

7-1-2012

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Recommended Citation

Alexandra T. Steele, *One Nation's Humanitarian Intervention is Another's Illegal Aggression: How to Govern International Responsibility in the Face of Civilian Suffering*, 35 Loy. L.A. Int'l & Comp. L. Rev. 99 (2012).
Available at: <http://digitalcommons.lmu.edu/ilr/vol35/iss1/4>

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One Nation’s Humanitarian Intervention is Another’s Illegal Aggression: How to Govern International Responsibility in the Face of Civilian Suffering

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I. INTRODUCTION

In February 2011, a civilian uprising demanding governmental reform and the displacement of longtime leader Colonel Muammar Qaddafi emerged in Libya.¹ By mid-February, Qaddafi had instituted a regime of military force and violence in opposition to the uprising.² In Tripoli, the military used gunfire to “disperse thousands of protestors who streamed out of mosques after prayers” and mounted a challenge to the government’s crackdown.³ Quickly, what appeared to be an organized core of antigovernment opponents emerged and the rebel army asserted itself as an alternative to Qaddafi’s rule.⁴ By the end of February, the United Nations Security Council (“UNSC”) unanimously adopted Resolution 1970, condemning violence and human rights violations, calling the Resolution “a vital step—a clear expression of the will of a united community of nations.”⁵ On March 1, 2011, the United

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1. Alan Cowel, *Protests Take Aim at Leader of Libya*, N.Y. TIMES, (Feb. 16, 2011), available at http://www.nytimes.com/2011/02/17/world/middleeast/17libya.html?_r=0.

2. Kareem Fahim & David D. Kirpatrick, *Gaddafi Makes Surprise Appearance as Protests Continue*, NDTV (Feb. 26, 2011), <http://www.ndtv.com/article/world/gaddafi-makes-surprise-appearance-as-protests-continue-87975>.

3. *Id.*

4. *Id.*

5. Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187 (Feb. 26, 2011) [hereinafter *Tough Measures on Libyan Regime*], available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>.

States Senate adopted Resolution 85, which further condemned violence and human rights violations, called on Qaddafi to desist from violence, and called on the UNSC to institute a no-fly zone over Libyan territory.⁶ By mid-March, others in the Muslim world including the African Union, the Organization of the Islamic Conference, and the Council of the League of Arab States, joined in condemning Libya and urged imposition of a no-fly zone.⁷

Qaddafi failed to comply with Resolution 1970. In response, the UNSC passed Security Council Resolution 1973 authorizing a no-fly zone over Libya and empowering member states to take “all necessary measures” to enforce the ban.⁸ Once again, Qaddafi failed to comply.⁹ On March 19th, 2011, the United States, in conjunction with NATO members, launched an air strike to enforce Resolution 1973.¹⁰

As NATO, member states, and the Libyan rebels advanced against Qaddafi, and the toppling of the Qaddafi regime appeared imminent, post-intervention criticism of NATO and the UNSC emerged.¹¹ While many Westerners rejoiced at the end of Qaddafi’s rule and saw it as an end to crimes against humanity, others saw NATO and U.S. involvement in Libya as nothing more than the advancement of a Western political and policy agenda.¹²

Questions rise to the surface: was NATO’s mission in Libya really humanitarian in nature, or was it an inappropriate intervention in a sovereign state’s civil war? If the latter, was this not a violation of international law, and in particular, the UN Charter? How does NATO decide which parts of the world qualify for their “humanitarian intervention” missions? If NATO will enter Libya to protect civilian human rights, why was the same not done for Syria? If violations of the UN Charter have taken place, as well as potential war crimes in the

6. Caroline D. Krass, *Authority to Use Military Force in Libya*, 35 Op. Att’y Gen. 1 (2011), available at <http://justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

7. *Id.*

8. Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilian, By Vote of 10 in Favour with 5 Abstentions, U.N. Doc. SC/10200 (Mar. 17, 2011), available at <http://www.un.org/News/Press/docs/2011/sr10200.com.htm#Resolution>.

9. Louis Charbonneau, *No Sign Gaddafi Complying with UN Demands: Ban*, THOMSON REUTERS, Mar. 25, 2011, available at <http://af.reuters.com/article/topNews/idAFJJOE72O02E20110325?sp=true>.

10. Curtis Doebbler, *The Use of Force Against Libya: Another Illegal Use of Force*, JURIST (Mar. 20, 2011), <http://jurist.org/forum/2011/03/the-use-of-force-against-libya-another-illegal-use-of-force.php>.

11. *Id.*

12. *Id.*

perpetration of “humanitarian intervention,” what are the available remedies?¹³ Finally, if there are no remedial measures in instances of violation, have the UNSC and NATO permanently expanded and redefined the “peace and security” exception of the UN Charter with regard to the use of force?

This Note will argue that the “peace and security” exception that justified the use of force in Libya and, in particular, its “humanitarian” sub-exception, not only sets a dangerous precedent, but also violates international law. Part I will set forth the history and the exceptions to the use of force in the UN Charter specifically focusing on “humanitarian intervention” and its newer, controversial form, the “Responsibility to Protect.” Part II will address whether the Responsibility to Protect, before and after its implementation in Libya, is an emerging norm of customary international law. Part III discusses the inherently political nature of decisions to use military force, in particular how the international community decides to use military force only in select countries. In the case of Libya and Syria, political and policy agendas clearly are at the core of that decision despite the UN Charter’s express prohibition against such rationale. In particular, the article will examine the specific acts of NATO and member states that tend to show that the use of force is being used to advance a political and policy agenda, in direct contradiction of the requirements of the UN Charter.

Part IV lays out the impact of the Libya intervention on the UNSC, and the UN Charter’s prohibition against the use of force. Further, the Note argues that revelations surrounding the Libyan intervention pose particular challenges to the legitimacy of the Responsibility to Protect doctrine, and that in its current form, it threatens to render the Charter’s prohibition against the use of force irrelevant.

Part V proposes remedial measures that delineate and set boundaries on actions taken under the Responsibility to Protect. These measures would prevent its use as cover by NATO member states to advance their own agendas as opposed to serving the doctrine’s true purpose to mitigate humanitarian crisis. The remedial measures proposed focus on using the tools of the International Criminal Court,

13. Elena Papadopoulou, *The Impact of SC Res. 1970/2011 on the Obligation of UN Member States Under the Rome Statute and Some Reflections on the Immunities of Libyan Officials*, 27 INT’L ENFORCEMENT L. REP. 731 (2011). While many parties to the UN Charter are subject to the jurisdiction of the International Criminal Court (“ICC”), some members, in particular the United States, are not.

the International Court of Justice, and the veto power of UNSC voting members.

This Note will conclude that the UN Charter has been violated for the following reasons: (1) the Charter requires that members refrain from intervening in matters that are primarily domestic (i.e. civil war) yet NATO's Libyan intervention has done just that; (2) the lack of fact-finding to determine violations of the UNSC Resolutions and human rights prior to NATO's military campaign in the region provides insufficient affirmation that the use of force was a measure of last resort; and lastly, (3) NATO took the side of the rebels, thus advancing a political agenda in direct violation of the Charter. For these reasons, the Libyan intervention cannot be justified under the Responsibility to Protect. Finally, in order to maintain the integrity of the UN Charter, the UN's political and judicial organs, and the legal standing of the Responsibility to Protect, the international legal community must develop measures that instill strict limits on further authorization and discharge of military intervention under the peace and security/humanitarian exception to the long standing *jus cogens* prohibiting the use of force.

II. THE HISTORY OF THE UN CHARTER AND THE USE OF FORCE

A. *The Prohibition Against the Use of Force*

The United Nations Charter, created in 1945, sets out specific guidelines and principles for its members.¹⁴ Specifically, Article 2(4) prohibits the use of force to advance political or policy agendas, "or in any other manner inconsistent with the Purposes of the United Nations."¹⁵ This prohibition is binding "on states both individually and as members of international organizations, such as NATO, as well as on those organizations themselves."¹⁶ Further, Article 2(7) provides that nothing in the UN Charter "shall authorize the United Nations to intervene in matters which are essentially within domestic jurisdiction of any state."¹⁷

The UN Charter's prohibition of the use of force carries with it the

14. *Charter of the United Nations: Introductory Note*, UNITED NATIONS, available at <http://www.un.org/en/documents/charter/intro.shtml> (last visited Mar. 15, 2013).

15. U.N. Charter art. 2, para. 4.

16. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 3 (1999).

