PERMISSION TO INTERCEDE OR SOVEREIGNTY SUPREME?: THE INFLUENCE OF R2P ON NON-FORCEFUL RESPONSES TO ATROCITY CRIMES

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ABSTRACT

Is it acceptable in the 21st century to require the international community to do nothing when atrocity crimes are being committed? The international law principles of sovereignty and non-intervention, when taken at their highest, require States to stand idle and not intervene in another State regardless of what atrocities may be occurring there. This traditional legal view is being challenged by an emerging practice of States choosing to act, inspired by the concept of the responsibility to protect ('R2P').

Drawing on R2P, this thesis introduces and develops an original conceptual tool – intercession – to capture and explain the significant change in State practice in recent years as to the increasing utilisation of measures less than force taken by the international community in response to the commission or anticipation of atrocity crimes occurring in other States. While a great deal of existing scholarship has focussed on the coercive aspects of R2P, equating R2P with the use of military force, this thesis builds upon a smaller body of scholarship which focuses on the non-forcible aspects of R2P.

This thesis argues that its conceptual framework of intercession can explain this new State practice, which has led to an expansion in both the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States, and a simultaneous restraint on the formulation and imposition of those measures. In doing so, this thesis undertakes novel and important research.

This thesis includes three case studies, which have been chosen to demonstrate intercession at work in different ways across diverse areas of international law. Through a detailed examination of recent State practice, each of the case studies demonstrates the accordion effect of intercession – an increase in permissible State responses to atrocity crimes

occurring in other States, coupled with restraint exercised by States in the formulation and implementation of those responses.

The first case study – sanctions – demonstrates that R2P now permits States to impose regional or unilateral sanctions (measures of intercession) in response to atrocity crimes that would previously have been impermissible, indicating an emerging change to the boundaries of the customary international law principle of non-intervention. This case study also demonstrates restraint on the part of regional organisations and States in formulating and imposing sanctions in such a way that they minimise impacts on the general population.

The second case study – assistance to opposition groups – reveals an evolution in the customary norm of non-intervention, in that States can now intervene in conflicts earlier, and lawfully take more measures, to respond to atrocity crimes by assisting opposition groups. This case study also demonstrates self-restraint in the provision of expanded forms of assistance to opposition groups.

The third case study – the *Arms Trade Treaty* – shows the influence of intercession under R2P on the development of treaty norms and the implementation of treaties.

Intercession under R2P provides a conceptual solution to the dilemma of whether it is acceptable for the international community to do nothing by articulating when and how States *may* respond to atrocity crimes in other States. The close examination of State practice undertaken in this thesis reveals that R2P has served as the inspiration for a re-aligned conceptualisation of the limits of State responses to atrocity crimes, charting a way forward for the international community which is at once sensitive to State sovereignty but also responsive to humanitarian imperatives.

STATEMENT

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

Some of the arguments in this thesis have been developed through publication during the course of research and writing. The concept of intercession was first presented at the Responsibility to Protect in Theory and Practice Conference, University of Ljubljana, Slovenia (24 April 2015), and published in 'R2P and the expansion of measures less than force' in Vasilka Sancin and Maša Kovič Dine (eds), *Responsibility to Protect in Theory and Practice* (Ljubljana: GV Založba, 2015). An earlier version of Chapter VII was published as 'The Arms Trade Treaty: Responsibility to Protect in Action?' (2017) 9(2) *Global Responsibility to Protect* 147.

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I INTRODUCTION

> [I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?[1]

A *Introduction*

That was the challenge posed to the international community by UN Secretary-General Kofi Annan in 2000. By 2005, as this thesis demonstrates, the international community had an answer – at the conceptual level – in the form of the responsibility to protect ('R2P'). But the practical implications of this conceptual change are still being worked out today. This thesis demonstrates that there has been a significant change in State practice in recent years, with increasing utilisation of measures less than force by the international community in response to the commission of atrocity crimes. Drawing on the adoption by the international community of the concept of R2P, this thesis develops an original conceptual tool, referred to as intercession, to capture and explain this change in State practice and articulate the ways in which this reflects a re-aligned conceptualisation of the permissible limits of State responses to atrocity crimes occurring in other States. This thesis argues that its conceptual framework of intercession under R2P can explain this new State practice, which has led to an expansion in both the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States, and a simultaneous restraint on the formulation and imposition of those measures. This thesis demonstrates that R2P has served as the inspiration for the taking by States of enhanced non-forceful measures in response to atrocity crimes in other States, charting a way forward for the international community which is at once sensitive to State sovereignty but also responsive to humanitarian imperatives.

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[1] *We the Peoples: The Role of the UN in the 21st Century (Millennium Report of the Secretary-General)* (New York, United Nations Department of Public Information, 2000), 48.

B *Rationale for research*

Despite repeated declarations of 'never again' in response to the commission of atrocities, civilians have continued to be targeted by their leaders and opposition groups. The principles of sovereignty and non-intervention, which when taken at their highest require States to stand idle and not intervene in another State regardless of what atrocities may be occurring there, reveal fault lines between the law as traditionally understood and the current practice of States that need to be explored. In 2001, in the shadow of the international community's failure to prevent or act in response to mass atrocities in Rwanda[2] and Srebrenica,[3] and the 1999 'legitimate, but not legal'[4] NATO intervention in Kosovo, the International Commission on Intervention and State Sovereignty ('ICISS') produced a report, titled *The Responsibility to Protect*,[5] which provided a framework of policy tools designed to prevent the recurrence of mass atrocities.

R2P rests on a reconceptualisation of the traditionally sacrosanct concept of Westphalian sovereignty, under which a State has absolute control and supreme authority over its territory and its population.[6] Drawing on the work of Deng and colleagues at the Brookings Institution,[7] the ICISS report re-defined sovereignty to include the responsibility of a State to protect its population from harm.[8] More controversially, the report submitted

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[2] International Commission on Intervention and State Sovereignty ('ICISS'), *The Responsibility to Protect* (International Development Research Centre, 2001), 1; Max W Matthew, 'Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur' (2008) 31(1) *Boston College International and Comparative Law Review* 137, 139; 'Rwanda: How the Genocide Happened', *BBC News* (online), 1 Apr 2004, <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm>.

[3] ICISS, above n 2, 1; Matthew, above n 2, 139; 'Bosnian Muslim Guilty but Freed', *BBC News* (online), 30 June 2006, <http://news.bbs.co.uk/2/hi/europe/5132684.stm>.

[4] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000), 289.

[5] ICISS, above n 2.

[6] See Chapter II.

[7] Francis Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution, 1996).

[8] ICISS, above n 2, 8.

that when a State fails in its duty 'through either inability or deliberate inaction',[9] sovereignty and the principle of non-intervention must 'yield to the international responsibility to protect'.[10]

Much of the criticism levelled against the ICISS report mirrored the previous debates about humanitarian intervention.[11] Some scholars argued that the simple change in language did not resolve the fundamental debates that have always existed regarding humanitarian intervention.[12] Still others argued that R2P was simply a 'cover for legitimating the neo-colonialist tendencies of major powers'.[13] Despite these criticisms, within a short five years from release of the ICISS report, the language of R2P 'infiltrated discussions of humanitarian crises to such an extent that both the General Assembly and Security Council have affirmed the international responsibility to protect'.[14]

At the 2005 United Nations' World Summit, a modified version of R2P was adopted by consensus by the General Assembly as follows:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.

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[9] Tessa Davis, 'Taking International Law At Its Word And Its Spirit: Re-Envisioning Responsibility To Protect As A Binding Principle Of International Law' (2010) 38 *Florida State University Law Review* 883, 892.
[10] ICISS, above n 2, xi.
[11] See, eg, Scott Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, 2001); Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention and the Use of Force* (Oxford University Press, 2008); Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24(3) *Wisconsin International Law Journal* 703; Christopher Greenwood, 'Humanitarian Intervention: the case of Kosovo' (2002) *Finnish Yearbook of International Law* 141; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003).
[12] Jennifer Welsh, Carolin Thielking and S Neil MacFarlane, 'The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty' (2002) 57(4) *International Journal* 489, 500; Matthew, above n 2, 146.
[13] Rebecca J Hamilton, 'The Responsibility to Protect: From Document to Doctrine – But What of Implementation?' (2006) 19 *Harvard Human Rights Journal* 289, 292; Mohammed Ayoob, 'Third World Perspectives on Humanitarian Intervention and International Administration' (2004) 10 *Global Governance* 99, 115.
[14] Matthew, above n 2, 146-147; Hamilton, above n 13, 293; *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/1 (24 Oct 2005) paras 138-139; SC Res 1674, UN SCOR, 61st sess, 5430th mtg, UN Doc S/RES/1674 (28 Apr 2006).

> The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to *use appropriate diplomatic, humanitarian and other peaceful means*, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[15]

Some scholars, such as Weiss, have argued that the version of R2P adopted at the World Summit was so much narrower than the original ICISS report, that it is better described as 'R2P-lite'.[16] Three key issues form the basis of this criticism. First, the original ICISS report defined the triggering crimes for R2P as 'large scale loss of life or large scale ethnic cleansing',[17] whereas the World Summit limited the triggering crimes to 'genocide, war crimes, ethnic cleansing or crimes against humanity'.[18] Second, the threshold for action by the international community in the original ICISS report was that a State be 'unwilling or unable' to prevent the triggering crimes. The World Summit, however, increased this threshold requirement to a manifest failure by the State to protect its population from the four triggering crimes;[19] what would amount to a manifest failure was left undefined.[20] Third, the original ICISS report had left open the possibility of action through the General Assembly or

[15] *2005 World Summit Outcome*, UN Doc A/RES/60/1, paras 138-139 (emphasis added).
[16] Thomas Weiss, 'R2P after 9/11 and the World Summit' (2006) 24(3) Wisconsin International Law Journal 741, 750.
[17] ICISS, above n 2, xii.
[18] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 138.
[19] Ibid, para 139.
[20] See, eg, Adrian Gallagher, 'Syria and the indicators of a 'manifest failing'' (2014) 18(1) *The International Journal of Human Rights* 1; Adrian Gallagher, 'What constitutes a 'Manifest Failing'? Ambiguous and inconsistent terminology and the Responsibility to Protect' (2014) 28(4) *International Relations* 428.

regional or subregional organisations if the Security Council failed to act.[21] This contrasts with the World Summit version of R2P which places the duty to exercise collective action solely in the hands of the Security Council.[22] Chesterman has pessimistically asserted that 'by the time RtoP was endorsed by the World Summit in 2005, its normative content had been emasculated to the point where it essentially provided that the Security Council could authorize, on a case-by-case basis, things that it had been authorizing for more than a decade'.[23] Contrary to this view, this thesis argues that even if R2P as formulated in the *2005 World Summit Outcome* document is imperfect and incomplete, even if it is indeed 'R2P-lite',[24] it is something more than just empty rhetoric. The close examination of State practice undertaken in this thesis reveals that R2P is shaping State behaviour in the context of measures less than the use of force, resulting in significantly enhanced international responses to the commission of atrocity crimes.

R2P is fundamentally about duty. The primary duty is placed upon States to protect their citizens from atrocity crimes.[25] The novel secondary duty is that of the international community to 'help to protect' populations from atrocity crimes.[26] The primary duty, while incredibly important, is relatively uncontentious. With the development of international human rights law, States 'have increasingly agreed and obligated themselves to protect their population from grave human rights abuses, such as genocide and crimes against humanity'.[27] It is now generally accepted that States do have a legal obligation to protect their populations,

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[21] ICISS, above n 2, xiii.
[22] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[23] Simon Chesterman, "'Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya' (2011) 25 *Ethics & International Affairs* 279, 280.
[24] See, eg, Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution, 2008), 46-50; Alex J Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84(4) *International Affairs* 615; Alex J Bellamy, 'Conflict Prevention and the Responsibility to Protect' (2008) 14(2) *Global Governance* 135; Alex De Waal, 'Darfur and the responsibility to protect' (2007) 83(6) *International Affairs* 1039.
[25] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 138.
[26] Ibid, para 139.
[27] Sheri P Rosenberg and Bryan R Daves, 'The Responsibility to Protect: A Framework for Confronting Identity-based Atrocities' (2009) 1 *Global Responsibility to Protect* 421, 421-422.

and those within their territory, both in times of war and times of peace.[28] Indeed, even States wary of the concept of R2P readily accept the primary duty to protect their own populations from atrocity crimes.[29]

The secondary duty of the international community, and what that duty actually entails, is far more contentious,[30] and is the focus of this thesis. Although many commentators argue that R2P supports the use of armed force in furtherance of its noble aim

[28] Saira Mohamed, 'Taking Stock of the Responsibility to Protect' (2012) 48(2) *Stanford Journal of International Law* 319, 324; Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 3 *Global Responsibility to Protect* 400; Louise Arbour, 'The Responsibility to Protect as a Duty of Care of International Law and Practice' (2008) 34 *Review of International Studies* 445. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 21; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950)*; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)*; Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950)*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

[29] See statements by Venezuala, Cuba, Myanmar, Nicaragua and Sudan in the 2009 General Assembly debate on R2P: UN GAOR, 63rd sess, 98th plen mtg, UN Doc A/63/PV.98 (24 July 2009) 3-6, 21-23; UN GAOR, 63rd sess, 100th plen mtg, UN Doc A/63/PV.100 (28 July 1999) 7-8, 12-13; UN GAOR, 63rd sess, 101st plen mtg, UN Doc A/63/PV.101 (28 July 1999) 10-11. See also Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) *Human Rights Law Review* 1, 3.

[30] There are debates about authority, the use of military force, as well as whether the secondary duty is legally binding or merely a political promise. See, eg, Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Jutta Brunée and Stephen J Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2 *Global Responsibility to Protect* 191, 192; Hilary Charlesworth, 'Feminist Reflections on the Responsibility to Protect Concept' (2010) 2 *Global Responsibility to Protect* 232, 235; Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 *Journal of Conflict and Security Law* 191, 193; Amrita Kumar, '"Humanity as the A and Ω of Sovereignty": Four Replies to Anne Peters' (2009) 20 *European Journal of International Law* 560, 562; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm' (2007) 101 *American Journal of International Law* 99; Ekkehard Strauss, 'A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect' (2009) 1 *Global Responsibility to Protect* 291; Rachel Van Landingham, 'Politics or Law? The Dual Nature of the Responsibility to Protect' (2012) 41(1) *Denver Journal of International Law and Policy* 63; Andrew Garwood-Gowers, 'The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?' (2013) 36(2) *University of New South Wales Law Journal* 594.

of protecting populations from atrocity crimes,[31] State practice and *opinio juris* in support of this principle is notoriously patchy.[32]

The secondary duty is expressed in the *2005 World Summit Outcome* document as a responsibility to 'use appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes, and a willingness to take action through the Security Council when States 'manifestly fail' in their primary duty to protect their populations.[33] The first part of this duty raises interesting questions about how it interacts with the principle of State sovereignty, and whether it may permit actions that might traditionally have been regarded as impermissible pursuant to the principle of non-intervention.[34] The second part of this duty cements the privileged position of the Security Council in relation to the use of force.[35] Neither part of the secondary duty imposes new legal obligations on the international community to act either unilaterally or collectively in response to atrocity crimes occurring in third States, in the sense of there being a legal compulsion to act or respond in some way to the commission of atrocity crimes.[36]

Many States have expressed concern since the 2005 World Summit about the coercive aspect of R2P and the lack of clarity about what would be 'appropriate circumstances to take

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[31] See, eg, David Chandler, 'The Responsibility to Protect? Imposing the "Liberal" Peace' (2004) 11(1) *International Peacekeeping* 59; Jared Genser and Irwin Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (Oxford University Press, 2012); Greenwood, above n 11; Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28; Alston and MacDonald (eds), above n 11; Evans, 'From Humanitarian Intervention to the Responsibility to Protect', above n 11.

[32] See, eg, Nathan J Miller, 'International Civil Disobedience: Unauthorised Intervention and the Conscience of the International Community' (2015) 74 *Maryland Law Review* 315, 342-348.

[33] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.

[34] *Charter of the United Nations* art 2(7). See also *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Judgment)* [1986] ICJ Rep 14 ('*Nicaragua*'); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 ('*DRC v Uganda*').

[35] See, eg, Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

[36] See: Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 192; Charlesworth, above n 30, 235; Focarelli, above n 30, 193; Kumar, above n 30, 562; Stahn, above n 30; Strauss, above n 30; Van Landingham, above n 30.

coercive action as well as fears regarding misuse of intervention by more powerful [S]tates',[37] treating R2P as synonymous with military intervention. A great deal of scholarship has focussed on this coercive aspect of R2P, and the Security Council's continued privileged role in relation to intervention involving the use of force.[38] This thesis argues that the focus on the coercive aspect of R2P has obscured the more subtle influence that R2P has had on recent State practice in the increasing adoption of measures less than the use of force. This thesis asks whether, in light of the adoption of R2P at the 2005 World Summit, there has been an expansion in the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States. The thesis further examines whether, aligned with such a development, there has arisen a simultaneous obligation to exercise restraint in the formulation and imposition of those measures.

As Weiss observes 'the main challenge [now] facing the responsibility to protect is how to act, not how to build normative consensus'.[39] Orford notes that there has been 'little discussion to date of the limits to the actions that the international community might take in the name of protecting populations at risk'.[40] This thesis argues that the development of 'diplomatic, humanitarian and other peaceful means' under R2P's secondary duty provides the greatest opportunity to progress the R2P framework in a meaningful way, which will have a significant impact on the protection of populations from atrocity crimes. In this way, R2P, as implemented in the *2005 World Summit Outcome* document, is something more than just empty rhetoric.

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[37] Van Landingham, above n 30, 77; Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment* (2009) <www://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf>, 2.

[38] See, eg, Orford, *International Authority and the Responsibility to Protect*, above n 35; Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 192; Charlesworth, above n 30, 235; Focarelli, above n 30, 193; Kumar, above n 30, 562; Stahn, above n 30; Strauss, above n 30; Van Landingham, above n 30.

[39] Thomas G Weiss, 'RtoP Alive and Well After Libya' (2011) 25(3) *Ethics and International Affairs* 287, 291.

[40] Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 422.

This thesis argues that the influence of R2P can be seen in recent State behaviour in the increasing use of measures less than force in response to atrocity crimes. It introduces an original conceptual tool, referred to as intercession, which builds upon the secondary duty under R2P, to capture and explain this change in State practice. Intercession provides the conceptual framework underlying the evolution in State practice in the diverse areas examined in the case studies in Chapters V to VII. This thesis argues that examination of the contours of intercession revealed through State practice demonstrates the present impact of R2P on traditional conceptualisations of sovereignty and non-intervention. Further, the conceptual framework of intercession under R2P can explain this new State practice, which has led to an expansion in both the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States, and a simultaneous restraint on the formulation and imposition of those measures. This restraint is revealed in the practice of States explicitly considering the impact their actions may have on the facilitation or commission of atrocity crimes to ensure that any action taken does not increase the risk of atrocity crimes.[41]

C *Methodology*

This thesis employs a doctrinal methodology,[42] and undertakes extensive study of State practice. The research is based on analysing the legal rules, their wording and interpretation, as well as existing literature. This approach enables the meanings and

[41] See, eg, the revised commentaries to the Geneva Conventions which are indicative of a trend in thinking consistent with this idea. International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 2nd ed, 2016); International Committee of the Red Cross, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (International Committee of the Red Cross, 2nd ed, 2017). See also Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations' (2014) 96(895/896) *International Review of the Red Cross* 707.

[42] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

implications of these rules, and the principles which underpin them, to be critically analysed. The main sources of data for this doctrinal research will be United Nations documents including the Charter of the United Nations, General Assembly declarations, Security Council resolutions, reports of the Secretary-General, and relevant treaties. This doctrinal analysis is supported by a detailed examination of recent State practice in response to, or anticipation of, atrocity crimes occurring in third States. This inevitably necessitates looking beyond traditional black letter legal materials, but the importance of State practice is fully accepted within the discipline of international law.[43] The methodology employed is still firmly doctrinal in nature as it entails a critical, qualitative analysis of legal materials, such as domestic instruments, to identify State practice. A doctrinal approach can provide a sound structural basis from which the thesis can proceed.

The purpose of examining existing literature on sovereignty, the principle of non-intervention, and R2P, is to identify similarities and differences that may exist in existing scholarship. Additionally, it enables a wider understanding of the relevant issues. The information has been gathered from a variety of sources including textbooks, refereed journals, conference papers, newspaper articles, and other publications.

A great deal of existing scholarly material has focussed on the coercive aspects of R2P, equating R2P with the use of military force.[44] In contrast, this thesis builds upon a smaller body of existing scholarly material which focuses on the non-forcible aspects of R2P. This thesis develops an original conceptual tool, referred to as intercession, to capture and explain the significant change in State practice in recent years as to the increasing utilisation

[43] *Statute of the International Court of Justice*, opened for signature 26 June 1045, 1 UNTS XVI (entered into force 24 October 1945) art 39(1)(b); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(b).

[44] See, eg, Orford, *International Authority and the Responsibility to Protect*, above n 35; Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 192; Charlesworth, above n 30, 235; Focarelli, above n 30, 193; Kumar, above n 30, 562; Stahn, above n 30; Strauss, above n 30; Van Landingham, above n 30.

of measures less than force taken by the international community and articulate the ways in which this reflects a re-aligned conceptualisation of the limits of State responses to atrocity crimes occurring in other States. In doing so, this thesis undertakes novel research and contributes new knowledge in this area.

This thesis includes three case studies, which have been chosen to demonstrate intercession at work in different ways across diverse areas of international law. The three case studies chosen are also three areas where there is the greatest amount of State practice available for analysis. Through a detailed examination of recent State practice, each of the case studies demonstrates the accordion effect of intercession – an increase in permissible State responses to atrocity crimes occurring in other States, coupled with restraint exercised by States in the formulation and implementation of those responses. The first case study of sanctions demonstrates political action in the Security Council as well as regional and autonomous actions, and practice which evidences self-restraint by States. The second case study of assistance to opposition groups reveals an evolution in customary norms, in that States can now intervene in conflicts earlier, and lawfully take more measures, to respond to atrocity crimes by assisting opposition groups. This case study also demonstrates self-restraint in the provision of expanded forms of assistance to opposition groups. The third case study of the *Arms Trade Treaty* shows the influence of intercession under R2P on the development of treaty norms and the implementation of treaties. The three case studies demonstrate that the influence of intercession under R2P can be seen across diverse areas including practice in the implementation of treaties, political action in the Security Council, practice which is driving an evolution in customary norms, and practice which evidences self-restraint by States that may be independent of changed customary law obligations.

D *Structure: an overview of the study*

This thesis consists of this introduction, six substantive Chapters, and a conclusion. The Chapter overviews below will sketch an outline of the central arguments in each Chapter.

1 *Sovereignty and non-intervention*

Chapter II examines the foundational concepts of sovereignty and the principle of non-intervention. These are fundamental concepts for the analysis in subsequent Chapters and understanding how R2P has led to an evolution in State practice, which reveals a change in how these concepts are now interpreted and applied.

This Chapter sets a baseline for the analysis in subsequent Chapters by outlining what the concept of sovereignty and the principle of non-intervention are, and how they have been traditionally interpreted. The first part of the Chapter explores conceptualisations of sovereignty, from the historical (pre-Westphalian) conceptualisation to the Westphalian conceptualisation of sovereignty as supreme control and absolute authority. R2P and its impact on the reconceptualisation of sovereignty as responsibility is discussed in Chapter III; this Chapter examines sovereignty as a concept, and identifies the problems inherent in its traditional conceptualisation from a humanitarian perspective.

The second part of this Chapter analyses the principle of non-intervention. It begins by briefly outlining the two elements of the principle of non-intervention – the right of States to freely conduct their internal and external affairs in relation to matters within the exclusive competence of the State, and the prohibition on coercive interference in these affairs. The Chapter then examines the legal basis of the customary principle of non-intervention and discusses the high watermark of non-intervention set by the ICJ in *Nicaragua*.

This Chapter finds a breadth in the traditional conceptualisations of sovereignty and non-intervention, which raises uncomfortable questions about the extent to which these concepts shield the State and prevent other States from taking effective action in response to atrocity crimes.

2 *Responsibility to Protect*

Chapter III begins by examining the reconceptualisation of sovereignty as responsibility, which underpins the concept of R2P. The Chapter explains the driving forces that shaped the emergence of R2P and reveals consensus that the manifest indifference of Westphalian sovereignty is no longer tenable.

Chapter III then discusses the evolution of the concept of R2P from its original formulation in the ICISS report, to its adoption at the 2005 UN World Summit, and subsequent implementation. The Chapter highlights that the secondary duty under R2P has always been, and remains, about more than military force; it is about States utilising all available means to prevent or halt atrocity crimes. This Chapter also identifies the relevant tensions surrounding the secondary duty under R2P, including the narrower triggering crimes, increase in the threshold requirement to 'manifestly failing to protect', and ongoing privileged position of the Security Council in relation to the use of force.

This Chapter finds in R2P a powerful new concept of statecraft, which responds to the weaknesses of Westphalian sovereignty identified in Chapter II, and is capable of influencing State behaviour. In particular, the impact of R2P will be seen in the contemporary State practice examined in the case studies in Chapters V to VII.

3 *Intercession*

Chapter IV proceeds from the conceptual basis established in Chapter III: that measures less than the use of force are an important part of the concept of R2P. It goes further by introducing intercession as an original conceptual tool, which both influences and explains the increasing practice of States in giving effect to the secondary duty under R2P by responding to atrocity crimes with measures less than the use of armed force. This emerging practice of States (which is the subject of further analysis in Chapters V to VII) is no 'wilderness of single instances';[45] R2P, and in particular the concept of intercession, is driving this development.

The first part of Chapter IV discusses the ways in which international norms can influence State behaviour. The second part outlines examples of new and emerging State practice implementing measures less than the use of armed force. Viewing this new and emerging State practice through the prism of intercession, the power of ideas (in this case, R2P) to animate change in international law is revealed through, in particular, the reconceptualisations of sovereignty and the principle of non-intervention.

The third part of this Chapter argues that intercession can serve as a useful conceptual tool to capture and explain this change in State practice, and articulate the ways in which this reflects a re-aligned conceptualisation of the limits of State responses to atrocity crimes occurring in other States. Intercession provides a tool to examine the evolution of State practice in respect of the implementation of the fundamental principles of international law of sovereignty and the principle of non-intervention. In this way, R2P is something more than

[45] 'Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.' Alfred, Lord Tennyson, *Aylmer's Field* (1793); Dan Hunter, 'No Wilderness of Single Instances: Inductive Inference in Law' (1998) 48(3) *Journal of Legal Education* 365.

empty rhetoric; it is shaping the evolution of State practice in diverse areas which are the subject of the case studies in Chapters V to VII.

4 *Sanctions*

Chapter V develops sanctions as a case study to examine the implementation of measures of intercession by States and the influence of R2P on this evolving State practice. This Chapter first briefly outlines what is meant by 'sanctions', before analysing the legal justifications for the imposition of sanctions. It then analyses some contemporary examples of sanctions practice in situations where there have been, or have been alleged, one or more of the four R2P-triggering atrocity crimes.

This Chapter demonstrates that contemporary regional and unilateral sanctions practice, which is limited by areas of international law such as the principle of non-intervention, is more expansive than earlier sanctions practice. From the statements of the States implementing such sanctions, and the international reception of this more expansive State practice which has been more supported or acquiesced in than the subject of formal complaint (other than by a few States), it can be inferred that there is now a greater scope to impose sanctions without offending limits that had been previously understood to apply. However, this expansion is simultaneously tempered by a restraining influence, which can be seen in States exercising self-restraint in ensuring that measures of intercession (in this case, sanctions) are formulated and imposed in such a way that they are more humane and minimise impacts on the general population.

The effectiveness, or not, of sanctions in achieving the cessation of atrocity crimes is beyond the scope of this Chapter. They key focus of this Chapter is on the evolving practice of States in the implementation of sanctions as a tool of intercession under R2P.

5 *Assistance to opposition groups*

Chapter VI examines the increase in overt support to opposition groups through analysis of State responses in relation to the contemporary conflicts in Libya and Syria. The first part of Chapter VI discusses how the principle of non-intervention traditionally applies in relation to the provision of assistance to government and opposition groups. The second part discusses the types of assistance provided in the contemporary examples of Libya and Syria, and explores how this new and emerging State practice reveals the influence of R2P on these measures of intercession.

This Chapter argues that the modern practice in respect of Libya and Syria suggests that States can now intervene in conflicts earlier, and lawfully take more measures, to respond to atrocity crimes by assisting opposition groups in situations where government forces are reportedly committing atrocity crimes. This Chapter demonstrates that there is an emerging practice of permitting, or at least tolerating, assistance to opposition groups in response to atrocity crimes. This change in State practice may be modifying the application of the principle of non-intervention to enable States to provide assistance to opposition groups, where such assistance would traditionally have amounted to prohibited intervention.

Together with this expansion in State practice, this Chapter reveals that a simultaneous restraint has emerged from R2P, in the practice of interceding States considering the consequences of any assistance to opposition groups and refusing to assist opposition groups where that assistance would facilitate or exacerbate the commission of atrocity crimes. This Chapter demonstrates the influence of R2P on this State practice evidencing self-restraint in the provision of expanded forms of assistance to opposition groups.

6 *Arms Trade Treaty*

Chapter VII advances the *Arms Trade Treaty* as an example of intercession under R2P influencing treaty practice. The Chapter begins with a brief history of the *Arms Trade Treaty*, before turning to examine the language used in the treaty. The Chapter demonstrates that the risk assessment requirements and prohibitions on transfer of conventional arms contained in the *Arms Trade Treaty* reveal the influence of R2P on the development of treaty norms. In requiring Member States to explicitly undertake risk assessment processes before authorising transfers, and refrain from transferring arms in situations where there are atrocity crimes occurring, the *Arms Trade Treaty* requires States to undertake measures which are expressly intended to impact the behaviour of other States, under the mantle of R2P.

This Chapter argues that the legal restraint on States Parties to the *Arms Trade Treaty* in relation to the transfer of conventional arms is itself a means of intercession, intended to avert atrocity crimes by denying the tools necessary to carry out those crimes. Simultaneously, the *Arms Trade Treaty* is also an instance of self-restraint inspired by R2P, in that it seeks to ensure that States do not aid or abet atrocity crimes in another State by transferring conventional arms. In this way, the *Arms Trade Treaty* is both R2P at work in terms of reinforcing States' own obligations of restraint under international human rights law and international humanitarian law, as well as a form of intercession inspired by R2P in terms of its imposition of risk assessment requirements and transfer prohibitions which are intended to impact on the commission of atrocity crimes in other States.

7 *Conclusion*

This thesis argues that current State practice regarding intercession reveals the most important present impact of R2P. This thesis demonstrates that R2P has led to both an expansion in permissible State responses to atrocity crimes, and a simultaneous restraint on

the way those measures are implemented. The analysis in this thesis will show that expansion can be seen in the increase in permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States – whether this is through diplomatic means (examined in Chapter IV), the imposition of sanctions (considered in Chapter V), support for opposition groups (analysed in Chapter VI) or limiting the trade in arms (investigated in Chapter VII). Restraint can be seen in these same instances in the self-restraint exercised by States in explicitly considering the impact their actions may have on the facilitation or commission of atrocity crimes, and refraining from acting where there is an increased risk of atrocity crimes. The influence of intercession under R2P can be seen across diverse areas including practice in the implementation of treaties, political action in the Security Council, practice which is driving an evolution in customary norms, and practice which evidences self-restraint by States that may be independent of changed customary law obligations. This thesis concludes that R2P, as implemented in the *World Summit Outcome* document, is something more than just empty rhetoric; it is shaping State behaviour in the context of intercessions less than the use of force, resulting in significantly enhanced international responses to the commission of atrocity crimes.

II SOVEREIGNTY AND THE PRINCIPLE OF NON-INTERVENTION

> National sovereignty offers vital protection to small and weak States, but it should not be a shield for crimes against humanity'.[46]

A *Introduction*

This Chapter will discuss the international law concept of sovereignty and the principle of non-intervention, both of which would be the subject of renewed humanitarian challenges as the new millennium dawned. They are fundamental concepts for the analysis in subsequent Chapters of this thesis. This Chapter sets a baseline for the analysis which follows by outlining what the concept of sovereignty and the principle of non-intervention are, and how they have been traditionally interpreted. It is in response to these traditional understandings that R2P has led to the evolution in State practice that is examined later in this thesis, and which will be shown to reveal a change in how the fundamental concept of sovereignty and the principle of non-intervention are now interpreted and applied.

The first part of this Chapter explores competing conceptualisations of sovereignty. It begins with a brief discussion of the concept of sovereignty generally. It then discusses historical (pre-Westphalian) views, then the Westphalian conceptualisation of sovereignty as supreme control and absolute authority, before turning to attempts to prise open the iron curtain of Westphalian sovereignty. R2P and its impact on the reconceptualisation of sovereignty is discussed in detail in Chapter III; this Chapter examines sovereignty as a concept, and identifies the problems inherent in it from a humanitarian perspective.

The second part of this Chapter analyses the principle of non-intervention. It begins by briefly outlining the two elements of the principle of non-intervention – the right of States to freely conduct their internal and external affairs in relation to matters within the exclusive competence of the State, and the prohibition on coercive interference in these affairs. It

[46] Kofi Annan, 'We the Peoples' (Speech delivered at the General Assembly, New York, 3 April 2000).

examines the legal basis of the customary principle of non-intervention and discusses the high watermark of non-intervention set by the ICJ in *Nicaragua*.

This Chapter finds a breadth in the traditional conceptualisations of sovereignty and the principle of non-intervention, which raises uncomfortable questions about the extent to which these concepts shield delinquent States and prevent other States from taking effective action in response to atrocity crimes. The idea that there is an inherent problem in these concepts – as traditionally understood – will then be carried further in Chapter III, which will explore how sovereignty and the principle of non-intervention might be reconceptualised in accordance with the recognition and acceptance of R2P by the international community. Chapter IV will then introduce the original conceptual tool of this thesis, referred to as intercession, to examine the evolution of State practice in respect of the implementation of the fundamental principles of sovereignty and the principle of non-intervention. The case studies in Chapters V to VII will examine how, under the influence of R2P, State practice has departed from the traditional conceptualisations of sovereignty and the principle of non-intervention outlined in this Chapter. In this way, R2P will be shown to be something more than empty rhetoric; it will be seen that it is shaping the evolution of State practice in diverse areas, moving away from the traditional conceptions of sovereignty and non-intervention that are analysed in this Chapter.

B *Sovereignty*

Sovereignty is often treated as an ontological fact in academic commentary – a concept that just is – on which analysis can safely rely without more. The term is used to refer to 'the bundle of rights that all [S]tates deserve as members of the international

community'.[47] The traditional 'understanding of a sovereign [S]tate in international law considers it to be a political entity that is legally free to determine its domestic affairs independently from others'.[48] In *Island of Palmas*, the Permanent Court of Arbitration observed that

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.[49]

Sovereignty has been described as 'the supreme authority of every [S]tate within its territory'.[50] As Crawford has observed, one of the key characteristics of sovereignty is 'exclusive authority over territory, i.e. the capacity to exercise, to the exclusion of other [S]tates, [S]tate functions on or related to that territory, and includes the capacity to make binding commitments under international law'.[51] The *Lotus* principle summarised this exclusive authority as follows: 'whatever is not explicitly prohibited by international law is permitted'.[52] The State is presumed to have absolute freedom in the absence of any express prohibition.

However, that freedom is not as absolute as it first might appear. In the *Corfu Channel* case, it was recognised that certain obligations are imposed on a State by virtue of sovereignty.[53] 'Sovereignty confers rights upon States and imposes obligations on them',[54]

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[47] Mortimer Sellers, 'The Legitimacy of Humanitarian Intervention Under International Law' (2001) 7(1) *International Legal Theory* 67, 69.
[48] An Hertogen, 'Letting *Lotus* Bloom' (2015) 26(4) *European Journal of International Law* 901, 901. Indeed, as the *Tallinn Manual 2.0* observes the 'Latin origin [of sovereignty] – sui juris, essesuaepotestatis, superanusor summa potestas – indicates that sovereignty refers to the supreme authority of the prince or king or, applied to modern international law, the State': See Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017) 11.
[49] *Island of Palmas (United States v Netherlands)* (1928) 2 RIAA 829, 838.
[50] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1996), 564.
[51] James Crawford, 'Sovereignty as a legal value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 131.
[52] *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10; Prosper Weil, '"The Court Cannot Conclude Definitively…" *Non Liquet* Revisited' (1998) 36 *Columbia Journal of Transnational Law* 109, 112; Brad R Roth, 'The Enduring Significance of State Sovereignty' (2004) 56 *Florida Law Review* 1017, 1029; Hugh Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' (2008) 29 *Michigan Journal of International Law* 71, 72; Hertogen, above n 48, 902.
[53] *Corfu Channel (United Kingdom v Albania) (Judgment)* [1949] ICJ Rep 4 ('*Corfu Channel*').

such as the principle of non-intervention and the consequent obligation not to intervene in matters within the exclusive competence of another State.

The International Court of Justice has held that the 'principle of respect for State sovereignty…is…closely linked with the principles of the prohibition of the use of force and non-intervention'.[55] Further, as Crawford noted '[s]overeignty – qualified as sovereignty under the law – is the standard operating assumption of a decentralised international system. It is intervention that requires special justification'.[56] Indeed, the concept of sovereignty and the principle of non-intervention are often referred to as foundational concepts of international law.[57] Yet their definitions and boundaries remain notoriously elusive[58] and deeply contested.[59] Suganami has argued that 'there are domestically *and* internationally relevant senses of the word 'sovereignty' and there is more than one meaning internationally'.[60] Tsagourias noted that the content of the principle of sovereignty 'remains vague although worshipped as sacrosanct'.[61] Crawford has recognised that '[t]he term 'sovereignty' has a long and troubled history, and a variety of meanings'.[62]

Even with the uncertainty regarding its exact content, sovereignty is generally presumed to be comprised of two distinct components – internal sovereignty and external sovereignty. Malmvig described this as the 'duality of sovereignty', enabling

> [S]tate sovereignty to be articulated both as an internal relationship between ruler and ruled – where sovereignty denotes a hierarchical concentration of [S]tate power and authority inside – and as an external relationship between independent political communities, where sovereignty

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[54] Ibid, 43 (Alvarez J).
[55] *Nicaragua* [1986] ICJ Rep 14, [212].
[56] Crawford, 'Sovereignty as a legal value', above n 51, 132.
[57] See, eg, Christopher M Ryan, 'Sovereignty, Intervention and the Law: A Tenuous Relationship of Competing Principles' (1997) 26(1) *Journal of International Studies* 77, 84.
[58] Hidemi Suganami, 'Understanding sovereignty through Kelsen/Schmitt' (2007) 33 *Review of International Studies* 511, 511.
[59] Jeremy Moses, *Sovereignty and Responsibility: Power, Norms and Intervention in International Relations* (Palgrave Macmillan, 2014), 1.
[60] Suganami, above n 58, 512.
[61] Nicholas Tsagourias, 'Humanitarian Intervention and Legal Principles' (2001) 7(1) *International Legal Theory* 83, 84.
[62] James Crawford, *The Creation of States in International Law* (Clarendon, 1979), 26.

> denotes the antithesis, in the form of anarchy and the absence of power and authority concentration.[63]

Zucca has observed

> We are still very much in the spell of that [Hobbesian] account of [S]tate sovereignty, which implies two ingredients. First, [S]tate sovereignty means full responsibility on the part of the ruler to run the internal business of the [S]tate by wielding its own normative powers. Second, [S]tate sovereignty means freedom from external interference in the way national business is run. It matters little if the sovereign power is acting rightly or wrongly from the viewpoint of international moral standards. State sovereignty creates a protective buffer that screens the sovereign authority from criticism and interference.[64]

Internal sovereignty refers to the relationship between the State and those located within the territory of that State. Internal sovereignty at its highest holds that a State can do whatever it chooses within its borders.[65] Under this conceptualisation of internal sovereignty, international law is not concerned about the internal government of a State at all, no matter how undemocratic and tyrannical, provided it has control and exclusive authority over territory.[66]

External sovereignty expresses a State's legal status at the international level, and its rights and obligations in respect of other States and international actors, as distinct from governing its relationship with its citizens.[67] It is concerned with the State's exclusive control over foreign affairs; that is, the ability of the State to engage, or chose not to engage, in relations with other States.[68] External sovereignty refers to 'the legal identity of the [S]tate in international law, an equality of status with all other [S]tates and the claim to be the sole

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[63] Helle Malmvig, *State Sovereignty and Intervention: A discourse analysis of interventionary and non-interventionary practices in Kosovo and Albania* (Routledge, 2006), 77.
[64] Lorenzo Zucca, 'A Genealogy of State Sovereignty' (2015) 16(2) *Theoretical Inquiries in Law* 399, 412.
[65] See, eg, Ryan, above n 57; Malmvig, above n 63; Moses, above n 59.
[66] See Crawford, 'Sovereignty as a legal value', above n 51, 131-132. The characteristics of sovereignty are described as '(a) sovereignty inheres in the state, considered as an autonomous territorial community across time; (b) sovereignty is the exclusive authority over territory, i.e. the capacity to exercise, to the exclusion of other states, state functions on or related to that territory, and includes the capacity to make binding commitments under international law; (c) such sovereignty is exercisable by the governmental institutions established within the state; (d) the government of the state depends on the fact of local control, not on democratic legitimacy'.
[67] Hertogen, above n 48, 901; Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513, 515-518.
[68] Stephen Carley, 'Limping toward Elysium: Impediments created by the myth of Westphalia on humanitarian intervention in the international legal system' (2009) 41(5) *Connecticut Law Review* 1741, 1743; Crawford, 'Sovereignty as a legal value', above n 51, 118.

official agent acting in international relations on behalf of a society'.[69] This is reflected in the principle of sovereign equality enshrined in the United Nations Charter.[70] The principle of non-intervention (discussed in the second part of this Chapter), is often considered a characteristic or corollary of external sovereignty.

As Moore and Hinsley have both argued, while the 'idea of separating internal and external sovereignty is perfectly sensible as a heuristic device to facilitate analysis and discussion,…they are not separate in practice, merely "inward and outward expressions…of the same idea"'.[71] Accordingly, in this thesis I will refer to sovereignty as a whole, distinguishing between internal and external sovereignty only where such distinctions are relevant to the argument or otherwise necessary. The next part of this Chapter will explore the competing conceptualisations of sovereignty beginning with the historical (pre-Westphalian) approach.

