

THE FUTURE UNDER INTERNATIONAL LAW OF THE RESPONSIBILITY TO PROTECT AFTER LIBYA AND SYRIA

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INTRODUCTION

The United Nations (U.N.) Security Council’s paralysis, caused by the Russian and Chinese veto of resolutions addressing the Syrian crisis, calls into question the international community’s commitment to act collectively “in a timely and decisive manner” through the Security Council to protect

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the populations from mass atrocity crimes, including crimes against humanity.¹

Several reports, including one each in the latter half of 2011 by the United Nations High Commissioner for Human Rights,² the U.N. Human Rights Council (HRC),³ and the U.N. Committee Against Torture,⁴ and one each by the HRC (February 22, 2012)⁵ and Amnesty International (AI) (August 2012),⁶ affirmed allegations that government forces and militias have committed gross human rights violations that are widespread and systematic, amounting to crimes against humanity with the apparent knowledge and consent of those at the highest level of the Syrian government.⁷

To illustrate, the fact-finding mission established by the Office of the United Nations High Commissioner for Human Rights analyzed first-hand information obtained through interviews conducted with victims and witnesses of murder and disappearances, torture, and persecution, and found patterns of human rights violations that may amount to crimes against humanity.⁸ The first report of the Independent International Commission of Inquiry, submitted in November 2011, stated:

1. This was the commitment undertaken by the heads of state and government gathered at the U.N. World Summit in New York in September 2005. 2005 World Summit Outcome, G.A. Res. 60/1, ¶139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome] (the atrocity crimes to which R2P applies include genocide, war crimes, and ethnic cleansing, along with crimes against humanity and their incitement).

2. U.N. Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, A/HRC/18/53 (Sept. 15, 2011) [hereinafter A/HRC/18/53].

3. U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add.1 (Nov. 23, 2011) [hereinafter A/HRC/S-17/2/Add.1].

4. U.N. Human Rights Office of the High Commissioner for Human Rights, Syria: UN Committee Against Torture Concerned About Gross and Widespread Rights Violations (Nov. 25, 2011) (reporting that the U.N. Committee Against Torture expressed alarm on November 25, 2011, that “prompt, thorough, and impartial investigations ha[d] not been undertaken” despite reports of massive human rights violations. It “requested the Government of Syria to provide it with a special report by 9 March 2012 . . .”).

5. U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/19/69 (Feb. 22, 2012) [hereinafter Inquiry on the Syrian Arab Republic, 2012].

6. ALL-OUT REPRESSION: PURGING DISSENT IN ALEPPO, SYRIA, AMNESTY INT’L (2012), available at <http://www.amnestyusa.org/research/reports/all-out-repression-purging-dissent-in-aleppo-syria> [hereinafter ALL-OUT REPRESSION].

7. Appalled at the “indiscriminate and possibly deliberate . . . killing . . . in the area of Homs in Syria” in late May 2012, the U.N. High Commissioner for Human Rights said that these acts “may amount to crimes against humanity or other forms of international crime.” U.N. Human Rights Office of the High Commissioner for Human Rights, Syria: Pillay Says El Houleh Killings May Amount to International Crimes (May 27, 2012) (quoting Navi Pillay, U.N. High Commissioner for Human Rights).

8. A/HRC/18/53, *supra* note 2, at 3-4, 20.

The substantial body of evidence gathered by the commission indicates that these gross violations of human rights have been committed by Syrian military and security force since the beginning of the protests in March 2011. The commission is gravely concerned that crimes against humanity have been committed in different locations in the Syrian Arab Republic during the period under review.⁹

The second Commission report stated that the government had “manifestly failed in its responsibility to protect its people. Since November 2011, its forces have committed more widespread, systematic and gross human rights violations.”¹⁰

The AI report of August 2012 detailed a wide range of state-directed, systematic violations of human rights, including the deliberate targeting of peaceful protesters, hunting-down of injured protesters, torture, targeting of medics providing emergency treatment to the wounded, arbitrary arrests, and disappearances in Syria’s largest and most populous city, Aleppo.¹¹ The report, which was based on AI’s field research in and around Aleppo in late May 2012, concluded that the Syrian government was responsible for systematic violations in Aleppo amounting to crimes against humanity:

The cases and patterns of abuses investigated in this report, together with the gross and widespread human rights abuses documented by Amnesty International over the past 18 months in other parts of the country, constitute a body of evidence that Syrian government forces and state-armed militias have been responsible for crimes against humanity and war crimes.¹²

Because the commitment to protect the populations from serious human rights violations, including crimes against humanity and war crimes, constitutes the core of the Responsibility to Protect (R2P) principle adopted by the world’s leaders at the September 2005 U.N. World Summit,¹³ the obvious question arises: what is the future of R2P? This inquiry is especially pertinent because after the invocation and application of R2P in Libya, which resulted in the North Atlantic Treaty Organization’s (NATO) intervention in 2011 leading to the overthrow of Muammar Gadhafi, Secretary-General Ban Ki-moon stated on January 18, 2012:

9. A/HRC/S-17/2/Add.1, *supra* note 3, at 1.

10. A/HRC/19/69, *supra* note 5.

11. ALL-OUT REPRESSION, *supra* note 6, at 10-12, 18-20, 24-26.

12. *Id.* at 8. See also Written Statement, Amnesty Int’l, No More Impunity for Crimes Against Humanity in Syria (Dec. 2, 2011), available at <http://www.amnesty.org/en/library/asset/MDE24/083/2011/en/5ca30b30-247e-41c6-ba8c-4ec4a2b9d8fd/mde240832011en.pdf>.

13. See Ved P. Nanda, *From Paralysis in Rwanda to Bold Moves in Libya: Emergence of the “Responsibility to Protect” Norm Under International Law—Is the International Community Ready for It?*, 34 Hous. J. Int’l. L. 1, 39-45 (2011) [hereinafter *Paralysis in Rwanda*].

Today we mark the first decade in the life of the responsibility to protect. There will be many more, for we can now say with confidence that this fundamental principle of human protection is here to stay. . . .

In 2011, history took a turn for the better. The responsibility to protect came of age; The principle was tested as never before. The results were uneven, but at the end of the day, tens of thousands of lives were saved. We gave hope to people long oppressed. In Libya, Côte d'Ivoire, South Sudan, Yemen and Syria, by our words and actions, we demonstrated that human protection is a defining purpose of the United Nations in the twenty-first century.

We also learned important lessons. For one, we have learned that this Organization cannot stand on the sidelines when challenged to take preventive action.¹⁴

When the Secretary-General spoke, the U.N. was already facing a test in Syria. Since then, more than nine months have passed and Syria continues to burn, with the spiral of violence still on the rise. Day after day we hear reports of the carnage as innocent men, women, and children are tortured and killed. According to media reports, as of the beginning of September 2012, the death toll in Syria had reportedly already surpassed 18,000.¹⁵

After Libya, the R2P glow quickly faded. Silence at the U.N. has been accompanied by lack of an effective response by the international community. Hence, this question is valid: "Will R2P rhetoric suffer the same fate as the 'never again' slogan in the aftermath of the Holocaust?" This article is a response to that inquiry. Part II provides an historical context leading to the birth of R2P. This is followed in Part III by a review of the NATO action in Libya, and in Part IV, the Syrian crisis. Part V examines Brazil's proposal to supplement R2P with RWP (responsibility while protecting) and explores the means to implement and operationalize R2P. Part VI is the concluding section.

14. U.N. Secretary General, *'Responsibility to Protect' Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict Before it Breaks Out*, U.N. Doc. SG/SM/14068 (Jan. 18, 2012).

15. *Timely and Decisive Response Vital to Uphold 'Responsibility to Protect'-UN Officials*, U.N. NEWS CENTRE, <http://www.un.org/apps/news/story.asp?NewsID=42806&Cr=responsibility+to+protect&Cr1=#.UFPmdU8kWaI> ("The Secretary-General pointed to the immense human cost of failing to protect the population of Syria, where more than 18,000 people, mostly civilians, have died since the uprising against President Bashar al-Assad began 18 months ago."); *See also Syria Crisis: Death Toll Tops 17,000, Says Opposition Group*, HUFFINGTON POST WORLD (July 7, 2012), http://www.huffingtonpost.com/2012/07/09/syria-crisis-death-toll-17000_n_1658708.html.

I. THE GENESIS OF THE “RESPONSIBILITY TO PROTECT” PRINCIPLE AND ITS EVOLUTION

As the Secretary-General marked “the first decade in the life of the responsibility to protect,” he was implicitly referring to the December 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), entitled *The Responsibility to Protect*,¹⁶ which was most influential in giving the concept its final shape. It is worth noting that the Commission’s initiative was in response to the call of then—U.N. Secretary-General Kofi Annan in his Millennium Report to the General Assembly in April 2000, for member states to “unite in the pursuit of more effective policies, to stop organized mass murder and egregious violations of human rights.”¹⁷

The tragedies of Rwanda and Srebrenica, which had happened on Kofi Annan’s watch, were the precursors to his call. Humanitarian intervention as a possible response to such tragedies had come under severe criticism for its potential abuse.¹⁸ Annan acknowledged the criticism as he stated: “[I]f 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 affect every precept of our common humanity?”¹⁹

The ICISS’s response to this challenge was to shift the debate from the “right of humanitarian intervention” or “right to intervene,” to the

16. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. [hereinafter ICISS Report].

17. The Secretary-General’s Millennium Report, *We the Peoples: The Role of the United Nations in the 21st Century*, 47, U.N. Doc. A/54/2000 (April 3, 2000), www.un.org/millennium/sg/report/ch3.pdf. See also Press Release, Secretary General, ‘We the Peoples: The Role of the United Nations in the 21st Century,’ to General Assembly, U.N. Press Release GA/9704 (Apr. 3, 2000). See generally *Paralysis in Rwanda*, *supra* note 13 (discussing the development of the R2P concept and its invocations in Libya).

18. For discussion of humanitarian intervention, see generally 21 SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (Burns H. Weston et al. eds., 1996); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); Matthew C. Cooper, *A Note to States Defending Humanitarian Intervention: Examining Viable Arguments Before the International Court of Justice*, 40 DENV. J. INT’L L. & POL’Y 167 (2011); James A.R. Nafziger, *Humanitarian Intervention in a Community of Power Part II*, 22 DENV. J. INT’L L. & POL’Y 219 (1994); Ved P. Nanda et. al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia-Revisiting the Validity of Humanitarian Intervention under International Law-Part II*, 26 DENV. J. INT’L L. & POL’Y 827 (1998); Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CALIF. L. REV. 1171 (2009); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT’L L. 3 (2000); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135 (2004).

19. ICISS Report, *supra* note 16, at 2.

“responsibility to protect,” which meant a focus on the point of view of those seeking or needing support instead of those who may be considering intervention.²⁰ It must, however, be acknowledged that in the mid-1990s Francis Deng, then Special Representative on Internally Displaced Persons and later the Special Adviser for the Prevention of Genocide, and his colleagues at the Brookings Institution had already defined sovereignty not simply as a right but as a responsibility.²¹ And as several international legal instruments have mandated, sovereignty is not without obligations.²²

The ICISS’s “responsibility to protect” concept comprises three distinct responsibilities: the responsibility to prevent,²³ the responsibility to react (which in extreme cases may include military intervention),²⁴ and the responsibility to rebuild after military intervention.²⁵ The responsibility to prevent focuses on the importance of early warning mechanisms and conflict prevention, and on the use of diplomatic, economic, and military means to contain a conflict before it escalates. The responsibility to react applies when a state is either unable or unwilling to protect its citizens from massive human rights violations occurring in the state. The Commission proposed a “just cause” threshold for such intervention to be “serious and irreparable harm” to human beings, such as large scale “loss of life,” or large scale ethnic cleansing.²⁶ It also proposed four precautionary principles to guide the use of force once this threshold has been reached: 1) right intention to “halt or avert human suffering”;²⁷ 2) last resort after all diplomatic means have been explored; 3) proportional means;²⁸ and 4) reasonable prospect of success in ending the suffering so that “the

20. *Id.* ¶ 2.29.

21. FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996); *See also* Francis M. Deng, *Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced*, 8 *LEIDEN J. INT’L L.* 249 (1995).

22. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 102 Stat 3045, 78 U.N.T.S. 277 (obligating states to “prevent and punish” the crime of genocide). *See also* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/8082 (Oct. 24, 1970) (listing, along with the principle of sovereign equality of States, the duty of States to fulfill in good faith their international obligations); International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res 56/83, 53rd Sess., Jan. 28, 2002, arts. 40, 41, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (calling for a positive duty of a State to cooperate to bring to an end any serious breaches of a peremptory norm of general international law).