17. U.N. Charter art. 2, para. 7.

norm of *jus cogens* – “a principle having status of such a peremptory norm” of general international law.¹⁸ This is supported “most notably in the *Nicaragua* judgment of the International Court of Justice” (“ICJ”) in which the ICJ based its decision on customary international law naming the prohibition of the use of force as a “fundamental or cardinal principle of such law.”¹⁹ Additional judicial organs have analyzed the use of force such as the International Tribunal on the Law of the Sea.²⁰ The International Tribunal on the Law of the Sea held that “the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.”²¹

B. Exceptions to the Use of Force

Under the UN Charter, the use of force is only permitted in two instances.²² The first exception to the prohibition against the use of force is self-defense.²³ A second, more recently emerging, exception allows the use of force when necessary to maintain “peace and security.”²⁴ From 1990 to 1994, the UNSC considered and passed twice as many resolutions as it had in its entire history on what constituted threats to international peace and security under Chapter VII of the UN Charter, thus expanding it to include humanitarian concerns.²⁵

1. Humanitarian Intervention

The “peace and security” exception that now arguably includes the protection of humanitarian interests was, and remains, quite controversial.²⁶ The humanitarian intervention exception to the

18. NICO SCHRIJVER, *Challenges to the Prohibition To Use Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Gall Too Much?*, in *THE SECURITY COUNCIL AND THE USE OF FORCE – THEORY AND REALITY – A NEED FOR CHANGE?* 31, 39 (Niels Blokker & Nico Schrijver, eds., Martinus Nijhoff Publishers, 2005).

19. *Id.*; Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 125, ¶ 243 (June 27).

20. SCHRIJVER, *supra* note 18, at 40.

21. *Id.*

22. Simma, *supra* note 16, at 3.

23. *Id.*

24. Richard Falk, *Preliminary Libyan Scorecard: Acting Beyond the U.N. Mandate*, CITIZEN PILGRIMAGE (Sept. 6, 2011), <http://richardfalk.wordpress.com/2011/09/06/preliminary-libyan-scorecard-acting-beyond-the-un-mandate/>.

25. Rebecca J. Hamilton, Note, *The Responsibility to Protect: From Document to Doctrine – But What of Implementation?*, 19 HARV. HUM. RTS. J. 289–97 (2006).

26. *Id.*

prohibition of the use of force is a tangled web – many argue that the use of force for humanitarian purposes should not be denied in cases where genuine action is needed.²⁷ Yet “the doctrine is prone to abuse for other than humanitarian purposes.”²⁸ The “humanitarian” peace and security exception itself has been called a violation of international law because while humanitarian intervention “may be an ‘emerging norm,’ it is not yet an established principle of international law.”²⁹ In the ICJ’s ruling on U.S. military activities in Nicaragua during the 1980s, the court declared, “the use of force could not be the appropriate method to monitor or ensure such respect [for human rights].”³⁰ Following the ICJ’s issuance of its decision in *Nicaragua*, the United Kingdom Foreign Office commented on unauthorized ‘humanitarian intervention,’ noting, “its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.”³¹

The resistance to “humanitarian intervention” has its basis in the UN Charter itself as an instrument of decolonization – extending the notion of sovereign equality.³² The resulting legal order represents a formal commitment to anti-colonial nationalism, self-determination, and to the protection of human rights.³³ Critics argue that to use human rights as the justification for military intervention of allegedly sovereign states is to “betray” the original purpose of the Charter, allowing for and protecting the equality of individual states, and is a new form of imperial domination.³⁴

Critics of intervention further claim that the use of force in the name of humanitarianism is not truly aimed at protecting human rights, but rather about pushing a political or policy agenda.³⁵ Interventions undertaken in Somalia, Liberia, Rwanda, Haiti, Sierra Leone, and Kosovo have led many “to posit the emergence of a challenge to the

27. *Id.*

28. SCHRIJVER, *supra* note 18, at 39

29. Craig Martin, *The Legal Implications of Military Intervention in Libya*, HUFFINGTON POST (Mar. 2, 2011), http://www.huffingtonpost.com/craig-martin/the-legal-implications-of_b_830089.html.

30. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 134–35 (June 27).

31. Simma, *supra* note 16, at 5.

32. ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW*, 19–20 (James Crawford, et. al. eds., 2003).

33. *Id.* at 43.

34. *Id.*

35. Falk, *supra* note 24.

assumed inviolability of state sovereignty.”³⁶ A report issued by the International Commission on Intervention and State Sovereignty (“ICISS”) identifies the different tensions at play in the debate on intervention:

For some, the international community is not intervening enough; for others it is intervening much too often. For some, the only real issue is in ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger. For some, the new interventions herald a new world in which human rights trump state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights.³⁷

A compelling narrative, principally characterized by its “humanitarianism,” justifies intervention in sovereign states. This humanitarian narrative, equipped with traditional storytelling tools, and further embellished by the media – through photos, news bites and punditry - has succeeded in presenting a convincing story that appeals to deeply engrained Western ideologies of democracy and good and evil.³⁸ This narrative is primarily heroic in nature,³⁹ calling forth stories of “rogue states, ruthless dictators and ethnic tensions as threats to the established liberal international order.”⁴⁰ Those peddling intervention craftily paint the UNSC as a benevolent patriarch⁴¹ or UN peace-keepers as the “[k]night in [w]hite [a]rmour.”⁴²

Despite arguments against the practice of humanitarian intervention, the narrative of justification has won. International law has arguably been broken at least twice since *Nicaragua*. Military force was used without UNSC authorization prior to humanitarian intervention in both Kosovo and Iraq.⁴³ In the 1999 Kosovo conflict, for example, NATO justified intervention by relying on widely accepted norms

36. Hamilton, *supra* note 25, at 289.

37. Max W. Matthews, *Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur*, 31 B.C. INT’L & COMP. L. REV. 137, 140 (2008) (quoting ICISS Report).

38. See ORFORD, *supra* note 32.

39. *Id.* at 158.

40. *Id.* at 164.

41. *Id.* at 167.

42. See CHRISTOPHER BELLAMY, *KNIGHTS IN WHITE ARMOUR: THE NEW ART OF WAR AND PEACE* (1997) (discussing UN peace-keepers in the “new world order.”).

43. *Id.*; Abraham D. Sofaer, *The International Court of Justice and Armed Conflict*, 1 NW. J. INTL. HUM. RTS. 4 (2004).

incorporated in treaties such as the Genocide Convention, the Laws of War, and the Geneva Convention.⁴⁴ Both the interventions in Kosovo and Iraq were supported by NATO's moral authority but conspicuously lacked legal authority.⁴⁵ Legal commentators abashedly duck their heads, rationalizing the illegality of humanitarian intervention by arguing that "hard cases" do occur, and these hard cases leave state actors no choice but to act outside the law.⁴⁶ Furthermore, these circumventions of the international law proscription on the use of force have not, as of yet, led to repercussions of any sort.⁴⁷

Former Secretary General Kofi Annan delivered a convincing blow to the state sovereignty argument in his Millennium Report of 2000 when he rebuffed the notion that intervention is tantamount to meddling with a state's internal affairs.⁴⁸ Annan asked: "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?"⁴⁹

The Independent International Commission on Kosovo further highlighted the tension between legality, the need for protection of human rights through intervention, and the use of force. It concluded that NATO's use of force against Serbia was "illegal, but legitimate."⁵⁰ Given the level of dissent by critics of intervention in places like Kosovo, and the failed attempts at intervention in places like Rwanda, it became clear that the doctrine of humanitarian intervention was due for a facelift. Without a serious re-thinking of the interventionist approach, the humanitarian justification could not be codified in international law.⁵¹

The convincing and now prevailing voices favoring intervention for humanitarian reasons reframed concepts of sovereignty and started

44. Soafer, *supra* note 43, ¶ 17.

45. *Id.* ¶ 19.

46. ORFORD, *supra* note 32, at 164.

47. Falk, *supra* note 24, at 4–5.

48. U.N. Secretary General, *We the Peoples: The Role of the United Nations in the 21st Century: Rep. of the Secretary-General*, 48, U.N. Doc. A/54/2000 (Sept. 6–8, 2000) [hereinafter *United Nations, We the Peoples*].

49. *Id.*

50. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 4 (2000).

51. Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF. (Nov.–Dec. 2002), <http://www.foreignaffairs.com/articles/58437/gareth-evans-and-mohamed-sahnoun/the-responsibility-to-protect>.

to develop a potentially more palatable doctrine.⁵² Instances of illegal but justified violations of international law would now be delineated, and defined in an acceptable manner. A new prism through which to address these issues and attempt – or, at least *appear* – to act in compliance with international law was conceived. Thus came the introduction of the Responsibility to Protect.⁵³

2. The Responsibility to Protect

In 2001, international rights leaders affiliated with the ICISS, issued a report on the Responsibility to Protect. The report was intended to reconcile the many problems with humanitarian intervention, define the international community's responsibilities in the face of crimes against humanity, and formulate a legal and humane framework for when and how intervention should be implemented.⁵⁴ In 2005, at the 60th session of the UN General Assembly, the member states “unanimously endorsed” the Responsibility to Protect.⁵⁵ The Responsibility to Protect requires member states to protect the world's populations from “genocide, war crimes, ethnic cleansing, and crimes against humanity” which “are deemed to be part of international jus cogens.”⁵⁶

The framers of the doctrine argued that the Responsibility to Protect is foundationally “consistent with the core claims of sovereignty.”⁵⁷ Fundamental to the notion of State sovereignty is a responsibility of the State itself to protect the people of the State.⁵⁸ When a population is suffering from crimes due to internal conflict, and the State is unable, or unwilling, to protect them, the principle (and law)

52. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) (hereinafter ICISS Report).