1 *Historical (pre-Westphalian) conceptualisation of sovereignty*

The traditional Hobbesian account of sovereignty presented political authority as absolute and exhaustive.[72] 'Either the [S]tate is sovereign and there is no other authority beyond it, or it is not sovereign and therefore it is not a [S]tate'.[73] Bodin defined sovereignty as absolute and perpetual power.[74] Vattel was a strong advocate for sovereignty and non-

[69] Ramesh Thakur, 'Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS' (2002) 33(3) *Security Dialogue* 323, 328.
[70] *Charter of the United Nations* art 2(1).
[71] Tod Moore, 'Violations of Sovereignty and Regime Engineering: A Critique of the State Theory of Stephen Krasner' (2009) 44(3) *Australian Journal of Political Science* 497, 501; Francis Harry Hinsley, *Sovereignty* (Cambridge University Press, 2nd ed, 1986), 158.
[72] Thomas Hobbes, *Leviathan* (Floating Press, first published 1651, 2009 ed).
[73] Zucca, above n 64, 401.
[74] Jean Bodin, *Six Books on the Commonwealth* (Blackwell, first published 1576, 1967), 28.

intervention, although he did not assert that sovereignty entailed complete autonomy.[75] Whereas Rouseau considered the purpose of the sovereign was to realize the common good.[76]

Some scholars have asserted that there has always been a link between sovereignty and responsibility, at least under the historical (pre-Westphalian) conceptualisation of sovereignty.[77] Sellers has argued that '[e]ven the most extreme apostle of sovereignty, Jean Bodin, conceded that one sovereign may intervene to punish another who governs without regard to the public welfare, honor, or survival'.[78] Glanville and Orford have both submitted that there are close historical links between sovereignty and responsibility.[79] Glanville argued that 'sovereignty has historically involved varied and evolving responsibilities',[80] and further that

> responsibilities have been an enduring feature of the social and historical construction of sovereignty. Indeed, the history of sovereignty is in important ways a history of demands from domestic and international societies that the rights of sovereigns be limited by those responsibilities that have underpinned the legitimacy of their authority.[81]

Under this view, and seemingly in stark contrast particularly to the Hobbesian conceptualisation of sovereignty, pre-Westphalian sovereignty is considered by some to have also required the sovereign to protect its subjects as a defining characteristic of sovereignty. Flowing from this, it is argued by some scholars that it was historically permissible for other sovereigns to provide assistance, to intervene, when a sovereign failed to provide such

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[75] See Suganami, above n 58, 513.
[76] J Rousseau, *Du contrat social* (1954 ed), livre II, ch I, 249-250 cited in Peters, above n 67, 519.
[77] See, eg, Sellers, above n 47; Anne Orford, 'Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981; Luke Glanville, 'The antecedents of 'sovereignty as responsibility' (2011) 17(2) *European Journal of International Relations* 233; Luke Glanville, 'Gaddafi and Grotius: Some Historical Roots of the Libyan Intervention' (2013) 5 *Global Responsibility to Protect* 342; Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (University of Chicago Press, 2014); Davide Rodogno, 'Humanitarian Intervention in the Nineteenth Century' in Alex J Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press, 2016), 19-37.
[78] Sellers, above n 47, 67.
[79] Moses, above n 59, 59; Glanville, 'The antecedents of 'sovereignty as responsibility', above n 77; Orford, 'Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect', above n 77.
[80] Glanville, 'The antecedents of 'sovereignty as responsibility', above n 77, 237.
[81] Glanville, *Sovereignty and the Responsibility to Protect: A New History*, above n 77, 213-214.

protection and thus lost their legitimacy.[82] However, even if this view of historical (pre-Westphalian) sovereignty is correct, the requirement to provide protection as part of sovereign legitimacy vanished with the conceptualisation of absolute (Westphalian) sovereignty in the seventeenth century.

2 *Westphalian conceptualisation of sovereignty*

The idea of absolute sovereignty is generally believed to have originated in 1648 with the Treaties of Westphalia, which ended the Thirty Years War.[83] A reference to Westphalian sovereignty calls to mind a 'legally-empowered image',[84] which Koskenniemi has referred to as the 'metaphoric sense of Westphalia',[85] of the international system as 'an association of sovereign [S]tates'.[86] This conceptualisation of sovereignty treats sovereignty as supreme control and absolute authority – the sovereign State having the right to do whatever it likes within its territory. The principle of non-intervention is closely linked to this conceptualisation of sovereignty.

Under this conceptualisation of sovereignty, international law is not concerned with the internal activities of the State, and States are prohibited from interfering in another State's internal activities. While several scholars have challenged the notion of Westphalian sovereignty as entailing absolute authority,[87] it is generally accepted that the Westphalian

[82] Sellers, above n 47; Orford, 'Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect', above n 77; Glanville, 'The antecedents of 'sovereignty as responsibility', above n 77; Glanville, 'Gaddafi and Grotius: Some Historical Roots of the Libyan Intervention', above n 77; Glanville, *Sovereignty and the Responsibility to Protect: A New History*, above n 77; Rodogno, above n 77, 19-37. See also Susan Breau, *The Responsibility to Protect in International Law: An emerging paradigm shift* (Routledge, 2016) 11-12.
[83] Carley, above n 68, 1744; Stéphane Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?' (2000) 2 *Journal of the History of International Law* 148.
[84] Stéphane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8(2) *Australian Journal of Legal History* 181, 212.
[85] Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), 51.
[86] Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 1999), 5.
[87] See, eg, David Armitage, *Foundations of Modern International Thought* (Cambridge University Press, 2013); Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', above n 83; Beaulac, 'The Westphalian

conceptualisation of sovereignty was indeed that sovereignty was supreme.[88] This is the aspect of sovereignty which is most open to critique on humanitarian grounds. As Chapter III will demonstrate, the Westphalian conceptualisation of sovereignty is threatened by efforts, flowing from R2P, to reconceptualise sovereignty as conditional upon responsibility. The next part of this Chapter will discuss criticisms of an international system founded upon the absolute form of Westphalian sovereignty.

3 *Prising open the iron curtain of Westphalian sovereignty*

By the end of World War I, the 'cult of sovereignty that placed the [S]tate above the law'[89] was being called into question. The end of World War I 'saw an unsuccessful attempt to prise open the iron curtain of Westphalian sovereignty by individualising criminal responsibility for violations of the emerging law of war'.[90] The punishment provisions in the peace treaties of Versailles and Sevres originally sought to extend criminal jurisdiction over States (Germany and Turkey) to cover war crimes and crimes against humanity.[91] Germany and Turkey protested

> against Allied calls for the establishment of supranational tribunals to try the officials and personnel of these countries implicated in wartime atrocities…arguing that sovereignty over territory and authority over nationals, a sacrosanct principle of international law, was threatened if the proposed supranational tribunals proceeded.[92]

Model in Defining International Law: Challenging the Myth', above n 84; Jens Bartelson, 'From Empire to Sovereignty – and Back?' (2014) 28(2) *Ethics and International Affairs* 251, 261; Sebastian Schmidt, 'To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature' (2011) 55(3) *International Studies Quarterly* 601.

[88] See, eg, Stephen D Krasner, *Sovereignty. Organized Hypocrisy* (Princeton University Press, 1999); Peter Stirk, 'The Westphalian Model, Sovereignty and Law in *Fin-de-siècle* German International Theory' (2005) 19(2) *International Relations* 153; Darel E Paul, 'Sovereignty, Survival and the Westphalian Blind Alley in International Relations' (1999) 25(2) *Review of International Studies* 225; David Kennedy, 'International Law and the Nineteenth Century' (1996) *Nordic Journal of International Law* 65; Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth' (2001) 55(2) *International Organization*.

[89] Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford University Press, 2008), 47.

[90] Jackson Nyamuya Maogoto, 'Sovereignty in Transition: Human Rights and International Justice' (2005) 7 *University of Notre Dame Australia Law Review* 83, 84-85.

[91] Ibid, 85.

[92] Ibid.

However, the notion that sovereignty entailed more than supreme control and absolute authority was far from extinguished. Atrocities carried out during World War II exposed the hazards inherent in an international system founded upon absolute sovereignty.[93] Following the end of World War II, the traditional Westphalian conceptualisation of sovereignty was significantly impacted with the subsequent war crimes trials at Nuremberg, Tokyo and elsewhere,[94] the increased momentum of the human rights movement,[95] and the entry into force of the *Genocide Convention*[96] and the four 1949 *Geneva Conventions*.[97]

In 1955, Kelsen challenged the notion of absolute sovereignty and presented 'a vision of sovereignty that derives its authority not only from the human beings forming the [S]tate, but from the whole of humanity':[98]

> [T]he [S]tate is not a mysterious substance different from its members, i.e., the human beings forming the [S]tate, and hence a transcendental reality beyond rational, empirical cognition but a specific normative order regulating the mutual behaviour of men… By demonstrating that absolute sovereignty is not and cannot be an essential quality of the [S]tate existing side by side with other [S]tates, it removes one of the most stubborn prejudices which prevent political and legal science from recognizing the possibility of an international legal order constituting an international community of which the [S]tate is a member, just as corporations are members of the [S]tate.[99]

As Orford noted 'faith [in fundamental human rights] would inform the body of international human rights law and international humanitarian law that developed over the course of the

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[93] See Winston Nagan, 'Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia' (1995) 6 *Duke Journal of Comparative & International Law* 127, 149.
[94] Francis Deng, 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'' (2010) *Global Responsibility to Protect* 353, 356; Timothy LH McCormack and Gerry J Simpson (eds), *The law of war crimes: national and international approaches* (Kluwer Law International, 1997).
[95] The 'idea that international law should protect the rights of individuals started to gain traction in legal circles, leading to a proliferation of international human rights treaties in the postwar era': William Magnuson, 'The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law' (2010) 43(2) *Vanderbilt Journal of Transnational Law* 255, 257. See also Bryan F MacPherson, 'Limited Humanitarian Intervention' (2001) 7(1) *International Legal Theory* 59, 60.
[96] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').
[97] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War*; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*.
[98] Eyal Benvenisti, 'The Paradoxes of Sovereigns as Trustees for Humanity: Concluding Remarks' (2015) 16(2) *Theoretical Inquiries in Law* 535, 540.
[99] Hans Kelsen, 'Foundations of Democracy' (1955) 66 *Ethics* 1, 34.

twentieth century as a constraint on [S]tate action'.[100] The 'concept of the inviolability of [S]tate sovereignty existed in uneasy equilibrium with the new world of human rights'.[101] Further, international law has subsequently recognised that there are fundamental principles (*jus cogens*) that supersede the rights of States to act with impunity within their borders.[102]

In 1999, then Secretary-General Kofi Annan described the balancing between sovereignty and the protection of human rights as follows:

> State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.[103]

Peters has argued that the emphasis on protection as an obligation of sovereignty 'corresponds to the evolution of the contemporary human rights discourse, in which protection has become the overarching doctrinal paradigm'.[104]

Walling has observed that United Nations' Security Council discourse in relation to Kosovo further challenged the conceptualisation of sovereignty as supreme control and absolute authority.[105] The Security Council was divided between States appealing to a popular conception of sovereignty and States appealing to Westphalian sovereignty. France, the United Kingdom and the United States, argued 'that Serbia had violated its sovereign responsibilities by forcibly deporting and murdering its ethnic Albanian population'.[106] In contrast, China and Russia argued 'that Serbia was exercising its sovereign right to neutralize

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[100] Orford, 'Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect', above n 77, 993.
[101] Magnuson, above n 95, 267.
[102] Ryan, above n 57, 86.
[103] Kofi Annan, 'Two Concepts of Sovereignty' (1999) *The Economist* 49, 49.
[104] Peters, above n 67, 525.
[105] Carrie Booth Walling, 'Human Rights Norms, State Sovereignty, and Humanitarian Intervention' (2015) 37(2) *Human Rights Quarterly* 383, 401-404.
[106] Ibid, 403.

internal threats to its rule'.[107] In the aftermath of the 1999 NATO intervention, the Netherlands argued that

> [t]he Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens.[108]

Despite the divisions in the Security Council, 'the documentary record shows that human rights justifications were gaining influence in the Council, fundamentally transforming the meaning of sovereignty for most of its members'.[109]

Cronin has argued that sovereignty is interpreted and re-interpreted by international actors over time:

> Sovereignty is the constitutive principle of the nation-[S]tate system, yet is also derivative of that system. This underlies the paradox of sovereignty: [S]tates are sovereign only within the context of a broader global system of [S]tates, and thus they can remain independent only by maintaining a system that imposes constraints on their independence.[110]

In 2005, Koskenniemi submitted that

> the very concept of sovereignty loses its normative significance…If a [S]tate cannot refer to its sovereignty to justify its actions but has to find a rule of law which has given it the right, liberty or competence to act in a certain way, then to speak of 'sovereignty' at all is merely superfluous or, at best, a description of the norms whose normative force is in their being incorporated into some legal act, not in their being inherent in statehood.[111]

Further, Kornfeld has argued that 'the notion that nation-States are akin to separate islands, each standing guard over its internal affairs, has for the most part evaporated in the age of human rights and international trade'.[112]

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[107] Ibid.
[108] UN GAOR, 53rd sess, 4011th mtg, UN Doc S/PV.4011 (10 June 1999), 12.
[109] Walling, above n 105, 404.
[110] Bruce Cronin, 'Multilateral Intervention and the International Community' in Michael Keren and Donald A Sylvan (eds), *International Intervention: Sovereignty versus Responsibility* (London, Taylor & Francis, 2002), 147.
[111] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 231; Moses, above n 59, 28
[112] Itzchak Kornfeld, 'Is News of "Sovereignty's Death" Exaggerated?' (2012) 18(2) *ILSA Journal of International & Comparative Law* 315, 318.

One view of sovereignty, expressed by Borgen and endorsed by Kornfeld, is that sovereignty is like 'a deck of cards. A nation-State gives and takes cards as it needs them'.[113] The most obvious example of this is in relation to international trade, especially the growth of bilateral investment treaties, which 'demonstrates that States continue to 'give up' sovereignty in order to gain benefits'.[114] As Kornfeld has noted, this swapping or trading of sovereignty for benefit is an exercise of sovereignty, 'not an abrogation of it'.[115] Tomuschat has gone so far as to assert that 'the international legal order cannot be understood any more as being based exclusively on State sovereignty…States are no more than instruments whose inherent function is to serve the interests of their citizens as legally expressed in human rights'.[116] These challenges to the conceptualisation of sovereignty as supreme control and absolute authority laid the groundwork for the acceptance of R2P by the international community and the concomitant reconceptualisation of sovereignty as responsibility, which is further elaborated on in Chapter III.

4 *Conclusion: the traditional conceptualisation of sovereignty*

While it has been argued by some scholars that the historical (pre-Westphalian) conceptualisation of sovereignty included the requirement to provide protection as part of sovereign legitimacy, this requirement was absent from the conceptualisation of absolute (Westphalian) sovereignty in the mid-1600s. The Westphalian conceptualisation of sovereignty held that sovereignty entails supreme control and absolute authority. Under this conceptualisation of sovereignty, international law is not concerned with the internal

[113] Ibid, 320 quoting personal communication dated 20 October 2011 from Christopher Borgen expressing the deck of cards analogy.
[114] Ibid, 320.
[115] Ibid.
[116] Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 11 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 161; Peters, above n 67, 514.

activities of the State, and States are prohibited from interfering in another State's internal activities regardless of what atrocities may be occurring there.

However, the conceptualisation of sovereignty has evolved significantly since World War I, particularly in the aftermath of atrocities during World War II, and in more recent conflicts at the end of the 20th century, including Rwanda and Kosovo. The manifest indifference of Westphalian sovereignty has been the subject of greater critique than at any previous time, and appears no longer tenable. The idea that international law should also protect the rights of individuals, and no longer turn a blind eye to the internal activities of a State, began to gain traction. As further discussed in Chapter III, this humanitarian critique of Westphalian sovereignty laid the groundwork for the reconceptualisation of sovereignty as responsibility and R2P. The next part of this Chapter will explore the principle of non-intervention, which is a corollary of sovereignty, and serves to demarcate the area within which a State is entitled to act autonomously by the principle of sovereignty. This analysis will identify a baseline against which contemporary State practice will be assessed in subsequent Chapters.

C *The Principle of Non-Intervention*

The principle of non-intervention is usually considered to be the most important legal consequence of sovereignty.[117] It is generally considered to provide the State with protection from outside interference in matters within the State's domestic jurisdiction.[118] Although the meaning and boundaries of non-intervention clearly derive from the content of the principle

[117] Suganami, above n 58, 523; Peters, above n 67, 527; Jianming Shen, 'The Non-Intervention Principle and Humanitarian Interventions Under International Law' (2001) 7(1) *International Legal Theory* 1; James Turner Johnson, 'Humanitarian Intervention, the Responsibility to Protect, and Sovereignty: Historical and Moral Reflections' (2015) 23(3) *Michigan State International Law Review* 609, 614.

[118] The *Tallinn Manual 2.0* expresses this as 'those matters on which international law does not speak or that international law leaves solely to the prerogative of States constitute *domaine réservé* and are therefore to be regarded as protected from intervention by other States': Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 314.

of State sovereignty,[119] the two concepts being inextricable linked, the exact scope of the principle of non-intervention has long created controversy.[120] Despite this uncertainty surrounding its exact boundaries, the principle of non-intervention has been confirmed by the ICJ as a norm of customary international law on multiple occasions.[121]

It is generally agreed that the principle of non-intervention consists of two elements.[122] The first element is the right of States to freely conduct their internal and external affairs in relation to matters within their domestic jurisdiction. In the *National Decrees Advisory Opinion*, the PCIJ found that '[t]he question whether a certain matter is or is not solely within the jurisdiction of a [S]tate is an essentially relative question; it depends upon the development of international relations'.[123] It is generally accepted that a matter will be within a State's domestic jurisdiction if it is a matter that international law leaves for the State to decide. In its internal affairs this would include matters such as its own political, economic, social and cultural system.[124] In its external affairs this would include matters such as national defence and foreign policy.[125] The second element is the prohibition on coercive interference in these affairs by other States. Coercion is a necessary element of the

[119] Cynthia Weber, 'Reconsidering statehood: examining the sovereignty/intervention boundary' (1992) 18(3) *Review of International Studies* 199, 208.
[120] See, eg, Raymond John Vincent, *Nonintervention and International Order* (New Jersey, Princeton University Press, 1974); Sean Watts, 'Low-Intensity Cyber Operations and the Principle of Non-Intervention' in Jens David Ohlin, Claire Oakes Finkelstein, and Kevin Govern (eds), *Cyberwar: Law and Ethics for Virtual Conflicts* (Oxford University Press: 2015) 249, 255; Shen, above n 117; Weber, above n 119; Sellers, above n 47; Thomas J Jackamo, 'From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention' (1992) 32 *Virginia Journal of International Law* 929.
[121] *DRC v Uganda* [2005] ICJ Rep 168, [161]-[163]; *Nicaragua* [1986] ICJ Rep 14, [202]; *Corfu Channel* [1949] ICJ Rep 4, 35.
[122] Vincent, above n 120; Shen, above n 117; Weber, above n 119; Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 312-327.
[123] *National Decrees Issued in Tunisia and Morocco (Advisory Opinion)* [1923] PCIJ Series B No 4 ('*National Decrees*').
[124] Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 312-327.
[125] *Nicaragua* [1986] ICJ Rep 14, [205]. In *National Decrees*, the PCIJ referred to matters that 'are not, in principle, regulated by international law' as being within a State's domestic jurisdiction: *National Decrees* [1923] PCIJ Series B No 4, 24. See also Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 315-317, [8]-[16].

principle of non-intervention. Non-coercive means of interference do not constitute a prohibited intervention.[126]

1 *Non-intervention in the UN Charter*

There is no explicit principle of non-intervention contained in the UN Charter.[127] The closest the Charter comes to expressing such a principle is in Article 2. Article 2(4) prohibits the threat or use of force and calls on all Member States to respect the sovereignty, territorial integrity and political independence of other States.[128] In addition, Article 2(7) provides that the United Nations has no authority to intervene in matters which are within the domestic jurisdiction of any State, with the exception of enforcement measures under Chapter VII.[129]

Sellers notes that the protected zone in Article 2(7) 'extends only so far as our conception of the [S]tate's "domestic jurisdiction"',[130] which has traditionally been conceptualised to cover a broad range of matters. Lauterpacht submits that Article 2(7) merely prohibits 'direct legislative interference by the United Nations – *i.e*. an attempt to impose upon States rules of conduct as a matter of legal right'.[131]

2 *Non-intervention in treaties and United Nations' instruments*

The principle of non-intervention is commonly described in treaties and United Nations instruments as a prohibition on States, prohibiting certain conduct in relation to other States. The 1933 *Montevideo Convention* provides that '[n]o [S]tate has the right to intervene

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[126] In *Nicaragua*, the ICJ dismissed the argument that non-coercive means of interference could be an indirect form of intervention. The Court refused to regard such non-coercive measures as a breach of the principle of non-intervention: *Nicaragua* [1986] ICJ Rep 14, [244]-[245].
[127] Vincent, above n 120, 234; Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 312.
[128] *Charter of the United Nations* art 2(4).
[129] Ibid art 2(7).
[130] Sellers, above n 47, 68.
[131] Sir Hersch Lauterpacht, *International Law and Human Rights* (Stevens, 1950), 167-171.

in the internal or external affairs of another'.[132] The 1948 *Charter of the Organization of American States* expressed the principle of non-intervention as:

> 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. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.[133]

Although as Damrosch notes, forms of economic leverage such as sanctions, as well as diplomatic relations, which would appear to be directed against 'political, economic, and cultural elements', have traditionally been considered legal under international law.[134]

In 1957, the United Nations General Assembly passed the *Peaceful and Neighbourly Relations Among States Resolution*.[135] The Resolution recalled that 'the fundamental objectives of the Charter of the United Nations are the maintenance of international peace and security and friendly co-operation among [S]tates'.[136] It further realised the need to:

> promote these objectives and to develop peaceful and tolerant relations among States, in conformity with the Charter, based on mutual respect and benefit, non-aggression, respect for each other's sovereignty, equality and territorial integrity and non-intervention in one another's internal affairs.[137]

In 1965, the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* provided that:

> No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.[138]

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[132] *Convention on Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 8.
[133] *Charter of the Organization of American States*, signed 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951) art 18.
[134] Lori Fisler Damrosch, 'Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs' (1989) 83 *American Journal of International Law* 1, 34.
[135] *Peaceful and Neighbourly Relations Among* States, GA Res 12/1236, UN GAOR, 12th sess, 731st plen mtg, Agenda Item 66, Supp No 18, UN Doc A/RES/12/1236 (14 December 1957), 5.
[136] Ibid.
[137] Ibid.
[138] *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 20/2131, UN GAOR, 20th sess, 1408th plen mtg, Agenda Item 107, Supp No 14, UN Doc A/RES/20/2131 (21 December 1965) [1].

The use of the phrase 'against the personality of the State or against its political, economic and cultural elements' echoes the terminology used in the 1948 Charter of the Organisation of American States. The Resolution continues:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.[139]

This serves to qualify the principle of non-intervention and limit its intended scope to coercive measures only.[140]

In 1966, the *Status of the Implementation of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty Resolution* urged 'the immediate cessation of intervention, in any form whatever, in the domestic or external affairs of States'.[141] However, also during 1966, the report of the *Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States* noted

> There might be many instances in which States should try to influence others to follow policies consistent with the maintenance of peace and security – or, to give another example, with the principle of respect for human rights. Thus, the idea that States should have freedom to influence the policies of other States seemed…to be essential to the fulfilment of the obligations of States to the international community.[142]

Several States objected to any rule which sought to codify the scope of permissible interference,[143] while others claimed that all forms of pressure, even economic, political and diplomatic were illegal.[144] As Vincent notes

> Armed intervention was disapproved of whether it took the form of the organization and training of armed forces for the purpose of incursion into other [S]tates, subversive and terrorist activities or interference in civil strife in another [S]tate, or the provision of arms and

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[139] Ibid.
[140] See, eg, Watts, above n 120, 259. Note that the ICJ has confirmed coercion as a necessary element of prohibited intervention observing 'The element of coercion…defines, and indeed forms the very essence of prohibited intervention': *Nicaragua* [1986] ICJ Rep 14, [205].
[141] *Status of the implementation of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 21/2225, UN GAOR, 21st sess, 1499th plen mtg, Supp No 16, UN Doc A/RES/21/2225 (19 December 1966), 16.
[142] *Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States*, UN GAOR, 21st sess, UN Doc A/6230 (27 June 1966) [73].
[143] Ibid, [73] and [161].
[144] Ibid, [149].

> materials in support of a rebellion within another [S]tate. Though all representatives objected to coercion, and this was the common thread running through the various views on the actions the principle disallowed, some representatives pointed out the difficulty of distinguishing between "impermissible coercion and legitimate persuasion".[145]

The 1970 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* ('*Friendly Relations Declaration*') developed the principle of non-intervention further. It was argued by some commentators to have full legal effect as an authoritative interpretation of the UN Charter,[146] and has been treated as representative of customary international law.[147] The *Friendly Relations Declaration* provides

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.[148]

The *Friendly Relations Declaration* also used the phrase 'against the personality of the State or against its political, economic and cultural elements', echoing the 1948 *Charter of the Organisation of American States* and 1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*. The *Friendly Relations Declaration* refers to intervention as including such acts by a State as to 'organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State'.[149]

Also in 1970, the *Declaration on the Strengthening of International Security* provided:

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[145] Vincent, above n 120, 247 citing *Report of the Special Committee* 1967, 52, [353].
[146] Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713, 735.
[147] *Nicaragua* [1986] ICJ Rep 14, [264]; *DRC v Uganda* [2005] ICJ Rep 168, [162].
[148] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 25/2625, UN GAOR, 25th sess, 1883rd plen mtg, Agenda Item 85, Supp No 28, UN Doc A/RES/25/2625 (24 October 1970).
[149] The ICJ has found this to be customary international law: *DRC v Uganda* [2005] ICJ Rep 168, [162]. See also *Nicaragua* [1986] ICJ Rep 14, [264].

> States must fully respect the sovereignty of other States and the right of people to determine their own destinies, free of external intervention, coercion or constraint, especially involving the threat or use of force, overt or covert…[150]

The 1975 *Helsinki Final Act* expansively addressed the principle of non-intervention providing:

> The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.
> They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.
> They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.
> Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.[151]

The 1976 *Declaration of Non-interference in the Internal Affairs of States* ('*Non-interference Declaration*') recognized that a 'wide range of direct and indirect techniques, including withholding assistance…, subtle and sophisticated forms of economic coercion, subversion and defamation with the view to destabilization, are being mobilized against Governments'.[152] While reaffirming the principle of self-determination and the legitimacy of the struggle of oppressed peoples, the *Non-interference Declaration* denounced

> any form of interference, overt or covert, direct or indirect…by one State or group of States and any act of military, political, economic or other form of intervention in the internal or external affairs of other States, regardless of the character of their mutual relations.[153]

The 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* ('*Inadmissibility of Intervention Declaration*') declared that 'no [S]tate or group of [S]tates has the right to intervene or interfere in any form or for any reason

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[150] *Declaration on the Strengthening of International Security*, GA Res 25/2734, UN GAOR, 25th sess, 1932nd plen mtg, Agenda Item 32, UN Doc A/RES/25/2734 (16 December 1970). In its 1974 *Definition of Aggression* the General Assembly distinguished between interference in domestic affairs and support for oppressed peoples struggling against racist and alien regimes: *Definition of Aggression*, 144, Annex art 7.
[151] *Helsinki Final Act of the Conference on Security and Co-operation in Europe*, 1 August 1975, 14 ILM 1292, Principle VI: Declaration on Principles Guiding Relations between Participating States.
[152] *Non-interference in the internal affairs of states*, GA Res 31/91, UN GAOR, 31st sess, 98th plen mtg, Supp No 39, UN Doc A/RES/31/39 (14 December 1976).
[153] Ibid.

whatsoever in the internal or external affairs of other [S]tates'.[154] The *Inadmissibility of Intervention Declaration* went further than the previous General Assembly resolutions and specifically addressed a more subtle form of intervention. It declared

> The right of States and peoples to have free access to information and to develop fully, without interference, their system of information and mass media and to use their information media in order to promote their political, social, economic and cultural interests and aspirations.[155]

The Resolution also noted that

> the dissemination of false or distorted news which can be interpreted as interference in the internal affairs of other States or as being harmful to the promotion of peace, cooperation and friendly relations among States and nations.[156]

As Watts observes, the *Inadmissibility of Intervention Declaration* 'prohibits a particularly broad range of acts and appears even to preclude the possibility of traditional justifications operating to excuse interventions'.[157]

3 *The high watermark of the principle of non-intervention*

Against the background of this very considerable practice, the International Court of Justice set the high-watermark for the principle of non-intervention in *Nicaragua*, where it was recognised as a principle of customary international law.[158] The Court observed that

> [t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.[159]

The Court held that '[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal

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[154] *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of* States, GA Res 36/103, UN GAOR, 36th sess, 91st plen mtg, Supp No 51, UN Doc A/RES/36/103 (9 December 1981).
[155] Ibid.
[156] Ibid.
[157] Watts, above n 120, 262-263. Although note that the International Group of Experts on the *Tallinn Manual 2.0* agreed that the *Inadmissibility of Intervention Declaration* did not represent customary international law in its entirety. See Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 312 (footnote 760).
[158] See also *DRC v Uganda* [2005] ICJ Rep 168, [161]-[165], *Corfu Channel* [1949] ICJ Rep 4, 35.
[159] *Nicaragua* [1986] ICJ 14, [202].

affairs'.[160] The Court then noted that '[e]xpressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find'.[161]

The Court applied the *Friendly Relations Declaration* and made it clear that the principle of non-intervention relates to both the internal and the external affairs of other States.[162] The Court found that

> As regards the…content of the principle of non-intervention,…in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities within another State.[163]

The Court clearly stated that forms of coercion, in addition to the use of force, are prohibited and breach the principle of non-intervention.[164] The Court found that 'the support given by the United States… to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistical support, constitute[d] a clear breach of the principle of non-intervention'.[165]

The Court noted that '[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to

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[160] Ibid, [186].
[161] Ibid, [202].
[162] Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the *Nicaragua* Judgment' (2012) 25(1) *Leiden Journal of International Law* 157, 158-159.
[163] *Nicaragua* [1986] ICJ Rep 14, [205].
[164] Ibid, 108; Yoram Dinstein, 'Foreign intervention in a NIAC' in Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press: 2014), 85.
[165] *Nicaragua* [1986] ICJ Rep 14, [242].

international law'.[166] However, the Court made it clear that such aid must be non-discriminatory and for the purpose of preventing and alleviating human suffering and 'to protect life and health and secure respect for the human being'[167] in order to be permissible. Humanitarian aid not provided on this basis would be a breach of the principle of non-intervention. The Court found that the aid provided was in breach of the principle of non-intervention as it was directed solely to the *Contras*.[168] The Court also found that the United States had violated the customary international law of non-intervention by training, encouraging and arming the *Contra* forces in Nicaragua.[169] However, the Court declined to hold that US sanctions imposed against Nicaragua violated the principle of non-intervention.[170]

The International Court of Justice has consistently held that there is no 'right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State'.[171] The high-watermark for the principle of non-intervention set by *Nicaragua* considered only economic measures, such as embargoes and cessation of aid, and strictly humanitarian assistance provided without discrimination, to be consistent with the principle of non-intervention. This was reaffirmed in *Democratic Republic of Congo v Uganda*, where the ICJ held that international law continues to 'prohibit a State from intervening, directly or indirectly, with or without armed force, in support of the internal opposition in another State'.[172]

4 *A change to the boundaries of non-intervention?*

In his 1991 annual report, then UN Secretary-General Javier Pérez de Cuéllar stated:

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[166] Ibid.
[167] Ibid; Kohen, above n 162, 163.
[168] Ibid.
[169] *Nicaragua* [1986] ICJ Rep 14, 146.
[170] Damrosch, above n 134, 34.
[171] *Nicaragua* [1986] ICJ Rep 14, [206]; *DRC v Uganda* [2005] ICJ Rep 168, [164].
[172] *DRC v Uganda* [2005] ICJ Rep 168, [164].

> [i]t is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be systematically violated with impunity…[T]he case for not impinging on the sovereignty, territorial integrity, and political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty…includes the right of mass slaughter or of launching systematic campaigns of decimation or of forced exodus of civilian populations in the name of controlling civil strife or insurrection.[173]

Former Secretaries-General Ban Ki-Moon, Kofi Annan, Boutros Boutros-Ghali and Javier Pérez de Cuéllar have each affirmed that 'the evolution of international human rights standards and support for their implementation has now reached the stage where norms of non-intervention, and the related deference to sovereignty rights, no longer apply to the same extent in the face of severe human rights abuses'.[174] Annan commented in 2000

> We must protect vulnerable people by finding better ways to enforce humanitarian and human rights law, and to ensure that gross violations do not go unpunished. National sovereignty offers vital protection to small and weak States, but it should not be a shield for crimes against humanity'.[175]

Further, as Kohen observes

> [S]tates are free to take their decisions in an independent way on matters essentially falling within the realm of their national concern. What has evolved since the *Nicaragua* judgment is the reaction of the international community with regard to matters that today are of international concern.[176]

As will be demonstrated in Chapter III, the adoption of R2P at the 2005 UN World Summit Outcome challenges the high watermark of non-intervention set by the ICJ in *Nicaragua*. Moreover, the case studies in Chapters V to VII will demonstrate that recent State practice has come to embrace actions that might traditionally have been regarded as impermissible pursuant to the principle of non-intervention. This analysis will offer evidence to support the view that the reconceptualisation of sovereignty as responsibility, discussed in Chapter III, has been accompanied by a reconceptualisation of the traditional boundaries of the principle of non-intervention that have been established in this Chapter.

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[173] *Report of the Secretary-General of the United Nations* (New York: Press Office of the United Nations, 1991), 5.4
[174] *The Kosovo Report*, above n 4, 169.
[175] Annan, 'We the Peoples', above n 46.
[176] Kohen, above n 162 160.

5 *Conclusion: The Principle of Non-Intervention*

The principle of non-intervention is considered to be the most important legal consequence of sovereignty.[177] It is generally accepted to be a rule of customary international law.[178] Under the principle of non-intervention, no State or group of States has the right to intervene, directly or indirectly, in the internal or external affairs of another State.[179] The principle of non-intervention prohibits interventions involving the use of force, and also other forms of coercive interference against the 'against the personality of the State or against its political, economic and cultural elements'. [180]

The principle of non-intervention is closely tied to the conceptualisation of sovereignty. However, just where the boundaries or limits of action are when a State fails to protect its population from atrocity crimes or is the perpetrator of such crimes, particularly in relation to less intrusive measures not involving the threat or use of force, is not settled. This Chapter has shown that the traditional view is that any intervention (as defined in the above analysis) in another State not authorised by the Security Council under Chapter VII is a violation of the principle of non-intervention.[181] However, as this thesis will demonstrate in later Chapters, there is growing acceptance among scholars and States that particular forms of intervention not involving the use of force (intercession) are permissible and not a violation of the principle of non-intervention. Indeed, it will be argued in subsequent Chapters that there has been a narrowing of the boundaries of the principle of non-intervention.

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[177] Suganami, above n 58, 523; Peters, above n 67, 527; Shen, above n 117; Johnson, above n 117, 614.
[178] *DRC v Uganda* [2005] ICJ Rep 168, [161]-[165]; *Nicaragua* [1986] ICJ Rep 14, [202].
[179] *Helsinki Final Act of the Conference on Security and Co-operation in Europe*; *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, UN Doc A/RES/20/2131; *Convention on Rights and Duties of States* art 8.
[180] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, UN Doc A/RES/20/2131.
[181] Shen, above n 117.

D *Conclusion*

Sovereignty and the principle of non-intervention are considered foundational concepts of international law. Yet their definitions and boundaries remain elusive and deeply contested. This Chapter has outlined what the concept of sovereignty and the principle of non-intervention are, and how they have been traditionally interpreted.

This Chapter has examined sovereignty as a concept, and identified the problems inherent in it from a humanitarian perspective. The first part of this Chapter explored competing conceptualisations of sovereignty. It first considered the historical (pre-Westphalian) conceptualisation of sovereignty and acknowledged the view of some scholars that sovereignty and responsibility have historical links. It then considered the Westphalian conceptualisation of sovereignty as supreme control and absolute authority. This Chapter then discussed the criticisms of sovereignty, which questioned the 'cult of sovereignty that placed the [S]tate above the law'.[182] As Chapter III will demonstrate, these critiques laid the groundwork for the reconceptualisation of sovereignty as responsibility and, ultimately, to the adoption of R2P.

This Chapter found a breadth in the traditional conceptualisations of sovereignty and the principle of non-intervention, which raised uncomfortable questions about the extent to which these concepts shield the State and prevent other States from taking effective action in response to atrocity crimes. As Zucca observed, under the traditional conception of sovereignty, 'it matters little if the sovereign power is acting rightly or wrongly from the viewpoint of international moral standards.'[183] However, the humanitarian cost of such a view, which would require States to stand idle while atrocities unfold in another State, has increasingly been seen as unacceptable. As de Cuéllar stated, sovereignty does not include

[182] O'Connell, *The Power and Purpose of International Law*, above n 89, 47.
[183] Zucca, above n 64, 412.

'the right of mass slaughter or of launching systematic campaigns of decimation or of forced exodus of civilian populations in the name of controlling civil strife or insurrection.'[184] Annan similarly noted that 'When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.[185] These humanitarian critiques of Westphalian sovereignty inspired the ultimate reconceptualisation of sovereignty as a concept which may be conditional on upholding certain minimum responsibilities – which is the subject of Chapter III of this thesis.

The second part of this Chapter analysed the principle of non-intervention, which is closely related to the conceptualisation of sovereignty, with a view to identifying a baseline against which the change in State practice discussed in subsequent Chapters can be assessed. It began by briefly outlining the two elements of the principle of non-intervention – the right of States to freely conduct their internal and external affairs in relation to matters within the exclusive competence of the State, and the prohibition on coercive interference in these affairs. The Chapter examined the legal basis of the customary principle of non-intervention and discussed the high watermark of non-intervention set by the ICJ in *Nicaragua*. The Chapter then analysed commentary relating to a potential narrowing of the boundaries of the principle of non-intervention. Subsequent Chapters will explore how R2P has led to an evolution in State practice, which reveals a change in how the principle of non-intervention is now interpreted and applied.

[184] *Report of the Secretary-General of the United Nations*, above n 173.
[185] Annan, 'Two Concepts of Sovereignty', above n 103, 49.

III SOVEREIGNTY RECONCEPTUALISED AND THE RESPONSIBILITY TO PROTECT

> What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their [S]tates are unwilling or unable to protect them.[186]

A *Introduction*

The supreme control and absolute authority of Westphalian sovereignty, discussed in Chapter II, increasingly came to be seen as unacceptable from a humanitarian perspective. This Chapter explains the driving forces that shaped the emergence of R2P, inspired by a consensus that the manifest indifference of Westphalian sovereignty was no longer tenable. It begins by examining the reconceptualisation of sovereignty as responsibility, which underpins the concept of R2P, and was the conceptual solution to the humanitarian problems inherent in Westphalian sovereignty.

This Chapter then examines the evolution of the concept of R2P from its original formulation in the ICISS report, to its adoption at the 2005 UN World Summit, and subsequent implementation. This Chapter highlights that the secondary duty under R2P has always been, and remains, about more than military force. It is about States utilising all available means to prevent or halt atrocity crimes. This Chapter also identifies the relevant tensions surrounding the secondary duty under R2P, including the narrower triggering crimes, increase in the threshold requirement to 'manifestly failing to protect', and ongoing privileged position of the Security Council in relation to the use of force.

The impact of R2P on the conceptualisations of sovereignty and the principle of non-intervention that have been examined in Chapter II will be further analysed in this Chapter, and again developed in subsequent Chapters. This Chapter finds in R2P a powerful new concept of statecraft, which responds to the weaknesses of Westphalian sovereignty identified

[186] ICISS, above n 2, 11; Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come…And Gone?' (2008) 22(3) *International Relations* 283, 286.

in Chapter II, and is capable of influencing State behaviour. In particular, the impact of R2P, as augmented by this thesis' original conceptual tool of intercession, will be seen in the contemporary State practice examined in the case studies in Chapters V to VII.

B *The reconceptualisation of sovereignty as responsibility*

R2P is founded upon the conceptualisation of sovereignty as responsibility,[187] drawing heavily on the work of Deng and colleagues at the Brookings Institution.[188] In contrast to the Westphalian conceptualisation of sovereignty as supreme control and absolute authority discussed in Chapter II, Deng favours a conceptualisation of sovereignty which embraces both rights and responsibilities.[189] According to Deng, such a conceptualisation strengthens sovereignty as a State fully performing its duties also enjoys the privilege (instead of the right) of non-intervention.[190] It is only when the State fails to protect its people that the social contract is void and the right to non-intervention is lost.[191]

Glanville observes that

> [f]or Deng, sovereignty entailed stern responsibilities, just as it had for early modern theorists of absolute monarchical rule, and sovereign authority was legitimate only so long as it secured the rights and liberties of peoples, just as it had been for theorists of popular sovereignty and the American and French revolutionaries. Further, Deng insisted that these rights and liberties were appropriately secured by international society rather than only by the people themselves.[192]

This conceptualisation of sovereignty as responsibility reflects a Lockean view of sovereignty, 'according to which the citizens entrust governments with sovereign powers, which are consequently intrinsically limited, revocable, and merely in the service of the principals'.[193] This is in contrast to the traditional Hobbesian view which held the sovereign

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[187] Deng, Kimaro, Lyons, Rothchild and Zartman, above n 7.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid; Orford, 'Jurisdiction without Territory: from the Holy Roman Empire to the Responsibility to Protect', above n 77, 982-3.
[192] Glanville, *Sovereignty and the Responsibility to Protect: A New History*, above n 77, 175.
[193] John Locke, *Two Treatises of Government* (P Laslett ed 1960), 413, [149]; Peters, above n 67, 526.

responsible only to God.[194] It is also a dramatic departure from the Westphalian conceptualisation of sovereignty as supreme control and absolute authority. In 2004, the UN High Level Panel observed that

> [w]hatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a [S]tate to protect the welfare of its own peoples and meet its obligations to the wider international community.[195]

A wealth of academic commentary documents and welcomes this reconceptualisation of sovereignty. Mohamed argues that the reconceptualisation of sovereignty as responsibility has challenged and unsettled traditional (Westphalian) interpretations of sovereignty and its related principle of non-intervention.[196] Tsagourias observes that the State 'is an organic entity, not abstract as the notion of sovereignty would imply. Thus, sovereignty is organically tied to the welfare of the [S]tate's population'.[197] Peters argues that the conceptualisation of sovereignty as responsibility 'conditions non-intervention … on the capability properly to discharge the internal functions of a sovereign, and postulates the sovereign's accountability *vis-á-vis* the population'.[198] Further, Moses submits that the conceptualisation of sovereignty as responsibility leads to 'the argument that the principle of non-intervention that has been traditionally associated with the post-Westphalian sovereign [S]tate can and should be disposed of in situations where governments are abusing or failing to protect their own populations'.[199] As Moses observes, '[s]uch arguments have since remained at the centre of efforts to bring about a normative transformation of [S]tate sovereignty to allow greater intervention in the domestic crises of [S]tates'.[200] Benvenisti argues that it is 'morally required that we reconceive sovereignty in such a way that [S]tates

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[194] Hobbes, above n 72. For further discussion on the theological roots of sovereignty see Zucca, above n 64.
[195] *A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High Level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2 December 2004), 17.
[196] Mohamed, 'Taking Stock of the Responsibility to Protect', above n 28, 321.
[197] Tsagourias, above n 61, 85.
[198] Peters, above n 67, 517.
[199] Moses above n 59, 4.
[200] Ibid, 56.

are understood to have obligations to strangers beyond their borders'.[201] Dyzenhaus argues that States should take the interests of others seriously into account, even in the absence of specific treaty obligations.[202]

This commentary suggests that sovereignty is no longer considered supreme, with international law no longer turning a blind eye to the internal activities of a State. The idea that international law should also protect the rights of individuals was inspired by a humanitarian critique of the Westphalian conceptualisation of sovereignty. Flowing from the reconceptualisation of sovereignty as responsibility, R2P emerged as the conceptual solution to the problems inherent in Westphalian sovereignty. The next part of this Chapter will trace the evolution of R2P and the path to the acceptance of a version of R2P by the international community at the 2005 World Summit.