23. ICISS Report, *supra* note 16, ¶¶ 3.1.43.

24. *Id.* ¶¶ 4.1-.43.

25. *Id.* ¶¶ 5.1-.31.

26. *Id.* ¶¶ 4.18-.19, 4.32-.33.

27. *Id.* ¶ 4.33.

28. *Id.* ¶ 4.39

consequences of action [are] not likely to be worse than the consequences of inaction.”²⁹

The ICISS report identified the U.N. Security Council as the right authority under the U.N. Charter to authorize military intervention.³⁰ Addressing the veto issue, the Commission said that the five permanent members of the Security Council should agree not to use the veto where their vital state interests are not at stake, assuming there is majority support for such action.³¹

The report offered alternative options if the Security Council is unable to act: an emergency special session of the General Assembly under the “Uniting for Peace” resolution,³² or action of regional organizations “subject to their seeking subsequent authorization from the Security Council.”³³ The report cautions the Security Council that if the Council fails to live up to its responsibility, single states or coalitions might take action.³⁴

The next stage in the evolutionary process was the December 2004 Report of the High-Level Panel on Threats, Challenges and Change, established by Secretary-General Kofi Annan.³⁵ The Panel endorsed a “collective international responsibility to protect,” which it said was an “emerging norm,” while supporting the ICISS report’s recommendation that the Security Council is the proper U.N. body to authorize military intervention as a last resort “in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”³⁶ The Panel, however, did not discuss any alternative to the Security Council taking action, although it did urge the permanent members to refrain from “use of the veto in cases of genocide and large-scale human rights abuses.”³⁷

The Panel also endorsed the ICISS report’s “just cause” threshold as well as its precautionary principles, while renaming the basic criteria of legitimacy—seriousness of threat, proper purpose, last resort, proper means,

29. ICISS Report, *supra* note 16. at XII, ¶ 4.41.

30. *Id.* ¶¶ 6.13-6.15.

31. *Id.* ¶¶ 8.28-8.30.

32. *Id.* ¶¶ 6.29-6.30; Uniting for Peace, G.A. Res. 377 (V), U.N. Doc. A/1775 (Nov. 3, 1950).

33. ICISS Report, *supra* note 16, ¶¶ 6.31-6.35.

34. *Id.* ¶ 6.39.

35. See generally High-Level Panel on Threats, Challenges, and Change, U.N. Secretary-General, Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004).

36. *Id.* ¶ 203.

37. *Id.* ¶ 256.

and balance of consequences.³⁸ Kofi Annan accepted the Panel's recommendation in his March 2005 report.³⁹

Finally, in September 2005, the U.N. World Summit of Heads of State and Government considered the Secretary-General's report and, while endorsing each state's "responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity," added that: "[t]his responsibility entails the prevention of such crimes."⁴⁰ The Summit further resolved:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, . . . on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴¹

A comparison of the commitments undertaken by the 2005 World Summit with the recommendations in the ICISS report shows several differences between the two documents. The World Summit commitments are restrictive. First, the scope of the responsibility to protect is limited in the Outcome Document to genocide, war crimes, ethnic cleansing, and crimes against humanity, while the ICISS report encompassed "large scale loss of life" or "large scale ethnic cleansing." Second, the scope of possible collective action is limited in light of the Outcome Document's rather vague wording regarding the states' obligation when genocide and other atrocity crimes are committed—they are "prepared to act" in a timely manner "on a case-by-case basis." Third, there is no reference in the Outcome Document to the role of the General Assembly or the possibility of action without the Security Council's authorization. And fourth, the Outcome Document drops the ICISS's suggested guidelines on the use of force—the "just cause" threshold and the precautionary principles.

38. *Id.* ¶ 207.

39. *See generally* U.N. Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, U.N. Doc. A/59/2005, (Mar. 21, 2005).

40. World Summit Outcome, *supra* note 1, ¶¶ 138-39.

41. *Id.* ¶ 139. For the commitments compared here between the World Summit Outcome Document principles and the ICISS report, see *id.* ¶¶ 139 and *supra* note 16, ¶¶ 4.18-.19, 4.32-.33, respectively. *See also* U.N. Secretary-General, Implementing the Responsibility to Protect: Rep. of the Secretary-General, U.N. Doc. A/63/677 (Jan. 12, 2009) (articulating R2P's three-pillar framework) [hereinafter *Implementing the Responsibility to Protect*].

II. THE APPLICATION OF THE RESPONSIBILITY TO PROTECT IN LIBYA

The uprisings that toppled Hosni Mubarak in Egypt and Zine el-Abidine ben Ali in Tunisia did not spare Libya. In response to protests and demonstrations, which began in February 2011, the Muammar Qaddafi regime used force to suppress dissent.⁴² The U.N. Secretary-General was outraged at reports that government troops had fired at demonstrators from aircraft, and called for an immediate end to the violence on February 21, 2011.⁴³ The following day, the Security Council issued a statement on the Libyan situation in which the members “expressed grave concern, condemned the violence” and repression against the civilians and demonstrators, and called upon the Libyan Government to “meet its responsibility to protect its population.”⁴⁴ Four days later, in response to the reports about the regime’s use of foreign mercenaries, detention and torture of the opposition, shooting of peaceful demonstrators, and indiscriminate killing, the Secretary-General called upon the Security Council to take concrete action.⁴⁵

Expressing grave concern at the Libyan situation, the U.N. Security Council condemned the violence and use of force against civilians in Resolution 1970, which it adopted on February 26, 2011.⁴⁶ Prior to the adoption of this resolution, several U.N. officials had also condemned the serious violations of human rights in Libya. These included the U.N. High Commissioner for Human Rights, Navi Pillay, who denounced “the use of live ammunition . . . against peaceful protesters in Libya”⁴⁷ and called for an

42. *See generally* Int’l Coal. for the Responsibility to Protect, *The Crisis in Libya*, RESPONSIBILITYTOPROTECT.ORG, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (last visited Sept. 2012).

43. Press Release, Secretary-General, Outraged Secretary-General Calls for Immediate End to Violence in Libya, U.N. Press Release SG/SM/13408 AFR/2119 (Feb. 22, 2011).

44. Press Release, Security Council, Security Council Press Statement on Libya, U.N. Press Release SC/10180 AFR/2120 (Feb. 22, 2011).

45. Press Release, Security Council, Fundamental Issues of Peace, Security at Stake, Secretary-General Warns as He Briefs Security Council on Situation in Libya, U.N. Press Release SC/10185 (Feb. 25, 2011); Press Release, Secretary-General, Secretary-General Tells Security Council Time to Consider Concrete Action in Libya, as Loss of Time Means More Loss of Lives, U.N. Press Release SG/SM/13418-SC/10186-AFR/2124 (Feb. 25, 2011).

46. *See* S.C. Res. 1970 (2011), U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter U.N. Doc. S.C. Res. 1970].

47. U.N. Office of the High Comm’r for Human Rights, Pillay Denounces Violence by Security Forces in Libya, Bahrain and Other Countries in Middle East and North Africa (Feb. 18, 2011), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10738&LangID=E>.

international inquiry into the violence,⁴⁸ and a group of U.N. Human Rights experts “who warned . . . that the gross violations of human rights committed by the government of Libya could amount to ‘crimes against humanity.’”⁴⁹

The U.N. Human Rights Council adopted a resolution on February 25, 2011, strongly condemning “the gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity.”⁵⁰ Under the resolution the Council established an independent international commission of inquiry to investigate the alleged human rights violations, and requested the Commission “to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible to identify those responsible . . . [so that] those individuals responsible are held accountable.”⁵¹ The Council also recommended to the General Assembly to suspend Libya’s membership in the Human Rights Council,⁵² which the General Assembly did on March 1, 2011.⁵³

The Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference also condemned the violations of human rights and international human rights law being committed in Libya, which the Security Council welcomed in the preamble of Resolution 1970.⁵⁴

48. U.N. Office of the High Comm’r for Human Rights, Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims (Feb. 22, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10743&LangID=E>

49. U.N. Office of the High Comm’r for Human Rights, Libya: “Stop the Massacre”—UN Experts (Feb. 22, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10747&LangID=E>

50. Human Rights Council Resolution 15/1, Situation of Human Rights in the Libyan Arab Jamahiriya, 15th Spec. Sess., U.N. Doc. A/HRC/RES/S-15/1 (Feb. 25, 2011) [hereinafter U.N. Doc. A/HRC/RES/S-15/1].

51. *Id.* ¶ 11. *See also* U.N. Office of the High Comm’r for Human Rights, Council Holds Interactive Dialogue with Commission of Inquiry on Alleged Human Rights Violations in Libya (June 9, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11131&LANGID=E> (finding by the Commission on behalf of the Commission’s chair, Professor Cherif Bassiouni, that the government forces and their supporters had committed serious violations of international law, including murder, torture, persecution, and enforced disappearance, and presented it to the Human Rights Council meeting, and that these violations constituted “crimes against humanity” under customary international law, and as defined in the International Criminal Court’s statute, as well as committing serious violations of international humanitarian law, amounting to war crimes); *See also* Human Rights Council, Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Law in the Libyan Arab Jamahiriya, U.N. Doc. A/HRC/17/44, 17th Sess. (June 1, 2011).

52. U.N. Doc. A/HRC/RES/S-15/1, *supra* note 50, ¶ 14.

53. Suspension of the Rights of Membership of the Libyan Arab Jamahiriya in the Human Rights Council, G.A. Res. 65/265, ¶ 1, U.N. Doc. A/RES/65/265 (Mar. 3, 2011).

54. U.N. Doc S.C. Res. 1970, *supra* note 46, at pmbl.

It welcomed the Human Rights Council's decision regarding the establishment of an independent international commission of inquiry,⁵⁵ and specifically invoked "the Libyan authorities' responsibility to protect its population."⁵⁶

The Security Council deplored "the gross and systematic violation of human rights," expressed "deep concern at the death of civilians," rejected "unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,"⁵⁷ demanded an immediate end to the violence, and urged the Libyan authorities to act "with the utmost restraint, respect human rights and international humanitarian law."⁵⁸ It also decided to refer the Libyan situation to the International Criminal Court⁵⁹ and imposed sanctions against Libya, including an arms embargo,⁶⁰ travel ban against named government officials,⁶¹ and an asset freeze.⁶² The Security Council established a new sanctions committee⁶³ and decided to remain actively seized of the matter.⁶⁴

The Libyan government remained defiant, violence was on the rise, and there were calls for a no-fly zone and international action to protect civilians. To illustrate, in his statement to the General Assembly on March 1, the U.N. Secretary-General commented on the "reports that Government forces have fired indiscriminately on peaceful protesters," and reminded the General Assembly that "[o]ur collective challenge will be to provide real protection for the people of Libya."⁶⁵

On the same day, the African Commission on Human and Peoples' Rights called on "the responsibility of the African Union, the Peace and Security Council of the African Union, and the International Community to take all the necessary political and legal measures for the protection of the

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* ¶ 2(a).

59. *Id.* ¶¶ 4-8. *See also* Press Release, International Criminal Court, Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah al-Senussi (June 27, 2011), <http://www.icc-cpi.int/NR/exeres/D07229DE-4E3D-45BC-8CB1-F5DAF8370218.htm>. (reporting that the International Criminal Court issued warrants of arrest for Gaddafi, one of his sons, and Libya's Intelligence Chief on murder and persecution charges through the state apparatus and Security Forces which constituted crimes against humanity).

60. U.N. Doc. S.C. Res. 1970, *supra* note 46, ¶¶ 9-14.

61. *Id.* ¶15, Annex I.

62. *Id.* ¶¶ 17-22, Annex II.

63. *Id.* ¶ 24.

64. *Id.* ¶ 28.

65. Press Release, Secretary-General, United Nations Response To Violence Against Civilians in Libya Sends Strong Message; There is 'No Impunity' For Crimes Against Humanity, Secretary-General Says, U.N. Press Release, para. 11, SG/SM/13425, GA/11051, AFR/2130 (Mar. 1, 2011). *Id.* at para. 26.

