

Plato and Aristotle were the first to consider the morality of war.[12] Later, in the time of the Roman Empire, it was Cicero, one of the most important philosophers of that time, who contributed greatly to the recognition of just authority and just cause when considering legitimacy of war. Augustine of Hippo, whose work was influenced by Cicero, without doubt shaped the development of the just war theory. For Augustine the right intention as well as the

[9] This will be illustrated in Chapter 4, Part A.
[10] HEHIR, Aidan (2010): Humanitarian Intervention. An Introduction, Basingstoke/New York (Palgrave Macmillan), 23.
[11] Listed by HEHIR, Aidan (2010), Box 2.1, 24.
[12] For a detailed genealogy of the just war tradition see e.g. BELLAMY, Alex J. (2009), 15 ff; HEHIR, Aidan (2010), 22 ff.

right authority were of particular importance.[13] He believed that a just king would fight only just wars to uphold justice and maintain the peace; therefore for him only wars of necessity and not those of choice were fought.[14] Hence the three core criteria of today's just war theory where already formulated by Augustine of Hippo, even if it was Thomas of Aquin who conceptualised the *jus ad bellum* doctrine in the Middle Ages. From this perspective war would only be morally legitimate if the right authority acted for the right reason and with the right intention.[15] Francisco de Vitoria was also a great contributor in the advancement of just war and natural law. Hugo Grotius, often referred to be the father of international law, believed in the law of nature,[16] which according to his presumption formed the basis of the law of nations.[17] Natural law plays an important role in contemporary debates on the use of force and can be seen as one of the foundations of humanitarian intervention and R2P as it is the foundation of humanitarian law and of the proliferation of human right. Just war doctrine however disappeared from international law when the European system of balance of power and the concept of sovereign state were established in 1648 with the Peace of Westphalia.[18] As states where from then onwards considered being sovereign and equal a just cause for war ceased to exist, in so far as it became irrelevant in any legal way for the international community.[19] Rather, states where admonished to respect the other states and to privilege peaceful methods of solving conflicts, neglecting war. With the First World War, the just war doctrine was revived as the international community again dealt with the question of unjust war.[20] Today, two distinguished fields of assessment have developed and sharpened the differentiation between *jus ad bellum* and *jus in bello*. While *jus in bello* is a different subject which does not concern this thesis, the *jus ad bellum* tradition established an important framework and helpful tool when analysing the legitimacy of coercive force. Hence the philosophical roots of R2P can essentially be found in the just war tradition as well as in natural law. The following chapters will chart the doctrine of humanitarian interventions and the controversy on legitimation and justification of military intervention in order to protect lives.

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[13] HEHIR, Aidan , (2010), 27.
[14] BELLAMY, Alex J., (2009), 28.
[15] HEHIR, Aidan, (2010), 28.
[16] For extensive definition of natural law see supra note 32. Natural law is unwritten law premised on the view that certain rights are inherent by virtue of human nature. The naturalist doctrine rests upon the idea that common human nature generates common moral duties and rights.
[17] HEHIR, Aidan (2010), 30-31.
[18] SHAW, Malcolm N. (2003): International Law. Fifth Edition. Cambridge (Cambridge University Press),1015.
[19] Ibid.
[20] Ibid, 1016.

1.2. Humanitarian Intervention and R2P

R2P essentially derives from a controversial doctrine, debated under the term 'humanitarian intervention'. It needs to be clarified that R2P is not completely distinct from humanitarian intervention; rather, it is an advancement of it. An essential distinction is that R2P, as put forward by the ICISS Report, does not solely deal with military intervention on the basis of humanitarian reasons, in contrary to humanitarian intervention. It is a broader concept that includes prevention, reaction and rebuilding and not only military acts.[21] Therefore and due to several other reasons,[22] the ICISS commissioners decided to change the language relating to the subject. Introducing a new language to the debate on humanitarian intervention aimed inter alia to emphasise the new elements added to the old debate on humanitarian interventions. At the very heart of the work of the Commission was an effort to develop an efficient framework to prevent and react upon massive and systematic human rights abuses, large scale loss of life, genocide and ethnic cleansing, as well as finding a way of reconceptualising humanitarian intervention so as to ensure that it would enjoy the widest possible international support. Hence R2P derives from humanitarian intervention but can also be pictured as a distinct concept due to the various new approaches amending the original doctrine. This was illustrated for example when R2P was presented to the General Assembly (GA) at the World Summit 2005. Former Secretary-General Kofi Annan decided not to place R2P under the banner 'collective security' and 'use of force', in order to distinguish R2P from humanitarian intervention as a broader concept which does not only deal with the use of force and security issues.[23] It is often stressed that even concerning non consensual use of force, R2P is much more than humanitarian intervention, as it is a commitment from all member states of the UN to protect their own citizens from genocide, ethnic cleansing, and crimes against humanity as well as to assist other states in fulfilling their responsibilities.[24] As humanitarian interventions mark the background where R2P originates from, and due to the similarity of the two concepts, especially when it comes to military intervention, it is essential to outline the prior.

[21] As already outlined in the preface this thesis exclusively deals with military intervention and excludes the issues of prevention and rebuilding. Adding prevention and rebuilding to achieve a broader concept on the issue, however, was one of the main amendments which mark the difference between humanitarian intervention and R2P.
[22] This will be illustrated more closely in Chapter 4, Part A.
[23] BELLAMY, Alex J. (2009), 76.
[24] Ibid, 197.

1.3. Humanitarian Intervention

One of the greatest difficulties of the concept of 'humanitarian intervention' is that it lacks clarity. More precisely there is no consensus within the international community on which circumstances, if any, may allow for rightful and legitimate military intervention aiming to protect strangers across borders. The debate about moral justification is primarily a political one, while the discourse on the legitimacy is judicial. The controversy in the matter of humanitarian intervention is mirrored in the great variety of definitions given for such interventions. One of the various descriptions of humanitarian intervention is given by Holzgrefe:

> '[T]he threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of fundamental human rights of persons other than the nationals of the intervening state and without the permission of the state within which force is applied.'[25]

The ICISS defines humanitarian intervention as:

> 'Action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective [...] including all forms of preventive measures, and coercive intervention measures – sanctions and criminal prosecutions - falling short of military intervention.'[26]

The definition given by Fernando Téson, includes the judgement of permissible and impermissible interventions. Furthermore he considers the form of government of the intervening and the intervened state. His definition of permissible interventions reads as follows:

> '[T]he proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect.'[27]

Despite lacking a clearly defined understanding of humanitarian intervention, the majority of scholars agree upon certain attributes: namely, that humanitarian intervention requires the

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[25] HOLZGREFE, J.L. (2003): "The Humanitarian Intervention Debate" in: HOLZGREFE, J.L; KEOHANE, Robert O. ed. (2003): Humanitarian Intervention. Ethical, Legal and Political Dilemmas. Cambridge/New York (Cambridge University Press),18. Holzgrefe stresses that he defines humanitarian intervention in this particular way, excluding non-forcible interventions such as economic or diplomatic sanctions, because the question of legitimating the use of force to protect human rights is more urgent and controversial. The author of the present thesis decided to follow this definition given by Holzgrefe as the scope of the present thesis is limited to military intervention.

[26] ICISS (2001a), 8. Quoted by HEHIR, Aidan (2010), 17.

[27] TÈSON, Fernando R. (2003): "The Liberal Case for Humanitarian Intervention" in: HOLZGREFE, J.L.; KEOHANE, Robert O. ed. (2003): Humanitarian Intervention. Ethical, Legal and Political Dilemmas. Cambridge/New York (Cambridge University Press), 94.

intervener to be a third party of the conflict, that the intervention is an act without the consent of the host state and that the means of the intervention are coercive, hence the threat or use of armed force.[28] Furthermore, the intervention by definition has to be driven, at least allegedly, by humanitarian concerns in order to be associated with the term humanitarian intervention. The scope and content of these humanitarian concerns as well as which, if any, humanitarian concerns should morally as well as legally legitimate military intervention is subject to fierce debate. It was therefore necessary to clarify which intentions are qualified to justify military intervention on grounds of humanitarian concerns. Furthermore, the question of determining which cases of human rights violations provide the basis of a just cause to intervene needed to be resolved. The ICISS attempted to resolve these questions about legitimacy and the content of humanitarian intervention by determining six criteria which need to be satisfied for intervention to be justifiable and legal.[29]

One of these criteria primary concerns the legal debate, namely the question of the lawfulness of coercive intervention in a sovereign state. The ICISS suggests that military interventions on humanitarian grounds need a UNSC authorisation under Chapter VII of the UN Charter in order to be in compliance with international law.[30] The legality of such authorised interventions notwithstanding, it is further often assumed that interventions which are permitted by the UNSC must also satisfy the other criteria of a morally rightful intervention. That is to say that the intervention must be based on a just cause and guided by the right intentions. Therefore, interventions aiming to protect civilians which are legitimised by the UNSC enjoy better standing in the international community than those lacking a UNSC mandate. If a UNSC approval is missing, the issue becomes much more controversial, legally as well as politically. The controversy about the legitimacy of military intervention without a UNSC approval has been debated heavily and impulsively ever since. This dispute has so far not been resolved.

Those contributing to this discussion take sides depending upon their particular attitude on the primacy of certain principles and rules of international law.[31] Some scholars, mainly those following natural law,[32] argue that military intervention on the grounds of human protection

[28] See e.g. HEHIR, Adian (2010), 16ff.
[29] These six criteria follow the just war doctrine and will be outlined in detail in Chapter 4, Part A.
[30] See e.g. HOBE, Stephan; KIMMINICH Otto (2004): Einführung in das Völkerrecht. Achte, vollständig neu bearbeitete und erweiterte Auflage. Tübingen/Basel (A. Francke Verlag), 332; BELLAMY, Alex J.(2009), 205.
[31] BELLAMY, Alex J. (2006), 199.
[32] See e.g. HEHIR, Aidan (2010), 83ff. See also HOLZGREFE J.L. (2003), 25-28. One of the most divisive controversies surrounding R2P and humanitarian intervention is the tension between positive and natural law. Natural law is unwritten law premised on the view that certain rights are inherent by virtue of human nature. The

can be legitimised by obligations under international human rights law[33] and therefore does not necessarily need the authorisation of the UNSC.[34] A minority of scholars argue 'that there is a customary right of intervention'[35] in 'supreme humanitarian emergencies',[36] such as actual or apprehended large scale loss of life or ethnic cleansing. In contrast, the majority claims that humanitarian intervention involving the threat or use of armed force, undertaken without the mandate or the authorisation of the UNSC, is a breach of international law.[37] This breach of international law, however, does not exclude the possibility of the intervention being morally legitimate. This raises the political and ethical question concerning the moral rightfulness of unilateral and collective interventions without a UNSC mandate.

The debate on the centralised control over the use of force exercised by the UNSC came dramatically to the fore after the Rwanda genocide and the later forceful NATO intervention in Kosovo. The genocide in Rwanda in spring 1994[38] hallmarked an essential turning point as people all over the world were shocked and deeply stirred that 800.000 people where most brutally killed in only 100 days because the most powerful member states of the UN could not muster enough political or moral will to halt a genocide that was more efficient than the

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naturalist doctrine rests upon the idea that common human nature generates common moral duties and rights. These rights or rules of moral behaviour are thought to be universally binding and determined by our human nature. Some authors infer that these duties, which all people have by virtue of common humanity, include a right of humanitarian intervention. Holzgrefe for example mentions Hugo Grotius who argued that states have the right, but not the duty, to intervene in behalf of the oppressed. Grotius based this right on natural law and the universal community of humankind. On the contrary Holzgrefe presented theorists of natural law, like Emanuel Kant, who oppose the right to intervene and maintained that states have the duty to refrain from interfering in each others affairs. The contrary position is positive law, which basically is 'man made law'. Positive law rests on the notion that law is what lawmakers command or have agreed upon. For positivists norms are just if they are lawful, which means that they are enacted according to accepted procedures. The content of the norm is irrelevant to its binding force. [HOLZGREFE J.L (2003), 35] Positive law has increasingly evolved since the end of the Second World War and today is predominant in international relations and international law.

[33] In reference to international human right treaties such as e.g. the Universal Declaration of Human Rights (UDHR), the Genocide Convention, the Geneva Conventions and its Additional Protocols.

[34] ICISS (2001a), para 2.26,p 16.

[35] BELLAMY, Alex J.,(2006), 201.

[36] Ibid, quoting WHEELER, Nicholas; GRAY, Christine (2008): International Law and the Use of Force. Third Edition. Oxford/New York (Oxford University Press); General ed. EVANS, Malcolm; OKOWA, Phoebe: Foundations of Public International Law, 42. As Gray outlines in the context of the NATO intervention in Kosovo, the UK for example argued that the use of force is legal in and justifiable as an exceptional measure to prevent an overwhelming humanitarian catastrophe if all diplomatic means have been tried and failed.

[37] See e.g. SIMMA, Bruno (1999): "NATO, the UN and the Use of Force: Legal Aspects" in: European Journal of International Law (EJIL), 10, 6; See also BELLAMY, Alex J. (2006), 200.

[38] Until Rwandan independence in 1962, the minority Tutsis ruled the country. In the early 1990s, Hutu extremists (the Hutus where the biggest of the three ethnic groups of Rwanda with approximately making up 85 % of the population) within Rwanda's political elite blamed the Tutsi minority (approximately 14 % of the population) for the country's increasing social, economic, and political pressures. Violence began after a plane carrying President Habyarimana, a Hutu, was shot down on April 6, 1994 and killed everyone on board. Under the cover of war Hutu extremists killed approximately 800,000 people, Tutsis as well as moderate Hutus. The systematic massacre of men, women and children took place in less than 100 days between April and July 1994. See e.g.: UNSC Report 1257 (1999): Of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda. S/1999/1257 of 16 December 1999 (Enclosure); BARNETT, Michael (2011), 5.

Holocaust.[39] After the great failure in 1994 the majority of Western governments agreed that actual or apprehended genocide, ethnic cleansing or gross human right violations are matters which must be acted upon. A well known example for effectively protecting civilians across state boarders even if the UNSC is unwilling or unable to authorise the use of force is the NATO intervention in the former Federal Republic of Yugoslavia in 1999 without a UNSC authorisation. That Rwanda had not been forgotten and that the lesson had been learned was poignantly stressed in 1999 in Atlanta by Tony Blair, a heavy campaigner for the NATO intervention:

> 'Can the outside world simply stand by when a rogue state brutally abuses the basic rights of those it governs? [...] Allow ethnic cleansing or stop it. That remains the choice.'[40]

In opposition to such rhetorical commitment to military intervention for the purpose of human protection the majority of the world's states still give privilege to non-intervention over human rights.[41] Nevertheless, protection of and respect for human rights has effectively become a central subject in International Relations and international law as well as in Realpolitik.[42] The intervention in the Kosovo conflict demonstrated that if the UNSC is blocked, the moral duty to prevent mass murder and ethnic cleansing does not vanish. The NATO intervention was not condemned by the UNSC but also not approved. Some scholars argue that there was meagre approval of the intervention and that the actions taken by NATO can not support any legal justification of a right to militarily intervene to protect human rights and lives.[43] Other argued that international community predominantly approved the actions taken by NATO in Kosovo which gives credence to the development of consensus that in certain cases intervening in sovereign states for humanitarian reasons can be justified without

[39] LU, Catherine; WHITMAN, Jim ed. (2006): Just and Unjust Interventions in World Politics. Public and Private. Basingstoke/New York (Palgrave Macmillan),1f.

[40] MALMVIG, Helle (2001): "The Reproduction of Sovereignties. Between Man and State During Practices of Intervention" in: Cooperation and Conflict, 36, 257.

[41] BELLAMY, Alex J. (2006), 206. See also BELLAMY, Alex J. (2008): "The Responsibility to Protect and the problem of military intervention" in: International Affairs, 84/4, 621-624. As Bellamy argues in his article the overwhelming majority of governments, regional organisations and particularly the UN itself reject coercive measures without authorization by the UNSC and therefore dismiss military intervention or use of force beyond the two exemptions of the UN Charter. Bellamy also recalls that a widespread hostility to the idea of military intervention on humanitarian grounds was articulated by NGOs, civil society organisations as well as by governments when participating in the roundtables held by the ICISS while working on the final Report of R2P.

[42] See e.g. ICISS (2001a), para. 1.15,p 6.

[43] SHAW, Malcolm N. (2003), 1047. He argues that the doctrine of humanitarian intervention was invoked and not condemned by the UN, as there was no formal endorsement but also no condemnation of the NATO intervention in Kosovo. Therefore it is not possible to chart the legal situation as going beyond this.

UNSC approval.[44] The triggering question in the context of Kosovo is whether the intervention can be seen as a particular shift in collective international security towards individual human security - towards legitimising intervention on legal foundations such as the human rights provisions of the UN Charter. The problem faced here essentially is reflected in the UN Charter itself. On the one hand, forbidding armed intervention and the plea for respect of state sovereignty; on the other hand, demanding the Member States to respect human life, human dignity, basic freedoms and fundamental rights of every human owed by humanity, whilst remaining silent on how to regulate conflict between these norms. The dilemma is a logical result of the vast proliferation of human rights coupled with the commitment to protect and respect those rights, as well as the absence of corresponding changes to the Charter's provision dealing with the violation of human rights.[45] A number of countries, particularly in the West, are gradually shifting towards a commitment to protect not only their own citizens but also those of other states from genocide, war crimes, ethnic cleansing and crimes against humanity.[46] Despite certain conclusions that can be drawn from Kosovo, there was an obvious need to clarify and reconsider legal legitimacy of what was morally postulated, namely intervention for the purpose of human protection. Nevertheless humanitarian intervention remains a twofold topic; allowing such interventions, especially without UNSC authorisation, bears the danger to open a Pandora's Box of legitimising the use of force on grounds of moral assumptions. Such interventions further following the standpoint of international courts and the majority of international lawyers lack explicit legal basis in the UN Charter as well as unanimous assent in the international community on the issue. On the other hand it is owed to humanity to not watch while millions are murdered by dictators or due to a failed state situation. Therefore it is important to highlight that one should not only be impressed by the

[44] See e.g. GRAY, Christine (2008), 42-43, 50; Those defending the legality of the NATO intervention often point at the UNSC Resolutions passed under Chapter VII of the UN Charter which called on Yugoslavia to stop its action, imposed an arm embargo and warned Yugoslavia from further actions taken under Chapter VII of the UN Charter if the situation amounts to a threat to international peace and security. Hence as Yugoslavia did not comply with the demands of the UNSC the NATO intervention was justified especially in regard to UNSC Resolution 1203 (1998) despite the lack of clear authorisation of the use of force. This however also indicated that those who argue along these lines strongly refer to an implied authorization of the UNSC and therefore generally do not support the unilateral right to intervene militarily on humanitarian grounds. See UNSC Resolution 1160 (1998): on the letters from the United Kingdom (S/1998/223) and the United States (S/1998/ 272), of 31 March 1998; UNSC Resolution 1199 (1998): on Kosovo (FRY), of 23 September 1998; UNSC 1203 (1998): on Kosovo, of 24 October 1998.

[45] HEHIR, Aidan (2010), 94.

[46] See e.g. CHANDLER, David (2004): "The Responsibility to Protect? Imposing the „Liberal Peace" in: International Peacekeeping, 11/1, 59.

dangers and ineffectiveness which humanitarian intervention bears but rather sensitise consciousness to the immorality and probable ineffectiveness of non-intervention.[47]

[47] BELLAMY, Alex J., (2006), 202. Quoting RAMSEY (2002), 23.

2. The ICISS Report on R2P

2.1. Core Principles and Foundations of R2P

Responding to the desire and need to find common ground on the subject of humanitarian intervention, the ICISS worked over one year on a new concept which was presented in the final Report of the Commission in December 2001. The 90 page Report and 400 page supplementary volume was published under the title *The Responsibility to Protect*. The Commission met five times and hosted eleven regional roundtables and various national consultations.[48] The Commission was chaired by the former Australian Foreign Minister Gareth Evans and by Mohammed Sahnoun, a former Algerian diplomat, and assisted by ten other commissioners from, Canada, the USA, Germany, Switzerland, Russia, south Asia, Latin America and Africa.[49]

The Report states that it is about the so-called right of humanitarian intervention and 'the question of when, if ever, it is appropriate for states to take coercive - and in particular military - action, against another state for the purpose of protecting people at risk in that other state'.[50] In general, the Commission aimed to settle the continuing disagreement as to whether there is a right of intervention for human protection purposes; when it should be exercised and under whose authority.[51] The necessity to establish a clear concept on intervention for human protection purposes, as outlined in the previous chapter, resulted from the 'growing recognition worldwide that the protection of human security, including human rights and human dignity, must be one of the fundamental objectives of modern international institutions'[52]. Hence the ICISS outlined the goal of their work as follows:

> '[…] to generally build a broader understanding of the problem of reconciling intervention for human protection purpose and sovereignty; more specifically, […] to try to develop a global political consensus on how to move from polemics- and often paralysis- towards action within the international system, particularly through the United Nations.'[53]

Although the Commission renamed the debate from 'right to intervention' to 'responsibility to protect', the substantive issue did not change; namely, when it is legitimate or necessary to

[48] EVANS, Gareth (2008): The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All. Washington, D.C. (Brookings Institution Press), 38.
[49] See e.g. BELLAMY, Alex J. (2009), 37.
[50] ICISS (2001a), Foreword VII.
[51] Ibid.
[52] Ibid, 6.
[53] Ibid, 2.

intervene in a sovereign state. Noteworthy is the fact that the Commission's work shifted the focus from the state to the individual as it did not focus on the issue of humanitarian intervention and therefore the right to intervene but rather on the responsibility to intervene. The concept of R2P therefore hallmarks a shift towards human security[54] accordingly the Commission states that "[…] the concept of security is now increasingly recognized to extend to people as well as to states"[55].

The main insight of R2P is that each sate has the responsibility towards its citizens to protect them from murder and severe human rights violations. This responsibility is an inherent part of state's sovereignty; therefore sovereignty vanishes if the sovereign state does not fulfil its responsibilities towards its population.[56] Correspondingly, the synopsis of the Report stated that 'state sovereignty implies responsibilities, and the primary responsibility for the protection of its people lies with the state itself".[57] The Report followed the concept of sovereignty as responsibility which means that sovereignty can be suspended if a state does not fulfil its responsibility to protect its citizens. Following the core principles of the R2P doctrine sovereignty is not indispensable. Rather, it is conditioned by the compliance of a state to fulfil its responsibilities towards its people. To use Bellamy's words: '[…] if governments fail to fulfil sovereignty's purpose their legitimacy is diminished'.[58] As the Report stressed, the primary responsibility remains within the state itself. It is 'only when national systems of justice either cannot or will not act to judge crimes against humanity that universal jurisdiction and other international options should come into play'.[59] Hence if a government fails to take its responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, the responsibility of the unwilling or incapable government to protect its population is assigned to the international community. The international community then is responsible to guarantee the wellbeing of the population with non military, as well as military means, if necessary. To quote the Report:

> 'Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or

[54] EVANS, Gareth (2008), 34. The concept of human security though, derives from Mahbub ul Haq, special adviser of the Human Development Report 1994 titled *New Dimension of Human Security*, and his team, who encouraged a change of focus from the predominant state security towards the affected people and their freedom from want and from fear.
[55] ICISS (2001a), para 1.28,p 6.
[56] See also BELLAMY, Alex J. (2006), 206, for historical background of the idea of „sovereignty as responsibility".
[57] ICISS (2001a), XI.
[58] BELLAMY, Alex J. (2006), 205.
[59] ICISS (2001a),14.

avert it, the principle of non-intervention yields to the international responsibility to protect'[60].

Furthermore, the foundations of R2P are outlined in the Report. These foundations are primarily obligations inherent in the concept of sovereignty as responsibility as outlined, further the duties and responsibilities of the UNSC for the maintenance of international peace and security, third the human rights and human protection treaties international as well as national, and finally state practise as well as the practise of regional organisations and the UNSC itself.[61] The final Report of the ICISS introduced three levels of responsibility which are all embraced by R2P. First the responsibility to prevent, second the responsibility to react (which means to respond to human need with appropriate measures, including coercive measures and in extreme cases military intervention) and the responsibility to rebuild.[62]

2.1.1. Scope and Title of the Doctrine

The Commission decided to distance itself from the terminology 'humanitarian intervention' for two reasons: primarily as a response to strong opposition of humanitarian agencies and organisations towards militarisation of the word 'humanitarian' and, secondarily, because of the inherently approving nature of the positive associated word humanitarian.[63] The new terminology 'the responsibility to protect' was meant to support the sense for reconceptualising the issues relating to 'humanitarian intervention', it was also expected to have a refreshing effect on the ongoing debate about humanitarian intervention in the international community.

The Report stressed that it does not argue for or against a 'right to intervene'; rather, it prefers to talk of the 'responsibility to protect'.[64] Nevertheless, intervention remains a central term of the debate no matter how it is named. Therefore, the Commission found it necessary to clarify the meaning of the ambiguous term. The Commission stated that:

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[60] Ibid, XI.