53. See *id.*

54. *History and Timeline of R2P*, R2P COALITION, <http://r2pcoalition.org/content/view/22/48/> (last visited Mar. 15, 2013).

55. *Id.*

56. Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Cote d'Ivoire, Libya, and the Responsibility to Protect*, 87 INT'L. AFFAIRS 824, 827 (2011) (discussing the international society's response to the humanitarian crises in Libya and the Cote d'Ivoire and the new politics of protection that has developed over the past decade); Ekkehard Strauss, *A Bird in the Hand is Worth Two in the Bush*, in THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW, 25, 49, (Alex J. Bellamy, Sara E. Davies & Luke Glanville eds., 2011).

57. Edward C. Luck, *Sovereignty, Choice and the Responsibility to Protect*, THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 14, 17 (Alex J. Bellamy et al. eds., 2011).

58. Int'l Commission On Intervention and State Sovereignty, *The Responsibility to Protect*, Rep. (Dec. 2001) (hereinafter ICISS Report).

of non-intervention should “[yield] to the international responsibility to protect.”⁵⁹ Proponents of intervention claim that the issue of State sovereignty would be moot unless a State was to insist it had a right to commit humanitarian crimes against its people.⁶⁰ Only in these instances, where the claim of sovereignty is illegitimate and illegal, might a State interfere. Sovereignty “need not pose a barrier, legally or politically, for Responsibility to Protect.”⁶¹ Others take a stronger position, suggesting that the Responsibility to Protect stands for the proposition that national governments do not possess an absolute right of sovereignty. Rather, that right is earned.⁶²

In 2001, the ICISS and the UN High-level Panel on Threats, Challenges, and Change Report outlined the factors to consider in making the decision to intervene.⁶³ The responsibility to use coercive military measures only arises when prevention and other coercive but non-military measures fail.⁶⁴ Security Council authorization of military action is only considered in extreme circumstances or for “just cause.”⁶⁵ Just cause is defined as the “large scale loss of life . . . which is a product either of deliberate state action, or state neglect or inability to act . . . or large scale ‘ethnic cleansing’ . . . carried out by killing, forced expulsion, acts of terror or rape.”⁶⁶ When these situations present themselves, the Responsibility to Protect requires sufficient evidence and facts to warrant intervention.⁶⁷

Where there is cause, but before the Security Council authorizes intervention, it must also consider several additional factors: (1) the seriousness of the threat, (2) whether the action would be undertaken for the proper purpose, (3) whether military action is the last resort, (4) whether the action proposed is proportional, and (5) whether the consequences of military action outweigh the benefits.⁶⁸ The

59. *Id.*

60. Luck, *supra* note 57, at 17.

61. *Id.*

62. Michael Contarino & Selena Lucent, *Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 193, 196 (Alex J. Bellamy et al. eds., 2011).

63. ICISS Report, *supra* note 58, at 32.

64. *Id.*

65. *See id.* at 29, 32; *see also* U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, *Rep. of the Secretary-General's High-level Panel on Threats, Challenges, and Change*, U.N. Doc A/59/565 (Dec. 2, 2004) [hereinafter U.N. High-Level Report].

66. ICISS Report, *supra* note 58, at 32.

67. *Id.* at 34.

68. U.N. High-level Report, *supra* note 65, at 67.

Responsibility to Protect comes with the post-intervention obligation to ensure that the problems that provoked intervention do not recur or resurface.⁶⁹ The development of this specific framework has paved the way for the Responsibility to Protect to become international law.

III. THE RESPONSIBILITY TO PROTECT AS AN EMERGING NORM OF CUSTOMARY INTERNATIONAL LAW PRIOR TO NATO'S INTERVENTION IN LIBYA

The ICJ defines customary law as “the general practice accepted as law.”⁷⁰ “[C]ustomary law may come into existence by virtue of State practice, which entails elements of consistency of practice, generality of practice and duration, as well as *opinio juris*.”⁷¹ Gareth Evans, the main author of the Responsibility to Protect ICISS report, stated, “There is not yet a sufficiently strong basis to claim the emergence of . . . something as formal as a new principle of customary international law.”⁷² Furthermore, “while the original ICISS report did not explicitly call for legal reform to enshrine [Responsibility to Protect], the Commissioners did leave the impression that international morality and international law should be more closely aligned.”⁷³ Evans’ statement reflects the hope of the proponents of the humanitarian concept that the Responsibility to Protect will in fact become international law.⁷⁴ Some argue that the newly labeled Responsibility to Protect, and the non-binding general assembly document may satisfy the *opinio juris* requirement.⁷⁵ Other dedicated champions of the Responsibility to Protect go a step further and say that the concept, even prior to Libya, backed with the “custom” of humanitarian intervention, is already an emerging norm.⁷⁶ Yet, humanitarian intervention was never a legally fortified doctrine.⁷⁷ It follows then that the Responsibility to Protect is not international law.⁷⁸

69. ICISS Report, *supra* note 58, at 39.

70. Olof Leps, *Responsibility to Protect: A Political Norm or a Customary Law?*, PUB. POL’Y & L. EU (Jun. 23, 2010), <http://quovadis europe.blogspot.com/2010/06/responsibility-to-protect-political.html> (citing the Statute of the International Court of Justice (San Francisco, June 26, 1945)).

71. ICISS Report, *supra* note 58, at 39.

72. *Id.*

73. *Id.*

74. *Id.* at 135.

75. Leps, *supra* note 70.

76. Matthews, *supra* note 37, at 147–48.

77. Leps, *supra* note 70.

78. *Id.*

The main factor that prevents the Responsibility to Protect from becoming customary law is the inconsistency with which humanitarian intervention has been practiced.⁷⁹ Military operations have often commenced without UNSC authorization—for example, “the 1999 NATO aggression against Serbia in the Kosovo conflict was unauthorized, illegal and ‘condemned by China, Russia, and India.’”⁸⁰ As consistency and state practice are requirements for customary law, global condemnation of these recent interventions on the grounds of humanitarian crisis weigh against the grant of such status.⁸¹ So at this point, the Responsibility to Protect remains a mere suggestion, and intervention in Libya on this basis is still arguably illegal. The implications of the Libyan intervention on the Responsibility to Protect’s progress toward customary international law will be discussed below.

IV. THE INHERENTLY POLITICAL NATURE OF DECIDING WHERE TO INTERVENE

At first glance, the 2011 situation in Libya appeared to be a case for international humanitarian intervention.⁸² Though Qaddafi was waging war against Libyans,⁸³ Mary Ellen O’Connell, critic of the Responsibility to Protect, argued that it was unclear whether the doctrine’s requirement of just cause was truly met.⁸⁴ When the bombing in Libya began, Western leaders compared the situation in Libya to Rwanda and Bosnia. O’Connell made the distinction; UN Peacekeepers were present in Rwanda to protect unarmed civilians against genocide. Qaddafi on the other hand, was arguably fighting a civil war—insufficient support for just cause.⁸⁵

The initial measures, specifically UNSC Resolution 1973 and its sanctions, were not allowed to fully take effect before NATO undertook military intervention.⁸⁶ “The intervention was not a last resort.

79. Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine—But What of Implementation?*, 19 HARV. HUM. RTS. J. 289 (2006) (showing inconsistent state practice “precludes the development of customary law.”).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Mary Ellen O’Connell, *The Libyan Intervention: A Victory for War?*, PEACE POL’Y (Oct. 5, 2011), <http://peacepolicy.nd.edu/2011/10/05/the-libyan-intervention-a-victory-for-war/>.

85. *Id.*

86. See Doebbler, *supra* note 10.

Sanctions, including an arms embargo, had hardly been put in place when the bombs began to fly.”⁸⁷ Despite the Responsibility to Protect’s requirement for fact-finding prior to turning to the “last resort,” i.e. military intervention, NATO began its mission before definitive evidence of Libya’s non-compliance had been proved.⁸⁸ Libya invited international monitors to visit their country, but this invitation was not accepted.⁸⁹ The “[f]act-finding mission by the UN Human Rights Council and the Security Council [had] not yet gone to Libya” when NATO began military action in March 2011.⁹⁰

*A. Political and Economic Interests in the Region
as Justification for Intervention: Oil and Lockerbie*

According to Gareth Evans, several tests must be met to authorize the implementation of the Responsibility to Protect.⁹¹ One such test is making sure that the primary purpose for the “proposed military action is to halt or avert the threat in question.”⁹² Evans claims that Libya passed this test – if the primary motivator to intervene in Libya had been regime change or oil, the Arab League or Security Council support would never have been achieved.⁹³ Yet many factors contradict Evans’ contention.