C *The original formulation of R2P*

1 *Rallying call*

The failings of the Westphalian conceptualisation of sovereignty were highlighted in the last decade of the 20th century, when the international community failed to prevent or halt the 1994 Rwandan genocide, which saw 800,000 Rwandan Tutsis slaughtered over a 100 day period,[203] and the 1995 mass-murder near Srebrenica of over 8,000 Bosnians by an ethnic Serbian militia.[204] When the North Atlantic Treaty Organization ('NATO') intervened in Kosovo in 1999, without authorisation or approval from the United Nations, to halt the ethnic cleansing of Kosovar Albanians by Serbian forces, whether or not humanitarian intervention

[201] Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295, 297.
[202] David Dyzenhaus, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought' (2015) 16(2) *Theoretical Inquiries in Law* 338, 338.
[203] ICISS, above n 2, 1; Matthew, above n 2, 139; 'Rwanda: How the Genocide Happened', above n 2.
[204] ICISS, above n 2, 1; Matthew, above n 2, 139; 'Bosnian Muslim Guilty but Freed', above n 3.

could provide a legal basis for its actions was highly contested.[205] The Independent International Commission on Kosovo concluded that the NATO 'intervention was legitimate, but not legal'.[206] Further, in 2000, at least 133 States issued individual or joint statements rejecting the legality of 'the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law'.[207]

In the shadow of these events, then UN Secretary-General Kofi Annan challenged the international community to 'find common ground in upholding the principles of the Charter, and acting in defence of our common humanity'.[208] He asked:

> if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?
>
> We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.[209]

2 *The suggested answer*

In an effort to answer this question, and seeking to close the gap between legitimacy and legality that had arisen in the aftermath of the 1999 NATO intervention in Kosovo,[210] the Canadian government sponsored the ICISS. The ICISS was charged with

> exploring the whole range of legal, moral, operational and political questions rolled up in this debate, in order to consult with the widest possible range of opinion around the world, and to

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[205] See, eg, Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, above n 11; Alston and MacDonald (eds), above n 11; Evans, 'From Humanitarian Intervention to the Responsibility to Protect', above n 11; Greenwood, above n 11; Orford, *Reading Humanitarian Intervention*, above n 11.
[206] *The Kosovo Report*, above n 4, 289. The same year, the African Union promulgated a new Constitutive Act, which reserved a right of 'the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity': *Constitutive Act of the African Union*, opened for signature 11 July 2000, OAU Doc. CAB/LEG/23.15 (2001) (entered into force 26 May 2001) art 4.
[207] Group of 77, *Declaration of the South Summit*, Havana, Cuba (10-14 April 2000) [54]; Non-Aligned Movement, *Final Document of the XIII Ministerial Conference*, Cartagena, Colombia (8-9 April 2000) [263]. See also: *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of* States, UN Doc ARES/36/103; Ryan Goodman, 'Humanitarian Intervention and Pretexts for War' (2006) 100 *American Journal of International Law* 107.
[208] ICISS, above n 2, 2.
[209] *We the Peoples*, above n 1, 48.
[210] *The Kosovo Report*, above n 4, 289.

> generate a report that would help the Secretary-General and other concerned parties find some new common ground.[211]

The ICISS report, entitled *The Responsibility to Protect*[212] was released in December 2001 in the aftermath of the 9/11 terror attacks. Unsurprisingly, it received little attention when it was released, given that the focus of the international community was then firmly on national security and protection from global terrorism. The protection of vulnerable populations in other States had been 'overshadowed by those events'.[213] However, the ICISS report found a champion in then UN Secretary-General Kofi Annan, with whose support the concept of R2P, albeit in a modified form, was ultimately adopted at the 2005 United Nations World Summit.

(a) Changing the focus

The ICISS report sought to change the focus of the debate surrounding humanitarian intervention from the rights of States to considerations of human security and human rights.

> Millions of human beings remain at the mercy of civil wars, insurgencies, [S]tate repression and [S]tate collapse. This is a stark and undeniable reality, and it is at the heart of all the issues with which the Commission has been wrestling. What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their [S]tates are unwilling or unable to protect them.[214]

The report drew upon the reconceptualisation of sovereignty as responsibility, emphasising that

> [t]hinking of sovereignty as responsibility…has a threefold significance. First, it implies that the [S]tate authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And, thirdly, it means that the agents of the [S]tate are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.[215]

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[211] Matthew, above n 2, 140; ICISS, above n 2, vii.
[212] ICISS, above n 2.
[213] Ivan Shearer, 'A Revival of the Just War Theory?' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Koninkliike Brill BV, 2007) 1, 19.
[214] ICISS, above n 2, 11; Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come…And Gone?', above n 186, 286.
[215] ICISS, above n 2, 13.

As Peters observes, the ICISS approach conceptualised sovereignty as incorporating legal responsibility, not simply political accountability to be enforced by voters in elections or the international community through diplomacy.[216]

In their 2002 article, Evans and Sahnoun, who were co-chairs of the ICISS, emphasise that changing the language from a discussion about 'rights' to one about 'responsibility', as proposed by the ICISS report, has three main benefits.[217] First, the change in focus means that issues are evaluated from the point of view of those in need of protection, rather than those considering intervention.[218] Second, the primary responsibility to protect its population rests with the State concerned – only if that State is unable or unwilling to fulfil its responsibility to protect, or is itself the perpetrator, should the international community take the responsibility in its place.[219] Third, R2P is an umbrella concept, not restricted to military intervention, encompassing the responsibility to react, the responsibility to prevent and the responsibility to rebuild.[220] As Stamnes notes this 'involved a shift of focus towards [S]tates' responsibilities and away from their rights – both away from their right to non-interference in domestic affairs, and away from what many saw as the West's self-proclaimed rights to intervene'.[221]

(b) The primary duty

R2P placed the primary duty on States to protect their own populations from atrocity crimes.[222] As discussed above, this primary duty required a reconceptualisation of sovereignty as responsibility.[223] The ICISS report noted

[216] Peters, above n 67, 526.
[217] Gareth Evans and Mohamed Sahnoun, 'The Responsibility to Protect' (2002) 81(6) *Foreign Affairs* 99, 99.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Eli Stamnes, ''Speaking R2P' and the Prevention of Mass Atrocities' (2009) 1 *Global Responsibility to Protect* 70, 72.
[222] ICISS, above n 2, xi.

> The defence of [S]tate sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a [S]tate to do what it wants to its own people….It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other [S]tates, and internally, to respect the dignity and basic rights of all the people within the [S]tate. In international human rights covenants, in UN practice, and in [S]tate practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.[224]

The ICISS report was widely praised for 'preserving the integrity of the principle of [S]tate sovereignty'[225] by placing the primary duty on States to protect their own populations.

(c) The secondary duty

More controversially, the ICISS version of R2P held that when a State fails in its duty 'through either inability or deliberate inaction',[226] sovereignty and the principle of non-intervention must 'yield to the international responsibility to protect'.[227] Indeed, it has been claimed that '[t]his foundational concept – that the State owes a duty its citizens, the neglect or flouting of which opens the door to international intervention – is the core' of R2P.[228] The ICISS report provided that where a State is unable or unwilling to carry out its primary duty to protect its population, the international community has a secondary duty to step in and protect populations at risk.[229]

The report suggested that intervention by the international community could only occur where six criteria were satisfied:[230]

1 the 'just cause' threshold: civilians must be faced with the threat of serious and irreparable harm, either large scale loss of life or large scale ethnic

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[223] Deng, Kimaro, Lyons, Rothchild and Zartman, above n 7.
[224] ICISS, above n 2, 8.
[225] Matthew, above n 2, 140; Welsh, Thielking and MacFarlane, above n 12, 492-494.
[226] Davis, above n 9, 892.
[227] ICISS, above n 2, xi.
[228] Davis, above n 9, 893.
[229] ICISS, above n 2, xi.
[230] This version of R2P has been referred to as 'strong R2P', see: Oona A Hathaway, Julia Brower, Ryan Liss, Tina Thomas and Jacob Victor, 'Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign' (2013) 46 *Cornell International Law Journal* 499.

cleansing, which is the product of deliberate State action, State neglect, inability to act or State failure;[231]

2 the four precautionary principles:

a. right intention – the primary purpose must be to halt or avert human suffering;[232]

b. last resort – every non-military option for the prevention or peaceful resolution of the crisis must have been explored with reasonable grounds for believing lesser measures would not have succeeded;[233]

c. proportional means – the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined objective of protecting civilians;[234] and

d. reasonable prospects – there must be a reasonable chance of success in halting or averting the suffering that has justified intervention; the consequences of action must be no worse than the consequences of inaction;[235]

3 the requirement of right authority: Security Council authorisation should, in all cases, be sought prior to any military intervention being carried out.[236] Only if the Security Council fails to act should the matter proceed either to an emergency special session of the General Assembly under the Uniting for Peace procedure or to action within an area of jurisdiction by regional or

[231] ICISS, above n 2, xii and 32-35.
[232] Ibid, xii and 35-36.
[233] Ibid, xii and 36-37.
[234] Ibid, xii and 37.
[235] Ibid.
[236] Ibid, xii-xiii and 49-55.

> subregional organisations under Chapter VIII of the UN Charter subject to their seeking subsequent authorisation from the Security Council.[237]

Several commentators have argued that the ICISS formulation of R2P and the six criteria are 'nothing more than a revival of Saint Augustine's 'Just War' theory of the 400s'.[238] Shearer observes that '[t]hese six criteria are but a modern restatement of just war theory (or of a version of that theory), even though the Commission refrains from so identifying their origin'.[239] Evans, co-chair of the ICISS, argues that these criteria 'have an explicit pedigree in Christian just war theory, but their themes resonate equally with other major world religions and intellectual traditions'.[240]

To the disappointment of many,[241] these six criteria or indeed any set of guiding principles, were absent from the agreed version of R2P adopted at the 2005 UN World Summit (discussed below). Evans explains the absence of the six criteria from the 2005 *World Summit Outcome* document as follows:

> they fell at the last hurdle: caught, in effect, in a pincer movement between, on the one hand, the hostility of the United States, which very definitely did not want any guidelines adopted that could limit in any way the Security Council's – and by extension, its own – complete freedom to make judgments on a case-by-case basis, and on the other, the hostility of a number of developing countries who argued, with more passion than intelligibility, that to have a set of principles purporting to limit the use of force to exceptional, highly defensible cases was somehow to encourage it.[242]

It is important to note that the secondary duty, even in its original formulation, has always been about more than military intervention.[243] The ICISS report confirmed the 'need for a range of escalating non-coercive and coercive measures to prevent or halt'[244] atrocity

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[237] Ibid, 53-55.
[238] Erika Simpson, 'The Responsibility to Protect', Annual Joint Seminar of the Canadian Pugwash Group and Science for Peace, 23 March 2002 cited in Hamilton, above n 13, 292; Breau, above n 82, 11-12.
[239] Shearer, above n 213, 3.
[240] Evans, 'From Humanitarian Intervention to the Responsibility to Protect', above n 11, 710.
[241] Shearer, above n 213, 16; Evans, 'From Humanitarian Intervention to the Responsibility to Protect', above n 11, 716.
[242] Evans, 'From Humanitarian Intervention to the Responsibility to Protect', above n 11, 716-717.
[243] Davis, above n 9, 894.
[244] ICISS, above n 2, 29-31; Matthew, above n 2, 141.

crimes, with military intervention being reserved as a remedy of last resort.[245] The report expressly noted that

> we are also very much concerned with alternatives to military action, including all forms of preventive measures, and coercive intervention measures – sanctions and criminal prosecutions – falling short of military intervention. Such coercive measures are discussed in this report in two contexts: their threatened use as a preventive measure, designed to avoid the need for military intervention arising; and their actual use as a restrictive measure, but as an alternative to military force.[246]

Amongst other measures, the ICISS report specifically discussed the use of targeted sanctions,[247] including asset freezes, arms embargoes and travel bans, withdrawal of investment or aid,[248] suspension of membership or expulsion from international or regional bodies,[249] and ending military cooperation and training programmes.

The ICISS report made clear its view that while approval was required for military intervention,[250] States did not need to seek approval from the Security Council when using measures less than force.[251] It is on these measures less than the use of military force that this thesis focusses. Chapter IV will develop an original conceptual apparatus – intercession – which builds upon R2P to capture and explain this new State practice in relation to the use of measures less than force in response to atrocity crimes occurring in other States. Chapters V to VII will then examine State practice in three key contemporary situations of intercession to demonstrate the present impact of R2P on traditional conceptualisations of sovereignty and the principle of non-intervention.

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[245] ICISS, above n 2, 36-37; Matthew, above n 2, 141.
[246] ICISS, above n 2, 8.
[247] Ibid, 29-30.
[248] Ibid, 23.
[249] Ibid, 31.
[250] The ICISS report states that approval is required from the Security Council or from the General Assembly or regional and subregional organisations when the Security Council fails to act. See Ibid, xii-xiii and 49-55.
[251] Ibid, xii-xiii.

3 *Criticism of the original formulation of R2P*

Many scholars viewed the ICISS report and its proposal of R2P 'as the most comprehensive framework for approaching humanitarian intervention ever put forth'.[252] Others claimed that it merely legitimised the status quo by relying on the Security Council as the authorising body for military intervention.[253] Some considered it 'dangerously disrespectful of current international law'.[254] Much of the criticism levelled against the ICISS proposal of R2P mirrored the previous debates about humanitarian intervention. Some scholars argued that the simple change in language did not resolve the fundamental debates that have always existed regarding humanitarian intervention.[255] Still others argued that R2P was simply a 'cover for legitimating the neo-colonialist tendencies of major powers'.[256]

The secondary duty on the international community under the ICISS proposal of R2P was also heavily criticised as being an 'imperfect duty'.[257] As the secondary duty was allocated to the international community generally, it was argued that this 'diffuse responsibility can make it easier for [S]tates and international organisations to shirk their obligations'.[258] There was also criticism of the concept as raising unfulfilled expectations amongst populations at risk,[259] and for the noticeable 'absence of mechanisms for holding the international community accountable retrospectively for its failure to play its remedial role'.[260]

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[252] Hamilton, above n 13, 291. See also Matthew, above n 2, 146.
[253] See Jeremy I Levitt, 'The Responsibility to Protect: A Beaver Without a Dam?' (2003) 25 *Michigan Journal of International Law* 153, 176; Matthew, above n 2, 146.
[254] Mary Ellen O'Connell, 'Taking *Opinio Juris* Seriously: A Classical Approach to International Law on the Use of Force' in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force* (Leiden, Martinus Nijhoff, 2005), 28-29; Hamilton, above n 13, 292.
[255] Welsh, Thielking and MacFarlane, above n 12, 500; Matthew, above n 2, 146.
[256] Hamilton, above n 13, 292; Ayoob, above n 13, 115.
[257] Jennifer M Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 *Global Responsibility to Protect* 213, 219.
[258] Ibid.
[259] Ibid.
[260] Ibid.

Despite these criticisms, within a mere five years from release of the ICISS report, the language of R2P had 'infiltrated discussions of humanitarian crises to such an extent that both the General Assembly and Security Council have affirmed the international responsibility to protect'.[261] The next part of this Chapter will outline the journey of the concept to its eventual adoption, in modified form, at the 2005 UN World Summit.

D *The journey to adoption of R2P at the 2005 UN World Summit*

1 *The lead up to the 2005 UN World Summit*

The concept of R2P was embraced and developed in two UN reports in 2004 and 2005. The 2004 report by the Secretary-General's High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*,[262] endorsed the ideas and principles of R2P from the ICISS report[263] and contributed to the development of the R2P concept in two ways. The report stated that:

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing, or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.[264]

First, by affirming the status of R2P and the secondary duty of the international community as an emerging norm, the report contributed to the development of R2P by increasing the 'doctrine's credibility in the international community'.[265] Second, the report firmly grounded

[261] Matthew, above n 2, 146-147; Hamilton, above n 13, 293; *2005 World Summit Outcome*, UN Doc A/RES/60/1, paras 138-139; SC Res 1674, UN Doc S/RES/1674.
[262] *A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High Level Panel on Threats, Challenges and Change*, UN Doc A/59/565 (2 December 2004).
[263] Ibid.
[264] Ibid [203].
[265] Davis, above n 9, 897.

R2P in existing obligations under the *Genocide Convention*,[266] which reinforced R2P as 'a valid development in international law, rather than a figment of its imagination'.[267]

Building on this groundwork, the Secretary-General's 2005 report, *In Larger Freedom: Towards Development, Security and Human Rights for All*,[268] expressly asked States not to simply recognise the principle of R2P but to recognise it 'as a doctrine that requires action, rather than merely an aspirational statement'.[269] It was against this backdrop, that the 2005 UN World Summit took place.

2 *The 2005 UN World Summit*

The 2005 UN World Summit was a significant moment in the evolution of R2P. It concluded 'with an agreement that the international community, acting through the United Nations, bears a responsibility to help to protect populations from genocide and other atrocities when their own government fails to do so'.[270] The agreed version of R2P adopted by consensus by the General Assembly was as follows:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to *use appropriate diplomatic, humanitarian and other peaceful means*, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context,

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[266] *A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High Level Panel on Threats, Challenges and Change*, UN Doc A/59/565, [200]. The *Genocide Convention* provides that 'Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish': art 1.
[267] Davis, above n 9, 897.
[268] *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General*, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005).
[269] Davis, above n 9, 897; *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General*, UN Doc A/59/2005, [7(a)-(b)].
[270] Alicia L Bannon, 'The Responsibility to Protect: The UN World Summit and the Question of Unilateralism' (2006) 115 *Yale Law Journal* 1157, 1157.

> we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[271]

The World Summit Outcome Document built upon recent trends in international law[272] and 'codifie[d] them into an agreement that nearly every country in the world participated in forming'.[273] For the first time, the international community had expressed a 'clear acceptance of the existence of a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity'.[274] '[I]t is not unreasonable to say strongly that, in 2005, the world wanted to look at itself in a mirror and to begin a kind of introspection and, indeed, to examine its conscience so that it could acknowledge that there have been serious failures in recent decades'.[275]

(a) Significance of the 2005 World Summit Outcome document

The first significant outcome from the 2005 World Summit is that it 'affirms important limits on national sovereignty by recognizing a State's responsibility to protect its own citizens'.[276] As discussed above, this relies on the reconceptualisation of sovereignty as responsibility. This was a dramatic normative evolution and the solution to the problems

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[271] *2005 World Summit Outcome*, UN Doc A/RES/60/1, paras 138–139 (emphasis added).
[272] See, eg, Stephen J Toope, 'Does International Law Impose a Duty upon the United Nations to Prevent Genocide?' (2000) 46 *McGill Law Journal* 187; ICISS, above n 2, 16.
[273] Bannon, above n 270, 1158.
[274] Matthew, above n 2, 137.
[275] UN GAOR, UN Doc A/63/PV.98, 29 (Guinea-Bissau).
[276] Bannon, above n 270, 1158.

inherent in Westphalian sovereignty that were examined in Chapter II.[277] Under the reconceptualisation of sovereignty as responsibility, States do not have supreme control and absolute authority, but have a responsibility to protect their populations and those within their territory from atrocity crimes; 'the primary raison d'être and duty' of every State is to protect its population.[278] Further, the international community is willing to act (intervene) in the State should there be a manifest failure to provide such protection.

Crawford argues that it is doubtful that the reconceptualisation of sovereignty as responsibility has developed or changed the existing legal position.[279] In his view, the triggers for intervention 'are not matters of domestic jurisdiction in any event'[280] and R2P does not suggest the imposition of specific legal obligations 'over and above existing obligations under human rights, humanitarian law and international criminal law'.[281] From a strict positivist view, States are already responsible for protecting their citizens from atrocity crimes and agents of the State are already accountable under international criminal law for crimes such as torture.[282] Adams suggests that R2P 'is an established international norm [that] can act as a political framework for mobilising action to protect those who are otherwise marked for death', while acknowledging that R2P 'does not seek to impose new legal obligations'.[283]

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[277] See, eg, Mohamed, 'Taking Stock of the Responsibility to Protect', above n 28, 321; Tsagourias, above n 61, 85; Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', above n 201, 297.

[278] *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General*, UN Doc A/59/2005, [135]. See also Roberta Cohen and Francis Deng, 'Sovereignty as Responsibility: Building Block for R2P' in Alex J Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press, 2016), 74-93.

[279] Crawford, 'Sovereignty as a legal value', above n 51, 131.

[280] Ibid.

[281] Ibid.

[282] Ibid.

[283] Tomas Konigs, Junko Nozawa and Erica Teeuwen, 'An interview with Dr Simon Adams' (2013) 29(76) *Utrecht Journal of International and European Law* 109.

In contrast, Evans argues that R2P is 'a brand new international norm of really quite fundamental importance and novelty…that is unquestionably a major breakthrough'.[284] Mohamed argues that the reconceptualisation of sovereignty as responsibility has challenged and unsettled traditional (Westphalian) interpretations of sovereignty and its related principle of non-intervention.[285] Moses argues that

> a primary claim behind the RtoP is that 'traditional' concepts of sovereignty are no longer suited to the conditions of contemporary life and that, as a consequence, the sense of immunity and impunity that has accompanied such concepts needs to be dispensed with and replaced with a strong sense of responsibility'.[286]

Further, that the conceptualisation of sovereignty as responsibility leads to 'the argument that the principle of non-intervention that has been traditionally associated with the post-Westphalian sovereign [S]tate can and should be disposed of in situations where governments are abusing or failing to protect their own populations'.[287] The *2005 World Summit Outcome* document confirms that the traditional conceptualisation of sovereignty has evolved into a reconceptualised concept of sovereignty as responsibility. This inevitably has consequences for the principle of non-intervention. One commentator has suggested that the principle of non-intervention has become conditional upon the State protecting its population from atrocity crimes.[288] Through the case studies in Chapters V to VII, relevant State practice will be examined to determine if this claim is proven.

A second significant result of the *2005 World Summit Outcome* document is that it 'sets clear responsibilities for the international community when a country fails to protect its own citizens'.[289] Paragraph 139 is an express commitment by the international community to help 'States build capacity to protect their populations from genocide, war crimes, ethnic

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[284] Gareth Evans, 'The Responsibility to Protect: From an idea to an international norm' in Richard H Cooper and Juliette Voïnov Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, 2009) 15, 16.
[285] Mohamed, 'Taking Stock of the Responsibility to Protect', above n 28, 321.
[286] Moses, above n 59, 5.
[287] Ibid, 4.
[288] David Luban, 'Just War and Human Rights' (1980) 9 *Philosophy and Public Affairs* 160, 169.
[289] Bannon, above n 270, 1158.

cleansing and crimes against humanity and to [assist] those which are under stress before crises and conflicts break out'.[290] In this way, the international community acknowledges that prevention of atrocity crimes is better than reaction after the crimes have already been committed and lives lost.

A third important consequence is that the secondary duty is expressed in the *2005 World Summit Outcome* document as a responsibility to 'use appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes, and a willingness to take action through the Security Council when States 'manifestly fail' in their primary duty to protect their populations.[291] Through the examination of State practice in Chapters V to VII, it will be demonstrated that the secondary duty permits, but does not compel, the international community to intervene in matters that might traditionally have been prohibited pursuant to the principle of non-intervention.[292]

(b) Criticism of the 2005 World Summit Outcome document

Some scholars argue that 'R2P's greatest potential lies in the continuum of action it sets forth identifying [S]tates' responsibilities to prevent, protect and rebuild in the aftermath of a circumscribed set of mass atrocities'.[293] Others, such as Weiss, argue that the secondary duty on the international community in the version of R2P adopted at the World Summit was so much narrower than the original ICISS proposal, that it is better described as 'R2P-lite'.[294] Chesterman pessimistically asserts that 'by the time RtoP was endorsed by the World Summit in 2005, its normative content had been emasculated to the point where it essentially provided that the Security Council could authorize, on a case-by-case basis, things that it had been

[290] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[291] Ibid.
[292] *Charter of the United Nations* art 2(7). See also *Nicaragua* [1986] ICJ Rep 14; *DRC v Uganda* [2005] ICJ Rep 168.
[293] Rosenberg and Daves, above n 27, 422.
[294] Weiss, 'R2P after 9/11 and the World Summit', above n 16, 750.

authorizing for more than a decade'.[295] Mohammed observes that '[w]hen it comes to the international community, there is little responsibility remaining in the responsibility to protect'.[296] Miller argues that 'the anemic legal implementation of R2P belies the strength of the moral commitment that underpins the emerging consensus that [S]tates must not be permitted to rape, torture, and slaughter their citizens with impunity'.[297]

In addition to the criticism above, three key issues form the basis of the criticism of R2P as reflected in the *2005 World Summit Outcome* document. First, the original ICISS proposal defined the triggering crimes for R2P as 'large scale loss of life or large scale ethnic cleansing',[298] whereas the World Summit limits the triggering crimes to 'genocide, war crimes, ethnic cleansing or crimes against humanity'.[299] The triggering crimes are not as important as the adoption of the principle itself, and, further, the threshold can change through State practice. Second, the threshold for action by the international community in the original ICISS proposal was that a State be 'unwilling or unable' to prevent the triggering crimes. The World Summit, however, increased this threshold requirement to 'manifestly failing to protect their populations' from the four triggering crimes,[300] although what would amount to a manifest failure was left undefined.[301] In practice, however, there may not be much difference between a State which is 'unable or unwilling' or 'manifestly failing' to protect its population from atrocity crimes, and again this distinction is not critical to the argument in this thesis. Third, the original ICISS proposal had left open the possibility of forceful action through the General Assembly or regional or subregional organisations if the

[295] Chesterman, "'Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya', above n 23, 280.
[296] Mohamed, 'Taking Stock of the Responsibility to Protect', above n 28, 330.
[297] Miller, above n 32, 332.
[298] ICISS, above n 2, xii.
[299] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 138.
[300] Ibid, para 139.
[301] See, eg, Gallagher, 'Syria and the indicators of a 'manifest failing'', above n 20; Gallagher, 'What constitutes a 'Manifest Failing'? Ambiguous and inconsistent terminology and the Responsibility to Protect', above n 20.

Security Council failed to act.[302] This contrasts with the World Summit version of R2P which places the duty to exercise collective action solely in the hands of the Security Council.[303] This thesis focusses on measures less than the use of force, and as such does not address this issue.

These changes reflect the compromise position that was necessary to construct a version of R2P 'that is sufficiently broad to be effective, but also narrow enough that nations will agree to be bound by the doctrine'.[304] Even if R2P as formulated in the *2005 World Summit Outcome* document is far from perfect or complete,[305] 'it still represents a significant step away from the culture of indifference that has dominated the international [S]tate system for so long, and for which millions of people have paid the ultimate price'.[306] By studying measures less than the use of armed force, this thesis focusses on the positive impacts of the adoption of R2P at the 2005 World Summit, and not on the loss of what might have been if it had been left to commentators, rather than States, to define the scope of R2P.

E *The legal significance of R2P*

R2P 'invokes one of the most powerful moral and legal terms'[307] – responsibility. The agreed version of R2P recognises – in its primary and secondary duties – a two tier level of responsibility for protecting civilians from atrocity crimes. Yet, it still remains controversial whether R2P is a legal obligation, simply a political concept, soft law, or an emerging norm of customary international law.[308]

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[302] ICISS, above n 2, xiii.
[303] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[304] Davis, above n 9, 898.
[305] See, eg, Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, above n 24, 46-50; Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', above n 24; Bellamy, 'Conflict Prevention and the Responsibility to Protect', above n 24; De Waal, above n 24.
[306] Stamnes, above n 221, 70-71.
[307] Welsh and Banda, above n 257, 213.
[308] See, eg, Strauss, above n 30; Sheri P Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442; Stahn, above n 30.

In support of the argument that R2P is a legal obligation, proponents argue that R2P is rooted in pre-existing treaty obligations such as Common Article 3 of the 1949 *Geneva Conventions*, the *Genocide Convention*, and in international human rights treaties which include positive obligations on States.[309] Thus, it has been said that 'those working in the office of former UN Secretary General Kofi Annan in the run-up to the 2005 World Summit insist that his goal was not to develop new law, but rather to strengthen the implementation of existing international humanitarian law, such as the *Genocide Convention*'.[310] This may be true of the first limb of R2P, but it is more difficult to argue that it is also the case with the second limb. It is with respect to the second limb, and in particular the question of whether it obliges or merely permits action by the international community, that commentators primarily question the legal status of R2P. Serrano argues that 'R2P has not yet achieved the status of a legally binding norm'.[311] Breau observes that '[t]here is neither the [S]tate practice nor the *opinio juris* to assert a legal obligation to intervene in another [S]tate when threshold conditions exist for intervention (such as crimes against humanity, war crimes, ethnic cleansing or genocide).[312]

Despite this disagreement as to the legal status of the different parts of R2P, the concept has 'become the operating language utilised by the UN organisation, [S]tates and NGOs when confronting humanitarian crises'.[313] For example, deliberations in relation to Darfur between 2004 and 2006 emphasized the primary responsibility of the government of Sudan to protect the people of Darfur, being the 'first country-specific situation in which the UNSC employed responsibility to protect language'.[314] Security Council Resolutions 1556

[309] See, eg, Arbour, above n 28, 450; Peters, above n 67, 540 and 544.
[310] Welsh and Banda, above n 257, 227.
[311] Mónica Serrano, 'The Responsibility to Protect and its Critics: Explaining the Consensus' (2011) 3 *Global Responsibility to Protect* 425, 425.
[312] Breau, above n 82, 2.
[313] Rosenberg and Daves, above n 27, 422.
[314] Walling, above n 105, 407.

and 1564 both utilized responsibility to protect language in their preambles,[315] confirming the conceptualisation of sovereignty as also entailing the responsibility of the State to protect its population. In this regard, the United Kingdom stated that the adoption of Resolution 1564 'underlies the commitment of the Security Council to ensure that all Governments fulfil that most basic of obligations – the duty to protect their own citizens'.[316] France and Germany respectively described the Sudanese government's responsibility to protect its citizens as a 'primary responsibility' and a 'sacred obligation'.[317] Further, the Philippines stated that

> Sovereignty also entails the responsibility of a [S]tate to protect its people. If it is unable or unwilling to do so, the international community has the responsibility to help that State achieve such capacity and such will and, in extreme necessity, to assume such responsibility itself. We voted in favour of resolution 1556 (2004) in that context.[318]

Benin argued that the concept of sovereignty as responsibility reflected a renewed commitment of the United Nations to principles enshrined in the UN Charter – fundamental rights, human dignity, and worth of the human being.[319] Subsequently, Resolution 1706 made explicit reference to 'the responsibility of each United Nations Member State to protect its citizens and the international community's responsibility to assist in this if the [S]tate could not provide for such protection alone'[320] further strengthening the reconceptualisation of sovereignty as responsibility.

As at 10 June 2017, the 2005 World Summit version of R2P has been reaffirmed in 58 Security Council resolutions since 2006.[321] The secondary duty has been expressly

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[315] SC Res 1556, UN SCOR, 59th sess, 5015th mtg, UN Doc S/RES/1556 (30 July 2004); SC Res 1564, UN SCOR, 59th sess, 5040th mtg, UN Doc S/RES/1564 (18 Sept 2004), 2.
[316] UN GAOR, 59th sess, 5015th mtg, UN Doc S/PV.5015 (30 July 2004), 5.
[317] UN GAOR, 59th sess, 5040th mtg, UN Doc S/PV.5040 (18 Sept 2004), 7 and 9.
[318] UN GAOR, UN Doc S/PV.5015, 10-11.
[319] UN GAOR, UN Doc S/PV.5040, 9; Walling, above n 105, 408.
[320] UN GAOR, 61st sess, 5519th mtg, UN Doc S/PV.5519 (31 August 2006), 4.
[321] SC Res 1653, UN SCOR, 61st sess, 5359th mtg, UN Doc S/RES/1653 (27 January 2006); SC Res 1674, UN Doc S/RES/1674; SC Res 1706, UN SCOR, 61st sess, 5519th mtg, UN Doc S/RES/1706 (31 August 2006); SC Res 1894, UN SCOR, 64th sess, 6216th mtg, UN Doc S/RES/1894 (11 November 2009); SC Res 1970, UN SCOR, 66th sess, 6491st mtg, UN Doc S/RES/1970 (26 February 2011); SC Res 1973, UN SCOR, 66th sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011); SC Res 1975, UN SCOR, 66th sess, 6508th mtg, UN Doc S/RES/1975 (30 March 2011); SC Res 1996, UN SCOR, 66th sess, 6576th mtg, UN Doc S/RES/1996 (8 July 2011); SC Res 2014, UN SCOR, 66th sess, 6634th mtg, UN Doc S/RES/2014 (21 October 2011); SC Res 2016,

reaffirmed in 7 of those resolutions,[322] with a further 4 resolutions making reference to assisting or supporting the State to uphold its primary responsibility.[323] The secondary duty has also been reaffirmed in two Presidential Statements as at 10 June 2017.[324]

While the second limb of R2P may not impose an enforceable legal obligation on the international community 'to engage in unilateral or collective intervention in response to

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UN SCOR, 66th sess, 6640th mtg, UN Doc S/RES/2016 (27 October 2011); SC Res 2040, UN SCOR, 67th sess, 6733rd mtg, UN Doc S/RES/2040 (12 March 2012); SC Res 2085, UN SCOR, 67th sess, 6898th mtg, UN Doc S/RES/2085 (19 December 2012); SC Res 2093, UN SCOR, 68th sess, 6929th mtg, UN Doc S/RES/2093 (6 March 2013); SC Res 2095, UN SCOR, 68th sess, 6934th mtg, UN Doc S/RES/2095 (12 March 2013); SC Res 2100, UN SCOR, 68th sess, 6952nd mtg, UN Doc S/RES/2100 (25 April 2013); SC Res 2109, UN SCOR, 68th sess, 6998th mtg, UN Doc S/RES/2109 (11 July 2013); SC Res 2117, UN SCOR, 68th sess, 7036th mtg, UN Doc S/RES/2117 (26 September 2013); SC Res 2121, UN SCOR, 68th sess, 7042nd mtg, UN Doc S/RES/2121 (10 October 2013); SC Res 2127, UN SCOR, 68th sess, 7072nd mtg, UN Doc S/RES/2127 (5 December 2013); SC Res 2134, UN SCOR, 69th sess, 7103rd mtg, UN Doc S/RES/2134 (28 January 2014); SC Res 2139, UN SCOR, 69th sess, 7116th mtg, UN Doc S/RES/2139 (22 February 2014); SC Res 2149, UN SCOR, 69th sess, 7153rd mtg, UN Doc S/RES/2149 (10 Apr 2014); SC Res 2150, UN SCOR, 69th sess, 7155th mtg, UN Doc S/RES/2150 (16 April 2014); SC Res 2155, UN SCOR, 69th sess, 7182nd mtg, UN Doc S/RES/2155 (27 May 2014); SC Res 2165, UN SCOR, 69th sess, 7216th mtg, UN Doc S/RES/2165 (14 July 2014); SC Res 2170, UN SCOR, 69th sess, 7242nd mtg, UN Doc S/RES/2170 (15 August 2014); SC Res 2171, UN SCOR, 69th sess, 7247th mtg, UN Doc S/RES/2171 (21 August 2014); SC Res 2185, UN SCOR, 69th sess, 7317th mtg, UN Doc S/RES/2185 (20 November 2014); SC Res 2187, UN SCOR, 69th sess, 7322nd mtg, UN Doc S/RES/2187 (25 November 2014); SC Res 2196, UN SCOR, 70th sess, 7366th mtg, UN Doc S/RES/2196 (22 January 2015); SC Res 2206, UN SCOR, 70th sess, 7369th mtg, UN Doc S/RES/2206 (3 March 2015); SC Res 2211, UN SCOR, 70th sess, 7415th mtg, UN Doc S/RES/2211 (26 March 2015); SC Res 2217, UN SCOR, 70th sess, 7434th mtg, UN Doc S/RES/2217 (28 April 2015); SC Res 2220, UN SCOR, 70th sess, 7447th mtg, UN Doc S/RES/2220 (22 May 2015); SC Res 2223, UN SCOR, 70th sess, 7451st mtg, UN Doc S/RES/2223 (28 May 2015); SC Res 2227, UN SCOR, 70th sess, 7474th mtg, UN Doc S/RES/2227 (29 June 2015); SC Res 2228, UN SCOR, 70th sess, 7475th mtg, UN Doc S/RES/2228 (29 June 2015); SC Res 2237, UN SCOR, 70th sess, 7517th mtg, UN Doc S/RES/2237 (2 September 2015); SC Res 2241, UN SCOR, 70th sess, 7532nd mtg, UN Doc S/RES/2241 (9 October 2015); SC Res 2250, UN SCOR, 70th sess, 7573rd mtg, UN Doc S/RES/2250 (9 December 2015); SC Res 2252, UN SCOR, 70th sess, 7581st mtg, UN Doc S/RES/2252 (15 December 2015); SC Res 2254, UN SCOR, 70th sess, 7588th mtg, UN Doc S/RES/2254 (18 December 2015); SC Res 2258, UN SCOR, 70th sess, 7595th mtg, UN Doc S/RES/2258 (22 December 2015); SC Res 2262, UN SCOR, 71st sess, 7611st mtg, UN Doc S/RES/2262 (27 January 2016); SC Res 2277, UN SCOR, 71st sess, 7659th mtg, UN Doc S/RES/2277 (30 March 2016); SC Res 2286, UN SCOR, 71st sess, 7685th mtg, UN Doc S/RES/2286 (3 May 2016); SC Res 2288, UN SCOR, 71st sess, 7695th mtg, UN Doc S/RES/2288 (25 May 2016); SC Res 2290, UN SCOR, 71st sess, 7702nd mtg, UN Doc S/RES/2290 (31 May 2016); SC Res 2295, UN SCOR, 71st sess, 7727th mtg, UN Doc S/RES/2295 (29 June 2016); SC Res 2296, UN SCOR, 71st sess, 7728th mtg, UN Doc S/RES/2296 (29 June 2016); SC Res 2301, UN SCOR, 71st sess, 7747th mtg, UN Doc S/RES/2301 (26 July 2016); SC Res 2304, UN SCOR, 71st sess, 7754th mtg, UN Doc S/RES/2304 (12 August 2016); SC Res 2317, UN SCOR, 71st sess, 7807th mtg, UN Doc S/RES/2317 (10 November 2016); SC Res 2327, UN SCOR, 71st sess, 7840th mtg, UN Doc S/RES/2327 (16 December 2016); SC Res 2332, UN SCOR, 71st sess, 7849th mtg, UN Doc S/RES/2332 (21 December 2016); SC Res 2339, UN SCOR, 72nd sess, 7872nd mtg, UN Doc S/RES/2339 (27 January 2017); SC Res 2340, UN SCOR, 72nd sess, 7878th mtg, UN Doc S/RES/2340 (8 February 2017); SC Res 2348, UN SCOR, 72nd sess, 7910th mtg, UN Doc S/RES/2348 (31 March 2017).

[322] SC Res 1674, UN Doc S/RES/1674; SC Res 1706, UN Doc S/RES/1706; SC Res 1894, UN Doc S/RES/1894; SC Res 2117, UN Doc S/RES/2117; SC Res 2150, UN Doc S/RES/2150; SC Res 2171, UN Doc S/RES/2171; SC Res 2220, UN Doc S/RES/2220.

[323] SC Res 1996, UN Doc S/RES/1996; SC Res 2085, UN Doc S/RES/2085; SC Res 2185, UN Doc S/RES/2185; SC Res 2227, UN Doc S/RES/2227.

[324] UN SCOR, 68th sess, 6917th mtg, UN Doc S/PRST/2013/2 (12 February 2013); UN SCOR, 68th sess, 6946th mtg, UN Doc S/PRST/2013/4 (15 April 2013).

every situation of mass atrocity',[325] R2P is of legal significance in that it has both permitted and inspired an evolution in State practice. That evolution in State practice has led to a re-interpretation of the principle of sovereignty, as demonstrated above, and raised the possibility that the principle of non-intervention now permits a greater range of measures to be taken in response to, or anticipation of, the commission of atrocity crimes, which will be explored in Chapters V to VII.

1 *The secondary duty on the international community*

As adopted at the World Summit, the secondary duty is expressed as a responsibility to 'use appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes, and a willingness to step in when States 'manifestly fail' in their primary duty to protect their populations.[326] Although many commentators argue that R2P supports the use of armed force in furtherance of its noble aim of gaining greater respect for human rights,[327] State practice and *opinio juris* in support of this principle is notoriously patchy. This thesis focusses on actions less than the use of armed force, which form that part of the secondary duty which is both less controversial and the site of greater contemporary State practice.

There are two parts to the secondary duty on the international community under R2P. The first part is the responsibility to 'use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the *Charter*, to help to protect

[325] Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 208.
[326] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[327] See, eg, Chandler, above n 31; Genser and Cotler (eds), above n 31; Greenwood, above n 11; Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28; Alston and MacDonald (eds), above n 11; Evans, 'From Humanitarian Intervention to the Responsibility to Protect', above n 11.

populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[328] This part of the secondary duty has inspired an evolution in State practice which has re-interpreted principles of sovereignty and non-interference to now permit, but not require, the international community to intervene in situations that would traditionally have been off limits pursuant to the principle of non-intervention as a domestic matter.[329] This expansion in permissible conduct can be seen most clearly in the increasing use of intercession by the international community – 'appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes. In this thesis, I also examine whether any greater scope permitted to States to act in response to atrocity crimes has been accompanied by a simultaneous restraint on States in their formulation and imposition of those measures. In particular, I examine in Chapters V to VII whether States explicitly consider the impact their actions may have on the facilitation or commission of atrocity crimes before taking action, to ensure that any action taken does not increase the risk of atrocity crimes.[330] The impact of R2P on the principle of non-intervention is discussed in more detail below, and will be developed further through examination of the specific case studies in Chapters V to VII.