[61] Ibid. The foundations of R2P read as follows: 'A. Obligations inherent in the concept of sovereignty; B. the responsibility of the Security Council, under Art 24 of the UN Charter, for the maintenance of international peace and security; C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law; D. the developing practice of states, regional organisations and Security Council itself.'

[62] The first and the third responsibilities do not lie at the heart of this thesis and therefore will not be assessed.

[63] Ibid, para 1.40, p 9. "The Commission has responded to the very strong opposition expressed by humanitarian agencies towards any militarization of the word 'humanitarian' as well as the Commission responded to the suggestion that the use in this context of an inherently approving word like 'humanitarian' tends to prejudge the very question in issue - that is, whether the intervention is in fact defensible."

[64] Ibid, para 2.4, p 11.

> ‘The kind of intervention with which we are concerned in this report is action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective.’[65]

‘Intervention’ therefore can include any non-consensual interference in internal affairs, as well as any kind of coercive action which includes political and economic measures as well as military threat or force.[66] In spite of the recognition of the different forms of intervention, the greater part of the final Report focuses on intervention via military force.

The Commission further found it necessary to clarify that it was not within the scope of the Report to break new ground on the question of responding to terrorist attacks within a state. This clarification was necessary due to the terrorist attacks of September 11 in New York and Washington DC three months before publication of the Report in December 2001. The terrorist attacks of September 11 launched a controversial debate on protection against terrorism and the right of self- defence. These issues, however, are neither at the centre of the Commission’s field of study nor a research question of this thesis.

As mentioned in the introduction, R2P is mostly referred to as a doctrine or principle and only few scholars claim that R2P can already be called an emerging norm of international law. The Commission itself argued that ‘there is not yet a sufficiently strong basis to claim the emergence of the new principle of customary international law’[67]. R2P therefore is rather suggested to be called an emerging guiding principle of the international community of states.[68] This appraisal still is the most commonly supported, notwithstanding the broad recognition of R2P today as it certainly has a particular status of sufficient consensus in functioning as a foundation for action. The concept of R2P can therefore be pictured as a developing international principle, not yet an emerging norm, which reconceptualises the legitimacy of intervention on the grounds of humanitarian reasons and moral duty.

After the given introduction of the doctrine the next chapter will illustrate the history of R2P and how it gained international standing, as well as its implementation.

2.2. Genealogy of R2P

In 2004, three years after the official presentation of the final Report of the ICISS on R2P, UN Secretary-General Kofi Annan appointed a High-Level Panel on Threats, Challenges and

[65] Ibid, para 1.38, p. 8.
[66] Ibid.
[67] Ibid, 15.
[68] Ibid, 15; XI.

Changes to assess and clarify contemporary threats to international peace and security, and indicate appropriate ways to respond to them. The report of this panel was presented to the UNGA and carries the title 'A more secure world: Our shared responsibility'[69]. It calls R2P an emerging norm of great importance. One year later, UN Secretary-General Kofi Annan supported the concept of R2P in his 2005 Report 'In larger Freedom: Towards Development, Security and Human Rights for all'.[70] With this clear endorsement of the R2P concept, it finally gained official advocacy within the centre of the UN. At least since that moment, R2P has been advocated and discussed broadly in national as well as in the international arena. Another remarkable step towards implementing the concept of R2P was its inclusion in the UNGA Resolution 60/1 of the '2005 World Summit Outcome'. The UNGA Resolution acknowledges the concept of R2P in Paragraphs 138-139, titled: 'Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[71] The two paragraphs 138 and 139 of the World Summit Outcome essentially clarified that the state itself has the primary responsibility towards their own citizens but that all other states have the responsibility to assist the state in fulfilling this primary responsibility. Paragraph 139 further states that the international community, through the UN, has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help to protect population from genocide, war crimes, ethnic cleansing and crimes against humanity.[72] Furthermore the UNGA Resolution stipulates that if peaceful means are inadequate and national authorities are manifestly failing to protect their populations the international community is prepared to take collective action, through the UNSC, on case – by - case basis and in a timely and decisive manner.[73] It needs to be highlighted that there is significant discrepancy between the original concept of R2P and how it has been adopted by the world community. More precisely, the ICISS Report has been cut down to three paragraphs and was therefore massively truncated. Furthermore, the UNGA Resolution limited military interventions exclusively to UNSC approval. Advocators of the concept of R2P nevertheless claim that the acknowledgment of the concept by the UNGA can still be seen as a remarkable achievement as the fundamental structure of the R2P has been preserved.

[69] UN (2004): A more secure world. Our shared Responsibility. Report of the Secretary- General's High level Panel on Threats, Challenges and Change. A/59/565 of December 2004.
[70] UN (2005): In large freedom. Towards security, development and human rights for all. Report of the Secretary-Generals High level Panel on Threats, Challenges and Change. A/59/2005 of March 2005.
[71] UNGA Resolution 60/1 (2005): World Summit Outcome of October 2005, para 138- 139.
[72] Ibid, para 139.
[73] Ibid.

2.3. Institutionalisation of R2P

The institutionalisation and recognition of R2P was mainly realised by the UNSC Resolutions 1674 (2006) and 1706 (2006). UNSC Resolution 1674 (2006) 'on the protection of civilians in armed conflict' reaffirms in Paragraph four the Paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[74] UNSC Resolution 1706 (2006) on the Sudanese conflict region of Darfur recalls the Resolution UNSC 1674 (2006) and also reaffirms the two paragraphs of the World Summit Outcome Document dealing with R2P.[75] Another step towards reinforcing the significance of the concept was the proclamation of UN Secretary-General Ban Ki-Moon in his annual report 2009 'Implementing the responsibility to protect' which expressed his ambitious hopes of institutionalising the concept by the end of the year.[76] Furthermore, the thematic debate of R2P in the GA from 23 to 28 July 2009 was another important step to strengthen the awareness of the concept. The debate involved strong assertiveness as well as strong scepticism of the values relating to R2P and its necessities.

The most recent case putting R2P into effect was the Libya intervention and the corresponding UNSC Resolutions on the Libya conflict. UNSC Resolution 1970 of 26 February 2011 was the first Resolution to deal with the uprising in Libya. The Resolution stressed *inter alia* the consideration that the widespread and systematic attacks against the civilian population in Libya may amount to crimes against humanity and demanded an immediate end to the violations and to fulfil the legitimate demands of the population.[77] UNSC Resolution 1973 was adopted on 17 March 2011 due to the fact that Libyan authorities failed to comply with the former UNSC Resolution 1970.[78] Being adopted under Chapter VII of the UN Charter, the Resolution demanded the immediate establishment of a cease-fire and

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[74] UNSC Resolution 1674 (2006): On protection of civilian in armed conflicts, of 28. April 2006, para 4.

[75] UNSC Resolution 1706 (2006): Reports of the Secretary-General on the Sudan, of 31. August 2006, para 2 of the preamble.

[76] UN (2009): Implementing the responsibility to protect. Report of the Secretary-General. A/63/677 of 12. January 2009; See also UN (2008b): Report of the Secretary-General on the work of the Organization. A/63/1 (2008) of 12. August 2008, para. 74.

[77] UNSC Resolution 1970 (2011): On peace and security in Africa- Libya, of 26 February 2011, para 1.

[78] UNSC Resolution 1973 (2011): On the situation on Libya, of 17 March 2011. The Resolution was adopted by a vote of 10 in favour to none against, with 5 abstentions (Brazil, China, Germany, India, Russian Federation). Representatives who had supported the text agreed that the strong action was made necessary because the Qaddafi regime had not heeded the first actions of the Council and was on the verge of even greater violence against civilians as it closed in on areas previously dominated by opposition in the east of the country. See e.g. Department of Public Information/News and Media Division, United Nations, 17. March 2011: *Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions.* Available at: http://www.un.org/News/Press/docs/2011/sc10200.doc.htm.

a complete end to violence and all attacks against, and abuses of, civilians.[79] Essentially the Resolution '[…] authorizes Member States […] to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack […] including Benghazi […]'[80]. These Resolutions and the implementation of R2P in the Libya conflict will be dealt with in greater detail in Part B.

[79] UNSC Resolution 1973 (2011), para.1.
[80] UNSC Resolution 1973 (2011), para.4.

3. Legal Questions

The third chapter assesses the legal questions associated with R2P. At the beginning of this chapter a brief introduction to human rights, as it is one of the foundations of R2P, will be given before analysing the prohibition of the use of force, the principle of state sovereignty as well as the concept of sovereignty as responsibility and of non-interference. The legal questions are examined closely, as intervention in a sovereign state, even if morally legitimate due to humanitarian reasons, can oppose some of the most important legal obligations of public international law if not authorised by the UNSC.

3.1. Human Rights

> 'The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[81]

When writing about military intervention for benevolent and humanitarian reasons the first evident conflict which comes to mind is the struggle between human rights and sovereignty and accordingly the prohibition on intervention. Sovereignty refers to the rights that states enjoy and human rights refer to the rights and freedoms of individuals by virtue of their humanity, as natural law would characterise it.[82] This conflict is reflected in the UN Charter itself. The UN principles, stated in Art 2 of the UN Charter, determine the protection of state sovereignty and prohibit intervention as well as the use of force. At the same time it endorses the importance of human rights as phrased in the Preamble and Art 1 of the UN Charter drafting the purpose of the UN, as well as in Art 55 and Art 56 of the UN Charter.[83] 'There is therefore a paradox at the heart of international law regarding human rights.'[84]

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[81] UNGA Resolution 217 (III) (1948): International Bill of Human Rights, Universal Declaration of Human Rights, of 10. December 1948, Preamble.

[82] BELLAMY, Alex J. (2009), 8.

[83] United Nations, Charter of the United Nations, 1 UNTS XVI, of 24 October 1945, Preamble: „We the people of the United Nations determined […] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small […]. UN Charta Art 1 para 3 „The Purpose of the United Nations are […] to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion […]." In contrary UN Charta Art 2 "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. (1) The Organization is based on the principle of the sovereign equality of all its Members. […]. (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. […] (7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction

Human rights law, traditionally a domestic policy field, only entered the field of public international law after the Second World War.[85] Until then, human rights had been granted to individuals via bills of rights, constitutional and common law and therefore were a domestic concern.[86] Today human rights are a central issue in International Relations and have reached the top of the international political agenda. Since the adoption of the UN Charter and the Universal Declaration of Human Rights (UDHR) after the Second World War, various universal and regional instruments have been designed to protect human rights.[87] A great number of international human rights treaties, pacts and declarations grant individual and collective rights as well as partly acknowledge remedies which an individual or collective can seek after the exhaustion of domestic remedies.[88] The widespread recognition of human rights in international community law can doubtless be seen as '[…] a common standard of achievement for all people and nations'[89]. Unquestionably, it is well established in contemporary international law '[…] that serious violation of human rights are a matter of international concern'[90]. Various international law treaties oblige states to respect and protect the human rights of their own citizens. Nevertheless, these obligations cannot be equated as a right for, or duty on, other states or international actors to implement or enforce these obligations, particularly not with use of force. Even the UN Genocide Convention does not legitimise any prevention or punishment measure in the case of apprehended or actual violations of the Convention by a contracting party without a corresponding UN mandate.[91]
Some fundamental human rights rank higher than others, such as the prohibition of torture, genocide and slavery which have entered customary international law through state practice and are considered to be *jus cogens*.[92] *Jus cogens* is defined as a norm

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of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII"; See also UN Charter Art. 55 and Art 56 obliges states to take joint and separate action in cooperation with the UN in defence of human rights. Art 2(4) of the UN Charter on the other hand prohibits the threat or use of force against the territorial integrity or political independence of a state if inconsistent with the purposes of the UN.

[84] HEHIR, Aidan (2010), 95.

[85] See e.g. SHAW, Malcolm N. (2003), 249f.

[86] ARNOLD, Roberta; QUÉNIVET, Noelle ed. (2008) *International Humanitarian Law and Human Rights Law.* Towards a New Merger in International Law. Leiden/Boston (Martinus Nijhoff Publishers), 2.

[87] Ibid, 3.

[88] For the exhaustion of domestic remedies rule, see e.g. SHAW, Malcolm N. (2003), 254.

[89] SHAW, Malcolm N. (2003), 247.

[90] SIMMA, Bruno (1999), 1.

[91] UNGA Resolution 260 (III) (1948): Prevention and Punishment of the Crime of Genocide, of 9 December 1948. Article VIII reads as follows: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

[92] SHAW, Malcolm N. (2003), 257 and 303 ff; See also Vienna Convention on the Law of Treaties on 23 May 1969, Article 53 which reads as follows: 'A treaty is void if, at the time of its conclusion, it conflicts with a

> '[…] accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'[93].

The corresponding '[…] obligation on states to respect and protect human rights of all humans is the concern of all states, that is, they are owed *erga omnes*'.[94] As a consequence of the *erga omnes* obligations of states regarding human rights, it is often stressed that in case of breach every state is lawfully entitled to resort to reprisals against the perpetrator.[95] Those countermeasures however do not include the threat to or use of force.[96]

Most international agreements of human rights protection, however, are legally unenforceable and therefore effectiveness is minimal.[97] A majority of the treaties only obligate state parties to take certain measures by domestic legislation or to make periodic reports. Most treaties do not directly sanction the violation of a provision nor provide individual remedies. Only very few conventions grant the right of individual petition. Despite the great recognition of the importance of human rights as natural rights or a universal set of principles governing mankind,[98] implementation and realisation often encounter great difficulties. As some state; '[…] the mechanisms for enforcing these laws have failed to evolve and enforcement remains largely the preserve of the Security Council and the signatories themselves'[99]. Hence some scholars point out that compliance with human rights law at the bottom line still is an internal matter for each state party.[100] Other scholars stress that in modern international law human rights violations are not an internal issue but rather international matters.[101] Therefore, we still face a 'considerable confusion' of the role of human rights in international law. [102]

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peremptory norm of general international law. […] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

[93] SHAW, Malcolm N. (2003), 117.

[94] SIMMA, Bruno (1999), 2.

[95] Ibid.

[96] See UNGA Resolution 2625 (XXV): The Declaration on Principles of International Law concerning Friendly Relations an Co-operation among States in accordance with the Charter of the United Nations, of 24.10.1970, (Hereinafter: Declaration on Friendly Relations).

[97] See e.g. SHAW, Malcolm N. (2003); HEHIR, Aidan (2010), 94ff; As well as FISCHER, Peter; KÖCK, Heribert Franz (2004): Völkerrecht. Das Recht der universellen Staatengemeinschaft. Sechste, durchgesehene und erweiterte Auflage. Wien (Linde Verlag), 247ff.

[98] Following the natural law view; see SHAW, Malcolm N. (2003), 248f.

[99] HEHIR, Aidan (2010), 95.

[100] Ibid.

[101] PAYANDEH; Mehrdad (2012), 366. Payandeh argues that this can particularly be seen in the context of the modern practice of the UNSC qualifying human rights violations as a threat or breach of international peace and security.

[102] HEHIR, Aidan (2010); SHAW, Malcolm N. (2003), 247ff.

The concept of R2P aims to protect humans from large scale loss of life and severe human right violations if the state primarily responsible to secure this protection does not, for whatever reason, fulfil its obligations. The doctrine, as outlined in the ICISS Report, limits the legitimacy of military intervention to cases of actual or apprehended large scale loss of life, genocide and large scale ethnic cleansing. Therefore, the conflict between sovereignty, non-intervention and prohibition of force versus human rights is limited to extraordinary situations meeting this high threshold and does not emerge when other rights and freedoms are violated. The R2P doctrine certainly clarifies when military interventions shall be legitimated. However within the international community there is still no clear consensus regarding the extent to which the non-adherence of human rights legitimises intervention into the internal affairs of a state. On the one hand, the international community generally agrees that in some situations, which are commonly referred to as exceptional circumstances and to avoid a humanitarian catastrophe, military actions can be necessary. On the other hand, the proliferation and safeguarding of 'Western' human rights through military intervention faces great critics, commonly arguing '[…] that the increasing focus on human rights and appetite for intervention had a more nefarious genesis, namely the attempt to further empower Western states […]'[103]. This threat of abusing honourable norms certainly cannot be ignored and at the same time it cannot be a profound justification for neglecting the proliferation of human rights nor to not intervene if genocide, ethnic cleansing or mass atrocities occur.

3.2. Prohibition of Armed Force in International Law

Armed intervention for the purpose of human protection can be in conflict with the general prohibition on the threat or use of force enshrined in Art 2 (4) of the UN Charter it states as follows:

> 'All Members (of the UN) shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.' [104]

This particular prohibition is a core norm of international law.[105] It further enjoys the recognition as a principle of customary international law and even *jus cogens* and as such is

[103] HEHIR; Aidan (2010), 6.
[104] UN Charter, Chapter one: Purposes and Principles.
[105] GRAY, Christine (2008), 30; International Court of Justice (ICJ): Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda), (hereafter: Armed Activities on the Territory of Congo case), Judgment on 19 December 2005, ICJ Reports (2005) 168, para 148: 'The prohibition against the use of force is a cornerstone of the United Nations Charter'.

binding on all states of the world community, as well as on international organisations such as NATO.[106] The UN Charter recognises two types of exceptions for the prohibition of threat or use of force, namely UN enforcement measures under Chapter VII of the UN Charter as a response to 'threat to or breach of the peace or of an act of aggression'[107] and the right to individual or collective self-defence as laid down in Art 51 of the UN Charter[108]. The precondition for any military enforcement action under Chapter VII of the UN Charter is the determination of the UNSC that a threat to peace, breach of peace, or act of aggression has occurred.[109] UNSC Resolutions permitting military enforcement measures under Chapter VII require affirmative votes of nine members of the UNSC including the concurring votes of the five permanent UNSC members.[110] Furthermore, the measures taken must be necessary to maintain or restore international peace and security. Hence military interventions on grounds of human rights protection can be legitimate under Chapter VII but are in conflict with the prohibition of Art 2(4) UN Charter if there is no authorisation of the UNSC. Accordingly, armed force is regarded as a violation of the UN Charter if not legitimised by self-defence or collective security measures approved by the UNSC. Therefore, if an intervention is not justifiable under the exceptions of the UN Charter states should refrain from such an act, out of respect for international law.

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[106] SHAW, Malcolm N. (2003), 1018; GRAY, Christine (2008), 30; See also Art 53 Convention of the Law of Treaties; International Court of Justice (ICJ): Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (hereafter: Nicaragua case), Merits, Judgment of 27 June 1986, ICJ Reports (1986),14, para 190. The Court stated that Art 2(4) of the UN Charter is customary law as well as *jus cogens*: 'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'; Furthermore the ICJ clarified in the Nicaragua case, para 183 and 186 its approach to international customary law stressing the need for practice and *opinion juris* and clearly stated that universal compliance is not necessary 'The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule'.

[107] UN Charter, Chapter VII, Art. 39. The UNSC has especially since the end of cold war more frequently labeled not only interstate conflicts but also intrastate conflict as well as human rights violations as threat to international peace and security. This practice has been accepted by the international community as well as justified by international lawyers by pointing to the open wording of Art 39 UN Charter and a dynamic reading of the Charter as a whole [PAYANDEH; Mehrdad (2012), 364- 366].

[108] Art. 51 of the UN Charter states that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[109] See UN Charter, Art. 39 ff.

[110] Concurs has been loosened so as to allow abstentions, UN Charter Art. 27 (3).

Notwithstanding the general acceptance of Art 2 (4) of the UN Charter being *jus cogens* and international customary law the scope of the provision is subject of controversial debates. These debates mostly concern interventions in intrastate conflicts. Article 2(4), due to its timely context, drafted shortly after the Second World War, was primarily addressed to interstate conflicts, while internal conflicts where no subject of International Relations and international law as they were mostly seen as internal matters.[111] Some international legal scholars advance approaches to reconceptualise the provision in regard to military intervention for human protection purposes. The first argument put forward from scholars, mostly following legal realism, challenges the predominant interpretation of the relevant international convention, namely the UN Charter: Legal realism '[…] posits a process of interaction between original texts and state behaviour that can lead to changes in international law'.[112] Scholars following this assumption recommend the expansion of Art 2 (4) of the UN Charter prohibiting the use and threat of force in order to permit military intervention on humanitarian grounds.[113] These scholars argue in favour of justifying interventions beyond the traditional scope of the UN Charter's enumerated exceptions for benevolent, humanitarian reasons, claiming that such interventions are not directed against the territorial integrity or political independence of a state and therefore are not inconsistent with the purpose of the UN Charter.[114] Most international lawyers counter this approach of legal realism pointing at the drafting of the UN Charter and arguing that the UN Charter clearly wanted to reinforce the ban of force with the wording '[…] territorial integrity or political independence of any State […]'[115] and evidently did not aim to narrow or restrict it.[116] The core dispute therefore lies within the interpretation of Article 2(4) of the UN Charter. The triggering question is if the provision was constructed as a strict prohibition on all use of force against another state, or if the provision allows interventions if their aim is not to overthrow the government or violate the territory of a state, and provided that the actions are consistent with the purpose of the UN Charter.[117] It was often argued, especially from US-American scholars during the Cold War, that an extensive interpretation of 2(4) of the UN Charter can especially be put forward in cases where the UNSC is 'deadlocked' by a veto power and therefore the effective

[111] GRAY, Christine (2008), 67.
[112] WELSH; Jennifer M. (2004): "Taking Consequences Seriously: Objections to Humanitarian Intervention" in: WELSH, Jennifer M. ed. (2004): Humanitarian Intervention and International Relations. Oxford (Oxford University Press), 55.
[113] Ibid.
[114] HOLZGREFE, J. L. (2003), 37- 39. See also PAYANDEH; Mehrdad (2012), 359.
[115] UN Charter Art. 2(4).
[116] HOLZGREFE, J. L. (2003), 38.
[117] GRAY, Christine (2008), 31.

functioning of the collective security is hindered.[118] This argument is also raised by legal realists who more precisely claim that the word "or" in the phrase '[…] or in any other manner inconsistent with the purpose of the United Nations'[119] expresses a permission for unauthorised humanitarian intervention if the UNSC fails to meet one of its main objectives, namely to protect human rights as stipulated in Article 1(3), Article 55 and Article 56 of the UN Charter.[120] Along these lines the USA tried to justify the invasion of Grenada in 1983, inter alia, with the claim that Article 2(4) should not be seen isolated, stating that:

> 'the prohibitions against the use of force in the Charter are contextual, not absolute. They provide justification for the use of force in pursuit of the values also inscribed in the Charter, such values as freedom, democracy, peace.'

Opponents of this extensive interpretation of Art 2(4) stress that the provision intends to ban force against the territorial integrity and political independence of other states and in any other manner inconsistent with the promotion of human rights.[121] Furthermore, it is argued that although human rights are recalled in the first provisions of the UN Charter many other principles are named there as well and there is no justification for privileging human rights over the others if not explicitly grounded on the Charters provision.[122]

Other scholars focus on the state practice and unwritten customary law, since the end of the cold war, to argue for a more flexible interpretation of the prohibition of use of force in cases of humanitarian interventions.[123] The ICISS even called the developing practice of states, regional organisations and the UNSC itself as one of the four foundations of R2P.[124] Scholars arguing in favour of a customary right to intervene to protect people abroad claim that gradually establishing customary rule[125] can be seen in the accumulated practice of

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[118] Ibid.
[119] UN Charter, Art. 2(4).
[120] HOLZGREFE J.L. (2003), 39.
[121] Ibid, 40.
[122] WELSH, Jennifer M. ed. (2004), 55.
[123] See e.g. WHEELER, Nicholas J. (2004): "The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purpose in International Society" in: WELSH, Jennifer M. ed. (2004): Humanitarian Intervention and International Relations, Oxford (Oxford University Press), 30.
[124] ICISS, (2001a), XI.
[125] See SHAW, Malcolm N. (2003), 68 ff. Customary law can be deducted from state practise and the corresponding belief that this behaviour is law or becoming law (*opinio juris*). More precisely customary law is established if state practice through certain duration is accomplished by *opinion juris* and by absence of protest by states particular interested at the matter as well as the acquiescence by other states. The two attributes of binding customary international law are general observance and widespread acceptance that it is lawful. Within domestic legal system customary law today is of no particular importance. Within the international system in contrary, due to the lack of centralised authority, customary law still is a dynamic source of law. However there is great disagreement to the value of customary as source of law. Some writers deny customary law while others declare that customary law is even more important than treaties.

intervention and the *opinio juris*[126] which is indicated by the expression of states articulating humanitarian motives when forcefully intervening.[127] Increasing state practice and a corresponding *opinio juris* can indeed be gradually spotted since the end of the Cold War. Since then, a shift in state practice as well as also in the UN and regional organisations has taken place.[128] The intervention of the USA, France and UK in Iraq in 1991 to protect the Kurds and Shiites as well as the NATO intervention in Kosovo in 1999 are often recalled as examples for more open implementation of the legal doctrine of humanitarian intervention,[129] especially as the UNSC did not authorise either of these interventions. One example of a clear reference to the human protection doctrine can be seen in the statements and publications of the Foreign and Commonwealth Office of the UK when justifying the implementation of the no-fly zone in Iraq which stated that: 'We believe that international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need.'[130] In 2001 the UK even published a policy guideline which openly supported the doctrine of humanitarian intervention.[131] Furthermore, UNGA Resolution 60/1[132] of the 2005 Summit can be seen as strengthening the legal justification for limited forms of unilateral and regional actions, including military action, as it explicitly acknowledges the doctrine of R2P.[133]

The claim of the existence of a customary right of unauthorised interventions is contested by the majority of international lawyers pointing at the very few cases of such practice, which is an insufficient and inadequate basis to conclude that a customary rule has been established. Especially as Art 2(4) is considered to be *jus cogens* it clearly is a provision which cannot be

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[126] SHAW, Malcolm N. (2003), 80. „*Opinio juris*, or the belief that a state activity is legally obligatory is the factor that turns the usage into a custom and renders it part of the rules of international law. […] States will behave a certain way because they are convinced it is binding upon them to do so'; SHAW, Malcolm N. (2003), 83, Defines *opinion juris* as state practice based on the belief that the behaviour is law or is becoming law.