The Centre International de Recherches et d’Etudes sur La Terrorisme & l’Aide aux Victimes du Terrorisme⁹⁴ Report (“CIRET – AVT”) holds that because Libya is an oil rich country, NATO, particularly the United States, has an interest in seeing a cooperative, NATO-friendly regime in Libya.⁹⁵ Libya possesses the largest oil reserves in Africa and, before the uprising, was the world’s 12th largest oil exporter, though mostly to European markets.⁹⁶ Even in recent years,

87. O’Connell, *supra* note 84.

88. Doebbler, *supra* note 10.

89. *Id.*

90. *Id.*

91. Gareth Evans, Chancellor of the Austl. Nat’l Univ., Lecture on Law and Human Rights: Implementing the Responsibility to Protect: Lessons and Challenges, (May 5, 2011), *available at* <http://www.gevans.org/index.html>.

92. *Id.*

93. *Id.*

94. “The International Center for Research and Studies on Terrorism and Aid of Terrorism Victims.”

95. CENTRE INTERNATIONAL DE RECHERCHES ET D’ETUDES SUR LA TERRORISME & L’AIDE AUX VICTIMES DU TERRORISME REPORT, LIBYA: AN UNCERTAIN FUTURE – REPORT ON A FACT FINDING MISSION TO ASSESS BOTH SIDES OF THE LIBYAN CONFLICT (2011) [hereinafter CIRET-AVT Report].

96. Alexander Belenky, *Libya After Gaddafi Could Mean Good News for Obama, U.S.*

the United States has considered Qaddafi a quasi-ally, albeit a potentially unreliable one. In 2004, President Bush negotiated with Qaddafi to ensure the United States would have a stake in the portion of Libya's oil reserves that were previously unavailable to the U.S. oil industry.⁹⁷ To tap this reserve, President Bush lifted the economic sanctions against Libya that had been in place since the 1988 Lockerbie bombing.⁹⁸

During the 1970s, Libya's oil output had soared to three million barrels a day.⁹⁹ By 2004 this number decreased drastically to just about 1.5 million barrels a day.¹⁰⁰ Qaddafi hoped that in exchange for his promise to renounce nuclear weapons and terrorism, the introduction of U.S. oil companies back into the region would lift Libya's sagging oil production.¹⁰¹ As time passed, it became clear that Qaddafi was not as cooperative as the United States would have liked.¹⁰² In 2007, it became evident that the Libyan leader was making a push for Libyan resource nationalism—"Labor laws were amended to 'Libyanize' the economy, and oil firms were pressed to hire Libyan managers, finance people and human resources directors."¹⁰³ A U.S. State Department cable read: "Those who dominate Libya's political and economic leadership are pursuing increasingly nationalistic policies in the energy sector that could jeopardize efficient exploitation of Libya's extensive oil and gas reserves."¹⁰⁴

Tension continued to mount between the United States and Qaddafi.¹⁰⁵ In 2008, the U.S. Congress passed a bill that allowed easier access to reparations for the surviving families of the Lockerbie bombings.¹⁰⁶ According to the State Department cable, Libya threatened

Economy, HUFFINGTON POST (Aug. 23, 2011), www.huffingtonpost.com/2011/08/23/libya-gaddafi-obama-economy_n_933837.html.

97. Steven Mufson, *Conflict in Libya: U.S. Oil Companies Sit on the Sidelines as Gaddafi Maintains Hold*, WASH. POST (June 10, 2011), http://www.washingtonpost.com/business/economy/conflict-in-libya-us-oil-companies-sit-on-sidelines-as-gaddafi-maintains-hold/2011/06/03/AGJq2QPH_story_2.html.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (noting that the U.S. passed a bill to make it easier for victims of the Lockerbie Bombings to go after Libyan assets, making Qaddafi "livid").

106. *Id.*

to significantly curtail its oil production to penalize the United States.¹⁰⁷ Oil prices began to creep upward, “which spiked globally in February [2011] as the flow of oil from Libya dried to a trickle.”¹⁰⁸ Indeed, this posed problems for the oil dependent and ailing U.S. economy.¹⁰⁹ Qaddafi’s decreased willingness to participate “efficiently” in oil exportation became a significant motive for the United States and other NATO allies to want Qaddafi expunged from Libya.¹¹⁰ With Qaddafi gone, the country’s oil production could go back “online.”¹¹¹

This strategy successfully led to a drop in the price of oil – “the news of the rebels’ success [affected] Brent crude, which is used to price many international oil varieties, dropping 92 cents.”¹¹² With President Obama’s approval rating suffering due to the economy,¹¹³ U.S. involvement in the successful deposing of Qaddafi made an appealing additive for the President’s political punch as the 2012 election neared.

In addition to the U.S. interest in Libya’s oil reserves, the United States was concerned with China’s growing influence in the region.¹¹⁴ Further, because China had made significant investments in energy in Libya, military intervention in Libya first provided an excuse to evacuate the twenty-nine thousand Chinese who live there, and secondly to ensure the replacement of China-friendly Qaddafi with a new regime less favorable to China.¹¹⁵

For the United States, oil and financial gain were not the only reasons to seek a new regime in Libya. The Libyan perpetrators of the 1988 Pan Am Flight bombing over Lockerbie, Scotland¹¹⁶ still remain unpunished.¹¹⁷ In September 2011, four republican U.S. Senators visited

107. *Id.*

108. Belenky, *supra* note 96.

109. *Id.*

110. Mufson, *supra* note 97.

111. Belenky, *supra* note 96.

112. *Id.*

113. *Id.*

114. *See China’s Evolving Foreign Policy: The Libyan Dilemma*, *ECONOMIST* (Sept. 10, 2011), available at <http://www.economist.com/node/21528664>.

115. *Id.*

116. In 1988, Pan Am Flight 103 between London and New York was destroyed by a bomb over Lockerbie, Scotland. After a protracted F.B.I. investigation, a Libyan intelligence official was found responsible. Qaddafi’s lack of cooperation in punishing the official resulted in U.S. sanctions against Libya. *Time Line: The Bombing of Pan Am Flight 103*, *WASH. POST*, <http://www.washingtonpost.com/wp-srv/inatl/longterm/panam103/timeline.htm> (last visited Feb. 15, 2013).

117. *See* Kareem Fahim & Rick Gladstone, *U.S. Senate Delegation Offers Praise and Caution to Libya’s New Leaders*, *N.Y. TIMES* (Sept. 29, 2011), <http://www.nytimes.com/2011/09/30/world/africa/senate-delegation-offers-praise-and-caution-to->

the post-Qaddafi Libya and “raised the delicate subject of prosecuting” the Lockerbie bombers.¹¹⁸

With its considerable influence, due to disproportionate financial and human contributions to NATO military actions, these looming U.S. interests were likely a driving force behind the decision to move past initial coercive measures.¹¹⁹

B. *Libya, but Not Syria, Bahrain, or Yemen*

Some argue that the UNSC and NATO are inconsistent, even hypocritical, in their application of the Responsibility to Protect.¹²⁰ Continued “U.S. support of the Yemeni and Bahraini regimes as they brutally suppress nonviolent pro-democracy protesters raises questions as to why the U.S. [was] so quick to intervene militarily against the Libyan regime suppressing an armed rebellion by those whose commitment to democracy is more suspect.”¹²¹ Further, even as Qaddafi’s regime was formally ended by his public death, and as his top officials are now facing prosecution by the ICC,¹²² NATO’s Secretary General announced in October 2011 that NATO had “[n]o intention whatsoever” to enter Syria.¹²³ Several factors have been cited as the reasoning behind NATO’s decision to intervene in Libya and not Syria.

Director of research at the Brookings Doha Center in Qatar, Shadi Hamid, opined that there is significantly more danger of the Syrian regime causing trouble in the region.¹²⁴ UNSC authorization is inherently political in nature and the powerful member states have pull

libyas-new-leaders.html.

118. *Id.*

119. See CARL EK, CONG. RESEARCH SERV., RL 30150, NATO COMMON FUNDS AND BURDEN SHARING: BACKGROUND AND CURRENT RESEARCH SERVICE (2010), available at <http://fpc.state.gov/documents/organization/142718.pdf>.

120. Shadi Hamid, *Is Intervening in Libya in American Interests?* DEMOCRACY ARSENAL (Mar. 19, 2011), <http://www.democracyarsenal.org/2011/03/is-intervening-in-libya-in-american-interests.html>.

121. Stephen Zunes, *Libya, the ‘Responsibility to Protect,’ and Double Standards*, HUFFINGTON POST (Mar. 28, 2011), http://www.huffingtonpost.com/stephen-zunes/libya-the-responsibility-_b_841168.html?

