

ARTICLES

HOW RUSSIAN INTERVENTION IN SYRIA REDEFINED THE RIGHT TO PROTECT IN ARMED CONFLICT

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The use of military force to forestall humanitarian crisis remains a controversial issue in international law. This strategy is considered antithetical to the sovereignty and territorial integrity of the host country. This legal quandary emanated in 1998 after NATO launched a series of airstrikes against the Yugoslavian forces under the doctrine of humanitarian intervention. This legal conundrum prompted the United Nations to craft comprehensive legal principles to determine the parameters of foreign interventions in armed conflict. The objective was realised in 2005 after the UN adopted the Right to Protect (R2P) as means of resolving humanitarian crisis. This doctrine intended to harmonise the foreign intervention in light of the shortcomings of unilateral humanitarian intervention. However, the abysmal failure in resolving the Libyan crisis exposed its soft underbelly as tool for perpetuating regime change against unpopular leaders. Subsequently, when Security Council proposed similar remedy for Syrian conflict, Russia strenuously objected and advocated for a political and diplomatic solution. This geopolitical gridlock prompted the divided council to adopt a different scenario in dealing with the Syrian conflict with the west supporting the rebels while Russia stood by Assad. This prompted Assad to appeal for assistance from Russia in counteracting ISIS and rebel forces that threatened to depose his government. In 2017 President Putin announced the success of the Russian intervention and called for peace talks among the various warring factions. As such Russia had realised the humanitarian objective behind R2P while respecting the sovereignty of Syria.

Keywords: Syria; Russia; armed conflict.

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Introduction

The political turmoil in Syria remains one of the most volatile and catastrophic phenomenon of the 21st century.¹ This appraisal is drawn from the horrific statistics which indicate the conflict has left close to 100,000 civilians dead while displacing almost 9 million with most of them seeking refuge in the Middle East and Europe.² In essence, this multifaceted conflict has fragmented the country along the fault

¹ Laurie R. Blank & Geoffrey S. Corn, *The Law of War's Essential Role in Containing Brutality: Syria's Painful Reminder*, Global Policy Essay (2013) (Jun. 5, 2018), available at <https://www.globalpolicyjournal.com/articles/conflict-and-security/law-wars-essential-role-containing-brutality-syrias-painful-reminder>.

² Azfer Ali Khan, *Can International Law Manage Refugee Crises?*, 5 Oxford University Undergraduate Law Journal 54 (2016).

lines of religion, ethnicity and to some degree geopolitical interests.³ On one hand, the government forces loyal to President Bashar al-Assad are battling the western supported rebels informally known as “Free Syria Movement” who are seeking to gain control of the country. Conversely, the ultra-fundamentalist Islamic State (used interchangeably with ISIS and Daesh) intends to establish a religious caliphate traversing the entire Middle East region.⁴ This terror group has committed countless of violence against the Yazidi women including sexual enslavement, honour killings and human trafficking.⁵ Furthermore, its adherents are accused of perpetrating religious cleansing against minority Christians and plundering their property and holy sites.⁶

Throughout the course of the conflict the west has vilified President Assad as the principal perpetrator of the atrocities besetting the country.⁷ This blanket condemnation prompted the North Atlantic Treaty Organisation (NATO) aligned states to shore up support for the rebels as strategy of expelling President Assad from office.⁸ The Arab league followed suit by slapping Syria with sanctions and demanding the immediate resignation of President Assad.⁹ However, this indictment is biased and inconclusive after the United Nations (hereinafter the UN) prepared a comprehensive report which incriminated both sides for the atrocities.¹⁰

On the opposite end of the spectrum Russian President Vladimir Putin has remained steadfast in supporting the regime. He has reiterated President Assad is the legitimate leader of Syria and should be involved in any dispute resolution mechanism.¹¹ Furthermore, Russia has vetoed any resolution by the Security Council (used interchangeably with the council) seeking to invoke military intervention in

³ Alex Schank, *Sectarianism and Transitional Justice in Syria: Resisting International Trials*, 45 *Georgetown Journal of International Law* 557, 559 (2014).

⁴ Emin Daskin, *Justification of Violence by Terrorist Organisations: Comparing ISIS and PKK*, *Journal of Intelligence and Terrorism Studies* 1, 6 (2016).

⁵ Mah-Rukh Ali, *ISIS and Propaganda: How ISIS Exploits Women*, *Reuters Institute for the Study of Journalism* (2015) (Jun. 5, 2018), available at [http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Isis%2520and%2520Propaganda-%2520How%2520Isis%2520Exploits%2520W](http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Isis%2520and%2520Propaganda-%2520How%2520Isis%2520Exploits%2520Women.pdf)omen.pdf.

⁶ Michael Solomatin, *The Unjust War in the Syrian Arab Republic and the Protection of Syrian Churches as Cultural Property*, 6 *Ave Maria International Law Journal* Spring 88, 99 (2017).

⁷ Matthew C. Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123(6) *Yale Law Journal* 297 (2013).

⁸ Amos N. Guiora, *Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 *Case Western Reserve Journal of International Law* 251, 271 (2011).

⁹ Thilo Marauhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – The Case of Syria*, 43 *California Western International Law Journal* 402, 411 (2013).

¹⁰ Draft UN Resolution, UN Doc S/2012/77, 4 February 2012.

¹¹ Muditha Halliyade, *Syria – Another Drawback for R2P?: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention*, 4(2) *Indian Journal of Law & Social Equality* 215, 215 (2016).

Syria for fear of regime change. President Putin drew a perfect comparison with Libya where NATO used humanitarian concerns as an excuse to dislodge Colonel Gaddafi from power only to leave behind a failed and fractured state.¹² Subsequently, Russia offered the regime military support in combating the rebels and jihadist who were determined to gain control of the country. This last resort measure has prompted the west to accuse Moscow of complicity to the alleged atrocities committed by the Assad regime.¹³

However, in September 2015 this conflict took a totally different turn after Russia became actively engaged in the conflict at the behest of the President Assad. The Russian armed forces launched a series of surgical air strikes and deployed ground troops to reinforce the government forces in countering the Islamic State.¹⁴ After two years of vigorous battles ISIS was ultimately neutralised thereby enabling the regime to regain significant control of the country. In December 2017 President Putin made a victory tour of Syria to commemorate the successful military campaign whereupon he announced the partial withdrawal of Russian troops from the county.¹⁵ Furthermore, he expressed his desire to mediate post-conflict reconciliation among the various factions in the country.¹⁶ Despite this self-evident triumph the west has viewed the Russian support with suspicion of protecting its economic and geopolitical interests in the region.¹⁷ Some analysts argue Russian support for the Assad regime is the precursor to the resumption of a “new cold war.”¹⁸ Nonetheless, these concerns seem antiquated since Russia has always advocated for a political and diplomatic solution to the conflict while strenuously opposing the use of force.¹⁹

¹² Jon Austin, *US and NATO Want Syria to Be the Next Libya – Claims Assad and Putin “GOOD Guys” of Conflict*, Express, 2 August 2017 (Jun. 5, 2018), available at <https://www.express.co.uk/news/weird/836154/Syria-War-Vladimir-Putin-Russia-President-Assad-good-guys-Nato>.

¹³ Derek Averre & Lance Davies, *Russia, Humanitarian Intervention and Responsibility to Protect: The Case of Syria*, 91(4) International Affairs 813, 814 (2015).

¹⁴ Marauhn 2013, at 414.

¹⁵ Nathan Hodge, *Putin Declares Victory in Surprise Stopover in Syria*, Wall Street Journal, 11 December 2017 (Jun. 5, 2018), available at <https://www.wsj.com/articles/putin-declares-victory-in-surprise-stopover-in-syria-1512994876>.

¹⁶ Raf Sanchez, *Bashar Al-Assad Thanks Putin for “Saving Our Country” as Russian Leader Prepares for Talks on Ending Syrian War*, The Telegraph, 21 November 2017 (Jun. 5, 2018), available at <https://www.telegraph.co.uk/news/2017/11/21/bashar-al-assad-says-ready-syria-peace-talks-rare-meeting-vladimir/>.

¹⁷ Caitlyn A. Buckley, *Learning from Libya, Acting in Syria*, 5(2) Journal of Strategic Security 82, 83 (2012).

¹⁸ *Russia, Syria, and the “New Cold War,”* Journal of Middle Eastern Politics and Policy, 18 December 2016 (Jun. 5, 2018), available at <http://jmepp.hkspublications.org/2016/12/18/syria-russia-new-cold-war/>.

¹⁹ Reuters Staff, *Russia Says Opposes Any Resolution Threatening Force Against Syria*, 22 September 2013 (Jun. 5, 2018), available at <https://www.reuters.com/article/syria-crisis-russia/russia-says-opposes-any-resolution-threatening-force-against-syria-idUSL5N0H10A020130922>.

Looking at the bigger picture Russian intervention in Syria falls well within the ambit of the Right to Protect (used interchangeably with R2P) under international humanitarian law. This amorphous policy formulated in 2005 maps out the terrains of foreign humanitarian assistance during armed conflicts.²⁰ Secondly, Russian intervention safeguarded Syria's sovereignty since it was undertaken at the behest of President Assad who is the *de facto* leader of the country.²¹ In stark contrast the western countries decision to support the rebels was initiated in flippant disregard of principle of international law that prohibits illegal use of force against a sovereign state.²² As the ICJ held in *Nicaragua v. USA* and *DRC v. Uganda* funding of armed resistance is tantamount to infringing upon a country's sovereignty and territorial integrity.²³ As I shall argue the approach by NATO raises serious legitimate issues regarding the culpability of the Syrian rebels as active participants in the conflict.

This brief historical antecedent forms the focal point of this manuscript. Broadly speaking I argue the Russian military support of the Assad regime falls well within the scope of the Right to Protect. In contradistinction the western approach of supporting the rebels is blotted with serious legal ramifications in both international and humanitarian laws. This manuscript is divided into five major segments. The first portion underscores an elaborate discussion of the historical development of the doctrine of the Right to Protect (R2P). It outlines the legal position of this doctrine in light of the ever changing dynamics of the international law. The second segment shall discuss the Syrian conflict. This portion forms the main focus of this paper by expounding on the international humanitarian issues about the conflict. The third portion shall encompass a comprehensive discussion of the Russian intervention in Syria. Furthermore, it will give a brief synopsis of Putin's ascension to power and how his foreign policy transformed the geopolitical landscape. The fourth portion shall flesh out the fundamental distinction between the Russian and Western intervention in Syria. Moreover, this segment shall discuss the jurisprudence on this subject matter as enunciated by the International Court of Justice (ICJ).²⁴ The fifth portion shall entail a general overview of the problem together with some concluding remarks from the author.