[127] WELSH, Jennifer M. (2004), 55.

[128] GRAY, Christine (2008), 49. E.g. Somalia, Liberia and Sierra Leone.

[129] Ibid, 35- 37. However it also needs to be noted that critical voices claimed that the operation in Iraq was not so much about protecting strangers abroad and therefore not purely based on humanitarian reasons but rather it was a military operation in order to weaken Iraqi air forces in regard to the later invasion in 2003.

[130] Ibid, 37.

[131] SHAW, Malcolm N. (2003), 1047, Supra note 175; GRAY, Christine (2008), 37. This marked a great shift in UK policy towards such interventions as in 1984 the Foreign and Commonwealth Office expressed considerable doubt of the existence of a doctrine of humanitarian intervention as illustrated by GRAY, Christine (2008), 34.

[132] UNGA Resolution 60/1 (2005), para 138- 139. However the UNGA Resolution also limited R2P to a corresponding UNSC mandate if the use of force is included.

[133] See e.g. BANNON, Alicia L. (2006): „The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism" in: Yale Law Journal, 115, pp. 1157-1165. Bannon stresses that the Summit implies an hierarchy of actors, therefore unilateral and regional measures are subordinated to U.N. measures, as well as peaceful measures are privileged over violent measures [see 1164] At the same time the summit agreement is limited to a small set of extreme human right abuses. Bannon therefore stresses that even if she points towards a strengthening effect of unilateral measures, by the UN 2005 world summit agreement, the cases are strictly limited.

altered without universal consent. Those in favour of a customary right to intervene further tend to ignore other well established practices which prohibit the use of force in absolute terms, as for example reflected in the UNGA Resolution Declaration on Friendly Relations[134]. Furthermore, the growing recognition of R2P, as illustrated in the UNGA Resolution[135] of the World Summit in 2005, acknowledges the concept of R2P but does not support the view that unilateral intervention is legal, as it explicitly limits intervention on a corresponding approval of the concerned UN organ.[136] Additionally, the judgement of the ICJ in the Nicaragua case clearly recalled that the use of force could not be the appropriate method to ensure the respect of human rights.[137] It also has to be taken into account that most states still explicitly reject the legality of military intervention in the absence of the UNSC mandate, in particular the continuing opposition of China and Russia cannot be ignored.[138] Altogether the doctrine of military intervention for a human protection purpose without UNSC authorisation can therefore not be called firmly established in customary law.

Obviously this debate cannot and shall not be settled for good in this thesis, but as far as the author is concerned one can hardly talk about emerging customary international law allowing military intervention on humanitarian grounds. The aforementioned cases of unauthorised humanitarian interventions are highly selective[139] and the majority of the world community is reluctant to accept a legal duty or right to intervene on humanitarian grounds. Hence, too little evidence can be found supporting the claim of a developing customary law for military intervention on benevolent reasons. Moreover, even if one follows the argument of R2P being a developing customary norm of international law, one has to keep in mind that customary international law does not prevail over treaty law as long as it does not concern a norm of *jus cogens*.[140] Considering that some human rights as well as the prohibition on use of force are *jus cogens* it needs to be settled which norm overrides the other. Most lawyers arguing in favour of R2P therefore base their argument primarily on moral and not on legal grounds.[141]

[134] Declaration on Friendly Relations.
[135] UNGA Resolution 60/1 (2005), para 138-139.
[136] PAYANDEH, Mehrdad (2012), 360.
[137] SHAW, Malcolm (2003), 1047, foot note 174, referring to the Nicaragua case.
[138] PAYANDEH, Mehrdad (2012), 360.
[139] HOLZGREFE, J. L (2003), 47. Holzgrefe names some cases of the 20 century were millions of people have been killed, starved and murdered and no intervention of world community took place to protect or rescue them.
[140] WELSH, Jennifer W. (2004), 55; See also SHAW, Malcolm N. (2003), 89. "For many writers, treaties constitute the most important source of international law […] treaties are thus seen as superior to custom."
[141] WELSH, Jennifer W. (2004), 56. See also HOLZGREFE, J.L. (2003), 46.

3.3. Principles of Non-interference and Sovereignty

Besides the aforementioned prohibition of force, two other principles of international law are in conflict with unilateral intervention: the principles of sovereignty and of non-interference[142] in internal affairs. Both are essential pillars of international relations (and today's world community). It is often stressed that international law as well as international order and stability is based on the concept of the sovereign state. The principle of non-intervention is customary international law founded on the concept of respect for the territorial sovereignty of states.[143] The roots of these principles go back to 1648 to the treaties of Münster and Osnabrück, more commonly referred to as the Peace of Westphalia, and the first international pact mentioning the principle of sovereignty.[144] The Peace of Westphalia established the dual aspect of sovereignty: internal sovereignty, which is the ability of state authorities to rule inside their state's borders and external sovereignty, which grants states the right of non-intervention and inviolability of its sovereignty.[145] The traditional perception of sovereignty means that a state enjoys territorial integrity, political independence and the right to non-intervention on the grounds of its recognition as sovereign.[146]

Following the traditional perception, sovereignty is violated if a state or group of states militarily intervene without the consent of the intervened state. The intervention can be legally justified if either based on a UNSC Resolution authorising the intervention as a measure of collective security of Chapter VII of the UN Charter or if the intervention is an act of self-defence. Military interventions on the ground of humanitarian reasons, which are not justified by self-defence nor authorised by a UNSC Resolution, therefore create an indissoluble conflict with the traditional perception of sovereignty.

UN Secretary-General Kofi Annan poignantly highlighted the conflict between sovereignty and human rights protection. He stressed the particular necessity of developing common ground on the subject in 1999 and repeated the dilemma in 2000 in his Millennium Report to the General Assembly.

> '[..] If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?[...]We

[142] Also often called non-intervention, those words can be used interchangeably.
[143] SHAW, Malcolm N. (2003), 1039; See also Nicaragua case, para 190.
[144] See e.g. CROXTON, Derek (1999): "The peace of Westphalia of 1648 and the Origins of Sovereignty." in: The International History Review, XXI, 3, pp 569-852.
[145] HEHIR, Aidan (2010), 45.
[146] BELLAMY, Alex J. (2009), 8.

> confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principles should prevail when they are in conflict. Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle - not even sovereignty - can ever shield crimes against humanity.'[147]

The following sections deal with the principles of non-interference and sovereignty more closely with regard to R2P.

3.3.1 Non-interference

The principle of non-interference is generally referred to as '[…] the power, authority, and competence of a state to govern persons and property within its territory'.[148] It is basically the obligation to not interfere in internal affairs of a domestic state and to respect another state's sovereignty.[149] This principle of non-interference is explicitly restated in Art 2 (7) of the UN Charter prohibiting the UN itself to interfere in domestic affairs of its member states. The article reads as follows:

> 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under the Chapter VII'.[150]

This provision enjoys recognition in numerous treaties and UN Resolutions[151] and also is considered to be customary international law.[152]

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[147] UN (2000a): We the people: The role of the United Nations in the 21 Century. Report of the Secretary-General. A/54/2000 (2000) of March 2000, para 217-219.

[148] ICISS (2001b) Research, Bibliography, Background, Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty. Ottawa (International Development Research Centre), Part 1 Research Essays, A Elements of the Debate, 6.

[149] See ICISS (2001a), 12; See also ICISS (2001b), 6.

[150] UN Charter, Art. 2 (7).

[151] UNGA Resolution 375 (IV) (1949): Draft Declaration on Rights and Duties of States. A/RES/375 (IV) of 6 December 1949, Art. 3 - 4. Which inter alia stated that every state has the duty to refrain from intervention in internal affairs of any other state; UNGA Resolution 2131 (XX) (1965): Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. A/RES/2131 (XX) of 21 December 1965, Art. 1. Which more clearly state that no state has the right to intervene in other states, for any reason whatsoever; Declaration on Friendly Relations: which recalls the prohibition on the use of force as well as on the prohibition of interference in internal matters of a state. The declaration further

The principle of non-interference and the prohibition of intervention concluded from this principle cannot be pictured in isolation from sovereignty since non-interference is an associated principle and even an integrated element of legal sovereignty.

3.3.2. Sovereignty

Sovereign equality or legal sovereignty of states and international organisations is one of the fundamental principles on which international law and international relations rely. The principle of sovereignty is recognised as customary international law as well as a fundamental principle of the UN enshrined in Art 2 (1) of the UN Charter, stating that 'The Organization is based on the principle of the sovereign equality of all its Members'.[153]

> 'Sovereign equality is the concept that every sovereign state possesses the same legal rights as any other sovereign state at international law […] it includes the right to recognize and be recognized by other sovereign states, to send and receive embassies, to make treaties, to join international organisations[…]'.[154]

The supplementary volume of the final Report of the ICISS states that sovereignty denotes the competence, independence and legal equality of states, including the choice of political, economic, social and cultural systems without intrusions from other states.[155] Statehood and inviolability of sovereignty today face various challenges such as globalisation, economic interdependence and international cooperation as well as the proliferation and rise of human rights.[156] Within the context of this thesis the relationship of sovereignty and the inherent responsibility towards its citizens, especially in regards to respect for and protection of basic human rights, is a core field of analysis.

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it clarified the content of the use of force determining the duty to not support or interfere in civil strife even if they are directed to overthrow the regime of another state; See e.g. GRAY, Christine (2008), 68, for detailed assessment.

[152] The ICJ confirmed in the case on Activities on the Territory of Congo [para 162] and in the Nicaragua case [para 191] that the provisions of the Declaration on Friendly Relations are customary international law. The Declaration on Friendly Relations states inter alia that: 'No state or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law. […] Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State'.

[153] UN Charter Art. 2(1).

[154] LEE, Thomas H. (2004): "International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today" in: Law and Contemporary Problems, 67/ 4, Case Studies in Conservative and Progressive Legal Order, 148.

[155] ICISS (2001b), .6.

[156] HEHIR, Aidan (2010), 41. Referring to ANNAN.

When picturing sovereignty one has to bear in mind that aside from the core elements of legal sovereignty which are commonly agreed upon, many different perceptions are advocated. These perceptions rely on normative judgements on how International Relations should be shaped and which principles take privilege over others. It is essential to differentiate between the different approaches when discussing the struggle between human rights protection and sovereignty in terms of R2P. When judging if collective measures are in conflict with the inviolability of sovereignty, the outcome significantly depends on the perception used to define sovereignty.

The traditional concept of sovereignty has been harshly criticised and reinterpreted in the human rights field.[157] Human rights scholars have pleaded that it is necessary '[…] to call into question the supreme moral value and significance attached to sovereign rights in international society […]'[158] and that the value of sovereignty must be reconsidered in the light of the '[…] genocide in Rwanda and other similar mass atrocities committed within sovereign borders and often with the complicity, if not direct involvement, of ruling governments […]'[159]. On the other hand, various scholars argue that '[…] sovereignty promotes order and stability in the international system. While it may not necessarily be compatible with certain expansive concepts of human rights, it at least provides a basis which facilitates non-violent international interaction and even cooperation.'[160] Hence, legal sovereignty can be pictured as preserving the balance of power within the international system, as sovereignty strengthens peace and advances cooperation. The majority of scholars and state authorities argue that sovereignty is still of positive and particular importance for International Relations and has therefore not only been enshrined in the UN Charter but also reinforced by the UN and the international community.

Especially decolonised countries insist on the inviolability of sovereignty due to their inherent protection of the right to self-determination. The right to self- determination, which is a basic human right, is the people's right to freely determine their own form of culture, form of governance and political status.[161] The ethical objection on interventions on humanitarian grounds and its relationship to self-determination was highlighted by John Stuart Mill in the

[157] SHAW, Malcolm N. (2003), 254f.
[158] LU, Catherine (2006), 3.
[159] LU, Catherine (2006), 3.
[160] HEHIR, Aidan (2010), 55. WELSH, Jennifer M (2004), 64. Pluralist scholars argue that order in international society is based on mutual toleration of difference and that this is a precondition for protection and promotion of individual well being. The obligation to preserve this order and to prevent war overrules the moral obligation to promote human rights elsewhere.
[161] UNGA Resolution 2200A (XXI): International Covenant on Civil and Political Rights, of 16. December 1966, Part 1, Art. 1.

nineteenth century. His approach '[…] is based on the belief that our highest moral duty is to respect the right of self-determination. It is through the act of self-government that political communities - and by extension, individuals - realize freedom and virtue'.[162] Michael Walzer the most famous promoter of the importance of self-determination of political communities and the right of non-intervention[163] argues that

> '[…] the claim that only liberal or democratic states have a right against external intervention is akin to saying that protection should be offered only to individuals who have arrived at a certain opinion or lifestyle. The rule of non-intervention is the respect that foreigners owe to a historic community and to its internal life'.[164]

Despite to this insight of the great importance of the right to self-determination Walzer further argues that in certain exceptional situations intervention can be legitimate. For him these situations are either a failed state situation or a serious threat to basic individual rights in such manner that the individuals are no longer self-determining.[165] Hence Walzer proposes a high threshold for intervention, just as the ICISS report does, limiting it to extreme cases. Walzer and the final Report of the ICISS noted the great difficulty to establish scientific measures of these extreme cases, which are commonly referred to as either a threat to international security, or violence which shocks the conscience of mankind.[166] The majority of the countries that have experienced colonisation follow the traditional perception of sovereignty, arguing that intervention should only be legitimised in extraordinary situations and only through collective security measures, meaning that they are authorised by a corresponding UNSC mandate. However, politicians and scholars also caution that sovereignty is the only legal restraint for big and powerful countries to not interfere into the domestic affairs of small and weaker states.[167] Thus, the traditional perception of sovereignty and the connected prohibition of intervention in internal affairs for many states is the guarantee to preserve self-determination and cultural pluralism.[168] Those following the traditional perception of sovereignty harshly condemn any unilateral intervention as a violation of a supreme norm of international law, namely sovereignty and self-determination.[169]

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[162] WELSH, Jennifer M. (2004), 60. Referring to J.S. Mill 1875.
[163] Ibid.
[164] Ibid, 61. Referring to WALZER, Michael.
[165] Ibid.
[166] Ibid, 61.
[167] See e.g. Ibid, 66. Referring to AYOOB, Mohammed.
[168] See BELLAMY, Alex J. (2009), 11.Sovereignty as a human right and traditional sovereignty, 15ff .
[169] Ibid,17.

Contrary to the above pictured traditional perception of sovereignty a different approach stresses that sovereignty is conditioned by certain responsibilities. Many scholars (such as Bellamy) stress that sovereignty and military intervention for human rights protection only lie in conflict if sovereignty is understood as entitling sovereigns '[…]to act however they please within their own jurisdiction […]'[170]. This absolutist concept of sovereignty, legitimising absolute unlimited freedom and power without any restraints, was advocated most strongly in the nineteenth century.[171] Today it is commonly accepted that legal sovereignty is restrained by certain responsibilities, as many scholars describe sovereignty as 'constrained by the existence of international law' and not as 'synonymous with absolute isolation or complete internal autonomy'[172]. Jennifer Welsh stresses in opposition to Ayoob that '[…] we can no longer accept mass murder or killing of innocent civilians as a necessary part of what he [Ayoob Mohammed] calls the 'historical trajectory of states-making' - not only because it may threaten international peace and security, but also because the citizens inside such states should enjoy the same basic rights as those in the developed world'[173]. Following these concerns, it can be suggested that sometimes coercive measures to protect fundamental human rights do not necessarily strike at the very essence of legal sovereignty. As soon as sovereignty is understood to be conditioned by certain internal and external responsibilities, the struggle between the two concepts can be dissolved.

It was Francis Deng, former Special Representative of the UN Secretary-General on Internally Displaced People and Special Adviser for the Prevention of Genocide since 2007, who advanced the positive account towards sovereignty as responsibility.[174] He and his colleague Roberta Cohen intensively worked on this issue and were the first to stress that:

> 'Sovereignty carries with it certain responsibilities for which governments must be held accountable. And they are accountable not only to their national constituencies but ultimately to the international community. In other words, by effectively discharging its responsibilities for good governance, a state can legitimately claim protection for its national sovereignty'.[175]

At the Ditchley Foundation Lecture in 1998, former Secretary- General Kofi Annan presented his approach towards the sovereignty debate and clarified that in his view, protection of basic

[170] Ibid,12.
[171] Ibid,13.
[172] HEHIR, Aidan (2010), quoting SIMPSON.
[173] WELSH, Jennifer M. (2004), 67.
[174] EVANS, Gareth (2008), 35-36. See also BELLAMY, Alex J. (2009), 22.
[175] BELLAMY, Alex J. (2009), 23. Quoting inter alia DENG, Francis M. (1996): Sovereignty as Responsibility. Conflict Management in Africa.

human rights is the very essence of the UN Charter. At the same time he articulated his respect of Art 2 (4) UN Charter:

> '[…] The Charter, after all, was issued in the name of 'the people', not the governments, of the United Nations. Its aim is not only to preserve international peace - vitally important though that is - but also 'to reaffirm faith in fundamental human rights, in the dignity and worth of human persons'. The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibilities, not just power'[176].

With this he emphasised a redefinition of '[…] national sovereignty as it has to be weighed and balanced by individual sovereignty as recognised in the international human rights instruments'[177].

The NATO intervention in Kosovo without a corresponding UNSC mandate intensified the debate on the subject and forced the former Secretary-General, as well as the involved states, to determine their standpoints regarding sovereignty versus interventions for human rights protection. In the oft-quoted speech to the Economic Club of Chicago in April 1999 U.K Prime Minister Tony Blair set out his approach towards sovereignty as responsibility in the broader framework of globalisation and the necessity to rethink the concept accordingly. He argued as follows, mentioning internationally connected trade markets and the strong dependence on interconnection in times of globalisation as reasons for the paradigm change:

> 'We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure. […] The most pressing foreign policy problem we face is to identify the circumstances in which we should get actively involved in other people's conflicts. […][178]. He further argued that '[…] non-interference has long been considered an important principle of international order […]' but at the same time stressed that '[…] acts of genocide can never be a purely internal matter [...]'[179].

The most essential part of his speech was the identification of five major considerations when deciding to intervene in a sovereign state. Gareth Evans, when writing about R2P, criticised that these criteria, even if they marked a good starting point, remained incomplete and mainly

[176] BELLAMY, Alex J. (2009), 28. Quoting ANNAN, Kofi: „Intervention", Ditchtley Foundation Lecture, 26 June 1998.
[177] EVANS, Gareth (2008), 37.
[178] BELLAMY, Alex J. (2009), 25. Quoting BLAIR, Toni: „Doctrine of international community", Speech to the Economic Club of Chicago, Hilton Hotel, Chicago, 22. April 1999.
[179] Ibid.

rhetoric.[180] However, these five tests to identify the legitimacy of intervention were later also embraced by the ICISS and read as follows:

1) Are we sure of our case?

2) Have we exhausted all diplomatic options?

3) Are there military operations we can sensibly and prudently undertake?

4) Are we prepared for the long term?

5) Do we have national interest involved?[181]

Kofi Annan's statement after the NATO intervention in Kosovo lead to controversial discussions as he, as the Secretary-General of the UN, essentially said that it is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.[182] In September 1999 he then published an article named 'Two concepts of sovereignty'[183], underlining the double-sided nature of sovereignty as well as rethinking the concept of sovereignty:

> 'State sovereignty, in its most basic sense, is being redefined - not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty - by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties - has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.'[184]

This approach towards sovereignty as responsibility entails both rights and responsibilities; rights insofar as individuals have certain natural, indispensable and universal human rights and responsibility in respect to the primary responsibility of governments to protect the rights of their citizens.[185] At its heart this approach follows the assumption that states have no legal sovereignty if they undermine their legitimacy, which occurs when they are unable or unwilling to protect certain fundamental freedoms and rights of their citizens. Therefore intervention does not violate sovereignty nor is it in conflict with the prohibition of

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[180] EVANS, Gareth (2008), 34; BELLAMY, Alex J. (2009), 26.
[181] EVANS, Gareth (2008), 33. See also BELLAMY, Alex J. (2009), 25-26.
[182] Quoted by BELLAMY, Alex J. (2009). See also e.g. BBC News, 13. April 1999, *Kofi Annan's Delicate Balance*. Available at: http://news.bbc.co.uk/2/hi/special_report/1999/03/99/kosovo_strikes/318104.stm .
[183] ANNAN, Kofi, Economist: Two concepts of sovereignty. 16. September 1999, para 4. Available at: http://www.economist.com/node/324795 .
[184] BELLAMY, Alex J. (2009), 19. Quoting ANNAN, Kofi; Economist: Two concepts of sovereignty. 18. September 1999.
[185] BELLAMY, Alex J. (2009), 19-20.

interference in internal affairs if the concerned governments abuse or violate the rights of which they have a responsibility to protect.

3.4. Conclusion

In conclusion, the subjects of sovereignty and the use of force for human protection remain unsettled. As outlined above, Article 2 (4) of the UN Charter is generally interpreted in a narrow and traditional sense as there are not enough legal grounds for arguing in favour of modification. What remains is the moral duty and, to some extent, the legal duty to guarantee the well being of humans, even foreigners.

When reflecting on sovereignty and non-intervention the dispute is broad and rich in different perceptions. The concept of sovereignty as responsibility embraces unilateral as well as collective intervention and does not necessarily demand UNSC approval for interventions to be legitimate. It presents a new perception where intervention on humanitarian grounds no longer, by nature, lie in conflict with sovereignty and non-intervention. This concept however does not yield assent if it does not limit the power to decide on this matter to a recognised authority. Acknowledging the approach of sovereignty as responsibility does not solve the question of when and under which circumstances intervention is justified or who would be the right authority to authorise such intervention. Therefore, even if sovereignty as responsibility presents a theoretical approach, combining humanitarian intervention with sovereignty and resolving the clash between them, the questions of 'right authority' and of 'right threshold' remain unsolved.