The second part of the secondary duty under R2P is the willingness to 'take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes,

[328] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[329] *Charter of the United Nations* art 2(7).
[330] See, eg, the revised commentaries to the Geneva Conventions which are indicative of a trend in thinking consistent with this idea. International Committee of the Red Cross, *Commentary on the First Geneva Convention*, above n 41; International Committee of the Red Cross, *Commentary on the Second Geneva Convention*, above n 41. See also Dörmann and Serralvo, above n 41.

ethnic cleansing and crimes against humanity'.[331] This part of the secondary duty cements the privileged position of the Security Council in relation to the use of force.[332] This forceful part of the secondary duty is not the focus of this thesis.

Neither part of the secondary duty imposes new legal obligations on the international community to act either unilaterally or collectively in response to atrocity crimes occurring in third States, in the sense of there being a legal compulsion to act or respond in some way to the commission of atrocity crimes.[333] The decision about whether to act remains a matter for the State and is not prescribed by the secondary duty under R2P. As will be demonstrated in Chapters V to VII, however, R2P imposes its own requirements on the manner in which a State may act in pursuance of the secondary duty *if* it chooses to respond. The next part of this Chapter will discuss the development of the concept of R2P since the 2005 World Summit.

F *After the 2005 World Summit*

Since its acceptance and adoption at the 2005 World Summit, debate at the UN regarding R2P has moved from a discussion about R2P's legal status and boundaries, to a discussion about developing 'strategy, standards, processes, tools and practices for [implementing] the responsibility to protect'.[334]

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[331] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[332] See, eg, Orford, *International Authority and the Responsibility to Protect*, above n 35.
[333] See: Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 192; Charlesworth, above n 30, 235; Focarelli, above n 30, 193; Kumar, above n 30, 562; Stahn, above n 30; Strauss, above n 30; Van Landingham, above n 30.
[334] *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677, summary. The implementation of R2P has been the subject of eight reports of the Secretary-General as at 10 June 2017: *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677; *Early warning, assessment and the responsibility to protect- Report of the Secretary-General*, 64th sess, Agenda Items 48 and 114, UN Doc A/64/864 (14 July 2010); *The role of regional and subregional arrangements in implementing the responsibility to protect – Report of the Secretary-General*, 65th sess, Agenda Items 13 and 115, UN Doc A/65/877-S/2011/393 (28 June 2011); *Responsibility to protect: timely and decisive response – Report of the Secretary-General*, 66th sess, Agenda Items 14 and 117, UN Doc A/66/874-S/2012/578 (25 July 2012); *Responsibility to protect: State responsibility and prevention – Report of the Secretary-General*, 67th

1 *Three pillars*

In his 2009 report, *Implementing the Responsibility to Protect*,[335] then UN Secretary-General Ban Ki-moon put forward a three pillar strategy, with three equally weighted pillars, to advance the implementation of R2P. The first pillar is the primary responsibility of a State to protect its citizens from four atrocity crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.[336] The first pillar affirms the reconceptualisation of sovereignty as responsibility, highlighting that States have the primary responsibility to protect their citizens from atrocity crimes.[337] The second pillar is international assistance and capacity building to assist a State to fulfil its primary responsibility to its citizens.[338] The third pillar is the international community's responsibility to take timely and decisive action in accordance with the UN Charter, where a State has manifestly failed in its responsibility to protect its citizens.[339] The use of measures less than the use of force under the third pillar is the focus of this thesis. The report emphasised that the three pillar strategy 'stresses the value of prevention and, when it fails, of early and flexible response tailored to the specific circumstances of each case'.[340] It stated that

> [w]hile the scope [of R2P] should be kept narrow, the response ought to be deep, employing the wide array of prevention and protection instruments available to Member States, the United Nations system, regional and subregional organizations and their civil society partners.[341]

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sess, Agenda Items 14 and 113, UN Doc A/67/929-S/2013/399 (9 July 2013); *Fulfilling our collective responsibility: international assistance and the responsibility to protect – Report of the Secretary-General*, 68th sess, Agenda Items 14 and 118, UN Doc A/68/947-S/2014/449 (11 July 2014); *A vital and enduring commitment: implementing the responsibility to protect – Report of the Secretary-General*, 69th sess, Agenda Items 13 and 115, UN Doc A/69/981-S/2015/500 (13 July 2015); *Mobilizing collective action: the next decade of the responsibility to protect – Report of the Secretary-General*, 70th sess, Agenda Items 15 and 116, UN Doc A/70/999-S/2016/620 (22 July 2016).

[335] *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677.

[336] Ibid, summary

[337] Alex Stark, 'Introduction: The Responsibility to Protect: challenges and opportunities in light of the Libyan intervention' (November 2011) *e-International Relations* 4, 4.

[338] *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677, summary

[339] Ibid; Alex J Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24(2) *Ethics and International Affairs* 143, 143.

[340] *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677, 2.

[341] Ibid, [10(c)].

During the General Assembly debates on this report, many States expressed support for R2P and the three pillar approach to its implementation.[342] For example, the representative of Azerbaijan stated that '[t]he Secretary-General's report on implementing the responsibility to protect (A/63/677) does indeed take an important first step towards turning the authoritative words of the 2005 Summit Outcome into doctrine, policy and, most important, deeds'.[343] Austria noted that the 'Secretary-General's report sets out the tools available to the international community'.[344] The majority of the speakers during the debates 'affirmed that it was necessary for the Security Council to be ready to take timely and decisive action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, should their government be manifestly failing to do so'.[345]

While there was unanimity within the General Assembly on the first two pillars, many States expressed concern about the coercive aspect of the third pillar. The concerns related to the lack of clarity about when would be 'appropriate circumstances to take coercive action as well as fears regarding misuse of intervention by more powerful [S]tates'.[346] Although States raised concerns in relation to the use of force under the third pillar, the use of measures less than force was accepted by States. Singapore noted that responses under the third pillar 'can and should take different forms, without necessarily resorting to the use of force'.[347] Chile stated that the third pillar 'is forceful, but also cautious. It refers to peaceful measures that could be taken.'[348] South Africa observed 'that there are a myriad of instruments at the

[342] See, eg, statements by Peru, Kenya, Malaysia, Lesotho, Azerbaijan, Georgia, Kyrgyzstan, Argentina, Sudan, Gambia, Serbia, Cameroon, Holy See, and Palestine: UN GAOR, UN Doc A/63/PV.101. See also Michael Small, 'An Analysis of the Responsibility to Protect Program in Light of the Conflict in Syria' (2014) 13(1) *Washington University Global Studies Law Review* 179, 182.
[343] UN GAOR, UN Doc A/63/PV.101, 6 (Azerbaijan).
[344] UN GAOR, UN Doc A/63/PV.98, 2 (Austria).
[345] See UN GAOR, UN Doc A/63/PV.98; Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment*, above n 37, 4.
[346] Van Landingham, above n 30, 77; Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment*, above n 37, 2.
[347] UN GAOR, UN Doc A/63/PV.98, 8 (Singapore).
[348] Ibid, 11 (Chile).

disposal of the international community to utilize in response'[349] to atrocity crimes under the third pillar. Japan stated that '[t]he international community should use, initially, diplomatic, humanitarian and other peaceful means. If those means are inadequate, collective action will be necessary to protect populations'.[350] China, too, noted that 'the third pillar…highlights the role of the international community within the framework of the United Nations: to favour diplomatic, humanitarian and other appropriate peaceful means to help protect populations from mass crimes and atrocities'.[351] Kenya stated that 'necessary measures should…not be equated with the threat of use of force'.[352] Lesotho stated that '[t]he invocation of pillar three would not necessarily translate into recourse to the use of force. This is because that pillar encompasses many measures that are non-coercive and non-violent in nature'.[353] The Holy See noted that 'this element has too often focussed solely on the use of violence in order to prevent or stop violence, rather than on the various ways in which intervention can be carried out in a non-violent manner'.[354] Thus, the use of measures less than the use of force under the third pillar enjoyed strong support from States.

As subsequent reports of the Secretary-General have confirmed, the third pillar of timely and decisive response can include a wide range of measures, not just military responses. Indeed, I argue that the focus on the coercive aspect of R2P under the third pillar has obscured the influence of R2P on recent State practice in the increasing adoption of measures less than force in response to atrocity crimes occurring in other States. The use of measures less than force under the third pillar will be examined in the case studies in Chapters V to VII of this thesis.

[349] Ibid, 17 (South Africa).
[350] Ibid, 22 (Japan).
[351] Ibid, 25 (China).
[352] UN GAOR, UN Doc A/63/PV.101, 3 (Kenya).
[353] Ibid, 5 (Lesotho).
[354] Ibid, 17 (Holy See).

2 *The importance of measures less than force*

Subsequent reports of the Secretary-General on the implementation of R2P have confirmed the wide range of tools available to the international community in implementing the secondary duty under R2P, demonstrating that the third pillar is about more than the use of force. The 2012 report clearly identifies the importance of using all available tools, not just the use of force, to help to protect populations from atrocity crimes.[355] Amongst the tools discussed in the report are measures such as fact-finding missions and commissions of inquiry,[356] monitoring and observer missions deployed under Chapter VI,[357] threats of referrals to the ICC,[358] and naming and shaming.[359] More coercive measures, which still fall below the use of force, such as sanctions, travel bans, asset freezes, and embargoes, are also discussed.[360] Sanctions as a case study of intercession are examined in Chapter VI.

The 2015 report notes that the crises in Libya and Syria 'contributed to wider misperceptions that the responsibility to protect is primarily concerned with coercive measures'.[361]

> Notwithstanding this range of options, the third pillar of the responsibility to protect is still commonly perceived as being solely concerned with the use of force. This perception needs to be countered. First, the choice is not between inaction and the use of force. Non-military tools have made a tangible difference in responding to the commission of atrocity crimes and preventing their escalation. Second, even in intractable situations characterized by continuing violence, international actors have attempted to fulfil their responsibility to protect through political, diplomatic and humanitarian means. These efforts may at times have fallen short of delivering a long-term protective environment, but they have succeeded in saving lives. Finally, in some circumstances it may not be judged possible to employ force for protection purposes without potentially causing more harm than good.[362]

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[355] *Responsibility to protect: timely and decisive response – Report of the Secretary-General*, UN Doc A/66/874-S/2012/578, [21].
[356] Ibid, [27].
[357] Ibid, [28].
[358] Ibid, [29].
[359] Ibid, [30].
[360] Ibid, [31].
[361] *A vital and enduring commitment: implementing the responsibility to protect – Report of the Secretary-General*, UN Doc A/69/981-S/2015/500, [9].
[362] Ibid, [38].

Highlighting the 'full range of tools at the disposal of the international community – non-military as well as military – to respond to the imminent risk or commission of genocide, war crimes, ethnic cleansing and crimes against humanity',[363] the report stresses the continued need for 'an early and flexible approach to acting on pillar III responsibilities that focuses on non-coercive means, but that takes into consideration from the outset all the mechanisms available under the Charter'.[364]

The Secretary-General's 2016 report on R2P notes that

> [t]he views of Member States converge on many important elements, including … that any international action should employ the full range of diplomatic, political and humanitarian measures and that military force should be considered as a measure of last resort.[365]

The report emphasises the 'ongoing responsibility to use peaceful means to protect populations',[366] and reiterates the 'broad range of peaceful tools available to protect populations affected by atrocity crimes'.[367]

3 *Restraint*

The Secretary-General's reports on implementation also demonstrate that R2P contains within it a set of restraints on potential action taken by the international community in response to the commission of atrocity crimes. While restraint as a part of R2P first appeared in the four precautionary principles contained with the ICISS version of R2P (discussed above), the reports on implementation confirm that restraint remains a part of R2P following the adoption of the modified version of R2P at the 2005 World Summit. Indeed, the element of restraint was noted to be a key component of R2P and the three pillar approach to implementation during the debates in the General Assembly. For example, Vietnam stated

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[363] Ibid, [37].
[364] Ibid, [39].
[365] *Mobilizing collective action: the next decade of the responsibility to protect – Report of the Secretary-General*, UN Doc A/70/999-S/2016/620, [18].
[366] Ibid, [45].
[367] Ibid, [47].

'[u]nder all circumstances, the impact of such acts on the population – particularly its most vulnerable sectors – should be the consideration of top priority'.[368]

The 2010 report confirms that peaceful and preventive measures 'are most likely to be effective if they are undertaken at an early point and are carefully targeted and calibrated'[369] to the circumstances of the case. The 2012 report notes that at 'every stage of the implementation process, from identification and assessment to policy formulation and action, international actors need to act responsibly'.[370] The 2014 report states

> Experience has shown that poorly designed international assistance can inadvertently create or exacerbate social cleavages, thereby contributing to the development of atrocity crimes. International support or technical advice that contributes to discrimination and disparities or causes groups to compete over sources of revenue is particularly damaging. International partners should therefore make all possible efforts to "do no harm" by incorporating atrocity crime prevention into the assessment, planning and monitoring processes that guide their assistance.[371]

This report specifically notes that one of the ways the international community can assist States under stress to protect their own populations is through denial of the means to commit atrocities.[372] The *Arms Trade Treaty* is noted to be a 'significant step forward in this respect and reinforces the obligation of States not to knowingly provide arms that could be used for atrocity crimes'.[373] Denial of means and the *Arms Trade Treaty* are discussed in more detail in Chapter VII. Further, the 2015 report emphasises the 'responsibility to anticipate, as far as possible, any harmful effects of … policy responses and to mitigate those potential consequences'.[374] Examination of State practice in Chapters V to VII will reveal that this

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[368] UN GAOR, UN Doc A/63/PV.98 , 28 (Vietnam).
[369] *Early warning, assessment and the responsibility to protect- Report of the Secretary-General*, UN Doc A/64/864, [3].
[370] *Responsibility to protect: timely and decisive response – Report of the Secretary-General*, UN Doc A/66/874-S/2012/578, [51].
[371] *Fulfilling our collective responsibility: international assistance and the responsibility to protect – Report of the Secretary-General*, UN Doc A/68/947-S/2014/449, [17].
[372] Ibid, [60].
[373] Ibid.
[374] *A vital and enduring commitment: implementing the responsibility to protect – Report of the Secretary-General*, UN Doc A/69/981-S/2015/500, [40].

restraint is demonstrated in States explicitly considering the impact their actions under the third pillar may have on the facilitation or commission of atrocity crimes.[375]

G *Impact of R2P on sovereignty and the principle of non-intervention*

1 *Sovereignty reconceptualised*

The adoption of R2P at the 2005 World Summit reflects an evolution in the conceptualisation of sovereignty, such that 'sovereignty should not and will not be allowed to be used as a license to kill and brutalize people'.[376] As discussed above, the concept of R2P is founded upon the reconceptualisation of sovereignty as responsibility,[377] drawing heavily on the work of Deng and colleagues at the Brookings Institution.[378] The reconceptualisation of sovereignty as necessarily including a responsibility of the State to protect its own citizens from atrocity crimes is a dramatic normative evolution, and at present provides the solution to the problems inherent in Westphalian sovereignty that were demonstrated in Chapter II.[379] It is now generally accepted that States do have a legal obligation to protect their populations, and those within their territory, both in times of war and times of peace.[380] Even States wary of the concept of R2P readily accept the primary duty to protect their own populations from

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[375] See, eg, the revised commentaries to the Geneva Conventions which are indicative of a trend in thinking consistent with this idea. International Committee of the Red Cross, *Commentary on the First Geneva Convention*, above n 41; International Committee of the Red Cross, *Commentary on the Second Geneva Convention*, above n 41. See also Dörmann and Serralvo, above n 41.

[376] S Pandiaraj, 'Sovereignty as Responsibility: Reflections on the Legal Status of the Doctrine of the Responsibility to Protect' (2016) 15 *Chinese Journal of International Law* 795, 813.

[377] Deng, Kimaro, Lyons, Rothchild and Zartman, above n 7.

[378] Ibid.

[379] Mohamed, 'Taking Stock of the Responsibility to Protect', above n 28, 321; Moses, above n 59, 5.

[380] Mohamed, 'Taking Stock of the Responsibility to Protect', above n 28, 324; Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28; Arbour, above n 28. See also *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*; *Geneva Convention Relative to the Treatment of Prisoners of War*; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*; *ICCPR* art 21; *Convention on the Rights of the Child*, art 2.

atrocity crimes.[381] The reconceptualisation of sovereignty is reflected in the primary duty under R2P and has been reiterated in 58 Security Council resolutions[382] and 17 Presidential Statements[383] since the adoption of R2P at the 2005 World Summit. As Hehir argues 'R2P has ostensibly solidified its status as a 'norm' through its increased use in high-level political discourse, even when [S]tates have disagreed on how to act'.[384] The traditional conceptualisation of sovereignty has been replaced by a reconceptualisation of sovereignty as

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[381] See statements by Venezuala, Cuba, Myanmar, Nicaragua and Sudan in the 2009 General Assembly debate on R2P: UN GAOR, UN Doc A/63/PV.98, 3-6, 21-23; UN GAOR, UN Doc A/63/PV.100, 7-8, 12-13; UN GAOR, UN Doc A/63/PV.101, 10-11. See also Glanville, 'The Responsibility to Protect Beyond Borders', above n 29, 3.

[382] SC Res 1653, UN Doc S/RES/1653; SC Res 1674, UN Doc S/RES/1674; SC Res 1706, UN Doc S/RES/1706; SC Res 1894, UN Doc S/RES/1894; SC Res 1970, UN Doc S/RES/1970; SC Res 1973, UN Doc S/RES/1973; SC Res 1975, UN Doc S/RES/1975; SC Res 1996, UN Doc S/RES/1996; SC Res 2014, UN Doc S/RES/2014; SC Res 2016, UN Doc S/RES/2016; SC Res 2040, UN Doc S/RES/2040; SC Res 2085, UN Doc S/RES/2085; SC Res 2093, UN Doc S/RES/2093; SC Res 2095, UN Doc S/RES/2095; SC Res 2100, UN Doc S/RES/2100; SC Res 2109, UN Doc S/RES/2109; SC Res 2117, UN Doc S/RES/2117; SC Res 2121, UN Doc S/RES/2121; SC Res 2127, UN Doc S/RES/2127; SC Res 2134, UN Doc S/RES/2134; SC Res 2139, UN Doc S/RES/2139; SC Res 2149, UN Doc S/RES/2149; SC Res 2150, UN Doc S/RES/2150; SC Res 2155, UN Doc S/RES/2155; SC Res 2165, UN Doc S/RES/2165; SC Res 2170, UN Doc S/RES/2170; SC Res 2171, UN Doc S/RES/2171; SC Res 2185, UN Doc S/RES/2185; SC Res 2187, UN Doc S/RES/2187; SC Res 2196, UN Doc S/RES/2196; SC Res 2206, UN Doc S/RES/2206; SC Res 2211, UN Doc S/RES/2211; SC Res 2217, UN Doc S/RES/2217; SC Res 2220, UN Doc S/RES/2220; SC Res 2223, UN Doc S/RES/2223; SC Res 2227, UN Doc S/RES/2227; SC Res 2228, UN Doc S/RES/2228; SC Res 2237, UN Doc S/RES/2237; SC Res 2241, UN Doc S/RES/2241; SC Res 2250, UN Doc S/RES/2250; SC Res 2252, UN Doc S/RES/2252; SC Res 2254, UN Doc S/RES/2254; SC Res 2258, UN Doc S/RES/2258; SC Res 2262, UN Doc S/RES/2262; SC Res 2277, UN Doc S/RES/2277; SC Res 2286, UN Doc S/RES/2286; SC Res 2288, UN Doc S/RES/2288; SC Res 2290, UN Doc S/RES/2290; SC Res 2295, UN Doc S/RES/2295; SC Res 2296, UN Doc S/RES/2296; SC Res 2301, UN Doc S/RES/2301; SC Res 2304, UN Doc S/RES/2304; SC Res 2317, UN Doc S/RES/2317; SC Res 2327, UN Doc S/RES/2327; SC Res 2332, UN Doc S/RES/2332; SC Res 2339, UN Doc S/RES/2339; SC Res 2340, UN Doc S/RES/2340; SC Res 2348, UN Doc S/RES/2348.

[383] UN SCOR, 66th sess, 6621st mtg, UN Doc S/PRST/2011/18 (22 September 2011); UN SCOR, 66th sess, 6657th mtg, UN Doc S/PRST/2011/21 (14 November 2011); UN SCOR, 67th sess, 6796th mtg, UN Doc S/PRST/2012/18 (29 June 2012); UN SCOR, 67th sess, 6895th mtg, UN Doc S/PRST/2012/28 (19 December 2012); UN SCOR, UN Doc S/PRST/2013/2; UN SCOR, UN Doc S/PRST/2013/4; UN SCOR, 68th sess, 6980th mtg, UN Doc S/PRST/2013/8 (17 June 2013); UN SCOR, 68th sess, 7039th mtg, UN Doc S/PRST/2013/15 (2 October 2013); UN SCOR, 69th sess, 7109th mtg, UN Doc S/PRST/2014/3 (12 February 2014); UN SCOR, 69th sess, 7115th mtg, UN Doc S/PRST/2014/5 (21 February 2014); UN SCOR, 69th sess, 7171st mtg, UN Doc S/PRST/2014/8 (12 May 2014); UN SCOR, 69th sess, 7289th mtg, UN Doc S/PRST/2014/21 (28 October 2014); UN SCOR, 70th sess, 7361st mtg, UN Doc S/PRST/2015/3 (19 January 2015); UN SCOR, 70th sess, 7504th mtg, UN Doc S/PRST/2015/15 (17 August 2015); UN SCOR, 70th sess, 7567th mtg, UN Doc S/PRST/2015/22 (25 November 2015); UN SCOR, 70th sess, 7568th mtg, UN Doc S/PRST/2015/23 (25 November 2015); UN SCOR, 71st sess, 7650th mtg, UN Doc S/PRST/2016/1 (17 March 2016).

[384] Aidan Hehir, 'Assessing the influence of the Responsibility to Protect on the UN Security Council during the Arab Spring' (2016) 51(2) *Cooperation and Conflict* 166, 168. For example, despite the absence of any agreement in the Security Council on how to appropriately respond to events in Syria, United Nations' discourse in relation to Syria also confirms that sovereignty now requires a minimal respect for human rights: UN GAOR, 67th sess, 6810th mtg, UN Doc S/PV.6810 (10 July 2012); UN GAOR, 67th sess, 6826th mtg, UN Doc S/PV.6826 (30 August 2012); UN GAOR, 68th sess, 6906th mtg, UN Doc S/PV.6906 (23 January 2013); UN GAOR, 68th sess, 6950th mtg, UN Doc S/PV.6950 (24 April 2013); UN GAOR, 68th sess, 7000th mtg, UN Doc S/PV.7000 (16 July 2013); UN GAOR, 68th sess, 7019th mtg, UN Doc S/PV.7019 (19 August 2013); UN GAOR, 69th sess, 7180th mtg, UN Doc S/PV.7180 (22 May 2014); SC Res 2165, UN Doc S/RES/2165.

responsibility. States no longer have supreme control and absolute authority, but have a responsibility to protect their populations and those within their territory from atrocity crimes.[385] Further, with the international community being willing to act (intervene) should there be a manifest failure to provide such protection; sovereignty is no longer supreme.

2 *A change to the boundaries of non-intervention?*

The ICJ has consistently held that there is no 'right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State'.[386] The high-watermark for non-intervention set by *Nicaragua* considered only economic measures and strictly humanitarian assistance to be consistent with the principle of non-intervention. This was reaffirmed in *Democratic Republic of Congo v Uganda*, where the ICJ held that international law continues to 'prohibit a State from intervening, directly or indirectly, with or without armed force, in support of the internal opposition in another State'.[387] Evans, with whom Thakur concurs, argues that

> there is general agreement that a normative shift has taken place from non-intervention, the dominant global norm in 1990 that shielded sovereign [S]tates from external intervention, to the responsibility to protect that seeks to qualify the norm of non-intervention in significant respects, albeit under narrow circumstances and tight procedural safeguards.[388]

Under the secondary duty under R2P, States have agreed that they are willing to

> take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[389]

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[385] Walling, above n 105, 411.
[386] *Nicaragua* [1986] ICJ Rep 14, [206]; *DRC v Uganda* [2005] ICJ Rep 168, [164].
[387] *DRC v Uganda* [2005] ICJ Rep 168, [164].
[388] Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, above n 24; Ramesh Thakur, 'The Development and Evolution of R2P as International Policy' (2015) *Global Policy* doi10.1111/1758-5899.12258, 2.
[389] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.

While this part of the secondary duty cements the privileged position of the Security Council in relation to the use of force,[390] the case studies in Chapters V to VII will demonstrate that it has also heralded a willingness by the international community to intervene using measures less than force in situations that would traditionally have been prohibited pursuant to the principle of non-intervention as a domestic matter.[391] This expansion in permissible conduct can be seen most clearly in the increasing use of intercession by the international community – 'appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes. As subsequent Chapters will argue, new and emerging State practice indicates that States are interpreting the principle of non-intervention more narrowly than the ICJ in *Nicaragua,* in order to maximise the permissible measures available to respond to atrocity crimes, albeit subject to limitations arising from the restraint that is required when acting in accordance with the secondary duty under R2P.

H *Conclusion*

The primary function of R2P 'is to remind all [S]tates of the obligations they have to their own citizens and to clarify the extraterritorial responsibilities they have to strangers'.[392] At its heart, R2P is about duty: the primary duty of States to protect those within their borders from atrocity crimes and the secondary duty of the international community to help to protect populations from atrocity crimes.

> In the decades since diplomats from 51 countries and territories created the UN Charter in San Francisco, collective expectations for the appropriate behaviour of [S]tates to protect people from harm have evolved tremendously, and the idea of a responsibility to protect…is a product of this normative evolution.[393]

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[390] See, eg, Orford, *International Authority and the Responsibility to Protect*, above n 35.
[391] *Charter of the United Nations* art 2(7).
[392] Welsh and Banda, above n 257, 231.
[393] Gerrit Kurtz and Philipp Rotmann, 'The Evolution of Norms of Protection: Major Powers Debate the Responsibility to Protect' (2016) 30(1) *Global* Society 3, 3. See also: Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, Oxford University Press, 2003); Philipp Rotmann, Gerrit Kurtz and Sarah Brockmeier, 'Major Powers and the Contested Evolution of a Responsibility to Protect: Introduction' (2014) 14(4) *Conflict, Security and Development* 355.

This Chapter built on the analysis of sovereignty in Chapter II. It began with an examination of the reconceptualisation of sovereignty as responsibility, which underpins the concept of R2P. It concluded that sovereignty is no longer supreme, with international law no longer turning a blind eye to the internal activities of a State. The manifest indifference of Westphalian sovereignty is no longer tenable. Flowing from the reconceptualisation of sovereignty as responsibility, R2P emerged as the conceptual solution to the problems inherent in Westphalian sovereignty.

This Chapter then discussed the evolution of the concept of R2P from its original formulation in the ICISS report, its adoption at the 2005 World Summit, and subsequent implementation. It outlined the three pillar approach to implementation and demonstrated the secondary duty under R2P has always been, and remains, about more than military force. It is about States utilising all available means to prevent or halt atrocity crimes. This Chapter revealed that the third pillar of timely and decisive response can include a wide range of measures, not just military responses. Indeed, this Chapter argued that the focus on the coercive aspect of R2P under the third pillar has obscured the influence of R2P on recent State practice in the increasing adoption of measures less than force in response to atrocity crimes occurring in other States. The use of measures less than force under the third pillar will be examined in the case studies in Chapters V to VII of this thesis.

This Chapter also demonstrated that R2P contains within it a set of restraints on potential action taken by the international community in response to the commission of atrocity crimes. While restraint as a part of R2P first appeared in the four precautionary principles contained with the ICISS version of R2P, the reports on implementation confirm that restraint remains a part of R2P. Indeed, the element of restraint was noted to be a key component of R2P and the three pillar approach to implementation during the debates in the General Assembly.

Weiss observes that 'the main challenge [now] facing the responsibility to protect is how to act, not how to build normative consensus'.[394] As Orford notes there has been 'little discussion to date of the limits to the actions that the international community might take in the name of protecting populations at risk'.[395] R2P is a powerful concept of statecraft which has provided a conceptual solution to the failings of Westphalian sovereignty from a humanitarian perspective identified in Chapter II by articulating when and how States *may* respond to atrocity crimes in other States. While R2P may not impose an enforceable legal obligation on the international community 'to engage in unilateral or collective intervention in response to every situation of mass atrocity',[396] R2P is of legal significance in that it has both permitted and inspired an evolution in State practice. That evolution in State practice has led to a re-interpretation of the principle of sovereignty, as demonstrated above, and raised the possibility that the principle of non-intervention now permits a greater range of measures to be taken in response to, or anticipation of, the commission of atrocity crimes, which will be explored in Chapters V to VII. First, however, Chapter IV will examine in more detail how the concept of intercession, perhaps the most important aspect of the implementation of the secondary duty of the international community recognised in the third pillar of R2P, has come to animate the State behaviour that will be examined in more detail in Chapters V to VII.

[394] Weiss, 'RtoP Alive and Well After Libya', above n 39, 291.
[395] Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 422.
[396] Ibid, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 208.

IV INTERCESSION

> Non-military tools have made a tangible difference in responding to the commission of atrocity crimes and preventing their escalation. … even in intractable situations characterized by continuing violence, international actors have attempted to fulfil their responsibility to protect through political, diplomatic and humanitarian means. These efforts may at times have fallen short of delivering a long-term protective environment, but they have succeeded in saving lives.[397]

A *Introduction*

It is clear from recent conflicts, particularly those in relation to Libya and Syria, that States are not simply sitting idle while atrocities unfold in other States. If it is 'impossible to intervene anywhere' with military force,[398] as has been suggested in the context of the Syrian conflict, this begs the question of what lesser options are available for States to respond to atrocity crimes occurring in other States. As Chapter III demonstrated, an extremely important part of the concept of R2P is the emphasis placed on measures less than the use of force when States are acting under the third pillar in accordance with the secondary duty of the international community. While States may not be intervening with armed force in most cases, as R2P at its highest suggests they could in certain circumstances, there has been a significant change in State practice over the last decade or so, with an increase in the use of non-forcible measures by States in response to atrocity crimes occurring in other States.

This Chapter proceeds from the conceptual basis established in Chapter III: that measures less than the use of force are an important part of the concept of R2P. It goes further by introducing intercession as an original conceptual tool, which articulates and explains the increasing practice of States in giving effect to the secondary duty under R2P by responding to atrocity crimes with measures short of the use of armed force. This emerging practice of States (which will be the subject of further analysis in Chapters V to VII) is no

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[397] *A vital and enduring commitment: implementing the responsibility to protect – Report of the Secretary-General*, UN Doc A/69/981-S/2015/500, [38].
[398] George Osborne quoted in 'Aleppo: George Osborne attacks 'vacuum' of Western leadership', *BBC News* (online), 16 December 2016, <http://www.bbc.com/news/uk-politics-38305413>.

'wilderness of single instances';[399] R2P, and in particular the concept of intercession, is driving this development.

Viewing this new and emerging State practice through the prism of intercession, the power of ideas (in this case, R2P) to animate change in international law is revealed through, in particular, the reconceptualisations of sovereignty and the principle of non-intervention. Intercession provides a tool to examine the evolution of State practice in respect of the implementation of these fundamental principles of international law, and a standard against which the legality of State practice can be assessed. In this way, R2P, as implemented in the World Summit Outcome Document, even if it is indeed 'R2P-lite',[400] can be something more than just empty rhetoric; it is shaping State behaviour in the context of the utilisation of measures less than the use of force, resulting in significantly enhanced international responses to the commission of atrocity crimes.

The first part of this Chapter will discuss the ways in which international norms can influence State behaviour. The second part will outline examples of new and emerging State practice implementing measures less than the use of armed force. The third part of this Chapter argues that intercession can serve as a useful conceptual tool to capture and explain this change in State practice, and articulate the ways in which this reflects a re-aligned conceptualisation of the limits of State responses to atrocity crimes occurring in other States. The contours of intercession will then be further developed in the analysis in the case study Chapters V to VII.

[399] Tennyson, above n 45; Hunter, 'No Wilderness of Single Instances: Inductive Inference In Law', above n 45.
[400] See, eg, Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, above n 24, 46-50; Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', above n 24; Bellamy, 'Conflict Prevention and the Responsibility to Protect', above n 24; De Waal, above n 24.

B *International norms can influence State behaviour*

Literature suggests that international norms can influence the behaviour of States.[401] In particular, where States have (more or less) consistently changed their behaviour in a relatively short time period, this may be evidence that they changed their behaviour 'in order to conform to the international norm'.[402] Sloss argues that

> The fact that all these [S]tates changed their behavior in a relatively brief time period while the norm was crystallizing – or after the norm had already crystallized, depending upon one's view of the timing issue – provides compelling evidence that they changed their behavior in order to conform to the international norm.[403]

As Sloss observes, '[i]f powerful [S]tates…modify their behavior to conform to international norms, one may infer that weaker [S]tates are even more likely to be influenced'.[404] As such, the conduct of powerful States, such as the United States, as well as powerful regional organisations, such as the Arab League and the European Union, can be particularly important in understanding the impact of norms on State behaviour.

There are three broad theoretical approaches that seek to explain the influence of international norms on State behaviour. These approaches can be identified as interest-based (realist), norm-based (enlightment), and integrated (post-modern). While the dividing line between these theoretical approaches is far from absolute,[405] the different approaches addressed here outline the prevailing modes of thought on the influence of international norms on State behaviour.

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[401] See, eg, Ryan Goodman and Derek Jinks, 'Toward an Institutional Theory of Sovereignty' (2003) 55 *Stanford Law Review* 1749, 1762-1780; David Sloss, 'Do International Norms Influence State Behavior?' (2006) 38 *George Washington International Law Review* 159, 161.
[402] Sloss, above n 401, 172.
[403] Ibid.
[404] Ibid, 161.
[405] See, eg, Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organisations* 217, 224-225; Oona A Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469, 477.

1 *Interest-based approach*

The interest-based approach argues that States create and comply with international law 'only when there is some clear objective reward for doing so; in other words, [S]tates follow consequentialist reasoning or what has been termed the "logic of consequences"'.[406] The interest-based approach is rooted in the realist view of international relations, and views States as 'rational, unitary actors in pursuit of self-interest'.[407]

There are clearly substantial costs incurred by a State when it chooses to get involved in events occurring in another State.[408] There are human costs in terms of potential lives lost of deployed military personnel; political costs in terms of reputation and public opinion; and economic costs associated with the measure adopted, whether that is the financial cost of sending troops to a particular area, the cost of weapons used, or the costs of humanitarian assistance in terms of food, medicine or other aid. States are generally presumed to act out of self-interest, when the benefits received outweigh the costs incurred.[409] Early supporters of this approach argued that international law exists and is enforced only when it serves the geopolitical interests of the most powerful States.[410] More recent supporters of this approach argue that international regimes can also influence the behaviour of States by allowing States 'to engage in cooperative activity that would otherwise be impossible'.[411]

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[406] Hathaway, above n 405, 476-477.
[407] Ibid, 478.
[408] Benjamin A Valentino, 'The True Costs of Humanitarian Intervention: The Hard Truth About a Noble Notion' (2011) 90(6) *Foreign Affairs* 60.
[409] See, eg, Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599; Anne-Marie Slaughter, 'International Relations: Principle Theories' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2011).
[410] See, eg, Hans Morgenthau, *Politics Among Nations: the struggle for power and peace* (Knopf, first published 1948, 3rd ed, 1966); Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: an introduction to the study of international relations* (MacMillan, 2nd ed, 1946); Hans Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260.
[411] Robert O Keohane, 'The Demand for International Regimes' in Stephen D Krasner (ed), *International Regimes* (Cornell University Press, 1983) 141, 147; Hathaway, above n 405, 479.

If States are motivated by self-interest, as the interest-based approach suggests, this raises the question of why States would engage in behaviour 'that impose[s] costs in return for little or no apparent benefit',[412] such as supporting civilian protection norms which impose sovereignty costs on States in return for the collective good of humanity and human dignity.[413] Yet empirical evidence shows that States do engage in such behaviour, entering into human rights treaties[414] and acting in various ways to protect individuals, both within and beyond their borders.[415] While acknowledging that permission to intervene under R2P is not the same as States being willing to do so, and that the circumstances in which States are or are not willing to live up to the secondary duty may be problematic, the focus of this thesis is on the situation where States are willing to act, and how the law facilitates and structures that action, not on the situations where States are unwilling to act (for whatever reason). Under the interest-based approach, States might act in accordance with R2P because (and when) it responds to their desires to take action in response to atrocity crimes.

2 *Norm-based approach*

The norm-based approach argues that States create and comply with international law 'not only because they expect a reward for doing so, but also because of their commitment (or the commitment of transnational actors that influence them) to … norms or ideas';[416] in other words, States follow 'what has been termed the "logic of appropriateness"'.[417] While acknowledging that State behaviour is 'often motivated by self-interest, normative scholars contend that it is also motivated by the power of principled ideas – ideas that are not given by nature but are themselves constructed through interaction among

[412] Hathaway, above n 405, 479.
[413] Kurtz and Rotmann, above n 393.
[414] See, eg, the near universal ratification of the *Convention on the Rights of the Child*.
[415] Chapters V to VII will provide case studies which show States acting in ways to protect individuals.
[416] Hathaway, above n 405, 477.
[417] Ibid.

individuals, groups, and [S]tates'.[418] Under the norm-based approach, States internalise norms and act in accordance with them 'because they understand them to be correct or appropriate',[419] out of habit,[420] or because they shape a State's sense of identity.

This approach begins with the assumption that States obey international law 'almost all of the time'[421] and treats international law as a given, focussing instead almost exclusively on compliance. There are two main variants of the norm-based theoretical approach that seek to explain why States comply with international law – fairness theory and legal process theory.[422] Fairness theory focuses on the perceived fairness of the legal obligations concerned. As Franck submits, a fair legal obligation exerts a compliance pull that leads States to comply with it.[423] In contrast, legal process theory explains compliance on the basis of interactions, either horizontal[424] or vertical,[425] among States with the central step being internalisation of the international norm.[426]

Consistent with a norm-based approach, Goodman and Jinks refer to social pressures to conform in their work on acculturation and socialisation in international law.[427] Acculturation refers to the 'general process of adopting the beliefs and behavioral patterns of

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[418] Ibid, 481.
[419] Ibid.
[420] James N Rosenau, 'Before Cooperation: Hegemons, Regimes, and Habit-Driven Actors in World Politics' (1986) 40 *International Organisations* 849, 861-874.
[421] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia, 2nd ed, 1979), 25-26; Koh, 'Why Do Nations Obey International Law?', above n 409.
[422] Hathaway, above n 405, 482.
[423] Thomas Franck, *Fairness in International Law and Institutions* (Clarendon, 1995), 7-9; Hathaway, above n 405, 482.
[424] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995), 115-116.
[425] Harold Hongju Koh, 'The 1998 Franckel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623, 644-655; Harold Hongju Koh, 'How Is International Human Rights Law Enforced?' (1999) 74 *Indianna Law Journal* 1397, 1413-1414; Hathaway, above n 405, 482.
[426] Hathaway, above n 405, 482-3.
[427] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621, 684; Tomer Broude, 'Behavioural International Law' (2015) 163 *University of Pennsylvania Law Review* 1099, 1111.

the surrounding culture'.[428] In short, acculturation induces behavioural changes 'by changing the actor's social environment'.[429] Goodman and Jinks observe that 'cognitive pressures suggest that [S]tates may be more inclined to conform their behaviour to community expectations – and that they are unlikely to sustain, over the long term, idiosyncratic interpretation[s] of any norm that the international community considers central'.[430] They submit that common State practice may be enacted out of a sense of global normative expectations, generally involving notions of State duties and responsibilities.[431] Further, according to Sloss,

> reputation is a function of the surrounding social environment, and changes in the surrounding social environment affect the reputational loss associated with a particular course of action. As a norm becomes more widely accepted by the international community, a [S]tate's continued refusal to accept the norm exacts mounting reputational costs…This, however, is just another way of saying that…[States] reacted to the "normative pull"[432]

Additionally, Jenks considers the basis of States' obligations in international law to be the will of the 'world community'.[433]

The norm-based approach focusses 'attention on the powerful role of ideas in international law'.[434] This theoretical approach 'offers good reason for thinking that norms matter in the formulation of key areas of international law'.[435] In the context of R2P, Kurtz and Rotmann observe that there has been a normative evolution of 'collective expectations for the appropriate behaviour of [S]tates to protect people from harm'.[436] Under this approach, R2P, as a powerful idea, is capable of shaping State behaviour.

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[428] Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 427, 638; See also: Sloss, above n 401, 193.
[429] Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', above n 427, 638.
[430] Ibid, 684.
[431] Ryan Goodman and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19(4) *European Journal of International Law* 725, 745.
[432] Sloss, above n 401, 194.
[433] C Wilfred Jenks, *Law, Freedom and Welfare* (Stevens and Sons, 1963), 83-100 cited in Hathaway, above n 405, 487 (at footnote 49).
[434] Hathaway, above n 405, 483.
[435] Ibid, 482.
[436] Kurtz and Rotmann, above n 393.

3 *Integrated approach*

A more recent strand of scholarship seeks to find common ground between the interest-based and norm-based theoretical approaches. The post-modern, or integrated, approach seeks to explain State behaviour on the basis that States pursue the aims preferred by domestic political institutions, interest groups, and State actors.[437] Under this approach the behaviour of States is the 'result of complex interactions between political players at the domestic level, and cannot be explained as simply resulting from power-maximizing behavior or strategic calculation by a unitary actor'.[438] Taking this theoretical approach one step further, Hathaway argues that by 'discarding an all-or-nothing approach in favor of a more nuanced understanding of when and how international law can shape what [S]tates do, we can find ways to use international law more effectively to bring order to a world that desperately needs it'.[439] This approach recognises the influence of R2P on State behaviour while also acknowledging that a multitude of factors can motivate State action, some of which can be explained by the influence of normative ideas, such as R2P, and some of which are motivated by other factors.

4 *Theoretical approaches: Summary*

As discussed above, various theories seek to explain the influence of international norms on State behaviour. Regardless of which approach is taken, each of these theories agrees with the central hypothesis that international norms – the power of ideas – can motivate, and change, State behaviour. This is important for R2P, which rests on the idea of

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[437] Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 277-278; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 504; Anne-Marie Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations' (1995) 4 *Transnational Law and Contemporary Problems* 377, 398-398; Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205, 207; Anne-Marie Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907, 1920-1921.

[438] Hathaway, above n 405, 484.

[439] Ibid, 535.

sovereignty reconceptualised as responsibility. This suggests the pathway through which R2P can become something more than just empty rhetoric; it can motivate, change, and shape State behaviour.

Having established the failings of the Westphalian conceptualisation of sovereignty in Chapter II, this thesis then demonstrated in Chapter III how R2P became an accepted concept which justified, in a principled manner, a reconceptualisation of sovereignty. Chapter III also demonstrated that action in accordance with the secondary duty on the international community under the third pillar of R2P might be forceful or not, and revealed that it is the non-forceful measures that are best supported by States in practice, although relatively neglected in scholarly analysis. In order to address this lacuna, this thesis introduces an original conceptual apparatus, referred to as intercession, to capture and explain this new and emerging State practice. This Chapter, having showed in theory the ability of a conceptual norm such as R2P to influence State practice, will now examine instances of State practice to determine if R2P has in fact done so. After this analysis, the case study Chapters V to VII will each analyse in more depth how intercession, as a particular instance of R2P, has been reflected in and shaped State behaviour in adopting new and more vigorous responses to the commission of atrocity crimes in other States.