²⁰ Tomas Königs et al., *Responsibility to Protect: Implementing a Global Norm Towards Peace and Security*, 29(76) *Utrecht Journal of International and European Law* 109, 110 (2013).

²¹ Samuel Mercier, *The Legality of Russian Airstrike in Syria and "Intervention by Invitation,"* *E-International Relations*, 29 April 2016 (Jun. 5, 2018), available at <http://www.e-ir.info/2016/04/29/the-legality-of-russian-airstrikes-in-syria-and-intervention-by-invitation/>.

²² Julian E. Barnes et al., *Obama Proposes \$500 Million to Aid Syrian Rebels*, *The Wall Street Journal*, 26 June 2014 (Jun. 5, 2018), available at <https://www.wsj.com/articles/obama-proposes-500-million-to-aid-syrian-rebels-1403813486>.

²³ Alexis Goh & Steven Freeland, *The International Court of Justice and Recent Orders on Provisional Measures*, 11 *Australian Journal of International Law* 47, 48 (2004).

²⁴ A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31(2) *University of Pennsylvania Journal of International Law* 295, 297 (2009).

1. General Background on the Right to Protect (R2P)

1.1. The Pre-Unilateral Humanitarian Intervention Era

By and large, international law enshrines the norms governing the relationship among nation states. This unique framework is largely attributed to Hugo Grotius who popularised the term *jus gentium* (laws of the nation) which envisages a community nations posited within a common legal order.²⁵ This notion was later codified in 1648 when European powers signed the treaty of Westphalia thereby ending the thirty years war.²⁶ This futuristic document laid the foundation for modern precepts of sovereignty and statehood by defining territorial integrity and state autonomy.²⁷ Despite these tremendous steps interstate relationships were inundated with legal loopholes and frictions that erupted into World War I in 1914.²⁸ After the war the allied victors envisioned a new world order governed by the League of Nations.²⁹ However, this supranational organisation failed to realise its objective after Europe relapsed into a diabolical arms race and annexations which triggered the outbreak of World War II.³⁰ Similarly, the ultimate defeat of the axis powers reshaped the international legal order after the allies lobbied for the formation of the United Nations (hereinafter the UN).³¹ This global body succeeded the defunct League of Nations in overseeing the relationship among the member states.³² This led to the promulgation of the United Nations Charter in 1945 which delineated the boundaries on the use of force by the member states.³³ Pursuant to Arts. 2(4) and 51 of the charter the use of force is restricted to the purpose of self-defense.³⁴ By narrowing this scope, the framers of the charter intended to safeguard the territorial integrity of the member states

²⁵ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106(8) Yale Law Journal 2559, 2605 (1997).

²⁶ Leo Gross, *The Peace of Westphalia, 1648–1948*, 42(1) American Journal of International Law 20, 22 (1948).

²⁷ Daud Hassan, *The Rise of the Territorial State and the Treaty of Westphalia*, 9 Yearbook of New Zealand Jurisprudence 62, 63 (2006).

²⁸ Talbot C. Imlay, *The Origins of the First World War*, 49(4) The Historical Journal 1253, 1255 (2006).

²⁹ Anne Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87(2) American Journal of International Law 205, 210 (1993).

³⁰ Robert J. Delahunty & John C. Yoo, *Peace Through Law – The Failure of a Noble Experiment*, 106 Michigan Law Journal 923, 926 (2007).

³¹ John Humphrey, *The Main Functions of the United Nations in the Year 2000 A.D.*, 17(1) McGill Law Journal 219, 220 (2000).

³² Leland M. Goodrich, *From the League of Nations to United Nations*, 1(1) International Organization 3, 9 (1947).

³³ Charter of the United Nations and Statute of the International Court of Justice (San Francisco 1945) (Jun. 5, 2018), available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

³⁴ David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 Duke Journal of Comparative & International Law 57, 66 (1991).

from needless infringement by powerful and aggressive countries.³⁵ Eugene Rostow noted these dual provisions crystallised the use of force strictly for the purpose of self-defense as part of customary international law.³⁶ In addition to these clauses, the obligation to preserve international peace and stability was bestowed upon the Security Council which comprised of the former allies powers during the war.³⁷

Aside from the UN Charter, the global human rights regime underwent a metamorphosis after the adoption of the Convention on the Prevention of Genocide and the Geneva Conventions on the Laws of War.³⁸ The spirit behind these futuristic documents was to prevent the recurrence of mass atrocities reminiscent of World War II.³⁹ From another perspective, some scholars argue this legal change obligated third parties to avert genocide and other mass forms of mass atrocities.⁴⁰ The previous regime placed no legal obligation on foreign states to intervene during such scenarios thereby opening the leeway for autocrats to commit mass atrocities against helpless civilians the most striking example being the holocaust.⁴¹

In spite of this transformative concrete framework and institutions there was a resurgence of incursions and barbarism as several UN members flouted the charter in pursuit of their geopolitical interests. A case in point was the Belgian invasion of the Republic of Congo (Kinshasa) after the secession of the mineral rich Katanga region.⁴² At face value Belgium justified its decision as means of preventing the ethnic cleansing and persecution of its civilians residing in Katanga. However, this humanitarian measure morphed into a full blown civil war pitting the Western backed Katanga against the Soviet supported African nationalist government led by Patrice Lumumba.⁴³ Thereafter, this trend was replicated in three countries; India (East Pakistan) in 1971, Tanzania (Uganda) in 1978 and Vietnam (Kampuchea) in

³⁵ Richard B. Lillich, *Intervention to Protect Human Rights*, 15(2) McGill Law Journal 205, 208 (1969).

³⁶ Eugene V. Rostow, *The Legality of the International Use of Force by and from States*, 10 Yale Journal of International Law 286, 286 (1985).

³⁷ Ian Hurd, *The UN Security Council and the International Rule of Law*, 7(3) Chinese Journal of International Politics 361 (2014).

³⁸ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) A of the United Nations General Assembly on 9 December 1948; Geneva Conventions of the Laws of War, 12 August 1949.

³⁹ Henry T. King Jr. et al., *Origins of the Genocide Convention*, 40(1) Case Western Reserve Journal of International Law 13, 17 (2007).

⁴⁰ Eyal Mayroz, *The Legal Duty to "Prevent": After the Onset of "Genocide,"* 14(1) Journal of Genocide Research 79, 81 (2012).

⁴¹ Daniel Levy & Natan Sznaider, *The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights*, 3(2) Journal of Human Rights 143, 145 (2004).

⁴² Jonathan J. Cole, *The Congo Question: Conflicting Visions of Independence*, 43(1) Emporia State Research Studies 26, 33 (2006).

⁴³ Nicole Hobbs, *The UN and the Congo Crisis of 1960*, Harvey M. Applebaum '59 Award, Paper 6 (2014).

1978 all of whom intended to oust callous regimes.⁴⁴ To some degree these actions were reminiscent of Hitler's invasion of Sudetenland in former Czechoslovakia and Poland under the pretext of liberating the ethnic Germans from persecution.⁴⁵ This worrisome state of affairs prompted the famed international scholar Thomas Franck to pose the serious question "who killed Article 2(4) of the UN Charter?"⁴⁶ Despite the perpetual discussion on this emotive subject the global community failed to reach a consensus on how to reconcile dynamics of international law with the demands of humanitarian protection thereby leaving a glaring lacuna on this subject matter.

1.2. Unilateral Humanitarian Intervention

The last decades of the 20th century are classified as one of the grotesque periods in human history.⁴⁷ This description stems from the waves of civil wars and ethnic conflicts that engulfed the global south countries.⁴⁸ This conundrum reached the climax after the Rwandan genocide of 1994 and Yugoslavian conflict that dominated the better part of this epoch.⁴⁹ This worrisome trend prompted some western countries to lobby for the right to intervene during internal conflict as means of averting humanitarian crisis.⁵⁰ In 1998 this humanitarian concern impelled NATO unilaterally pierced the veil of sovereignty and launch a series of airstrikes against Yugoslavia under the banner of "humanitarian intervention." As David Robertson notes humanitarian intervention is

a doctrine under which one or more state may take action inside the territory of another state in order to protect those who are experiencing serious human rights persecution, up to and including attempts at genocide.⁵¹

⁴⁴ Nadia Banteka, *Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council*, 54 Columbia Journal of Transnational Law 382 (2016).

⁴⁵ Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100(1) American Journal of International Law 107, 113 (2006).

⁴⁶ Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64(5) American Journal of International Law 809, 810 (1970).

⁴⁷ Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6(11) Duke Journal of Comparative & International Law 11, 41 (1995).

⁴⁸ Andreas Wenger & Simon J.A. Mason, *The Civilisation of Armed Conflict: Trends and Implications*, 90(872) International Review of the Red Cross 835, 841 (2008).

⁴⁹ Jane Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 Georgetown Journal of International Law 251, 267 (2007).

⁵⁰ Dabiru Sridhar Patnaik, *International Law and Responsibility to Protect: South Asian Perspective*, Doshisha Global Studies Journal 173, 176 (2013).

⁵¹ David Robertson, *A Dictionary of Human Rights* 119 (2nd ed., London: Europe Publications, 2004).

Despite the benevolent objectives behind the military campaign, this decision raised the critical issue of whether the NATO was justified to use force against a sovereign state.⁵² Consequently, the aggrieved government of Federal Republic of Yugoslavia filed a memorial with the International Court of Justice (ICJ) against NATO which states a case later known as *Legality of Use of Force*.⁵³ The applicant applied for temporary halt of the airstrikes arguing they were illegal and calamitous under Art. 9 of the Genocide Convention.⁵⁴ In its cautious and one-dimensional verdict the court expressed “deep concerns” about the humanitarian tragedies in the region which raised “serious issues” of international law.

However, the thrust of the decision revolved around the preliminary objection raised by NATO states which questioned the plaintiff’s legal standing. The majority judges argued Serbia and Montenegro lacked the *locus standi* to lodge the matter since they failed to meet the threshold of a UN member state as envisaged in Art. 35 of the ICJ Charter.⁵⁵ Ensuing from this substantive technicality the court resolved that the applicant lacked the capacity to institute the proceedings and their case was summarily dismissed. Nonetheless, the applicants had a strong case since Arts. 2(4) and 51 of the UN Charter proscribes the use of force beyond the purview of self-defense contrary to NATO’s actions.⁵⁶ Furthermore, the court failed to issue legal guidelines on foreign intervention thereby de-escalating the dire humanitarian situation in the region and did not restore certainty on this subject matter for posterity purposes.⁵⁷ From another perspective, by failing to seal this legal lacuna the court opened the floodgates for individual member states to interpret the charter in accordance to their personal objectives.⁵⁸ This legal quandary was exposed after the U.S. led invasion of Iraq to depose Iraqi strongman Saddam Hussein who was accused of possessing Weapons of Mass Destruction and sponsoring terrorist organisations including Al-Qaeda.⁵⁹ This legal pitfall spurred the call to reform the

⁵² Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 European Journal of International Law 597, 600 (2002).