Scholars who criticise interventions on humanitarian grounds and oppose the concept of sovereignty as responsibility question whether '[…] the values underpinning recent interventions are truly universal […]'[186] and further ask '[…] who is it that decides when a state has not fulfilled its responsibilities and determines that only force can bring about its compliance?'[187] Furthermore, those opposing the concept of sovereignty as responsibility stress the very limited notion of the concept in international society and notice the very strong conviction that the state still is the best agent to promote and protect human rights.[188] Some scholars even go further when criticising the doctrine of sovereignty as responsibility '[…] arguing that it carries shades of the old 'standard of civilization' mindset […]'[189] and that

[186] WELSH, Jennifer M. (2004), 66.
[187] Ibid.
[188] Ibid, 67.
[189] Ibid, 65. Referring to AYOOB, Mohammed.

implementation of such doctrine would mark '[…] contemporary revival of imperialism […]'[190]. Despite these criticisms, over 170 countries have nevertheless participated in forming the UN 2005 World Summit Outcome, which clearly emphasises the concept of sovereignty as responsibility stating that '[…] each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity […]'[191] and if the state fails to do so, '[…] the international community, through the United Nations, also has the responsibility […]'[192]. This grave shift from classic understanding of sovereignty, rejecting intervention in internal matters of sovereign state, towards the concept of sovereignty as responsibility, is striking. Albeit the limitation to extreme cases and the reluctance towards unilateral or regional intervention and the unaccommodating character of UNGA Resolutions, it still mirrors basic consent of the majority of world states, that sovereignty is limited and conditional even when facing purely internal disputes. It at least clarified that national sovereignty can be understood in different manners and can also be portrayed in consistency with, or even demanding intervention on the grounds of, R2P. Following the UNGA of the World Summit Outcome 2005 the superior authority to decide when to intervene where and how is the UN. When considering the UNSC as superior authority, it has to be noted that it has remained unreformed since its foundation and therefore urgently would need to be reformed in order to fully comply with such a role. As history illustrated, one cannot rely on the UNSC to place common good ahead of self-interest. One could witness the UNSC being deadlocked by the veto right of the permanent five members not only in 1999 concerning the Kosovo conflict but also in 2012 and 2013 regarding the conflict in Syria, when state interests and alliances seemed more important than the protection of civilians. This could especially be seen in the case of Syria where the international community did not comply with its responsibility to protect the Syrian population, at least so far, despite the humanitarian catastrophe which the Syrian population is suffering from. The UNSC so far has been deadlocked regarding any military intervention and can therefore not meet its responsibility, despite the fact that the intrastate conflict between Bashar -Al Assad and the anti-government forces seems to further escalate and maybe even amount to a cross boarder threat of international peace and security.[193] These facts underpin that time certainly

[190] Ibid, 65
[191] UNGA Resolution 60/1 (2005), para 138.
[192] Ibid, para 139.
[193] TISDALL, Simon, the Guardian, Friday 19. October 2012: *Turkey calls on major powers to intervene in Syria*. Available at: http://www.guardian.co.uk/world/2012/oct/19/turkey-britain-us-intervene-syria 'Turkey has called on the US, Britain and other leading countries to take immediate action to intervene in Syria to prevent a

has come for statesmen and policymakers to become more serious about improving the representativeness and effectiveness of the UNSC.

looming humanitarian "disaster" that it says threatens the lives of millions of internally displaced people and refugees as winter approaches and could soon ignite a region-wide conflagration. Appealing to the major powers to set aside their differences over how to end the 20-month-old civil war in which an estimated 32,000 people have died. More than 145,000 refugees have taken shelter in improvised camps or Turkish cities, fighters of the Free Syrian Army and their Gulf backers use Turkey as a base and covert weapons supply route, and fighting has spilled on to Turkish soil. Earlier this month, Syrian shelling killed five Turkish civilians in the town of Akçakale, triggering a week of cross-border artillery and mortar exchanges and fears of all-out war. Turkey also recently forced down an aircraft flying from Russia to Syria that it said was carrying military equipment.'; BBC News, 19. October 2012: *Beirut blast kills intelligence chief Wissam al-Hassan*. Available at: http://www.bbc.co.uk/news/world-middle-east-20008827.Tension in Lebanon has been rising as a result of the Syrian conflict. Lebanon's head of internal intelligence has been killed in a massive car bomb attack in central Beirut. Wissam al-Hassan was among eight people who died in the attack. He was close to opposition leader Saad Hariri, a leading critic of the government in neighbouring Syria.' See also e.g. GÄRTNER, Heinz (2012): Der amerikanische Präsident und die neue Welt. Politik aktuell, Band 13, Berlin (LIT Verlag),147-158.

4. The Responsibility to React According to the ICISS

This chapter will analyse the ICISS Report on the responsibility to react on genocide, large scale loss of life and severe human rights violation and the connected question of the right authority determining when the threshold is met and therefore military intervention can be authorised and by whom.

4.1. Responsibility to React

The fourth chapter of the final Report of the ICISS deals with the responsibility to react to humanitarian crises. The coercive measures which can be taken to respond to large scale humanitarian crises are political, economic, judicial and military. Due to the case study of Libya where military measures were put into effect and due to the research question of this thesis, economic, political and judicial measures are negligible; the focus will be coercive military intervention (notwithstanding the preferable options of non military measures and the acknowledgment that R2P deals with more than just military intervention). If non- military means are unable to protect civilians, military force is the last resort to either directly protect civilians or to target those responsible for the attacks on civilians. As highlighted by Alex J. Bellamy, the case of Darfur is a perfect example for this ambivalence of the debate and the difficulty of deciding if military troops effectively can advance the situation of the civilians or if military intervention would cause more harm than good.[194] Military intervention undoubtedly becomes crucially difficult when the concerned state does not give its consent.

At the beginning of the fourth chapter -'the responsibility to react'- the principle of non-intervention is reaffirmed. It is also highlighted that any departure of this norm must be well considered and justified.[195] The Report confirmed the strong advocacy of maintaining an order of sovereigns, i.e. all states generally abstain from intervening or interfering in the domestic affairs of other states.[196] Further, the Commission cautioned that intervention cannot only '[…] destabilize the order of states […]'[197] but also harm people and cultures, and therefore violate self-determination '[…] enabling societies to maintain the religious, ethnic and civilization differences that they cherish'[198]. The Commission further stressed that for

[194] BELLAMY, Alex J. (2009), 149ff.
[195] ICISS (2001a), para. 4.12, p 31.
[196] Ibid.
[197] Ibid.
[198] Ibid, para 4.11, p 31.

military interventions, the threshold for being defensible must be high and the circumstances must be grave.[199] Therefore, only very extreme cases could ever serve as a basis for the justification of military interventions for human protection purposes without consent from the concerned state.

The Commission argued that certain criteria must be satisfied before the decision to intervene can be defensible. These criteria, if fulfilled, justify military interventions. They are familiar requirements of the just war doctrine and are named in the Report as follows: just cause threshold (right reason) and additionally four precautionary principles guiding the decisions making, namely: right intention, proportional means, reasonable prospects and last resort.[200] The four precautionary principles were later renamed by the UN High-Level Panel on Threats, Challenges and Changes. The question of the right authority is illustrated in a separate chapter of the ICISS final Report as it is a critical question and '[…] deserves a full discussion to itself […]'[201]. Therefore this element will also be debated separately in the present thesis namely in the next chapter.

Despite the reluctant attitude of various states to loosen the principle of non-intervention, general acceptance could be found that

> '[…] there are exceptional circumstances in which the very interest that all states have in marinating a stable international order requires them to react when all order within a state has broken down or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale.'[202]

These exceptional circumstances are the threshold of the ***right reason*** or ***just cause*** for coercive military intervention. Military intervention therefore can only be defensible if it follows the just cause; namely, to halt or avert actual or apprehended large scale loss of life, genocide and ethnic cleansing. If either large scale loss of life or ethnic cleansing or both conditions are satisfied the 'just cause' for military intervention is fulfilled.[203] Hence, concerning the core challenge to settle when military intervention should be justified, the Commission promoted a very high threshold limiting military intervention to extreme cases. Additionally, the Report clarifies that the just cause also includes apprehended crimes as the international community must have the possibility of anticipatory action in order to prevent

[199] Ibid, para 4.1, p 29.
[200] Ibid, XII ; 35.-37.
[201] Ibid, para 4.17, p 32.
[202] Ibid, para 4.13, p 31.
[203] Ibid, para 4.19, p 32.

loss of life or ethnic cleansing.[204] For the just cause threshold to be fulfilled it does not matter if the people are threatened by state actors or non state actors. What matter is that people are at risk in such way that the just cause threshold is met. It further is irrelevant to the Commission if the abuses occur within state borders, cross-border or with cross-border consequences. The element of 'large scale' was not further quantified by the Commission but the Report named some situations which fall under the term of 'large scale loss of life' and 'large scale ethnic cleansing'. These shall be listed as follows:

> 1) Those actions defined by the framework of the 1948 Genocide Convention that involved large scale threatened or actual loss of life;
> 2) the threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving state action;
> 3) different manifestations of "ethnic cleansing", including the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area […];
> 4) those crimes against humanity and violations of the laws of war, as defined in the Geneva conventions and Additional Protocols and elsewhere, which involve large scale killing or ethnic cleansing;
> 5) situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war; and
> 6) overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.'[205]

Furthermore, the final Report explicitly mentions several examples of cases which do not justify military action for human protection purpose such as 'systematic imprisonment or other repression of political opponents'[206], 'systematic racial discrimination'[207] as well as 'denial of democratic rights by a military take-over'[208]. Although the ICISS affirmed that the overthrow of a democratic government is a serious matter, the Commission supposes that this situation requires international sanctions, diplomatic or economic, for example but does not

[204] Ibid, XII; para. 4.21 ,p 33.
[205] Ibid, para 4.20, p 33.
[206] Ibid para. 4.25, p 34.
[207] Ibid.
[208] Ibid, para. 4.26, p 34.

justify military intervention, if large scale loss of life or ethnic cleansing of civilian is not threatened or taking place.[209] With this the Commission confirmed their commitment that '[…] military intervention for human protection purpose should be restricted exclusively […] to those situations where large scale loss of civilian life or ethnic cleansing is threatened or taking place'[210]. The Secretary-General's UN High-Level Panel on Threats, Challenges and Change broadened the just cause threshold by adding 'serious violations of humanitarian law' and at the same time narrowed the element by insisting that the threat must be actual or 'imminently' apprehended.[211]

The second substantial condition which has to be met is the ***right intention***. The primary purpose of the intervention must be to halt or avert human suffering.[212] The Report clearly states that overthrowing a regime is not a legitimate objective of intervention, although it might be necessary to disable the regime's capacity to harm its own people.[213] Furthermore it is illustrated that right intention is most likely to be guaranteed if military intervention is supported by multilateral or collective actors rather than by a single state. The Report also finds that mixed motives do not harm the fulfilment of the criteria of right intention so long as humanitarian motives, not self-interest, remain the primary motives behind military intervention.[214] 'Complete disinterestedness - the absence of any narrow self-interest at al l- may be an ideal, but it is not likely always to be reality.'[215]

Furthermore, it is of particular importance that military intervention for human protection purposes must always remain the ***last resort*** to combat actual or apprehended ethnic cleansing or large scale loss of life.[216] The military intervention can only be warranted when every non-military option has been explored. It is also essential to reinforce that military intervention shall always meet the criteria of ***proportional means***. The military action must always be limited to the minimum necessary to secure the humanitarian objective in question.

The fourth precautionary criterion which has to be met is ***reasonable prospects***. 'Military intervention is not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.'[217] The

[209] Ibid.
[210] Ibid.
[211] BELLAMY, Alex J. (2009), 75; UN Doc A/59/565 of 2 December 2004: A more secure world: Our shared responsibility" para 207, 257.
[212] ICISS (2001a), para. 4.32; para 4.33.
[213] Ibid para 4.33, p 35.
[214] Ibid, para 4.35, p 36.
[215] Ibid.
[216] Ibid, 12, XII.
[217] Ibid, para 4.41, p 37.

Commission concluded in this chapter that it might 'be the case that some human beings simply cannot be rescued except at unacceptable costs.'[218] Therefore, the Commission underlined the 'painful reality' that military action against any one of the five permanent members of the UNSC, even if all other conditions for intervention were met, would be precluded.[219] Answering the question of double standards, the Commission states that '[…] the reality that interventions may not be able to be mounted in every case where there is justification for doing so, is not a reason for them to be mounted in any case.'[220] This however, in the author's view, is a rather unsatisfying answer and fails to address the important question of selectivity of interventions, which often gives rise to the criticism of arbitrariness and pure self-interest of some states.

4.2. Right Authority

Under international law, as already outlined previously in chapter 3, military interventions for human protection purposes are unproblematic if authorised by the UNSC. The UNSC holds the primary responsibility for international peace and security as laid down in Art 24 of the UN Charter and can authorise military collective measures under Chapter VII, Art 42 of the UN Charter. Therefore, and due to its international standing, the UNSC is the first body to think of which might be capable of fitting the role of the right authority legally as well as politically. At the same time one has to bear in mind the constant demand of various states to reorganise the UNSC corresponding to a changed political world order and the fact that it has remained unreformed since its foundation. Nevertheless, neither the UNGA nor regional organisations could fill this function better than the unreformed UNSC, as both lack the legal capacity and international standing to decide effectually in the concerned matter. Art 10 and Art 11 of the UN Charter give certain responsibilities to the UNGA, especially important here is the fall-back responsibility in cases where the UNSC is blocked.[221] These norms, however,

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[218] Ibid.
[219] Ibid, para 4.42, p 37.
[220] Ibid.
[221] Department of Public Information/News and Media Division, United Nations, 4. February 2012: United Nations Press: *Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan*. Available at: http://www.un.org/News/Press/docs/2012/sc10536.doc.htm; Department of Public Information / News and Media Division United Nations Press, 16. February 2012: *General Assembly Adopts Resolution Strongly Condemning 'Widespread and Systematic' Human Rights Violations by Syrian Authorities*. Available at: https://www.un.org/News/Press/docs//2012/ga11207.doc.htm. This fall-back responsibility as well as its handicap is particularly illustrated in the case of Syria where the UNSC was blocked by the Veto powers China and Russia who vetoed the draft UN SC RES/10536/ on 4. February 2012 '[…] that would have demanded that all parties in Syria - both Government forces and armed opposition groups - stop all violence and reprisals, ending days of intense negotiations in New York as diplomats laboured to bring a halt to the deadly 10-month

remain a political accommodation as the UNGA only has the power of recommendation and no binding decision-making powers. The UNGA therefore remains a moral and political power but cannot ensure formal legality of any actions taken. Further, Chapter VIII of the UN Charter acknowledges the security role of regional and sub-regional organisations but at the same time states that no enforcement measures shall be taken without the authorisation of the UNSC.[222] Following these remarks the UNSC is the most obvious candidate for the role as the right authority to make judgement on military intervention for human protection.

If we agree that the UNSC is the right authority, mainly due to the lack of alternatives, the next question logically arising is what to do if the UNSC is blocked by a veto power and therefore fails to fulfil its responsibility. The central question here is if unilateral or collective military measures can be legitimised on the grounds of R2P despite the missing authorisation of the 'right authority' namely the UNSC. This debate has already been outlined in the introduction as well as in the chapters 1 and 3 as it essentially has risen with the NATO intervention in Kosovo.

Without doubt, the obligations under human rights law and under sovereignty as responsibility do not vanish with the lack of the UNSC approval. Despite this notion, one has to keep in mind that if one would approve the assumption of customary international law justifying military intervention for human protection purpose, these military actions would still risk violating treaty provisions of the UN Charter, which are commonly viewed as superior to customary international law. Furthermore, unilateral and collective measures without UNSC approval are often feared to open doors for abuse on grounds of pure self-interest. Besides these considerations, it cannot be denied that there is an urgent need for a commonly agreed authority to decide on interventions in order to effectively facilitate responsibility to react. Especially concerning military interventions the decision making process must be quick and efficient in order to counter the threat of actual or apprehended large scale loss of life. Hence it is necessary to determine an authority who can detect when the thresholds are met and military intervention is legitimate.

In this chapter the response of the Commission towards these questions will be assessed. The Report did not break new grounds on the debate of a right authority as it promotes a middle position in between the two extremes. The Report outlined three layers when dealing with

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crackdown on anti-Government protests in the Middle Eastern country.[…]'. A response to this veto the GA /Res/ 11207 was adopted with overwhelming support. See generally to the fall-back responsibility e.g. ICISS (2001a), para 6.7, p 48; EVANS, Gareth (2008), 136.

[222] ICISS (2001a), para 6.5, p 48. See also EVANS, Gareth (2008), 35.

responsibility for the protection of citizens and the question of right authority. The Commission reaffirmed that the state itself is primarily responsible for the protection of its citizens, corresponding to the concept of sovereignty as responsibility.[223] The Commission states that only if the state fails to fulfil its responsibility, regional organisations acting in partnership with domestic authorities shall take over this responsibility.[224] As a third step and only if this consensual partnership also fails to ensure protection of civilians, the responsibility falls to the international community. [225] It was clearly not the ambition of the Commission to identify alternatives to the UNSC as the right authority. As the Report stated:

> '[…] there is absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purpose. […] If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that the central role of the Security Council will have to bear at the heart of that consensus. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has.'[226]

Besides reaffirming the UNSC as the primary source of authority to decide on military intervention, the general outcome of the roundtables also laid down a wide recognition of intervention for regional organisations even without UNSC authorisation. This general recognition of non-consensual force was found in the statement that the UNSC was *primarily* in charge of authorisation of military intervention rather than *exclusively* as it then has been launched in the 2005 World Summit Outcome where world leaders formally adopted R2P.[227] This illustrates that a broader consent within the Commission in comparison to world community could be found: that there are specific situations where other actors should be allowed to authorise military intervention as long as they act collectively and meet the threshold as well as precautionary criteria. Hence a significant insight of the Report, namely that states or organisations should take it up to themselves if the UNSC failed to fulfil its responsibility,[228] was not implemented by the world community[229]. This result reflects that

[223] ICISS (2001a), para 6.11, p 49.
[224] Ibid.
[225] Ibid.
[226] Ibid, para 6.14, p 49.
[227] BELLAMY, Alex J. (2009), 73.
[228] Ibid, 55. Quoting Kofi ANNAN,
[229] Ibid, 75. Referring to UN High-Level Panel on Threats, Challenges and Changes did not implement the code of conduct.

only a minority of states welcome a departure from the UN framework since the majority believes that military intervention should only occur if authorised by the UNSC.[230]

The Report itself also reaffirmed the often raised plea of a reform of the UNSC and framing ways how it could work better in concerns of R2P.[231] At the Paris roundtable Hubert Védrine proposed a code of conduct which demanded a clear threshold of a humanitarian crisis which required intervention and the agreement that the permanent five would not use their veto in such cases if not risking violation of vital national security interests.[232] This code of conduct, certainly being a favourable mechanism, was included in the Report but never put into effect elsewhere.

To conclude, it therefore is essential to differentiate between the doctrine as stipulated by the ICISS and the modified version of the doctrine which has been implemented and practiced by the international community especially concerning the question of right authority. In general, the doctrine of R2P certainly has gone long distance in short time. Nevertheless, it so far still strongly depends on the goodwill of the five veto powers within the UNSC if the international community complies with its responsibility to protect.

The last chapter of this part will now outline some selected schools of International Relations and illustrate their standpoints towards the doctrine of R2P, more precisely towards military interventions for human protection purpose without the consent of the intervened state.

[230] Ibid. Referring to Yevgeny M. Primakov, (2004).
[231] Ibid, 50.
[232] Ibid.

5. R2P and International Relations Theory

This chapter outlines four major theories of International Relations, namely realism, liberalism, cosmopolitanism and the English School and their standpoints towards R2P considers the arguments against and in favour of R2P, the danger of abuse and the doctrine's dilemma of selectivity. This part does not aim be a comparative analysis of the four theories; rather, it aims to give an overview of different approaches in International Relations theory towards the concerned subject. It needs to be stressed that therefore it falls out of this thesis' scope to portray the theories exhaustively. The focus is rather set exclusively on the assumptions concerning interventions on humanitarian grounds. This chapter further aims to give room to those who oppose interventions on humanitarian grounds and to reflect on their concerns. Additionally, it intends to portray how other perceptions with a positive approach towards R2P counter the profound criticism of those opposing it.

5.1. Realism

Realism certainly is one of the most important strains in International Relations.[233] Essential for the realist perception is the distinction between political theory analysing domestic politics and International Relations dealing with relations between states.[234] Realist tradition[235] clearly opposes the norm of humanitarian intervention.[236] Realists at the bottom line argue that ethics and morality are irrelevant to conduct foreign policy and therefore are no issue in International Relations.[237] Hans Morgenthau argued that '[…] universal moral principles cannot be applied to the actions of states […]'[238]. Concepts such as universal rights cannot be applied to the action of states in International Relations as the international domain is

[233] BROWN, Chris (2002): Sovereignty, Rights and Justice. International Political Theory Today. Cambridge/Oxford (Polity Press), 2. See also generally about realism: WOHLFORTH, William C. (2012): "Realism and foreign policy" in: SMITH, Steve; HADFIELD, Amelia; DUNNE, Tim ed. (2012): Foreign Policy. Theories, Actors, Cases. Oxford (Oxford University Press), 35-52.
[234] BROWN, Chris (2002), 2.
[235] Generally see e.g. SCHIEDER, Siegfried; SPINDLER Manuela ed. (2010): Theorien der Internationalen Beziehungen. Dritte überarbeitete und aktualisierte Auflage. Opladen & Farmington Hills (Verlag Barbara Budrich UTB), 39ff.
[236] BELLAMY, Alex J. (2003): "Humanitarian Intervention and the Three Traditions" in: Global Society 17/1, 10.
[237] VASQUEZ John A. (2005): "Ethics, foreign Policy, and Liberal Wars: the role of Restraint Moral Decision Making" in: International Studies Perspectives, 6, 310. Referring to MORGENTHAU. See also HEHIR, Aidan (2010), 61, referring to HOBBES.
[238] HEHIR, Aidan (2010), 62, quoting MORGENTHAU.

anarchic,[239] to the contrary of domestic affairs where normative values are recognised. Realists frequently contrast the 'community', which does exist but only in the inside within the state borders among their citizens, with the 'anarchy' which exists on the outside.[240] Téson Fernando describes anarchy as the complete absence of social order, which leads to the Hobbesian war of all against all.[241] Following this assumption, realist scholars of International Relations portray an anarchic world system in which self-interest is rampant in absence of a social contract; ethical considerations are therefore harmful for national interests. Hence, at the international level, the realist tradition asserts that nations are in an anarchic state of nature, due to the lack of centralised authority, dominated by constant struggle for power in order to survive.[242] Realist theory pictures states to be locked in a constant security dilemma.[243] The logical consequence following the realist view on international affairs predetermines the goal of foreign policy by saying that it is determined by self-defence and power seeking considerations, as the primary responsibility of the state is to guarantee for the survival of the state itself and the wellbeing of its citizens.[244] Hence, the only interest of the foreign affairs of a state is to maximise the benefits for its own citizens. Therefore, morality or ethics is not a norm in foreign policy and, if claiming the contrary, it aims to hide the real self-interests behind. To quote Michael Barnett who stated that

> '[…] beware whenever states claim they are doing something for someone else. Such claims are mere smokescreens, ideological props that are intended to legitimate their

[239] Ibid, 61. The classic realist tradition focused on the evil nature of human kind while neorealist concentrate on international anarchy. In this chapter the assumption of the neorealist of an anarchic international system will serve as a basis.

[240] BARNETT, Michael (2012): „Duties beyond borders" in: SMITH, Steve; HADFIELD, Amelia; DUNNE, Tim ed. (2012): *Foreign Policy, Theories, Actors, Cases*. Second Edition. Oxford (Oxford University Press), 224.

[241] TÈSON, Fernando R. (2003), 96.

[242] See e.g. BELLAMY, Alex J. (2003), 10. HEHIR, Aidan (2010), 62. 'The struggle for power and the struggle for survival are seen as identical, and all other interests are secondary.' Anarchy is defined by SCHMIDT, Brian C. (2012): "The primacy of national Security" in: SMITH, Steve; HADFIELD, Amelia; DUNNE, Timothy ed. (2008): Foreign Policy: Theories, Actors, Cases. Oxford/New York (Oxford University Press), 192; as "[…] the term which realist use to indicate that international politics takes place in an environment that has no overarching central authority. […] For structural realists, the condition of anarchy – that is, the fact that there is no "higher power" to ensure peace among sovereign state - is often viewed as synonymous with a state of war.[…]" For realists, survival of the state cannot be guaranteed under anarchy as the use of force is a legitimate instrument of statecraft, this explains why survival and therefore national security is the ultimately central goal of foreign policy.

[243] BELLAMY, Alex J. (2003), 9.

[244] Ibid, 10. See also SCHMIDT, Brian C. (2012), 194. See additionally review by POGGE, Thomas W. (1986): "Liberalism and Global Justice: Hoffmann and Nardin on Morality in International Affairs" in Philosophy & Public Affairs, 15 /1, 67-81.

more primeval foreign policy goals […] sometimes states will help others, but rarely will they do so when it actually cost them something'[245].

Following the realist assumption, duties of morality and responsibility for individuals stop at the borders of states. Hence, whenever states pretend to intervene due to humanitarian reasons they only do so '[…] to camouflage their true motives'[246]. States do not help unless there is some benefit to get out of it.[247] Realist theory clearly opposes the concept of R2P as an indicator for norm change within the international community, which for them is anarchy. Due to the sharp distinction between International Relations and domestic politics states have moral duties only towards their citizens. Hence, it lies out of the scope of foreign policy to implement a normative concept of universal rights, human dignity and moral duties to prevent severe violations of human life only for the benefit of humanity.

The realist tradition enhances the debate of R2P with a lot of important criticism and considerable perspectives. The hidden self-interest behind humanitarian intervention has ever since been debated strongly and certainly is one of the strongest arguments raised against R2P. However, the realist approach of International Relations being a pure anarchy seems to be outdated when considering the proliferation of international human rights treaties and various declarations illustrating that the protection of people has become a global topic and no longer seems to be an exclusive internal matter.