C *What are States doing?*

In recent years, States have engaged in a range of conduct in response to the commission of, or apprehension of, atrocity crimes occurring in other States. While some of the measures adopted by States fall within measures traditionally adopted in international relations, such as diplomacy, other measures are not so easily explainable and fall outside the traditional boundaries of permissible conduct under the principle of non-intervention. In this section, I examine some of these measures, in order to highlight the broader range of actions

States now feel able to take as a result of their embrace of the concept of intercession under R2P. The case study Chapters V to VII further develop analysis of the impact of R2P and intercession in the contexts of sanctions, assistance to opposition groups, and the *Arms Trade Treaty.*

1 *Post-Election Violence in Kenya*

In Kenya, the December 2007 presidential elections descended into violence, leading to 1,133 deaths and more than 600,000 internally displaced persons.[440] Efforts at mediation were quickly commenced by South African archbishop, Desmond Tutu,[441] supported by then US Assistant Secretary of State for African Affairs, Jendayi Frazer,[442] and several former presidents of African countries and the African Union.[443] A second attempt at mediation, led by an AU Panel of Eminent African Personalities and headed by former UN Secretary-General Kofi Annan, eventually successfully secured a power sharing arrangement, and established several inquiry and reconciliation mechanisms.[444] The entire process from election to successful mediation occurred in the space of around 41 days. As Junk observes, the 'ethnic nature and increasing severity of the crisis, as well as the presence of international observers and diplomats, led to relatively swift rhetorical responses at the international level'.[445]

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[440] Abdullah Boru Halakhe, 'R2P in Practice: Ethnic Violence, Elections and Atrocity Prevention in Kenya' (Occasional Paper Series, No 4, The Global Centre for the Responsibility to Protect, 2013), 5; Julian Junk, 'Bringing the Non-coercive Dimensions of R2P to the Fore: The Case of Kenya' (2016) 30(1) *Global Society* 54, 56.
[441] Wooldridge, Mike, 'Can Tutu Heal Kenya's Wounds?', *BBC News* (online), 4 January 2008, <http://news.bbc.co.uk/2/hi/africa/7171605.stm>; Junk, above n 440, 56.
[442] 'US Envoy Begins Kenyan Meetings', *BBC News* (online), 5 January 2008, <http://news.bbc.co.uk/2/hi/africa/7172665.stm>.
[443] 'Four Retired African Presidents in Kenya to Mediate Election Crisis', *Afrik News* (online), 9 January 2008, <http://www.afrik-news/article12436.html>; Thomas Kwasi Tieku, 'Multilateralization of Democracy Promotion and Defense in Africa' (2009) 56(2) *Africa Today* 74; Junk, above n 440, 56.
[444] Junk, above n 440, 56.
[445] Ibid.

Elections traditionally fall within the domestic jurisdiction of a State, protected from outside interference under the principle of non-intervention. However, it is clear that States did not sit idle while the post-election violence unfolded. While R2P may not have been explicitly invoked by States, with the exception of one statement by the French Foreign Minister Kouchner during the mediation,[446] it was invoked by key international actors, and it 'served as background music'[447] and had an implicit impact on international responses to events in Kenya. Luck and Evans have both subsequently described the international responses in Kenya as being the first instance where the United Nations employed an R2P lens in shaping its responses to an ongoing crisis.[448] Annan, too, subsequently described his mediation efforts in Kenya as being a successful example of R2P at work:

> I saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people…I knew that if the international community did not intervene, things would go hopelessly wrong…Kenya is a successful example of [R2P] at work.[449]

Ban Ki Moon has also stated in relation to Kenya that 'for the first time both regional actors and the United Nations viewed the crisis in part from the perspective of the responsibility to protect'.[450] Explicitly acknowledged as an influence by Annan, Moon and Kouchner, R2P was important in shaping international responses to help protect the Kenyan population.

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[446] 'In the name of the responsibility to protect, it is urgent to help the people of Kenya. The United Nations Security Council must take up this question and act': Bernard Kouchner, 'Violence in Kenya' (Statement Made by French Foreign and European Affairs Minister Bernard Kouchner, 31 January 2008) <http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/1488-06-february-2008-news-update>.

[447] Junk, above n 440, 57.

[448] Edward C Luck, 'Preface' in Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace? The Story of 41 Days of Mediation in Kenya* (International Peace Institute, 2009), iii; Gareth Evans quoted in Meredith Preston-McGhie and Serena Sharma, 'Kenya' in Genser and Cotler (eds), above n 31, 280.

[449] Quoted in Roger Cohen, 'How Kofi Annan Rescued Kenya' (14 August 2008) 55(13) *The New York Review of Books* 51; Serena K Sharma, 'The 2007-08 Post Election Crisis in Kenya: A Success Story for the Responsibility to Protect' in Julia Hoffmann and Andre Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Pallas Publications, 2012), 30; Junk, above n 440, 58.

[450] *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677, 23. Junk notes that these 'direct references to R2P are certainly indicative of R2P playing a considerable role in the retrospective interpretation of the events in Kenya': Junk, above n 440, 58

2 *Sanctions*

States have also adopted measures in other situations where there have been, or there is a risk of, atrocity crimes. Contemporary practice in the imposition of sanctions, including travel bans and asset freezes, shows States are capable of acting swiftly in imposing measures of intercession, and that when they act they are conscious to minimise the impact of sanctions on the general population. Sanctions are discussed in more detail in Chapter V.

In the case of Libya, sanctions were imposed quickly, with US sanctions being imposed a mere 9 days after commencement of the violence, Security Council sanctions one day later, and EU sanctions within a fortnight.[451] In the case of Syria, regional organisations and States have imposed sanctions against Syria, although there have been no Security Council sanctions due to deadlock.[452] Within months of the commencement of the conflict, the Arab League suspended Syria's membership,[453] and approved sanctions against Syria shortly thereafter, the first time the Arab League has taken such steps against a Member State.[454]

Sanctions, which will be further analysed in Chapter V, have also been imposed in relation to conflicts in Sudan,[455] the Democratic Republic of the Congo,[456] Côte d'Ivoire,[457]

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[451] SC Res 1970, UN Doc S/RES/1970; *Council Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya* [2011] OJ L 58.
[452] See, eg, *Council Decision 2011/273/CFSP concerning restrictive measures against Syria* [2011] OJ L 121; *Council Decision 2013/255/CFSP concerning restrictive measures against Syria* [2013] OJ L 147; Exec Order No 13,572, 76 Fed. Reg. 85 (29 April 2011); Exec Order No 13,573, 76 Fed. Reg. 98 (18 May 2011); Exec Order No 13,582, 76 Fed. Reg. 172 (17 August 2011); Exec Order No 13,606, 77 Fed. Reg. 79 (22 April 2012); Exec Order No 13,608, 77 Fed. Reg. 86 (1 May 2012); *Autonomous Sanctions Regulations 2011* (Cth) (Australia).
[453] Libya's membership of the Arab League was suspended on 14 November 2011, nine months after the conflict began. 'Syria defiant and EU steps up sanctions' *The Age* (Melbourne), 25 June 2012.
[454] 'Assad on borrowed time as Arab sanctions against Syria kick in', *The Australian* (Sydney), 29 November 2011.
[455] SC Res 1591, UN SCOR, 60th sess, 5153rd mtg, UN Doc A/RES/1591 (29 March 2005); SC Res 1945, UN SCOR, 65th sess, 6401st mtg, UN Doc A/RES/1945 (14 October 2010); *Council Decision 2014/450/CFSP concerning restrictive measures in view of the situation in Sudan and repealing Decision 2011/423/CFSP* [2014] OJ L 203; Exec Order No 13,400, 71 Fed. Reg. 83 (26 April 2006); Exec Order No 13,412, 71 Fed. Reg. 200 (13 October 2006).

and the Central African Republic.[458] This practice – some of which consists of the imposition of regional or autonomous sanctions independently of any Security Council mandate – indicates that States are now taking measures of intercession in response to atrocity crimes where they may not have felt able to act previously, but in each of these situations (as Chapter V will demonstrate) the manner in which sanctions have been imposed reveals restraint, flowing from R2P, with sanctions being designed and implemented in a way that is intended to minimise impact on the general population.

3 *Assistance to Opposition Groups*

States have also provided various forms of assistance to opposition groups ranging from the clearly permissible provision of strictly humanitarian aid provided without discrimination, to the far more contentious provision of logistics and training, and even arms, to opposition groups. This recent State practice, examined in more detail in Chapter VI, reveals a significant departure from the ICJ's approach to non-intervention in *Nicaragua*,

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[456] SC Res 1807, 63rd sess, 5861st mtg, UN Doc A/RES/1807 (31 March 2008); SC Res 2136, 69th sess, 7107th mtg, UN Doc A/RES/2136 (30 January 2014); *Council Decision 2014/147/CFSP amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2014] OJ L 79; *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 USC § 5581, Pub L No 111-203, § 1502(a), Stat 1376, 2213 (2010).

[457] See, eg, SC Res 1572, UN SCOR, 59th sess, 5078th mtg, UN Doc S/RES/1572 (15 November 2004); SC Res 1643, UN SCOR, 60th sess, 5327th mtg, UN Doc S/RES/1643 (15 December 2005); SC Res 1946, UN SCOR, 65th sess, 6402nd mtg, UN Doc S/RES/1946 (15 October 2010); SC Res 2219, UN SCOR, 70th sess, 7436th mtg, UN Doc S/RES/2219 (28 April 2015); *Council Common Position 2004/852/CFSP concerning restrictive measures against Côte d'Ivoire* [2004] OJ L 368; *Council Decision 2006/30/CFSP renewing the restrictive measures against Côte d'Ivoire* [2006] OJ L 19; *Common Position 2008/873/CFSP renewing the restrictive measures against Côte d'Ivoire* [2008] OJ L 308; *Council Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire* [2010] OJ L 285; *Council Decision (CFSP) 2016/917 repealing Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire* [2016] OJ L 153; Exec Order No 13,396, 71 Fed. Reg. 28 (7 February 2006); *United Nations Côte d'Ivoire Regulations*, SOR/2005-127 (Canada); African Union Peace and Security Council, Communique, 252nd mtg, PSC/PR/COMM.1 (CCLII), Addis Ababa (9 December 2010), [3] and [4]; Economic Community of West African States, Final Communique on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire, ECOWAS Doc 188/2010, Abuja, Nigeria (7 December 2010), [7]. See also Economic Community of West African States, Final Communique on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire, ECOWAS Doc 192/2010, Abuja (24 December 2010).

[458] SC Res 2121, UN Doc S/RES/2121; SC Res 2127, UN Doc S/RES/2127; SC Res 2134, UN Doc S/RES/2134; SC Res 2149, UN Doc S/RES/2149; SC Res 2181, UN SCOR, 69th sess, 7280th mtg, UN Doc A/RES/2181 (21 October 2014); SC Res 2196, UN Doc S/RES/2196; SC Res 2212, UN SCOR, 70th sess, 7416th mtg, UN Doc 2212 (26 March 2015); *Council Decision 2013/798/CFSP concerning restrictive measures against the Central African Republic* [2013] OJ L 352; Exec Order No 13,667, 79 Fed. Reg. 94 (12 May 2014).

reaffirmed in *Democratic Republic of Congo v Uganda*, which provided that any form of assistance to opposition groups, lethal or non-lethal, was a violation of the principle of non-intervention. This State practice reveals that it is now permissible to provide food rations, medicines, body armour, armoured vehicles and other non-lethal equipment for 'humanitarian or protective use' to opposition groups. Further, even direct assistance by way of the provision of funds to aid daily activities has been provided to opposition groups in the Syrian conflict, which whilst not overtly acknowledged as permissible has been, at the very least, acquiesced in by many other States. This dramatic change in State practice reveals the importance of measures of intercession in facilitating State responses to atrocity crimes occurring in other States and the influence of R2P in shaping those responses.

Moreover, in the Libyan conflict, Security Council Resolution 1973 was interpreted broadly by the United States and the United Kingdom (explicitly), and France (implicitly), as also allowing the arming of anti-Gaddafi opposition groups to further the aim of the protection of civilians and civilian protected areas. Only Syria and Algeria opposed the intervention in Libya, with Syria's Foreign Ministry stating that it rejected 'all forms of foreign interference in Libyan affairs, since that would be a violation of Libya's sovereignty, its independence and the unity of its land'.[459] This new and emerging State practice indicates (as Chapter VI will demonstrate) that States are interpreting the principle of non-intervention more narrowly than the ICJ in *Nicaragua*, in order to maximise the permissible measures available to respond to atrocity crimes.

4 *Arms Trade Treaty*

In addition, the influence of intercession under R2P on the development of treaty norms and the implementation of treaties can be seen in the *Arms Trade Treaty*. As will be

[459] 'Syria says against foreign intervention in Libya', *Reuters* (online), 10 March 2011, <http://af.reuters.com/article/egyptNews/idAFLDE72917420110310>.

further analysed in Chapter VII, the influence of R2P on the development of treaty norms can be seen throughout the *Arms Trade Treaty*, from the language used to the obligations imposed on States Parties. The language and structure of responsibility of R2P has been incorporated into the Treaty's preamble, principles and express purpose, and will impact the interpretation of the treaty obligations as a whole.[460] The scope of the *Arms Trade Treaty*, and its application to a broad range of activities under the term 'transfer', increase the capacity of States Parties to 'help to protect populations' from atrocity crimes. In requiring Member States to explicitly undertake risk assessment processes before authorising transfers, and refrain from transferring arms in situations where there are atrocity crimes occurring, the *Arms Trade Treaty* requires States to undertake measures which are expressly intended to impact the behaviour of other States, under the mantle of R2P.

The legal restraint on States Parties to the *Arms Trade Treaty* in relation to the transfer of conventional arms is itself a means of intercession, intended to avert atrocity crimes by denying the tools necessary to carry out those crimes. Simultaneously, the *Arms Trade Treaty* is also an instance of self-restraint inspired by R2P, in that it seeks to ensure that States do not aid or abet atrocity crimes in another State by transferring conventional arms. In this way, as Chapter VII will demonstrate, the *Arms Trade Treaty* is both R2P at work in terms of reinforcing States' own obligations of restraint under international human rights law and international humanitarian law, as well as a form of intercession inspired by R2P in terms of its imposition of risk assessment requirements and transfer prohibitions which are intended to impact on the commission of atrocity crimes in other States.

[460] *Vienna Convention on the Law of Treaties* art 31.

5 *Lessons from Current Practice*

The influence of R2P on State practice can be seen in acts of intercession in response to atrocity crimes (or an apprehension of atrocity crimes) including the swift engagement of the international community in Kenya following the post-election violence; the design and implementation of recent targeted sanctions in Libya, Syria, Sudan, the Central African Republic, and the Democratic Republic of the Congo; the overt support to opposition groups in Libya and Syria; and the influence of intercession under R2P on the development of treaty norms in the *Arms Trade Treaty*. More detailed examination of this State practice in Chapters V to VII reveals an expansion in the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States. It also reveals a simultaneous restraint on the formulation and imposition of those measures. I argue that intercession, drawn from R2P, can serve as a useful conceptual tool to explain this new State practice.

D *Intercession*

Kurtz and Rotmann suggest that the key normative shift toward increased protection of people occurred in the early 1990s following the atrocities in Rwanda and Srebrenica, when '[t]oleration of mass atrocities no longer seemed acceptable – it seemed immoral'.[461] As Chapter II demonstrated, this was in fact the culmination of a much longer process through which the humanitarian critique of Westphalian sovereignty resulted in a desire to re-conceptualise that key concept of international law. At the 2005 UN World Summit, R2P

[461] Rosa Brooks, 'The UN Security Council and Civilian Protection', in Jared Genser and Bruno Ugarte (eds), *The UN Security Council in the Age of Human Rights* (Cambridge University Press, 2013), 48; Kurtz and Rotmann, above n 393, 4.

came of age, as all major powers agreed 'that the protection of populations from mass atrocities is both a national and an international responsibility'.[462]

It has been noted that '[t]he arguments in support of an R2P that implicitly influenced international actors…are empirically difficult to test'.[463] However, through analysis of case studies in Chapters V to VII, I argue that the influence of R2P can be seen across diverse areas. I refer to these non-forcible measures collectively as intercession. Intercession refers to actions less than the use of armed force taken by States pursuant to the secondary duty under R2P to 'use all appropriate diplomatic, humanitarian and other peaceful means…to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity'.[464]

Intercession is the most dynamic area in current practice implementing R2P. It can capture and explain the significant change in State practice, and articulate the ways in which this reflects a re-aligned conceptualisation of the limits of State responses to atrocity crimes occurring in other States. By exploring the precise contours of intercession in subsequent Chapters, it will be revealed that R2P has led to an expansion in the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States. It has also led to a simultaneous restraint on the formulation and imposition of those measures. This, in turn, reveals the reconceptualisations of sovereignty and non-intervention; foundational principles of international law which have evolved to permit States to take a greater range of measures to help to protect populations from atrocity crimes.

[462] Kurtz and Rotmann, above n 393, 6.
[463] Junk, above n 440, 58
[464] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.

E *Conclusion*

This Chapter began by demonstrating how the concept of R2P, after its acceptance by the international community, could in theory come to influence State practice. This Chapter has argued that the conceptual tool of intercession, developed from R2P, can articulate and explain this new State practice.

Brunnée and Toope argue that 'international legal norms are produced and maintained through practice'.[465] While States may not be intervening through the use of force, there has been a significant change in State practice over the last decade or so, with an increase in the use of non-forcible State responses to atrocity crimes occurring in other States, which is in accordance with the secondary duty of the international community under R2P. This Chapter introduced an original conceptual tool, referred to as intercession, to capture and explain this change in State practice. As will be seen in more detail in Chapters V to VII, the influence of R2P can be seen across diverse areas including practice in the implementation of treaties, political action in the Security Council, practice which is driving an evolution in customary norms, and practice which evidences self-restraint by States that may be independent of changed customary law obligations.

By viewing this new and emerging State practice through the prism of intercession, the power of ideas (in this case R2P) in animating change in international law is revealed through, in particular, the reconceptualisations of sovereignty and the principle of non-intervention. Intercession provides an organising principle for examining the evolution of these fundamental principles of international law revealed through this new State practice.

[465] Jutta Brunnée and Stephen J Toope, 'The rule of law in an agnostic world: the prohibition on the use of force and humanitarian exceptions' in Wouter G Werner, Marieke de Hoon and Alexis Galán (eds), *The law of international lawyers: reading Martti* Koskenniemi (Cambridge University Press, 2017), 137-166, 146.

The contours of intercession will be examined through specific case studies in Chapters V to VII. In this way, R2P, as implemented in the World Summit Outcome Document, even if it is indeed 'R2P-lite',[466] is something more than just empty rhetoric; it is shaping State behaviour in the context of the utilisation of measures less than the use of force, resulting in significantly enhanced international responses to the commission of atrocity crimes. In the coming three Chapters, the impact of R2P and intercession will be examined in more depth in the contexts of sanctions, assistance to opposition groups, and the *Arms Trade Treaty* (respectively).

[466] See, eg, Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, above n 24, 46-50; Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', above n 24; Bellamy, 'Conflict Prevention and the Responsibility to Protect', above n 24; De Waal, above n 24.

V SANCTIONS

> The increased use of sanctions in lieu of military measures has, and can, ensure that more peaceful efforts are taken to resolve international disputes before resorting to military means. But due to the dichotomy of realities between the need to impose economic sanctions and their harmful effects, it becomes all the more necessary that more discussions and efforts are had to ensure that economic sanctions programs are restrained by a legal order that ensures they are humane in their implementation and effects.[467]

A *Introduction*

This Chapter examines sanctions as a case study of the implementation of measures of intercession by States, in the process demonstrating the influence of R2P on this evolving State practice. As Marossi and Bassett observe, 'the general appeal of economic sanctions has grown as major developed States are under domestic pressure to avoid military involvement in foreign disputes, while they remain under an expectation to prevent the spread of global conflicts'.[468] For this reason, sanctions are an important tool of intercession for States wishing to act in accordance with the secondary duty of the international community under R2P. Further, the manner in which such sanctions are imposed is also important. This Chapter will demonstrate how sanctions function as a tool of intercession, and illustrate that State practice relating to sanctions now includes a more humane implementation consistent with the secondary duty under R2P to 'help to protect' populations.

This Chapter will first briefly outline what is meant by 'sanctions', before analysing the legal justifications for the imposition of sanctions. This Chapter will then analyse some contemporary examples of sanctions practice in situations where there have been, or have been alleged, one or more of the four R2P-triggering atrocity crimes. The effectiveness, or not, of sanctions in achieving the cessation of atrocity crimes is beyond the scope of this

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[467] Ali Z Marossi and Marisa R Bassett (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, and Consequences* (TMC Asser Press, 2015), v.
[468] Ibid.

Chapter and will not be addressed. The key focus here is on the evolving practice of States in the implementation of sanctions as a tool of intercession under R2P.

This Chapter will demonstrate that contemporary regional and unilateral sanctions practice, which (unlike sanctions authorised by the Security Council) is limited by other principles of international law such as non-intervention, is more expansive than previously. From the international reception of this more expansive State practice, I argue that there is now a greater scope for States to impose sanctions in pursuit of the secondary duty of the international community under R2P without offending limits that had been previously understood to apply. However, I argue that this expansion is simultaneously tempered by the restraining influence of R2P which can be seen in States exercising self-restraint in ensuring that sanctions are formulated and imposed in such a way that they are more humane and minimise impacts on the general population. The evolving practice of States in the implementation of regional and unilateral sanctions reveals that R2P is influencing the actions of States in their shaping of unilateral sanctions policy and regulations, as well as their interpretation of regional treaty frameworks governing the use of sanctions (for example, by the European Community and African Union).

B *What are sanctions?*

'The term 'sanctions' is not, strictly speaking, a term of art in public international law'.[469] As Tzanakopoulos notes, the term 'appears nowhere in the UN Charter'.[470] In the absence of an authoritative definition, it is necessary to briefly explore the definition of 'sanctions' before turning to the legal justifications for the imposition of sanctions.

[469] Antonios Tzanakopoulos, 'Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility', in Marossi and Bassett (eds), above n 467, 146.
[470] Ibid.

Ruys observes that there are three approaches to defining 'sanctions' which can be identified in the literature.[471]

> A first approach is purpose-oriented and focuses on a measure's *objective* to respond to a breach of a legal norm. A second approach instead focuses on the *identity* of the author of the measures concerned, and limits the concept to measures adopted by an international organization (and in accordance with its constituent instrument). A third approach, prominent in international relations theory, defines sanctions by reference to the *type of measures* undertaken, and construes it as referring to *economic* sanctions, such as import and export restrictions against certain countries, or asset freezes targeting specific individuals or entities.[472]

The first approach is broad and defines a sanction to be any measure 'taken against a State to compel it to obey international law or to punish it for a breach of international law'.[473] The second approach is far narrower and understands sanctions as a 'measure adopted by an international organization, and in accordance with the organization's rules'.[474] The third approach falls somewhere in the middle and defines sanctions based on the type of measures adopted. This approach construes sanctions 'as referring specifically to a variety of economic measures, notably embargoes (whether of a general nature or limited to the trade of certain goods…, import and export restrictions, as well as (increasingly popular) targeted sanctions, such as asset freezes, travel bans etc'.[475]

For the purposes of this thesis, a combination of the first and third approaches to defining sanctions will be adopted in order to allow a broad range of measures to be considered. The first approach, which considers the objective of the measures adopted, results in a broad definition of sanctions and allows consideration of other non-forcible means of expressing State disapproval, such as expulsion from regional organisations.

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[471] Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing, 2016), 1.
[472] Ibid.
[473] Jonathan Law and Elizabeth A Martin (eds), *A Dictionary of Law* (Oxford University Press, 2014), 'sanction'. See also Jeremy M Farrell, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007), 6: defining sanctions as 'a range of action that can be taken against a person who has transgressed a legal norm'.
[474] Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 2.
[475] Ibid, 2-3.

Consideration of these broader measures are important for the purposes of positioning sanctions as a tool of intercession consistent with the focus of this thesis on measures less than force taken by States in response to atrocity crimes occurring in other States.

However, the main focus of this Chapter will be on measures that fall more squarely within the third approach to defining sanctions – economic measures, such as embargoes, and other targeted sanctions, such as travel bans and asset freezes, adopted by the United Nations, regional organizations, or States, imposed against another State in response to the commission of atrocity crimes. Consideration of these measures is important as, although the United Nations is authorised to impose sanctions on Member States in response to threats to international peace and security,[476] regional organisations[477] and individual States are increasingly adopting measures of this nature as a tool of foreign policy 'less dangerous than military force, but more serious – and sometimes more effective – than diplomacy alone'.[478] The increasing adoption of these measures by regional organisations and individual States suggests that there is now a greater scope to impose regional or unilateral sanctions without offending limits (such as the principle of non-intervention) that had been previously understood to apply. Analysis of these measures also reveals the exercise of considerable self-restraint on the part of regional organisations and States in ensuring that sanctions are formulated and imposed in such a way that they are more humane and minimise impact on the general population. First, however, the next part of this Chapter will discuss the legal justifications for the imposition of sanctions, by the United Nations Security Council, by regional organizations, and unilaterally by States.

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[476] *Charter of the United Nations* art 41.

[477] The 2014 High Level Review of UN Sanctions identified 48 situations where the European Union had adopted sanctions (labelled as restrictive measures), and 11 situations where the African Union had adopted such sanctions. See: Enrico Carisch, Sue Echert, Lorraine Rickard-Martin, 'High Level Review of UN Sanctions Background Paper' (Background Paper, Watson Institute for International Studies, Brown University, 2014) <http://www.hlr-unsanctions.org/20140706_HLR_Background.pdf>, 17.

[478] Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, 2nd ed, 2008), 925.

C *Legal justifications for the imposition of sanctions*

The legal justification for the imposition of sanctions varies depending on whether it is a measure adopted by the United Nations Security Council, a regional organisation, or an individual State.

1 *United Nations Security Council*

It is well known that the United Nations Security Council engages in various sanctions strategies in response to 'the existence of any threat to the peace, breach of the peace, or act of aggression'.[479] The Charter authorises the Security Council to impose measures including 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.[480] The 1990s, in particular, saw a dramatic increase in the imposition of UN mandated sanctions,[481] the most high-profile being the comprehensive sanctions imposed on Iraq,[482] Haiti,[483] and the former Yugoslavia.[484]

Joyner notes that the 'UNSC itself seems to have come to regard economic sanctions as the most attractive (ie, least costly to them) tool in its toolbox of options for dealing with

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[479] *Charter of the United Nations* art 39. Ruys observes that 'in order to adopt binding sanctions, the [Security] Council need not (and very often does not) find a breach of international law, but must (only) find the existence of a 'threat to the peace, a breach of the peace or an act of aggression' in the sense of Article 39 UN Charter': Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 4.

[480] *Charter of the United Nations* art 41.

[481] Between 1945 and 1990, the UN had only employed sanctions twice. Compare this to twelve times during the 1990s. See Daniel W Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice' (2011) 13 *International Studies Review* 96, 97.

[482] SC Res 661, UN SCOR, 45th sess, 2933rd mtg, UN Doc S/RES/661 (6 August 1990); SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/RES/687 (3 April 1991). See also Enrico Carisch, Loraine Rickard-Martin, and Shawna R Meister, 'Humanitarian Collateral Costs: From Iraq to Yugoslavia to Haiti' in *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights* (New York, Springer, 2017),184-202.

[483] SC Res 841, UN SCOR, 48th sess, 3238th mtg, UN Doc S/RES/841 (16 June 1993); SC Res 873, UN SCOR, 48th sess, 3291st mtg, UN Doc S/RES/873 (13 October 1993); SC Res 875, UN SCOR, 48th sess, 3293rd mtg, UN Doc S/RES/875 (16 October 1993); SC Res 917, UN SCOR, 49th sess, 3376th mtg, UN Doc S/RES/917 (6 May 1994). See also Carisch, Rickard-Martin, and Meister, above n 482, 214-220.

[484] SC Res 1160, UN SCOR, 53rd sess, 3868th mtg, UN Doc S/RES/1160 (31 March 1998); Carisch, Rickard-Martin, and Meister, above n 482, 203-213.

States and nonstate actors that it determines constitute a threat to international peace and security'.[485] It is beyond doubt that, under the *Charter*, the Security Council has the prerogative to take binding action, including through sanctions pursuant to Article 41, against States, non-State groups or specific individuals.[486] When the Security Council mandates sanctions, Member States are obliged to implement them.[487]

2 *Regional organisations*

Article 53 of the Charter provides that the Security Council can utilise

> regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.[488]

According to Orakhelashvili, this means that a regional organisation can give further effect to coercive measures that the Security Council has already adopted but it is not permitted to 'resort, on its own initiative, to coercive measures that are qualitatively different from those adopted within the UN system'.[489]

Further, the constituent instruments of many regional organisations contain provisions which enable the organisation to take certain measures against its members. For example, the *Constitutive Act of the African Union* provides that

> Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communication links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.[490]

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[485] Daniel H Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Marossi and Bassett (eds), above n 467, 85-86.
[486] Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 15.
[487] *Charter of the United Nations* arts 25 and 103.
[488] Ibid, art 53.
[489] Alexander Orakhelashvili, 'The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria' in Marossi and Bassett (eds), above n 467, 10.
[490] *Constitutive Act of the African Union*, opened for signature 11 July 2000, OAU Doc. CAB/LEG/23.15 (2001) (entered into force 26 May 2001) art 23(2).

The ILC commentary to the *Draft Articles on the Responsibility of International Organizations* states that: 'Sanctions, which an organization may be entitled to adopt against its members according to its rules, are per se lawful measures and cannot be assimilated to countermeasures'.[491] Alland observes that sanctions 'adopted by international organizations do not display the essential characteristic of countermeasures, that is, their intrinsic contrariety to what is normally required from them by international engagements'.[492] Such sanctions, sometimes referred to as institutional sanctions, are not contrary to international law when imposed in accordance with the rules of the organisation against Member States.[493]

However, there has been a significant change in the practice of regional organisations relating to sanctions in recent years, with regional organisations also imposing sanctions against non-Member States, and in situations where they are not simply implementing Security Council mandated sanctions. Whereas 'from the 1960s onwards in relation to sanctions imposed against Rhodesia, Iraq, Libya, the Federal Republic of Yugoslavia, and Haiti', regional organisations supported 'pre-existing sanctions instituted by the UNSC',[494] there has been a change in recent conflicts, most clearly in relation to Syria, for regional organisations to impose sanctions in the absence of a sanctions regime authorised by Security Council resolution.[495]

In relation to the European Union, Orakhelashvili suggests that 'EU policy is premised on, or presupposes, some authority to impose coercive sanctions on a State without a UNSC resolution and to independently judge what kinds of measures are justified in the

[491] 'Draft articles on the responsibility of international organizations, with commentaries' (2001) II(2) *Yearbook of the International Law Commission*, 47.
[492] Denis Alland, 'The definition of countermeasures' in James Crawford, Alain Pellet and Simon Olleson (eds), *The law of international responsibility* (Oxford University Press, 2010) 1127, 1135.
[493] For further discussion on the lawfulness of institutional sanctions see Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 17-21.
[494] Orakhelashvili, above n 489, 11.
[495] See part D of this chapter.

relevant situation'.[496] The justification offered for unilateral sanctions imposed by the EU in relation to Kosovo was that they were a response to 'unacceptable violations of human rights'.[497] The use of sanctions in such circumstances fits with the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes.[498]

3 *Individual States*

States are obliged to implement sanctions mandated by the Security Council and, accordingly, measures taken by States to implement those UN-mandated sanctions are lawful.[499] In addition, there are also situations where States impose sanctions against another State or non-State actor on a unilateral, or autonomous, basis. In contrast to the multilateral process of UN and regional organisation sanctions, 'unilateral sanctions [may] involve only one State making the determination that there has been a violation of international law or a breach of an international obligation'.[500] This challenges 'the existing international legal order which is anchored in the UN Charter, according to which sanctions are to be imposed by the UNSC, following a determination that there is a threat to or a breach of international peace and security'.[501]

The permissibility of the imposition of sanctions by States that are not themselves injured by an internationally wrongful act of another State has long been subject to debate.[502]

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[496] Orakhelashvili, above n 489, 7-8.
[497] Tzanakopoulos, 'Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility', above n 469, 151.
[498] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.
[499] *Charter of the United Nations* arts 25 and 103.
[500] Marossi and Bassett (eds), above n 467, xv.
[501] Ibid.
[502] In the *Barcelona Traction* case, the ICJ famously distinguished between obligations vis-à-vis another State, and 'obligations of a State towards the international community as a whole', which 'by their very nature…are the concern of all States': *Barcelona Traction (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, [33]. In this judgment, the ICJ seemingly retreated from its more conservative stance in the *South West Africa* cases (*South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Judgment)* [1966] ICJ Rep 6, [99]). It has become generally accepted that States other than the injured State can invoke the international responsibility of

In setting the high watermark for the principle of non-intervention,[503] the ICJ in *Nicaragua* appeared to rule out the use of such sanctions when it held:

> The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[504]

Despite this, the ILC

> found several instances where (non-injured) third States had reacted to breaches of international law by economic sanctions or other measures, as when the United States prohibited the export of goods and technology to, and all imports from, Uganda in 1978, pursuant to alleged genocide by the Ugandan government against its population.[505]

While the ILC found in 2001 that such practice was 'limited and rather embryonic',[506] new State practice has materialised in more recent years which reveals a tendency toward the imposition of sanctions unilaterally by States in response to the commission of atrocity crimes occurring in other States.[507]

In light of the increasing recourse to unilateral sanctions by States in response to the commission of atrocity crimes occurring in other States, Ruys submits that it may be appropriate 'to shift the debate from the binary question whether…[they] are permissible or not, to defining the possible boundaries to their use'.[508] Intercession and R2P can provide useful normative frameworks in this regard, providing guidance to States in determining

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another State in respect of a breach of a *jus cogens* norm. See, eg, *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, [68]-[69]; *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226.

[503] See Chapter II.

[504] *Nicaragua*, [249].

[505] 'Draft articles on the responsibility of international organizations, with commentaries', above n 491, 137-138; Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 23.

[506] 'Draft articles on the responsibility of international organizations, with commentaries', above n 491, 137.

[507] Eleni Katselli Proukaki, *The problem of enforcement in international law: countermeasures, the non-injured state and the idea of international community* (Routledge, 2010), 331. Dawidowicz has demonstrated that State practice imposing such sanctions is widespread, emanating from States on all continents (with the exception of South America) and from international organisations such as the EU, AU and ECOWAS: Martin Dawidowicz, 'Public law enforcement without public law safeguards? An analysis of State practice on third-party countermeasures and their relationship to the UN Security Council' (2006) 77 *British Yearbook of International Law* 333, 333.

[508] Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 25.

when and how they can respond to atrocity crimes occurring in other States in a way that contributes to the protection of populations. The next part of this Chapter will analyse some contemporary examples of sanctions practice in detail.

D *Recent contemporary examples*

In recent years, sanctions have been increasingly employed in situations where there have been alleged atrocity crimes committed by government or opposition forces, or by both. Recent conflicts have seen sanctions imposed by the UN Security Council, regional organisations, and States either to implement UN mandated sanctions or unilaterally. The next part of this Chapter will analyse sanctions imposed in recent conflicts, and demonstrate that contemporary regional and unilateral sanctions practice is more expansive than previous sanctions practice.

1 *Democratic Republic of the Congo ('DRC')*

The conflict in the DRC began in the aftermath of the Rwandan genocide.[509] Numerous armed groups have been operating in the DRC for more than twenty years and continue to attack vulnerable populations, carrying out mass killings, home burning, torture, and forced recruitment into armed groups.[510] Since defeating the March 23 militia in November 2013, government forces have engaged in offensives against other armed groups in eastern DRC.[511]

[509] Mallory Owen, 'The Limits of Economic Sanctions Under International Humanitarian Law: The Case of the Congo' (2012) 48 *Texas International Law Journal* 103, 108.
[510] *R2P Monitor,* Global Centre for the Responsibility to Protect (January 2015) <http://www.globalr2p.org/media/files/r2p_monitor-jan15-final.pdf>, 12-13.
[511] Ibid, 12.

(a) United Nations sanctions

The Security Council sanctions regime in relation to the DRC commenced in 2003 with the imposition of an arms embargo, with all Member States being directed to

> take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, to all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement, in the Democratic Republic of the Congo.[512]

In 2005, in response to the continued violence, the Security Council extended the arms embargo,[513] and also imposed a travel ban[514] and asset freezes[515] against designated individuals and entities. In 2008 in response to the 'recruitment, targeting and use of children' in hostilities, and the 'continuing violence, in particular sexual violence directed against women',[516] the Security Council passed resolution 1807 stressing 'the primary responsibility of the Government of the Democratic Republic of the Congo for ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights and international humanitarian law'.[517] The resolution reaffirmed the arms embargo,[518] travel bans,[519] and asset freezes.[520]

In response to the 'persistence of serious human rights abuses and humanitarian law violations against civilians in the eastern part of the DRC, including summary executions, sexual and gender based violence and large scale recruitment and use of children committed by armed groups',[521] the United Nations sanctions regime was renewed in 2014. Using the language of R2P, Resolution 2136 stressed 'the primary responsibility of the Government of

[512] SC Res 1493, UN SCOR, 58th sess, 4797th mtg, UN Doc S/RES/1493 (28 July 2003), [20].
[513] SC Res 1596, 60th sess, 5163rd mtg, UN Doc S/RES/1596 (18 April 2005), [1].
[514] Ibid, [13] and [14].
[515] Ibid, [15] and [16].
[516] SC Res 1807, UN Doc S/RES/1807, preamble.
[517] Ibid.
[518] Ibid, [1].
[519] Ibid, [9].
[520] Ibid, [11].
[521] SC Res 2136, UN Doc S/RES/2136, preamble.

the DRC for ensuring security in its territory and protecting civilians with respect for the rule of law, human rights and international humanitarian law'.[522] The sanctions regime reaffirmed the arms embargo,[523] travel bans,[524] and asset freezes on designated entities and individuals.[525] The UN sanctions, by imposing travel bans and asset freezes on designated entities and individuals only, have been formulated in an attempt to minimise their impact on the general population, targeting only those responsible for the commission of atrocities and the ongoing conflict. This restraint and care in the imposition of sanctions is consistent with the secondary duty under R2P to 'help to protect' populations from atrocity crimes.

(b) Sanctions imposed by regional organisations and States

On 21 October 2002, nearly nine months prior to the UN sanctions, the European Union imposed an embargo on the 'sale or supply of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned into the Democratic Republic of the Congo'.[526] The EU sanctions were subsequently amended to bring the arms embargo into line with the UN arms embargo,[527] and to include a travel ban[528] and asset freeze on designated individuals and entities[529] in conformity with the UN sanctions regime.[530] The EU sanctions regime

[522] Ibid.
[523] Ibid, [1].
[524] Ibid, [2].
[525] Ibid, [3]. As at 30 December 2017, nine entities and thirty-one individuals have been designated under this sanctions regime.
[526] *Council Decision 2002/829/CFSP on the supply of certain equipment into the Democratic Republic of Congo* [2002] OJ L 285.
[527] *Council Decision 2003/680/CFSP amending Common Position 2002/829/CFSP on the supply of certain equipment into the Democratic Republic of Congo* [2003] OJ L 249.
[528] *Council Decision 2005/440/CFSP concerning restrictive measures against the Democratic Republic of Congo and repealing Common Position 2002/829/CFSP* [2005] OJ L 152, art 4.
[529] Ibid, art 5.
[530] The EU sanctions regime was updated to incorporate changes to the UN sanctions regime in 2008 (*Council Decision 2008/179/CFSP amending Common Position 2005/440/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2008] OJ L 57 and *Council Decision 2008/369/CFSP concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2005/440/CFSP* [2008] OJ L 127); 2010 (*Council Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP* [2010] OJ L

continues to include additional unilateral sanctions against designated senior officials involved in government repression,[531] whereas the UN sanctions regime is limited to individuals and armed groups responsible for serious human rights abuses, mostly in eastern Congo.[532] Only the DRC protested against the imposition of sanctions by the EU, asserting that they 'are illegal because they are a sort of imperial law that is at odds with international law'.[533] In contrast, the president of the Congolese Association for Access to Justice stated that the sanctions 'could help walk Congo back from the brink and deter further violent repression'.[534]

The formulation and implementation of the EU sanctions regime demonstrates both the expansionary and restraining influence of intercession under R2P. The EU's imposition of sanctions against a non-Member State prior to Security Council mandated sanctions reveals a significant change in State practice consistent with the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes. Simultaneous restraint can be seen in the design of the sanctions to target only those responsible for the commission of atrocity crimes (by way of

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336); 2012 (*Council Decision 2012/811/CFSP amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2012] OJ L 352); 2014 (*Council Decision 2014/147/CFSP amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2014] OJ L 79); and 2015 (*Council Decision (CFSP) 2015/620 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2015] OJ L 102).

[531] *Council Implementing Regulation (EU) 2017/904 implementing Article 9(2) of Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo* [2017] OJ L 60; *Council Implementing Decision (CFSP) 2017/905 implementing Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2017] OJ L 60; *Council Decision (CFSP) 2017/2282 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2017] OJ L 328.

[532] Human Rights Watch, 'DR Congo: EU, US Sanction Top Officials: UN, AU Should Expand Action Against Rights Abusers, Press for Credible Elections' (1 June 2017) <https://www.hrw.org/news/2017/06/01/dr-congo-eu-us-sanction-top-officials>.

[533] Matthew Tempest, 'EU slaps DR Congo officials with sanctions after anti-Kabila deaths', *Euractiv* (online), 13 December 2016, <https://www.euractiv.com/section/development-policy/news/eu-slaps-dr-congo-officials-with-sanctions-after-anti-kabila-deaths/>.