⁵³ *Yugoslavia v. NATO*, 1999 I.C.J. 916.

⁵⁴ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

⁵⁵ Article 35(1) of the Statute states that Courts shall be opened to the states to the present Statute.

⁵⁶ Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25(3) Ethics & International Affairs 293, 301 (2011).

⁵⁷ Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua*, 14(5) European Journal of International Law 867, 870 (2013).

⁵⁸ Goodman 2006, at 108.

⁵⁹ Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35(3) Cornell Journal of International Law 533, 540 (2012); Judith Miller, *Comments on the Use of Force in Afghanistan*, 35(3) Cornell Journal of International Law 605, 605 (2012).

doctrine of humanitarian intervention for being susceptible to manipulation by individual countries.⁶⁰

1.3. The Right to Protect

This origin of this principle is attributed to the emphatic speech by former UN Secretary General Kofi Annan as published in the UN Millennium Report of 2001.⁶¹ He stated in part:

If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?⁶²

Secretary Annan's concern exposed the inextricable conflict between sovereignty and the use of force in protecting fundamental rights and freedom.⁶³ In hindsight, the framers of the UN Charter envisaged Arts. 2(4) and 51 as limiting the use of force to purposes of self-defense.⁶⁴ Therefore, expanding this scope to encompass humanitarian interventions would trigger a paradigmatic shift in the international legal order. In order to harmonise this process the UN convened an *ad hoc* committee on the International Commission on Intervention and State Sovereignty (ICISS). This committee was comprised of seasoned experts in international humanitarian law who prepared a report that recommended a novel doctrine called the "Responsibility to Protect."⁶⁵ This proposal was deeply anchored in the laxity and reticence of the global community in addressing the genocides in former Yugoslavia and Rwanda.⁶⁶

At a glance this R2P stands on three major pillars as tools of averting civilian atrocities during armed conflict.⁶⁷ The first is the *responsibility to prevent* which entails

⁶⁰ Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12(3) European Journal of International Law 437 (2001).

⁶¹ United Nations General Assembly, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, Report of the Secretary-General, 27 March 2000 (Jun. 5, 2018), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf>.

⁶² *Id.* at 35, para. 217.

⁶³ Sandra Fabijanić Gagro, *The Responsibility to Protect (R2P) Doctrine*, III(1) International Journal of Social Sciences 61, 63 (2014).

⁶⁴ *Id.* Arts. 2(4) and 51 of the UN Charter.

⁶⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Report (December 2001) (Jun. 5, 2018), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

⁶⁶ Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20(2) Ethics & International Affairs 143, 148 (2006).

⁶⁷ Gabija Grigaitė, *Responsibility to Protect Concept and Conflict in International Law*, 83 Teise 174, 177 (2012).

tackling the root causes that may culminate in internal conflict.⁶⁸ This requirement intends to strike a balance between state sovereignty and humanitarian concerns by engaging the relevant stakeholders in redressing the dispute. This mechanism intended to cure the shortcoming of humanitarian intervention which solely relied on the unilateral use of force in redressing gross human rights abuses. Conversely, the *responsibility to react* empowers countries to respond to humanitarian concerns through various means including sanctions, international prosecution but resorting to military intervention only as the last option.⁶⁹ This proposal intended to offer viable options other than force in resolving armed conflict. Finally, the *responsibility to rebuild* underscores the duty to reconstruct countries torn apart by armed conflict through infrastructural development and post-conflict reconciliation.⁷⁰

In addition to these principal obligations R2P stands on precautionary principles on the use of force. Ramesh Thakur one of the foremost authorities in this subject and an ICISS committee member explains the use of force should be the last resort and not the tool of choice when confronting human rights atrocities.⁷¹ Therefore, these supplementary principles intend to protect the sanctity and integrity of R2P as a benign remedy to armed conflict. First is *right intention principle* which stipulates the primary obligation of the intervening state is to halt human suffering. Second is the *last resort principle* which limits the use of military force as the measure of last resort. The third *principle of proportional force* prescribes the proportionate force at par with the nature and degree of the conflict. Finally, *reasonable prospects principle* which provides there for a proper assessment on the use of force to ensure that the consequences of the action does not outweigh the ultimate consequences of inaction.⁷² The commission further recommended the permanent members of the Security Council to craft the guidelines of enforcing the doctrine.⁷³ This resolution was subsequently adopted at the UN summit in 2005 but the divided Security Council failed to delineate the concrete boundaries on the implementation of the principle.⁷⁴

Noteworthy, R2P is distinguishable from humanitarian intervention since its overarching objective is to protect civilians vulnerable to the atrocities of armed conflict

⁶⁸ Grigaité 2012.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ramesh Thakur, *R2P after Libya and Syria: Engaging Emerging Powers*, 36(2) *Washington Quarterly* 61, 73 (2013).

⁷² Mitsuhsa Fukutomi, *Humanitarian Intervention in Libya: Is It Causing Internal War?*, 45(2) *Hitotsubashi Journal of Law and Politics* 23, 26 (2017).

⁷³ Herbert Hirsch, *The Responsibility to Protect and Preventing Genocide in the Twenty-First Century*, 1(2) *Journal of African Conflicts and Peace Studies* 68, 73 (2009).

⁷⁴ Scott Straus, *Rwanda and Darfur: A Comparative Analysis*, 1(1) *Genocide Studies and Prevention: An International Journal* 41, 44 (2006).

rather than the determining the rights of intervening states.⁷⁵ Furthermore, R2P utilises a spectrum of mechanisms to redress conflict with the use of force being the last resort. In contradistinction humanitarian intervention gives utmost priority to using force in resolving gross violation of human rights.⁷⁶ Finally, Ramesh Thakur differentiates R2P from humanitarian intervention since it requires approval from the UN compared to the latter which is prone to unilateral initiative by the intervening country.⁷⁷

Despite these changes there is legitimate concern the Security Council may improvise the R2P doctrine into a tool for condemning weaker nations especially in the global south to the International Criminal Court (ICC).⁷⁸ Secondly, the Libyan intervention demonstrated this doctrine may give preference to regime change rather to humanitarian concerns after NATO instigated the downfall of Colonel Muammar Gaddafi.⁷⁹ This myopic and messy approach to the conflict left behind a failed state embroiled in sectarian violence, terrorist insurgency and human trafficking.⁸⁰ This failed Libyan experiment cast serious aspersions on this principle as budding concept in international humanitarian law thereby inhibiting its application in other jurisdictions like Syria.⁸¹ Despite the obvious challenges the adoption of R2P played a significant role in charting the course towards redressing gross violation of human rights violation during armed conflict.

2. The Syrian Conflict

2.1. Brief History of Syria

The origin of the modern Syrian state is broadly traced to the great Ottoman Empire that spanned across the entire Middle East region.⁸² After the defeat during

⁷⁵ Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91(876) *International Review of the Red Cross* 803, 815 (2009).

⁷⁶ Karina Sangha, *The Responsibility to Protect: A Cosmopolitan Argument for the Duty of Humanitarian Intervention*, *Expressions: The Journal of the Canadian Political Science Students' Association* (2012), at 2 (Jun. 5, 2018), available at <http://web.uvic.ca/~cpssa/articles/2012winter001.pdf>.

⁷⁷ Ramesh Thakur, *The Responsibility to Protect at 15*, 92(2) *International Affairs* 415, 418 (2016).

⁷⁸ Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91(1) *International Affairs* 37, 41 (2015).

⁷⁹ Jeffrey Bachman, *R2P's "Ulterior Motive Exemption" and the Failure to Protect in Libya*, 3(4) *Politics and Governance* 56, 60 (2015).

⁸⁰ Emin Poljarevic, *Libya: A Case Study of a Failed Revolution*, 2nd International Conference on Social Sciences, 2–3 April 2016, Istanbul, Turkey, at 73, 75.

⁸¹ Rafał Tarnogórski, *Libya and Syria: Responsibility to Protect at a Crossroads*, 26 *The Polish Institute of International Affairs* 1, 4 (2012).

⁸² American Society of International Law, *French Mandate for Syria and Lebanon*, 17(3) *American Journal of International Law* 177, 177 (1923).

World War I this vast empire collapsed and the League of Nations granted France the mandate rule over the Syrian territory.⁸³ This imperialist ruling ignited the nationalist armed struggle which led to independence in April 1946.⁸⁴ Nonetheless, this autonomy was momentary since the country was beset with both internal and external conflicts. Domestically, the ruling Arab Socialist Baath regime began crumbling under the weight of political infighting leading to a string of coups and countercoups that ultimately propelled the Minister of Defense Hafez al-Assad into power.⁸⁵ Despite being an Alawite minority Hafez built an omnipotent political dynasty that dominated the country for decades.⁸⁶ Externally, the country was entangled in endless and volatile conflicts with its arch-nemesis Israel, a position which was aggravated by the humiliating defeat during the six day war.⁸⁷ However, Assad redeemed his image when the Arabs triumphed during the Yom Kippur war by forcing Israel to cede the Sinai Peninsula to Egypt and thereafter peace accords at Camp David.⁸⁸

Despite these challenges Hafez cemented his iron-fisted rule for 29 years until his death in 2000 when he was succeeded by his son Bashar. The introverted western-oriented ophthalmologist became the polished image of a modern and reformed Syria compared to his abrasive ultra-conservative father.⁸⁹ During his first term he embarked on ambitious reforms including liberalising the economy, secularising the country and releasing political prisoners.⁹⁰ Nonetheless, these changes did not appease some factions leading to the resurgence of political dissidence supported by the western countries.⁹¹ Noteworthy, the demographics of Syria is that of a predominantly Sunni Muslim country with significant pockets of Shi'ite, Christian

⁸³ Ayse Tekdal Fildis, *The Troubles in Syria: Spawned by French Divide and Rule*, 18(4) Middle East Policy Council 129, 130 (2011).

⁸⁴ Amanda Pitrof, *Too Many Cooks in the Kitchen: Examining the Major Obstacles to Achieving Peace in Syria's Civil War*, 15(1) Pepperdine Dispute Resolution Law Journal 157, 160 (2015).

⁸⁵ Malcolm H. Kerr, *Hafiz Asad and the Changing Patterns of Syrian Politics*, 28(4) International Journal 689, 701 (1973).

⁸⁶ Uğur Ümit Üngör, *Mass Violence in Syria: A Preliminary Analysis*, 3 New Middle Eastern Studies 1, 3 (2013).

⁸⁷ Kardo Karim Rached Mohammad, *The Six-Day War and Its Impact on Arab and Israeli Conflict*, 7(2) History Research 90, 91 (2007).