5.2 Liberalism

By contrast, liberalism is most probably one of the core theories embodying implementation of ethical concerns in foreign policy. The most common belief in liberalism is the importance of the freedom of the individual.[248] Liberalism, in contrast to realism, opposes the perception of human rights being an exclusively domestic policy field. Liberalism, being a child of the enlightenment, draws on a long tradition based on natural law and the strong belief in the right of individuals, regardless of status as a foreigner or citizen.[249] Liberalism does not limit its

[245] BARNETT, Michael (2012), 226.
[246] Ibid.
[247] HEHIR, Aidan (2010), 62.
[248] See e.g. generally on Liberalism: van de HAAR, Edwin ed. (2009): Classical Liberalism and International Relations Theory. New York (Palgrave Macmillan).
[249] BROWN, Chris (2002), 7.

understanding of the right to be treated and the duty to treat others as ethical subjects to national borders.[250]

The political theory, as indicated by its name, rests on the belief in liberty, pictured in social and political freedom. Essential factors for realisation of this individual liberty are a liberal democratic form of state, respect for human rights, as well as liberty of property. Liberals strongly believe in the value of national self-determination adhered to the conviction that democratic and self-determined nations would not fight war against each other.[251] Hence, liberal political theory endorses the proliferation of western norms, constitutionalism and liberal democratic forms of government as this is, as some scholars of this theory claim, the '[…] final form of human government[…]'[252]. For liberals the respect for pluralism finds an end if regimes do not reflect liberal values.[253]

Liberal scholars further argue that individuals prefer cooperation over conflict: '[…] people do not want war; war comes about because people are led into it by militarists or autocrats […]'[254]. Additionally, liberals argue that this assumption can be projected on International Relations where states also recognise the utility of cooperation.[255] The central insight shared by all liberal scholars is that states are embedded in civil society, which determines the foreign policy of nations.[256] Hence, liberals, in contrast to realists, believe in the development of progressive international cooperation and that the current international system is of a temporary nature.[257] Following the liberal perception, actors of International Relations are framed in social contracts and norms which make foreign policy a reflection of interests of the domestic society.[258] The liberal school accredits the realist belief that humans and therefore also manmade politics is driven by desire for personal gain. At the same time, in contrast to realists, liberalism emphasises that aiming for personal gain does not necessarily have to be harmful for interaction and society organisation in the international field of policy.[259] Furthermore, liberalism generally limits the role of the state to '[…] the extent that

[250] DOYLE, Michael W. (2012): „Liberalism and Foreign Policy" in: SMITH, Steve; HADFIELD, Amelia; DUNNE, Timothy ed. (2008): Foreign Policy: Theories, Actors, Cases. Second Edition. Oxford (Oxford University Press), 55 and 75-76.
[251] BROWN, Chris (2002), 63.
[252] HEHIR, Aidan (2010), 68 referring to FUKUYAMA, Francis (1992).
[253] Ibid, 69 referring to SIMPSON, Gerry (2004) describing liberal anti pluralism.
[254] BROWN, Chris (2002), 62.
[255] Ibid, 61; HEHIR, Aidan (2010), 62.
[256] BROWN, Chris (2002), 61 - 62.
[257] HEHIR, Aidan (2010), 67.
[258] MORAVCSIK, Andrew (1992): "Liberalism and International Relations Theory" Paper – No 92-6, Centre for European Studies, Harvard University and University of Chicago, 7.
[259] HEHIR, Aidan (2010), 67.

the people out of which it is composed have transferred to it the competence to exercise public powers on their behalf'[260]. As liberalism advocates that state interests are determined by social factors, they are by nature highly variable. This variability of state interests and their interconnection with society, economy and other factors enables liberal scholars to explain and predict change within International Relations in contrast to realists' lack of ability to do so.

The liberalist perception of state and morality within the international society clearly opposes the absolute norm of non-intervention and follows the view that sovereignty is conditioned by responsibility. Every other view, so say the liberal scholars, is a doctrine of the past.[261] This view however has to be distinct from classic liberal perceptions such as those of John Stuart Mill as already illustrated above in the chapter dealing with sovereignty (3.3.2). Mill, as well as Walzer, generally believe '[…] that nations must achieve self determination without external involvement'[262]. However, Michael Walzer although following the tradition of Mill, allows intervention in extraordinary cases and argues that '[…] statesmen and women can no longer excuse amoral action by taking solace in the realist assertion that international society is irrevocably anarchical'.[263] Hence, liberalism does generally not oppose R2P nor the concept of sovereignty as responsibility.

5.3. Cosmopolitanism

Cosmopolitan theory[264] believes in a progressive evolution towards a universal order based on common morality. Therefore, scholars of this school argue against maintaining the differentiation of internal and external as it has been predominately in realist, neorealist and liberal views. This differentiation between external and internal is a cornerstone for the traditional understanding of sovereignty and the connected provision of non-intervention. Furthermore, some scholars of cosmopolitanism argue that states are no longer the dominant force in the international system as individual rights trump those of the state.[265]

One of the key scholars of enlightenment and the corresponding belief in human emancipation via the growth of knowledge was Emanuel Kant.[266] He plays an essential role in cosmopolitanism doctrine in history as well as today. Kant was the first to emphasise that

[260] Ibid, referring to WELLER, Marc (1999).
[261] Ibid, 69 referring to TESÓN, Fernando (2005a).
[262] HEHIR, Aidan (2010), 69.
[263] Ibid, referring to WALZER, Michael (1992).
[264] See generally BROWN, Chris (2002), 40 ff.
[265] HEHIR, Aidan (2010), 72.
[266] BROWN, Chris (2002), 42.

domestic politics cannot be pictured as detached from International Relations.[267] For Kant, '[…] a properly constituted political order is 'republican', that is, based on justice (*Recht*, a combination of the English notions of justice and law), political equality and the rule of law […]"[268]. Furthermore, Kant believes that war is the result of the absence of rule of law, criticising Hobbes '[…] that the implications of an international 'state of nature' is mitigated by effective domestic government alone. International Relations must be brought within the framework of law'.[269]

The cosmopolitan theory clearly is in favour of the concept of sovereignty as responsibility.[270] This perspective contradicts realist who claim that duties of states are limited to their territory and citizens. Cosmopolitans argue that states do not only follow self-interests but are also guided by certain principles and the ethic of humanity. This perception rests on natural law, the belief in common humanity and in equal moral worth of each person, which empties in a general commitment and responsibility towards all human beings for the sake of humanity.[271]

The cosmopolitan view not only demands domestic and international responsibility to stop human suffering if the sovereign itself is unable or unwilling but it demands all humans to act in such situations of severe threat to human life.

5.4. English School

The relationship between international order and international law has been predominately discussed in the literature of the English School. Therefore, this school presents interesting insights about international order, in particular concerning the role of non-intervention and the opposing norms of humanitarian interventions.

It is often stressed that it is difficult to classify scholars as belonging to this theory of International Relations due to its inherent combination of realist, liberalist and cosmopolitan approaches.[272] Scholars of the English School for example, like realists, consider international

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[267] Ibid, 43.
[268] Ibid, 44.
[269] Ibid.
[270] BROWN, Chris (2002), 42 „The endorsement of sovereignty was clearly anti-cosmopolitan […] the cosmopolitanism […] was not satisfied by the idea of a society of states; acceptance of such an society involved acceptance of the legitimacy of inter-state war […]".
[271] BARNETT, Michael (2012), 224.
[272] See SCHIEDER, Siegfried; SPINDER, Manuela ed. (2010), 258. The Australian scholar Hedley Bull has often been named a realist despite the acceptance of him being a central figure within English School tradition. Bull's affinities with realism to a great extent ground on his emphasis on the role of power in international relations and the importance of balance of a power, which for Bull remains the foundation of international society. Bull himself stressed that he is not a realist as realists generally "[…] pay insufficient attention to the framework of rules, norms and shared understanding on which international society depends". BULL, Hedley

society to be anarchical but at the same time believe in the formation of an international society which adheres to mutable shared norms and laws, which remains one of the cosmopolitan and liberal views.[273]

Within the English School two branches have to be differentiated: solidarists and pluralists. Hedley Bull is associated with the pluralist approach while Nicholas Wheeler and Tim Dunne are commonly regarded as belonging to the solidarist branch of the doctrine. However, Wheeler and Dunne argue that Bull has altered his position from pluralist towards a more solidarist approach in his later work.[274]

Pluralists stress that states have priority in the international system and therefore reject the cosmopolitan argument against state-centred scholarship in international society. Therefore individuals only enjoy legal rights to the extent states enable them to do so.[275] Despite this notion of states being the predominant actors in international order, pluralists acknowledge the role of international institutions as actors within the international order.

Hedley Bull, one of the most controversial and most important scholars of this theoretical doctrine, exposes that states form an international society and that geopolitical competition can be eliminated by establishing international affairs which rely on common identity. This, in the end would allow stable peace. Realists, by contrast, neglect such an approach to international order as they argue that any so called 'order' is merely defined by self-interest and power politics by states and therefore can and will be violated whenever so desired. Pluralists such as Bull argue that international order is built upon states that develop a sense of shared common interest and guarantee these interests through institutions, such as international law.[276] It is interesting to note that in this perception, international law reflects the existing world order and balance of power within the international system, as the more powerful states can effectively construct international law. In this perception, justice is no matter of international law, even though it is often referred to as the legal moral referent for the action of states.[277]

Following Bull and the pluralist view, international law and international order, as exclusively applied to states, have very little to do with individuals and human rights. This does not mean

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(2002): The Anarchical Society. A Study of Order in World Politics. Forwards by Stanley Hoffmann and Andrew Hurrell. Basingstoke/New York (Palgrave), viii.

[273] HEHIR, Aidan (2010) 70.

[274] RIFKIND, Jarrod (2012): "Reconfiguring Law, Order and Justice: The Case for Humanitarian Intervention." Prepared for the ISA Annual Convection, April 2012.

[275] HEHIR, Aidan (2010), 71.

[276] BULL, Hedley (2002), 64.

[277] RIFKIND, Jarrod (2010), 2.

that Bull does not include justice in his framework of world order. Rather he argues that global human rights concerns must be raised within a framework were states have priority in order to guarantee stability of international order.[278] Pluralists, basically argue that ensuring individual rights is the responsibility of the state and not the responsibility of the international community. Therefore pluralists, and particularly Bull in his earlier work, argue that the norm of non-intervention prevails over human rights as unilateral intervention would threaten international peace.[279] Those following the pluralist view emphasise the importance of non-intervention as states guarantee stability and protect human rights domestically.[280]

Notwithstanding this insight, Hedley Bull stated that interventions would not lie in conflict with international stability if the actions taken express the collective will of the international society.[281] Within Bull's work, one can spot an inherent tension between the solidarist notions on human rights and the pluralist view.

Wheeler and Dunne represent the younger critical strain of solidarists who try to find a normative justification for humanitarian intervention and therefore argue that if shared norms of international society are violated, intervention can be justified.[282] Solidarists argue that the universal recognition of the human rights of individuals is a requirement for the maintenance of international order.[283] Further, they argue that Bull's perception is antiquated, since international society has changed, as is clearly illustrated by the immense treaty work and ratifications in the international human rights field.[284] Wheeler and Dunne also stress that even Bull himself acknowledged the '[…] growing cosmopolitan awareness, at least among 'advanced countries' which was leading the West increasingly to 'empathies with actions of humanity that are geographically and culturally different from us'.'[285]

Hence the perceptions towards R2P remains divided within the English School depending on the affiliation with the pluralist view emphasising sovereignty, or the solidarist view. This inherent tension within the English School is an evident result of its incorporation of realist, pluralist cosmopolitan and solidarist notions of International Relations.

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[278] Ibid, 16.

[279] Ibid; Referring to BULL, Hedley (2002), 83. SCHIEDER, Siegfried; SPINDLER, Manuela ed.(2010), 274. Referring to Jackson (2000), 291. E.g. for contemporary pluralist scholars: Robert Jackson, a scholar belonging to the younger generation, also favours sovereignty over human rights due to international stability concerns.

[280] HEHIR, Aidan (2010), 71.

[281] Ibid.

[282] SCHIEDER, Siegfried; SPINDLER, Manuela ed. (2010), 273. See also HEHIR; Aidan (2010) 71.

[283] RIFKIND, Jarrod (2012), 19.

[284] HEHIR, Aidan (2002), 71.

[285] RIFKIND, Jarrod (2012), 18. Referring to DUNNE, Timothy; WHEELER, Nicholas (1996): Hedley Bull's pluralist of the Intellect and Solidarist of the Will. In International Society, 92.

5.5. Conclusion

Following the realist theoretical tradition, R2P is often pictured as a 'Trojan horse' which is mostly '[…] used by the powerful to legitimize their interference in the affairs of the weak'.[286] It is difficult to answer the question of how to detect ulterior motives behind military intervention propagated as humanitarian. Mixed motives, however, are not considered to be a drawback for an intervention to be legitimate, at least not for the ICISS as far as the humanitarian intention is predominant.[287] Still, the threat of abusing humanitarian reasons to conceal imperialistic ambitions should not be underestimated. Hence, the ICISS was right in being concerned about the danger that states might abuse humanitarian intervention to legitimise unjust wars.[288] At the same time as the Darfur crisis sadly demonstrated that the concept of R2P itself could also '[…] be abused by states keen to avoid assuming any responsibility for saving some of the world's most vulnerable people […]'.[289]

The threat of abusing the concept, legitimising military intervention as ultimo ratio to protect humans from severe human rights violations and genocide, can particularly been seen in the intervention in Iraq on, inter alia, humanitarian grounds after the terror strikes on 11 of September in 2001. The Iraq intervention has been criticised internationally as abuse of humanitarian justification for state interests as it brought about a particular interconnection between humanitarian interventions and forceful regime change. Many scholars even consider the intervention in Iraq in 2003 to have been illegal.[290] The Iraq intervention can be pictured as a confirmation of what realists postulate, namely that '[…] even if the states claim they are intervening on humanitarian grounds, they are actually attempting to further their own self-interest'[291]. Therefore the question which remains in the light of interventions like in Iraq in 2003 is how to prevent states from slipping back into imperialism, conquering states on behalf of humanitarian duty in order to destabilise hostile autocracies and establish friendly Western democracies. Some scholars claim that there are more parallels between American foreign policies now and the one which was pursued during its more openly imperial past.[292] Further, some scholars argue that '[…] aiming to reshape the world according to the prescription of a universal morality marks a policy that is revolutionary as well as imperial. It is revolutionary

[286] BELLAMY; Alex J. (2005) "Responsibility to Protect or Trojan Horse? The Crises in Darfur and Humanitarian Intervention after Iraq" in: Ethics & International Affairs, 19, 2, 32.
[287] ICISS (2001a), para 4.35.
[288] BELLAMY, Alex J. (2005), 53.
[289] Ibid.
[290] PAYANDEH, Mehedad (2012), 362.
[291] WELSH, Jennifer M. (2004), 58.
[292] NARDIN, Terry (2005), "Humanitarian Imperialism" Ethics & International Affairs, 19, 25.

in aiming to destroy government that do not mere its test of legitimacy [.] which at the end provides an ideological rationale for American empire […]'[293]. Along these lines it is further often stressed that '[…] theories of morality are […] the product of dominant nations or group of nations'[294].

Evidently various parameters have to be considered when judging a doctrine which legitimates military interventions, even if only as ultimo ratio, to protect a population abroad. The greatest drawback for a doctrine like R2P certainly is the danger of abuse for pure state interests. The selectivity of the implementation of R2P is often considered as a conformation for state interest being the primary motive of interventions rather than the protection of a foreign population. It needs to be given a profound thought in which cases the UNSC so far has approved military intervention on human protection purpose. Not only the oft-mentioned spotted economic and strategic interest are pointed to as being the triggering motives behind interventions, but also international stability and security are indispensable variables. Hence the validity of the claim that humanitarian intervention are approved by the UNSC not merely on the grounds of human right violation but rather on the '[…] claim that international stability is threatened by those violations - either through flow of refugees or the spill over effect of civil war'[295] - is evident. And indeed international security concerns as well as state interest play an important role when it comes to implementation of R2P. Furthermore, the decision to send troops to a foreign country to protect strangers certainly strongly depends on the particular domestic situation of the intervening state. Obviously interventions are more likely to happen if civil society strongly demands it or if the intervener has reasonable hope to benefit from the intervention in some way. Both alliances as well as historic and cultural boundaries between the suffering population and the intervening state often play an essential role. Further, the protection of a population via military intervention is very unlikely to happen if such an intervention would destabilise international peace and security.

Nevertheless we can see growing evidence in foreign policy practice reflecting a duty or a responsibility towards strangers.[296] Realists would ask us to look closer at this foreign policy practice, to reveal the hidden motives such as security, geostrategic interests, power and wealth. Liberalists on the other hand who follow the strand of independence theory would explain this change in foreign policy with the growing independence of states to one another.

[293] Ibid.
[294] HEHIR, Aidan (2010), 62 quoting Carr E.H.
[295] WELSH, Jennifer M. (2004), 57.
[296] BARNETT, Michael (2012), 225, 229.

Other scholars would point at globalisation and the role of the communication revolution which makes it possible to show pictures of suffering strangers from all over the world and creates sympathy with those strangers who do not seem to be so far away anymore. Albeit all these controversial perceptions towards and different reasoning for the gradually establishment of the doctrine of R2P, the international community has been strengthened and amended. The anarchy gradually adopts the features of a community. Today, the international community is built upon a dense network of rules, norms and principles which ties states and communities together. Human rights and protection of civilians are clear interests of the international community which have to be respected and implemented if the concerned state seeks to have respect and standing within the community.

Various approaches help to explain why foreign policy today increasingly expresses a duty to others. Nevertheless, it is tempting to follow the opinion of those who claim that at the bottom line, one cannot battle the realist claim '[…] that it is little more than cheap talk […]'[297] and hidden self interest rather than the belief in inalienable rights being strong enough to justify one's own sons and daughters being sent to war to protect the most vulnerable strangers. This claim is supported by the high selectivity of compliance with the responsibility towards strangers. This selectivity was especially demonstrated in the case of Syria in 2012 and today, as one can question why the world community decided to intervene in Libya while there is not enough political will to end the ongoing killing in Syria. Barnett Michaels proposes that 'Government and societies are not inherently heartless. Rather, when forces choose between interests and ethics, they generally choose interests if the ethical choice imposes a real cost or sacrifice.'[298]

Not aiming to give a conclusive answer to the struggle between those opposing the intervention for the purpose of human protection and those in favour of the it, it ultimately needs to be stressed that

> '[…] the debate over humanitarian intervention is not a black or white one, between those who are concerned about human rights and those who turn blind eyes to human suffering. Rather, it is a debate about the boundaries of moral community, the consequences of intervention, and the density of values that underpin international society.'[299]

[297] Ibid, 230.
[298] Ibid, 237.
[299] WELSH, Jennifer M. (2004), 52.

B.
Regime Change and the Libya Intervention

A. Introduction

The Libya intervention in 2011 is the most recent case where R2P was successfully implemented. The concerned UNSC Resolutions referred to the doctrine of R2P. The UNSC Resolutions in question harshly condemned the brutal reaction of the Gaddafi regime towards the peaceful protests, recalled the primary responsibility of a state to protect its citizens and effectively implemented the responsibility of the world community to undertake this responsibility if the concerned state is unwilling to comply. As it became obvious that the Gaddafi regime would not conform to the urgent demand of the UNSC to immediately stop the ongoing violence and severe human rights violations against its own population, the world community did not hesitate to react. In compliance with the doctrine of R2P the world community - in particular the UNSC acting as 'right authority' - assumed its responsibility to protect the Libyan population and intervened militarily. The widespread and systematic attacks in Libya against the civilian population, which could have amounted to crimes against humanity, certainly legitimated military intervention aiming to protect civilians. From this point of view, the intervention therefore fully complied with the rules and procedures of the doctrine of R2P and did not conflict international law, as a corresponding UNSC mandate was given.

The triggering point however lies elsewhere, namely in the question of whether the operation in Libya is the first case of a conducted operation under UNSC mandate implementing the doctrine of R2P with the more or less openly admitted goal of overthrowing the government and changing the regime.[300] The Resolution in question is the UNSC Resolution 1973 which established the no-fly-zone and authorised all members of the UN to '[…] take all necessary measures to protect civilians and civilian populated areas [...]'[301]. The scope of the mandate was considerably broad, which led to the question of whether the concerned Resolution could also be regarded as a legal basis for regime change in Libya. Especially non-western governments accused NATO, for example, of pursuing a policy of regime change while

[300] PAYANDEH, Mehrdad (2012), 385.
[301] UNSC Resolution 1973.

claiming to protect civilians.[302] In the context of the present thesis the point of concern is the particular conjunction of regime change and R2P for which the Libya case is a predestined case study.

[302] O'BRIEN, Emily; SINCLAIR, Andrew (2011): „The Libyan War: A Diplomatic History. February- August 2011" in: Centre of International Cooperation (New York University), 1.

B. Structure

Part ***one***, entitled **Libya Intervention 2011 - an Example for Correct Implementation of R2P (1.)**, answers the question of whether the Libya intervention was a case of correct implementation of the gradual establishment of the doctrine of R2P. The first chapter therefore starts by giving a brief *Chronology of the Libya Intervention (1.1.)*. It continues with an analysis of the Libya intervention in regard to the compliance with the *Threshold and Precautionary Criteria of the ICISS (1.2.)* in order to answer the question of a correct implementation of R2P in accordance with the doctrine as stipulated by the ICISS. Furthermore, the UNSC Resolutions mandating the Libya intervention, *UNSC Resolutions on Libya (1.3.)*, will be analysed with regard to implementation of R2P as well as regarding the question of whether these Resolutions can serve as a legal basis for authorised forceful regime change. More precisely the *UNSC Resolution 1970 of 26 of February 2011 (1.3.1.)*, *UNSC Resolution 1973 of 17 of March 2011 (1.3.2.)* and *UNSC Resolution 2009 of 16 September 2011 (1.3.3.)* are analysed. Finally the *Conclusion (1.4.)* will summarise the findings.

Part ***two***, entitled **Regime Change (2)**, introduces Regime Change as such and will refer to the parallelism of the judicial discourse of R2P and regime change. The first chapter starts with an *Introduction (2.1.)*, chapter two continues with a legal assessment of regime change entitled *Regime Change - Definition and a Judicial Analysis (2.2.)* and will then be followed by a closer discussion of the right to *Self-determination (2.2.1.)*. Only the difference of regime change compared to R2P will be demonstrated, as the author does not consider it necessary to repeat the already detailed illustrated political as well as judicial approaches towards R2P if the same applies to regime change. The following chapter discovers whether regime change is a legitimate goal of R2P, *Locating Regime Change in R2P (2.3.)*. A critical analysis of the ICISS's final Report will illustrate the relationship of the doctrine of R2P with regime change. Part four will answer the question of whether the Libya intervention was a *Forceful Regime Change Mandated by UNSC Authorisation (2.4.)*. Part two ends with the *Conclusion (2.5.)* summarising the outcomes of the assessments of regime change.

Part ***three*** is an **Actors Analysis of the Libya Intervention (3).** This chapter starts with an *Introduction (3.1.)*. The attitude towards forceful regime change of some selected actors involved in the military intervention in Libya will be outlined and analysed. This assessment will answer the question of when and if a call for forceful regime change in Libya can be

located while also answering the question of whether *Regime Change* is *a conditio sine qua non of R2P in Libya? (3.2.)*. Finally, the *Conclusion (3.3)* will give an answer to the question of whether forceful regime change is a necessary correlative of successful R2P policy.

1. Libya Intervention 2011- an Example for Correct Implementation of R2P?

1.1. Chronology of the Libya Intervention

The most recent case on R2P, putting the protection paradigm into effect, are the UNSC Resolutions dealing with the conflict in Libya in 2011.

The suicide of a 25-year-old academic in Tunisia marked the starting point of a cross-national revolutionary movement in various Arab countries against the ruling authorities and social grievances. The revolution in Libya can only be understood in the context of the 'Arab spring', the spirit of which quickly spread from Tunisia over Egypt to Libya, Bahrain, Yemen, Syria and Saudi-Arabia. On 15 February 2011, a month after the Tunisian people succeeded in overthrowing the former leader Zine el-Abidine Ben Ali, the revolution in Benghazi started.[303] Many people hoped that the nonviolent protest of the people of Libya against Gaddafi would follow the path of Tunisia and Egypt, were the oppressive regimes of Ben Ali and Mubarak capitulated without launching brutal attacks on citizens.[304] Those hopes were disappointed as Gaddafi forces attacked those who protested peacefully in the most brutal and severe way.[305]

The international community reacted swiftly on the precarious situations of the civilians and rebels in Libya: Only ten days after the uprising had started the UNSC reacted on the situation

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[303] For detailed information on the background and developments of the revolution in Libya see e.g. VANDEWALLE, Dirk (2006): *A Histroy of modern Libya*. Cambridge (Cambridge University Press).

[304] DAALDER, Ivo H.; STAVRIDIS, James G. (2012): „NATO's Victory in Libya. The Right Way to Run an Intervention" in: Foreign Affairs, 91, 2.