[534] Ibid.

travel bans and asset freezes), and the arms embargo which was imposed with a view to minimising the arms available to commit atrocity crimes.[535]

In October 2006, in response to 'widespread violence and atrocities', the United States imposed additional unilateral sanctions on 'certain persons contributing to the conflict in the Democratic Republic of the Congo'.[536] The sanctions took the form of an asset freeze and travel ban against individuals allegedly connected to the conflict in Darfur, including those responsible for committing 'serious violations of international law involving the targeting of children in situations of armed conflict in the Democratic Republic of the Congo, including killing and maiming, sexual violence, abduction, and forced displacement'.[537] In 2010, the United States Congress, believing that the exploitation and trade of conflict minerals was helping to finance the conflict in DRC and contributing to the humanitarian crisis,[538] imposed additional sanctions restricted to the trade in conflict minerals.[539]

In addition, section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* requires American companies to disclose annually whether conflict minerals necessary to the functionality or production of their product originated in the DRC or an adjoining country, with companies who can establish that their minerals were not extracted in the DRC or an adjoining country permitted to label their products 'DRC conflict free'.[540] In 2014, in response to 'operations by armed groups, widespread violence and atrocities, human

[535] See, eg, the arms embargo contained within the EU sanctions, which was extended until 12 December 2018 (*Council Decision (CFSP) 2017/2282 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo* [2017] OJ L 328). See also *Hansard*, 19 Dec 2002: Column WA142 <https://publications.parliament.uk/pa/ld200203/ldhansrd/vo021219/text/21219w03.htm>.
[536] Exec Order No 13,413, 71 Fed. Reg. 210 (27 October 2006).
[537] Ibid, s 1(a)(ii)(D).
[538] Owen, above n 509, 105.
[539] Conflict minerals include columbite-tantalite (used in the manufacture of condensers, micro-electronic technology such as chips and processors, cell phones, nuclear reactors and highly heat-tolerant varieties of steel), cassiterite (the major ore used in making tin), wolframite (the principle ore in tungsten, used in numerous electrical items), gold, and any other mineral or its derivatives that the Secretary of State determines is financing conflict in the DRC or an adjoining country: *Dodd-Frank Wall Street Reform and Consumer Protection Act*; Owen, above n 509, 110-111.
[540] *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

rights abuses, recruitment and use of child soldiers, attacks on peacekeepers, obstruction of humanitarian operations, and exploitation of natural resources to finance persons engaged in these activities', the United States imposed further unilateral sanctions against the DRC, targeting individuals who were reportedly contributing to atrocities who were not the target of the UN sanctions.[541] These sanctions amended the previous targeted sanctions to include, *inter alia*, individuals 'responsible for or complicit in' or who have 'engaged in, directly or indirectly'

> the targeting of women, children, or any civilians through the commission of acts of violence (including killing, maiming, torture, or rape or other sexual violence), abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law.[542]

In January 2017, the US imposed additional unilateral sanctions against designated senior DRC government officials.[543] Similar to the EU unilateral sanctions, the US sanctions are broader than the UN targeted sanctions regime. The US sanctions regime is expressed to have the 'intended effect of economically asphyxiating the warlords who turned eastern Congo into the deadliest conflict zone since World War II. …"The purpose is to cut off funding to people who kill people"'.[544]

Other States also implemented the UN sanctions regime domestically.[545] The sanctions applied by the EU and the United States are important instances of intercession; both States applied sanctions that were not UN mandated expressly on the basis of

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[541] Exec Order No 13,671, 79 Fed. Reg. 132 (8 July 2014).
[542] Ibid, s 1(a)(ii)(C)(3).
[543] <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170601.aspx>.
[544] David Aronson, 'How Congress Devastated Congo' (Op Ed), *The New York Times* (online), 7 August 2011, <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html>.
[545] See, eg, *Charter of the United Nations (Sanctions - Democratic Republic of the Congo) Regulations 2008* (Cth) (Australia); *United Nations Democratic Republic of the Congo Regulations*, SOR/2004-222 (Canada); *Regulations Amending the United Nations Democratic Republic of the Congo Regulations*, SOR/2005-306 (Canada); *Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo: Note verbale dated 16 May 2012 from the Permanent Mission of Brazil to the United Nations addressed to the Chair of the Committee*, UN Doc S/AC.43/2012/1 (21 May 2012).

responding to atrocity crimes, and both expressly designed them in accordance with the restraint required of measures of intercession under R2P.

2 *Côte d'Ivoire*

Côte d'Ivoire has experienced instability and political tension, characterised by sporadic violence and the outbreak of civil war in September 2002.[546] The November 2010 presidential elections led to a resurgence in violence between opposing political groups following the manipulation of electoral results. In the conflict that followed, there were reportedly acts of

> violence committed against civilians, including women, children, internally displaced persons and foreign nationals, and other violations and abuses of human rights, in particular enforced disappearances, extrajudicial killings, killing and maiming of children and rapes and other forms of sexual violence.[547]

Government forces also reportedly directly targeted civilians.[548]

(a) United Nations sanctions

In response to previous outbreaks of violence, the Security Council imposed sanctions in relation to Côte d'Ivoire in 2004 in the form of an arms embargo, travel ban and asset freeze,[549] and in 2005 in the form of an embargo on trade in rough diamonds.[550] These measures were reaffirmed in the lead-up to the 2010 presidential elections.[551]

On 30 March 2011, the Security Council expressed concern about 'the recent escalation of violence in Côte d'Ivoire and the risk of relapse into civil war',[552] emphasised

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[546] The United Nations has imposed sanctions on *Côte d'Ivoire* as a result of politically motivated violence on several occasions: See, eg, SC Res 1572, UN Doc S/RES/1572; SC Res 1643, UN Doc S/RES/1643; SC Res 1946, UN Doc S/RES/1946; SC Res 2219, UN Doc S/RES/2219.
[547] SC Res 1980, UN SCOR, 65th sess, 6525th mtg, UN Doc S/RES/1980 (28 April 2011), preamble.
[548] 'Ivory Coast shelling in Abidjan 'a war crime' – UN', *BBC News* (online), 18 March 2011, <http://www.bbc.com/news/world-africa-12787015>.
[549] SC Res 1572, UN Doc S/RES/1572, [7]-[12].
[550] SC Res 1643, UN Doc S/RES/1643, [6].
[551] SC Res 1946, UN Doc S/RES/1946, [1].
[552] SC Res 1975, UN Doc S/RES/1975, preamble.

the 'primary responsibility of each State to protect civilians',[553] and considered 'that the attacks currently taking place in Côte d'Ivoire against the civilian population could amount to crimes against humanity'.[554] It imposed sanctions in the form of travel bans and asset freezes against designated individuals 'who obstruct peace and reconciliation in Côte d'Ivoire, obstruct the work of UNOCI and other international actors in Côte d'Ivoire and commit serious violations of human rights and international humanitarian law'.[555] The Security Council also affirmed its 'intention to consider further measures, as appropriate, including targeted sanctions against media actors who meet the relevant sanctions criteria, including by inciting publicly hatred and violence'.[556] On 28 April 2011, the Security Council renewed the arms embargo, travel bans, and asset freezes against designated individuals and entities.[557]

In the lead up to the October 2015 presidential elections, and in light of 'violence committed against civilians, including women, children, internally displaced persons and foreign nationals, and other violations and abuses of human rights',[558] the Security Council imposed an embargo on 'arms and any related lethal materiel',[559] and renewed the travel bans and asset freezes on designated individuals.[560] The UN sanctions regime reveals both the expansionary and restraining influence of intercession under R2P. The use of sanctions as a preventative measure in anticipation of atrocity crimes prior to both the 2010 and 2015 presidential elections reveals that sanctions are being imposed as a form of response where traditionally there may have been none, and that they are being used as both responsive and anticipatory tools under the second and third pillars of R2P, discussed in Chapter III. The

[553] Ibid.
[554] Ibid.
[555] Ibid, [12].
[556] Ibid.
[557] SC Res 1980, UN Doc S/RES/1980, [1].
[558] SC Res 2219, UN Doc S/RES/2219, preamble.
[559] Ibid, [1].
[560] Ibid, [12].

formulation of the UN sanctions, being restricted to an arms embargo, and targeted travel bans and asset freezes, reveals restraint in the design of sanctions as a preventative measure to limit their impact on the general population.

(b) Sanctions imposed by regional organisations and States

The EU sanctions regime in relation to Côte d'Ivoire implemented the UN regime in 2004, including an arms embargo, asset freeze and travel bans against designated individuals.[561] On 7 February 2006, in response to 'the massacre of large numbers of civilians, widespread human rights abuses, significant political violence and unrest, and attacks against international peacekeeping forces leading to fatalities',[562] the United States implemented the UN sanctions regime, imposing travel bans and asset freezes on designated individuals and entities. Other States also implemented the UN sanctions regime domestically.[563]

In 2010, following the cancellation of the presidential election results, regional measures were taken beyond those at that time mandated by the UN Security Council. The AU suspended 'the participation of Côte d'Ivoire in all AU activities until such a time the democratically-elected President assumes [S]tate power'.[564] The AU urged Côte d'Ivoire to 'exercise utmost restraint and to refrain from any action that could jeopardize peace and the

[561] See, eg, *Council Common Position 2004/852/CFSP concerning restrictive measures against Côte d'Ivoire* [2004] OJ L 368; *Council Decision 2006/30/CFSP renewing the restrictive measures against Côte d'Ivoire* [2006] OJ L 19; *Common Position 2008/873/CFSP renewing the restrictive measures against Côte d'Ivoire* [2008] OJ L 308; *Council Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire* [2010] OJ L 285; *Council Decision (CFSP) 2016/917 repealing Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire* [2016] OJ L 153.
[562] Exec Order No 13,396, 71 Fed. Reg. 28 (7 February 2006).
[563] See, eg, *United Nations Côte d'Ivoire Regulations*, SOR/2005-127 (Canada); *United Nations Sanctions (Côte d'Ivoire) Regulations 2005*, SOR 2005/339 (New Zealand); *Monetary Authority of Singapore (Freezing Of Assets Of Persons - Cote d'Ivoire) Regulations 2006*, GN No S 154/2006 (Singapore); *Charter of the United Nations (Sanctions — Cote d'Ivoire) Regulations 2005* (Cth) (Australia).
[564] African Union Peace and Security Council, Communique, 252nd mtg, PSC/PR/COMM.1 (CCLII), Addis Ababa (9 December 2010), [3] and [4].

process for a way out of the crisis'.[565] In an extraordinary meeting, ECOWAS expressed 'support for a travel ban, freeze on financial assets and all other forms of targeted sanctions imposed by regional institutions and the international community on the out-going president and his associates'.[566] An ECOWAS spokesperson stated that ECOWAS would see 'how best they can contribute to the stabilisation'[567] of Côte d'Ivoire. These sanctions were later unanimously welcomed by the Security Council.[568] India stated that it 'supported all efforts to address the political crisis, including those of ECOWAS and the African Union to craft a way forward'.[569] Nigeria noted that 'the fact that the violence was taking on ethnic and sectarian overtones was evidence of the risk that inaction would pose… and emphasized the need to protect civilians'.[570] The United Kingdom 'supported [the] continuing role [of ECOWAS], as well as that of the African Union, in finding a political solution to end the crisis'.[571] China 'appreciated the efforts of the African Union and ECOWAS to help the parties find … a solution'.[572] The AU and ECOWAS response to the unfolding situation in Côte d'Ivoire demonstrates the use of diplomatic and sanctions-based measures of intercession by key African regional organisations.

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[565] 'African Union suspends Ivory Coast amid political chaos', *CNN* (online), 9 December 2010 <http://edition.cnn.com/2010/WORLD/africa/12/09/ivory.coast.au/index.html>.
[566] Economic Community of West African States, Final Communique on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire, ECOWAS Doc 188/2010, Abuja, Nigeria (7 December 2010), [7]. See also Economic Community of West African States, Final Communique on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire, ECOWAS Doc 192/2010, Abuja (24 December 2010).
[567] Ola Awoniyi, 'West African leaders meet for emergency Côte d'Ivoire talks', *Mail & Guardian* (online), 24 December 2010 < https://mg.co.za/article/2010-12-24-west-african-leaders-meet-for-emergency-cte-divoire>.
[568] UNSCOR, 65th sess, 6458th mtg, UN Doc S/PV.6458 (20 December 2010); SC Res 1962, UN SCOR, 65th sess, 6458th mtg, UN Doc S/RES/1962 (20 December 2010), preamble.
[569] United Nations Security Council, 'Security Council Demands End to Violence in Cote d'Ivoire, Imposing Sanctions Against Former President and Urging Him to 'Step Aside', in Resolution 1975' (Press Statement, SC/10215, 30 March 2011) <https://www.un.org/press/en/2011/sc10215.doc.htm>.
[570] Ibid.
[571] Ibid.
[572] Ibid.

3 *Sudan*

The conflict in Sudan began in 2003, when two rebel groups took up arms against the Sudanese government.[573] Government-backed militias known as janjaweed,[574] together with the Sudanese Armed Forces, attacked hundreds of villages throughout the Darfur region, with 400 villages being completely destroyed and millions of civilians forced to flee.[575] In a November 2014 report, the UN noted 55 attacks against civilians with 23 of those attacks allegedly perpetrated by the Sudanese Armed Forces.[576] The Sudanese Armed Forces reportedly committed war crimes, including extrajudicial killing, forced displacement and widespread sexual violence against civilians,[577] and engaged in 'scorched earth' tactics, including the systematic targeting of food sources and deliberate destruction of civilian structures.[578] Rebel groups 'also perpetrated war crimes including indiscriminate attacks on civilian populated areas as well as the alleged recruitment of child soldiers'.[579]

(a) United Nations sanctions

In July 2004, the Security Council imposed an embargo on the trade in 'arms and related materiel of all types, including weapons and ammunition, military vehicles and

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[573] *Q&A: Crisis in Darfur* (25 April 2008) Human Rights Watch <https://www.hrw.org/news/2008/04/25/q-crisis-darfur>.
[574] Ibid.
[575] Ibid.
[576] *Report of the Secretary-General on the African Union – United Nations Hybrid Operation in Darfur*, UN SCOR, UN Doc S/2014/852 (26 November 2014), [9].
[577] *R2P Monitor*, above n 510, 9. In 2007, President Omar al Bashir, Defence Minister Abdel Raheem Muhammad Hussein, and the governor of North Kordofan, Ahmad Haroun, were indicted by the International Criminal Court for war crimes and crimes against humanity committed in Darfur. In 2010, the International Criminal Court issued a warrant for President al Bashir for perpetrating genocide in Darfur, the first time a sitting president has been indicted by the Court: James Copnall, 'Darfur conflict: Sudan's bloody stalemate' *BBC News* (online), 29 April 2013 <http://www.bbc.com/news/world-africa-22336600>.
[578] *R2P Monitor*, above n 510, 9.
[579] Ibid. On 11 September 2014, the International Criminal Court issued an arrest warrant against Darfur rebel leader Abdallah Banda for war crimes: Ibid, 10.

equipment, paramilitary equipment, and spare parts' with rebel groups in the Darfur region in response to ongoing human rights abuses and the deteriorating humanitarian situation.[580] Utilising the language of R2P, the resolution also recalled 'in this regard that the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory'.[581] On 29 March 2005, the United Nations sanctions were expanded to apply the arms embargo to 'all parties to the N'djamena Ceasefire Agreement and any other belligerents in the [S]tates of North Darfur, South Darfur and West Darfur',[582] and to include a travel ban[583] and asset freeze on designated individuals and entities.[584]

In 2010, the arms embargo was renewed and an express obligation was imposed on States trading in arms with the Sudanese government to provide necessary end-user documentation to ensure arms were not re-directed to any parties to the N'djamena Ceasefire Agreement.[585] The UN sanctions illustrate the value of measures of intercession in response to atrocity crimes in accordance with the secondary duty on the international community under R2P. The design of the UN sanctions, which were formulated to minimise impact on the general population and to target those responsible for the conflict, also shows the restraint imposed on measures of intercession by R2P.

(b) Sanctions imposed by regional organisations and States

In April 2006, the United States imposed sanctions on Sudan in response to the 'persistence of violence in Sudan's Darfur region, particularly against civilians and including sexual violence against women and girls, and…the deterioration of the security situation and

[580] SC Res 1556, UN Doc S/RES/1556, [7].
[581] Ibid, preamble.
[582] SC Res 1591, UN Doc S/RES/1591, [7].
[583] Ibid, [3(d)].
[584] Ibid, [3(e)].
[585] SC Res 1945, UN Doc S/RES/1945, [10].

its negative impact on humanitarian assistance efforts'.[586] The sanctions implemented the UN sanctions regime and took the form of an asset freeze against individuals allegedly connected to the conflict in Darfur, including those responsible for 'heinous conduct with respect to human life or limb'[587] or otherwise in violation of international law, and an asset freeze on the property of the government of Sudan.[588] US policy in relation to Sudan was expressed to be focussed on 'achieving a definitive end to gross human rights abuses and conflicts, including in Darfur, Blue Nile and Southern Kordofan',[589] and an improvement in 'how Sudan treats its citizens and adheres to its international obligations'.[590] Other States also implemented the UN sanctions regime domestically.[591]

In January 2004, months *before* the imposition of the United Nations' sanctions regime, the EU imposed an embargo on exports of arms, munitions and military equipment to Sudan,[592] including a ban on the provision of technical and financial assistance related to military activities in Sudan.[593] The EU sanctions were amended following Security Council Resolution 1591 to reaffirm the embargo and to permit EU Member States to

> authorise the provision of financing and financial assistance and technical assistance related to:
> (a) non-lethal military equipment intended solely for humanitarian or protective use, or for

[586] Exec Order No 13,400, 71 Fed. Reg. 83 (26 April 2006), preamble.
[587] Ibid, [1(ii)(D)].
[588] Exec Order No 13,412, 71 Fed. Reg. 200 (13 October 2006).
[589] <https://www.state.gov/r/pa/ei/bgn/5424.htm>.
[590] Esther Sprague, 'Understanding Sudan and US Sanctions', *Huffington Post* (online), <https://www.huffingtonpost.com/esther-sprague/understanding-sudan-and-u_b_9106182.html>.
[591] See, eg, *United Nations Sudan Regulations*, SOR/2004-197 (Canada); *Regulations Amending the United Nations Sudan Regulations*, SOR/2005-122 (Canada); *Japan-Sudan Relations* (10 January 2017) Ministry of Foreign Affairs <http://www.mofa.go.jp/region/africa/sudan/data.html> (Japan); *Charter of the United Nations (Sanctions-Sudan) Regulations 2008* (Cth) (Australia).
[592] *Council Common Position 2004/31/CFSP concerning the imposition of an embargo on arms, munitions and military equipment on Sudan* [2004] OJ L 6; *Council Common Position 2004/510/CFSP amending Common Position 2004/31/CFSP concerning the imposition of an embargo on arms, munitions and military equipment on Sudan* [2004] OJ L 209.
[593] *Council Regulation (EC) No 131/2004 concerning certain restrictive measures in respect of Sudan* [2004] OJ L 21; *Commission Regulation (EC) No 1516/2004 amending Council Regulation (EC) No 131/2004 concerning certain restrictive measures in respect of Sudan* [2004] OJ L 278.

> institution-building programmes of the United Nations, the African Union, the European Union and the Community.[594]

The EU sanctions regime also included asset freezes[595] and travel bans[596] targeted at designated individuals. The arms embargo,[597] travel bans,[598] and asset freezes[599] were reaffirmed in 2014 in light of the ongoing conflict. The exclusion of 'non-lethal military equipment intended solely for humanitarian or protective use' from the embargo is consistent with the EU sanctions having been formulated and implemented in such a way as to maximise protection of civilians. This demonstrates the restraint on measures of intercession, exempting equipment which will 'help to protect' populations from the embargo while still providing important limitations on trade with a State where atrocity crimes are reportedly occurring. The UK stated that the

> measures broaden the exemptions to the prohibition on the supply of arms, technical assistance and financial assistance to include crisis management operations of the African Union. This allows EU member [S]tates to offer full practical and financial support to the deployment of the African Union's ceasefire commission to Darfur.[600]

The EU's imposition of sanctions against a non-Member State prior to Security Council mandated sanctions is an important example of measures of intercession being implemented in a situation where previously States might have felt unable to act, and is consistent with the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes.

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[594] *Council Common Position 2005/411/CFSP concerning restrictive measures against Sudan and repealing Common Position 2004/31/CFSP* [2005] OJ L 139; *Council Regulation (EC) No 838/2005 amending Regulation (EC) No 131/2004 concerning certain restrictive measures in respect of Sudan* [2005] OJ L 139, art 1.
[595] *Council Decision 2014/450/CFSP concerning restrictive measures in view of the situation in Sudan and repealing Decision 2011/423/CFSP* [2014] OJ L 203, art 5.
[596] Ibid, art 4.
[597] *Council Regulation (EU) No 747/2014 of 10 July 2014 concerning restrictive measures in view of the situation in Sudan and repealing Regulations (EC) No 131/2004 and (EC) No 1184/2005* [2014] OJ L 203, art 2.
[598] Ibid, art 19.
[599] Ibid, art 5.
[600] *Hansard*, 7 September 2004: Column 114WS <https://publications.parliament.uk/pa/cm200304/cmhansrd/vo040907/wmstext/40907m05.htm> (Bill Rammell, Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs).

4 *Libya*

The civil war in Libya began with peaceful protests in Benghazi on 16 February 2011. Government artillery, helicopter gunships and snipers fired upon protesters and civilians were reportedly attacked in their homes.[601] There were reports in Tripoli of 'death squads of foreign mercenaries roving the streets to silence residents who ventured outside'.[602] The conflict quickly escalated into civil war. The Security Council referred the situation in Libya to the International Criminal Court for crimes against humanity on 26 February 2011.[603]

(a) United Nations sanctions

The Security Council unanimously authorised sanctions against Libya on 26 February 2011, just 10 days after the violence began, in response to 'the gross and systematic violations of human rights, including the repression of peaceful demonstrators,…the deaths of civilians, and…the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government'.[604] The resolution recalled 'the Libyan authorities' responsibility to protect its population',[605] a clear reference to the primary duty under R2P, and considered that 'the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'.[606] The sanctions imposed included an open-ended embargo to and from the Libyan government on

> arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision,

[601] 'Libya Protests: 140 Massacred as Gaddafi Sends in Snipers to Crush Dissent', *The Telegraph* (online), 20 February 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html>.
[602] 'After the Air Raids, Gaddafi's Death Squads Keep Blood on Tripoli's Streets', *The Guardian* (online), 22 February 2011, < https://www.theguardian.com/world/2011/feb/22/air-raids-gaddafi-tripoli>.
[603] SC Res 1970, UN Doc S/RES/1970, [4].
[604] Ibid, preamble.
[605] Ibid.
[606] Ibid.

> maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories.[607]

The resolution also imposed a travel ban[608] and asset freeze[609] on designated individuals and entities. The arms embargo[610] and asset freeze[611] were reaffirmed in Resolution 1973, which also authorised the use of force in relation to the Libyan conflict, and reiterated 'the responsibility of the Libyan authorities to protect the Libyan population' and reaffirmed that 'the parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians'.[612] The no fly zone authorised under Resolution 1973 expressly excluded 'flights that had as their sole purpose humanitarian aid, the evacuation of foreign nationals, enforcing the ban or other purposes "deemed necessary for the benefit of the Libyan people"'.[613] Nigeria stated that the '"comprehensive" targeted sanctions…would deter individuals from supporting the regime and would provide for the protection of civilians and respect for international humanitarian and human rights law'.[614] The UN sanctions were formulated to '"cut [the Libyan regime] off" from the funds that had propped it up for so long',[615] targeted at those responsible for the commission of atrocities against the civilian population and demonstrating restraint in the formulation and imposition of sanctions.

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[607] Ibid, [9] and [10].
[608] Ibid, [15].
[609] Ibid, [17].
[610] SC Res 1973, UN Doc S/RES/1973, [13]-[16].
[611] Ibid, [19]-[21].
[612] Ibid, preamble.
[613] United Nations Security Council, 'Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions' (Press Statement, SC/10200, 17 March 2011) <https://www.un.org/press/en/2011/sc10200.doc.htm>.
[614] United Nations Security Council, 'In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters' (Press Statement, SC/10187/REV.1, 26 February 2011) <https://www.un.org/press/en/2011/sc10187.doc.htm>
[615] United Nations Security Council, 'Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions', above n 613.

(b) Sanctions imposed by regional organisations and States

In the weeks following Resolution 1970, Switzerland, the US, Canada, Australia, Japan, and the EU adopted the UN sanctions.[616] In addition, some of these States took unilateral action in freezing the assets of individuals who were not yet, but would eventually be, designated by the UN.[617] Within days, more than US$ 40 billion in assets believed to be directly or indirectly controlled by Qaddafi were frozen around the world.[618] On 23 February 2011, the EU 'expressed its grave concern regarding the situation unfolding in Libya…[and] strongly condemned the violence and use of force against civilians and deplored the repression against peaceful demonstrators'.[619] The EU imposed sanctions on Libya on 28 February 2011, less than a fortnight after the conflict began.[620] The EU sanctions regime implemented the UN sanctions and included an arms embargo,[621] travel ban,[622] and asset freeze[623] against designated individuals and entities. Other States also implemented the UN sanctions regime domestically.[624]

One day *prior* to the UN sanctions, on 25 February 2011, the United States imposed sanctions against Libya in response to the Libyan government's 'extreme measures against the people of Libya, including by using weapons of war, mercenaries, and wanton violence

[616] For more on this see: Carisch, Rickard-Martin, and Meister, above n 482, 436.
[617] Ibid.
[618] Ibid.
[619] *Council Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya* [2011] OJ L 58, preamble [1].
[620] Ibid.
[621] Ibid, art 1.
[622] Ibid, art 5.
[623] Ibid, art 6.
[624] See, eg, *Charter of the United Nations (Sanctions – Libya) Regulations 2011* (Cth) (Australia); *Regulations Implementing the United Nations Resolution on Libya and Taking Special Economic Measures*, SOR/2011-51 (Canada); *Regulations Amending the Regulations Implementing the United Nations Resolution on Libya and Taking Special Economic Measures*, SOR/2011-172 (Canada); *Regulations Amending the Regulations Implementing the United Nations Resolution on Libya and Taking Special Economic Measures*, SOR/2011-198 (Canada); *Regulations Amending the Regulations Implementing the United Nations Resolution on Libya*, SOR/2013-160 (Canada).

against unarmed civilians'.[625] The sanctions imposed asset freezes on over $30billion in government assets and were specifically targeted at, *inter alia*, individuals 'responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or [who]…have participated in, the commission of human rights abuses related to political repression in Libya'.[626] The US sanctions regime was specifically geared to 'deprive Qaddafi of the resources necessary to sustain his assault, to preserve Libya's wealth for its people, and to signal to Qaddafi and his allies that they were isolated'.[627] The formulation and implementation of the US sanctions reveals both the expansionary and restraining influence of intercession under R2P. The imposition of sanctions by the US prior to the authorisation of Security Council mandated sanctions is a significant change in State practice, indicating a greater freedom to impose sanctions without offending limits that had been previously understood to apply. The restraining influence of intercession can be seen in the US exercising self-restraint in ensuring that their sanctions were formulated and imposed in such a way that they are more humane and minimise impact on the general population, by targeting those responsible for the commission of atrocity crimes through travel bans and asset freezes.

5 *Syria*

The conflict in Syria commenced in March 2011 as part of the Arab Spring, after the arrest and torture of some teenagers who painted revolutionary slogans on a school wall.[628]

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[625] Exec Order No 13,566, 76 Fed. Reg. 41 (25 February 2011). See also Helene Cooper and Mark Landler, 'U.S. Imposes Sanctions on Libya in Wake of Crackdown', *The New York Times* (online), 25 February 2011, <http://www.nytimes.com/2011/02/26/world/middleeast/26diplomacy.html>.
[626] Exec Order No 13,566, 76 Fed. Reg. 41 (25 February 2011), s 1(b)(iii).
[627] Jose W Fernandez, 'Smart Sanctions: Confronting Security Threats with Economic Statecraft' (Speech delivered at the World Affairs Council of Northern California, San Francisco, 25 July 2012) <http://www.worldaffairs.org/media-library/event/950#.WjH-Ed-WYdU>.
[628] 'Syria: The story of the conflict', *BBC News* (online), 11 March 2016, <http://www.bbc.com/news/world-middle-east-26116868>.

By June 2013, the United Nations estimated that 90,000 people had been killed.[629] By August 2015, that figure had climbed to 250,000 killed, with 12 million people displaced.[630] Throughout the conflict there have been reports of atrocity crimes committed by both government and opposition forces.[631]

(a) United Nations sanctions

Attempts by the Security Council to impose sanctions in relation to the conflict in Syria have been repeatedly thwarted due to Russia and China continuing to exercise their vetos.[632] Even the alleged use of chemical weapons against the civilian population by the Syrian government,[633] has not resulted in the imposition of UN sanctions. In 2014, the Security Council did impose targeted sanctions against six individuals accused of terrorist acts in the region.[634] Syria, however, is a conflict where important sanctions have been imposed at regional and unilateral levels, offering a vivid demonstration of the influence of R2P on State practice implementing measures of intercession.

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[629] Megan Price, Jeff Klingner, Anas Qtiesh, and Patrick Ball, 'Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic' (commissioned by the Office of the UN High Commissioner for Human Rights, 13 June 2013) <https://hrdag.org/wp-content/uploads/2013/06/HRDAG-Updated-SY-report.pdf>.

[630] United Nations Security Council, 'Alarmed by Continuing Syria Crisis, Security Council Affirms its Support for Special Envoy's Approach in Moving Political Solution Forward' (Press Release, SC/12008,17 August 2015) <http://www.un.org/press/en/2015/sc12008.doc.htm>.

[631] For more see: *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, Human Rights Council, UN GAOR, 34th sess, Agenda Item 4, UN Doc A/HRC/34/64 (2 February 2017); *Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016-28 February 2017: Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic*, Human Rights Council, UN GAOR, 34th sess, Agenda Item 4, UN Doc A/HRC/34/CRP.3 (10 March 2017).

[632] Since the conflict in Syria began, Russia has exercised its veto seven times and China has exercised its veto six times.

[633] Chemical weapons were allegedly used in Damascus on 21 August 2013 and Khan Sheikhoun on 18 April 2017.

[634] SC Res 2170, UN Doc S/RES/2170, [18]-[21].

(b) Sanctions imposed by regional organisations and States

The Arab League suspended Syria's membership on 14 November 2011,[635] and approved sanctions against Syria shortly thereafter, the first time the Arab League has taken such steps against a Member State.[636] The sanctions included a travel ban on senior Syrian officials and a freeze on assets linked to the Syrian government.[637] Under the sanctions regime all dealings with the Syrian Central Bank ceased and trade with Syria was suspended, with the exception of food.[638] In relation to the sanctions, Qatar Prime Minister Hamad bin Jassim al-Thani commented that 'We have responsibilities not only as Arabs but as human beings to stop the bloodshed in Syria'.[639] The willingness of the Arab League to impose sanctions against a Member State indicates a significant change in practice aligned with the concept of intercession and consistent with the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes. The restraint required by R2P when imposing sanctions can also be seen in the exclusion of food from the embargo, and the targeting of only those responsible for attacks against civilians for sanctions.

On 29 April 2011, the EU 'expressed its grave concern about the situation unfolding in Syria and the deployment of military and security forces in a number of Syrian cities',[640] and 'strongly condemned the violent repression, including through the use of live ammunition, of peaceful protest in various locations across Syria resulting in the death of

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[635] 'Syria defiant and EU steps up sanctions', above n 453.
[636] 'Arab league place sanctions against 17 Syrian officials and includes a ban on flights', *Al Arabiya News* (online), 1 December 2011, <https://www.alarabiya.net/articles/2011/12/01/180249.html>; 'Assad on borrowed time as Arab sanctions against Syria kick in', above n 454.
[637] 'Arab league place sanctions against 17 Syrian officials and includes a ban on flights', above n 636.
[638] 'Arab League votes to impose sanctions against Syria', *CNN* (online), 28 November 2011, <http://edition.cnn.com/2011/11/27/world/meast/syria-unrest/>.
[639] Ibid.
[640] *Council Decision 2011/273/CFSP concerning restrictive measures against Syria* [2011] OJ L 121, preamble [1].

several demonstrators, wounded persons and arbitrary detentions'.[641] The EU stated that '[i]n view of the seriousness of the situation, restrictive measures should be imposed against Syria and against persons responsible for the violent repression against the civilian population in Syria'[642] and imposed sanctions, which remain in force as at 30 December 2017.[643] The EU sanctions regime includes an embargo on

> [t]he sale, supply, transfer or export of arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned, as well as equipment which might be used for internal repression, to Syria.[644]

The EU sanctions regime also included a travel ban on 'persons responsible for the violent repression against the civilian population in Syria, and persons associated with them',[645] and an asset freeze targeted at 'persons responsible for the violent repression against the civilian

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[641] Ibid, preamble [2].
[642] Ibid, preamble [3].
[643] See, eg, *Council Decision 2013/255/CFSP concerning restrictive measures against Syria* [2013] OJ L 147; *Council Decision 2013/760/CFSP amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2013] OJ L 335; *Council Decision 2014/74/CFSP amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2014] OJ L 40; *Council Decision 2014/309/CFSP amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2014] OJ L 160; *Council Decision 2014/901/CFSP amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2014] OJ L 358; *Council Decision (CFSP) 2015/837 amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2015] OJ L 132; *Council Decision (CFSP) 2015/1836 amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2015] OJ L 266; *Council Decision (CFSP) 2016/850 amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2016] OJ L 141; *Council Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011* [2012] OJ L 16; *Council Regulation (EU) No 168/2012 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2012] OJ L 54; *Council Regulation (EU)* No *509/2012 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2012] OJ L 156; *Council Regulation (EU) No 545/2012 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2012] OJ L 165; *Council Regulation (EU) No 867/2012 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2012] OJ L 257; *Council Regulation (EU) No 325/2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2013] OJ L 102; *Council Regulation (EU) No 697/2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2013] OJ L 198; *Council Regulation (EU) No 1332/2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2013] OJ L 335; *Council Regulation (EU) No 124/2014 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2014] OJ L 40; *Council Regulation (EU) No 1323/2014 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2014] OJ L 358; *Council Regulation (EU) 2015/827 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2015] OJ L 132; *Council Regulation (EU) 2015/1828 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria* [2015] OJ L 266; *Council Decision (CFSP) 2016/850 amending Decision 2013/255/CFSP concerning restrictive measures against Syria* [2016] OJ L 141.
[644] *Council Decision 2011/273/CFSP concerning restrictive measures against Syria* [2011] OJ L 121, art 1.
[645] Ibid, art 3.

population in Syria, and natural or legal persons, and entities associated with them'.[646] On 23 October 2011, the European Council stated 'that the Union would impose further measures against the Syrian regime as long as the repression of the civilian population continued'[647] and that '[i]n view of the gravity of the situation in Syria, the Council considers it necessary to impose additional restrictive measures'.[648] The sanctions regime was expanded to include a prohibition on the 'sale, supply, transfer or export of equipment or software intended primarily for use in the monitoring or interception by the Syrian regime, or on its behalf, of the Internet and of telephone communications on mobile or fixed networks in Syria',[649] as well as a prohibition on 'purchase, import or transport' of oil and petroleum products[650] and certain restrictions on trade[651] and financial services.[652] The EU sanctions regime was expressed to have the aim of 'helping the Syrian civilian population, in particular to meeting humanitarian concerns'.[653]

The formulation and implementation of the EU sanctions regime reveals both the expansionary and restraining influence of intercession under R2P. The EU's imposition of sanctions against a non-Member State in the absence of Security Council mandated sanctions demonstrates a significant change in State practice consistent with the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes. Intercession, in this context, has provided the regional organisation with a means of responding to atrocity crimes that it might previously have felt unable to. The restraining influence of R2P can be seen in the targeting of only those responsible for the commission of atrocity crimes by way of travel bans and asset

[646] Ibid, art 4.
[647] *Council Decision 2011/782/CFSP concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP* [2011] OJ L 319, preamble [2].
[648] Ibid, preamble [3].
[649] Ibid, art 3.
[650] Ibid, art 4.
[651] Ibid, art 12.
[652] Ibid, art 8 and arts 13-17.
[653] *Council Decision 2013/255/CFSP concerning restrictive measures against Syria* [2013] OJ L 147, art 6.

freezes, and the embargos imposed with a view to minimising the means available to commit those crimes by restricting the availability of arms, and financial and technical means.

On 29 April 2011, the United States tightened its unilateral sanctions program against Syria in response to the government of Syria's

> human rights abuses, including those related to the repression of the people of Syria, manifested most recently by the use of violence and torture against, and arbitrary arrests and detentions of, peaceful protestors by police, security forces, and other entities that have engaged in human rights abuses.[654]

The sanctions included an asset freeze imposed on the property of Syrian officials and others accused of being 'responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or…[who] have participated in, the commission of human rights abuses in Syria, including those related to repression'.[655] On 18 May 2011, the United States expanded the asset freeze, taking

> additional steps with respect to the Government of Syria's continuing escalation of violence against the people of Syria – including through attacks on protestors, arrests and harassment of protestors and political activists, and repression of democratic change, overseen and executed by numerous elements of the Syrian government.[656]

Asset freezes were thus imposed on the property of additional Syrian officials, including President Bashir al-Assad, and any person determined to be a senior official of the Syrian government.[657] On 17 August 2011, in response to the 'Government of Syria's continuing escalation of violence against the people of Syria',[658] the United States imposed additional sanctions on Syria including a further asset freeze, ban on Syrian-origin petroleum products, and prohibition on US citizens operating or investing in Syria.[659] The US sanctions regime was further expanded in response to the 'commission of serious human rights abuses' to

[654] Exec Order No 13,572, 76 Fed. Reg. 85 (29 April 2011).
[655] Ibid, s 1(b)(i).
[656] Exec Order No 13,573, 76 Fed. Reg. 98 (18 May 2011).
[657] Ibid.
[658] Exec Order No 13,582, 76 Fed. Reg. 172 (17 August 2011).
[659] Ibid, s 2.

include a travel ban and asset freeze on designated individuals.[660] These sanctions were expressed as being 'designed primarily to address the need to prevent entities located in whole or in part in Iran and Syria from facilitating or committing serious human rights abuses'.[661] The US sanctions regime was aimed at depriving 'the regime of the resources it needs to continue violence against civilians'.[662] The willingness of the US to impose sanctions against Syria in the absence of Security Council mandated sanctions, reveals the expansionary influence of intercession under R2P, with the US intervening in circumstances which would traditionally have been prohibited as a domestic matter. The US sanctions also reveal restraint in the targeting of those responsible for the commission of atrocity crimes by way of travel bans and asset freezes, and the arms embargo imposed with a view to minimising the means available to commit those crimes.

Australia's unilateral sanctions against Syria include an arms embargo,[663] and travel bans and asset freezes on any individual providing support for the Syrian regime or responsible for human rights abuses in Syria, including violence against civilians.[664] The Australian sanctions regime also restricts dealings with Syria in relation to oil, petroleum, luxury goods, financial services, equipment intended for monitoring or intercepting communications, and precious metals and gems.[665] In announcing the expansion of Australia's sanctions against Syria in June 2012, then Foreign Minister Carr said the

[660] Exec Order No 13,606, 77 Fed. Reg. 79 (22 April 2012).
[661] Ibid.
[662] Fernandez, above n 627.
[663] *Autonomous Sanctions Regulations 2011* (Cth) (Australia), Reg 4; *Autonomous Sanctions (Export Sanctioned Goods – Syria) Specification 2012* (Cth) (Australia).
[664] *Autonomous Sanctions Regulations 2011* (Cth) (Australia), Reg 6; *Autonomous Sanctions (Export Sanctioned Goods – Syria) Specification 2012* (Cth) (Australia).
[665] *Autonomous Sanctions Regulations 2011* (Cth) (Australia), Reg 4, 4A, 5 and 5A; *Autonomous Sanctions (Export Sanctioned Goods – Syria) Specification 2012 (Cth).*

sanctions were 'necessary to increase pressure on the Assad regime',[666] but were carefully targeted to impact only the regime 'rather than hit the Syrian people'.[667]

Other States, such as Canada,[668] have imposed similar sanctions against Syria. Syria's delegate to the General Assembly Sixth Committee objected to the imposition of unilateral sanctions against Syria, stating that '[t]he rule of law could never be realized if States continued to threaten and disrupt the internal affairs of others, support extremists abroad, and apply unilateral sanctions'.[669] However, the fact that numerous States and regional organisations have responded to the atrocity crimes in Syria by imposing sanctions reveals a significant change in State practice consistent with the secondary duty under R2P. The willingness of many States and regional organisations to impose sanctions against Syria in response to events occurring domestically, and in the absence of a Security Council resolution mandating a sanctions regime, indicates that States perceive there to now be a greater scope to impose sanctions without offending limits that had been previously understood to apply. However, this expansion is simultaneously tempered by the restraining influence of intercession which can be seen in States exercising self-restraint in ensuring that sanctions in relation to Syria have been formulated and imposed in such a way that they are

[666] 'Australia increases pressure on Syria's Assad regime', *The Daily Telegraph* (online), 25 June 2012, <https://www.dailytelegraph.com.au/news/national/australia-announces-new-syria-sanctions/news-story/c59803356fd25f8642705ee739b18386?sv=721fc15f99d8e64b44578bec3325e7ba>.
[667] 'New Syrian sanctions aimed at regime', *The Sydney Morning Herald* (online), 25 June 2012, <http://www.smh.com.au/federal-politics/political-news/new-syria-sanctions-aimed-at-regime-20120624-20wjz.html>.
[668] See, eg, *Special Economic Measures (Syria) Regulations*, SOR/2011-114; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2011-166; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2011-220; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2011-330; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-6; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-35; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-74; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-107; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-145; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-166; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2012-249; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2014-011; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2017-62; *Regulations Amending the Special Economic Measures (Syria) Regulations*, SOR/2017-69.
[669] United Nations General Assembly, 'Syria Calls for Application of Rule of Law in "Unimaginable" Situation Facing Country, as Sixth Committee Concludes Rule of Law Debate' (Press Release, GA/L/3437, 11 October 2012) < https://www.un.org/press/en/2012/gal3437.doc.htm>.

more humane and minimise impact on the general population by being limited to denial of means by way of arms embargoes, and targeted at those responsible for the commission of atrocity crimes by way of travel bans and asset freezes.

6 *Central African Republic ('CAR')*

The conflict in the CAR began in 2013 when an armed group, the Séléka, seized power and ousted the elected president, installing their leader in his place.[670] Subsequent conflict between the Séléka and militia groups, the largest known as the anti-Balaka, has been characterised by numerous attacks on the civilian population, large scale unlawful killings, forced disappearances, torture, sexual and gender-based violence, cruel, inhuman or degrading treatments, arbitrary arrests, unlawful detentions, recruitment of children, as well as destruction of homes and other properties and widespread pillaging.[671]

(a) United Nations sanctions

The Security Council has passed several resolutions in relation to the situation in the CAR.[672] Each of these resolutions, in accordance with R2P, emphasised that the primary responsibility to protect the population of the CAR lay with the transitional authorities, acting as the interim government of the CAR.[673] In response to 'violations of international humanitarian law and the widespread human rights violations and abuses'[674] and recognising 'the need for the international community to respond swiftly',[675] the Security Council

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[670] OHCHR, *Report of the Mapping Project documenting serious violations of international human rights law and international humanitarian law committed within the territory of the Central African Republic between January 2003 and December 2015* (MINUSCA & OHCHR, 2016) <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/CARProjetMapping2003-2015.aspx>, 13.
[671] Ibid, 15.
[672] These include SC Res 2121, UN Doc S/RES/2121; SC Res 2127, UN Doc S/RES/2127; SC Res 2134, UN Doc S/RES/2134; SC Res 2149, UN Doc S/RES/2149; SC Res 2181, UN Doc S/RES/2181; SC Res 2196, UN Doc S/RES/2196 and SC Res 2212, UN Doc S/RES/2212.
[673] See, eg, SC Res 2127, UN Doc S/RES/2127 and SC Res 2134, UN Doc S/RES/2134 which both refer to the primary responsibility of the Transitional Authorities to protect the civilian population in their preamble.
[674] SC Res 2127, UN Doc S/RES/2127 (5 Dec 2013), preamble.
[675] Ibid.

imposed sanctions in relation to the CAR on 5 December 2013. The sanctions regime included an embargo on

> arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories.[676]

The resolution noted the Security Council's 'strong intent to swiftly consider imposing targeted measures, including travel bans and assets freezes, against individuals who act to undermine the peace, stability and security'.[677] In January 2014, in response to 'multiple and increasing violations of international humanitarian law and the widespread human rights violations and abuses',[678] additional sanctions, in the form of an extension to the arms embargo,[679] and the imposition of travel bans[680] and asset freezes[681] against designated individuals and entities, were imposed by the Security Council. The UN sanctions are consistent with the secondary duty of the international community under R2P to 'help to protect' populations from atrocity crimes. They have also been formulated to target those responsible for the commission of atrocities against the civilian population and to restrict the means of committing those crimes by restricting the flow of arms to the CAR.