Libyan population.”⁶⁶ The Secretary General of the Organization of the Islamic Conference (OIC), Professor Ekmeleddin Ihsanoglu, announced (on March 8) that the OIC “aligned with those calling for a no-fly zone over Libya with a view to protecting civilians from air strikes [, and] called on the Security Council to assume its responsibility in this regard.”⁶⁷ On March 10 the European Parliament adopted a resolution stressing “that the EU and its Member States must honour their Responsibility to Protect, in order to save Libyan civilians from large-scale armed attacks,” and calling on “the High Representative and the Member States to stand ready for a UNSC decision on further measures, including the possibility of a no-fly zone aimed at preventing the regime from targeting the civilian population”⁶⁸

On March 12, “[t]he Arab League called on the UN Security Council [] to immediately impose a no-fly zone over Libya and announced its recognition of the rebel movement as that country’s legitimate government.”⁶⁹ Two days later, the Permanent Observer of the League of Arab States to the United Nations addressed a letter to the President of the U.N. Security Council informing him about the Council of the League’s decision “[t]o call upon the Security Council, in view of the deterioration in the situation in Libya, to shoulder its responsibility and take the measures necessary to immediately impose a no-fly zone on Libyan military aircraft”⁷⁰ The six Arab Gulf Countries also supported the imposition of a no-fly zone over Libya to protect civilians from attacks by the Libyan regime.⁷¹

On March 17, the Security Council adopted Resolution 1973,⁷² which authorized member states “to take all necessary measures . . . to protect

66. African Comm’n on Human and Peoples’ Rights, *Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya*, Res. 181 (Mar. 1, 2011), <http://www.achpr.org/sessions/9th-eo/resolutions/181/>.

67. *Ihsanoglu Support No-Fly Decision at Oic Meeting on Libya, Calls for an Islamic Humanitarian Programme in and Outside Libya*, ORG. OF ISLAMIC COOPERATION (Aug. 3, 2011), http://www.oic/oci.org/topic_print.asp?t_id=5031.

68. Resolution of 10 March 2011 on the Southern Neighbourhood, and Libya in particular, EUR. PARL. DOC. PV P7_TA(2011)0095 (Mar. 10, 2011), ¶10, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN>.

69. Richard Leiby & Muhammad Mansour, *Arab League Asks U.N. for No-Fly Zone Over Libya*, WASH. POST, Mar. 12, 2011, http://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R_print.html.

70. U.N. Security Council, Letter dated Mar. 14, 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, para. 1, U.N. Doc. S/2011/137 (Mar. 15, 2011).

71. *GCC Supports No-Fly Zone Over Libya, Call for Urgent Arab Summit*, GOING GLOBAL EAST MEETS WEST—ARCHIVES (Mar. 8, 2011), <http://articlesofinterest-kelley.blogspot.com/2011/03/gcc-supports-no-fly-zone-over-libya.html>.

72. S.C. Res. 1973, U.N. Doc. S/RES/1973, (Mar. 17, 2011) <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution> [hereinafter U.N. Doc. S.C. Res. 1973].

civilians and civilian populated areas under threat of attack in [Libya], including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”⁷³ At that time, Paul Williams and Colleen Popkin observed that “the world witnessed a brief moment of legal and moral clarity.”⁷⁴

The Security Council did indeed take a bold step by reiterating the Libyan authorities’ responsibility to protect the Libyan population, reaffirming the primary responsibility of the parties to armed conflicts “to take all feasible steps to ensure the protection of civilians,”⁷⁵ and, as noted earlier, “[a]uthoriz[ing] Member States . . . to take all necessary measures . . . to protect civilians”⁷⁶ The Libyan situation called for such measures, for Gaddafi had earlier called the protesters “cockroaches” and promised to track them down and kill them, “house by house”—reminiscent of the language used by those perpetrating the Rwandan massacre—and had pledged “no mercy” to those who did not surrender as his forces were on the outskirts of Benghazi on March 17.⁷⁷ The Security Council established a no-fly zone⁷⁸ and further strengthened the sanctions imposed by Resolution 1970.⁷⁹

Pursuant to the Security Council’s authorization, a coalition of western states intervened militarily in Libya with the U.S. undertaking an air campaign against Gaddafi’s forces and NATO assuming responsibility for enforcing the arms embargo and no-fly zone. Commencing in March and continuing until October 2011, NATO carried out military attacks in Libya. President Barack Obama offered the rationale for NATO’s intervention on March 28:

Qaddafi declared he would show “no mercy” to his own people. He compared them to rats, and threatened to go door to door to inflict punishment. We knew that if we . . . waited one more day, Benghazi, a city

73. *Id.* ¶ 4.

74. Paul R. Williams & Colleen (Betsy) Popken, *North Africa and the Mideast: To Where?: Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity*, 44 CASE W. RES. J. INT’L L. 225, 225 (2011) [hereinafter Williams & Popken].

75. U.N. Doc. S.C. Res. 1973, *supra* note 72, pmb1.

76. *Id.* ¶ 4.

77. See, e.g., Kareem Fahim & David D. Kirkpatrick, *Qaddafi’s Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES (Feb. 22, 2011), http://www.nytimes.com/2011/02/23/world/africa/23libya.html?_r=1&pagewanted=all (quoting Col. Muammar el-Qaddafi); *Responsibility to Protect: The Lessons of Libya*, ECONOMIST, May 19, 2011, at 67, available at <http://www.economist.com/node/18709571>; Jon Lee Anderson, *Letter from Libya: Sons of the Revolution: Can a Ragtag Civilian Army Defeat a Dictator?* NEW YORKER (May 9, 2011), http://www.newyorker.com/reporting/2011/05/09/110509fa_fact_anderson.

78. U.N. Doc. S.C. Res. 1973, *supra* note 72, ¶¶ 6-12.

79. *Id.* ¶¶ 13-21, Annex I, Annex II. (strengthening the arms embargo, ban on flying, and asset freeze).

nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world.⁸⁰

After seven months of military operations by NATO, the Gaddafi regime fell and his 42-year rule came to an end; eventually he was captured and died at the hands of rebels on October 20, 2011.⁸¹ A week later the U.N. ended its Libya military mandate,⁸² and NATO announced it was ending its military operations on October 31.⁸³

As the Syrian government continued killing civilians and the Security Council took no action, Williams and Popkin, who applauded a “moment of legal and moral clarity” when the Security Council passed Resolution 1973 concerning Libya, later acknowledged that “[t]his moment of legal and moral clarity may have already passed.”⁸⁴ As I study the Syrian crisis, I will discuss this quandary.

III. THE CRISIS IN SYRIA

A. Human Rights Violations in Syria Amounted to Crimes Against Humanity and War Crimes

On the heels of the R2P triumph in Libya, protests and nonviolent demonstrations in Syria, which began in mid-March 2011, were met with extreme violence and brutal repression by government forces to crush the opposition.⁸⁵ This repression led to defections from the army, acquisition of

80. President Barack Obama, Remarks by the President in Address to the Nation on Libya at National Defense University (Mar. 28, 2011), *available at* <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya>.

81. Kareem Fahim, Anthony Shadid, & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES, Oct. 20, 2011, at 1.

82. Kim Sengupta, *Security Fears as UN Ends Libya Military Mandate: NTC Urges Continuation of NATO Operations to Secure Border and Counter Loyalist Attacks*, INDEP. (London), Oct. 28, 2011.

83. Richard Norton-Taylor, *Nato Ends Military Operations in Libya*, GUARDIAN (London), Oct. 31, 2011.

84. Williams & Popken, *supra* note 74, at 225, n.1.

85. For concise reports on Syria’s continued state violence against civilians, *see generally* Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria* GLOBALR2P.ORG (Jan. 10, 2012), http://www.globalr2p.org/media/pdf/R2P_MonitorMarch2012.pdf [hereinafter R2P MONITOR, January 2012]; Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria* GLOBALR2P.ORG (Mar. 15, 2012), http://www.globalr2p.org/media/pdf/R2P_MonitorMarch2012.pdf [hereinafter R2P MONITOR, March 2012]; Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria* GLOBALR2P.ORG (May 15, 2012), http://www.globalr2p.org/media/pdf/R2P_MonitorMay2012_Final.pdf [hereinafter R2P MONITOR, May 2012]; Global Ctr. for the Responsibility to Protect, *Current Crisis: Mass Atrocity Crimes are Occurring and Urgent Action is Needed: Syria*

weapons from other countries by the opposition, and the start of an armed uprising aimed at toppling the regime of Bashar al-Assad. This eventually turned into a civil war. The protracted conflict between a regime under siege and a fractured opposition—with Iran and Russia supporting Assad and Saudi Arabia and Qatar, among others, supplying arms to the rebels—galvanized the sectarian divide between Alawites and Sunnis, with both sides receiving support from abroad; created unease among the Syrian Christian community; and stirred regional unrest and fear of instability.

Although the international community was outraged at reports of civilians being massacred in several places, the use of children as human shields by the army and militia, and the humanitarian catastrophe in Syria, the U.N.'s inaction was palpable. Russia and China repeatedly blocked efforts to get U.N. authority for tougher sanctions and stronger measures against the Syrian regime to stop the ongoing slaughter and humanitarian catastrophe.

The Assad regime's atrocities continued unabated. To illustrate, on July 27, 2012, the U.N. High Commissioner for Human Rights expressed deep alarm at the increased threat to civilians in Syria and noted a discernible pattern of actions by government forces as they tried to clear areas they claimed were occupied by opposition forces:

Typically, during the initial stages, after a village or urban district has been surrounded, water, electricity and food supplies are cut. This is followed by intense shelling and bombardment by a variety of weaponry, increasingly with air support from attack helicopters and now reportedly even jet aircraft. Then tanks move in, followed by ground forces who proceed door-to-door and reportedly often summarily execute people they suspect of being opposition fighters, although sometimes they detain them The bodies of those executed or otherwise killed are then sometimes burned or taken away.⁸⁶

She added: "While such conclusions can only ultimately be reached in a court of law, it is my belief, on the basis of evidence gathered from various credible sources, that crimes against humanity and war crimes have been, and continue to be, committed in Syria."⁸⁷ She "was also concerned by reports of killings of unarmed prisoners and use of excessive force by authorities reacting to unrest in two prisons."⁸⁸

GLOBALR2P.ORG (July 15, 2012), http://globalr2p.org/media/pdf/R2P_Monitor_July2012.pdf [hereinafter R2P MONITOR, July 2012].

86. U.N. Office of the High Commissioner for Human Rights, *Pillay Warns of Consequences Under International Law as Syria Conflict Escalates* (July 27, 2012), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12393&LangID=E> (quoting Navi Pillay, U.N. High Commissioner for Human Rights).

87. *Id.*

88. *Id.*

In July 2012, Human Rights Watch reported a pattern of torture in detention centers run by Syrian intelligence agencies, indicating the regime's policy of torture and ill-treatment.⁸⁹ Based on 200 interviews with former detainees from twenty-seven detention centers, the report states: "Since the beginning of anti-government protests in March 2011, Syrian authorities have subjected tens of thousands of people to arbitrary arrests, unlawful detentions, and forced disappearances, ill-treatment, and torture, using an extensive network of detention facilities, an archipelago of torture centers, scattered throughout Syria."⁹⁰

In response to the events in Syria, the UN Human Rights Council called upon the United Nations High Commissioner for Human Rights to appoint a fact-finding mission to investigate all alleged violations of international human rights law in Syria since March 2011.⁹¹ On August 22, 2011, the Council considered the report of the fact-finding mission at its 17th Special Session and, having expressed "profound concern about its finding, including that there were patterns of human rights violations that may amount to crimes against humanity," it "decide[d] to dispatch urgently an independent international commission of inquiry . . . to investigate all alleged violations of international human rights law [in Syria] since March 2011."⁹²

The Commission submitted its first report on November 23, 2011,⁹³ its second report on February 22, 2012,⁹⁴ and an oral update on June 26, 2012.⁹⁵ In another report on August 16, 2012, the Commission asserted that

89. HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011 79 (2012).

90. *Id.* at 1.

91. The Human Rights Council "express[ed] deep regret at the death of hundreds of people in connection with the recent and ongoing political protests in the Syrian Arab Republic, and grave concern at alleged deliberate killings, arrests and instances of torture of peaceful protesters by the Syrian authorities." Human Rights Council Res. S-16/1, The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events, 16th Spec. Sess., Apr. 29, 2011, U.N. GAOR, A/HRC/RES/S-16/1, at 1, ¶ 7 (Apr. 29, 2011).

92. Human Rights Council Res. S-17/2, Rep. of the Human Rights Counsel on its 17th Special Session, 17th Spec. Sess., Aug. 22, 2011, U.N. Doc. A/HRC/S-17/2, ¶¶ 2, 13 [hereinafter U.N. Doc. A/HRC/S-17/2].

93. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 17th Sess., U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23 2011) [hereinafter U.N. Doc. A/HRC/S-17/2/Add.1].

94. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 19th Sess., U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) [hereinafter U.N. Doc. A/HRC/19/69]; *See also* Press Release, U.N. Commission of Inquiry on Syria, Press Conference by Commission of Inquiry on Syria (Mar. 23, 2011) http://www.un.org/News/briefings/docs/2012/120323_Syria.doc.htm.

95. Human Rights Council, Oral Update of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/20/CRP.1 (June 26, 2012) [hereinafter U.N. Doc. A/HRC/20/CRP.1].

both the Syrian government and the opposition had used “brutal tactics.”⁹⁶ However, it charged that government forces had been responsible for war crimes including murder, extrajudicial killings and torture, and gross violations of international human rights including unlawful killing, attacks against civilians, and acts of sexual violence. These crimes were committed in line with State policy, with indications of the involvement at the highest levels of the Government, as well as security and armed forces.⁹⁷

The Commission faced a major challenge in its inability to visit Syria, despite repeated requests.⁹⁸ This lack of physical access to the country significantly hampered its investigation and its ability to fulfill its mandate. Although its chairperson did visit Damascus, the Commission had to collect firsthand accounts from people who had left the country. It also met with regional organizations, NGOs, and many individuals. The Commission’s methodology consisted of interviews in the field and electronically, via Skype or telephone, with witnesses and victims located inside the country; it conducted a total of 1,062 interviews from the time of its establishment in September 2011 through August 2012.

As its standard of proof, the Commission sought to obtain a reliable body of evidence that was consistent with other information, and thus the incidents reported were based on two or more consistent and reliable witness accounts, often further supported by additional corroborating evidence.⁹⁹ According to the Commission, a total of 7,928 people had been killed as of July 9, 2012; NGO reports ranged from 17,000 to 22,000, but the Commission was unable to confirm these figures.¹⁰⁰

Based upon the substantial body of evidence the Commission gathered, it concluded in the first (November 2011) report that the Syrian military and security forces had committed gross violations of human rights. It expressed grave concern that

[c]rimes against humanity of murder, torture, rape or other forms of sexual violence of comparable gravity, imprisonment or other severe deprivation of liberty, enforced disappearances of persons and other inhumane acts of

96. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, 21st Sess., U.N. Doc A/HRC/21/50 (Aug. 16, 2012) [hereinafter U.N. Doc A/HRC/21/50].

97. *Syrian Government and Opposition Forces Responsible for War Crimes- UN Panel*, UNITED NATIONS NEWS CENTRE (Aug. 15, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42687&Cr=syria&Cr1=&Kw1=civil&Kw2=syria&Kw3=conflict#>.

98. For the reports of the Commission from which the information in this paragraph is obtained, see U.N. Docs. A/HRC/S-17/2/Add.1, *supra* note 93; A/HRC/19/69, *supra* note 94; and A/HRC/21/50, *supra* note 96.

99. U.N. Doc A/HRC/19/69, *supra* note 94, ¶ 10.

100. U.N. Doc. A/HRC/21/50, *supra* note 96, ¶¶ 38-40.

a similar character have occurred in different locations in the country since March 2011¹⁰¹

Using a similar methodology as in the first report, the Commission concluded in its second report in February 2012:

The Government has manifestly failed in its responsibility to protect the population; its forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with the apparent knowledge and consent of the highest levels of the State. Anti-Government armed groups have also committed abuses, although not comparable in scale and organization with those carried out by the State.¹⁰²

The Commission added that the crimes against humanity and other gross human rights violations it had documented had been committed within a system of impunity.¹⁰³

On June 14, Francis Deng and Edward Luck, then Special Advisers to the U.N. Secretary-General on the prevention of genocide and the responsibility to protect, respectively, issued a statement highlighting “the Syrian government’s manifest failure to protect its population.”¹⁰⁴ They urged “the U.N. Security Council to consider the request of the High Commissioner on Human Rights to refer the Syrian situation to the International Criminal Court.”¹⁰⁵

In its oral update of June 26, the Commission reported on its special inquiry into the alleged killings at Al-Houla. As it was unable to visit the site of the killing, its report was based on interviews with witnesses either in person or, if they had fled the country, via telephone/Skype. The Commission found the perpetrators to be “*Shabbiha* or other local [pro-Government] militia from neighbouring villages,” and concluded that it had

[r]easonable grounds to believe that Government forces and *Shabbiha* have perpetrated unlawful killings, arbitrary arrests and detention and torture and other forms of ill-treatment Particularly affected are children interviews conducted by the Commission indicated that Government forces and *Shabbiha* have committed acts of sexual violence against men, women and children during the reporting period.¹⁰⁶

101. U.N. Doc. A/HRC/S-17/2/Add.1, *supra* note 93, ¶ 108.

102. U.N. Doc A/HRC/19/69, *supra* note 94, ¶ 126.

103. *Id.* ¶ 127.

104. Press Release, Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Syria- New York, (June 14, 2012), *available at* <http://www.un.org/apps/news/infocus/Syria/press.asp?sID=44>.

105. *Id.*

106. U.N. Doc. A/HRC/20/CRP.1, *supra* note 95, ¶¶ 48, 106.

In its report dated, August 15, 2012, the Commission found that armed violence had increased in intensity and spread to new areas and, based upon “the intensity and duration of the conflict, combined with the increased organization capabilities of anti-government armed groups, “the Syrian conflict had met the legal threshold for a non-international armed conflict.¹⁰⁷ Thus, in its assessment of the actions of the parties to the hostilities, the Commission applied both international humanitarian law and international human rights law.¹⁰⁸

The Commission found “reasonable grounds to believe that Government forces and the *Shabbiha* committed crimes against humanity, war crimes and violations of international human rights law and international humanitarian law.”¹⁰⁹ It also found reasonable grounds to believe that anti-Government armed groups had also violated human rights law and committed war crimes. The Commission underscored that it

[b]elieves that the large-scale operations during which the most serious violations were committed were conducted with the knowledge, or at the behest, of the highest levels of Government. Responsibility therefore rests with those who either ordered or planned the acts or, in the case of those in effective command and control, those who failed to prevent or punish the perpetrators. The consistent identification of the *Shabbiha* perpetrators of many of the crimes does not relieve the Government of its responsibility, as international law recognizes the responsibility of States that commit violations through proxies.¹¹⁰

Among NGOs, the Global Center for the Responsibility to Protect (Global R2P) reported on January 10, 2012, that “State violence against civilians in Syria constitutes ongoing crimes against humanity by the Syrian Arab Republic.”¹¹¹ It stated that since the beginning of the March 12 mass protest movement in Syria,

Syrian security forces have used tanks, warships and heavy weapons against centers of protest. The security forces have also indiscriminately fired live ammunition to disperse and terrorize civilian protesters. Since March massacres have been perpetrated against civilians in Damascus [and six more cities, including Homs].

....

107. U.N. Doc A/HRC/21/50, *supra* note 96, Summary; *See also How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, ICRC.ORG (Mar. 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

108. U.N. Doc A/HRC/21/50, *supra* note 96, at 1.

109. *Id.* ¶ 145.

110. *Id.* ¶ 147.

111. R2P MONITOR, January 2012, *supra* note 85, at 2.

Crimes against humanity perpetrated by the Syrian government continue to pose a grave threat to civilians.¹¹²

Subsequently, in its July 2012 report, Global R2P asserted that “security forces and allied ‘shabiha’ militias have been intensifying their attacks [massacring civilians, using] helicopter gunships and tanks.”¹¹³

B. The Response at the United Nations

At the United Nations the grave concern with the Syrian situation was accompanied by exploring all possible means to bring the conflict to an end and to ensure the protection of the population. Hence, in addition to the active engagement of the High Commissioner for Human Rights and the Human Rights Council, there were ongoing deliberations by members of both the Security Council and the General Assembly. As mentioned earlier, Russia and China stubbornly resisted any attempt by the Security Council to take strong measures against the Syrian government.

To briefly recapitulate, on August 3, 2011, a Security Council Presidential Statement condemned “the widespread violations of human rights and the use of force against civilians by the Syrian authorities.”¹¹⁴ The Council adopted this Statement by consensus, with only Lebanon “disassociat[ing] itself from the statement.”¹¹⁵ On October 4, 2011, after months of negotiations, a European-sponsored Security Council draft resolution¹¹⁶ containing sanctions against Syria including travel bans and an arms embargo, was defeated after receiving nine affirmative votes but with China and Russia vetoing, while South Africa, India, Brazil, and Lebanon abstained.¹¹⁷ The U.S. Representative to the U.N., Susan Rice, walked out after the vote, saying that “opposition to the resolution was a ‘cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people.’”¹¹⁸

Then, as discussed earlier, on August 22, the U.N. Human Rights Council resolved to dispatch its Independent International Commission of Inquiry to Syria to investigate all alleged human rights violations since

112. *Id.*

113. R2P MONITOR, July 2012, *supra* note 85, at 2.

114. Press Release, Security Council, Security Council, Security Council, in Statement, Condemns Syrian Authorities for ‘Widespread Violations of Human Rights, Use of Force against Civilians,’ U.N. Press Release SC/10352 (Aug. 3, 2011).

115. U.N. SCOR, 6598th mtg. at 2-3, U.N. Doc. S/PV.6598 (Aug. 3, 2011).

116. S.C. Res., U.N. Doc. S/2011/612 (Oct. 4, 2011).

117. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Press Release SC/10403 (Oct. 4, 2011) [hereinafter U.N. Press Release SC/10403].

118. *China and Russia Veto UN Resolution Condemning Syria*, BBC NEWS (Oct. 5, 2011), <http://www.bbc.co.uk/news/world-middle-east-15177114>.

March 2011, in the Syrian Arab Republic, “to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”¹¹⁹ On November 2, there was a bit of hope when the Syrian government agreed to an Arab League peace plan to end the fighting,¹²⁰ but the hope was short-lived.¹²¹

On December 19, the General Assembly agreed to a resolution urging Syria to implement the Arab League plan of action “in its entirety,” including cooperating with the HRC’s commission of inquiry.¹²² Resolution 66/176 “[s]trongly condemn[ed] the continued grave and systematic human rights violations by the Syrian authorities, such as arbitrary executions, excessive use of force and the persecution and killing of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including children”¹²³

The next attempt to take action in the Security Council came on February 4, 2012, following the bloody siege of the city of Homs in which some 217 to 260 people were killed. The strongly worded draft resolution called for President Assad to step down and for stringent sanctions against the Assad regime. The resolution condemned the ongoing violence and called upon the Syrian government to uphold its commitments under an Arab League plan that it had signed in November. On this occasion, none of the members abstained, but China and Russia again cast vetoes.¹²⁴

Subsequently, on February 16, the General Assembly overwhelmingly adopted another resolution, again

[s]trongly condemn[ing] the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with

119. Human Rights Council, Rep. of the Indep. Intl’l Comm. of Inquiry on the Syrian Arab Republic, 17th Spec. Sess., *supra* note 93, ¶ 113, ¶¶ 2, 13, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 11) [hereinafter U.N. Doc. A/HRC/S-17/2/Add.1].

120. *See generally* U.N. Secretary General, Secretary-General Hopes Syria Will Carry out Arab League Plan to End Crisis (Nov. 2, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40292&Cr=syria&Cr1=&Kw1=arab+league&Kw2=syria+&Kw3=peace>.

121. *See generally* Death Toll Passes 3,500 as Syrian Crackdown Continues, Says UN Human Rights Office (Nov. 8, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40326&Cr=syria&Cr1=&Kw1=arab+league&Kw2=syria+&Kw3=peace>.

122. G.A. Res. 66/176, ¶ 3, U.N. Doc. A/RES/66/176 (Feb. 23, 2012) [hereinafter U.N. Doc. A/RES/66/176]; *See* U.N. Secretary-General, General Assembly Urges Syria to Implement Arab League Plan to End Violence (Dec. 19, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40782&Cr=syria&Cr1=&Kw1=general+assembly&Kw2=syria&Kw3=resolution>.