⁸⁸ Louis Kriesberg, *Negotiating the Partition of Palestine and Evolving Israeli-Palestinian Relations*, 7(1) Brown Journal of World Affairs 63, 68 (2000).

⁸⁹ Najib Ghadbian, *The New Asad: Dynamics of Continuity and Change in Syria*, 55(4) Middle East Journal 624, 626 (2001).

⁹⁰ Louise Arimatsu & Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, Chatham House (March 2014) (Jun. 5, 2018), available at https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf.

⁹¹ Jānis Bērziņš, *Civil War in Syria: Origins, Dynamics, and Possible Solutions*, National Defence Academy of Latvia Center for Security and Strategic Research (August 2013) (Jun. 5, 2018), available at <https://ru.scribd.com/document/277150579/Berzins-pdf>.

and Alawite populations.⁹² Despite this cultural and religious admixture the country managed to surmount the sectarian aggression and remained relatively peaceful compared to its neighbours.

2.2. Origins of the Syrian Civil War

On 17 December 2010 Mohamed Bouazizi young Tunisian street vendor self-immolated in defiance of the rampant corruption and repression that bedeviled the country.⁹³ What began as personal protest sparked off a radical wave of revolution that forced the long time Tunisian autocrat Ben Ali to cede power and seek exile in Saudi Arabia.⁹⁴ This movement later spread like wild fires across the entire Middle East region, leading to the downfall of long term rulers in Egypt, Libya and Yemen.⁹⁵ In the Syrian context the trigger cause of the demonstrations is fraught with speculation and conspiracy theories. However, it is alleged the protests began after a group of juveniles' scrawled anti-government graffiti in the town of Daraa.⁹⁶ Another viewpoint argues the uprising was caused by a combination of sectarian violence and religious extremism fuelled by external forces.⁹⁷ Gradually, the clash between security forces and the demonstrators exploded into a full blown civil war that left close to 100,000 people dead and millions displaced with most of them migrating to Europe.⁹⁸

By and large, the western nations blamed President Assad for the atrocities while Russia, China and Iran remained highly skeptical of this sweeping indictment.⁹⁹ This platitude hit a peak in March 2013 after a chemical gas attack in Southern town of Khan al-Assal which left 25 dead and scores injured. The regime denied these allegations since it had submitted a comprehensive report to the UN

⁹² Esther van Eijk, *Pluralistic Family Law in Syria: Blane or Blessing?*, 2 Electronic Journal of Islamic and Middle Eastern Law 73, 73 (2014).

⁹³ Matt J. Duffy, *Arab Media Regulations: Identifying Restraints on Freedom of the Press in the Laws of Six Arabian Peninsula Countries*, 6 Berkeley Journal of Middle Eastern and Islamic Law 1, 1 (2014).

⁹⁴ Zoltan Barany, *Comparing the Arab Revolts: The Role of the Military*, 22(4) Journal of Democracy 28, 28 (2011).

⁹⁵ Jordan J. Paust, *International Law, Dignity, Democracy and Arab Spring*, 46(1) Cornell Journal of International Law 1, 5 (2013).

⁹⁶ Patrick B. Grant, *Islamic Law, International Law, and Non-International Armed Conflict in Syria*, 35 Boston University International Law Journal 1, 4 (2017).

⁹⁷ Artur Malantowicz, *Civil War in Syria and the 'New Wars' Debate*, 5(3) Amsterdam Law Forum 52, 55 (2013).

⁹⁸ Joseph Klinger, *Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law*, 55(2) Harvard Journal of International Law 483, 484 (2012).

⁹⁹ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 4 June 2013 (Jun. 5, 2018), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A-HRC-23-58_en.pdf.

denying possession of any chemical weapons.¹⁰⁰ Furthermore, the UN prepared a comprehensive investigation report which confirmed the use of the chemical weapons but could not determine the perpetrator.¹⁰¹ This incident was followed by a series recurrent gas attacks scattered across the country which led to the UK and France attributed to the regime.¹⁰² This prompted President Obama to issue stern warning to the Syrian government of “dire consequences” should it “cross the line.”¹⁰³ Conversely, Russian leader Vladimir Putin adopted a more objective and cautious approach by demanding independent and credible investigations by the UN into the alleged incidents.¹⁰⁴ This back and forth failed to avert the conflict which continued to claim more civilian casualties thereby prompting the Human Rights Council to classify the situation as “non-international armed conflict.”¹⁰⁵

2.3. Non-State Parties to the Syrian Conflict

2.3.1. The Syrian Rebel Movement/Free Syrian Movement

This resistance comprises of several anti-Assad movements supported by countries from the West and Middle East. The major groups include the National Coordination Committee (NCC) and the Syrian National Council (SNC). The former is a secular and political movement seeking democratic reforms while the latter is affiliated with the Muslim brotherhood and is more militant in nature.¹⁰⁶ This insurgent movement is buttressed by the “White helmet paramilitary” which comprises of mercenaries funded by NATO, Turkey and Saudi Arabia.¹⁰⁷ This movement merged

¹⁰⁰ United Nations Security Council, Note Verbale dated 7 November 2005 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Chairman of the Committee, 10 November 2005 (Jun. 5, 2018), available at [http://dag.un.org/bitstream/handle/11176/23813/S_AC.44_2004_\(02\)_70_Add.3-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/23813/S_AC.44_2004_(02)_70_Add.3-EN.pdf?sequence=3&isAllowed=y).

¹⁰¹ Petra Perišić, *Implications of the Conflicts in Libya and Syria for the “Responsibility to Protect” Doctrine*, 67(5) Zbornik PFZ 783, 799 (2017).

¹⁰² René Pita & Juan Domingo, *The Use of Chemical Weapons in the Syrian Conflict*, 2 Toxic 391, 393 (2014).

¹⁰³ Jillian Blake & Aqsa Mahmud, *A Legal “Red Line”?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA Law Review 244, 245 (2013).

¹⁰⁴ Ole Solvang, *Putin Calls for Investigations of Chemical Attack in Syria*, Human Rights Watch, 11 April 2017 (Jun. 5, 2018), available at <https://www.hrw.org/news/2017/04/11/putin-calls-investigations-chemical-attack-syria>.

¹⁰⁵ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 16 August 2012, para. 143 (Jun. 5, 2018), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf.

¹⁰⁶ Sertif Demir & Carmen Rijnoveanu, *The Impact of the Syria Crisis on the Global and Regional Political Dynamics*, 8(1) Journal of Turkish World Studies 55, 58 (2013).

¹⁰⁷ Christina Lin, *White Helmets – US Hybrid Warfare For Regime Change Operations?*, ISPSW Strategy Series: Focus on Defense and International Security (October 2016) (Jun. 5, 2018), available at http://www.ispsw.com/wp-content/uploads/2016/10/456_Lin-1.pdf.

into a formidable rebellion that launched a series of brutal attacks on both security forces and pro-regime civilians. For instance in 2014 the rebels shelled the pro-regime neighbourhood of Mahatta in Daraa killing dozens of unarmed civilians.¹⁰⁸

2.3.1.1. Legal Implication of the Syrian Rebel Movement

Despite the possible culpability on both sides western countries and human rights organisation have swiftly and repeatedly condemned the Assad regime for the atrocities while overlooking the actions of rebels.¹⁰⁹ A case in point is a human rights council report accused the regime of summary execution, torture and illegal detention despite the situation being classified as armed conflict.¹¹⁰ In *Prosecutor v. Dusko Tadic* the International Criminal Tribunal on former Yugoslavia (ICTY) stated:

An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.¹¹¹

This implication of this conclusion means the parties to the conflict including the rebels are bound by humanitarian obligations as underscored in common Art. 3 of the Geneva conventions.¹¹² As Antonio Cassese notes the spirit behind the protocol is protecting the unarmed civilian population (non-combatants) from the atrocities of internal armed conflict by holding the participants accountable for their actions.¹¹³

Moreover, this obligation to avert the atrocities is non-derogable irrespective of whether the parties are non-signatories to the relevant conventions.¹¹⁴ This holding was amplified in the *Tadic case* where the appellate chamber of the ICTY stated:

...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and

¹⁰⁸ Kheder Khaddour, *The Assad Regime's Hold on the Syrian State*, Carnegie Middle East Center (July 2015) (Jun. 5, 2018), available at http://carnegieendowment.org/files/syrian_state1.pdf.

¹⁰⁹ Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 *Impunity Watch Law Journal* 1, 1 (2015).

¹¹⁰ Human Rights Council, Report of the Human Rights Council on Its Seventeenth Special Session, 22 August 2011 (Jun. 5, 2018), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ResS17_1.pdf.

¹¹¹ *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 96.

¹¹² *Id.*

¹¹³ Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 *UCLA Pacific Basin Law Journal* 55, 86 (1984).

¹¹⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88(863) *International Review of the Red Cross* 491, 493 (2006).

organized armed groups or between such groups within a State... international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹¹⁵

Similar sentiments were later echoed in *Prosecutor v. Sam Hinga Norman* of where the appeals chamber of the Special Court for Sierra Leone stated:

It is well settled that all parties to an armed conflict, whether states or non-state actors are bound by international humanitarian law, even though only states may become parties to international treaties.¹¹⁶

In the view of the foregoing legal principles the Syrian rebels are equally culpable for the atrocities committed during the course of the conflict.

2.3.2. *The Islamic State of Iraq and Syria/ISIS/Islamic State/Daesh*

The Islamic State is a sadistic and ultra-fundamentalist group that intends to establish a Salafist caliphate across the region. A comprehensive study carried out by the Brookings institution indicates the IS is a caricature mini-state complete with rules and regulations defined by hard line *Shariah* law.¹¹⁷ These archaic norms are built upon capital and corporal punishments which forced a majority of the civilians to flee northwards. Furthermore it is driven by gross misogyny that proscribes women from economic participation through destruction of businesses, markets and farms.¹¹⁸

Its' origin is attributed to the rogue Jordanian Mujahideen Abu Musab al-Zarqawi who commanded the Al-Qaeda faction in Iraq.¹¹⁹ After a string of guerilla and suicide bomb attacks on the U.S. and Iraqi forces he merged the group together with other insurgencies to form the Islamic State of Iraq (ISI). After Zarqawi was killed by a U.S. airstrike in 2006 Abu Bakr al-Baghdadi assumed leadership of the group.¹²⁰ The fiery

¹¹⁵ *Prosecutor v. Dusko Tadic*, *supra* note 111, para. 70.

¹¹⁶ *Prosecutor v. Sam Hinga Norman* (Case No. SCSL-2004-14-AR72(E)), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.