(b) Sanctions imposed by regional organisations and States

The EU implemented UN sanctions against the CAR in December 2013. The sanctions regime includes an embargo on the 'sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and

[676] Ibid, [54]. The embargo has reportedly been adhered to: *Final Report of the Panel of Experts on the Central African Republic established pursuant to Security Council Resolution 2127 (2013)*, UN Doc S/2014/762 (29 October 2014).
[677] SC Res 2127, UN Doc S/RES/2127, [56].
[678] SC Res 2134, UN Doc S/RES/2134, preamble.
[679] Ibid, [40].
[680] Ibid, [30].
[681] Ibid, [32].

equipment, paramilitary equipment, and spare parts for the aforementioned'.[682] In March 2014, the arms embargo was reaffirmed[683] and additional measures were introduced in the form of travel bans[684] and asset freezes[685] against individuals and entities designated in the UN sanctions. The criteria for inclusion in these targeted measures was expressed to include, *inter alia*,

> being involved in planning, directing or committing acts that violate international human rights law or international humanitarian law, as applicable, or that constitute human rights abuses or violations, in the Central African Republic, including acts involving sexual violence, targeting of civilians, ethnic- or religious-based attacks, attacks on schools and hospitals, and abduction and forced displacement.[686]

Other States also implemented the UN sanctions regime domestically.[687]

In May 2014, in response to the 'breakdown of law and order, intersectarian tension, widespread violence and atrocities, and the pervasive, often forced recruitment and use of child soldiers', the US imposed targeted sanctions, including an arms embargo, travel ban, and asset freeze, on individuals contributing to the conflict.[688] The sanctions were targeted at individuals involved in, *inter alia*,

> the targeting of women, children, or any civilians through the commission of acts of violence (including killing, maiming, torture, or rape or other sexual violence), abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law.[689]

The US sanctions were more expansive than the UN sanctions and included unilateral sanctions against individuals not named in the UN sanctions, as part of 'ongoing efforts to target those responsible for fuelling violence and human rights abuses in the Central African

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[682] *Council Decision 2013/798/CFSP concerning restrictive measures against the Central African Republic* [2013] OJ L 352, art 1.
[683] *Council Decision 2014/125/CFSP amending Decision 2013/798/CFSP concerning restrictive measures against the Central African Republic* [2014] OJ L 70, art 1.
[684] Ibid, art 2(a).
[685] Ibid, art 2(b).
[686] Ibid, art 2(a)(1)(b).
[687] See, eg, *Charter of the United Nations (Sanctions – Central African Republic) Regulation 2014* (Cth) (Australia); *Regulations Implementing the United Nations Resolutions on the Central African Republic*, SOR/2014-163 (Canada).
[688] Exec Order No 13,667, 79 Fed. Reg. 94 (12 May 2014).
[689] Ibid, s 1(a)(ii)(A)(4).

Republic'.[690] The US sanctions against CAR is an important instance of intercession. The US applied sanctions that were not UN mandated, expressly on the basis of responding to atrocity crimes. Further, the US exercised self-restraint in ensuring that the sanctions targeted those responsible for the commission of atrocity crimes through travel bans and asset freezes, and minimised impact on the general population.

7 *The Significance of this Sanctions Practice*

The above analysis demonstrates that contemporary regional and unilateral sanctions practice, which (unlike sanctions authorised by the Security Council) is limited by other principles of international law such as non-intervention, is more expansive than previous sanctions practice. This evolving regional and unilateral sanctions practice illustrates the value of measures of intercession as a response to atrocity crimes in accordance with the secondary duty on the international community under R2P.

The evolving practice of regional organisations in the implementation of sanctions reveals that R2P is influencing the conduct of regional organisations, resulting in a more expansive sanctions practice. In the conflicts in the DRC, Sudan, and Syria, the EU imposed sanctions against a non-Member State either prior to, in addition to, or in the absence of UN sanctions. In the DRC, the EU imposed an arms embargo nearly nine months *before* the UN sanctions, and the EU sanctions regime continues to include travel bans and asset freezes which are more expansive than the UN sanctions and targeted against individuals not named in the UN sanctions. In relation to Sudan, the EU imposed an embargo on exports of arms, munitions and military equipment to Sudan and a ban on the provision of technical and financial assistance related to military activities in Sudan months *before* the imposition of the

[690] Joe Bavier, 'Central African Republic militia leaders hit with U.S. sanctions', *Reuters* (online), 13 April 2017 <https://www.reuters.com/article/us-centralafrica-usa-sanctions/central-african-republic-militia-leaders-hit-with-u-s-sanctions-idUSKBN17E2FS>.

UN sanctions regime. In Syria, where the UN has not imposed sanctions, the EU has again imposed sanctions in the form of travel bans and asset freezes, and embargoes.

This more expansive regional practice is not limited to the EU. In relation to the conflict in Syria, the Arab League suspended Syria's membership of the League, and imposed travel bans and asset freezes, the first time the Arab League has taken such steps against a Member State. Following the cancellation of presidential election results in Côte d'Ivoire, the African Union suspended the participation of Côte d'Ivoire in AU activities, and ECOWAS imposed travel bans and asset freezes. The willingness of the Arab League, African Union and ECOWAS to impose sanctions against Member States indicates a significant change in practice aligned with the concept of intercession and consistent with the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes. The increasing adoption of sanctions by regional organisations, and in the case of the EU even against non-Member States, suggests that there is now a greater scope to impose regional sanctions without offending limits that had been previously understood to apply.

Analysis of these measures also reveals the exercise of considerable self-restraint on the part of regional organisations in ensuring that sanctions are formulated and imposed in such a way that they are more humane and minimise impact on the general population. EU sanctions in the DRC, Sudan and Syria, and AU and ECOWAS sanctions in Côte d'Ivoire, have all been limited to measures such as asset freezes, travel bans, and embargoes in order to target only those responsible for the commission of atrocities and ongoing conflict. In addition, the express exclusion of food in the Arab League sanctions against Syria is evidence of the emerging obligation, flowing from the secondary duty on the international community under R2P, to minimise the impact of sanctions on the general population.

Analysis of the unilateral sanctions practice of States also demonstrates a more expansive practice than previously. In the DRC, the US imposed travel bans and asset freezes, and an embargo on conflict minerals, measures that were broader than the UN sanctions. In Libya, the US imposed sanctions *before* the UN sanctions, and other States also took unilateral action in freezing the assets of individuals who were not yet, but would eventually be, designated by the UN. In the CAR, the US imposed sanctions that were more expansive than the UN sanctions and included sanctions targeted against individuals not designated by the UN sanctions. In Syria, sanctions have been imposed at a unilateral level by many States, demonstrating the influence of R2P on State practice implementing measures of intercession. In the absence of Security Council mandated sanctions, Australia, Canada and the US have all imposed unilateral sanctions, but in so doing have stressed their careful targeting to avoid adverse consequences for civilians, and their focus on measures which will directly contribute to depriving those committing atrocity crimes of the ability to continue to do so.

The increasing adoption of sanctions by regional organisations and individual States suggests that there is now a greater scope to impose regional or unilateral sanctions without offending limits (such as the principle of non-intervention, analysed further below) that had been previously understood to apply. Analysis of these measures also reveals the exercise of considerable self-restraint on the part of regional organisations and States in ensuring that sanctions are formulated and imposed in such a way that they are more humane and minimise impact on the general population.

E *Evolution of the Principle of Non-Intervention*

Critics of unilateral sanctions 'have argued that economic intervention in the affairs of foreign [S]tates – and particularly extraterritorial measures that target third parties – violate

public international law principles of non-intervention'.[691] As shown in Chapter II, the principle of non-intervention is generally considered to provide the State with protection from outside interference in matters within the State's domestic jurisdiction[692] and has been held by the ICJ to be customary international law.[693] As demonstrated in Chapter II, the high watermark of the principle of non-intervention can be seen in *Nicaragua*, where the Court regarded as consistent with this principle only cessation of aid and imposition of economic measures,[694] and the provision of strictly humanitarian aid without discrimination.[695]

The legality of sanctions imposed by regional organisations and unilaterally is not settled. Prior to the adoption of the *Friendly Relations Declaration*, only Bolivia made an express reference to economic sanctions as a measure contrary to the principle of non-intervention.[696] Even in *Nicaragua*, it must be recalled, in response to Nicaragua's complaint that US cessation of aid and imposition of a trade embargo amounted to indirect intervention,[697] the ICJ held that it was 'unable to regard such action on the economic plane as a breach of the customary-law principle of non-intervention'.[698] The Court did not discuss what threshold would need to be met in order for economic pressure to amount to a prohibited intervention.[699]

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[691] Sarah Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 *Yale Journal of International Law* 1, 6.
[692] The *Tallinn Manual 2.0* expresses this as 'those matters on which international law does not speak or that international law leaves solely to the prerogative of States constitute *domaine réservé* and are therefore to be regarded as protected from intervention by other States': Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, above n 48, 314.
[693] *DRC v Uganda* [2005] ICJ Rep 168, [161]-[163]; *Nicaragua* [1986] ICJ Rep 14, [202]; *Corfu Channel* [1949] ICJ Rep 4, 35.
[694] *Nicaragua* [1986] ICJ Rep 14, [245].
[695] Ibid, [242].
[696] *Statement made by Bolivia before the UNGA Sixth Committee*, A/C.6/SR.1811 (25 September 1970) [22].
[697] *Nicaragua* [1986] ICJ Rep 14, [123] and [125].
[698] Ibid, [245].
[699] For more on this point see Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 370.

Some more recent scholarship remains uncertain as to the legal status of sanctions not imposed by the UN Security Council. Thus, Hofer has written that 'legal doctrine generally finds that the limitations of economic coercion are a grey area of international law'.[700] Ruys has similarly argued that 'it remains altogether unclear to what extent exactly the principle of non-intervention prohibits certain economic sanctions'.[701]

The extensive sanctions practice examined in this Chapter suggests that there is a new approach emerging, suggesting an evolution in the customary international law principle of non-intervention. Whether this evolution is fully complete, such that it could be said that the customary principle has been modified, may be difficult to determine without additional future practice and expressions of *opinio juris*. However, the body of State practice assessed in this Chapter is already highly significant, and suggests that R2P now permits States to undertake measures of intercession in response to atrocity crimes that would previously have been impermissible. This is consistent with Tzanakopoulos' recent conclusion that 'illegal acts of economic coercion barely exist in present-day international law'.[702] Indeed, this Chapter has not merely shown an evolution in practice, but has demonstrated that this change has taken place under the clear influence of R2P, and in the context of the reconceptualisation of sovereignty as responsibility that it entails. Thus, there has been an evolution at both the conceptual and practical levels, and possibly even an emergent change in customary international law.

However, although the above analysis has demonstrated that there have been remarkably few State critiques of individual sanctions regimes (except from the target States

[700] Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 *Chinese Journal of International Law* 175, 175.
[701] Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', above n 471, 7.
[702] Antonios Tzanakopoulos, 'The Right to Be Free From Economic Coercion' (2015) 4 *Cambridge Journal of International and Comparative Law* 633.

themselves), this modern practice has occurred against a background of more general opposition by some States (at least at a rhetorical level) to unilateral sanctions. The Human Rights Council has established a Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, and there have been twenty one resolutions on 'Human rights and unilateral coercive measures' adopted (albeit with significant opposition) at the General Assembly since 1996.[703] In December 2015, the General Assembly, by a vote of 135 to 54,[704] called upon States to refrain from the use of unilateral sanctions.[705] As Hofer observes, this serves to 'illustrate tension between the aspirations of developing countries to restrict the use of economic coercion, even when their alleged aim is to enforce compliance with essential international norms, and the continuing practice of developed States'.[706]

As the analysis of contemporary sanctions practice above demonstrates, the EU, the United States, Canada and Australia, among others, have been prolific users of sanctions as a tool to respond to atrocity crimes occurring in other States. According to the United States, '[u]nilateral and multilateral sanctions [are]… a legitimate means to achieve foreign policy, security, and other national and international objectives. The United States …[is] not alone in that view or practice'.[707] The EU argues that

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[703] Hofer, above n 700, 186.

[704] UN GAOR, 70th sess, 80th plen mtg, UN Doc A/70/PV.80 (17 December 2015). The 54 States which voted against the resolution are: Albania, Andorra, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Micronesia (Federated States of), Monaco, Montenegro, Netherlands, New Zealand, Norway, Palau, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

[705] *Human rights and unilateral coercive measures*, GA Res 70/151, UN GAOR, 70th sess, 80th plen mtg, Agenda Item 72(b), UN Doc A/RES/70/151 (7 March 2016).

[706] Hofer, above n 700, 196.

[707] *Statement made by the US before the UNGA Third Committee*, A/C.3/70/SR.52 (20 November 2015), [32]. See also A/C.3/64/SR.42 (12 November 2009), [56]; A/C.3/ 66/SR.44 (15 November 2011), [60]; A/C.3/67/SR.44 (26 November 2012), [12]; A/C.3/68/SR.49 (21 November 2013), [54]; A/C.3/69/SR.52 (24 November 2014), [33]. See also Hofer, above n 700, 189.

> unilateral economic measures [are] admissible in certain circumstances, in particular when necessary in order to fight terrorism and the proliferation of weapons of mass destruction, or to uphold respect for human rights, democracy, the rule of law and good governance.[708]

Further, even developing States have shown that they are 'willing to adopt sanctions depending on the norm that is at stake'.[709] In March 2017, Iran – an outspoken critic of unilateral sanctions – adopted sanctions against fifteen US companies for supporting Israel by providing arms and equipment.[710] Moreover, as this Chapter has already demonstrated, the AU and ECOWAS both adopted measures in respect of Côte d'Ivoire.

In addition, the analysis of UN sanctions above demonstrates that there has been a noticeable shift in UN sanctions practice towards the use of targeted sanctions in contemporary conflicts, and that this development has been motivated by R2P. This exercise of restraint in the imposition of sanctions, consistent with R2P, has been welcomed by a broad cross-section of States. Egypt, speaking for the African Group, had stated that '[s]anctions should…be non-selective and targeted to mitigate their humanitarian effects'.[711] Iran, on behalf of the Non-Aligned Movement, has stated that sanctions are 'not meant to punish or exact retribution on the populace'.[712] China has observed that 'the Security Council should continue to exert caution in applying such measures, avoiding negative impact on third States and civilians and ensuring that sanctions were applied in compliance with the United Nations Charter and relevant norms of international law'.[713] India has noted that 'the shift from comprehensive to targeted sanctions had reduced the incidence of unintended harm' and Tunisia has indicated that 'sanctions should be applied as a last possible resort [and] should not target civilian populations and should be mindful of the

[708] *Statement made on behalf of the EU before the UNGA Second Committee*, A/C.2/62/SR.28 (16 November 2007) [30] (Portugal speaking on behalf of the EU).
[709] Hofer, above n 700, 211.
[710] Maya Lester, 'USA and Iran impose sanctions on new people & entities European Sanctions' (28 March 2017) <https://europeansanctions.com/2017/03/28/iran-imposes-sanctions-on-15-us-firms/>.
[711] 'Syria Calls for Application of Rule of Law in "Unimaginable" Situation Facing Country, as Sixth Committee Concludes Rule of Law Debate', above n 669.
[712] Ibid.
[713] Ibid.

interests of neighbouring States'.[714] This restraint in the formulation and imposition of UN sanctions is consistent with the practice examined in this Chapter in respect of regional and unilateral sanctions, and contributes to a coherent picture of restraint being exercised in the imposition of sanctions consistently with the secondary duty of the international community under R2P to use non-forcible means to 'help to protect' populations from atrocity crimes.

In addition, the above analysis of the contemporary sanctions practice of States and regional organisations demonstrates that they use unilateral sanctions 'as a foreign policy weapon to promote…humanitarian policy goals abroad'.[715] The frequent and more expansive use of sanctions by States and regional organisations as a tool of intercession to respond to atrocity crimes suggests that there is now a greater scope to impose sanctions in response to atrocity crimes occurring in other States without violating the principle of non-intervention. The EU's imposition of sanctions against non-Member States, specifically the DRC, Sudan and Syria, either prior to, or in the absence of, Security Council mandated sanctions, demonstrates that sanctions are an important example of measures of intercession being implemented in a situation where previously regional organisations might have felt unable to act. The response of the AU and ECOWAS to the unfolding situation in Côte d'Ivoire also reveals a more expansive sanctions practice and increased willingness on the part of regional organisations to utilise measures of intercession. In addition to the expansion in permissible measures, this practice by regional organisations demonstrates the restraining influence of R2P in the targeting of only those responsible for the commission of atrocity crimes by way of travel bans and asset freezes, and the embargos imposed with a view to minimising the means available to commit those crimes by restricting the availability of arms, and financial and technical means.

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[714] Ibid.
[715] Cleveland, above n 691, 4-5.

The unilateral sanctions applied by States against the DRC, Libya, the CAR, and particularly Syria, in the absence of, or prior to, Security Council mandated sanctions further reveals the expansion in the use of sanctions as a permissible measure to respond to atrocity crimes. In each of these situations, States have applied sanctions that were not UN mandated expressly on the basis of responding to atrocity crimes, and expressly designed sanctions in accordance with the restraint of intercession under R2P. This State practice indicates that States are interpreting the principle of non-intervention even at least as narrowly as the ICJ in *Nicaragua,* in order to maximise the permissible measures available to respond to atrocity crimes, albeit subject to limitations arising from the secondary duty under R2P.

F *Conclusion*

This Chapter examined the evolving State practice in the implementation of sanctions as a tool of intercession under R2P. Analysis of recent sanctions practice revealed that there has been a significant evolution in the formulation and implementation of sanctions. The enhanced scope of sanctions imposed by regional organisations and States unilaterally in situations where there have been atrocity crimes, but which traditionally may have been seen as prohibited as a domestic matter, is inspired by the secondary duty under R2P to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes.

The increasing adoption of sanctions by regional organisations against non-Member States, and individual States unilaterally, in the absence of Security Council mandated sanctions suggests that there is now a greater scope to impose sanctions without offending limits that had been previously understood to apply. For example, EU sanctions in relation to DRC and Sudan, US sanctions in relation to Libya, and sanctions against Syria, were all imposed prior to, or in the absence of, any Security Council mandated sanctions. This

indicates a greater perceived freedom on the part of regional organisations and States to impose sanctions in response to the commission of atrocity crimes occurring in other States, and demonstrates that contemporary regional and unilateral sanctions practice is more expansive than previous sanctions practice.

The lack of specific objections to this practice by other States (notwithstanding the existence of the more general opposition to unilateral coercive measures examined above) is indicative of a form of acquiescence in this practice. One reason for this is the close conceptual link that this Chapter has demonstrated between these forms of intercession and R2P, and the consistency of the actions taken with the reconceptualization (examined in Chapters II and III) of sovereignty as responsibility under R2P. This bears out the analysis in Chapter IV which suggested pathways through which R2P could come to influence State practice in a significant way. Another reason for this form of acquiescence, demonstrated in the responses of States to UN sanctions practice examined above, is that the exercise of restraint in the formulation and imposition of sanctions has been clear.

Indeed, this expansion in sanctions practice has been simultaneously tempered by the restraining influence of intercession under R2P, which can be seen in States exercising self-restraint in ensuring that sanctions are formulated and imposed in such a way that they are more humane and minimise impact on the general population. In particular, this can be seen in the evolution in State practice away 'from comprehensive sanctions affecting entire populations to more targeted measures intended to influence the conduct of responsible actors'.[716] This change reveals a clear movement toward the use of targeted sanctions, which are targeted at individuals responsible for the commission of atrocity crimes who can materially influence policy-making and resources that are not essential for civilian

[716] Najwa M Nabti, 'Increasing the Cost of Rape: Using Targeted Sanctions to Deter Sexual Violence in Armed Conflict' in Marossi and Bassett (eds), above n 467, 45.

survival.[717] The imposition of travel bans and asset freezes targeted against those responsible for the commission of atrocity crimes is a particularly clear example of this. Further, the express exclusion of food, for example in the Arab League sanctions against Syria, is evidence of the emerging obligation, flowing from the secondary duty on the international community under R2P, to minimise the impact of sanctions on the general population. Moreover, the use of arms and technology embargoes is illustrative of action carefully tailored to respond directly to facilitators of atrocity crimes. Analysis of these measures reveals self-restraint on the part of regional organisations and States in ensuring that sanctions are formulated and imposed in such a way that they are more humane and minimise impact on the general population, and more directly seek to interrupt atrocity crimes.

While critics of unilateral sanctions argue that they violate the principle of non-intervention, this was not the view adopted by the Court in *Nicaragua*, and the analysis of contemporary State practice above has demonstrated that there is now a greater scope to impose sanctions in response to atrocity crimes occurring in other States without offending limits that had been previously understood to apply. Sanctions have been imposed by regional organisations and States unilaterally in situations where such measures may traditionally have been seen as impermissible, in order to respond to atrocity crimes occurring in other States. That other States have either also imposed unilateral sanctions, or, at a minimum acquiesced in the imposition of these sanctions, suggests that there has been a narrowing of the customary international law principle of non-intervention to permit the use of sanctions as a tool of intercession to respond to atrocity crimes.

This Chapter has revealed intercession at work, in the context of contemporary UN, regional and unilateral sanctions practice where there have been, or have been alleged, one or

[717] Jeremy Farrell, 'The Use of UN Sanctions to Address Mass Atrocities' in Alex J Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (New York, Oxford University Press, 2016), 655-672, 664-667.

more of the four R2P-triggering atrocity crimes – war crimes, genocide, ethnic cleansing, and crimes against humanity. This is intercession at once permitting States to act in response to atrocity crimes in accordance with the secondary duty of the international community under R2P by imposing sanctions, and simultaneously imposing restraint on the manner in which States can impose sanctions as measures of intercession. Next, Chapter VI will examine intercession in another context: new forms of assistance being provided by States to opposition groups in States where atrocity crimes are occurring.

VI ASSISTANCE TO OPPOSITION GROUPS

> The international community's credibility is on the line because we give lip service to the notion that these international norms are important.[718]

> Having said that arming the rebels would in principle be permitted, there is a limitation on this. The purpose of such an act must be to protect civilians or civilian populated areas.[719]

A *Introduction*

States have increasingly looked for additional measures beyond diplomacy (explored in Chapter IV) and sanctions (analysed in Chapter V), but less than the use of force, to respond to atrocity crimes occurring in other States when those other measures have failed. As the analysis of recent State practice in this Chapter will demonstrate, States have increasingly turned to the provision of assistance to opposition groups as a more drastic, but still non-forceful, form of intercession.

The increase in the overt provision of assistance to opposition groups as part of the 'Arab Spring',[720] most notably in the conflicts in Libya and Syria, raises the question of whether the international community is entering a more permissive era, where States can intervene in conflicts earlier, and lawfully take more measures, to respond to atrocity crimes. If this is indeed the case, as a broad reading of the secondary duty of the international community under R2P might suggest, then this raises further questions about the need to temper this expansion in permissible conduct to avoid facilitating or exacerbating the

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[718] Barack Obama, quoted in Patrick Wintour, 'Syria crisis: China joins Russia in opposing military strikes', *The Guardian* (online), 5 September 2013 <https://www.theguardian.com/world/2013/sep/05/syria-china-russia-opposing-military-strikes>.

[719] Dapo Akande, 'Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?' on *EJIL Talk* (31 March 2011) <https://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/>.

[720] Christian Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces' (2013) 36(2) *University of New South Wales Law Journal* 642, 643; Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of *Jus contra Bellum* and *Jus in Bello*' (2013) 18 *Journal of Conflict and Security Law* 59; Julian M Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship between the *Jus in Bello* and *Jus ad Bellum*' (2012) 17 *Journal of Conflict and Security Law* 117.

commission of atrocity crimes, and to combat the threat of colonialism rebranded as assistance.

This Chapter examines the increase in overt support to opposition groups, through analysis of State responses in relation to the contemporary conflicts in Libya and Syria. In this Chapter, I argue that there has been a re-interpretation of the boundaries of the principle of non-intervention since *Nicaragua*, stemming from R2P, to enable States to provide assistance to opposition groups, where such assistance would traditionally have been regarded as prohibited intervention. Together with this expansion in State practice, a simultaneous restraint has emerged, with interceding States considering the consequences of any assistance to opposition groups and refusing to assist opposition groups where that assistance would facilitate or exacerbate the commission of atrocity crimes. For example, in early 2017 in the context of the ongoing conflict in Sudan, the US envoy to Sudan and South Sudan warned that 'some leaders of the Sudanese opposition, especially those with guns, are more than willing to ignore the interests and well-being of ordinary civilians in favor of their own political ambitions' and urged the international community to show restraint in their dealings with rebel group the Sudan People's Liberation Movement – North and to be 'clear-eyed' in dealing with Sudanese opposition groups.[721]

The first part of this Chapter will discuss how the principle of non-intervention traditionally applied in relation to the provision of assistance to government and opposition groups. The second part of this Chapter will discuss the types of assistance provided in the contemporary examples of Libya and Syria, and explore how this State practice reveals the influence of R2P on these measures of intercession. This Chapter argues that there is an

[721] Special Envoy Donald Booth, 'U.S. Special Envoy Speaks on Sudan and South Sudan' (Speech delivered at the U.S. Institute of Peace, 18 January 2017); Lesley Wroughton, 'US envoy warns against being too trusting of Sudan's armed opposition', *Reuters* (online), 19 January 2017, <http://www.reuters.com/article/us-usa-sudan-envoy-idUSKBN15232E>.

emerging practice of permitting, or at a minimum tolerating, assistance to opposition groups in response to atrocity crimes, which may be modifying the application of the principle of non-intervention. At the same time, this expansion in permissible conduct reveals R2P's potential dark side by increasing the situations where the international community might intervene under the guise of helping to 'protect' populations from atrocity crimes, highlighting the need for States to consider the consequences of their actions. This Chapter argues that this is where intercession under R2P also operates as a restraining influence, requiring States to interpret their legal rights and obligations in such a way that the consequences of their assistance to government[722] and opposition groups are explicitly considered, forming a conscious part of the decision-making process, and refrain from providing assistance where it may facilitate or exacerbate the commission of atrocity crimes.

B *The traditional approach: non-intervention and assistance*

The principle of non-intervention 'involves the right of every sovereign State to conduct its affairs without outside interference'.[723] As discussed in Chapter II, the principle of non-intervention[724] is recognised as being customary international law.[725] States have repeatedly reaffirmed that '[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.[726]

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[722] Assistance to government can take many forms and includes trade in conventional arms. See Chapter VII.
[723] *Nicaragua* [1986] ICJ Rep 14, [202].
[724] See also: *Charter of the United Nations* art 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'.
[725] *Nicaragua* [1986] ICJ Rep 14, [246]; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 1147.
[726] *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, UN Doc A/RES/20/2131, [1]; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625.

However, States are permitted to involve themselves in the affairs of another State, provided it is at the invitation of, or with the consent of, the government of that State,[727] 'which may be given ad hoc or in advance by treaty'.[728] States are generally free to, and do, provide various forms of assistance to governments, including the lawful trade in arms.[729] This is relatively uncontentious.[730] In the absence of a Security Council embargo upon a State, there is nothing in principle to preclude States from providing arms and other assistance to the government of a State.[731] However, there is some support for the view that

> when a civil war is identifiable, that is, an internal armed struggle for power within a [S]tate the outcome of which is not certain, [S]tates are under a legal obligation to refrain from intervening in support of *either* side, whether the belligerent parties happen to be two non-governmental forces or the governmental forces of the [S]tate concerned and an opposition force.[732]

Under this view, intervention in support of either side to the conflict means that the intervening State would be influencing the outcome of a conflict thereby preventing the State as a whole from independently determining its political future.[733]

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[727] This is unsurprising, given that the government is the sole representative of the State. For more on intervention by consent, see: Hathaway, Brower, Liss, Thomas and Victor, above n 230; Joseph Klingler, 'Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law' (2014) 55(2) *Harvard International Law Journal* 483, 490; David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 *Duke Journal of Comparative and International Law* 209, 238; Christian Henderson, 'Contested States and the Rights and Obligations of the *Jus ad Bellum*' (2013) 21 *Cardozo Journal of International and Comparative Law* 367, 405. For a discussion on the need for the government to be legitimate and retain effective control of the State in the context of intervention by invitation see Christine Gray, *International Law and the Use of Force* (New York, Cambridge University Press, 3rd ed, 2008), 99

[728] Jennings and Watts (eds), above n 50, 435.

[729] For restrictions on the lawful trade in arms, see Chapter VII on the Arms Trade Treaty.

[730] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189, 251. Of course, in situations where a particular government is accused of committing atrocity crimes, questions may still be asked in relation to whether this assistance is justifiable, irrespective of the legality of that assistance. For example, some EU Member States provided assistance to the Libyan government in the form of arms transfers, when the Libyan government was clearly willing to use force against its people: 'EU arms exports to Libya: who armed Gaddafi?', *The Guardian* (online), 1 March 2011, <https://www.theguardian.com/news/datablog/2011/mar/01/eu-arms-exports-libya>. See also: James Pattison, 'The Ethics of Humanitarian Intervention in Libya' (2011) 25 *Ethics & International Affairs* 271.

[731] Klingler, above n 727, 487; Wippman, above n 727, 209.

[732] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 668.

[733] See, eg, Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 668; Planning Staff of the Foreign and Commonwealth Office, 'Is Intervention Ever Justified?' (Foreign Policy Document No 148, UK Government, 1986) quoted in Geoffrey Marston (ed),

The ICJ has consistently held (relying on the reiteration of this principle by States – see footnote 726 above) that there is no 'right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State'.[734] Further, the Court has held that the principle of non-intervention

> would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State…Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of the opposition. Such a situation does not in the Court's view correspond to the present state of international law.[735]

Echoing the *Friendly Relations Declaration*, the Court further held that

> in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally farreaching.[736]

'United Kingdom Materials on International Law 1986' (1986) 57 *British Yearbook of International Law* 487, 614; Doswald-Beck, above n 730, 251; Gray, above n 727, 92; *The Principle of Non-Intervention in Civil Wars* (14 August 1975) Institut de Droit International <http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf>. Wright has expanded this to the context of internal disturbances below the threshold of civil war, arguing that international law 'does not permit the use of force in the territory of another state on invitation either of the recognized or the insurgent government in times of rebellion, insurrection or civil war. Since international law recognizes the right of revolution, it cannot permit other states to intervene to prevent it': Quinoy Wright, 'Subversive Intervention' (1960) 54 *American Journal of International Law* 521, 529; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 668. However, 'there does not seem to be much evidence that states accept that they are legally obliged to refrain from supporting governments in a civil war situation': Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 669. Rather, State practice suggests that 'many forms of aid, such as economic, technical and arms provision arrangements, to existing governments faced with civil strife, are acceptable': Shaw, above n 725, 1152; see also: Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011), 119. Dinstein argues that the principle of non-intervention in a civil war might need to be maintained where the State has plunged into 'chaotic turbulence, with several claimants to constitutional legality or none at all' where it is impossible to determine 'any remnants of the central Government and…who has rebelled against whom': Dinstein, *War, Aggression and Self-Defence*, above n 733, 120. However, there is 'little *opinio juris* for a rule preventing the provision of arms to the governmental forces during a civil war or one permitting counter-intervention in support of the opposition forces in light of such prior intervention': Klingler, above n 727, 504-507; Patrick CR Terry, 'Afghanistan's Civil War (1979-1989): Illegal and Failed Foreign Interventions' (2011) 31 *Polish Yearbook of International* Law 107, 130; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 670.

[734] *Nicaragua* [1986] ICJ Rep 14, [206]; *DRC v Uganda* [2005] ICJ Rep 168, [164].

[735] *Nicaragua* [1986] ICJ Rep 14, [246].

[736] Ibid, [241].

More recently, in *Democratic Republic of Congo v Uganda*, the ICJ reaffirmed that international law continues to 'prohibit a State from intervening, directly or indirectly, with or without armed force, in support of the internal opposition in another State'.[737]

This is the high-watermark of non-intervention and initially appears to render unlawful any form of assistance to opposition groups, lethal or non-lethal, as a violation of the principle of non-intervention, in the absence of a Security Council resolution authorising such measures. However, drawing on the *Friendly Relations Declaration*,[738] the Court in *Nicaragua* also held that the principle of non-intervention is violated only once the intervention becomes 'coercion' and bears 'on matters in which each State is permitted, by the principle of State sovereignty, to decide freely'.[739] As Schmitt and Wall note

> The key to the prohibition is the requirement of coercion. States often take actions designed to influence other [S]tates, the classic example being diplomacy. However, an act is only coercive when it is intended to compel another [S]tate to behave in a manner other than how it normally would, or to refrain from taking an action it would otherwise take. Persuasion or propaganda does not qualify, nor do actions that merely affect another [S]tate's decision-making processes, such as cutting off trade with the target [S]tate.[740]

Under the approach to non-intervention of the ICJ in *Nicaragua*, any intervention involving the use of force is a particularly obvious violation of the principle of non-intervention.[741] The Court further held that less direct measures may also be contrary to the principle of non-intervention. Measures such as arming and training opposition forces, intelligence and logistic support, and even the 'mere supply of funds' were held - in the context of the subversionary aims of the organisations supported - to be 'undoubtedly an act of intervention in the internal affairs' of the State.[742] Conversely, the Court held that

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[737] *DRC v Uganda* [2005] ICJ Rep 168, [164].
[738] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625.
[739] *Nicaragua* [1986] ICJ Rep 14, [205].
[740] Michael N Schmitt and Andru E Wall, 'The International Law of Unconventional Statecraft' (2014) 5 *Harvard National Security Journal* 349, 354.
[741] As noted by the ICJ, this would also be a violation of the prohibition on the use of force: *Charter of the United Nations* art 2(4). For more on this see: Schmitt and Wall, above n 740.
[742] *Nicaragua* [1986] ICJ Rep 14, [228].

economic influence, such as cessation of economic aid, reduction in import quotas, and trade embargoes, do not constitute a violation of the principle of non-intervention.[743]

Further the provision of strictly humanitarian aid, including the 'provision of food, clothing, medicine, and other humanitarian assistance',[744] without discrimination 'cannot be regarded as unlawful intervention, or as in any other way contrary to international law'.[745] On this, the ICJ held that

> [a]n essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of…[the State], not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need…[746]

This is a particularly high threshold for aid to qualify as humanitarian, which renders the exception a narrow one.

This raises the question of what level of support for opposition groups States can provide consistent with the principle of non-intervention and the secondary duty under R2P to 'help to protect populations' from atrocity crimes. As this part has shown, the high-watermark for non-intervention set by *Nicaragua* considered only economic measures, such as embargoes or cessation of aid, and strictly humanitarian assistance, to be consistent with the principle of non-intervention. However, law is not static, and while fundamental legal principles remain the same, they evolve and develop over time to fit the world as it is now. The next part examines the provision of foreign support to opposition groups in the conflicts in Libya and Syria, and suggests that this reveals an emerging and different State practice

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[743] '[T]he Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention': *Nicaragua* [1986] ICJ Rep 14, [244]-[245].
[744] *Nicaragua* [1986] ICJ Rep 14, [97] and [243].
[745] Ibid, [242] (emphasis added); Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 650.
[746] *Nicaragua* [1986] ICJ Rep 14, [243].

consistent with, and motivated by, the secondary duty under R2P to help to protect populations from atrocity crimes.

C *Evidence of an emerging and different State practice*

1 *Libya*

As noted in Chapter V, the civil war in Libya began with peaceful protests in Benghazi on 16 February 2011.[747] When the protests spread, the government unleashed security forces, ordering them to bomb civilians and vowing to fight to the last bullet.[748] Reports of 'death squads of foreign mercenaries roving the streets to silence residents who ventured outside'[749] meant that '[t]he prospect that some thousands of 'cockroaches' may be killed was no longer distant but imminent'.[750] The conflict quickly escalated into civil war.

On 22 February 2011, the UN High Commissioner for Human Rights condemned the '[w]idespread and systematic attacks against the civilian population [which] may amount to crimes against humanity'.[751] The Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a Press Statement emphasising the primary duty of the Libyan government under R2P, noting that '[i]f the reported nature and scale of …attacks are confirmed, they may well constitute crimes against humanity, for which

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[747] Kareem Fahim and David D Kirkpatrick, 'Qaddafi's Grip on the Capital Tightens as Revolt Grows', *The New York Times* (online), 22 February 2011, <http://www.nytimes.com/2011/02/23/world/africa/23libya.htm1?pagewanted+all>.
[748] 'Defiant Gaddafi Issues Chilling Threat', *ABC News* (online), 23 February 2011, <http://www.abc.net.au/worldtoday/content/2011/s3146582.htm>.
[749] 'After the Air Raids, Gaddafi's Death Squads Keep Blood on Tripoli's Streets', above n 602.
[750] Spencer Zifcak, 'The Responsibility to Protect After Libya and Syria' (2012) 13 *Melbourne Journal of International Law* 59, 60. Gaddafi had used the word 'cockroaches' in February 2011 to describe those in the city of Benghazi who were rising against him: 'Qaddafi's Grip on the Capital Tightens as Revolt Grows', above n 747.
[751] Office of the High Commissioner for Human Rights, 'Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims' (Press Release, 22 February 2011); Zifcak, above n 750, 61.

national authorities should be held accountable'.[752] The Security Council also issued a Press Statement calling on the Libyan government to meet its responsibility to protect its population and urging it to 'act with restraint, to respect human rights and international humanitarian law, and to allow immediate access for international human rights monitors and humanitarian agencies'.[753] The language of R2P was utilised heavily by States and the Security Council from the beginning of this conflict, with a strong emphasis placed on the primary responsibility of the Libyan government to protect its people from atrocity crimes.[754]

On 25 February 2011, the Human Rights Council convened a special session on the situation in Libya, describing the descent into violence as 'shocking and brutal'[755] and recommending the suspension of Libya's membership of the Council.[756] The resolution passed by the Human Rights Council strongly condemned

> the recent gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity.[757]

It also strongly called upon the Libyan government to 'meet its responsibility to protect its population, to immediately put an end to all human rights violations, to stop any attacks

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[752] Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Libya' (Press Release, 22 February 2011).
[753] United Nations Security Council, 'Security Council Press Statement on Libya' (Press Statement, SC/10180, 22 February 2011).
[754] SC Res 1970, UN Doc S/RES/1970; SC Res 1973, UN Doc S/RES/1973.
[755] Navi Pillay, 'Situation of Human Rights in the Libyan Arab Jamahiriya' (Speech delivered at the Human Rights Council, Geneva, 25 February 2011) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10760&LangID=E>.
[756] *Situation of Human Rights in the Libyan Arab Jamahiriya*, Human Rights Council, UN GAOR, 15th special sess, 2nd mtg, UN Doc A/HRC/RES/S-15/1 (25 February 2011); *Suspension of the Rights of Membership of the Libyan Arab Jamahirya in the Human Rights Council*, UN GAOR, UN Doc A/RES/65/265 (1 March 2011).
[757] *Situation of Human Rights in the Libyan Arab Jamahiriya*, UN Doc A/HRC/RES/S-15/1, [1].

against civilians, and to fully respect all human rights and fundamental freedoms'.[758] A fact finding committee was established to examine the unfolding events.[759]

On 26 February 2011, the Security Council passed Resolution 1970, which condemned the widespread and systematic attacks on civilians, demanded an end to the violence, imposed an arms embargo, asset freeze and travel ban, and referred the situation to the International Criminal Court for the investigation of possible crimes against humanity.[760] The Resolution explicitly recalled 'the Libyan authorities' responsibility to protect its population'.[761] Counterbalanced with the sanctions imposed on Libya was an explicit call to

> all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya.[762]

The language of R2P can be clearly seen in Resolution 1970, with explicit mention of both the primary duty on the Libyan government and the secondary duty on the international community (Member States) to 'facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance' to help to protect the Libyan population.[763] The Resolution also echoes the language of R2P in the 'readiness to consider taking additional appropriate measures, as necessary', which is consistent with R2P's third pillar.[764]

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[758] Ibid, [2].
[759] Zifcak, above n 750, 61; *Situation of Human Rights in the Libyan Arab Jamahiriya*, UN Doc A/HRC/RES/S-15/1.
[760] SC Res 1970, UN Doc S/RES/1970.
[761] Ibid, preamble.
[762] Ibid, [26].
[763] Gareth Evans, 'End of the Argument: How We Won the Debate on Stopping Genocide' (2011) *Foreign Policy*, <http://www.foreignpolicy.com/articles/2011/11/28/gareth_evans_end_of_the_argument>; Alex Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm (2011) 25(3) *Ethics & International Affairs* 263, 263; Ban Ki Moon, 'The Responsibility to Protect: Responding to Imminent Threats of Mass Atrocities' (Speech delivered at Breakfast Roundtable with Foreign Ministers, New York, 23 September 2011) <http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID 1325>. See also Ivo H Daalder and James G Stavridis, 'NATO's Victory in Libya: The Right Way to Run an Intervention' (2012) *Foreign Affairs* <https://www.foreignaffairs.com/articles/libya/2012-02-02/natos-victory-libya>.
[764] *Implementing the Responsibility to Protect – Report of the Secretary-General*, UN Doc A/63/677, [10(c)]. This is discussed in more detail in Chapter III.