123. U.N. Doc. A/RES/66/176, *supra* note 122, ¶ 1.

124. S.C. Res., U.N. Doc. S/2012/77 (Feb. 4, 2012).

access to medical treatment, torture, sexual violence, and ill-treatment, including against children.¹²⁵

A week later, on February 23, the Secretary General and the League of Arab States announced their appointment of Kofi Annan as a Joint Special Envoy on Syria.¹²⁶ This move was enthusiastically endorsed by the Security Council,¹²⁷ which

expressed its full support for [his] efforts . . . to bring an immediate end to all violence and human rights violations, secure humanitarian access, and facilitate a Syrian-led political transition to a democratic, plural political system, in which citizens are equal regardless of their affiliations or ethnicities or beliefs¹²⁸

On March 26, the Syrian government accepted Kofi Annan's six-point proposal.¹²⁹ However, implementation again seemed unattainable. On April 4, 2012, the Security Council unanimously adopted Resolution 2042,¹³⁰ authorizing a team of up to thirty unarmed military observers "to liaise with the parties and to begin reporting on the implementation of a full cessation of armed violence in all its forms by all parties." The resolution noted the Syrian government's commitment to implement a ceasefire as of April 10, which the parties at that time apparently intended to observe, and underlined the urgency of full implementation of Kofi Annan's proposed six-point plan.¹³¹

The Syrian government, through its representative, pledged to support Mr. Annan's mission as long as it respected Syria's sovereignty, saying, "The time for violence is gone . . . the time for stewardship over us is gone

125. G.A. Res. 66/253, ¶ 2, U.N. Doc. A/RES/66/253 (Feb. 21, 2012) [hereinafter U.N. Doc. A/Res/66/253].

126. U.N. Secretary General, Syria: UN and Arab League Appoint Joint Envoy to Deal With Crisis (Feb. 23, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41346&Cr=syria&Cr1=&Kw1=annan&Kw2=arab+league&Kw3=join>.

127. U.N. Doc. A/Res/66/253, *supra* note 125, ¶ 11.

128. U.N. Security Council, In Presidential Statement, Security Council Gives Full Support to Efforts of Joint Special Envoy of United Nations, Arab League to End Violence in Syria (Mar. 21, 2012), <http://www.un.org/News/Press/docs/2012/sc10583.doc.htm>. *See also* U.N. Secretary-General, Security Council Calls for Implementation of Six-Point Plan to End Crisis in Syria (Mar. 21, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41598&Cr=syria&Cr1=>.

129. *See* U.N. Secretary-General, Syrian Government Accepts UN-Arab League Envoy's Six-Point Plan to End Crisis (Mar. 27, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41646&Cr=Syria&Cr1=&Kw1=six%2Dpoint+plan&Kw2=annan&Kw3=syria>.

130. S.C. Res. 2042, ¶ 7, U.N. Doc. S/RES/2042 (Apr. 14, 2012) [hereinafter U.N. Doc. S/RES/2042].

131. *See* U.N. Doc. A/RES/66/176, *supra* note 122, at 1.

as well.”¹³² The Council stated that once the cessation of violence was sustained it would immediately establish a U.N. supervision mission in Syria to monitor all relevant aspects of the Annan plan. The parties to the six-point proposal, set forth in an annex to the resolution, agreed to

- work in an “inclusive Syrian-led political process to address the legitimate aspirations and concerns of the Syrian people”;
- stop the fighting through a U.N. supervised cessation of armed violence to protect civilians and stabilize the country, in which the government would stop moving troops into population centers and begin a pullback of military concentrations in those areas , and also work to cease armed violence, with U.N. supervision; the opposition would similarly stop fighting and work toward cessation of armed violence, with U.N. supervision;
- ensure access for provision of humanitarian assistance, including a daily two-hour pause for humanitarian access;
- “intensify the pace and scale of release of arbitrarily detained persons”;
- allow freedom of movement for journalists in the country; and
- “respect freedom of association and the right to demonstrate peacefully as legally guaranteed.”¹³³

But the fighting did not cease.¹³⁴ Instead, it very soon escalated, and, as it was apparent that the called-for cessation of armed violence was “clearly incomplete,”¹³⁵ the Security Council’s action again became urgent. On April 21, the Council unanimously adopted Resolution 2043, establishing a ninety-day U.N. Supervision Mission to monitor the ceasefire and implementation of Resolution 2042 and deploying 300 unarmed military observers.¹³⁶

132. Press Release, Security Council, Security Council Unanimously Adopts Resolution 2042 (2012), Authorizing Advance Team to Monitor Ceasefire in Syria: Syria’s Representative Pledges Support for Mission, Stresses Sovereignty, U.N. Press Release SC/10609 (Apr. 14, 2012) (quoting Syria’s representative).

133. S.C. Res. 2042, *supra* note 130, Annex, Six Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States.

134. See, e.g., U.N. News Centre, *UN-Arab League envoy presses for ceasefire in Syria*, April 10, 2012, <http://www.un.org/apps/news/story.asp?NewsID=41735&Cr=syria&Cr1=&Kw1=syria&Kw2=ceasefire&Kw3=security+council>.

135. S.C. Res. 2043, at 2, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

136. *Id.*

However, all efforts were unavailing. On July 19, yet another Security Council resolution calling for sanctions on Damascus was vetoed by China and Russia.¹³⁷ The Council's inaction was widely criticized.¹³⁸ In an August 3 resolution, the General Assembly expressed its "deep concern at the lack of progress towards implementation of the six-point plan, and deplor[ed] the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions."¹³⁹ The resolution, which was passed by 133 in favor, twelve against, and thirty-one abstentions,¹⁴⁰ encouraged the Security Council to consider appropriate measures to hold accountable those responsible for human rights violations, including those that may amount to crimes against humanity.¹⁴¹ The resolution reiterated the General Assembly's call for "an inclusive Syrian-led political transition to a democratic, pluralistic political system"¹⁴²

In the face of what must have appeared a hopeless situation, Kofi Annan resigned as Joint Envoy on August 2, 2012, with very critical words for the Security Council's inability to exercise its authority to save the lives of innocent victims in Syria.¹⁴³ The Secretary-General announced that he and the Arab League had agreed upon Lakhdar Brahimi for Annan's replacement as Joint Envoy on August 17.¹⁴⁴

137. See U.N. Secretary-General, Security Council fails to adopt resolution on Syria (Jul. 19, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42513&Cr=Syria&Cr1=&Kw1=syria+&Kw2=security+council&Kw3=resolution>; U.S. Permanent Representative to the United Nations, U.S. Mission to the United Nations, Explanation of Vote by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a Security Council Session on Syria, July 19, 2012 (July 19, 2012), <http://usun.state.gov/briefing/statements/195246.htm>; Michelle Nichols, *Russia, China Veto Syria Resolution From UN Security Council*, HUFFINGTON POST (July 19, 2012), http://www.huffingtonpost.com/2012/07/19/russia-china-syria_n_1686172.html.

138. See, e.g., Amnesty Int'l, *Syria: Security Council Vote Will Embolden Violators*, AMNESTY.ORG, (July 19, 2012), <http://www.amnesty.org/en/news/syria-security-council-vote-fails-address-grave-human-rights-violations-2012-07-19>; José Luis Díaz, *The Security Council's Syria Shame*, CNN.com (Aug. 2, 2012), <http://globalpublicsquare.blogs.cnn.com/2012/08/02/the-security-councils-syria-shame/>.

139. G.A. Res. 66/253 B, at 2, U.N. Doc. A/RES/66/253 B (July 31, 2012) [hereinafter U.N. Doc. A/RES/66/253 B].

140. See Press Release, U.N. Dept. of Public Info., General Assembly, in Resolution, Demands All in Syria "Immediately and Visibly" Commit to Ending Violence That Secretary-General Says is Ripping Country Apart, U.N. Press Release GA/11266 (Aug. 3, 2012); See also Howard LaFranchi, *Syria: UN Security Council Inaction Earns Reprimand From General Assembly*, CHRISTIAN SCIENCE MONITOR (Aug. 2, 2012), <http://www.csmonitor.com/USA/Foreign-Policy/2012/0802/Syria-UN-Security-Council-inaction-earns-reprimand-from-General-Assembley>.

141. U.N. Doc. A/RES/66/253 B, *supra* note 139, ¶¶ 8-9.

142. *Id.* ¶ 16.

143. See, e.g., Rick Gladstone, *Resigning as Envoy to Syria, Annan Casts Wide Blame*, N.Y. TIMES, Aug. 2, 2012, available at http://www.nytimes.com/2012/08/03/world/middleeast/annan-resigns-as-syria-peace-envoy.html?_r=1&pagewanted=all.

144. See, e.g., Rick Gladstone, *Veteran Algerian Statesman to Succeed Annan as Special Syrian Envoy*, N.Y. TIMES, Aug. 18, 2012, available at

C. Regional Response

Arab inter-governmental organizations have been at the forefront of the effort to address the conflict in Syria. The Arab Parliament, an eighty-eight-member advisory committee of lawmakers from the forty-four-member nations of the Arab League, called for monitors to leave Syria as their presence provided an imprimatur for the actions of the Syrian government. The Speaker of the Parliament called this a “clear violation of the Arab League protocol which is to protect the Syrian people.” He added, “We are seeing an increase in violence, more people are being killed including children . . . and all this in the presence of Arab League monitors, which has angered the Arab people.”¹⁴⁵

The Arab League suspended Syria and imposed tough economic sanctions to isolate Syria from the rest of the membership in November 2011 after the Assad government accepted a peace plan,¹⁴⁶ but then blatantly ignored the plan and invaded Homs.¹⁴⁷ On August 15, the Organization of Islamic Cooperation (OIC) suspended Syria from membership in the organization, which represents 1.5 billion Muslims, because of “strong concern over the massacres and the inhumane acts that are being committed against the Syrian people.”¹⁴⁸

http://www.nytimes.com/2012/08/18/world/middleeast/lakhdar-brahimi-algerian-statesman-to-succeed-kofi-annan-as-special-syrian-envoy.html?_r=1.

145. AFP, *Syria Activists Heap Criticism on Arab Monitors*, Tribune.com (Jan. 2, 2012), <http://tribune.com.pk/story/315415/syria-activists-heap-criticism-on-arab-monitors/> (quoting Salemal Diqbassi, Arab Parliament speaker), AFP, *Syria Activists Heap Criticism on Arab Monitors*, THE EXPRESS TRIBUNE.COM, (Jan. 2, 2012), <http://tribune.com.pk/story/315415/syria-activists-heap-criticism-on-arab-monitors/>.

146. See generally Neil MacFarquhar & Nada Bakri, *Arab League Says Syria Accepts Its Plan for Talks; Protesters Are Skeptical*, N.Y. TIMES, (Nov. 2, 2011), <http://www.nytimes.com/2011/11/03/world/middleeast/arab-league-says-syria-accepts-plan-for-talks.html>.

147. See *Times Topics: Arab League*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/organizations/a/arab_league/index.html (last updated Feb. 13, 2012).

148. See Salma Abdelaziz, Nick Paton-Walsh & Joe Sterling, *Organization of Islamic Cooperation Suspends Syria*, CNN, <http://www.cnn.com/2012/08/15/world/meast/syria-unrest/index.html> (last visited Aug. 15, 2012).

D. Sanctions against Syria¹⁴⁹

Numerous states and regional organizations imposed diplomatic and economic sanctions on Syria during the course of its deadly war against its people. A number of states closed their embassies in Damascus and/or expelled the representatives of Syria. Also, many states and regional organizations imposed economic sanctions.

E. Nongovernmental Organizations' (NGOs) Response

NGOs have been equally frustrated in their efforts to make any meaningful inroads in protecting the Syrian population, but their work has been critical, nonetheless, in raising awareness of the ongoing Syrian crisis, as well as in monitoring the violations and providing humanitarian aid. The contributions of a selected few organizations are noted here.

After all of the efforts on the intergovernmental scale had clearly failed to halt the violence in Syria, and as the Syrian government's bloody repression drew ever greater and more organized resistance, on August 4, 2012, the International Committee for the Red Cross, which is responsible for the Geneva Conventions and their application in conflicts, characterized the situation as a "non-international armed conflict," or civil war.¹⁵⁰ Thus, it announced that henceforth all parties were subject to international humanitarian law:

Under international humanitarian law, the parties to the conflict must at all times distinguish between civilians and persons directly participating in hostilities. Attacks may be directed only against military objectives—

149. See generally *Timeline of International Response to the Situation in Syria*, http://www.globalr2p.org/media/pdf/Timeline_of_International_Response_to_Syria.pdf (last visited Sept. 24, 2012); see also Carol J. Williams, *Sanctions Against Syria Hurting, Assad Regime Concedes*, L.A. TIMES, (May 23, 2012), http://latimesblogs.latimes.com/world_now/2012/05/syria-sanctions-hurting.html; U.S. Dep't of the Treasury, Resource Center, *Syria Sanctions*, <http://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx> (last visited Aug. 24, 2012); *Swiss Target More Syrian Firms and Individuals*, Swissinfo.ch, (Aug. 14, 2012), http://www.swissinfo.ch/eng/politics/foreign_affairs/Swiss_target_more_Syrian_firms_and_individuals.html?cid=33311532; Laurence Norman, *EU Nations Reach Deal on New Syria Sanctions*, WSJ.COM, (July 19, 2012), <http://online.wsj.com/article/SB10000872396390444097904577537221674487292.html>.