¹¹⁷ Mara Revkin, *The Legal Foundations of the Islamic State*, The Brookings Project on U.S. Relations with the Islamic World, Analysis Paper No. 63, 12 July 2016 (Jun. 5, 2018), available at https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web.pdf.

¹¹⁸ Marwa Shalaby & Ariana Marnicio, *The Effect of the Presence, Duration, and Intensity of Armed Conflict on Women's Formal and Informal Economic Participation: A Case Study of the 2003 Iraqi War and the Recent Rise of the Islamic State in Iraq and Syria*, 3 *Journal of Women and Human Rights in the Middle East* 5, 13 (2015).

¹¹⁹ Chanchal Kumar, *Islamic State of Iraq and Syria (ISIS) a Global Threat: International Strategy to Counter the Threat*, 1(4) *Journal of Social Sciences and Humanities* 345, 347 (2015).

¹²⁰ *Id.*

and eloquent cleric used his sublime oratory skills to recruit volunteers from across the world thereby creating a large militia which ultimately conquered the city of Mosul.¹²¹ This expansion was subsequently aggravated by the Arab Spring which left a significant power vacuum for encroachment into Egypt, Libya and Yemen.¹²² After the Syrian crisis, it operated through an affiliate organisation called “Al-Nusra Front” which later merged with ISI to form the Islamic State of Iraq and Syria (ISIS).¹²³ It is widely believed due to its’ Sunni underpinnings ISIS wanted to use Syria as the platform for penetrating the impregnable Shiite crescent of Lebanon and Iran.¹²⁴

Apart from the ultra-religious fanaticism, ISIS is feared for its signature medieval barbarism which includes suicide bombings, beheading of infidels, enslaving women, public execution of sexual minorities and forceful conscription of child soldiers. The group is also blamed for the rape, enslavement, trafficking and honour killings of Yazidi women and girls who are derided as unclean and sub-human.¹²⁵ Surprisingly, the sinister and callous insurgent group continues to attract young volunteer fighters from across the world with most of them coming from Western Europe and Australia.¹²⁶ This international recruitment stands on the anti-western sentiments that engulfed the region after the U.S. led invasion of Afghanistan and Iraq.¹²⁷ Under the command of Baghdadi Daesh unleashed brutal attacks on both the Syrian army and civilians through suicide bombings and beheading of the state soldiers.

2.4. The Right to Protect and the Syrian Conflict

The Syrian conflict presented a tough and awkward situation for the UN to implement the right of protect. Firstly, the contentious Libyan intervention had sullied the status of this doctrine after NATO clamoured for the downfall and execution of Muammar Gaddafi.¹²⁸ This discrepancy culminated into mounting skepticism against

¹²¹ Kumar 2015.

¹²² *Id.*

¹²³ David Sverdlov, *Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women*, 50 Cornell Journal of International Law 333, 335 (2017).

¹²⁴ Michael Stathis, *ISIS, Syria, and Iraq: The Beginning of a Fourth Gulf War?*, 8(1) Critical Issues in Justice and Politics 1, 11 (2015).

¹²⁵ Lisa Davis, *Iraqi Women Confronting ISIL: Protecting Women’s Rights in the Context of Conflict*, CUNY Academic Works (2016), at 101, 107 (Jun. 5, 2018), available at https://academicworks.cuny.edu/cgi/viewcontent.cgi?referer=https://www.google.ru/&httpsredir=1&article=1120&context=cl_pubs.

¹²⁶ Tanya Mehra, *Foreign Terrorist Fighters: Trends, Dynamics and Policy Responses*, ICCT Report (December 2016), at 3, 5 (Jun. 5, 2018), available at <https://icct.nl/wp-content/uploads/2016/12/ICCT-Mehra-FTF-Dec2016-2.pdf>.

¹²⁷ Tom Pettinger, *What is the Impact of Foreign Military Intervention on Radicalization?*, 5 Journal for Deradicalization 92, 96 (2015–2016).

¹²⁸ Sarah Brockmeier et al., *The Impact of the Libya Intervention Debates on Norms of Protection*, 30(1) Global Society 113, 126 (2016).

this doctrine which was perceived as a travesty for regime change.¹²⁹ Furthermore, there was profound optimism post-Gaddafi Libya would evolve in the beacon of liberal democracy in the Arab world. However, this optimism turned ominous after the country disintegrated into a dystopian state haunted by terrorist insurgency, sectarian violence and human trafficking.¹³⁰

Subsequently, when the Security Council debated the resolution to intervene in Syria, Russia and China voted against the suggestion for fear of replicating the Libyan failure in the Middle East. These divergent viewpoints split the council right down the middle pitting the USA, France and UK supporting the rebel movement while Russia and China affirming their support for the regime.¹³¹ The latter states advocated for political and diplomatic solution that included President Assad being a legitimate stakeholder. They further argued military intervention would be analogous to infringing upon the sovereignty and domestic issues of Syria.¹³² However, after the terrorist attack in Paris, France on 13 November 2015 the UN Security Council passed a resolution calling on the member states to take all necessary measures to avert future attacks by the Islamic State.¹³³ This resolution known as “necessary measures” offered the council the wide latitude to use force against ISIS which posed an existential threat to global peace and stability.¹³⁴ However, since there was no consensus among the members of the Security Council, each faction decided to tackle the problem in a manner that befitted their agenda.

3. The Russian Intervention in Syria

3.1. Brief Background of President Vladimir Putin’s Ascension to Power

President Vladimir Putin is one of the most enigmatic and dominant figure in contemporary global politics. The tough talking judo *sensei* began his career as a KGB agent stationed in Dresden, East Germany during the Cold War. After the collapse of the Soviet Union he meandered his way through local politics rising to the level of Deputy Mayor of his native city of St. Petersburg. In 1998 his political

¹²⁹ Chelsea O’Donnell, *The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention*, 24 *Duke Journal of Comparative & International Law* 558, 576 (2014).

¹³⁰ Perišić 2017, at 804.

¹³¹ Andrew Garwood-Gowers, *The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?*, 36(2) *University of New South Wales Law Journal* 594, 600 (2013).

¹³² Halliyade 2016, at 216.

¹³³ United Nations, *Unanimously Adopting Resolution 2253 (2015), Security Council Expands Sanctions Framework to Include Islamic State in Iraq and Levant*, 7587th Meeting, 17 December 2015 (Jun. 5, 2018), available at <https://www.un.org/press/en/2015/sc12168.doc.htm>.

¹³⁴ Patrick Terry, *Germany Joins the Campaign against ISIS in Syria: A Case of Collective Self-Defence or Rather the Unlawful Use of Force?*, 4(1) *Russian Law Journal* 26, 28 (2016).

career took a giant leap after he was appointed to head the Russian intelligence, then renamed Federal Security Service of the Russian Federation (FSB).¹³⁵ This position granted him leverage to forge strategic political networks that propelled him to the Premiership in August 1999 after the aging and ailing Yeltsin anointed him as his successor. This political change offered Russia the perfect window of opportunity to reclaim its international image in a unipolar world controlled by the USA. The Yeltsin rapprochement with west had sacrificed at considerable expense Russia's national pride and hegemony.¹³⁶ For example he abandoned the "parity doctrine" which forced Russia to relinquish its nuclear rearmament ambition of being at par with the Americans. Furthermore, his ambition to remodel the economy around the western oriented free market system aggrieved both the nationalist and communist who lampooned him as the "America's yes man."¹³⁷ At the turn of the millennium Yeltsin resigned as President thereby paving way for Putin's leadership which intended to build Russia's image on the geopolitical platform.¹³⁸

3.2. Russia and Military Intervention

After World War II the Soviet Union became one of the permanent members of the UN Security Council. After the disintegration of the Soviet Union in 1991, Russia inherited the Soviet seat in the Security Council with Boris Yeltsin elected President.¹³⁹ Although Yeltsin was ambivalent towards reinstating the Russian geopolitical dominance, his successor was determined to forge strategic alliances with several countries in Eastern Europe, Asia and South America. Upon embarking on this volatile mission Putin found himself ensnared in a geopolitical impasse with NATO. This military organisation was aggressively expanding eastwards after engulfing significant portions of Eastern European countries including Poland, Hungary and Czech Republic.¹⁴⁰ This global confrontation hit a peak after Russia's unilateral military intervention in Georgia in support of the renegade regions of South Ossetia and Abkhazia.¹⁴¹ The West assailed Russia for violating its' international

¹³⁵ Padma Desai, *Russian Retrospectives on Reforms from Yeltsin to Putin*, 19(1) *Journal of Economic Perspectives* 87, 91 (2005).

¹³⁶ Robert H. Donaldson, *Boris Yeltsin's Foreign Policy Legacy*, 7(2) *Tulsa Journal of Comparative & International Law* 285, 308 (1999).

¹³⁷ Andrei Shleifer & Daniel Treisman, *A Normal Country: Russia after Communism*, 19(1) *Journal of Economic Perspective* 151, 153 (2005).

¹³⁸ Peter Rutland, *Putin's Path to Power*, 16(4) *Post-Soviet Affairs* 313, 318 (2000).

¹³⁹ Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3 *European Journal of International Law* 354, 356 (1992).

¹⁴⁰ Amiran Kavadze & Tina Kavadze, *NATO Expansion to the East: Georgia's Way to NATO Membership, Perspectives and Challenges*, 3(2) *Journal of Social Sciences* 21, 22 (2014).

¹⁴¹ Gregory Hafkin, *The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention after Kosovo*, 28 *Boston University Law Journal* 219, 224 (2010).

law obligation by invading and occupying a foreign sovereign state. More specifically, the western countries read mischief in Russia's "peacekeeping efforts" after it supported the minority Abkhaz resistance against the Georgian army.¹⁴² Nonetheless, the deployment of Russian forces in the region was well within the international legal order as it was strictly restricted within the disputed regions. Furthermore, the Georgian intervention was the final resort after Russia had relentlessly tried to engage all stakeholders in resolving the dispute diplomatically.¹⁴³

This geopolitical antagonism was exacerbated in 2013 after the Crimean region of Ukraine held a referendum and unanimously voted to join the Russian Federation.¹⁴⁴ However, the west ignored the underlying self-determination concern and viewed it as Russia's annexation of Ukraine.¹⁴⁵ This prompted President Obama and other western countries to impose the disingenuous sanctions against Russia as countermeasure the Crimean "annexation."¹⁴⁶ In 2014, the former American Secretary of Defense Robert Gates labeled Putin the biggest threat to global stability who was determined to avenge the west for the collapse of Soviet Union.¹⁴⁷ He then proposed a continuum of stringent measures to constrain this objective including substituting Russia as the biggest supplier of oil and gas in Western Europe.¹⁴⁸ Despite the countervailing opposition from the NATO Putin's leadership has reinstated Russia as a force to reckon in the geopolitical landscape.¹⁴⁹

3.3. Russia and Syrian Intervention

The warm relationship between Russia and Syrian goes back to the Cold War era when the Soviet Union supported Syria during its perennial conflicts with Israel.¹⁵⁰

¹⁴² Noelle M. Shanahan Cutts, *Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict*, 40(1) Case Western Reserve Journal of International Law 281, 294 (2007–2008).