[305] See e.g. Human Rights Watch, 19. February 2011: Security Forces Kill 84 Over Three Days. Available at:http://www.hrw.org/news/2011/02/18/libya-security-forces-kill-84-over-three-days: Human rights watch demanded the immediate stop of violent attacks of pro government armed groups against peaceful protesters. According to Human Rights Watch, 84 People have been killed by security forces in a few days of peaceful protests against Gaddafi; Human Rights Watch, 22. February 2011: Commanders Should Face Justice For Killings. Available at: http://www.hrw.org/news/2011/02/22/libya-commanders-should-face-justice-killings: Witnesses in Tripoli have described Libyan forces firing "randomly" at protesters. On February 21, high ranking Libyan diplomats around the world publicly resigned from their roles representing the government in Tripoli and demanded strong international action to end the violence, see also MOYNIHAN, Colin, New York Times, 21. February 2011: Libya's U.N. Diplomats Break With Qaddafi. Available at: http://www.nytimes.com/2011/02/22/world/africa/22nations.html?_r=0: Ibrahim Dabbashi, Libya's deputy ambassador to the United Nations, called for the Libyan leader to step down. Members of Libya's mission to the United Nations called Qaddafi a genocidal war criminal responsible for mass shootings of demonstrators protesting against his four decades in power. Mr. Dabbashi asked that the United Nations create a 'no-fly zone' and also said that he wanted the ICC to investigate what he termed 'crimes against humanity and crimes of war'; Aljazeera, 21. February 2011: Libya revolt spreads to Tripoli. Available at: http://www.aljazeera.com/news/africa/2011/02/201122131439291589.html: Saif al-Islam Gaddafi, the son of leader Muammar Gaddafi, said on state television that leader Muammar Gaddafi will fight a popular revolt to 'the last man standing'.

with UNSC Resolution 1970 of 26 of February 2011, condemning the violence and the use of force against civilians.[306] The Resolution explicitly took reference to R2P and reminded the Libyan authorities of the responsibility to protect its population and to immediately stop the violence. Furthermore, several embargos and bans where adopted. The situation in Libya, additionally, was referred to the International Criminal Court (hereafter ICC) in Den Haag, Netherlands.[307] This is worth stressing as the Libya case was the first case to be unanimously referred to this court.[308] Especially the USA, Russia and China have a very reluctant approach to the ICC. On February 22, 2011 the Arab League[309] suspended Libya from its sessions and called on the international community to impose a no-fly-zone.[310]

As the regime did not comply with the UNSC Resolution 1970, the UNSC enacted Resolution 1972 on March 17, 2011, implementing a no-fly-zone and allowing member states to take all necessary measures to protect civilians and civilian areas in Libya. The first air and missile strikes against Libyan forces were launched on March 19, 2011 the collective military mission of USA and European forces, called "Operation Odyssey Down", was led by the USA.[311] On March 31 NATO took over the command of the operation in order to ensure the effective integration of allied and partner militaries as already ten NATO countries contributed to the intervention: Belgium, Canada, Denmark, France, Italy, The Netherlands, Norway, Spain, the United Kingdom, and the USA.[312] In the end eighteen states were involved in the operation 'Unified Protector', coordinated by NATO. Germany abstained from UNSC Resolution 1972,

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[306] UN SC Resolution 1970(2011).

[307] UNSC Resolution 1970 (2011), point 4: 'Decides to refer the situation in the Libyan Jamahiriya since 15. February 2011 to the Prosecutor of the International Criminal Court.'; See also United Nations Public Information/News and Media Division: United Nations, 26. February 2011: *In Swift Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters*. Available at: http://www.un.org/News/Press/docs/2011/sc10187.doc.htm.

[308] UNSC Resolution 1970 of 26. February 2011 was adopted unanimously with 15 votes in favour. See UNSC Record of 6491[1h] Meeting, S/PV.6491, 26 February 2011.

[309] The League of Arab States (hereinafter: Arab League)

[310] See e.g. BBC News, 23. February 2011: *The Arab League suspends Libya until demands of the people are met.* Available at: http://www.bbc.co.uk/worldservice/africa/2011/02/110223_libya_arableague_focus.shtml; BRONNER, Ethan; SANGER, David E., New York Times, 12. March 2011: *Arab League Endorses No-Flight Zone Over Libya*. Available at: http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all.

[311] The White House, President Barack Obama, Office of the Press Secretary, 18. March 2011: *Remarks by the President on the Situation in Libya.* Available at: http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya; U.S. Department of Defence, 10. March 2011 Information on '*Operation Odyssey Down'*. Available at: http://www.defense.gov/home/features/2011/0311_libya2/.

[312] North Atlantic Treaty Organisation, NATO Fact Sheet, 2. November 2011: *Operation Unified Protector Final Mission Stats.* Available at: http://www.nato.int/cps/en/natolive/71679.htm; NATO Press Release, 27. March 2011: *Statement by NATO Secretary General Anders Fogh Rasmussen on Libya*. Available at: http://www.nato.int/cps/en/natolive/news_71808.htm.

which authorised the military intervention to physically protect the civilians of Libya from mass atrocities, and therefore also stayed out of the military operation.[313]

The NATO operation 'Unified Protector' consisted of three tasks, namely policing the arms embargo, patrolling the no-fly-zone and protecting civilians.[314] The Libyan National Transitional Council finally gained enough military force in the middle of August 2011 to secure control over the entire country. Gaddafi was captured and killed by the rebels. The NATO operation ended on October 31, 2011.[315]

1.2. Threshold and Precautionary Criteria of the ICISS

As illustrated in great detail in part A of this thesis the state itself retains the primary responsibility to protect its population from mass atrocities, which have been defined by the ICISS as large scale loss of life, such as genocide or ethnic cleansing in large scale.[316] This is the first of six criteria which the ICISS postulated for legitimate military interventions, named the 'just cause threshold' or the 'criteria of right reason'. Additionally, the five precautionary criteria of right authority, right intention, last resort, proportional means and reasonable prospects guide the decision-making.[317] As already previously illustrated, the right cause threshold legitimating military intervention was established by the ICISS and unanimously reaffirmed by the UNGA in 2005[318] and the UNSC in 2006[319]. As debated above in the chapter dealing with the responsibility to react, the right to intervene militarily is strictly limited to extreme cases. This section will examine if the Libya intervention implemented the doctrine of R2P in accordance with the criteria stipulated by ICISS. The implementation of the doctrine will be measured against the fulfilment of these individual criteria.

It is worth stressing that the implementation of the doctrine of R2P by the UNGA Resolution did not include all six criteria as stipulated by the ICISS. Only the threshold criteria was endorsed by the UNGA Resolution of the World Summit Outcome 2005, the additional five precautionary criteria, which are familiar from the doctrine of just war, were only partly and

[313] See e.g. UNSC Record of 6498th Meeting, S/PV.6498, 17 March 2011.
[314] DALLDER; Ivo H. ; STAVRIDIS, James G. (2012), 3.
[315] NATO Press Release, 28. October 2011: *NATO Secretary General statement on the end of Libya mission.* Available at: http://www.nato.int/cps/en/SID-0E8A17E1-4409DFD3/natolive/news_80052.htm.
[316] ICISS (2001a), XI,32.
[317] Ibid, XXI; 35.-37.
[318] UNGA Resolution 60/1 (2005), para 138- 139.
[319] UNSC Resolution 1674 (2006), para 4; UNSC Resolution 1706 (2006).

vaguely debated. [320] Nevertheless, concerning the case study of the Libya intervention the fulfilment of all criteria stipulated by the ICISS will be analysed.

In the particular case of Libya the existence of massive human rights violations and use of lethal force against civilians and insurgents had been reported by numerous organisations and states. More precisely the various organs of the United Nations[321] as well as human rights NGOs such as Human Rights Watch ascertained the unproportional violence against civilians in Libya.[322] Furthermore, various non-western organisations such as the Arab League, the African Union[323] and the Organisation of the Islamic Conference condemned the killing of civilians by the Gaddafi regime and called for an effective protection of civilians. Moreover, Gaddafi himself as Supreme Commander of the Libyan Armed Forces openly threatened to murder civilians who revolt against him.[324] The violent reaction of the Gaddafi regime against the protest was harshly condemned universally. These universal condemnations and the ascertainment of massive human right violations and the use of force against civilians through many different sources provide a sufficient basis to detect a threat of large-scale loss of life. Bellamy even stated that in Libya '[…] there was an extraordinary clarity of the threat of mass atrocities. Not since Rwanda has a regime so clearly signalled its intent to commit crimes against humanity'.[325] Therefore, one can conclude that the threshold of just cause was reached in the case of Libya. More precisely, the threat of large-scale loss of life was actually given and the state itself - the Gaddafi regime - was obviously not willing to protect its

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[320] UNGA Resolution 60/1 (2005), para 138-139.

[321] E.g. United Nations, Human Rights, Office of the High Commissioner for Human Rights, 25. February 2011: *Situation of Human Rights in the Libyan Jamahiriya: Statement by Navy Pillay, UN High Commissioner for Human Rights* (Human Rights Council- 15th Special Session). Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10760&LangID=E; See generally United Nations Regional Information Centre for Western Europe, UNRIC Library Background: Libya. Available at: http://www.unric.org/en/unric-library/26483.

[322] See e.g. supra note 305; Human Rights Watch, 17. March 2011: *Benghazi Civilians Face Grave Risk.* Available at: http://www.hrw.org/news/2011/03/17/libya-benghazi-civilians-face-grave-risk; Human Rights Watch, 20. February 2011: *Governments Should Demand End Unlawful Killings.* Available at: http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings

[323] African Union, Press Release, 19. March 2011: *Meeting of the African Union High –Level Ad Hoc Committee on Libya Meets In Nouakchott on 19 March 2011*. Available under: http://www.au.int/en/content/african-union-ad-hoc-high-level-committee-libya-meets-nouakchott-19-march-2011; African Union, Press Release 26. March 2011: *Consultative Meeting on the Situation in Libya Addis Ababa, Ethiopia 25 March 2011*. Available at: http://www.au.int/en/content/communiqu%C3%A9-consultative-meeting-situation-libya-addis-ababa-ethiopia-25-march-2011; The African Union High Level Committee on Libya expressed its support of UNSC Resolution 1973 but also emphasised the need for a peaceful solution.

[324] See e.g. STANGLIN, Douglas, USA TODAY, 17. March 2011: *Gadhafi Vows to Attack Benghazi and Show 'No Mercy'*. Available at http://content.usatoday.com/communities/ondeadline/post/2011/03/gadhafi-vows-to-retake-benghazi-and-show--no-mercy/1#.UK4lB2chySo; supra note 305. Statement of Saif-al Islam Gaddafi the son of Muammar al Gaddafi on public television.

[325] BELLAMY; Alex (2011): „Libya and the Responsibility to Protect: The Exception and the Norm" in: Ethics & International Affairs, 25, 265.

population. The exceptional and extraordinary measure of coercive military measures across borders was justified in the case of Libya, as there was serious and irreparable harm occurring to human beings. Because of these reasons, the requested threshold stipulated by the ICISS was reached. [326] The political repression of the people in Libya or massive imprisonment of insurgents would not have been a sufficient basis to intervene militarily as the threshold is only satisfied if the actual threat of large-scale loss of life is evident.

The second condition, namely of right intention, is met if the primary purpose of the intervention is to halt or avert human suffering.[327] Even those authors criticising the UNSC Resolution 1973 as authorisation of forceful regime change do not question the primary humanitarian intention of the military intervention in Libya. Hence, when answering the question of right intention it is of particular importance to separate the intention and the means that the objective is achieved with In other words, the primary intention needs to be kept distinguished from the secondary objection, which is necessary in terms of a *conditio sine qua non* in order to achieve the primary. The intention of UNSC Resolution 1973 clearly was the protection of civilians and the civilian populated areas.[328] The criterion of right intention therefore was fulfilled in the case of Libya as the military intervention's primary intention explicitly was to protect the civilians in Libya who where endangered of being killed by the forces of the Gaddafi regime. This intention of the collective military intervention was also clearly stated in the UNSC Resolution mandating the intervention.

Furthermore, as outlined in the ICISS Report as well, the right intention is most likely to be guaranteed if military intervention is supported by multilateral or collective actors rather than by a single state. In the case of Libya not only Western states and organisations but also regional organisations lobbied for the enforcement of a no-fly zone in order to stop the killing of civilians.[329] The UNSC mandate, however, was broader than the pure implementation of the no-fly zone. Rather, the UNSC authorised UN member states to take all necessary measures to protect civilians and civilian populated areas. This broad scope might not have been the intention of some organisations such as the Arab League, as they merely supported the implementation of a no-fly zone; nevertheless, the NATO operation was supported by

[326] ICISS (2001a), para 4.18, p 32.
[327] ICISS (2001a), para 4.32, para 4.33, p 35.
[328] Representatives who had supported the text of UNSC Resolution 1973 (2011) stressed that the objective was solely to protect civilians from further harm. See e.g. United Nations Press Release, 17. March 2011: *Security Council Approves 'No Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote Of 10 In Favour With 5 Abstentions*.
Available at: http://www.un.org/News/Press/docs/2011/sc10200.doc.htm.
[329] See supra note 306.

numerous states, in the end. Not only Western states such as the USA, France, United Kingdom, Italy, Sweden, Spain, Netherlands, Greece, Belgium, Canada, Denmark, Norway, Bulgaria and Romania supported the NATO intervention in Libya, but also the United Arab Emirates, who deployed fighters for combat operations, and Jordan, Qatar and Turkey, which helped to enforce the no-fly-zone and thus to fulfil the UNSC mandate.[330] This broad support certainly can be taken as indicator that the primary intention was to stop the killing of civilians.

Nevertheless one cannot deny that, in this particular case, the fulfilment of the goal necessarily was linked to the resignation of Gaddafi, which was not very likely to happen. Therefore, the answer to the question of whether the primary intention was by nature linked to the objective of removing Gaddafi from power is evident. Hence, to remove Gaddafi from power became a necessary means in order to achieve the actual goal of protecting civilians, particularly after Gaddafi had demonstrated that a diplomatic solution of the conflict was not an option for him.[331] The question of forceful regime change in Libya will be answered and analysed later in part three dealing specifically with regime change. In this context however, it is important to stress that according to the ICISS Report, despite the fact that forceful regime change can never be a legitimate intention for military intervention, it can be necessary to disable the regime's capacity to harm its own people. An extract of Paragraph 4.33 reads as follows:

> 'The primary purpose of the intervention must be to halt or avert human suffering. […] Overthrow of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection - and what is necessary to achieve that disabling will vary from case to case. […]'[332]

Furthermore, mixed motives generally do not harm the fulfilment of the criteria as long as the protection of the population remains the primary intention.[333] To quote the relevant paragraph from the ICISS final Report on R2P:

> 'It may not always be the case that the humanitarian motive is the only one moving the intervening state or states, even within the framework of Security Council-authorized

[330] DAALDER, Ivo H.; STAVRIDIS, James G. (2012), 4.
[331] A ceasefire was declared after the UNSC Resolution 1973 was adopted but the Gaddafi troops violated the cease-fire by attacking Benghazi. See e.g. BBC News, 19. March 2011: *Gaddafi Forces Attacking Rebel-Held Benghazi.* Available at: http://www.bbc.co.uk/news/world-africa-12793919.
[332] ICISS (2001a), para 4.33, p 35.
[333] Ibid, para 4.35.

> interventions. Complete disinterestedness - the absence of any narrow self-interest at all - may be an ideal, but it is not likely always to be a reality: mixed motives, in international relations as everywhere else, are a fact of life. […] Apart from economic or strategic interests, that self-interest could for example take the understandable form of a concern to avoid refugee outflows […].'[334]

Hence, under this perspective the Libya intervention seems to fulfil the precautionary criteria of the right intention since it was always primarily aimed at the protection of the population. In accordance with the above quoted paragraphs of the ICISS final Report the ICISS considers the right intention as fulfilled, even if the regime is directly targeted and destabilised by the military operation and other motives additionally may have influenced the intervening states in their decisions, as long as the primary intention is the protection of the endangered population.

The third criterion stipulates that military intervention for the purpose of human protection must always remain the last resort to actual or apprehended ethnic cleansing or large scale loss of life.[335] The military intervention can only be warranted when every non-military option has been explored.[336] This, however, does not mean that every non-military measure has actually had to be tried and failed. What it means is that non-military measure and especially all diplomatic efforts to find a non-military solution to the problem have to be considered and attempted as far as possible. UNSC Resolution 1970 can be seen as such an attempt to solve the conflict with non-military measures. The Resolution clearly appealed to the Libyan authorities to stop the killing and severe human right violations of civilians while implementing non-military sanctions. Moreover, the Resolution in question unmistakably warned the Libyan authorities that in case of non-compliance, the responsibility to protect the population of Libya against large scale loss of life can yield to the international community. Furthermore, great effort was used to negotiate a cease-fire which was broken by Gaddafi's troops immediately after it had been agreed upon.[337]

Criterion number four demands that military interventions shall always meet the criterion of proportional means. The military action must always be limited to the minimum necessary to secure the humanitarian objective in question. In the case of Libya, this was tried by implementing a no-fly zone and abstaining from sending ground troops. It is worth

[334] Ibid.
[335] Ibid, 12, XII.
[336] Ibid, para 4.37, p 36.
[337] See supra note 328.

mentioning that the ICISS explicitly states that '[…] the effect on the political system of the country targeted should be limited, again to what is strictly necessary to accomplish the purpose of the intervention.'[338] As detected above the primary intention and therefore the purpose of the intervention must be humanitarian. However, in the particular case of Libya, the humanitarian objective could only be reached by defeating the leader - Gaddafi - and his troops. Therefore, military targets as well as the troops of the political leader of the country were explicitly targeted as it was necessary to guarantee the protection of civilians. Therefore the bombing of those targets were as so far proportional as they where necessary in compliance with the mandate to protect the Libyan population. Hence the means of reaction to the situation in Libya seemed to have fulfilled the criterion of proportional means.

Furthermore, the fifth criterion is fulfilled if a reasonable prospect for success is given. 'Military interventions are not justified if actual protection cannot be achieved or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.'[339] In the case of Libya most countries who abstained from the vote on Resolution 1973 (2011), which implemented military sanctions against the Libyan authorities, argued that these military measures would not be the preferable mean to stop the ongoing violence in Libya.[340] Germany for example doubted the reasonable prospect of success being given and questioned the effectiveness of a military operation as well as doubting that such an operation would do more good than harm for the population at risk.[341] Reasonable chance of success of the intervention seems to nevertheless have been given in the case of Libya, as the military force of the alliance of states who absorbed the responsibility to protect was great; especially as NATO took over the coordination of the alliance, the probability of warranting actual protection to the civilians and of a successful end to the operation seemed to be sufficient. Furthermore in the light of the shocking merciless reaction of Gaddafi against the population of Libya there are strong reasons to believe that it was very likely that the Libyans would have faced greater harm if the international community would not have intervened.

The last criterion is evidently not a controversial subject in the case of Libya as the UNSC, acting as 'right authority', authorised the intervention. As already debated in great length, even those countries which are rather critical towards R2P are generally willing to accept military interventions to protect civilians if authorised by the UNSC within its competences.

[338] ICISS (2001a), para 4.39 ,p 37.
[339] Ibid, para 4.41, p 37.
[340] UNSC Record of 6498th Meeting, S/PV.6498, 17 March 2011.
[341] Ibid, 5.

From the perspective of international law the majority of commentators consider the UNSC mandate to be in compliance with international law, meaning that the UNSC acted within its competences. It clearly is within the competence of the UNSC to detect a threat to international peace. It is further commonly accepted as well as settled practise of the UNSC that severe human rights violations and atrocities against the civilian population can be qualified as threat to peace and therefore justify action under Section VII of the UN Charter. The UNSC Resolution 1973, authorising military measures, explicitly mentions the severe human rights violations, which could amount to crimes against humanity. So generally there is a broad consensus that the UNSC mandate did not violate international law.

The minority views of some scholars, however, claim that there was no sufficient proof of the Gaddafi regime being engaged in crimes against humanity. A prominent example is Michael Walzer who argued that the threshold for intervention had not been passed in the case of Libya and criticises the unclear purpose of the intervention and the lack of significant Arab support.[342] The arguments raised by those scholars criticising the Libya intervention as not having passed the necessary threshold for UNSC authorisation of military intervention remain isolated and unconvincing.[343] In this context however it is necessary to mention that besides the most brutal crimes against the Libyan population committed by Gaddafi's forces, which in the author's view certainly met the threshold of just cause of military intervention, the anti-Gaddafi forces also are suspected of having committed war crimes from February 2011 onwards until the end of the civil war.[344] Therefore the author does not want to suggest that those crimes committed by the anti-Gaddafi forces should not be prosecuted by the Libyan authorities or by the ICC. As war crimes have taken place on both sides of the conflict in Libya it is rather necessary to undertake a profound investigation of all crimes to ensure their complete prosecution.

[342] PAYANDEH; Mehrdad (2012), 396; WALZER, Michael (2011):"The Case Against Our Attack on Libya" in: The New Republic, 20. March 2011. Available at: http://www.tnr.com/article/world/85509/the-case-against-our-attack-libya#.

[343] See PAYANDEH, Mehrdad (2012), 396; BELLAMY, Alex J. (2011), 265; PATTISON, James (2011): "The Ethics of Humanitarian Intervention in Libya" in: Ethics and International Affairs, 25, 271.

[344] Human Rights Watch, 17. October 2012: *Libya: New Proof of Mass Killings at Gaddafi Death Site.* Available at: http://www.hrw.org/news/2012/10/16/libya-new-proof-mass-killings-gaddafi-death-site.

1.3. The UNSC Resolutions on Libya

This chapter gives a closer assessment of the UNSC Resolutions dealing with the uprising in Libya.

1.3.1. UNSC Resolution 1970 of 26 of February 2011

UNSC Resolution 1970 of February 26 2011 was the first UNSC Resolution dealing with the uprising in Libya. The Resolution expressed its grave concerns regarding the situation and condemned the violence, the use of force against civilians and the gross and systematic violation of human rights. The Resolution reminded the Libyan authorities of their responsibility to protect their population and further stressed that the widespread and systematic attacks in Libya against the civilian population may amount to crimes against humanity. The Resolution demanded an immediate end to the violations and calls for steps to fulfil the legitimate demands of the population.[345]

Sanctioning this harshly condemned behaviour, acting under Chapter VII of the UN Charter the Resolution implemented an arms embargo, travel ban and the freezing of all funds and assets of individuals being associated with the regime and affiliated to the regime as blacklisted in the annex of the concerning Resolution. Furthermore, the Resolution referred the Situation in Libya to the ICC. Most remarkable is the timely content of the Resolution: The UNSC reacted very swiftly to the widespread violations committed against civilians and the insurgents in Libya and adopted concrete sanctions against the regime of Muammar al Gaddafi, invoking R2P efficiently. This swift reaction needs to be seen in the context of the Arab Spring and the spirit of peaceful revolution which blossomed over many northern African and Arabian states and the corresponding international pressure to react. Nevertheless it was striking that none of the UNSC members voted against the Resolution, which referenced R2P, even though the veto powers Russia and China have always had a very reluctant attitude towards the new doctrine and towards intervention in internal matters of a state in general. The Resolution was adopted unanimously with 15 votes in favour.[346]

1.3.2. UNSC Resolution 1973 of 17 of March 2011

On March 17 2011, only nineteen days after Resolution 1970 had been passed, the UNSC again reacted swiftly to the deteriorating situation in Libya by adopting Resolution 1973. Further action was necessary as the Libyan authorities failed to comply with the previous

[345] UNSC Resolution 1970 (2011), para. 1.
[346] UNSC Record of 6491th Meeting, S/PV.6491, 26 February 2011.

Resolution 1970. Neither the sanctions implemented by this Resolution nor the reference to the ICC brought about the end or reduced the violence against civilians. On the contrary, the violence intensified and the international call for a no-fly zone became stronger.[347]

UNSC Resolution 1973 again stressed the responsibility of the Libyan authorities to protect the Libyan population and to ensure the protection of civilians. Furthermore, it repeatedly condemned the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions as well as the acts of violence against journalists. It also took note of the call of the Council of the Arab League of 12 March 2011 for the imposition of a no-fly zone on the Libyan military. Further, the Resolution recalled the condemnation of the serious violations of human rights by the Arab League, the African Union and the Secretary General of the Islamic Conference. The Resolution repeated the demand that had already been previously raised in Resolution 1970 that the Libyan authorities comply with their obligations under international law such as human rights and refugee law as well as international humanitarian law.[348]

The Resolution explicitly determined that the situation in Libya constituted a threat to international peace and security. The UNSC reacted on the international call for protection of Libyan civilians by demanding the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.[349] Furthermore, acting under Charter VII of the UN, the Resolution authorised Member States to take all necessary measures to protect civilians and civilian populated areas under threat of attack, including the city of Benghazi.[350] The Resolution further explicitly excluded a 'foreign occupation force of any form on any part of Libyan territory'[351]. This exclusion has to be interpreted restrictively as the Resolution did not exclude any ground forces but only 'occupation forces'. Hence, such military operations which include ground forces without occupation of territory where authorised under the Resolution.[352] Furthermore, the protection competence mandated by the Resolution was not limited to civilians but also included insurgents. This assumption can not only be derived from the wording of the Resolution which not only authorised the protection of 'civilians' but also included 'civilian populated areas' and 'Benghazi'. It is also supported

[347] More precisely it was frequently reported that the Gaddafi regime used lethal weapons, military aircraft, cannons and tanks to fight the population as well as Gaddafi himself proclaiming to show 'no mercy' to those who do not surrender, as already outlined in detail in the previous chapter.
[348] UNSC Resolution 1973 (2011), para 3.
[349] Ibid, para.1.
[350] Ibid, para.4.
[351] Ibid, para 4.
[352] For detailed assessment see PAYANDEH, Mehrdad (2012), 385-386.

by the fact that the main objective would have been much more difficult to fulfil if not at the same time protecting those who fought the regime, namely the insurgents.[353] Hence, a differentiation between civilians and insurgents was not effectively implemented and was not the intention of the Resolution.