150. Int'l Comm. of the Red Cross, News Release, *Syria: ICRC Urges Full Respect for International Humanitarian Law*, (Aug. 4, 2012, <http://www.icrc.org/eng/resources/documents/news-release/2012/syria-news-2012-07-31.htm> [hereinafter Red Cross News Release]. See *Syria in Civil War*, BBC NEWS, (Jul. 15, 2012, 2:08 PM), <http://www.bbc.co.uk/news/world-middle-east-18849362>; Geetha Pillai, *Syria Conflict Declared Civil War by Red Cross*, INTERNATIONAL BUSINESS TIMES, (July 16, 2012, 5:56 AM), <http://www.ibtimes.co.uk/articles/363225/20120716/syria-conflict-civil-war-red-cross-geneva.htm>.

never against civilians, or against civilian structures such as homes, schools or places of worship.¹⁵¹

This development is important in establishing the threshold for findings of international crimes committed in the course of the repression.

Within Syria, the Syrian Arab Red Crescent has had a major role in providing relief, but has been greatly hampered by the logistics of the war and competing political pressures.¹⁵² On the international level, organizations concerned with human rights in Syria include Amnesty International, Human Rights Watch (HRW), the International Coalition for Responsibility to Protect (ICR2P), and the Global Center for the Responsibility to Protect (GCR2P).

Amnesty International has been extremely effective in bringing to light the egregious human rights violations occurring in the Syrian conflict, including issuing major reports such as *Deadly Reprisals*¹⁵³ and *All-Out Repression*.¹⁵⁴ Similarly, Human Rights Watch, ICR2P, and GCR2P have been actively monitoring the situation and issuing comprehensive reports and recommendations.¹⁵⁵

IV. SUPPLEMENTING RESPONSIBILITY TO PROTECT WITH RESPONSIBILITY WHILE PROTECTING

Secretary-General Ban Ki-moon's 2009 report, *Implementing the Responsibility to Protect*,¹⁵⁶ is a seminal document in which he elaborated on the concept and further clarified it, especially highlighting its three pillars.¹⁵⁷ Pillar one states the primary responsibility of each state to protect

151. Red Cross News Release, *supra* note 150. (quoting Robert Mardini, ICRC Head of Operations for the Near and Middle East).

152. See, e.g., Integrated Reg'l Info. Networks (IRIN), *Principles or Pragmatism? Negotiating Access in Syria*, IRIN NEWS (June 8, 2012), <http://www.unhcr.org/refworld/docid/4fd72b982.html>; IRIN, *Syrian Red Crescent Fighting Perceptions of Partiality*, IRIN NEWS (Mar. 29, 2012), <http://www.irinnews.org/Report/95204/Analysis-Syrian-Red-Crescent-fighting-perceptions-of-partiality>.

153. AMNESTY INT'L, DEADLY REPRISALS: DELIBERATE KILLINGS AND OTHER ABUSES BY SYRIA'S ARMED FORCES (2012), available at <http://www.amnesty.org/en/library/asset/MDE24/041/2012/en/30416985-883b-4e67-b386-0df14a79f694/mde240412012en.pdf>.

154. Amnesty International, *All-Out Repression*, *supra* note 6.

155. See, e.g., Human Rights Watch (HRW), *UN: Human Rights Monitors Still Needed in Syria*, (Aug. 14, 2012), <http://www.hrw.org/news/2012/08/14/un-human-rights-monitors-still-needed-syria>; Ole Solvang, *Tracking Down Torture in Syria*, CNN Opinion, (Jul. 3, 2012), http://articles.cnn.com/2012-07-03/opinion/opinion_solvang-syria-torture_1_syria-observers-journalists?_s=PM:OPINION; HRW, *Torture Archipelago*, *supra* note 89; HRW, *Syria: Rights, Accountability Key to Transition Plan*, (Jun. 30, 2012), <http://www.hrw.org/news/2012/06/30/syria-rights-accountability-key-transition-plan>. For the websites of ICR2P and GCR2P, see responsibilitytoprotect.org and globalr2p.org, respectively.

156. *Implementing the Responsibility to Protect*, *supra* note 41.

157. See generally *id.*, ¶¶ 11-66.

its population from genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁵⁸ The second pillar states the international community's commitment to provide assistance to states in capacity building so that they can protect their populations from these crimes.¹⁵⁹ And pillar three articulates the international community's responsibility to take "timely and decisive" action to prevent and halt these crimes when a state is "manifestly failing" to protect the population.¹⁶⁰ A range of options for such action, both non-coercive and coercive, is available under Chapters VI, VII, and VIII of the U.N. Charter.¹⁶¹ The document also provides for the General Assembly to be proactive, as provided under Charter Articles 10-14 and under the "Uniting for Peace" resolution.¹⁶²

The Secretary-General emphasized the narrow scope of the Responsibility to Protect as limited to the four specified crimes. He recounted the impressive developments in Africa in redefining sovereignty, noting the Constitutive Act of the African Union, under which the Union has the right "to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity."¹⁶³

The General Assembly considered the Secretary-General's report, deliberating over a period of three days¹⁶⁴ — informal interactive dialogue on July 23¹⁶⁵ and two days of debate on July 24¹⁶⁶ and 28¹⁶⁷ — and adopted the resolution *The Responsibility to Protect* on September 14, 2009.¹⁶⁸ The resolution recalled the 2005 World Summit Outcome and took note of the report of the Secretary-General and of the "timely and productive"

158. *Id.*, ¶¶ 11(c), 12-27.

159. *Id.*, ¶¶ 11(c), 28-48.

160. *Id.*, ¶¶ 11(c), 49-66.

161. *Id.*, ¶¶ 11(c).

162. *Id.*

163. Org. of African Unity [OAU], *The Constitutive Act*, art. 4 ¶ h, OAU Doc., http://www.au2002.gov.za/docs/key_oau/au_act.htm (last visited Sept. 24, 2012).

164. Press Release, Gen. Assembly, Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate, U.N. Press Release GA/10850 (July 28, 2009).

165. Press Release, Gen. Assembly, Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect, U.N. Press Release GA/10847 (July 23, 2009).

166. Press Release, Gen. Assembly, More than 40 Delegates Express Strong Skepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect, U.N. Press Release GA/10849 (July 24, 2009).

167. Press Release, Gen. Assembly, Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debates, U.N. Press Release GA/10850, (July 28, 2009).

168. G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); *See Articles and Op-Eds From the General Assembly Debate on RtoP*, ICRTOP <http://responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/2498-articles-and-op-eds-from-the-general-assembly-debate-on-rtop> (last updated Aug. 27, 2012) (providing links to the press reports of the conversation on R2P).

deliberation in the General Assembly on the subject.¹⁶⁹ In its operative part, the General Assembly decided “to continue its consideration of the responsibility to protect.”¹⁷⁰

Pursuant to that decision, the General Assembly discussed R2P in an informal interactive dialogue in August 2010.¹⁷¹ Preceding the dialogue, the Secretary-General submitted a report, “Early Warning, Assessment and the Responsibility to Protect.”¹⁷² In this report, he noted the UN’s weakness in its insufficient focus on early warning and risk analysis and the lack of sufficient information sharing during the Rwanda and Srebrenica tragedies.¹⁷³ He referred to several gaps in “providing the timely information and assessment needed to implement the Responsibility to Protect in a balanced, responsible, rigorous manner.”¹⁷⁴

The Secretary-General underscored the importance of early engagement for understanding a given situation, which is equally important to framing strategies for either prevention or response. The report emphasized the need for well-informed action. Thus, [g]etting the right assessment—both of the situation on the ground and of the policy options available to the United Nations and to its regional and subregional partners—is essential for the effective, credible and sustainable implementation of the responsibility to protect and for fulfilling the commitments made by the Heads of State and Government at the 2005 World Summit.¹⁷⁵

The Secretary-General suggested that the Assembly discuss in its next interactive dialogue in 2011 the role of regional organizations in implementing the responsibility to protect.¹⁷⁶

In the General Assembly’s informal dialogue there was overall support for the R2P, although a few states remained critical.¹⁷⁷ The General Assembly also welcomed the Secretary-General’s suggestion that the next

169. *Id.*

170. G.A. Res. 63/308, *supra* note 168, ¶ 2.

171. See *GA Dialogue on Early Warning, Assessment and the Responsibility to Protect*, INTERNATIONAL COALITION FOR RESPONSIBILITY TO PROTECT (Aug. 2010), <http://www.responsibilitytoprotect.org/ICRtoP%20Report%20of%20EW%20dialogue%20on%209%20August%202010%20FINAL.pdf>; *Responsibility to Protect: Support Grows in GA but Detractors Remain Implacable*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS, <http://www.ishr.ch/archive-general-assembly/865-responsibility-to-protect-support-grows-but-detractors-remain-implacable> (last updated Aug. 24, 2010) [hereinafter *Responsibility to Protect: Support Grows in GA but Detractors Remain Implacable*].

172. U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010) [hereinafter U.N. Doc. A/64/864].

173. *Id.* ¶ 7.

174. *Id.* ¶ 10.

175. *Id.* ¶ 19.

176. *Id.* ¶ 14.

177. *Responsibility to Protect: Support Grows in GA but Detractors Remain Implacable*, *supra* note 171.

interactive dialogue focus on the role of regional organizations in implementing R2P.¹⁷⁸

The next informal interactive dialogue took place on July 12, 2011.¹⁷⁹ The Secretary-General presented a report on June 27, 2011, entitled “The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect.”¹⁸⁰ In his report, the Secretary General highlighted the partnership and collaboration between the U.N. Secretariat, on the one hand, and the regional organizations on the other. He noted the ongoing contacts between his special advisers on the prevention of genocide and on the responsibility to protect, and regional groups on both thematic issues and specific country situations.¹⁸¹ Addressing the General Assembly on July 12, the Secretary-General acknowledged that the record on atrocity prevention is still mixed and anticipated that dialogue would “open a sustained cross-regional conversation on lessons learned and practical experiences.”¹⁸²

The next interactive dialogue took place on September 5, 2012, on the third pillar—collective, timely, and decisive response when a state is “manifestly unwilling to protect its population.”¹⁸³ As in the past, prior to the Assembly meeting, the Secretary-General presented his report on July 25, entitled “Responsibility to protect: timely and decisive response.”¹⁸⁴

The timing was critical for the discussion of the third pillar, as the complexity of the Syrian situation had presented a dilemma for invocation and application of R2P. Unquestionably, the Syrian government has the responsibility to protect its population, which, as the first pillar mandates, is an affirmation of each state’s duty under international law. As to the second pillar, the international community’s assistance to states to develop local capacities to protect populations from atrocity crimes, the rapid pace of events in Syria made such assistance impossible. Every initiative of the

178. *Id.*

179. *Interactive Dialogue of the UN General Assembly on the Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT (Aug. 2011), [http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGOGA%20dialogue%20on%20RtoP%20FINAL\(1\).pdf](http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGOGA%20dialogue%20on%20RtoP%20FINAL(1).pdf).

180. U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011).

181. *Id.* ¶ 30.

182. Press Release, U.N. Secretary-General, History of Atrocity Crimes is Not One of Acting Too Boldly, But of Doing Too Little, Too Late, Secretary-General Tells General Assembly, U.N. Press Release SG/SM/13700 GA/11113 (July 12, 2011).

183. See Press Release, General Assembly, World Not Fulfilling “Never Again” Vow, Secretary-General Tells General Assembly Meeting on Responsibility to Protect; Use of Force Must Be Last Resort, Says President Before Panel Discussion, U.N. Press Release GA/11270 (Sept. 5, 2012) [hereinafter U.N. Press Release GA/11270].

184. General Assembly, *Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Response*, U.N. Doc. A/66/874-S/2012/578, July 25, 2012.

international community was either ignored or rebuffed by the Assad government. And protests against the government were brutally repressed by the Assad regime, which led to the use of violence by the opposition, as well.