122. *Lead: Libya Says It Will Prosecute Gaddafi’s Son, Former Officials Eds: Adds Quotes by Libyan Official*, EUR. ONLINE MAG. (May 5, 2012), http://en.europeonline-magazine.eu/lead-libya-says-it-will-prosecute-gaddafis-son-former-officialseds-adds-quotes-by-libyan-official_210428.html.

123. Brian Murphy, *Syria: NATO Will Not Intervene*, HUFFINGTON POST (Oct. 7, 2011), http://www.huffingtonpost.com/2011/10/07/syria-nato-intervention_n_1000153.html.

124. Brian Murphy, *Syria’s Risks Mute Talk of Libya Style Action*, GUARDIAN (Oct. 7, 2011), <http://www.guardian.co.uk/world/feedarticle/9884472>.

when protecting their interests.¹²⁵ Intervention in Syria is dangerous for the United States because anti-Western sentiment is easily spread in the region.¹²⁶ Well into 2012, Syria's dictator Assad was still favored by Russia and China and his downfall would be a blow to these countries' interests in the Middle East.¹²⁷ U.S. Ambassador to the UN, Susan Rice, alleged that Russia and China remain major arms dealers to Syria.¹²⁸

Another reason NATO is reluctant to enter Syria with military force comes from the fact that Qaddafi's security forces fought for six months despite "being hammered by NATO airstrikes," thus foreshadowing the possibility of a long, drawn-out, and expensive intervention.¹²⁹ Syria's military is thought to be much stronger and more cohesive than that of Libya and is armed with Russian-made weapons.¹³⁰

Syria is different from Libya in that Libya's rebel forces provided a natural new regime, whereas in Syria, the political landscape is splintered and thus could lead to more bloodshed.¹³¹ If Syria, with or without intervention, "implodes, Iran, Lebanon, Jordan and potentially Israel and Iraq would be infected" by the fallout.¹³² "The Arab League is itself divided between Gulf States like Saudi Arabia and Qatar, which support arming the rebels and toppling Assad, and others who fear that ousting Assad would spark sectarian violence that spills over into Lebanon and Iraq."¹³³ While some of this reasoning falls in line with the factors considered under the Responsibility to Protect, such as the balancing of consequences, other factors appear to have less to do with protecting the population of Syria than with the political interests of individual member states.

Other critics of the intervention in Libya argue that if the UNSC, NATO, and member states are not willing or able to intervene in all countries that need humanitarian protection and intervention, then it is

125. See Nancy Soderberg & David Bosco, *The 'Responsibility to Protect' in Syria and Beyond*, NAT'L PUB. RADIO (Feb. 6, 2012), <http://www.npr.org/2012/02/06/146474734/the-worlds-responsibility-to-protect>.

126. See *id.*

127. Murphy, *supra* note 123.

128. Edith M. Lederer, *NATO Bombing in Libya Added to Syria Vetoes*, GUARDIAN (Oct. 6, 2011), <http://www.guardian.co.uk/world/feedarticle/9883190>.

129. Murphy, *supra* note 123.

130. *Id.*

131. *Id.*

132. Soderberg & Bosco, *supra* note 125.

133. Louis Charbonneau & Patrick Worsnip, *U.N.-Arab League Syria Envoy Annan Has Near-Impossible Job*, REUTERS, Feb. 24, 2012, available at <http://www.reuters.com/article/2012/02/24/us-syria-un-annan-idUSTRE81N1XF20120224>.

best to stay out altogether, or risk being exposed as political and economic opportunists. Non-intervention will preserve parties from attack on a legal level as violators of international law and it will protect the principle of state sovereignty.

Alternatively, there are strong arguments for intervention where there is both political will and interest. It is better to do something in one place, where a humanitarian crisis is under way, than to always stand by helping no one.¹³⁴ The embarrassment, pain, and political consequence of doing nothing in Rwanda have convinced many to support the uneven disbursement of humanitarian interventionist forces.¹³⁵ At this point, however, inconsistency is a hindrance to the development of the Responsibility to Protect as a legal norm. Both the international legal and political communities continue to find military intervention for humanitarian purposes suspect.

V. IMPACT OF THE LIBYA INTERVENTION

A. *The Libyan Intervention's Impact on the UNSC's Relevance*

The UNSC's relevance and position was seriously set back after humanitarian intervention in countries like Kosovo.¹³⁶ NATO's exercise of force without UNSC authorization weakened the UNSC authority over such matters.¹³⁷ In 2011, Resolution 1973 restored some of the UNSC legitimacy as the gatekeeper and decision-making organ to authorize the use of force in humanitarian crisis situations.¹³⁸ Further, for the Responsibility to Protect to gain ground in its efforts to achieve status as internationally recognized legal doctrine, UNSC authorization remains an essential step in establishing a foundation for congruence of practice—a necessity for creating a legal norm.¹³⁹

B. *The Impact of the Libyan Intervention on the Responsibility to Protect*

Proponents of the intervention in Libya continue to argue that the

134. Hamid, *supra* note 120, at 1.

135. *See id.* at 2.

136. *See* INDEPENDENT INTERNATIONAL CONVENTION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

137. *Id.*

138. G.A. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

139. Jutta Brunnee and Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, in THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW 60, 77 (Alex J. Bellamy, Sara E. Davies & Luke Glanville eds., 2011).

measures taken by NATO and member states were justified under the doctrine, despite evidence suggesting that the mission was really based on political interest. At least with regard to Libya, NATO took the correct measures by obtaining UNSC authorization before intervention.¹⁴⁰ However, India's UN Ambassador, Hardeep Singh Puri, recently noted, "Libya has given R2P a bad name."¹⁴¹ The question remains whether NATO and member states were able to stay within the boundaries of acceptable practices in its intervention. "Many countries that opposed the Security Council's action, and even at least one that supported it, now believe the Western operation [went] far beyond merely protecting Libyans, and it is now widely being seen as an action intended from the start to get rid of the Libyan ruler."¹⁴² By October 2011, the United States dropped any pretense that participation in the Libyan intervention was motivated by humanitarianism when U.S. Secretary of State Hilary Clinton, addressing Libyans during a visit to the country, said that she hoped Qaddafi could be "captured or killed soon" – a statement that many took to suggest that political assassination was the intended outcome.¹⁴³

Regardless of how unpopular Qaddafi might have been, "the idea that NATO warplanes were trying to kill him struck a nerve . . . [with] countries already suspicious of the responsibility-to-protect concept."¹⁴⁴ Getting rid of Qaddafi was outside the bounds of what proponents of the Responsibility to Protect understood to be the goals or the plan of NATO intervention.¹⁴⁵ Gareth Evans claimed that eliminating the Libyan dictator "was not part of the Security Council consensus."¹⁴⁶

To many in the international community, NATO's arming of the rebels and deposing of Qaddafi amounted not only to a violation of Responsibility to Protect, but also of the UN Charter. While the desire to prevent humanitarian atrocity underlies the Responsibility to Protect doctrine, its façade is tarnished, making further UNSC Resolutions

140. See generally G.A. Res. 1973, *supra* note 138.

141. Philippe Bopolion, Op-Ed, *After Libya, the Question: to Protect or Depose?*, L.A. TIMES, August 25, 2011, at A15, available at <http://articles.latimes.com/2011/aug/25/opinion/la-oe-bopolion-libya-responsibility-t20110825>.

142. *Id.*

143. *Id.*

144. *Libya: U.S. Secretary of State Hillary Clinton in Tripoli*, BBC NEWS AFRICA (Oct. 18, 2011), <http://www.bbc.co.uk/news/world-africa-15349335>.

145. Bopolion, *supra* note 141.

146. Jeffrey Laurenti, *Syria Post-Libya: Testing the Responsibility to Protect*, CENTURY FOUND. (Jan. 19, 2012), <http://tcf.org/blogs/botc/2012/01/syria-post-libya-testing-responsibility-to-protect>.

under the theory unlikely. The first legitimate attempt to implement the Responsibility to Protect went too blatantly awry.¹⁴⁷ If the Responsibility to Protect in its current form and application retains a foothold in the international community as the doctrine under which the UNSC can authorize the use of force, then the exception to the use of force under the UN Charter will not only be eviscerated but rendered irrelevant.

*C. The Impact of the Libyan Intervention on the UN Charter
and The Prohibition on the Use of Force*

The UN Charter's prohibition on the use of force has been slowly eroded for many years as the "two main Charter exceptions to the prohibition to use force are not cast in iron language, but are subject to evolving albeit not unlimited interpretations in response to new global threats and changing needs of the international community."¹⁴⁸ Proponents of the idea that the prevention of human rights violations and genocide are themselves *jus cogens*—thus providing a stronger basis for institutionalizing the Responsibility to Protect - tout UNSC-authorized intervention in Libya as a victory for the concept, moving it closer to acceptance as customary international law.¹⁴⁹ This proposition is inherently problematic given the manner in which the intervention was undertaken. Outright acceptance of this proposition is a serious threat to the *jus cogens* status of another highly valuable UN Charter concept – the prohibition of the use of force.