It is remarkable that the UNSC Resolution authorisation to use all necessary measures to protect civilians was not limited in time or to a certain goal. Hence it was unclear in which concrete situation the authorisation would cease to exist or would be recalled. The wording 'all necessary measures' is the usual terminology used by the UNSC when authorising military measures under Chapter VII of the UN Charter. Hence this concrete phrasing of the authorisation does not give grounds to claim that the Resolution used an extraordinarily broad language leaving particularly broad room for interpretation or that can be seen as an authorisation of forceful regime change. If such an argument were raised, it would also have to be raised concerning all other Resolutions using the exact same wording in order to be consistent. Consequently, the authorisation to use all necessary measures legitimates all measures as long as they are necessary to ensure the protection of civilians and civilian populated areas.

Paragraphs 6 -12 of the Resolution established a no-fly-zone, more precisely a ban on all flights in order to help protect civilians, excluding flights with solely a humanitarian purpose. The Resolution authorised member states to take all necessary measures to enforce compliance with the ban on flights.[354] Furthermore, the measures imposed by Resolution 1970 were recalled and partly amended. The ban on flights and the freezing of assets were broadened. The travel ban for example was amended to a general ban on flights; more precisely, it was decided that all states must deny any airplanes which are registered or owned by Libyan nationals or companies to take off from, land in or fly over their territory.[355] Therefore, the target of the travel ban was no longer only on those individuals listed by the Resolution 1970 and those listed in the annex of Resolution 1973, but a general ban on flights was adopted. Furthermore, the assets freeze imposed by Resolution 1970 was expanded to all funds, assets and resources which are owned or controlled directly or indirectly by the Libyan

[353] See also SCHMITT, Michael N. (2011): 'Wings over Libya: The No-Fly Zone in Legal Perspective' in: The Yale Journal of International Law, 36, 56. As Schmitt argues: 'The reference to the protection of "populated areas" is especially important; it allows for the dense of cities and other areas held by rebel forces even if the Libyan armed forces are not directly targeting the civilians therein, since any Libyan assault would inevitably place civilians at risk. Moreover, that authorization permits attack on Libyan security forces that, while not directly engaged in attacks on civilians or areas populated by civilians, are supporting, or reasonably could be expected, such attacks even far from the battlefront.'

[354] UNSC Resolution 1973 (2011), para 8.

[355] Ibid, para 17.

authorities.[356] Paragraphs 13- 16 also amended the enforcement of the arms embargo of Resolution 1970.

The Resolution was adopted with five abstentions, by China, Russia, Brazil, India and Germany, and ten votes in favour.[357] India justified its abstention on the vote by claiming that there was too little credible information on the situation on the ground in Libya. Moreover, India expressed its uncertainty about the details of the enforcement measures, specifically how and by whom these measures would be carried out. At the same time India emphasised that it is gravely concerned about the humanitarian situation in Libya.[358] Like India also Brazil articulated their deep concerns about the deteriorating situation in Libya and condemned the use of violence against unarmed protesters and the violation of obligations under international humanitarian law and human rights law. The representative of Brazil further emphasised even more strongly than India that the abstention of Brazil '[…] should in no way be interpreted as condoning the behaviour of the Libyan authorities or as disregard for the need to protect civilians and respect their rights'[359]. For Brazil however the text of Resolution 1973 (2011) contemplated measures that would go beyond the call of regional organisations for measures to stop the violence. Brazil furthermore articulated scepticism that the use of force would lead to the immediate end to violence and the protection of civilians.[360] The abstentions of Brazil and India were not surprising as both countries always had a rather reluctant attitude towards the concept of R2P, especially concerning military interventions.

Germany's abstention by contrast was rather unusual in regard to the general political position towards severe human rights violations and the prevention of atrocities in countries abroad. Nevertheless, Germany decided to abstain from the vote and declared that it would not to contribute to a military effort with its own forces.[361] This was due to the concern over the ineffectiveness of the use of military force in Libya and the danger of such measures causing even wider military conflict. Germany emphasised the need to support the political transition in Libya by implementing further economic and financial sanctions. It further emphasised its belief that only strong sanctions backed by the whole international community would be an effective way to end the rule of Gaddafi. Nevertheless, in the statement to the abstention it

[356] Ibid, para 19.
[357] For all statements after the vote see UNSC Record of 6498th Meeting, S/PV.6498, 17 March 2011.
[358] Ibid, 5-6.
[359] Ibid, 6.
[360] Ibid.
[361] Ibid, 5.

was outlined that the regime of Gaddafi has lost all legitimacy and demanded Gaddafi's immediate relinquishment of power.[362]

Especially astonishing was that neither Russia nor China made use of their veto right, which would have prevented the further implementation of R2P in terms of implementing a no-fly-zone for the protection of civilians. Russia and China generally oppose any interference of the world community in internal matters of sovereign states. Russia stressed in its statement after the vote that its abstention does not change its position that the use of force against civilians is clearly unacceptable.[363] Furthermore, Russia highlighted its attention towards the request of the Arab States to take immediate measure to ensure the protection of the civilian population in Libya and to implement a no-fly-zone in Libyan airspace. However, Russia criticised that Resolution 1970 does not settle on concrete measures for the enforcement of the protection of civilians and the no-fly-zone, and is missing limits on the use of force. Russia however highlighted that despite its concerns in regard to the use of military force in Libya it did not prevent the adoption of this Resolution.[364] Likewise, China highlights its general rejection of the use of force in international relations.

Some authors claim that Russia and China would have vetoed the Resolution if there had not been this extraordinarily broad support of implementing a no-fly-zone from regional organisations as well as unusual clear indications for the imminent threat of mass atrocities and no reasonable political alternative to prevent the massacre.[365] These factors certainly did influence the vote of Russia and China but also those of the other abstaining countries as all of them emphasised their concerns over the widespread and systematic attacks on civilians and condemned the behaviour of the Libyan authorities, as just outlined by their statements after the vote on the Resolution.

1.3.3. UNSC Resolution 2009 of 16 September 2011

On September 16 the Security Council adopted Resolution 2009, which was the final Resolution dealing with the situation in Libya. Resolution 2009 repeated the condemnation of the violence against civilians and recalled the decision to refer the situation in Libya to the ICC. It further strongly condemned sexual violence, particularly against women and girls and the recruitment and use of children in situations of armed conflict. Furthermore, the

[362] Ibid, 4.
[363] Ibid, 8.
[364] Ibid.
[365] BELLAMY; Alex (2011), 265-266.

Resolution reaffirmed that the UN should lead the efforts of the international community in supporting the Libyan-led transition and rebuilding process aimed at establishing a democratic, independent and united Libya. The Resolution furthermore noted the improved situation in Libya and called upon the Libyan authorities to ensure the promotion and protection of human rights. Further, the Resolution ensured that those assets that have been frozen pursuant to Resolution 1970 and 1973 should be made available for the benefit of the people of Libya. Resolution 2009 established a UN Support Mission in Libya (UNSMIL), loosened the Arms embargo, excluded some companies such as the Libyan National Oil Corporation from the asset freezing and modified the assets freeze on other institutions. The ban on flights stipulated in paragraph 17 of Resolution 1973 was lifted.[366]

1.4. Conclusion

The intervention in Libya certainly was morally necessary as well as legally legitimated. The intervention was morally necessary as the Gaddafi regime most brutally killed and threatened to kill its own population, which demanded swift reaction in order to protect civilian population. The intervention was legally legitimated as it was authorised by the UNSC within its competences after non-forceful measures had failed to bring an end to the violence.[367] Moreover, the right cause threshold stipulated by the ICISS was additionally fulfilled as large-scale loss of life occurred that was immediately apprehended. The UNSC further chose proportional means to fulfil its intention to protect the population in Libya. The measures taken, namely the implementation of a no-fly-zone and the protection of the Libyan population were supported by regional organisations as well as numerous individual states and therefore also had a reasonable chance to succeed. Therefore, the 2011 intervention in Libya can be seen as a good example of R2P being efficiently implemented and executed. This is despite the fact that the doctrine of R2P was only reaffirmed explicitly in Resolution 1973 and Resolution 1970 concerning the rather non-controversial point that the primary responsibility to protect the population lies within the state itself. The more controversial point, namely that this responsibility yields to the international community if the state itself is unwilling to protect its population, was not reaffirmed but was effectively practiced. This, however, is not a drawback for the doctrine, as Chesterman already pointed out that the significance of R2P was never - in a strict sense- legal but rather political and more

[366] UNSC Resolution 2009, para 21.
[367] SCHMITT, Michael N. (2011), 55.

importantly rhetorical.[368] Bellamy argues that the doctrine of R2P '[…] played an important role in shaping the world's response to actual and threatened atrocities in Libya'[369].

The end of the UN mandated military intervention in Libya monitoring the no fly-zone and protecting civilians was officially declared on Monday October 31, 2011 in compliance with the UN mandate. One of the most repressive regimes of the world had been overthrown. Muhammar al Gaddafi, who had ruled the country for 42 years had been defeated and killed. Gaddafi was killed almost exactly eight months after the first protests against his regime took place in Benghazi and seven months after the military intervention started. A regime that went through international political isolation, supported international terrorism, had forbidden political parties and repressed its own people, was overthrown.[370] A regime which ranked in the same category as North Korea and Turkmenistan concerning political freedom and civil rights had fallen.[371] NATO called the operation Unified Protector one of the most successful in its history. Furthermore, the Secretary General added that the NATO has '[…] fully complied with the historic mandate of the United Nations to protect the people of Libya, to enforce the no-fly zone and the arms embargo […]'[372]. He further stated that '[…] we have done this together for the people of Libya […] Libyans have now liberated their country. And they have transformed the region'[373].

In this context the question of forceful regime change suggests itself. Libya was lead by a dictator whom the Libyan insurgents most probably would have not been able to overthrow themselves. The brutal reaction of Gaddafi towards his own people who rebelled against the oppressive regime enabled the international community to give the rebels a hand to overthrow the dictator behind the smokescreen of protecting civilians from large scale loss of life. This particular question of R2P being conditioned by regime change, as one can illustrate in the case of Libya, is what shall be answered in the next chapters.

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[368] CHESTERMAN, Simon (2011): „ ‚Leading from Behind' The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya" in: Ethics & International Affairs, 25, 281.

[369] BELLAMY, Alex J. (2011): „Libya and the Responsibility to Protect: The Exception and the Norm" in: Ethics & International Affairs, 25, 263.

[370] VANDEWALLE, Dirk (2006), 6, 169 - 174; PAYANDEH, Mehrdad (2012). Libya's involvement in terrorist activities has been a constant item in the agenda of the UNSC and grounds for collective actions. Only when the Libyan government acknowledged its responsibility for certain terrorist actions, agreed to provide compensation and officially renounced all forms of terrorism, did the UNSC lift the sanctions.

[371] WERENFELS, Isabelle (2008): Qaddafis Libyen. Endlos stabil und reformresistent? SWP- Studie (Stiftung Wissenschaft und Politik.), Berlin (Deutsches Institut für international Politik und Sicherheit).

[372] NATO News, NATO Secretary General statement on end of Libya mission of 28.10.2011. Available at: http://www.nato.int/cps/en/SID-0E8A17E1-4409DFD3/natolive/news_80052.htm

[373] Ibid.

2. Regime Change

2.1. Introduction

The first conjunction between military intervention in a sovereign state on humanitarian grounds and regime change became publically widespread and was consciously launched when the USA and the UK used humanitarian reasons to justify their intervention in Iraq in 2003 and at the same time undertook a forceful 'regime change'. This more precisely included the forceful removal of the former leader of Iraq, Saddam Hussein, by the intervening forces, accompanied by efforts to install a more democratic form of government. The question that shall be answered here is which particular conjunction exists between regime change and R2P. To answer this question it is necessary to define regime change and analyse the relationship of R2P to it.

2.2. Regime Change - Definition and a Judicial Analysis

Regime change is defined as

> '[…] forced removal from power of a sitting government or executive leadership of a state, leading to a significant alteration in the governance of that state and an effective transfer of power to alternative actors'[374]

or as

> '[…] the forcible replacement by external actors of the elite and/or governance structure of a state so that the successor regime approximates some purported international standard of governance.'[375]

As Reismann argues, the impulse to liberate people from a government that poses no imminent or prospective threat to others, but is so despotic, violent, and vicious that those suffering under it cannot shake it off, certainly is noble but at the same time these attempts are often misconceived as well as conflicting with international law.[376] If this impulse truly is noble remains a moral question that shall not be answered here; rather, the question of whether such action intending to forcefully replace a government or elite lies in conflict with international law is the matter of concern of this chapter. The main legal questions are whether the prohibition on use of force prohibits the right to use force to intervene in internal

[374] MICKLER, David; MCMILLAN, Nesam (2011): "Locating 'Regime Change' in R2P and The ICC". University of Melbourne, Victoria, Australia.
[375] REISMAN, Michael W. (2004): The Manley O. Hudson Lecture: "Why Regime Change Is (Almost Always) a Bad Idea" in: 98 AM. Journal of International Law. 516 (2004), 516.
[376] REISMAN, Michael W. (2004), 516.

disputes to restore or further democracy or to restore order in a state which lacks effective government, as well as if the right to self-determination includes the right to use force.[377]

From the legal perspective the answer in the end is quite clear: forceful regime change generally lies in conflict with international law. More precisely, forceful regime change violates the principle of sovereignty, the corresponding principle of non-interference in domestic affairs and the general prohibition on the threat or use of force.[378] Furthermore, it bears the danger of political abuse and is often suspected to be a new form of imperialism or colonisation. Notwithstanding these legal and political concerns towards forceful regime change, an oppressive regime which does not even grant the minimal human rights may, depending on its participation and ratification status, violate prohibitions of international human right treaties; moreover, such behaviour lies in conflict with those of the UN Charter dealing with human rights.[379] It could further be argued that according to the concept of sovereignty as responsibility, legal sovereignty does not entitle governments to act how they please, and sovereignty can therefore be suspended in extreme cases of tyranny. Furthermore, one could also try to apply the extended interpretation of Article 2 (4) of the UN Charter, on the case of militarily overthrowing a regime which oppresses its population, arguing that military intervention for benevolent reasons are not directed against the territorial integrity or political independence of a state.

These arguments, however, have been developed for legitimating humanitarian interventions in extreme cases of severe human suffering such as large scale loss of life, and not as justification for forceful pro-democratic regime change. Despite the utility of the previously stated arguments on interventions, which primary intend to overthrow a regime, these arguments have not yet become a consensus opinion in the international community. Neither international courts nor the majority of international lawyers have so far been willing to condition sovereignty or to restrict the scope of Article 2 (4) of the UN Charta.[380] The gradually developing international custom and practice concerning military interventions as stipulated by the ICISS Report on R2P can certainly not be used on cases where the primary intention is to install a democratic form of state, as there is no indication for the legal right or doctrine of pro-democracy intervention.

[377] GRAY, Christine (2008), 7.
[378] For detailed analysis of the legal concerns see Part A, Chapter 2.
[379] The question of whether a state is in violation of human rights provisions essentially depends on the participation and ratification of the relevant treaties by the concerned state.
[380] PAYANDEH, Mehrdad (2012), 360.

Such a right can also not be derived from the often-recalled examples of forceful interventions aiming to restore democratic government in Haiti and Sierra Leone. Despite the fact that the change of the de facto regime was the explicit objective of the UNSC mandated collective intervention in Haiti, it cannot be seen as precedence for pro-democratic intervention or regime change.[381] This is mainly due to two reasons: Firstly, the interventions did not aim to overthrow a stable government in order to install democracy or a different form of state. The interventions rather aimed to reinstall the internationally recognized government.[382] Secondly the humanitarian situation, the refugee flow and the overall destabilised situation were essential motives and justifications when determining the threat to international peace and security and therefore authorising the intervention.[383] In the case of Sierra Leone, the UNSC did not authorise military intervention by Nigerian troops; rather, they intervened due to an explicit invitation by the government of Sierra Leone.[384] Hence, the interventions in Haiti and Sierra Leone cannot be categorised as UNSC authorised pro-democratic or regime changing interventions. Furthermore, those two examples are exceptions, as in the great majority of cases the UNSC did not authorise any pro-democratic actions when the overthrow of a democratic ruler or annulment of democratic elections occurred or react solely on the grounds that a government did not meet democratic standards.[385] Further, the above examples of reinstalling democratic leaders have to be distinguished from interventions aiming at forceful regime change like the intervention in Iraq in 2003, for example.

2.2.1. Self-determination

The most frequent argument in favour of forceful regime change derives from the right to self-determination and the responsibility to help those who are being oppressed and cannot free themselves without external help. Self-determination is a legal principle giving cohesive national groups the right to choose for themselves a form of political organisations and their relation to other groups.[386] The principle of self-determination is incorporated in Article 1(2)

[381] Ibid, 369.
[382] Ibid, 369 - 370.
[383] Ibid, 370.
[384] Ibid, 370.
[385] GRAY, Christine (2008), 59; PAYANDEH, Mehrdad (2012), 371.
[386] BROWNLIE, Ian (1998): Principles of Public International Law. Fifth Edition. Oxford/New York (Oxford University Press/ Clarendon Press).

and Article 55[387] of the UN Charter. Article 1 of the UN Charter states the purposes of the United Nations, point 2 reads as follows:

> '[…] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; […]'[388].

The Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the UNGA in 1960 regards the principle of self-determination as a part of the obligations stemming from the Charter.[389] Furthermore, the right to self-determination has been recognised as a fundamental human right in the Article 1 of the International Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Political Rights.[390] The principle of self-determination has been incorporated in plenty treaties and instruments. Especially the adoption of the Friendly Relations Declaration by the UNGA in 1970 illustrated a wide support of various states towards the right to self-determination. However, the scope and the particular content of the fundamental right to self-determination are highly controversial, especially concerning the question of whether the right to self-determination includes the permission to use force when accomplishing this right.

Liberalists, for example, for whom self-determination and democratic form of state are core elements of their theoretical strand, argue that individuals oppressed by their own government should only be rescued if there is a reasonable expectation that the intervention will end this oppression and allows for the chance of the establishment of authentic self-determination.[391] Scholars arguing in favour of the need to help those oppressed by despotism, dictatorship and tyranny often bring forward the argument of state praxis in the context of decolonisation, which can be pictured as indication of the right to intervene. This state praxis, however, has to be seen in the particular timely context and the particular situation of formerly colonised

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[387] UN Charter Art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (1) higher standards of living, full employment, and conditions of economic and social progress and development; (2) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (3) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[388] UN Charter Art.1(2).

[389] BROWNLIE, Ian (1998), 600; See UNGA Resolution 1514 (XV) (1960): Declaration on the Granting of Independence to Colonial Countries and Peoples. A/GA/RES/ 1514 (XV) of 14 December 1960.

[390] UNGA Resolution 2200A (XXI) (1966): International Covenant on Civil and Political Rights. UN Doc. A/Res/2200A (XXI) of 16 December 1966, Article 1; UNGA Resolution 2200A (XXI) (1966): International Covenant on Economic, Social and Cultural Rights. A/Res/2200A (XXI) of 16 December 1966, Article 1. Both covenants enshrine the identical article.

[391] See e.g. DOYLE, Michael W (2012), 75-76.

countries. Furthermore, the debate on whether the right to self-determination includes the right to use force and even more if third parties are legitimated to support the self-determination seeking people with force, is highly controversial and could so far not be settled, not even concerning decolonisation.[392] The UNGA for example acknowledge that liberation of colonised people could include legitimated 'armed struggle' and later reverted this phrase in 1991 to 'all available means'[393]. In regard to the continuous disagreement in the matter of the right to use force in the context of decolonisation most scholars argue that state practice of that time cannot be an *argumentum a major ad minus* for the present.[394]

2.3. Locating Regime Change in R2P

The use of force in order to protect a foreign population is a highly controversial issue, legally as well as politically. In order to find consensus on the issue of military intervention for humanitarian reasons it was necessary to limit its application to a very high threshold, namely to extraordinary situations which amount to large scale loss of life. Even this very high threshold in the end did not accomplish absolute unity within the international community, as many states are still very reluctant on the matter.

Political oppression and the circumcision of political rights is not a subject matter of the doctrine of R2P. The final Report of ICISS, as a primary source of the theoretical doctrine of R2P, clearly states that '[…] overthrowing of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm people may be essential to discharging the mandate of protection.'[395] Therefore, the doctrine of R2P rejects regime changing intentions as a just cause which legitimates military intervention. However, as already outlined previously, the ICISS accepted that mixed motives cannot be totally precluded as there will rarely only be one objective when states intervene militarily into another state's affairs to protect strangers.[396] The ICISS therefore concluded that, as long as self-interest is not the primary motive and humanitarian objectives are guaranteed to be supreme, mixed motives do not harm the legitimacy of the intervention from the perspective of the criterion of right

[392] PAYANDEH, Mehrdad (2012), 361 Payandeh argues that: "[…] this lack of consensus is best exhibited in numerous resolutions of the General Assembly dealing with decolonization." The GA emphasises the right to self-determination but is silent on the question on use of force. See UNGA Resolution 1514 (XV) (1960); UNGA Resolution 2105 (XX) (1965): Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.GA/RES/2105(XX) of 20 December 1965; Friendlily Relations Declaration; See also GRAY, Christine (2008), 59ff.
[393] GRAY, Christine (2008), 62.
[394] See e.g. Ibid, 64.
[395] ICISS (2001a), para 4.33, p 35.
[396] Ibid para, 4.35, p 36.

intention.[397] Furthermore, despite the insight that overthrowing a regime is not a legitimate objective of military intervention, the Commission acknowledges in its Report that it might be necessary to destabilise or target the regime in order to guarantee the protection of civilians.[398] Therefore, it is clearly not within the scope of R2P to attack another state with the primary intention of forcefully overthrowing the regime. At the same time it is well established that '[…] a government that does not abide by minimum human rights standard and the principle of self-determination forfeits its legitimacy […]'[399]. The controversial point therefore is the question of whether external forces can legally overthrow such a government through military means. Following the ICISS regime it may be justifiable to overthrow the government, if such a regime change is a consequence or unpreventable side effect of measures taken which are necessary to stop the regime from harming its own people.[400] Therefore, a change in a state's regime, as a necessary consequence of military intervention, is generally tolerated by the ICISS but may not be the primary goal of an intervention. What makes the case of Libya so controversial is the claim that the military operation under the UNSC mandate more or less openly legitimated the interveners to overthrow the government.[401] Whether UNSC Resolution 1973 (2011) authorised forceful regime change in Libya shall be answered in the next chapter.

2.4. Forceful Regime Change Mandated by UNSC Authorisation?

The assumption that the UNSC Resolutions mandating the Libya intervention can also be seen as an authorisation of forceful regime change cannot be supported by the wording of UNSC Resolution 1973 (2011). The text itself did not mention regime change as a goal of the military intervention. However, indirect evidence that the UNSC would support regime change in Libya can be spotted in UNSC Resolution 1970 (2011) as well as in UNSC Resolution 1973 (2011). UNSC Resolution 1970 (2011) simultaneously demanded an immediate end to the violence and called for steps to '[…] fulfil the legitimate demands of the population […]'[402]. This demand was recalled in UNSC Resolution 1973 (2011) stressing '[…] the need to intensify efforts to find a solution to the crisis which responds to the

[397] Ibid.
[398] Ibid, para. 4.33, p 35.
[399] PAYANDEH, Mehrdad (2012), 357.
[400] ICISS (2001a), para. 4.33, p 35.
[401] PAYANDEH, Mehrdad (2012), 358.
[402] UNSC Resolution 1970 (2011), para 1.

legitimate demands of the Libyan people […]'[403]. The UNSC further noted the decision of the African Union to send its ad hoc High Level Committee to Libya '[…] with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution.'[404] The Resolutions themselves did not further determine which exact legitimate demands of the people of Libya were meant by these phrases and how these demands should be fulfilled. However, no matter how one interprets the legitimate demands of the population of Libya it certainly was highly doubtful if these demands could have been met with Gaddafi in power.[405] Despite these doubts being justifiable, the mere references to the call of the UNSC to fulfil the demands of the population certainly cannot be interpreted as an UNSC authorisation of forceful regime change.[406] This would be a far too excessive interpretation of the UNSC call.