As the preceding discussion has shown, state-directed crimes against humanity and war crimes were committed in Syria and continue as of the time of this writing. The national authorities have manifestly failed to protect their population from atrocities and intense violence, which has resulted in high casualties; they indeed have been the primary perpetrators of these crimes. Vetoes by China and Russia in the Security Council did not permit the invocation and application of R2P, so neither effective non-coercive nor coercive measures could be taken by the international community. However, even if the Security Council could reach a consensus on taking effective non-coercive measures against the Assad regime in order to compel the security forces and militia to halt their excessive violence, assuming that the Syrian government did not halt its brutal repression, it is doubtful that there could be agreement on collective military intervention.

Although there is a stronger case for the use of the third pillar of R2P in Syria than there was in Libya, and there is a moral imperative to react when such egregious violations of human rights occur the situation in Syria is complex. The army is strong and well trained, extremists have reportedly joined the ranks of the rebels, and the opposition lacks unity. Minorities are apprehensive about possible persecution under a new regime, and there is a likelihood that in light of the inflammatory regional setting, a military intervention might trigger regional instability. Furthermore, a nuanced approach under R2P is called for, because R2P may not be invoked unless there are reasonable prospects of success in protecting the lives and well-being of people, so that the situation is made better for them rather than worse. Coupled with this complexity in Syria there were concerns about NATO having exceeded the Security Council's mandate in its implementation of Resolution 1973 by focusing on regime change in Libya rather than on protection of the people.¹⁸⁵

This was the situation after the second Russian and Chinese veto in the Security Council on October 4, 2011,¹⁸⁶ that the Permanent Representative of Brazil, Maria Luiza Ribeiro Viotti, presented to the Secretary General a concept note, entitled *Responsibility while protecting: Elements for the development and promotion of a concept*,¹⁸⁷ for circulation to member

185. The Russian and Chinese vetoes of the Security Council resolution on Syria on October 4, 2011, and the abstention by the other BRICS (Brazil, India, and South Africa, as non-rotating members on the Security Council) were apparently in part due to a backlash against NATO's intervention in Libya, purportedly to protect the civilian population there, but apparently aimed at bringing about a regime change. See *supra* note 117.

186. *Id.*

187. U.N. Permanent Rep. of Brazil, *Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-*

states. The note stressed the “painful consequences” of past interventions—aggravation of existing conflicts, increased incidence both of terrorism and vulnerability of civilian populations, and new cycles of violence— and a “growing perception” that R2P might be misused for purposes such as regime change.¹⁸⁸

RWP highlights prevention as “always the best policy”¹⁸⁹ and the use of force as a measure of last resort,¹⁹⁰ always to be authorized by the Security Council under Chapter VII, or “in exceptional circumstances, by the General Assembly, in line with” the Uniting for Peace Resolution.¹⁹¹ Force must meet the standard of proportionality and not exceed the mandate conferred by the Security Council or the General Assembly, nor “generate more harm than it was authorized to prevent.”¹⁹²

In addition the concept paper calls for the three pillars to strictly follow “political subordination and chronological sequencing.” The emphasis on sequencing is to distinguish between collective responsibility in the application of non-coercive measures and collective security, where there is a threat or situation of violence against civilians that is characterized as a threat to international peace and security.¹⁹³ It also proposes the creation of a monitoring and assessment system to review the use of force as it evolves.¹⁹⁴

RWP, which is aimed at ensuring strict regulation of R2P, supplements R2P by adding new principles and procedures. It suggests specific criteria which the Security Council must consider before authorizing the use of force: force must be a measure of last resort, it must meet the test of proportionality, and it must not cause “more harm than it was authorized to prevent.”¹⁹⁵ These criteria are similar to those recommended by the International Commission on Intervention and State Sovereignty (ICISS) discussed earlier, which form the basis of R2P.¹⁹⁶ RWP also calls for enhanced Security Council procedures for monitoring and assessing the interpretation and implementation of the Council’s resolution authorizing the use of force.

RWP’s focus on prevention is a reaffirmation of R2P’s pillar one. And its suggested criteria on the use of force are helpful supplements to R2P. But the proposed chronological sequencing of R2P’s three-pillar framework

General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011) [hereinafter U.N. Doc. A/66/551-S/2011/701].

188. *Id.* ¶¶ 9-10.

189. *Id.* ¶11(a).

190. *Id.* ¶ 7.

191. *Id.* ¶11(c).

192. *Id.* ¶¶11(d)-(f).

193. U.N. Doc. A/66/551-S/2011/701, *supra* note 187, ¶ 6.

194. *Id.* ¶ 11(h).

195. A/66/551-S/2011/701, *supra* note 187, ¶¶ 7, 11.

196. *See supra* notes 23-34 and accompanying text.

is a departure from the 2005 World Summit Outcome and from Secretary-General Ban Ki-moon's 2009 articulation of a three-pillar framework.¹⁹⁷ At the U.N. Informal Discussion on RWP of February 21, 2012, the International Coalition for the Responsibility to Protect (ICR2P) emphatically made this point:

The Secretary-General never called for the chronological sequencing of the pillars but rather established them together as representative of the full scope and range of measures necessary to protect. Every crisis situation is unique and requires a response according to the circumstances and needs of the population. All actors must have the full range of tools available when operating to prevent or halt crimes under RtoP. Restructuring the three-pillar framework would risk creating a system for prevention and reaction that fails to consider the particular elements of a crisis. Furthermore, the chronological sequencing of the three pillars would risk impeding timely and decisive action by limiting the array and flexibility of measures available and establishing required actions to be taken regardless of the needs of those under threat of mass atrocities. It is in this regard, that ICRtoP strongly believes that the conceptual foundation of the Responsibility to Protect must not be renegotiated.¹⁹⁸

The distinction between collective responsibility, which can be exercised through non-coercive measures, and collective security, requiring the Security Council's characterization as a threat to international peace and security, also raises concerns as it goes beyond the language of paragraph 139 of the Summit Outcome,¹⁹⁹ which explicitly refers to Chapter VII for the taking of collective action in the exercise of R2P. The ICR2P has again aptly stated that "genocide, war crimes, crimes against humanity and ethnic cleansing are by definition and under international law threats to international peace and security, thus requiring Member States and the UN to take preventive and reactive measures when faced with the threat of these crimes."²⁰⁰

It is in light of the Syrian crisis and Brazil's RWP initiative that we should consider the Secretary-General's July 2012 report and the General Assembly's informal interactive dialogue of September 2012. In his report, Secretary-General Ban Ki-moon provided an historical context for the genesis of the R2P concept and its development within the United Nations since its 2005 adoption. The report noted the three-pillar framework and

197. See *supra* text accompanying note 41.

198. Megan Schmidt, *Informal Discussion on "Responsibility while Protecting"* ICRtoP (Feb. 21, 2012), <http://www.responsibilitytoprotect.org/ICRtoP%2021%20Feb%20RwP.pdf> [hereinafter Schmidt].

199. See World Summit Outcome, *supra* note 1, ¶ 138.

200. Schmidt, *supra* note 198, ¶ 5.

asserted that these pillars “are not sequential and are of equal importance; without all three the concept would be incomplete.”²⁰¹

The Secretary-General emphasized the broad range of measures available under the third pillar of R2P, which articulates the member states’ responsibility to respond collectively in a timely and decisive manner when a state is manifestly failing to protect its population.²⁰² While R2P emphasizes prevention, the report suggests that one should not draw too sharp a distinction between prevention and response, for

[p]revention and response must be seen as closely connected. Early prevention should address structural factors that affect a state’s capacity both to prevent and to respond to the four specified crimes and violations. The Office of my two Special Advisers has developed an “analysis framework” that identifies factors that can be used to assess the risk of these crimes and violations. Further work could be done to develop and sharpen response tools to address each risk factor.²⁰³

In discussing the connections between prevention and response, the Secretary-General noted that the first two pillars of R2P are generally associated with prevention and the third pillar with response. But “[t]he dividing lines are . . . not so clear in practice, as action under either pillar one or two may include elements of both prevention and response.”²⁰⁴

The report addressed the issue of sequence by stating that there is an interactive and mutually supportive relationship between the three pillars. It emphasized that:

[p]illars are not sequenced. The question should therefore never be under what circumstances the responsibility to protect “applies”. This wrongly implies that there are situations where states do not have a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. It is clear that every state has an inherent responsibility to protect. The question we confront is one of how best to achieve the goals of RtoP in different circumstances.²⁰⁵

The report stated that U.N. peacekeeping missions are implemented under pillar two and therefore should be distinguished from action under pillar three because, “[w]hile the work of peacekeepers may contribute to the achievement of R2P goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives.”²⁰⁶

201. See U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 2.

202. *Id.* ¶ 3.

203. *Id.* ¶ 7.

204. *Id.* ¶¶ 11-12.

205. *Id.* ¶ 13.

206. *Id.* ¶ 16.

The report reiterates that “[r]esponsibility is an ally of sovereignty, in that collective action by the international community is not called for where a State fully discharges its sovereign responsibility to protect.”²⁰⁷ The Secretary-General also set forth five lessons learned from experience to date: 1) R2P should be applied consistently and uniformly, but as each situation is distinct, the methods and tools used should differ according to each situation; 2) it is essential that principles are applied consistently both in utterances and implementation so that international responses do not lead to charges of double standards and selectivity; 3) experience has shown the need to understand how the three pillars relate to and reinforce each other; 4) an effective and integrated strategy to protect populations is likely to include elements of both prevention and response; and 5) prevention and response measures are most effective when the United Nations works in tandem with its regional partners.²⁰⁸

The report discusses at length both non-coercive and coercive tools available for implementation under Chapters VI, VII, and VIII²⁰⁹ of the U.N. Charter to help protect populations from the four specified crimes and violations. These include mediation and preventive diplomacy, public advocacy, fact-finding missions and commissions of inquiry, monitoring and observer missions, the International Criminal Court, and finally, when diplomatic and other peaceful means fail, “timely and decisive” collective action is called for under Chapter VII.²¹⁰ In concluding this section, the report emphasized that

[t]here is room for Member States to think and act more strategically. Measures, especially those under Chapters VI and VII of the Charter, should be applied as early as possible. While military enforcement must remain part of the toolbox, our primary aim should be to respond early and effectively in non-coercive ways and thereby reduce the need for force. . . . Strengthening modes of collaboration between the national, the regional and the international levels in this regard continues to be necessary.²¹¹

While reemphasizing that “[t]he integrity and credibility of the concept depends upon its full, faithful and consistent application,”²¹² the report referred to those at the international, regional, national, and local levels who have obligations to protect their populations and those who must respond under pillar three in implementing R2P.²¹³ It specifically noted the role of the Human Rights Council, the ten U.N. treaty bodies of human rights

207. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 18.

208. *See id.* ¶ 20.

209. *Id.* ¶¶ 21-37.

210. *Id.* ¶¶ 23-31.

211. *Id.* ¶ 37.

212. *Id.* ¶ 38.

213. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶¶ 38-48.

conventions, the Office of the High Commissioner of Human Rights, the U.N. Children's Fund, and the Office of the High Commissioner for Refugees, along with individual and regional and sub regional organizations. It also noted the role of humanitarian organizations, national and international civil society organizations, private companies and businesses, and individuals.

The report concluded this section by stating that the international community's response to these atrocity crimes "is most effective when actions are tailored to individual circumstances and calibrated appropriately."²¹⁴ It emphasized that in all situations, "we must not lose sight of our common goal—the protection of populations from genocide, war crimes, ethnic cleansing and crimes against humanity—and we must focus on finding a common viable strategy for achieving it."²¹⁵

The Secretary-General welcomed the Brazilian initiative on "responsibility while protecting," stating that it had "received considerable attention from Member States as the international community has sought to refine and apply the concept" in light of the Libyan intervention.²¹⁶ With the expanded use of the concept as it has been invoked in several situations, the report noted the need to understand how to operationalize the concept "in a manner that is responsible, sustainable and effective,"²¹⁷ and also the importance of conducting early warning and assessment "fairly, prudently and professionally, without political interference or double standards."²¹⁸

While observing that in essence the "responsibility while protecting" calls for "doing the right thing, in the right place, at the right time and for the right reasons," the report focused on the need for assessment because "[a]n early and flexible response strategy requires dynamic assessment, focusing on trends and developments, not just the latest headlines."²¹⁹

On the Libyan crisis the report observed that the Security Council action under Chapter VII was authorized after most member states had concluded that peaceful measures had proved inadequate. But it acknowledged that some member states are concerned that non-coercive measures were not given adequate time to take effect, and that the implementation of Security Council Resolution 1973 exceeded the Council's mandate.²²⁰ Thus, going forward, these concerns must be taken into account and the Security Council must continue to respond flexibly, as it has a wide degree of latitude to decide on the appropriate course of action.²²¹

214. *Id.* ¶ 48.