Humanitarian intervention, and now the Responsibility to Protect, is, on the surface, driven by the altruistic intentions of intervening States. Neither, however, can be extricated from the competing and prohibited intentions of those same States. In the instant case, the prohibited intent rose to the surface and seized control of the intervention. The United States' fervent denial of regime change as the objective of the Libya operation did not, and could not, last. The international political importance of keeping those intentions buried was trumped by domestic political strategy as the 2012 election approached; Secretary Clinton herself chose to make a public showing of the U.S.

147. Martha Hall Findlay, *Can Responsibility to Protect Survive Libya and Syria?*, IPOLITICS (Nov. 18, 2011), <http://www.ipolitics.ca/2011/11/18/martha-hall-findlay-can-responsibility-to-protect-survive-libya-and-syria/>; Philippe Boloignon, Op-Ed, *After Libya, the Question: to Protect or Depose?*, L.A. TIMES, Aug. 25, 2011, at A15, available at <http://articles.latimes.com/2011/aug/25/opinion/la-oe-boloignon-libya-responsibility-t20110825>.

148. SCHRIJVER, *supra* note 18, at 44.

149. Evans, *supra* note 90.

desire to get rid of the bad guy, thus illegitimizing the humanitarian purpose under which the use of force was originally authorized.¹⁵⁰ Scholar Nico Schrijver warns, “if we are not careful, a question may arise as to how long the prohibition to the use of force still qualifies to be viewed as a *jus cogens* norm ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.’”¹⁵¹ Therefore, to prevent rendering the Charter’s principle against the use of force irrelevant, it is necessary to define boundaries on *how* Responsibility to Protect interventions are executed.

VI. REMEDIES

Critics of NATO’s actions in Libya, rather than calling for critical review and repercussions for these violations, ask politely that these acts not become precedent for further expansion of the Charter’s exception to the prohibition of the use of force.¹⁵² Thus, the UN Charter’s limits on the use of force have finally been rendered toothless and there is no incentive to fall within its bounds.¹⁵³ Without specific recourse in the form of remedy, a polite request to reconsider is not enough.¹⁵⁴ For states that have signed and ratified the Rome Statute, the International Criminal Court is a potential option to investigate and implement a remedy.¹⁵⁵ Otherwise, to prevent this sort of violation in the future, the responsibility remains with member states to authorize any forthcoming resolutions where the use of force is under consideration.¹⁵⁶

150. *Libya: U.S. Secretary of State Hillary Clinton in Tripoli*, *supra* note 144.

151. SCHRIJVER, *supra* note 18, at 39, 45.

152. Carsten Stahn, *R2P, the ICC and the Libyan Arrests*, HAGUE JUST. PORTAL (Nov. 24, 2011), <http://www.haguejusticeportal.net/smartsite.html?id=12998>.

153. Justin Morris & Nicholas J. Wheeler, *The Security Council's Crisis of Legitimacy and the Use of Force*, 44 INT’L POLITICS 214, 215 (2007), available at <http://www.palgrave-journals.com/ip/journal/v44/n2/pdf/8800185a.pdf>.

154. See Stahn, *supra* note 152.

155. *Id.*

156. U.N. Charter art. 39; U.N. Charter art. 42.

A. Adjudication to Set Specific Boundaries for the Use of Force: Several Opportunities

1. The ICC

a. Referral of Violating Countries Like Libya to the ICC Prior to UNSC Authorization

In 2011, Libya and Qaddafi were referred to the ICC for investigation and prosecution.¹⁵⁷ This action was unprecedented, as Libya is not a party to the Rome Statute.¹⁵⁸ The UNSC, which *is* party to the statute, referred Qaddafi and Libya's government as violators of international human rights law.¹⁵⁹ This action represents a major step in the development of the Responsibility to Protect into a doctrine of international legal legitimacy. In their article, *Stop the Killing*, Michael Contarino and Selena Lucent proposed that juridical process to analyze whether Responsibility to Protect action is necessary, would serve both a determination function and an action function:

[o]ver time, juridical R[esponsibility to Protect] determination could produce a body of R[esponsibility to Protect] jurisprudence that would clarify the bases for legal international interventions, and thereby facilitate effective, legal enforcement actions. Such jurisprudence, by clearly defining legal options, also would render the illegal military interventions feared by R[esponsibility to Protect] critics more difficult to justify. Accordingly, a juridical R[esponsibility to Protect] determination mechanism might well prove better able than the present system both to protect vulnerable populations *and* discourage violations of the norm of peace by nations using R[esponsibility to Protect] opportunistically and/or unilaterally taking R[esponsibility to Protect] into their own hands.¹⁶⁰

Currently, calls to refer Syria to the ICC echo within the international legal community.¹⁶¹ Through the powers and processes of

157. Stahn, *supra* note 149, at 1.

158. *Id.*

159. *Id.*

160. Michael Contarino & Selena Lucent, *Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 193, 195–96 (Alex J. Bellamy, Sara E. Davies & Luke Glanville eds., 2011).

161. Al Arabiya with Agencies, *U.N. Lists War Crimes Suspects in 'Leadership Positions'*, AL ARABIYA NEWS (Feb. 18, 2013), <http://english.alarabiya.net/articles/2013/02/18/266954.html>; Iveta Cherneva, *How to Get Assad*, FLETCHER F. WORLD AFF., (Apr. 4, 2012) <http://www.fletcherforum.org/2012/04/04/how-to-get-assad/>. While UNSC authorization of the

the ICC, the Responsibility to Protect can be strengthened and tamed into a potentially safe, effective, and legal method to combat humanitarian crisis.

b. ICC Prosecution of War Crimes to Serve as Deterrent for NATO

In order to solidify the boundaries of the Responsibility to Protect and prevent the “mission creep” that turns humanitarian action into regime change, serious ICC investigation and possible prosecution of any war crimes by NATO in Libya would establish legitimate repercussions, something that many critics of international law say is frequently lacking.¹⁶² With no enforcement or remedial mechanism, the Responsibility to Protect tenets carry little force. Libya presents an opportunity to legitimize and set true boundaries on the implementation of the Responsibility to Protect.

An ICC investigation could be a tool to do just that. NATO officials “say that between March and October NATO warplanes flew twenty-six thousand sorties, including more than 9,600 strike missions, destroying more than one thousand tanks, vehicles, and guns, as well as buildings claimed to have housed ‘command and control’ centers.”¹⁶³ Targeted facilities included Qaddafi’s “heavily fortified compound in Tripoli, [and] also residential homes of his supporters - targets which could be considered outside the UN mandate.”¹⁶⁴ Currently, NATO meets suggestions that it investigate these issues with an air of willing cooperation.¹⁶⁵ Friction is likely, however, because individual Member States that participated in the air strikes have called the allegations “libel.”¹⁶⁶ ICC prosecutor Luis Moreno-Ocampo faces political pressure to avoid opening a formal investigation and speaks of a potential investigation with caution and diplomacy.¹⁶⁷ Despite political pressures and distinct repercussions that certain member states face if formally investigated and prosecuted, standing up to such forces presents an opportunity to effect international use of force law in an important

use of force and referral to the ICC seem to go hand in hand, perhaps they are not mutually exclusive given the extremity of the current situation and Russia’s new distance from Assad. Further, alternatives for the exercise of ICC jurisdiction do exist.

162. Mike Corder and Slobodan Lekic, *NATO Fears War Crimes Investigation By World Court*, MSNBC (Nov. 11, 2011), http://www.msnbc.msn.com/id/45252513/ns/world_news-europe/t/nato-fears-libya-war-crimes-investigation-world-court.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

manner.

The threat of repercussions for member states that violate law in the course of military intervention would instill legitimacy in the Responsibility to Protect. Thus, any headway made by the Responsibility to Protect towards becoming a norm of international law would pose less of a threat to the principles behind the UN Charter, making the Responsibility to Protect a more palatable exception to the prohibition against the use of force.