Those claiming that the UNSC authorised forceful regime change in Libya furthermore point out the missing determination of the means by which the goal of the UNSC Resolution 1973 (2011) was suppose to be met. As already illustrated the UNSC mandate authorised the member states to take all necessary measures to protect civilians and civilian populated areas.[407] Therefore, even if regime change was not a legitimated goal of the military intervention it may have been a necessary means in order to achieve the primary goal. It certainly would have been very unlikely to effectively achieve the protection of the civilians and civilian populated areas without weakening and destabilising the regime in power that ordered the killing of the civilians. This however, as already illustrated, is neither illegal under international law nor in conflict with the doctrine of R2P as long as the primary intention remains the protection of civilians. Therefore, measures which were necessary to achieve the primary intention of the mandate certainly were within the scope of the authorisation. Every political institution, which had reasonable connection with the attacks on civilians and civilian populated areas, such as strongholds of insurgents, therefore was a legitimate military target. Moreover, the authorisation of the UNSC entitled the intervening forces to target Gaddafi himself and other high ranking officers of the regime responsible for the attacks on the Libyan population. Hence, Resolution 1973 (2011) cannot be seen as an authorisation of military regime change in Libya despite the fact that the UNSC most probably was well aware that

[403] UNSC Resolution 1973 (2011), para 2.
[404] Ibid
[405] PAYANDEH; Mehrdad (2012), 388.
[406] Ibid.
[407] UNSC Resolution 1973 (2011), para 4.

regime change most likely will be the necessary outcome of the military intervention if it would fulfil its primary intention.[408]

2.5. Conclusion

Without doubt, there is no such legal right to intervene forcibly in a civil conflict. This cannot only be derived from the general prohibition in Art 2(4) of the UN Charter but is also reflected in UNGA Resolutions 375 (1949) on the Right and Duties of States and UNGA Resolution 2131 (1965) on the Inadmissibility of Intervention.[409] The ICJ clarified in 1986 in the Nicaragua case that a third state may not forcible help the opposition to overthrow the government as no such general right of intervention in support of opposition within another state exists within contemporary international law.[410] Third parties only have the right to intervene militarily if they are invited by the government and if the domestic unrest falls below the threshold of civil war or, albeit being questionable, additionally in cases of national liberation movements seeking decolonisation.[411] State practise clearly illustrates that any direct use of force to support the opposition was mainly done secretly and if done openly then still based on a generally accepted legal justification, such as self-defence.[412] The 'Reagan doctrine' for example, which strongly advocated a duty to help 'freedom fighters' against socialist governments, remained a rhetorical doctrine. The USA never forwarded such a duty or right to intervene militarily into internal matters to support democratisation or regime change as a legal justification of the right to use force.[413] Hence military intervention aiming at forceful regime change is illegal under international law if not authorised by the UNSC or justified in reference to self-defence. Furthermore, the UNSC Resolution did not authorise forceful regime change per se. As illustrated in the case of Libya, however, the regime was forcefully changed by the intervening states. This nevertheless is neither in conflict with international law nor with the doctrine of R2P as the regime change was a side effect of the

[408] See e.g. HENDERSON; Christian (2011): "International Measures for the Protection of Civilians in Libya and Cote d'Ivoire" in: International and Comparative Law Quarterly, 60, 772; see also PATTISON, James (2011), 273ff.
[409] See supra note 152.
[410] Nicaragua case, paras 206-209: See also GRAY, Christine (2008), 77, 105.
[411] GRAY, Christine (2008), 85, 92, 105. If there is a civil war rather than mere internal unrest there is a duty to not intervene, even at the request of the government. This duty to not intervene however can be dismissed if there has been prior foreign intervention against the government. [92]
[412] In the Nicaragua case, for example, the USA did not claim the existence of a new right to intervention but rather based the legal justification on collective self-defence against an armed attack. [Nicaragua case, para 208] Hence it is of particular importance to strictly separate legal and political justification for actions of states when analysing their legality.
[413] GRAY, Christine (2008), 106.

primary intention, which was humanitarian. With every air strike NATO strengthened the insurgents and weakened Gaddafi's regime. Therefore, it is tempting to conclude that the UNSC authorised and NATO implemented forceful regime change when simply looking at the outcome. This, however, is a wrong conclusion as one has to differentiate between the legitimate goal of the intervention and the means or side effects with which the fulfilment of the intention is necessarily linked.

3. Actors Analysis of the Libya Intervention

3.1. Introduction

The last part of the present thesis is dedicated to a political actor's analysis, which illustrates whether and from when onwards the main actors involved in the military intervention in Libya have considered forceful regime change as a *conditio sine qua non* for guaranteeing the protection of the civilians in Libya. In this matter it is worth mentioning that there is a remarkable difference between political justification or politically propagated goals of interventions and the legal justification of the same. The USA, for example, on other occasions emphasised the distinction between the legal justification for actions and the goals and political interest to restore or protect democracy, highlighting that they do not claim the existence of a legal right of pro-democratic intervention.[414] This distinction certainly must be kept in mind when analysing the propagated goal or purpose of the Libya intervention. As in the case of Libya the judicial justification and the politically propagated goals where often found to drift apart.

3.2. Regime Change a *conditio sine qua non* of R2P in Libya?

Various authors characterise Resolution 1973 (2011) as attempt to force regime change[415] or raised the claim that the intention of the intervention in Libya was fairly unclear and supported their statement by pointing at the rhetoric of various coalition leaders strongly and unmistakably demanding regime change in Libya.[416] Indeed, rhetoric changed after the military operation in Libya had started and the operation progressed successfully. Some authors even claim that from then onwards the participating states more openly revealed the further intentions behind the intervention besides the protection of the civilians: namely, regime change.[417] However, the demand of regime change, in terms of 'Gaddafi must go', was already raised before UNSC Resolution 1973 (2011) was implemented. The first who openly demanded Gaddafi to step down from power was the French President Nicolas Sarkozy on his visit to Turkey in February 2011.[418] Shortly after Sarkozy's visit in Ankara on

[414] GRAY, Christine (2008), 57.
[415] SEUMAS, Milne, the Guardian, 23. March 2011: *There's Nothing Moral About Nato's Intervention in Libya.* Available at: http://www.guardian.co.uk/commentisfree/2011/mar/23/nothing-moral-nato-intervention-libya
[416] WALZER, Michael (2011): The Case Against Our Attack on Libya; PATTISON, James (2011), 273 - 274.
[417] PAYANDEH; Mehrdad (2012), 382.
[418] ARSU, Sebnem; ERLANGER, Steven, New York Times, 25. February 2011: *Sarkozy Is Criticized on a Visit to Turkey.* Available at: http://www.nytimes.com/2011/02/26/world/europe/26turkey.html. However, at that time

February 26, the UNSC unanimously voted for the Resolution 1970 (2011). In this context the New York Times reported that President Barack Obama, during a telephone call with Germanys Chancellor Angelika Merkel, also said that Gaddafi had lost the legitimacy to rule and should step down.[419] A few days later David Cameron stated that:

> 'We must not tolerate this regime using military force against its own people. […] For the future of Libya and its people, Colonel Gaddafi's regime must end and he must leave. To that end we are taking every step possible to isolate the Gaddafi regime, deprive it of money, shrink its power and ensure that anyone responsible for abuses in Libya will be held to account'[420]

In the beginning of March 2011 Obama then repeated his call for Gaddafi to step down, saying that: 'The U.S. and the entire world continues to be outraged by the appalling violence against Libyan people: […] Muammar el-Gaddafi has lost the legitimacy to lead, and he must leave'[421]. While the discussion within international community continued over the favourable measures to stop the violence in Libya, the first regional Organisation, the Gulf Cooperation Council, demanded a no-fly-zone and called upon the UNSC to act on the ongoing violence in Libya.[422] On March 8, the Secretary General of the Organisation of the Islamic Conference proclaimed the organisation's support for a no-fly-zone.[423] Obama as well as Cameron again repeated their call for Gaddafi's resign, stating that Gaddafi must go as quickly as possible.

Sarkozy rejected a military intervention asking: 'What kind of credibility would such intervention bring the people there?'.

[419] WAYATT, Edward, New York Times, 26. February 2011: *Security Council Calls for War Crimes Inquiry in Libya.* Available at: http://www.nytimes.com/2011/02/27/world/africa/27nations.html. The article further reports from a White House account of the telephone call between Obama and Merkel which said that Obama told Merkel that: 'when a leader's only means of staying in power is to use mass violence against his own people, he has lost the legitimacy to rule and needs to do what is right for his country by leaving now.'

[420] MULHOLLAND, Héléne, the Guardian, 28. February 2011: *Libya crisis: Britain mulling no-fly zone and arms for rebels, says Cameron*. Available at: http://www.guardian.co.uk/world/2011/feb/28/libya-muammar-gaddafi.

[421] SHEAR, Michael D., New York Times, 3. March 2011: *Obama Authorizes Airlift of Refugees From Libya.* Available at: http://www.nytimes.com/2011/03/04/world/middleeast/04president.html.

[422] LANDLER, Mark, New York Times, 5. March 2011: *Obama's choice: To Intervene or Not in Libya.* Available at: http://www.nytimes.com/2011/03/06/weekinreview/06protect.html?pagewanted=all&_r=0; SALAMA, Samir, Gulfnews, 9. March 2011: *GCC backs no-fly zone to protect civilians in Libya*. Available at: http://gulfnews.com/news/gulf/uae/government/gcc-backs-no-fly-zone-to-protect-civilians-in-libya-1.773448.'The Gulf Cooperation Council (GCC) demands that the UN Security Council take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya,"foreign ministers of the six-nation bloc said in a statement read out by outgoing Secretary-General Abdul Rahman Al Attiyah […] ." We call on the international community, especially the UN Security Council, to face their responsibilities in helping the dear people," Shaikh Abdullah said.'

[423] DEVLIN, Michelle, Allvoices, 8. March 2011: *Islamic Countries Demand No-Fly Zone over Libya.* Available at: http://www.allvoices.com/contributed-news/8415670-islamic-countries-demand-nofly-zone-over-libya. 'The Organisation of the Islamic Conference (OIC) has announced unequivocal support of a no-fly zone over Libya […]". We are joining voices demanding the imposition of a no-fly zone over Libya," said the Secretary General of the Organisation of the Islamic Conference (OIC), Ekmeleddin Ihsanoglu, and pressed the UN Security Council to live up to its responsibilities.'

Then the Arab League publically supported the implementation of a no-fly-zone.[424] From March 16 onwards the Obama administration also started to push for a no-fly-zone after the foreign ministers of the G8 could not find consent on the issue in the Paris meetings on March 14 and 15.[425] After UNSC Resolution 1973 (2011) was adopted the strong criticism was raised by the Secretary General of the Arab League Amr Moussa claiming that the military intervention of France and its allies went beyond the demanded no-fly-zone.[426] A Few days later after a meeting with Ban Ki-Moon Amr Moussa revised his statement.[427] The military intervention meanwhile was also criticised mainly by states that abstained in the vote on UNSC Resolution 1973 (2011). Particularly Russia, China and Germany criticised the military intervention for going too far and demanded a cease-fire. However, the intervention was also supported by various states and organisations, like the 'Contact Group', for example, which held its first meeting in Doha on the 13 of April. This coalition, which was later renamed 'Friends of Libya', was formed at the London Conference on March 29, 2011. 21 countries participated in the meeting, in addition to representatives of the EU, the UN, NATO, the Arab League, the Organisation of Islamic Conference, the African Union and the Cooperation Council for the Arab Gulf States.[428] The meeting was co-chaired by the United Kingdom and the State of Qatar.[429] Qatar's prime minister read the final statement of the summit in which the international 'Contact Group' on Libya called for Gaddafi to stand down as leader.[430]

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[424] See supra note 306.

[425] ERLANGER, Steven, New York Times, 15. March 2011: *G-8 Ministers Fail to Agree on Libya No-Flight Zone.* Available at: http://www.nytimes.com/2011/03/16/world/africa/16g8.html?_r=0; 'The eight most powerful industrialized nations failed to agree Tuesday on a no-flight zone or any other military operation to help the Libyan opposition, instead passing the problem to the UNSC by urging an undefined increase of pressure on the Libyan leader, Col. Muammar el-Qaddafi. France and Britain pressed for agreement on a no-flight zone, while Germany and Russia opposed the measure and the United States was cautious, officials said, speaking anonymously following diplomatic protocol'; LANDLER, Mark; BILEFSKY, Dan, New York Times, 16. March 2011: *Specter of Rebel Rout Helps Shift U.S. Policy on Libya.* Available at: http://www.nytimes.com/2011/03/17/world/africa/17diplomacy.html 'The prospect of a deadly siege of the rebel stronghold in Benghazi, Libya, has produced a striking shift in tone from the Obama administration, which is now pushing for the United Nations to authorize aerial bombing of Libyan tanks and heavy artillery to try to halt the advance of forces loyal to Col. Muammar el-Qaddafi.'.

[426] CODY, Edward, Washington Post, 20. March 2011: *Arab League condemns broad Western bombing campaign in Libya.* Available at: http://www.washingtonpost.com/world/arab-league-condemns-broad-bombing-campaign-in-libya/2011/03/20/AB1pSg1_story.html.

[427] CHULOV; Martin, the Guardian, 22. March 2011: *Arab League to reiterate backing for Libya no-fly zone.* Available at: http://www.guardian.co.uk/world/2011/mar/22/arab-league-libya-no-fly.

[428] Foreign & Commonwealth Office, Latest News, 13. April 2011: *Libya Contact Group: Chair's statement. Statement by Foreign Secretary William Hague following the Libya Contact Group meeting in Doha.* Available at: http://www.fco.gov.uk/en/news/latest-news/?id=583592582&view=News;

[429] Ibid.

[430] BBC News, 13. April 2011: *Libya: Gaddafi must step down, says ‚contact group'.* Available at: http://www.bbc.co.uk/news/world-africa-13058694.

Meanwhile the attacks on Gaddafi‘s forces and other military targets continued. The bombing of Libya intensified, also targeting Gaddafi’s residence and headquarters. These military strikes launched the debate over the legitimate targets of NATO under the UNSC mandate. More precisely, the question was raised whether it is legitimate to directly target Gaddafi and his family. NATO stated that it is not the intention to kill Gaddafi; rather, the goal is to weaken Gaddafi and to intensify the pressure on him in order to stop the killing of the Libyan population.[431]

Of particular significance within the debate of forceful regime change in Libya was the collectively published statement of Barack Obama, Nicolas Sarkozy and David Cameron in the International Herald Tribune in April 2011 stating that an end of violence as well as a future in peace and prosperity for the Libyan population can only be accomplished by Gaddafi’s withdrawal.[432] The article further forecasts that leaving Gaddafi in power would lead to further chaos and lawlessness and would ultimately turn Libya not only to a pariah state but also into a failed state. An extract of the article edited by the Prime Minister of Great Britan, the President of the United States and of France reads as follows:

> ‚Our duty and our mandate under U.N. Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Qaddafi by force. But it is impossible to imagine a future for Libya with Qaddafi in power. […]It is unthinkable that someone who has tried to massacre his own people can play a part in their future government. […] However, so long as Qaddafi is in power, NATO must maintain its operations so that civilians remain protected and the pressure on the regime builds. Then a genuine transition from dictatorship to an inclusive constitutional process can really begin, led by a new generation of leaders. In order for that transition to succeed, Qaddafi must go and go for good.‘[433]

Without doubt this statement of the three leaders was meant to clarify the intentions of the intervention in Libya as it clearly stated that the primary intention of the intervention was the protection of the civilians and not the removal of Gaddafi. This statement, however, at the same time clarified that the participating countries did not believe in a successful fulfilment of

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[431] SHANKER, Thom; SANGER, David E., New York Times, 26 April 2011: *NATO Says it is Stepping Up Attacks on Libya Targets.* Available at: http://www.nytimes.com/2011/04/27/world/middleeast/27strategy.html?_r=0.

[432] BARACK, Obama; CAMERON, David; SARKOZY, Nicolas, New York Times; International Herald Tribune, 14. April 2011: *Libya’s Pathway to Peace.* Available at: http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html

[433] Ibid.

their mandate with Gaddafi in power. Therefore, regime change certainly was articulated to be a necessary correlative of successful implementation of R2P in the case of Libya.

3.3. Conclusion

What can therefore be concluded from the reviewed statements of political leaders and international as well as regional organisations is that it certainly was common sense that Gaddafi had lost legitimacy in the light of killing his own people and had to step down from power. At the end those being involved in the conflict directly or indirectly were well aware of the fact that military intervention in Libya would at the same time cause a change of the regime in power, various actors even strongly demanded such and change of the regime as illustrated in this chapter. The question which arises when looking at the statements accomplishing the Libya conflict is to what extend forceful regime change always is a necessary condition or even a *sine qua non* of R2P. This question at the end can be answered rather clearly: if a regime does not fulfil its primary responsibility to protect its population from large scale loss of life, genocide or ethnic cleansing and even actively endangers or orders the killing of its population, like Gaddafi did, and the international community accordingly reacts in response to this failure by implementing R2P and protecting the population abroad then this mandate most likely can never be successfully fulfilled without destabilising or even dispossessing the authorities in charge. Therefore, in such situations forceful overthrow of those unwilling to protect the population is a necessary condition in order to safeguard the wellbeing of civilians. This can be done either by directly targeting the regime or facilitating regime change by supporting the insurgents or opposition. In Libya NATO certainly choose the more indirect path as it once had been chosen in the 'Operation Iraqi Freedom', nevertheless the outcome was the same in the end:[434] Both Gaddafi and Saddam Hussein were forcefully removed from power. Hence it can be concluded that forceful regime change and implementation of R2P often go hand in hand, despite the fact that R2P essentially aims to build a broader common sense of legitimated military intervention to protect people abroad and certainly does not want to get mixed up with the negatively afflicted intervention aiming at forceful regime change. R2P and regime change are contradictory as the aim of R2P is solely to help people who are at risk of large scale loss of life and not to get involved in any internal political conflict. At the same time R2P and forceful regime change are strongly linked to each other. One will find only very view cases

[434] HENDERSON, Christian (2011), 777.

where the international community intervenes militarily without the consent of the intervened state, implementing R2P, without at the same time undertaking forceful regime change, or destabilising the regime in power. R2P nevertheless aims to protect people at risk and therefore has an elementary different intention then pure forceful regime change, even though, as just illustrated often going hand in hand with it.

III. Conclusion

R2P and regime change, as just concluded in the previous chapter, are on the one hand very strongly linked to each other and on the other hand fundamentally different. R2P on the one hand is well established and institutionalised as well as being promoted by various states and international organisations, notwithstanding the sceptics and opposition which the doctrine still faces today. Nevertheless, the doctrine of R2P might once even become a general principle of international law and a binding norm. On the other hand, forceful regime change in the sense of external military intervention with the intention to change the regime in power is strictly forbidden by international law. Furthermore the existence of such a right to intervene militarily in order to change the regime of a foreign country is not claimed to exist neither by states nor my international organisations. Moreover the exceptions of the principle of sovereignty and the prohibition on the use of force which have been put forward concerning R2P do not apply to forceful regime change. In spite of these vast differences R2P and regime change are often associated with each other. This due to various reasons but most strongly due to the instance that guaranteeing the protection of people abroad can often only be fulfilled by destabilising the regime in power, in particular if the regime in power is the trigger and cause for this danger. Thus if the state itself endangers its' population, the only way to effectively protect the people at risk is to stop the regime from putting it's population at risk. The necessary means in order to prevent genocide, mass murder or ethnic cleansing are often, inter alia, destabilising or even disempowering the regime in charge of the atrocities. Precisely in these cases where the regime is involved in the actual or threatened large scale loss of life the doctrine of R2P gets mixed up and associated with forceful regime change, albeit the fact that the intention of changing the regime in power can never be a right intention within the framework of the R2P doctrine.

Hence the answer, of the question if R2P is necessarily linked to regime change or if regime change is a correlative of successful R2P policy, is twofold. One the one hand regime change has nothing to do with R2P and should not get mixed up with it, as so far as in accordance with the R2P framework, it can never be a legitimate intention of a military intervention to install a democratic or any other form of state via coercive means or to protect political rights of people abroad. On the other hand regime change, as illustrated in the Libya case, can be a side effect of effective R2P policy and even a correlative of it. This even, without violating the R2P framework, as long as the primary intention is to stop or prevent large scale loss of life and the just cause threshold is met. The proportional means to implement R2P might also

target the regime in power as so far as it is necessary to destabilise the regime in order to protect the population.

At the end it cannot be ignored that R2P is a mixed blessing. Not only the connection of R2P with forceful regime change is criticised due to the danger of opening doors for purely pro-western interventions hidden under humanitarian reasons but also the selectivity when implementing the concept gives profound reason to be sceptical. It cannot be denied that the decision to intervene is always a politically driven decision and is not, at least not yet, sufficiently bound on objectivised norms and rules. Nevertheless, the advancement of the threshold and additional just war criteria put forward by the ICISS does point to the right direction in order to create a clearer framework when it comes to military intervention to prevent the large scale loss of life of a population abroad. R2P certainly is not yet a well established principle of international law but at the same time it certainly is on the right track to become such a principle once.

At the bottom line however it still depends to a great extent on one's ideology if R2P is to be seen as hidden self-interest or as a norm shift within international affairs and security studies. It has often been questioned if the development since the end of cold war has humanised world politics or if in fact humanitarian help is just used to fulfil other interests.[435] It might seem naive to even consider a norm shift towards humanitarian standards when analysing history as well as the profit and economy orientated and self-centred world today. Nevertheless, developments like the concept of R2P, despite it's negative association with regime change, as well as being a response to a great failure of mankind like Rwanda and Srebrenica, does give profound reasoning for postulating such a norm shift towards certain normative standards.

The reluctant reactions of the UN concerning the uprising in Syria, especially at the very beginning of the conflict and the brutal reaction of the regime, were most disturbing especially in comparison to the very swift reaction in Libya. This Janus face of R2P demonstrates that responsibility to intervene for the sake of human life might be on track to become a general norm but has not yet reached universal acceptance. This is the case due to two factors: Firstly, states are cautious towards R2P because of the threat of abuse and secondly, they are reserved due to the fear of responsibility they might have to take once accepting it as universal norm of international affairs. Therefore, world politics is hardly predictable when it comes to R2P.

[435] BARNETT, Michael (2011), 5.

From a legal standpoint the concept of R2P itself did not change the prohibition on the use or threat of force outside the two exceptions of self-defence and UNSC authorisation.[436] Neither did the Libya intervention and the corresponding Resolution break new grounds on R2P or impose a legal obligation to intervene when the threshold of the R2P doctrine is met. Nevertheless, R2P as a doctrine has come far in a short time. Even if R2P does not create a legal obligation it does imply a political commitment towards the responsibility to protect population abroad. Hence, as Chesterman stated correctly, the true significance of R2P, at least at the *status quo*, might not be the creation of new rights or obligations to do 'the right thing', but rather lies in making it harder to do the wrong thing or nothing at all.[437]

[436] CHESTERMAN; Simon (2011), 282.
[437] Ibid.

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Zusammenfassung

Vor dem Hintergrund, der rasanten Zunahme von innerstaatlichen Konflikten, in denen immer mehr Zivilisten Opfer von Kriegsverbrechen werden, stellt sich die Frage nach einem Recht auf humanitäre Intervention. Es ist zu fragen, ob und unter welchen Umständen militärische Interventionen, ohne Einwilligung des betroffenen Staates, gebilligt und als legitim anerkannt werden sollten, um die Zivilbevölkerung eines Landes vor jenen Kriegsverbrechen zu beschützen, vor denen der eigene Staat sie nicht beschützen kann oder möchte.

Die Intention dieser Arbeit ist es, das sich langsam etablierende völkerrechtliche Konzept von „Responsibility to Protect“ (R2P), kritisch zu analysieren, den Werdegang darzustellen, die Problemfelder aufzuzeigen, sowie das Verhältnis von R2P zu Regimewechseln, anhand des Beispiels der militärischen Intervention in Libyen 2011, zu durchleuchten. Der Analyse der Libyen Intervention wird die systemimmanente Frage vorausgestellt, ob Regimewechsel und R2P derart miteinander verknüpft sind, dass erfolgreiche R2P-Politik Regimewechsel bedingt.

Abstract

Today, a declining number of armed conflicts are inter-state; instead we face the problem of a proliferation of internal armed conflicts with a rising number of civilians becoming victims of human rights violations, often even involving government-sponsored atrocities against non-combatants. These developments highlight the question of so-called right of humanitarian intervention and the question of when, if ever, it is appropriate for states to take coercive, and in particular military action, against another state, without it's consent, for the purpose of protecting people at risk in that other state.

The final Report of the International Commission on Intervention and State Sovereignty (ICISS), introduced the concept of Responsibility to Protect (R2P), and can be seen as an attempt to institutionalise a normative framework clarifying when forceful intervention in a sovereign state may be morally and legally legitimate.

This thesis intends to critically examine the concept of R2P, an emerging principle of international law, which reconceptualises humanitarian intervention and its relation to regime change. Furthermore, this thesis will aim to investigate whether the intervention in Libya 2011 was an example of the correct implementation of the R2P doctrine. This will require an assessment of whether forceful regime change is a necessary correlative of successful R2P policy.

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