¹⁴³ Nicolai N. Petro, *Legal Case for Russian Intervention in Georgia*, 32(5) Fordham International Law Journal 1524, 1526 (2008).

¹⁴⁴ Khazar Shirmammadov, *How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination? The Case of Crimea*, 4(1) Russian Law Journal 61, 63 (2016).

¹⁴⁵ Ines Gillich, *Illegally Evading Attribution? Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 Vanderbilt Journal of Transnational Law 1191, 1198 (2015).

¹⁴⁶ John J.A. Burke, *Economic Sanctions Against the Russian Federation are Illegal under Public International Law*, 3(3) Russian Law Journal 126, 129 (2015).

¹⁴⁷ Robert M. Gates, *Putin's Challenge to the West: Russia Has Thrown Down a Gauntlet That is Not Limited to Crimea and Even Ukraine*, The Wall Street Journal, 25 March 2014 (Jun. 5, 2018), available at <https://www.wsj.com/articles/robert-gates-putins-challenge-to-the-west-1395780813>.

¹⁴⁸ *Id.*

¹⁴⁹ Nazir Hussain & Fatima Shakoov, *The Role of Leadership in Foreign Policy: A Case Study of Russia under Vladimir Putin*, 7(1) IPRI Journal 1, 13 (2017).

¹⁵⁰ Andrej Kreutz, *Syria: Russia's Best Asset in the Middle East*, Russian NIS Center, 22 November 2010 (Jun. 5, 2018), available at <https://www.ifri.org/sites/default/files/atoms/files/kreutzengrussiasyrianov2010.pdf>.

With regards to the present conflict Moscow defended the Assad government arguing it was using proportionate force against armed militants targeting both civilians and public infrastructure.¹⁵¹ Furthermore, Russia was averse to any form of regime change arguing President Assad was the legitimate leader of the country.¹⁵² This affirmation intended to avert the likelihood of replicate another Libya where NATO used R2P as the perfect vehicle for regime change.¹⁵³ Consequently, the Russian mission to the UN successfully vetoed a series of resolutions that intimated military intervention in Syria.¹⁵⁴ A majority of these resolutions were geared towards punishing the government while conveniently overlooking the atrocities committed by the various rebel splinter groups.¹⁵⁵

In 2015 President Assad requested Russian military and financial assistance in counteracting the incursion by domestic and foreign parties.¹⁵⁶ This military intervention was three dimensional in nature by pooling together air strikes, naval support in Tartus and reinforcing the Arab Syrian army with Russian ground troops.¹⁵⁷ The Russian military campaign became a success after aiding the regime in reclaiming the Southern city of Aleppo from ISIS and rebels.¹⁵⁸ In this case the Russian intervention fits neatly within the overall objectives of the Right to Protect. In terms of Pillar 1 Russia was firmly committed to addressing the root causes of the conflict by proposing a round table discussion among the various parties. This mechanism would have addressed the root causes of the conflict thereby curtailing the situation from culminating into a full blown civil war. However, due to the hard stance adopted by the west it was virtually implausible for parties to attempt this any reconciliation which led to other means including the use of force. Conversely, Pillar 2 demands capacity building as a means of deescalating the gross violation of human rights.¹⁵⁹ This stipulates the domestic

¹⁵¹ Garwood-Gowers 2013, at 600.

¹⁵² Nathalie Tocci, *Europe, the United States and Global Human Rights Governance: The Responsibility to Protect in Libya and Syria*, The Transatlantic Relationship and the Future Global Governance, Working Paper No. 42 (October 2014) (Jun. 5, 2018), available at http://www.iai.it/sites/default/files/tw_wp_42.pdf.

¹⁵³ Garwood-Gowers 2013, at 613.

¹⁵⁴ United Nations Security Council, 6627th Meeting, 4 October 2011 (Jun. 5, 2018), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6627.

¹⁵⁵ *Id.* at 3–5.

¹⁵⁶ Markus Kaim & Oliver Tamminga, *Russia's Military Intervention in Syria*, SWP Comment 2015/C 48 (November 2015).

¹⁵⁷ Maks Czuperski et al., *Distract, Deceive, Destroy: Putin at War in Syria*, The Atlantic Council (April 2016) (Jun. 5, 2018), available at <http://publications.atlanticcouncil.org/distract-deceive-destroy/assets/download/ddd-report.pdf>.

¹⁵⁸ James Sladden et al., *Russian Strategy in the Middle East*, Rand Corporation (November 2015) (Jun. 5, 2018), available at <https://www.rand.org/pubs/perspectives/PE236.html>.

¹⁵⁹ Ramesh Thakur, *The Responsibility to Protect: Retrospect and Prospect in Responsibility to Protect and Sovereignty 209* (C. Sampford & R. Thakur (eds.), Farnham: Ashgate, 2013).

government should be supported to the point of assuming control whereupon those responsible for the atrocities should be held culpable.¹⁶⁰ Furthermore, this obligation demands spontaneous reaction to emancipate civilians from the atrocities of armed conflict. By supporting the Syrian government Russia bolstered the fight against ISIS and other radical groups responsible for the atrocities in the conflict thereby restoring normalcy in the country.¹⁶¹ Pillar three entails the implementation of post-conflict reconstruction and reconciliation as means of restoring rule of law and normalcy after the conflict. President Putin has taken the personal initiative of mediating peace talks among the various warring factions as means of restoring peace and stability in the fractured country. However, there is legitimate concern his impartiality and objectivity may be clouded because of his close proximity to President Assad.¹⁶² In spite of these concerns President Putin has reiterated his support for tripartite peace talks overseen by a third party including the UN.¹⁶³

In the same vein, Russia's "invited intervention" respects Syria's sovereignty and territorial integrity since it acted at the behest of the legitimate government.¹⁶⁴ This point is anchored on the fact that President Assad being the legitimate authority of the country should be supported in his quest to restore order. According to Jean d'Aspremont in his paper "Legitimacy of Governments in the Age of Democracy" the legality of any government is determined from both internal and external perspectives.¹⁶⁵ Internal factor imply the regime is duly recognised by the majority of the people who comply with its public policies and laws. Furthermore, a normative interpretation of this concept implies the ruler has the power to impose sanction on the norms and behavior of the subjects within its territories.¹⁶⁶ Conversely, the litmus test for determining external recognition is how the regime relates with the governments of other countries. In superimposing this school of thought in the Syrian context, it is cogent to argue President Assad is

¹⁶⁰ Alise Coen, *R2P, Global Governance, and the Syrian Refugee Crisis*, 19(8) International Journal of Human Rights 1044, 1047 (2015).

¹⁶¹ Anshel Pfeffer, *Two Years in Syria: Putin's Success Story*, Haaretz, 22 September 2017 (Jun. 5, 2018), available at <https://www.haaretz.com/middle-east-news/two-years-in-syria-putin-s-success-marred-by-ukrainian-debacle-1.5452162>.

¹⁶² Assaad al-Achi, *Russia's Syria Talks in Sochi are Destined for Failure*, Al Jazeera, 26 January 2018 (Jun. 5, 2018), available at <http://www.aljazeera.com/indepth/opinion/russia-syria-talks-sochi-destined-failure-180126154408884.html>.

¹⁶³ Peter Heinlein, *Trump, Putin Agree to Support UN in Syrian Peace Process*, Voice of America, 21 November 2017 (Jun. 5, 2018), available at <https://www.voanews.com/a/trump-putin-talk-syrian-peace-process/4128537.html>.

¹⁶⁴ Christian Henderson, *The Provision of Arms and "Non-lethal" Assistance to Governmental and Opposition Forces*, 36(2) University of New South Wales Journal 642, 650 (2013).

¹⁶⁵ Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 New York University Journal of International Law and Politics 878, 883 (2006).

¹⁶⁶ Ian Hurd, *Legitimacy and Authority in International Politics*, 53(2) International Organization 379, 381 (1999).

the legitimate leader. This is because he enjoys the unwavering support of the Syrian people especially after his re-election in 2004 compared to the rebels and the Islamic state who are relegated to their controlled territories. Internationally, President Assad is widely regarded as the leader of the country by both his allies and adversaries. In light of the foregoing legal principles Russia intervention cannot be classified as illegal use of force against a sovereign state.

4. Legal Consequences of Western Intervention in Syria

4.1. The Concern about Aggression and State Sovereignty

The Russian intervention in Syria has been opposed especially the Western countries who are determined to topple the Assad regime. However, a cursory glance of the NATO led mission in Syria demonstrates a false moral equivalence between Assad and ISIS as equal perpetrators of the conflict. This erroneous approach has prompted the west to support the rebels as the means of toppling the regime. However, this approach is tantamount to form of aggression against the sovereignty and integrity of the Syria. In his opening address before the Nuremberg tribunal, former U.S. Attorney General and Supreme Court Judge Robert H. Jackson defined aggression to include:

Provision of support to armed bands formed in the territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory measures in its power to deprive those bands all assistance or protection.¹⁶⁷

Secondly, supporting the rebel movement instead of the regime is antithetical to the principle of sovereignty and territorial integrity under international law. As Olivier Corten and Vaios Koutroulis note there is no general rule in international law that permits any state to support rebels in overthrowing a government, even if it is responsible for gross violation of human rights.¹⁶⁸ The Assad regime is the legitimate government of Syria which pursuant to the UN Charter can only be attacked for purpose of self-defense purposes. This position is echoed by the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* which stipulates:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state...

¹⁶⁷ Christi Scott Bartman, *Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us*, 43(1) *Case Western Reserve Journal of International Law* 423, 425 (2010).

¹⁶⁸ Olivier Corten & Vaios Koutroulis, *The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus in Bello*, 18(1) *Journal of Conflict and Security Law* 59, 63 (2013).

No state shall organise, assist, foment, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in the civil strife in another state... Every state has the inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state...¹⁶⁹

In extrapolating this point to the R2P Hideo Yamagata observes it granted foreign states the power to support the host state in protecting the populace within its' territories unless there is compelling evidence of gross laxity or complicity to the atrocities.¹⁷⁰ In this case the lack of persuasive evidence of Syrian government being complicit to the atrocities implies the intervening state has the duty to respect and preserve the sovereignty of host country.