NATO is not a signatory to the Rome Statute, therefore prosecution by the ICC would be geared toward member state signatories.¹⁶⁸ ICC jurisdiction and subsequent punishment is only applicable to those who have signed and ratified the Rome Statute, leaving certain member states, e.g., the United States, technically free from submission to its jurisdiction.¹⁶⁹ Yet, prosecution of sister states may still have an influence on countries that have an interest in abiding by, or appearing to abide by, similar standards. With the United States' newfound warmth toward the ICC, this threat could nonetheless have a deterrent effect.¹⁷⁰

2. The ICJ

The ICJ, the United Nations judicial organ under UN Charter Article 92, is arguably the appropriate venue for review of UNSC resolutions.¹⁷¹ As with the U.S. Constitution, the UN Charter does not enumerate judicial review.¹⁷² Yet in the United States, the concept and practice of judicial review was legitimized by case law and has a long-standing precedent.¹⁷³ Traditionally, much tension has existed between the UNSC and the ICJ, as judicial review has not been formally incorporated as a concept as it has been in the United States.¹⁷⁴ Given that the two bodies of the UN have occasionally overlapping functions,

168. *Id.*

169. *Factsheet: Ratification/Accession and Signature on the Agreement of the Privileges and Immunities of the Court (APIC)*, by Region, COALITION INT'L CRIM. CT. (2012), http://www.coalitionfortheicc.org/documents/APIC_EN_chart_updated_January_2012.pdf.

170. See Harold Koh & Stephen Rapp, *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference*, U.S. DEPT. STATE (June 15, 2010), <http://m.state.gov/md143178.htm>. http://www.state.gov/j/gcj/us_releases/remarks/143178.htm.

171. See U.N. Charter, article 92.

172. Aditya Krishnamurthy, *The Lockerbie Incident Cases: Judicial Review By the ICJ*, <http://www.legalserviceindia.com/articles/lock.htm>, LEGALSERVICEINDIA.COM (last visited Oct. 10, 2011).

173. *Id.*

174. *Id.*

any advisory ruling by the ICJ on a UNSC resolution may be met with skepticism and highlight the Court's lack of authority.¹⁷⁵

In the Lockerbie bombing case, the ICJ ruled, "judicial review is an evolutionary process."¹⁷⁶ Still, the court declined to exercise judicial review of UNSC Resolutions 731¹⁷⁷ and 748¹⁷⁸ (the former requested Libya's compliance regarding the bombing of Pan Am Flight 103 and the latter instituted sanctions on Libya). The ICJ is nonetheless "a 'court' charged with interpretation of 'law,'" and is thus an appropriate mechanism from which to seek guidance in requesting an advisory opinion on issues such as whether the UNSC's Resolution 1973 and NATO's subsequent actions in Libya were lawful.¹⁷⁹

The ICJ is charged with applying international customary law in its decisions:¹⁸⁰

Under the Statute of the International Court of Justice, the ICJ is bound to decide cases "in accordance with international law" and to apply "international custom, as evidence of a general practice accepted as law." Customary law "owes its legal form to its acceptance as law by the international community." Its application has frequently required the Court to look to "proof of the pertinent contemporary international [community] standard." It is important to note in this respect that the classical definition of customary law has evolved from the traditional concept of the behavior of states to include the behavior of organizations, like the United Nations, that are composed of states.¹⁸¹

With this in mind, a finding that NATO's actions in Libya under Resolution 1973, as part of the Responsibility to Protect doctrine, qualifies as customary international law is unlikely given that, in its current form, the Responsibility to Protect was essentially untested before 2011. That is, no precedent exists. The ramifications of such a decision are unknown. An ICJ advisory opinion may however serve to sharpen the requirements and expectations of any further military course of action under the same or similar pretense, and ensure that the action

175. See Kathleen Renee Cronin-Furman, *The International Court of Justice and The United Nations Security Council: Rethinking a Complicated Relationship*, 106 COL. L. REV. 435, 447 R. (2006).

176. Krishnamurthy, *supra* note 168.

177. S.C. Res. 731, U.N. Doc. S/RES/731, at 52 (Jan. 31, 1992).

178. S.C. Res. 748, U.N. Doc. S/RES/748, at 52-4 (Mar. 31, 1992).

179. Krishnamurthy, *supra* note 168.

180. Cronin-Furman, *supra* note 171, at 455-456.

181. *Id.*

complies more closely to the provisions of the UN Charter.

B. *The UNSC Veto*

The veto power of the five permanent members of the UNSC provides a built-in safeguard to “reduce many unnecessary conflicts in international relations.”¹⁸² A veto by any of the permanent members prevents UNSC authorization of the use of force, while an abstention does not.¹⁸³ For example, in 2007, China and Russia voted against a resolution that “characterized the situation in Burma as constituting ‘a threat to international peace and security,’” blocking implementation of the Responsibility to Protect.¹⁸⁴ The ICISS’s report on the Responsibility to Protect calls upon the permanent five members of the Security Council to refrain from exercising their veto power “in matters where its vital state interests are not involved,” if their veto would obstruct the passage of resolutions that authorize military humanitarian intervention for which there is otherwise majority support.¹⁸⁵ While there is no legal restriction on the use of the veto power with regard to the Responsibility to Protect, the request that members abstain rather than veto, attempts to restrict the veto power by placing “political and moral pressure on the five permanent members.”¹⁸⁶

The passage of UNSC Resolution 1973 was unobstructed by China and Russia, both of whom chose to abstain rather than to exercise their veto power, perhaps under this “political and moral pressure.”¹⁸⁷ For a time, it appeared that China’s growing world power suggested that its status as “persistent objector” to humanitarian intervention might be a thing of the past as it is no longer in danger of intervention on its own soil.¹⁸⁸ Yet China’s unwillingness to allow passage of a resolution to authorize the use of force in Syria suggests that China’s role as objector remains active. Libya arguably served as a test case for the objectors, China and Russia, wherein they allowed intervention to move forward

182. See Yao Huang, *On the Military Intervention Under the Doctrine of the Responsibility to Protect*, CHINESE SOC’Y INT’L L., http://a10014931063.oinsite.cn/web/errors/404.aspx?aspxerrorpath=/_d271634455.htm (last visited Mar. 16, 2013). Huang discusses international legal theory over the last ten years, the R2P, and its influence on the collective coercive measures of the U.N. security system.

183. *Id.*

184. *Id.* at 6.

185. ICISS Report, *supra* note 58, at 51.

186. Huang, *supra* note 182, at 10.

187. *Id.*

188. Jonathan E. Davis, *From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT’L L. 217, 277–82 (2011).

despite concern that the intervention would be used to advance political interests and violate state sovereignty.¹⁸⁹

The stage was set for the Responsibility to Protect to gain legitimacy, yet given how the intervention played out, it was the importance and purpose of the *veto* that was reinforced.¹⁹⁰ The veto is one of few measures that can prevent the Responsibility to Protect from being used as a tool for an individual State to “pursue its self-interests.”¹⁹¹ Thus, reclaiming the veto power as such a safeguard is one way to insist that thinly guised political agendas that destabilize the true intent of the Responsibility to Protect do not prevail again.¹⁹²

VII. CONCLUSION

The future of the UN Charter’s prohibition against the use of force is precarious. To interventionists in the United States and Europe, intervention in Libya under the Responsibility to Protect doctrine was considered a success - moving the Responsibility to Protect closer to becoming a norm of international law.¹⁹³ Yet the fact still remains that NATO’s actions in Libya contradicted the UN Charter’s prohibition against the use of force to intervene in what most say was a civil war.¹⁹⁴ While many recognize a responsibility to protect, mission creep subsumed the humanitarian objective.¹⁹⁵ Despite the humanitarian principle that theoretically supported the intervention, political agendas were not adequately separated from the altruistic goal.¹⁹⁶ Calling an intervention “humanitarian” does not transform the action to one that meets the standards of international legality.

History once again challenges the precepts and functionality of international law as the situation in Syria worsens. The lessons learned from Libya have not yet been fully processed and the international community now faces pressure to throw aside a doctrine it has fought to invest with legal legitimacy.¹⁹⁷ As of February 2013, the civilian death

189. See Chris Keeler, *The End of the Responsibility to Protect?*, FOREIGN POL’Y J. (Oct. 12, 2012), <http://www.foreignpolicyjournal.com/2011/10/12/the-end-of-the-responsibility-to-protect/>.

190. See Davis, *supra* note 188.

191. Huang, *supra* note 182, at 28.

192. *Id.* at 4.

193. Keeler, *supra* note 189.

194. Doebbler, *supra* note 10.

195. Keeler, *supra* note 189.

196. *Id.*

197. *Id.*

toll approaches seventy thousand.¹⁹⁸ Two Western journalists have been killed.¹⁹⁹ In February 2012, reports of Iranian war boats docked in Syrian ports and the possibility of nuclear capability in Iran came from the region.²⁰⁰ Political hackles are raised from Israel to the United States and back to China. As matters progress in Syria, it becomes clear that what the West construes as “humanitarianism” in Syria is fraught with potential disaster on a global scale.²⁰¹ Executive Director of the Global Center for the Responsibility to Protect Simon Adams says, “[i]f Libya showed us how far we’ve come, then Syria has shown us how far we have to go.”²⁰² Others call for relinquishing the “desperate triumphalism” of the pro-Libyan interventionist and “come to grips with their pyrrhic victory in Libya.”²⁰³

For the Responsibility to Protect to maintain any ground it may have gained with the Libyan intervention, it is necessary for NATO to receive UNSC authorization prior to intervening.²⁰⁴ Yet UNSC authorization of even a watered down resolution with regard to Syria is a near impossibility.²⁰⁵ Until December 2012, when Russia publicly distanced itself from Assad,²⁰⁶ Russia and China remained firmly positioned against any kind of intervention in Syria and thrice vetoed a resolution that called for an end to Assad’s violence.²⁰⁷ Brazil, India, South Africa and Lebanon abstained in the second UNSC vote and

198. Ashley Fantz, *Syria Death Toll Probably at 70,000, U.N. Human Rights Official Says*, CNN (Feb. 13, 2013), http://edition.cnn.com/2013/02/12/world/mideast/syria-death-toll/index.html?hpt=hp_t1.