215. *Id.*

216. *Id.* ¶ 50.

217. *Id.* ¶ 49.

218. *Id.* ¶ 51.

219. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 53.

220. *Id.* ¶ 54.

221. *Id.*

Acknowledging that civilian lives were lost during the air campaign notwithstanding NATO's focus on minimizing civilian casualties, the report emphasized the importance of military actors "taking all possible precautions to avoid situations that place civilians at risk."²²² It reiterated the Secretary-General's preference for prevention in implementing R2P, which requires non-forcible measures. However, it emphasized that coercive measures should neither be left out of the protection strategy nor set aside for use only after all other measures have been applied and found to be inadequate. Thus, the report favored an early and flexible response, taking into consideration all the tools available under Chapters VI, VII, and VIII of the U.N. Charter, and tailoring each circumstance to each situation to ensure the protection of populations.²²³

While observing that the application of the third pillar will sometimes entail difficult choices, the report cautioned:

Disagreements about the past must not stand in the way of our determination to protect populations in the present. Nor should Heads of State and Government lose sight of the commitment made to act in accordance with the responsibility to protect. The initiative on "responsibility while protecting" provides a useful pathway for continuing dialogue about ways of bridging different perspectives and forging strategies for timely and decisive responses to crimes and violations relating to RtoP. Suggestions for improving decision-making in such circumstances and reviewing implementation are useful catalysts for further discussion.²²⁴

In conclusion the report noted that, while the concept has been widely accepted and has been invoked by the Security Council and the General Assembly, controversy persists on aspects of implementation, especially on the use of coercive measures to protect populations.²²⁵ Thus it stressed the need to employ all the coercive and non-coercive measures at an early stage to ensure prevention and to reduce the need for more coercive action to protect populations, but it reiterated, "Inaction is not an option."²²⁶ The Secretary-General called for continued dialogue on the responsibility to protect in the General Assembly.²²⁷

In his remarks on September 5, 2012, to the General Assembly's Informal Interactive Dialogue on the responsibility to protect,²²⁸ the

222. *Id.* ¶ 55.

223. *Id.* ¶ 56.

224. *Id.* ¶ 58.

225. U.N. Doc. A/66/874-S/2012/578, *supra* note 184, ¶ 59.

226. *Id.*

227. *Id.* ¶ 61.

228. U.N. Secretary-General, Secretary-General's Remarks to General Assembly Informal Interactive Dialogue on "The Responsibility to Protect: Timely and Decisive Response" (Sept. 5, 2012), <http://www.un.org/sg/statements/index.asp?nid=6271>.

Secretary-General said, “‘Never again’ is the oft-heard cry. But I am haunted by the fear that we do not live up to this call.”²²⁹ Noting that the R2P is a concept whose time has come, he emphasized that it reaffirms “sovereignty as a positive responsibility” for governments to protect their populations.²³⁰

Addressing the concerns related to selectivity in invoking the concept and the loss of innocent lives in military operations undertaken to protect populations, coupled with disagreements on both the oversight of implementation methods and the interpretation of Security Council resolutions, he said that “fears of its possible misuse should not inhibit its use in the face of incitement and grave violence”²³¹

The Secretary-General noted that the Security Council had explicitly referred to the concept of Responsibility to Protect in its resolutions on Libya and Yemen. Also, the General Assembly, the Human Rights Committee, and the High Commissioner for Human Rights, had referred to R2P in Côte d’Ivoire, Guinea, Kyrgyzstan, Libya, South Sudan, Sudan, Syria, Yemen, and the Democratic Republic of the Congo. He stated that there have been successes with the Responsibility to Protect, but also that concerns have been expressed about missions exceeding the intent and mandate of the resolutions on which they were based. He stressed that, notwithstanding concerns and disagreements about the past, we must move forward, for “we cannot stand by while populations fall victim to these grave crimes and violations.”²³²

Following the Secretary-General’s address, deliberations in the General Assembly found a general consensus on the primacy of the preventive aspects of R2P.²³³ The representative of Germany, however, emphasized the equality of all three pillars, which precludes an “either/or approach” regarding prevention and more coercive action, as well as a strict sequencing of measures under each pillar.²³⁴ He said that Germany had set up the structures to implement the second pillar by establishing an inter-ministerial working group for civil crisis prevention and early warning, as well as an adjunct advisory council, and was in the process of appointing a national focal point for R2P.²³⁵

The representative of the European Union to the United Nations emphasized that the three pillars are “parallel and finely balanced” and thus

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. U.N. Press Release GA/11270, *supra* note 183.

234. The Permanent Mission of Germany to the U.N., New York, Statement by Ambassador Berger at the 4th Informal Interactive Dialogue on the Responsibility to Protect (Sept. 5, 2012), http://www.new-york-un.diplo.de/Vertretung/newyorkvn/en/__pr/speeches-statements/2012/20120906-berger-ga-r2p.html.

235. *Id.*

there cannot be “a prioritization of action under one pillar over another or a chronological sequencing between them.”²³⁶ Among other participants, the representative of Brazil noted that its RWP initiative could make a contribution to the debate, as it provides 1) a set of guidelines for the Security Council to take into account before mandating any military force, and 2) an enhanced monitoring and review process that Council members could use to “discuss mandates during the implementation process.”²³⁷

The South African representative expressed concern that “international intervention might be used” in order to “effect regime change by those with political agendas,” and warned that the Security Council mandate not be the “pretense for operating beyond international law.”²³⁸ The representative of Singapore called for moving beyond “the mantra that the three pillars were ‘equally important’ . . . ‘mutually reinforcing,’ and ‘supportive,’” for, while member states would have no problem with supporting pillars one and two, it is pillar three which is a fundamental principle behind the R2P concept and on which attention must be focused.²³⁹ Reflecting on the intervention in Libya, he said that while the Security Council intervention was seen by many as a “vindication” of R2P, there remain “deep concerns” over the action.²⁴⁰ He added, “How R2P was invoked to justify Council action on Libya has cast a long shadow, resulting in the current impasse over Syria. Arguably, what happened to Libya has not only not helped the long-term development of R2P, but may have done it damage.”²⁴¹

The Singapore representative criticized the Permanent Members of the Security Council for not agreeing to the “recommendation that they consider refraining from using the veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.”²⁴² He echoed one of the “lessons learn[ed]” mentioned by the Secretary-General in his report -- that R2P principles must be applied consistently in rhetoric and implementation so as to avoid the “accusations of double standards and selectivity.”²⁴³ “The representative of Malaysia also emphasized that the biggest challenge continued to be “the selectivity and

236. E.U. Statement by Ioannis Vrailis, Deputy Head of Delegation, Chargé d’Affaires, Delegation of the European Union to the United Nations, to the U.N. General Assembly, Report of the Secretary-General on the Responsibility to Protect (Sept. 5, 2012), available at http://www.edu-un.europa.eu/articles/en/article_12549_en.htm.

237. U.N. Press Release GA/11270, *supra* note 183.

238. *Id.*

239. Permanent Rep. of Singapore to the U.N., Statement by Ambassador Albert Chua, Permanent Representative of Singapore to the United Nations, at the Informal Interactive Dialogue on the Responsibility to Protect (R2P) ¶ 4 (Sept. 5, 2012), <http://globalr2p.org/media/files/singapore-statement-2012.pdf>

240. *Id.* ¶ 6.

241. *Id.* ¶ 6.

242. *Id.* ¶ 10.

243. *Id.* ¶ 13.

double standards practiced” in implementing R2P.²⁴⁴ A few representatives, including those from India and Russia, challenged the Secretary-General’s statement that there should be no sequencing.²⁴⁵

V. OPERATIONALIZING THE RESPONSIBILITY TO PROTECT

The preceding discussion raises more questions than it answers. The deliberations in the General Assembly since 2009 have demonstrated consensus on what Secretary-General Ban calls “pillar one,” and which Heads of State and Government had accepted at the World Summit in paragraph 138 of the Summit Outcome Document, *viz.*, that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” including their incitement, which “entails the prevention of such crime . . . through appropriate and necessary means.”²⁴⁶ Thus, there is no situation in which a state does not have the primary responsibility to protect its population.

Similarly, no state questions in principle what Ban calls the second pillar: that the international community should “encourage and help States to exercise this responsibility,”²⁴⁷ and that there is a commitment “to helping States build capacity to protect their populations from [these atrocity crimes] and . . . assisting those which are under stress before crises and conflicts break out.”²⁴⁸ The term “appropriate and necessary” must mean that the state itself is seeking help to exercise this responsibility and to build capacity to protect its population from these crimes.

Also, the Summit Outcome calls on the U.N. to establish an early warning capability and for states to support the U.N. in accomplishing this goal.²⁴⁹ The Secretary-General has already focused his attention on early warning, which was the theme of his 2010 Report.²⁵⁰ Thus, what the appropriate measures are and how to reach agreement on them are important questions here.

The underlying purpose of the second pillar is to prevent the perpetration of these crimes. For if preventive diplomacy and using all the measures listed in Article 33 of the U.N. Charter for peaceful settlement of disputes were to succeed, there would be no need for the use of force.

244. Permanent Rep. of Malaysia to the U.N., Statement by H.E. Ambassador Hussein Haniff, Permanent Representative of Malaysia to the United Nations on “Responsibility to Protect” at the Interactive Dialogue at CR4 (NLB) of the United Nations New York ¶ 4 (Sept. 5, 2012), <http://globalr2p.org/media/pdf/Malaysia2012Statement.pdf>.

245. U.N. Press Release GA/11270, *supra* note 183.

246. World Summit Outcome, *supra* note 1, ¶ 138.

247. *Id.*

248. *Id.* ¶ 139.

249. *Id.* ¶ 138.

250. U.N. Doc. A/64/864, *supra* note 172.

The critical question that remains unresolved relates to the implementation of what Secretary-General Ban calls “pillar three”: collective military action in a “timely and decisive manner” and on a “case by case basis” when peaceful means are inadequate and “national authorities are manifestly failing to protect their populations” from the specified crimes.²⁵¹ A prerequisite is that Chapter VI and Chapter VIII measures either have been exhausted or are inapplicable. Currently, there are no guidelines and the action is, of course, left to the Security Council, where decision-making ends up in the hands of the fifteen members, uncontrolled by any guidelines or constraints. Consequently, we need criteria or guidelines to determine whether an armed response is appropriate, as a last resort.

It follows that for the operationalization of R2P we need common standards and criteria to govern the use of force, that is, to decide whether, based upon the information received, the situation warrants the invocation and application of the third pillar. Thus the pertinent question is what standards and principles will help us measure and analyze the information to determine whether the third pillar is applicable.

Following the tragedies in Northern Iraq, Somalia, Yugoslavia, Haiti, Rwanda, and Liberia, I suggested in a 1992 article that for an intervention to be valid on humanitarian grounds it must meet the criteria of necessity, proportionality, purpose, and maximization of the best outcomes.²⁵² On the criterion of necessity, the suggestion was “the existence of gross, persistent, and systematic violations of human rights which are likely to result in massive loss of life in any country.” Those criteria and the ICISS suggestions regarding the “just cause” threshold and precautionary principles²⁵³ also present a useful starting point for deliberations on the responsibility to protect at the UN, with active participation of the Secretary-General’s special adviser on the prevention of genocide and the civil society. The Brazilian initiative is indeed a useful tool in this context.

CONCLUSION

Syria has tested the responsibility to protect. The three pillars articulated by Secretary-General Ban Ki-moon offer a wide range of actions by the international community to prevent and halt mass atrocities. The main contention is on when and how to apply the third pillar. For that to be

251. World Summit Outcome, *supra* note 1, ¶ 139.

252. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT’L L. & POL’Y 305, 330 (1992). *See also* Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT’L L. & POL’Y 827, 827-28 (1998).

253. *See supra* notes 26-29 and accompanying text.

operational the need for common standards and principles is evident. The U.N. General Assembly and Security Council must set standards for evaluating the risks, determining the urgency of the situation and concluding whether a state is actually “manifestly failing” to meet its responsibility to protect. The challenge is to find the common ground to set such standards, notwithstanding the reality that without political will and cooperation among the permanent members of the Security Council no action is possible at the United Nations.