By the same token the principle of sovereignty and territorial integrity were well enunciated by the ICJ in *Nicaragua v. USA*.¹⁷¹ In this case the socialist Sandinista government of Nicaragua accused the USA of supporting and training renegade groups of right wing paramilitaries based in Honduras called the *contras*. These groups launched systematic campaigns of civilian terror which caused widespread carnage and displacement. It was later alleged the *contras* had committed numerous atrocities including rape, torture, assassinations, civilian executions and displacement against perceived Sandinista sympathisers. Subsequently, Nicaragua argued by providing material and financial support to the *contras*, USA should be held liable for the atrocities. However, the U.S. raised a preliminary objection challenging the authority of the ICJ to adjudicate the matter. It argued the 1946 declaration of consent to the compulsory jurisdiction of the court could not apply to the court.¹⁷² Nonetheless, the court dismissed the objection arguing Art. 36(5) of the Statute clothed it with the unfettered jurisdiction to adjudicate the matter.¹⁷³

Subsequently, the critical issue was whether by funding of the *contras* the United States had violated customary international law obligation to respect the domestic

¹⁶⁹ United Nations General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV), 24 October 1970 (Jun. 5, 2018), available at <http://www.un-documents.net/a25r2625.htm>.

¹⁷⁰ Hideo Yamagata, *Responsibility to Protect Democracy as a Robust International Legal Order*, 7 *Ritsumeikan International Affairs* 21, 26 (2009).

¹⁷¹ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 1.

¹⁷² Thomas J. Pax, *Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?*, 8(2) *Boston College of International and Comparative Law Review* 471, 474 (1985).

¹⁷³ This clause states that "Declarations made under Article 36(5) of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with the terms."

affairs of Nicaragua. The court responded in the affirmative by holding the USA responsible for interfering in the internal affairs of Nicaragua contrary to the UN Charter. The court went ahead and compartmentalised the nature of infringement into *direct control* and *indirect control*. *Direct control* applies the groups which are funded and controlled by a foreign state while *indirect control* pertains to groups that exercise a degree of autonomy. In the latter phase there must be sufficient evidence to prove the controlling state was in control and aware of the operations that culminated into the offences. In this case the contras fell within the second group and the USA could not be held culpable for their actions since it did not control their activities. By adopting this complex reasoning the court invoked such high standards that insulated the funding state from criminal liability of supporting armed movements in foreign jurisdictions. The USA being the commanding organ ought to have anticipated the likelihood of the contras using the funds, artilleries and tactics to commit atrocities against innocent Nicaraguans. In light of this verdict, there is an inextricable connection between the use of force and the doctrine of R2P since it defines the parameters of military purpose strictly for protecting the civilians.¹⁷⁴ However, if this sacrosanct objective is substituted with regime change then it nullifies the humanitarian purpose thereby necessitating from criminal sanctions.

In the *Oil Platforms case* the Islamic Republic of Iran sued the United States for breach of sovereignty and freedom of commerce after the bombing its oil platforms near the coast of Bahrain.¹⁷⁵ The U.S. argued self-defense under Art. 51 of the UN Charter after two of its merchant vessels were allegedly sunk by Iranian firepower within the vicinity of the Bahraini coast. The court held the U.S. reaction was unjustified since it failed to meet the threshold of necessity or self-defense under international law. However, the action did not amount to breach of freedom of commerce due to the inanimate existence of commercial relationship between the two countries which negated the claim for reparations.¹⁷⁶

This legal issue resurfaced in the *Armed Activities case* where the Democratic Republic of Congo (DRC) lodged a memorial against Uganda.¹⁷⁷ The gravamen of this dispute began when President Laurent Desire Kabila issued a moratorium demanding Uganda and Rwanda to withdraw all their troops stationed in the Eastern border town of Goma. In retrospect, the latter two countries supported his armed struggle that led to the overthrow of longtime Kleptocrat President Mobutu Sese

¹⁷⁴ Marcelo Kohen, *The Principle of Non-Intervention 25 Years after the Nicaragua Judgment*, 25(1) *Leiden Journal of International Law* 157, 160 (2012).

¹⁷⁵ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 2003 I.C.J. 1.

¹⁷⁶ Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14(2) *Theoretical Inquiries in Law* 455 (2013).

¹⁷⁷ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168.

Seko in 1997. Nonetheless, Uganda defied this directive and deployed its troops to the western town of Kitona then controlled by the anti-government MLC armed rebels. The DRC further alleged Uganda offered substantial material and military support to these insurgents who launched a string of armed operations seeking to overthrow the Kabila government.

This sudden change in loyalty and friendship forced President Kabila to solicit for military aid from his Southern allies Angola, Zimbabwe and Namibia whose swift onslaught quelled the rebellion and restored temporary normalcy in the country. After several peace talks and agreements the two countries reached a ceasefire and in 2003 Uganda agreed to withdraw its troops from the Congo.¹⁷⁸ Despite this accord the DRC alleged Uganda left behind “a complex network of warlords” along the border region of Ituri which orchestrated military incursions and plundering of the vast mineral wealth.¹⁷⁹ It further averred these military actions amounted belligerent occupation and infringement upon its territorial integrity as envisaged by Arts. 2(4) and 51 of the UN Charter.

In response, Uganda leveled similar accusation against the DRC after state forces stormed its Embassy in Kinshasa, harassed the diplomatic staff and confiscated their personal belongings. Uganda argued these actions were undertaken in flippant disregard of various provisions of the Vienna Convention on Diplomatic Relations of 1961.¹⁸⁰ In the verdict, the majority of the judges held that Uganda’s military activities in the DRC contravened Art. 2(4) of the UN Charter.¹⁸¹ Conversely, Uganda’s counterclaim for self-defense was dismissed since the framers of the Charter never envisaged the applicability of Art. 51 after the occurrence of an armed attack. Furthermore, Uganda failed to tender sufficient evidence of the legal and factual circumstances that would have warranted armed intervention.¹⁸² By and large, the common thread of reasoning that runs through these landmark decisions is that customary international law prohibits the disproportionate use of force against a sovereign state except during self-defense. Therefore, a similar argument can be raised against the inordinate use of force by NATO states against Syrian government.

¹⁷⁸ These peace agreements include the Lusaka Agreement in August 1999, Kampala Plan of 8 April 2000 and Harare Plan of 6 December 2000.

¹⁷⁹ *Democratic Republic of the Congo v. Uganda*, *supra* note 177, para. 54.

¹⁸⁰ Articles 22, 29 and 30 of the Vienna Convention on Diplomatic Relations, signed on 18 April 1961 and entered into force on 24 April 1964.

¹⁸¹ Faustin Z. Ntoubandi, *The Congo/Uganda Case: A Comment on the Main Legal Issues*, 7(1) *Africa Human Rights Law Journal* 162, 163 (2007).

¹⁸² Guy Fiti Sinclair, *Don't Mention the War (on Terror): Framing the Issues and Ignoring the Obvious in the ICJ's 2005 Armed Activities Decision – Case Note*, 8(1) *Melbourne Journal of International Law* 124, 130 (2007).

4.2. Belligerent Occupation

It would be prudent to delve deeper into the issue of belligerent occupation of foreign territories since it introduces new dimension to the concept of sovereignty. This amorphous term describes the illegal use of military force to invade and occupy foreign territory.¹⁸³ As Faustin Ntoubandi notes the legal principles pertaining to this subject matter are enunciated in Rules 42–56 of the Hague Rules¹⁸⁴ and Arts. 27–36 and 47–78 of the Fourth Geneva Conventions,¹⁸⁵ general principles of international law and customary international law.¹⁸⁶ Generally speaking if the host government grants consent to foreign troops within its territories there is no international armed conflict hence it cannot be classified as “belligerent occupation.”

This legal quandary was expounded by the ICJ in the *Legal Consequences of Wall Case*. The cardinal issue was whether Israel was justified to erect walls and barricades in occupied Palestinian territories.¹⁸⁷ The court admitted Israel by virtue of its founding in 1948 was not a signatory to the Hague Rules and Geneva Convention.¹⁸⁸ Nonetheless, international law had undergone a paradigmatic change that crystallised these principles into customary international law which bound the parties to the dispute.¹⁸⁹ The court further held that Israel had infringed upon the Palestinian territory by building the wall in the occupied regions of West Bank and Gaza Strip which prohibited the movement of Palestinian settlers.¹⁹⁰ In light of this cogent verdict it is fair to surmise that any form of unwarranted occupation that inhibits the civilian population is tantamount to infringement of territory. The benchmark in determining is whether the occupation changes sovereignty but whether it interferes with the effective control of the country.¹⁹¹

In the *Armed Conflict case* it was held that the fact that Uganda had stationed its troops in the Eastern Region of the DRC amounted to belligerent occupation.¹⁹²

¹⁸³ Adam Roberts, *What Is a Military Occupation?*, 55(1) *British Yearbook of International Law* 249, 261 (1985).

¹⁸⁴ *Laws and Customs of War on Land* (Hague, IV), signed on 18 October 1907.

¹⁸⁵ *Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949.

¹⁸⁶ Ntoubandi 2007, at 174.

¹⁸⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136.

¹⁸⁸ *Id.* para. 89.

¹⁸⁹ Fr. Robert J. Araujo, *Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 *Boston University International Law Journal* 349, 351 (2004).

¹⁹⁰ David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94(885) *International Review of the Red Cross* 207, 211 (2012).

¹⁹¹ Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23(3) *Berkeley Journal of International Law* 551, 601 (2005).

¹⁹² *Democratic Republic of the Congo v. Uganda*, *supra* note 177, paras. 177–178.

Unlike the *Nicaragua decision*, there was profound optimism this judgement would encourage state parties to engage in diplomatic dispute resolution mechanism rather than armed conflict for fear legal repercussions like Uganda.¹⁹³ Similar obligation extends to the R2P whose principle objective is to safeguard the human rights during armed conflict. However, if any country not permitted by Syria deploys troops or supports resistance intending to overthrow the Assad regime would be culpable of “belligerent occupation.” The principle requirement for this doctrine is the presence of troops on foreign soil and the ability of an occupying power to exert its authority over their activities.

4.3. Negligent Support of Rebels

By funding the armed rebels in Syria to fight their “proxy war” with the Assad regime the western countries are susceptible for “negligent support” under international humanitarian law. Mojtaba Mahdavi amplifies this observation by noting the military assistance to the opposition forces turned the Syrian spring into a proxy war and exacerbated an ugly and bloody civil war among ethnic and religious minorities.¹⁹⁴ This legal concept applies to countries that support armed insurgencies that are likely to cause unexpected violation of human rights.¹⁹⁵ This doctrine was enunciated in the *Tadic case* where the ICTY grappled with the cardinal issue as to whether the Bosnian Serb paramilitary militias were acting on behalf of Bosnia. The tribunal aptly observed:

...States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.¹⁹⁶

In juxtaposing this doctrine with the Syrian context, it is cogent to argue the countries supporting the Syrian rebels should be vicarious culpable for their actions. The states exercise a considerable degree of control by funding and training the rebels intending to overthrow the Assad regime. Judging by the volatile and antagonistic relationship among the parties to the conflict it is quite possible for the any foreign state to preempt the possible extermination of Syrian civilians perceived as sympathisers to the regime.