199. Rod Norland & Alan Comwell, *Two Western Journalist Killed in Syria Shelling*, N.Y. TIMES (Feb. 22, 2012), <http://www.nytimes.com/2012/02/23/world/middleeast/marie-colvin-and-remi-ochlik-journalists-killed-in-syria.html>.

200. Iranian Naval Ships Dock in Syria, TELEGRAPH (Feb. 20, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9092853/Iranian-naval-ships-dock-in-Syria.html>.

201. Stewart M. Patrick, *RIP for R2P? Syria and the Dilemmas of Humanitarian Intervention*, COUN. ON FOREIGN REL. (July 21, 2012), blogs.cfr.org/Patrick/2012/06/12/rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention/#cid=.

202. Jacob Mundy, *It’s Official: Syria is in a State of Civil War. Or Is It?* E-INT’L REL. (June 15, 2012), <http://www.e-ir.info/2012/06/15/its-official-syria-is-in-a-state-of-civil-war-or-is-it/>; Neil MacFarquhar, *Syria Denies Attack on Civilians, in Crisis Seen as Civil War*, N.Y. TIMES, July 16, 2012, at A6, available at http://www.nytimes.com/2012/07/16/world/middleeast/syria-denies-use-of-heavy-weapons-in-deadly-village-fight.html?_r=0.

203. *Id.*

204. *See id.*

205. *Id.*

206. Andrew Higgins, *Putin Puts More Distance Between Russia and Assad*, N.Y. TIMES (Dec. 21, 2012), <http://www.nytimes.com/2012/12/22/world/europe/putin-in-brussels-for-talks-with-european-union.html>.

207. Keeler, *supra* note 189.

South Africa and Pakistan abstained in the July 2012 vote, indicating a “major divide within the Security Council.”²⁰⁸ The UNSC’s failure to pass the resolutions “is directly related to the actions of the NATO-led intervention in Libya, during which the United States and its allies overtly overstepped the UN mandate authorizing action.”²⁰⁹

With Chinese and Russian interests strong in Syria and the bad taste lingering in the wake of intervention in Libya, it does not appear that the Responsibility to Protect in its imagined form will be the mechanism through which intervention in Syria will be initiated.²¹⁰ “Security Council deadlock and buyer’s remorse among UN member states have led some to suggest that R[esponsibility to Protect] is dead.”²¹¹ The vetoed resolution before the UNSC did not rise to the level of actually authorizing the use of force, yet the vetoing members took a strong stand against what they believe to be a slippery slope that inevitably leads to the use of force.²¹² Originally, it was argued that China and Russia’s vetoes were premature and prevented Syria from receiving humanitarian aid that was needed immediately.²¹³ Responsibility to Protect proponents wished that Russia and China would simply abstain and get out of the way. However, with the Red Cross’ July 2012 announcement that Syria is in a state of civil war, Russia and China, who tout state sovereignty as a reason to veto the UNSC resolutions, are arguably vindicated under international law.²¹⁴ To many, the vetoes point to a functioning UNSC system and will prevent what happened in Libya from happening in Syria.

As the “civil war” rages on in Syria, intervention will now largely be determined by an analysis of the declaration of civil war and whether it forecloses legal international intervention by virtue of the sovereignty argument or whether this particular civil war constitutes a threat to peace and security in the region, thus making intervention permissible under the UN Charter’s exception.²¹⁵ With Syria in a state of civil war, a broader range of international humanitarian law applies.²¹⁶ However, a

208. *Id.*

209. Patrick, *supra* note 201.

210. *Id.*

211. *Id.*

212. Keeler, *supra* note 189.

213. *Id.*

214. Jacob Mundy, *supra* note 202; *see also* MacFarquhar, *supra* note 202.

215. Mundy, *supra* note 202.

216. *See Q & A on Laws of War Issues in Syria*, HUM. RTS. WATCH (Aug. 10, 2012), <http://www.hrw.org/news/2012/08/09/q-laws-war-issues-syria#2>.

collapse of the Assad regime arguably threatens “peace and security” in the region to a much larger degree, with Iran, Saudi Arabia, Israel and Palestine all having major interests in the outcome.²¹⁷

Evidence of the disturbance of peace and security in the region was solidified on August 15, 2012, when an abduction of more than twenty Syrians occurred within Lebanese territory. Their captors called the incident “revenge for the kidnapping of a Lebanese relative by rebels inside Syria.”²¹⁸ Further, the United Nations refugee agency reported that the more than 857,712 refugees registered or awaiting registration in Iraq, Lebanon, Jordan, Turkey, Egypt and North Africa are overwhelming relief efforts.²¹⁹ Thus, it seems that obituaries for the Responsibility to Protect are “premature.”²²⁰ From this standpoint, it is arguable that the Russian and Chinese vetoes no longer point to a functioning UNSC system but rather symbolize a closely held political agenda that stands in the way of an intervention deserving of legal support.

Now it is up to the international community to find a politically and legally acceptable way to provide Syria with some humanitarian relief.²²¹ This need not signal an end to the Responsibility to Protect if the international community can refrain from pursuing intervention without UNSC authorization—a goal which may simply be too lofty.²²²

217. See also Mundy, *supra* note 202; MacFarquhar, *supra* note 202; Thomas Erdbrink & Rod Nordland, *As Chaos Grows in Syria, Worries Grow on the Sidelines*, N.Y. TIMES, July 20, 2012, at A4, available at <http://www.nytimes.com/2012/07/20/world/middleeast/if-syria-collapses-iran-faces-loss-of-valued-ally.html?>

218. *Syrian Conflict Crosses Border into Lebanon in Abductions*, N.Y. TIMES, Aug. 16, 2012, at A4, available at <http://www.nytimes.com/2012/08/16/world/middleeast/explosion-in-damascus-syria.html?pagewanted=all>.

219. UN Refugee Agency, *Syria Regional Refugee Response*, UNHCR (Feb. 18, 2013), <http://data.unhcr.org/syrianrefugees/regional.php>.

220. Patrick, *supra* note 201.

221. *Id.* Kofi Annan’s peace-plan as an alternative to UNSC sanction has failed as of July 2012.

222. *Id.* (“Senior [U.S.] administration officials have made it clear that if the UN Security Council . . . fails to ‘assume its responsibilities,’ in the words of U.S. envoy Susan E. Rice, ‘members of this council and members of the international community are left with the option only of having to consider whether they’re prepared to take actions outside of the Annan Plan and the authority of this council.’”). See also *Syria – Uprising and Civil War*, N.Y. TIMES

(Aug. 19, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html?8qa>

(While the Obama Administration up to this point declines to arm the Syrian rebels, despite intense political pressure from the political conservatives, the U.S. has increased aid with regard to intelligence and training. In early August, Kofi Annan resigned from as special envoy and by mid-August, the UNSC removed all peace-keeping observers due to increased violence). See also Damien Cave, *As Fighting Rages, Syria and Russia Reject U.S. Intervention Threat*, N.Y. TIMES,

If NATO decides, as it has done in the past, to use force without authorization, the Responsibility to Protect might as well be discarded as a possible legal norm. The UN Charter's prohibition faces a similar fate—one of much greater consequence.

The tide of history moves quickly forward. The UN Charter and its principles, stand as foundational pilings. They have taken a beating. An interval of calm to repair and reinforce would be convenient; yet, that is not what history allows. Now, despite the current climate, it is more important than ever to use the tools that law has set out to reinforce those principles. The veto, as used by UNSC member states, is one such tool. Review of Resolution 1973 by the ICJ should commence, as should an investigation of NATO's actions in Libya by the ICC. The pressure to make quick decisions about Syria should not prevent the repair and improvements that need to be undertaken to ensure that future interventions conform to international law. These measures are necessary to reinforce the legitimacy of the principles of the UN Charter and international legal order. Without such action, we risk being swept up by the immediacy of perceived humanitarian crisis, and those foundational pilings may not weather another storm.

Aug. 22, 2012, at A6, *available at* <http://nytimes.com/2012/08/22/world/middleeast/syria.html> (reporting President Obama's threats of military intervention if the Syrian government were to "move or deploy unconventional weapons").