¹⁹³ Benedict Kingsbury & Joseph H.H. Weiler, *Preface: Studying the Armed Activities Decision*, 40(1) *International Law & Politics* 1, 2 (2008).

¹⁹⁴ Mojtaba Mahdavi, *A Postcolonial Critique of Responsibility to Protect in the Middle East*, 20(1) *Perceptions* 7, 22 (2015).

¹⁹⁵ Graham Cronogue, *Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors*, 23 *Duke Journal of Comparative & International Law* 365, 373 (2013).

¹⁹⁶ *Prosecutor v. Dusko Tadic*, *supra* note 111, para. 117.

4.4. The Obligation to Protect Human Rights During Armed Conflict

On a more abstract level customary international law recognises the preventions of genocide, war crimes, crimes against humanity and crimes of aggression as *jus cogens*.¹⁹⁷ This means the obligation to prevent these atrocities cannot be shirked by any member states irrespective of whether they are signatories to their respective conventions. This principle was enunciated by in the *Legality of the Threat or Use of Nuclear Weapons* where the ICJ stated:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports* 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.¹⁹⁸

Against the backdrop of this quote, it is reasonable to argue the countries supporting the rebel movement are culpable of offenses should they be committed irrespective of their capacity and jurisdictions. This principle applies to the Syrian situation is inherently skewed in favour of the regime fighting various rebel factions that does not nullify its status and obligation as participants in non-international conflict.¹⁹⁹

4.5. Regime Change by Other Means

The hybrid version of R2P invoked by NATO seeking to oust President Assad is analogous to rehashing the failed campaign in Libya. Colonel Gaddafi ruled the country with an iron fist for four decades rule and was accused of sponsoring global terrorism the most prominent incident being the Lockerbie bombing in 1986.²⁰⁰ Despite the limited democratic space Libya boasted of high living standards compared to other “hydrocarbon economies” which are epitomised by endemic corruption and abject poverty. Furthermore, he ensured relative stability by repressing the various Islamist movements in the country.²⁰¹ In 2003 Libya initiated

¹⁹⁷ Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law* (Jun. 5, 2018), available at http://www.dphu.org/uploads/attachements/books/books_4008_0.pdf.

¹⁹⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 79.

¹⁹⁹ Tilman Rodenhäuser, *International Legal Obligations of Armed Opposition Groups in Syria*, 2 *International Review of Law* 1, 5 (2015).

²⁰⁰ Steve Emerson, *The Lockerbie Terrorist Attack and Libya: A Retrospective Analysis*, 36(2) *Case Western Reserve Journal of International Law* 487, 490 (2004).

²⁰¹ Alan J. Kuperman, *Lessons from Libya: How Not to Intervene*, *Quarterly Journal: International Security* (September 2013) (Jun. 5, 2018), available at <https://www.belfercenter.org/sites/default/files/files/publication/Kuperman%20policy%20brief%20published%20version%20.pdf>.

rapprochement with the west by paying compensation to the victims of Lockerbie, extraditing the chief suspects of the attack, abolishing its nuclear weapons and renouncing global terrorism.²⁰²

When the Arab spring poured into Libya it morphed into an organised armed rebel movement in Benghazi seeking to oust Gaddafi from power.²⁰³ This insurgency known as the Rebel Council (RC) comprised of government defectors, disgruntled Islamist militias and several political dissidents all of whom were supported by the west. The Security Council passed resolutions number 1970 and 1973 informally known as “Operation Unified Protector” as the blue print for military intervention.²⁰⁴ Noteworthy, Russia and China strenuously opposed military intervention against Libya citing it would be tantamount to infringing upon Libya’s sovereignty. On the 15 April 2011 Russian Foreign Minister Sergei Lavrov reiterated the need for a political and diplomatic solution since UN lacked the mandate to initiate regime change.²⁰⁵

This resolution provided for the alternative of military intervention by an international coalition incase diplomacy failed to remedy the situation.²⁰⁶ In attempting to remedy the situation NATO states issued a “no fly zone” in Libya and thereafter launched a series of airstrike against the Gaddafi forces.²⁰⁷ This double edged approach was construed as a means of the R2P to prevent the civilian atrocities. Nonetheless, it turned ominous after the ultimate downfall and gruesome execution of Gaddafi by the rebels. However, a cursory glance of this doctrine as implemented by the NATO countries was tarnished with undertones of “regime change” and to some degree the expansion of “western imperialism.”²⁰⁸ This grim reality was confirmed after the U.S. Secretary State Hilary Clinton appeared on live television applauding Gaddafi’s death by quipping “We came, we saw, he died!”²⁰⁹

²⁰² Christopher Fermor, *NATO’s Decision to Intervene in Libya (2011): Realist Principles or Humanitarian Norms?*, 8 *Journal of Politics & International Studies* 323, 342 (2012–2013).

²⁰³ Chris Townsend, *Civil-Military Relations in Tunisia and Libya through the Arab Spring*, 6(2) *Journal of Defense Resources Management* 5, 8 (2015).

²⁰⁴ United Nations Security Council, Resolution 1970 (2011) adopted by the Security Council at its 6491st Meeting on 26 February 2011; United Nations Security Council, Resolution 1973 (2011) adopted by the Security Council at its 6498th Meeting on 17 March 2011.

²⁰⁵ Geir Ulfstein & Hege Føsum Christiansen, *The Legality of the NATO Bombing in Libya*, 62(1) *International & Comparative Law Quarterly* 159, 166 (2013).

²⁰⁶ Paul R. Williams & Colleen Popken, *Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity*, 44(1) *Case Western Reserve Journal of International Law* 225, 226 (2011).

²⁰⁷ Christo Odeyemi, *R2P Intervention, BRICS Countries, and the No-Fly Zone Measure in Libya*, 2(1) *Cogent Social Sciences* 1, 8 (2016).

²⁰⁸ Pierre Thielbörger, *The Status and Future of International Law after the Libya Intervention*, 4(1) *Gottingen Journal of International Law* 11, 23 (2012).

²⁰⁹ Hillary Clinton “We Came, We Saw, He Died” (Jun. 5, 2018), available at <https://www.youtube.com/watch?v=FmlRYvJQeHM>.

This abnormal euphoria surrounding the humiliating downfall of Colonel Gaddafi confirmed suspicions that the intervention was driven by economic interests rather than humanitarian concerns.²¹⁰

In light of Pillar 3 of the R2P NATO just like any other international stakeholder had the obligation to initiate post armed conflict reconciliation and reconstruction.²¹¹ This duty would be instrumental in restoring harmony and the rule of law in a country that came apart under tribal and sectarian violence. But NATO shirked this responsibility by failing to put in place concrete efforts to enhance reconstruction and reconciliation in the country. This obligation to rebuild is instrumental in restoring normalcy after the armed conflicts.²¹² In Libya the downfall of Gaddafi left a volatile power vacuum which culminated into the socio economic disintegration, sectarian violence, human trafficking and terrorist insurgency.²¹³ As at 2015 the once prosperous nation was downgraded into a failed state with insurgence groups loyal to the Islamic State controlling large swaths of the country.²¹⁴ This failure prompted Russia to pour scorn over R2P as tool for redressing humanitarian concern in Syria.

Concluding Remarks

In summary, the Right to Protect (R2P) supports measures to protect civilians from genocide, war crimes, crimes against humanity and crimes of aggression.²¹⁵ Nonetheless, its abysmal failure in Libya has resulted in widespread skepticism towards its viability in redressing humanitarian crises.²¹⁶ This uncertainty spurred Russia to oppose its application in Syria for fear of replicating into regime change and igniting into a full blown regional conflict.

Furthermore, the Russian intervention in Syria is bound to elicit mixed reactions across the geopolitical spectrum. On one hand, the west has considers it as the

²¹⁰ Ronald Chipaika, *The Libya Crisis: The Militarisation of the New Scramble and More*, 2(8) International Journal of Human and Social Science 43, 44 (2012).

²¹¹ Malissa M. Tucker, *Lines in the Sand: Drawing Meaningful Contours for the Responsibility to Protect Doctrine (In a World at War)*, 5(2) National Security Law Brief 25, 37 (2015).

²¹² Erfan Norooz, *Responsibility to Protect and Its Applicability in Libya and Syria*, 9(3) Vienna Journal on International Constitutional Law (ICL Journal) 1 (2015).

²¹³ Mukhtar Imam et al., *Libya in the Post-Gaddafi Era*, 2(2) International Journal of Social Sciences and Humanities Invention 1150, 1161 (2012).

²¹⁴ Jonathan F. Kotra, *ISIS Enters the Stage in the Libyan Drama – How the IS Caliphate expands in Northern Africa*, International Institute for Counter-Terrorism (Fall 2015) (Jun. 5, 2018), available at <https://www.ict.org.il/UserFiles/ICT-ISIS-in-Libya-Kotra.pdf>.

²¹⁵ Michael Ramsden, *“Uniting for Peace” and Humanitarian Intervention: The Authorising Function of the UN General Assembly*, 25(2) Washington International Law Journal 267, 268 (2016).

²¹⁶ Iliia Xylopia, *The Rocky Road Ahead to Peace: The Arab Uprisings and the Conflict in Libya*, 3(1) Journal of Global Faultlines 50, 51 (2016).

permutation of the cold war in the region with Russia flexing its military muscles. Conversely, Russian support has contributed to the sustenance of the Assad regime and the ultimate annihilation of the Islamic State and rebels who threatened civilian welfare. Against this backdrop the overall objective of the intervention falls well within the purview of Pillar 2 of the R2P which intends to safeguard both national sovereignty and humanitarian welfare.²¹⁷ Furthermore, President Putin's commitment to ensure post-conflict reconciliation and reconstruction is representative falls in line with Pillar 3 of the principle which demands restoration of the rule of law and normalcy.

In stark contrast, the NATO intervention is beset with overtures of regime change after their repeated calls for overthrowing of the Assad regime. This position is augmented by their overt support of the Syrian rebels who are active participants in the conflict. As held in the *Nicaragua v. USA* and *DRC v. Uganda* cases this approach infringes on Arts. 2(4) and 51 of the UN Charter. In addition, there is inherent risk NATO states will be held liable for the atrocities committed by the Syrian rebels under the doctrine of "belligerent occupation." In light of these divergent strategies and opinions it would be prudent for all the material stakeholders to adopt a more efficient and cohesive form of post-conflict resolution mechanism in restoring normalcy in the country.

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