From the outset of the Libyan conflict, it became clear that it was not only Western States which were calling for an international role in protecting the Libyan population. Importantly, most members of the Arab League, many States of the African Union, and a large number of Latin American and Asian States joined the call.[765] Mauritius, speaking on behalf of the African Group stated

> The international community must send a strong message to those who are responsible for violence against the Libyan people and to the people of Libya, who are expressing their legitimate aspirations, that it is not indifferent to gross and systematic violations of human rights and that it respects the right of peaceful demonstrators to express their legitimate aspirations.[766]

The Philippines stated

> The United Nations and the international community have an inescapable responsibility to extend whatever assistance can be offered to the Libyan people during this time of emergency and cataclysmic change. The stakes are high not only for Libya but also for the entire world.[767]

Further, the Maldives stated

> It is evident that the Libyan dictatorship has no intention of upholding its principal responsibility to protect its people. It is therefore the duty of the international community to intervene. We, the community of nations, have a clear and unambiguous responsibility to protect innocent men, women and children in Libya.[768]

Cape Verde argued that '[s]ilence on our part at this juncture would not only be a crime but would constitute failure in the eyes of history'.[769] Lebanon stated that '[t]ime is of the essence…to pursue an immediate halt to the suffering'.[770]

On 1 March 2011, the General Assembly suspended Libya's membership.[771] On 17 March 2011, the Security Council passed Resolution 1973 authorising 'all necessary

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[765] UN GAOR, 65th sess, 76th plen mtg, Official Records, UN Doc A/65/PV.76 (1 March 2011). See, eg, the statements by the Lebanon (4 and 9), Mexico (9), the Philippines (10), the Maldives (11), Guatemala (12), Costa Rica (13), Botswana (16), Indonesia (17), Bolivia (19), and Cape Verde (20).
[766] Ibid, 5.
[767] Ibid, 10.
[768] Ibid, 11.
[769] Ibid, 20.
[770] Ibid, 4.
[771] Zifcak, above n 750, 62.

measures' to 'protect civilians and civilian populated areas'.[772] Although Russia abstained from the vote, then Russian President, Dmitry Medvedev, explicitly stated in a press conference held on 21 March 2011 that the decision to abstain was made 'consciously in the aim of preventing an escalation of violence' and emphasised that 'everything that is happening in Libya is a result of the Libyan leadership's absolutely intolerable behaviour and the crimes that they have committed against their own people'.[773]

Resolution 1973 reiterated the primary responsibility under R2P - 'the responsibility of the Libyan authorities to protect the Libyan population'.[774] Further, it expressly noted the readiness of the Security Council 'to consider taking additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya',[775] and expressed the determination 'to ensure the protection of civilians and civilian populated areas'.[776] This was the first military intervention using the terminology of R2P authorised by the Security Council. Resolution 1973 has been celebrated as R2P in action and an example of the international community responding in a 'timely and decisive' manner under its secondary duty to help to protect populations from atrocity crimes.[777] As Brockmeier, Stuenkel and Tourinho have observed, 'the idea that the international community had a role to play in

[772] SC Res 1973, UN Doc S/RES/1973, [4]. The vote was passed with 10 votes in favour and 5 absentions (China, Russia, Brazil, India and Germany).
[773] President Medvedev, 'Why Russia Voted to Abstain on Libya 'No-Fly' Resolution' (Excerpts from English Translation of Press Conference by President Medvedev, The Mendeleyev Journal, 21 March 2011). See also Yun Sun, *China's Acquiescence on UNSCR 1973: No Big Deal* (31 March 2011) PacNet: Pacific Forum CSIS <http://csis.org/files/publication/pac1120.pdf>.
[774] SC Res 1973, UN Doc S/RES/1973, preamble.
[775] Ibid.
[776] Ibid.
[777] See, eg, Zifcak, above n 750.

protecting Libyan civilians, against the stated wish of a functioning government, went remarkably undisputed'.[778]

However, it soon became clear that as well as using force directly under the authorisation of the Security Council to protect civilians, some States were also providing general assistance to opposition forces, and ultimately the result was regime change.[779] The existence of a Security Council mandated regime established under Resolutions 1970 and 1973, even one utilising the language of R2P, does not suggest any dramatic advance in the legal status of R2P, as the Security Council has always been authorised to take measures under Chapter VII of the *Charter*. However, the way that States subsequently interpreted and implemented those Security Council Resolutions, particularly the expansive interpretation of Resolution 1973 to permit the provision of assistance to opposition groups, reveals the influence of intercession under R2P in increasing the available measures that may be taken by the international community to protect the Libyan population from atrocity crimes.

(a) Training

The arms embargo under Resolution 1970 had expressly precluded 'technical assistance, training, financial or other assistance, related to military activities'.[780] Despite this, and although Resolution 1973 had specifically precluded an occupation force, some NATO Member States, primarily the United Kingdom,[781] France,[782] and Italy, interpreted the Resolutions as permitting them to send 'military personnel to the eastern rebel stronghold of

[778] Sarah Brockmeier, Oliver Stuenkel and Marcos Tourinho, 'The Impact of the Libyan Intervention Debates on Norms of Protection' (2016) 30(1) *Global Society* 113, 115.
[779] Brunnée and Toope, 'The rule of law in an agnostic world: the prohibition on the use of force and humanitarian exceptions', above n 465, 150; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 654; Corten and Koutroulis, above n 720, 69-71.
[780] SC Res 1970, UN Doc S/RES/1970, [9].
[781] John Pienaar, 'Libya: MPs' Concerns over "Mission Creep" Grow', *BBC News* (online), 20 April 2011 <http://www.bbc.co.uk/news/uk-politics-13142441>.
[782] 'Libya: France and Italy to Send Officers to Aid Rebels', *BBC News* (online), 20 April 2011 <http://www.bbc.co.uk/news/world-africa-13143988>.

Benghazi to 'advise' the opposition forces on logistics and intelligence training'.[783] UK Foreign Secretary William Hague stated that the 'military liaison advisory team' would

> support and advise the NTC [opposition National Transitional Council] on how to better protect civilians…how to improve their military organisational structures, communications and logistics, including how best to distribute humanitarian aid and deliver medical assistance.'[784]

He observed that the Libyan rebels 'have no military experience, they have little understanding of weaponry or military tactics. The best way we can assist them it to give them some technical capabilities in how to organise themselves'.[785] Further, Hague stated that '[t]his deployment is fully within the terms of UNSCR 1973 both in respect of civilian protection and its provision expressly ruling out a foreign occupation force on Libyan soil'.[786] Describing the Libyan rebels, then US Secretary of State Hilary Clinton stated that they

> were not a group that had been planning to oppose the rule of Gadhafi for years; it was a spontaneous response within the context of the broader Arab Spring. These are mostly business people, students, lawyers, doctors, professors who have very bravely moved to defend their communities and to call an end to the regime in Libya'.[787]

Qatar reportedly 'provided infantry training to Libyan fighters in the western Nafusa mountains and in eastern Libya. Qatar's military even brought Libyan rebels back to Doha for exercises'.[788] France announced that a 'small number of liaison officers [would be placed] with the national transition council in order to organise the protection of the civilian population'.[789] The expressed objective of providing this training was to 'give the TNC essentially technical, logistical and organisational advice to reinforce the protection of

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[783] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 655.
[784] 'British military officers to be sent to Libya', *BBC News* (online), 19 April 2011, <http://www.bbc.com/news/uk-13132654>.
[785] 'Libya rebels to get $25m of US military equipment under Pentagon proposal', *The Guardian* (online), 21 April 2011, <https://www.theguardian.com/world/2011/apr/20/libya-rebels-us-military-equipment-non-lethal>.
[786] 'Italy, France sending troops to advise Libyan rebels', *CNN* (online), 21 April 2011, <http://edition.cnn.com/2011/WORLD/africa/04/20/libya.war/index.html>.
[787] Ibid.
[788] Ian Black, 'Qatar admits sending hundreds of troops to support Libya rebels', *The Guardian* (online), 27 October 2011, <https://www.theguardian.com/world/2011/oct/26/qatar-troops-libya-rebels-support>.
[789] 'French officers to be sent to Libya', *Irish Times* (online), 20 April 2011, <https://www.irishtimes.com/news/french-officers-to-be-sent-to-libya-1.875249>.

civilians and to improve the distribution of humanitarian and medical aid'.[790] Italy announced that it would send military advisers to 'train the rebels in self-defence tactics'.[791] Libyan Foreign Minister Abdul Ati al-Obeidi objected to the sending of military personnel to Libya, asserting that it 'would harm any peace initiative and "prolong the confrontation"'.[792]

Under the ICJ's conceptual framework established in *Nicaragua*, the provision of this form of non-lethal assistance would have been a violation of the principle of non-intervention as an 'indirect form of support for subversive or terrorist armed activities within another State'.[793] Yet in relation to Libya, several States interpreted the Security Council Resolutions as permitting them to carve out a narrow exception to the arms embargo in relation to training opposition forces on the basis that such forces were protecting civilians from atrocities perpetrated by the Gaddafi regime.

(b) Arming opposition groups

Under the traditional approach to non-intervention of the ICJ in *Nicaragua*, arming opposition groups would be a particularly obvious violation of the principle of non-intervention. However, Resolution 1973 was interpreted by some States as also allowing the arming of anti-Gaddafi opposition groups to further the aim of the protection of civilians and civilian protected areas.[794] In June 2011, France confirmed that it had dropped weapons, including assault rifles, machine guns, and rocket-propelled grenades,[795] to 'help rebel forces

[790] 'Libya: France sends military team to rebel territory', *The Telegraph* (online), 20 April 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8463861/Libya-France-sends-military-team-to-rebel-territory.html>.
[791] 'Italy, France sending troops to advise Libyan rebels', above n 786.
[792] 'British military officers to be sent to Libya', above n 784.
[793] *Nicaragua* [1986] ICJ Rep 14, [205]. See also: Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 655.
[794] Julian Borger and Chris McGreal, 'US and Britain may arm Libya rebels if Gaddafi clings to power', *The Guardian* (online), 30 March 2011, <https://www.theguardian.com/world/2011/mar/29/libya-rebels-armed-by-us-uk>.
[795] 'France confirms arming Libyan rebels' *Al Jazeera* (online), 30 June 2011, <http://www.aljazeera.com/news/africa/2011/06/201162913557645830.html>.

who were "in a very deteriorating situation" under threat from the Libyan military'.[796] The provision of arms was expressed to be for the protection of 'groups of unarmed civilians…deemed to be at risk',[797] 'so that civilians would not be massacred'.[798] UK Foreign Secretary William Hague stated that 'in certain circumstances it is possible, consistent with those resolutions to provide people with the means to defend the civilian population'.[799] The UK Ministry of Defence confirmed the UK position that 'the UN resolution [Resolution 1973] allows, in certain limited circumstances, defensive weapons to be provided'.[800] Italy's Foreign Minister, Franco Frattini, stated '[e]ither we make it possible for these people to defend themselves or we withdraw our claims of support',[801] and that the 'UN resolution should not prohibit providing weapons to the rebels, saying this could be "morally justified"'.[802] Qatar's Prime Minister, Hamad bin Jassim, noted that there were differences in interpretation of the resolutions, adding that 'Qatar will make things available for the Libyan people to defend themselves'.[803] US Chairman of the House Intelligence Committee, Mike Rogers, stated that the US 'need[ed] to understand more about the opposition before I would support passing out guns and advanced weapons to them'.[804]

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[796] Michael Birnbaum, 'France sent arms to Libyan rebels' *The Washington Post* (online), 30 June 2011, <https://www.washingtonpost.com/world/france-sent-arms-to-libyan-rebels/2011/06/29/AGcBxkqH_story.html?utm_term=.c38c16c5ad50>. See also Nick Hopkins, 'Nato Reviews Libya Campaign After France Admits Arming Rebels' *The Guardian* (online), 29 June 2011, <http://www.guardian.co.uk/world/2011/jun/29/nato-review-libya-france-arming-rebels>; Hannah Woolaver, 'Pro-Democratic Intervention in Africa and the 'Arab Spring'' (2014) 22(2) *African Journal of International and Comparative Law* 161, 179.

[797] 'France confirms arming Libyan rebels', above n 795.

[798] Ibid.

[799] Ian Black, 'Libyan rebels receive boost of support from international community' *The Guardian* (online), 14 April 2011, <https://www.theguardian.com/world/2011/apr/13/libya-receives-boost-international-community>.

[800] 'Nato Reviews Libya Campaign After France Admits Arming Rebels', above n 796.

[801] 'Libyan rebels receive boost of support from international community', above n 799.

[802] 'Nato Reviews Libya Campaign After France Admits Arming Rebels', above n 796.

[803] 'Libyan rebels receive boost of support from international community', above n 799.

[804] Mark Hosenball, 'Exclusive: Obama authorizes secret help for Libyan rebels', *Reuters* (online), 31 March 2011, <http://www.reuters.com/article/us-libya-usa-order-idUSTRE72T6H220110330>.

In contrast, Belgium 'insisted it would not countenance any move to arm the rebels'.[805] Dutch Defence Minister, Han Hillen, warned against mission creep and called for a political solution to the crisis,[806] insisting that the mission 'should be confined to its mandate to protect civilians'.[807] Russian Foreign Minister, Sergei Lavrov, called the arming of rebels 'a very crude violation of UN Security Council resolution 1970'.[808] African Union Chief, Jean Ping, criticised the provision of arms, warning of the 'risk of civil war, risk of partition of the country, the risk of "Somalia-sation" of the country, risk of having arms everywhere'.[809] Libya predictably condemned the arming of the opposition, asserting that 'NATO and France are clearly not interested in the safety of civilians', and asking 'What right does NATO have to support the rebels?'.[810] In response, a French diplomatic source stated to the media that the weapons drop

> was an operational decision taken at the time to help civilians who were in imminent danger. A group of civilians were about to be massacred so we took the decision to provide self-defensive weapons to protect those civilian populations under threat. It was entirely justifiable legally, resolution 1970 and 1973 were followed to the letter and it can be assured that there will no diplomatic crisis despite what the African Union and Russia may say. France will not rule out more weapon drops in the future as we will take every decision on a case by case basis.[811]

The change in State practice by a significant number of States in interpreting and implementing the Security Council Resolutions broadly to permit the arming of opposition groups, on the basis that those groups were using those weapons to help to protect the population under imminent threat, demonstrates one way in which the secondary duty under R2P has had a significant influence on States in the application of measures of intercession in

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[805] 'Libyan rebels receive boost of support from international community', above n 799.
[806] 'France sent arms to Libyan rebels', above n 796.
[807] 'Nato Reviews Libya Campaign After France Admits Arming Rebels', above n 796.
[808] 'Libya: Russia decries French arms drop to Libya rebels', *BBC News* (online), 30 June 2011, <http://www.bbc.com/news/world-europe-13979632>.
[809] Ibid.
[810] 'France sent arms to Libyan rebels', above n 796.
[811] Tehmoor Khan, 'France 'won't rule out' more Libyan weapons drops', *Channel 4 news* (online), 30 June 2011, < https://www.channel4.com/news/france-wont-rule-out-more-libyan-weapon-drops>; Dapo Akande, 'France Admits to Arming Libyan Rebels – Was this Lawful?' on *EJIL Talk* (1 July 2011) <https://www.ejiltalk.org/france-admits-to-arming-libyan-rebels-was-this-lawful/>.

response to apprehended atrocity crimes. It also reveals the restraining influence of R2P, with caution being taken in relation to the provision of arms to opposition groups only in limited circumstances, rather than generally.

(c) Provision of non-lethal military equipment and funding

Resolution 1970 made a distinction between offensive and defensive military equipment, and expressly provided that the arms embargo was not to apply to 'non-lethal military equipment intended solely for humanitarian or protective use'.[812] Non-lethal equipment may be defined as 'equipment that while not having the primary aim of taking life nonetheless is provided with the aim of assisting the party concerned to prevail in an armed conflict, or at least to possess some (or better) capabilities to defend itself'.[813] This was interpreted broadly by States to permit the provision of non-lethal military equipment to opposition forces. NATO Member States provided opposition forces with non-lethal equipment, mostly in the form of body armour and satellite telephones.[814] Then UK Prime Minister David Cameron asserted that the Security Council regime permitted 'assisting the rebels with non-lethal equipment'.[815] In April 2011, the UK announced that it would send 1,000 flak jackets to opposition forces,[816] with a further '5,000 sets of body armour, 6,650 uniforms, 5,000 high-visibility vests and communications equipment for police loyal to Libya's opposition'[817] being announced in June 2011. In addition, Italy provided $586m,[818] France $420m,[819] Kuwait $180m,[820] and Qatar $400m[821] in funding to the opposition. In

[812] SC Res 1970, UN Doc S/RES/1970, [9(a)].
[813] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 649.
[814] Ibid, 656.
[815] 'Cameron: Libya UN Resolution Makes Mission "Difficult"', *BBC News* (online), 17 April 2011, <http://www.bbc.co.uk/news/uk-politics-13107834>.
[816] 'Libyan rebels receive boost of support from international community', above n 799.
[817] 'France sent arms to Libyan rebels', above n 796.
[818] 'Libya crisis: Allies step up funding to rebels', *BBC News* (online), 9 June 2011, <http://www.bbc.com/news/world-africa-13707685>.
[819] Ibid.

March 2011, US officials announced that the Obama Administration had decided to give the opposition $25 million in 'non-lethal assistance' after assessing the capabilities and intentions of opposition groups.[822] They indicated that the US would 'proceed cautiously until more information about the rebels can be collected and analyzed'.[823] This reveals the restraining influence of intercession under R2P on decision making, with the explicit consideration of the capabilities and intentions of the opposition groups forming part of the US decision to provide assistance to such groups. In March 2011, the Albanian Prime Minister stated that 'these operations are considered entirely legitimate, having as main objective the protection of freedoms and universal rights that Libyans deserve'.[824]

The provision of non-lethal equipment and funding to opposition forces in Libya is also a significant departure from the ICJ's approach to non-intervention in *Nicaragua*, reaffirmed in *Democratic Republic of Congo v Uganda*, which provided that any form of assistance to opposition groups, lethal or non-lethal, was a violation of the principle of non-intervention. There the Court held that even the mere supply of funds was 'undoubtedly an act of intervention in the internal affairs'[825] of the State. This is a significant evolution in State practice, reflective of the secondary duty under R2P, permitting the provision of non-lethal assistance and substantial funding to the opposition in Libya on the basis that they are helping to protect civilians from atrocity crimes.

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[820] Ibid.
[821] 'Qatar admits sending hundreds of troops to support Libya rebels', above n 788.
[822] 'Libya: France and Italy to Send Officers to Aid Rebels', above n 782; 'Obama Authorises Covert Aid to Libyan Rebels – Reports', *BBC News* (online), 31 March 2011, <http://www.bbc.co.uk/news/world-us-canada-12915401>; 'Nato Reviews Libya Campaign After France Admits Arming Rebels', above n 796.
[823] 'Exclusive: Obama authorizes secret help for Libyan rebels', above n 804.
[824] 'Albania supports the attacks on Libya', *Albeu* (online), 30 March 2011, <http://english.albeu.com/albania-news/albania-supports-the-attacks-on-libya/32495/>.
[825] *Nicaragua* [1986] ICJ Rep 14, [228].

(d) Libya – summary of assistance provided to opposition groups

While the specific use of the language of R2P by the Security Council in connection with the Libyan conflict, including in Resolutions, was significant, the subsequent interpretation by States of the boundaries of the Resolutions and what measures were permitted thereunder was of greater lasting consequence, and reveals the influence of R2P in animating current State practice. States interpreted the Resolutions very broadly, such that the provision of training in intelligence and logistics, arms, funding and non-lethal equipment to opposition forces, were all deemed to fall within the mandate. Although there was subsequent academic criticism that some States had over-reached into regime change,[826] the initial broad interpretations of what was permissible assistance were generally well received by the international community.[827] Japan stated 'we believe that it will contribute to urging the Libyan authorities to stop the violence… we support the actions taken that will help

[826] See, eg, Feisal Amin Rasoul Al-Istrabadi, 'The Limits of Legality: Assessing Recent International Interventions in Civil Conflicts in the Middle-East' (2014) 29 *Maryland Journal of International Law* 119; Serena K Sharma and Jennifer M Welsh (eds), *The Responsibility to Prevent: Overcoming the Challenges to Atrocity Prevention* (Oxford University Press, 2015), 364-365; Pattison, above n 730, 273-4; Zifcak, above n 750, 69; Chesterman, "'Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya', above n 23.

[827] Yasmine Saleh, 'Arab League chief says he respects UN resolution', *Reuters* (online), 21 March 2011, <https://www.reuters.com/article/us-libya-arabs-moussa-idUSTRE72K1JB20110321>; 'Gulf bloc: Qatar, UAE in coalition striking Libya', *The Hindu* (online), 21 March 2011, <http://www.thehindu.com/news/international/Gulf-bloc-Qatar-UAE-in-coalition-striking-Libya/article14956201.ece>; 'Kuwait, Jordan to give logistic help to Libya action: UK', *Dawn* (online), 23 March 2011, <https://www.dawn.com/news/615328/kuwait-jordan-to-give-logistic-help-to-libya-action-uk>; 'Azerbaijan appraises NATO forces' actions in Libya', *Trend news agency* (online), 30 March 2011,<https://en.trend.az/azerbaijan/politics/1852847.html>; 'Albania supports the attacks on Libya', above n 824; 'Belgium offers jets for Libya no-fly zone', *Expatica* (online), 18 March 2011, <http://www.expatica.com/be/news/Belgium-offers-jets-for-Libya-no-fly-zone_247495.html>; 'Danish jets land in Sicily for no-fly zone deployment', *Earth Times* (online), 19 March 2011, <http://www.webcitation.org/5xJ9Cu4EI?url=http://www.earthtimes.org/articles/news/372480%2Csicily-no-fly-zone-deployment.html>; Veronika Gulyas, 'Hungary welcomes UN decision on Libya airstrikes', *The Wall Street Journal* (online), 18 March 2011, <https://blogs.wsj.com/emergingeurope/2011/03/18/hungary-welcomes-u-n-decision-on-libya-air-strikes/>; 'Sweden backs up NATO request on Libya', *The Swedish Wire* (online), 18 March 2011, <http://www.swedishwire.com/politics/9022-sweden-backs-up-nato-request-on-libya>; 'Swiss neutrality does not mean indifference', *Swissinfo* (online), 27 March 2011, <http://www.swissinfo.ch/eng/swiss-neutrality-does-not-mean--indifference-/29853534>; Jeremy Thompson, 'Rudd prays no-fly zone comes in time', *ABC News* (online), 18 March 2011, <http://www.abc.net.au/news/2011-03-18/rudd-prays-no-fly-zone-comes-in-time/2652926>; Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy back into RtoP' (2011) 25(3) *Ethics & International Affairs* 255, 258. Contrast the responses of Russia and China: 'Libya: Russia decries French arms drop to Libya rebels', above n 808; Sun, above n 773.

progress towards the cessation of violence'.[828] Then Australian Foreign Minister Kevin Rudd stated that '[t]he international community has a responsibility to do all within its power to protect Libyan civilians from the deployment of the Libyan airforce against them',[829] and that 'as a result of NATO's intervention the onslaught by the Libyan regime…has been pushed back'.[830] The Secretary General of the Gulf Cooperation Council,[831] Abdul Rahman bin Hamad al-Attiyah, stated '[w]hat is happening now [in Libya] is not an intervention. It is about protecting the people from bloodshed'.[832] Opposition politicians in Venezeula 'welcomed western intervention as a legitimate effort to stop a brutal dictator slaughtering his own people'.[833] Then Australian Foreign Minister Kevin Rudd further stated

> You can't sit around and cheerlead for people when they rise up against someone like Gaddafi and, as an international community, then say it's all too hard diplomatically…[We need] to harness the resolve of the international community in support of a civilian population who, in the absence of international intervention of this type, run the huge risk of being butchered.[834]

In order to protect the Libyan population, measures that would traditionally have been a violation of the principle of non-intervention under the high-watermark of *Nicaragua* were not treated as being in violation by the great majority of States, despite not having been explicitly authorised by the Resolution.

Security Council Resolutions in relation to the Libyan conflict have been celebrated as a victory for R2P, with the international community responding in a timely and decisive

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[828] Japan (Press Conference by the Deputy Press Secretary, 12 May 2011) <http://www.mofa.go.jp/announce/press/2011/5/0512_01.html>.
[829] Foreign Minister Kevin Rudd, 'No-fly zone for Libya' (Media Release, 7 March 2011) <https://foreignminister.gov.au/releases/Pages/2011/kr_mr_110307.aspx?w=GYLX0mNSz4nLQKYuPOSgLQ%3D%3D>.
[830] Foreign Minister Kevin Rudd, 'Interview with Maruis Benson, ABC News Radio' (Transcript, 15 April 2011) <https://foreignminister.gov.au/transcripts/Pages/2011/kr_tr_110415_abc_newsradio.aspx?w=GYLX0mNSz4nLQKYuPOSgLQ%3D%3D>.
[831] The Gulf Cooperation Council is comprised of Saudi Arabia, Qatar, Bahrain, Oman, Kuwait and the United Arab Emirates.
[832] 'Gulf bloc: Qatar, UAE in coalition striking Libya', above n 827.
[833] 'Libya conflict: reactions around the world', *The Guardian* (online), 31 March 2011, <https://www.theguardian.com/world/2011/mar/30/libya-conflict-reactions-world>.
[834] 'Rudd prays no-fly zone comes in time', above n 827.

fashion to the evolving conflict.[835] The analysis of State practice above demonstrates that many States interpreted the Security Council mandate broadly, inspired by the secondary to 'help to protect populations', maximising the permissible measures of assistance to opposition groups on the basis that they were protecting the civilian population from government forces. Milanovic argues that Resolution 1973 contained 'deliberate ambiguity'[836] leaving open the possibility of providing assistance to opposition groups. Akande argues that 'the permission (if one may call it such) to assist the rebels is only valid in so far as it is for the purpose of carrying out the mandate in SC Res 1973'.[837] This is about more, however, than the interpretation of a Security Council resolution. This practice demonstrates intercession under R2P at once providing a more expansive range of measures to the international community to respond to atrocity crimes, and a simultaneous restraint on those measures.

2 *Syria*

From its commencement in 2011, the Syrian civil war has been characterised by an endemic disregard for international law on the part of both government and opposition forces.[838] The 2013 report of the Independent International Commission of Inquiry on the Syrian Arab Republic observed that

> Government and pro-government forces have continued to conduct widespread attacks on the civilian population, committing murder, torture, rape and enforced disappearance as crimes against humanity. They have laid siege to neighbourhoods and subjected them to indiscriminate shelling. Government forces have committed gross violations of human rights and the war crimes of torture, hostage-taking, murder, execution without due process, rape, attacking protected objects and pillage. Anti-government armed groups have committed war crimes, including murder, execution without due process, torture, hostage-taking and

[835] See, eg, Zifcak, above n 750.
[836] Marko Milanovic, 'Can the Allies Lawfully Arm the Libyan Rebels?' on *EJIL Talk* (30 March 2011) <https://www.ejiltalk.org/can-the-allies-lawfully-arm-the-lybian-rebels/#comment-6608>.
[837] Akande, 'Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?', above n 719.
[838] Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 *Chinese Journal of International Law* 13, [2].

> attacking protected objects. They have besieged and indiscriminately shelled civilian neighbourhoods.[839]

In 2016, the UN Special Envoy for Syria, Staffan de Mistura, estimated that 400,000 people had been killed in the previous five years of conflict.[840] The UN reportedly no longer keeps track of the death toll due to the inaccessibility of many areas and the complications of conflicting statistics put forward by the Syrian government and opposition groups.[841] Estimates by the Global Centre for the Responsibility to Protect put the figure at more than 465,000 killed as at 15 May 2017.[842] As at 27 July 2017, the UN High Commissioner for Refugees estimated that there were over 5.1 million Syrian refugees in neighbouring countries[843] and over 6.3 million internally displaced persons.[844]

Attacks on civilians have been carried out by government forces, government-allied militias, and armed opposition groups.[845] Government forces reportedly used chemical weapons in civilian areas in 2013 and 2017, [846] and continued to bombard opposition-held

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[839] *Report of the independent international commission of inquiry on the Syrian Arab Republic*, Human Rights Council, UN GAOR, 24th sess, Agenda Item 4, UN Doc A/HRC/24/46 (16 August 2013), summary.
[840] 'Syria death toll: UN envoy estimates 400,000 killed', *Al Jazeera* (online), 24 April 2016, <http://www.aljazeera.com/news/2016/04/staffan-de-mistura-400000-killed-syria-civil-war-160423055735629.html>.
[841] Stampler, Laura, 'U.N. to Stop Updating Syria Death Toll', *TIME* (online), 7 January 2014, <http://world.time.com/2014/01/07/un-to-stop-updating-syria-death-toll>; 'Syria death toll: UN envoy estimates 400,000 killed', above n 840.
[842] *R2P Monitor*, Global Centre for the Responsibility to Protect, Issue 33 (15 May 2017), 2.
[843] *Syria Regional Refugee Response*, UNHCR <http://data.unhcr.org/syrianrefugees/regional.php#_ga=2.183757615.802356475.1501827013-1667195851.1500095337>.
[844] <http://www.unhcr.org/en-au/syria-emergency.html>.
[845] See, eg, Russell Goldman, 'Assad's History of Chemical Attacks, and Other Atrocities', *The New York Times* (online), 5 April 2017, <https://www.nytimes.com/2017/04/05/world/middleeast/syria-bashar-al-assad-atrocities-civilian-deaths-gas-attack.html>; *Syria 2016/2017: Annual Report* (2017) Amnesty International <https://www.amnesty.org/en/countries/middle-east-and-north-africa/syria/report-syria/>; *Syria: events of 2016* (2016) Human Rights Watch <https://www.hrw.org/world-report/2017/country-chapters/syria>.
[846] 'More than 1,400 killed in Syrian chemical weapons attack, U.S. says', *The Washington Post* (online), 30 August 2013, < https://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html?utm_term=.034c2db3bd44>; 'Syria chemical 'attack': What we know', *BBC News* (online), 26 April 2017, <http://www.bbc.com/news/world-middle-east-39500947>; 'Autopsy shows chemical weapons used in Syria attack', *Aljazeera* (online), 7 April 2017, <http://www.aljazeera.com/news/2017/04/autopsy-shows-chemical-weapons-syria-attack-170406073556666.html>.

residential areas.[847] Some government-allied militias have been accused of having 'committed large-scale massacres and perpetrated war crimes and gross violations of international humanitarian law'.[848] Pro-government forces are reported as having conducted 'widespread attacks on the civilian population, committing murder, torture, rape and enforced disappearances as crimes against humanity'.[849] Several armed opposition groups are reported to have committed mass atrocity crimes, violated international humanitarian law and targeted religious minorities.[850] Daesh, also known as the Islamic State of Iraq and the Levant ('ISIL') and the Islamic State of Iraq and Syria ('ISIS'), an armed extremist group operating on both sides of the Syria-Iraq border has carried out mass executions, sexual enslavement and crimes against humanity in Syria.[851] The UN has reported that all parties to the Syrian conflict have laid sieges and impeded humanitarian access to civilians.[852]

Despite the seemingly unending reports of atrocities, the Security Council has been slow to respond. Indeed it was not until September 2013 that the Security Council passed Resolution 2118, which set out a destruction regime for Syrian chemical weapons.[853] This was followed in February 2014 with Resolution 2139 on the provision of humanitarian assistance and which highlighted the Syrian government's 'primary responsibility to protect its population'.[854] Russia and China, whilst condemning the killing of innocent civilians, have repeatedly vetoed resolutions intended to put pressure on the Syrian government through the imposition of any form of embargo or use of force, emphasising in their

[847] *R2P Monitor*, above n 510, 2.
[848] Ibid.
[849] Ibid; *Report of the independent international commission of inquiry on the Syrian Arab Republic*, Human Rights Council, UN GAOR, 27th sess, Agenda Item 4, UN Doc A/HRC/27/60 (13 August 2014).
[850] *R2P Monitor*, above n 510, 2.
[851] Ibid; *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc A/HRC/27/60.
[852] *R2P Monitor*,above n 510, 2.
[853] SC Res 2118, UNSCOR, 68th sess, 7038th mtg, UN Doc S/RES/2118 (27 September 2013).
[854] SC Res 2139, UN Doc S/RES/2139, [9].

statements Syria's sovereignty, political independence, and right to non-interference.[855] As Brunnée and Toope note, '[i]n the face of the rapidly mounting death toll in Syria and the government's ruthless disregard for its population, the members of the Security Council became increasingly frustrated with what they perceived to be China and Russia's intransigence'.[856] For example, in 2012 Pakistan asserted that the situation recalled 'two thousand years ago Pontius Pilate, washing his hands and saying, I have nothing to do with this'.[857]

Individual States and regional organisations, however, *have* responded to the atrocities occurring in Syria. This raises legal questions directly related to the principle of non-intervention regarding the lawfulness of foreign support to opposition groups. The next part of this Chapter is divided into assistance provided by EU Member States and other States, which parallels the examination of regional and autonomous sanctions as measures of intercession in Chapter V.

(a) EU Member States

In response to ongoing atrocities in Syria, the EU imposed an arms embargo upon the entire territory of Syria on 9 May 2011.[858] The way that the embargo was crafted and subsequently amended to carve out an exception for equipment intended solely for 'humanitarian or protective use' reveals a continuation of the change in State practice which was seen in the Libyan conflict. The embargo prohibited EU Member States from supplying 'equipment which might be used for internal repression…to any person, entity or body in

[855] UNSCOR, 66th sess, 6627th mtg, UN Doc S/PV.6627 (4 October 2011); UNSCOR, 67th sess, 6711st mtg, UN Doc S/PV.6711 (4 February 2012); UNSCOR, UN Doc S/PV.6826.
[856] Brunnée and Toope, 'The rule of law in an agnostic world: the prohibition on the use of force and humanitarian exceptions', above n 465, 151.
[857] UNSCOR, UN Doc S/PV.6711, 10. Morocco, Germany, the US and the UK similarly expressed their disappointment with the use of the Russian and Chinese veto: see UNSCOR, UN Doc S/PV.6711, 2, 4, 5, and 6.
[858] *Council Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria* [2011] OJ L 121.

Syria or for use in Syria'.[859] The types of equipment listed in the annex to the Regulation included traditional lethal equipment,[860] but also equipment that would fall within the category of 'non-lethal' equipment, such as vehicles and protective equipment including body armour and helmets.[861] However, the Regulation explicitly permitted Member States by 'way of derogation' to authorise the 'sale, supply, transfer or export of equipment which might be used for internal repression, under such conditions as they deem appropriate, if they determine that such equipment is intended solely for humanitarian or protective use'.[862] The inclusion of the exception for 'humanitarian or protective use' in the EU Regulation echoes the language used in Resolution 1970 in relation to Libya and is consistent with the secondary duty under R2P to help to protect populations from atrocity crimes, here by permitting the provision of protective equipment to opposition groups.

The EU embargo was modified on 28 February 2013 to explicitly permit 'additional assistance' to be provided to opposition groups in Syria,[863] in the form of non-lethal military equipment such as armoured vehicles and technical aid, provided that the equipment was used to protect civilians.[864] A statement agreed by EU foreign ministers stated that the sanctions were being amended 'so as to provide greater non-lethal support and technical

[859] *Council Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria*, art 2(1)(a); 'EU Imposes Arms Embargo on Syria', *The Guardian* (online), 10 May 2011, <http://www.guardian.co.uk/world/2011/may/09/syria-european-union-arms-embargo>.
[860] See Chapter V Sanctions for more on this.
[861] *Council Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria*, Annex; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 659.
[862] *Council Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria*, art 2(3).
[863] William Hague, 'Foreign Secretary Updates Parliament on Syria' (Speech delivered to the UK Parliament, London, 10 January 2013) <http://www.gov.uk/government/speeches/foreign-secretary-updates-parliament-on-syria>; 'Hague: "Options Open" on Military Support for Syrian Rebels', *BBC News* (online), 10 January 2013, <http://www.bbc.co.uk/news/uk-politics-20969386>.
[864] *Council Decision 2013/109/CFSP amending Decision 2012/739/CFSP concerning restrictive measures against Syria* [2013] OJ L 58, art 1. 'EU agrees to allow some non-lethal aid for Syrian opposition', *Reuters* (online), 1 March 2013, <https://www.reuters.com/article/us-syria-crisis-eu/eu-agrees-to-allow-some-non-lethal-aid-for-syrian-opposition-idUSBRE91R13D20130228>.

assistance for protection of civilians'.[865] French Foreign Minister Laurent Fabius stated that with the alteration to the arms embargo '[t]echnical assistance and protection of civilians will be easier'.[866] Significantly, the terminology 'humanitarian or protective use' was again used, which further emphasises the change in State practice, inspired by R2P, to maximise permissible measures to help to protect populations from atrocity crimes.

On 6 March 2013, UK Foreign Secretary William Hague announced that 'in addition to search and rescue equipment, communications equipment, and disease-prevention materials, the UK would also send "non-lethal military equipment", such as armoured vehicles and body armour, and provide "assistance, advice and training" to opposition forces in Syria "to help save lives"'.[867] He described the provision of this assistance to the opposition as a 'necessary, proportionate and lawful' response to extreme human suffering,[868] commenting that '[o]ur policy cannot remain static in the face of an ever-deteriorating situation'.[869] The UK and other individual EU Member States, including France[870] and Germany,[871] have provided opposition groups with 'non-lethal assistance', including food rations, intelligence, medicines, body armour and armoured vehicles.[872]

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[865] 'EU extends sanctions on Syria, amends arms embargo to help civilians', *Al Arabiya News* (online), 19 February 2013, <https://www.alarabiya.net/articles/2013/02/18/267001.html>.
[866] 'EU amends Syria arms sanctions to protect citizens', *France 24* (online), 25 February 2013, <http://www.france24.com/en/20130218-eu-agrees-renew-sanctions-syria-embargo>.
[867] William Hague, 'Parliamentary Debates' (Speech delivered in the House of Commons, London, 6 March 2013); 'UK to Send Armoured Vehicles to Syrian Opposition', *BBC News* (online), 6 March 2013 <http://www.bbc.co.uk/news/uk-politics-2164105>; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 660.
[868] UK to Send Armoured Vehicles to Syrian Opposition', above n 867.
[869] Jonathan Marcus, 'Frustration Forces Western Shift on Syria', *BBC News* (online), 28 February 2013, <http://www.bbc.co.uk/news/world-middle-east-21621691>.
[870] Martin Chulov, 'France funding Syrian rebels in new push to oust Assad', *The Guardian* (online), 8 December 2012, < https://www.theguardian.com/world/2012/dec/07/france-funding-syrian-rebels>.
[871] 'Berlin Rules out Arms for Rebels', *Der Spiegel* (online), 14 June 2013, <http://www.spiegel.de/international/germany/germany-says-it-will-not-provide-arms-to-syrian-rebels-a-905830.html>.
[872] 'UK to Send Armoured Vehicles to Syrian Opposition', above n 867.

In response to the continued support for the Syrian government from Iran and Russia,[873] some EU Member States pressed for a further relaxation or cessation of the embargo 'so as to permit the unrestricted provision of arms to the opposition forces'.[874] Germany, however, expressed concerns that this would have a negative impact on the situation in Syria and lead to a proliferation of arms in the region.[875] On 23 May 2013, EU Foreign Ministers decided not to renew the embargo,[876] although there remained an informal agreement not to deliver arms to Syria.[877]

The provision of non-lethal equipment and funding to opposition groups in Syria demonstrates a dramatic departure from the high watermark of the principle of non-intervention set by the ICJ in *Nicaragua*. While any form of assistance to opposition groups, lethal or non-lethal, is contrary to the traditional conceptualisation of the principle of non-intervention, the practice of EU Member States in response to atrocity crimes in Syria has been to provide assistance to opposition groups in the form of funding, intelligence and non-lethal equipment. This is a significant evolution in State practice, reflective of the secondary duty under R2P, progressing the R2P framework through regional organisations in order to help to protect populations from atrocity crimes when the Security Council is deadlocked and unable to act. This practice also demonstrates the restraining influence of intercession under R2P, suggesting that the provision of assistance to opposition groups is limited to items and equipment that will help to protect the population from atrocity crimes.

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[873] 'Iran "Steps Up Syria Support", Hilary Clinton Warns', *BBC News* (online), 1 February 2013, <http://www.bbc.co.uk/news/world-us-canada-21289219>; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 660.
[874] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 660.
[875] 'France and Germany Divided Over Syrian Arms Embargo', *EurActiv.com* (online), 12 March 2013, <http://www.euractiv.com/global-europe/france-germany-divided-syria-arm-news-518425>; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 661.
[876] 'EU Arms Embargo on Syrian Opposition Not Extended', *The Guardian* (online), 28 May 2013, <http://www.guardian.co.uk/world/2013/may/27/eu-arms-embargo-syrian-opposition>; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 661.
[877] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 661.

(b) Other States

Other States have provided support to either the Syrian government (in the case of Iran and Russia) or to opposition groups (in the case of several other States). In contrast, China has 'tried to keep a safe distance from the conflict[,]…insisted that the fate of Assad's government be decided by the Syrian people, and opposed any interference by foreign powers'.[878] China has, however, sided with Russia in vetoing Security Council resolutions in relation to Syria which involve of any form of embargo or use of force, emphasising Syria's sovereignty, political independence, and right to non-interference.[879] The provision of support, including arms, to Syrian government forces by Iran and Russia is not unlawful, in the absence of those States being States Parties to the *Arms Trade Treaty*.[880] As noted in Part B above, States are permitted to intervene in the affairs of another State, provided it is at the invitation of, or with the consent of, the government of that State.[881] The focus of this thesis is not on the legality of actions taken by Russia and Iran. Although, it is significant for an analysis of the secondary duty under R2P that questions regarding legality of support to governments accused of atrocity crimes might not have been raised previously.

Some States have provided financial assistance overtly to opposition groups in Syria. Turkey, Qatar and Saudi Arabia have provided assistance to 'various components of the armed opposition',[882] including the Free Syrian Army.[883] Qatar reportedly 'sees both the

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[878] 'China's role in Syria's endless civil war' *South China Morning Post* (online) 7 April 2017, <http://www.scmp.com/news/china/diplomacy-defence/article/2085779/backgrounder-chinas-role-syrias-endless-civil-war>.
[879] UNSCOR, UN Doc S/PV.6627; UNSCOR, UN Doc S/PV.6711; UNSCOR, UN Doc S/PV.6826.
[880] For more on the Arms Trade Treaty, see Chapter VII.
[881] This is not limited to the governments of recognised States, see Henderson, 'Contested States and the Rights and Obligations of the *Jus ad Bellum*', above n 727, 405. See also, Hathaway, Brower, Liss, Thomas and Victor, above n 230; Jennings and (eds), above n 50, 435.
[882] Simon Adams, 'Failure to Protect: Syria and the UN Security Council' (Occasional Paper, No 5, Global Centre for the Responsibility to Protect, March 2015), 7.
[883] *R2P Monitor*, above n 842, 2; Mark Mazzetti, Christopher John Chivers and Eric Schmitt, 'Taking Outsize role in Syria, Qatar Funnels Arms to Rebels', *New York Times* (online), 29 June 2013, <http://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-

Syrian and Libyan interventions in a moral light. Many Qataris are deeply angry that Syrians are being shot and shelled by their own government and don't possess the means to defend themselves'.[884] In February 2013, then US Secretary of State, John Kerry, announced that the US would provide $60 million of 'non-lethal' aid to support the Syrian National Coalition 'in its operational needs, day to day'.[885] This support appears to have been in the form of actual funds to aid daily activities, rather than in the form of training or provision of military equipment.[886] In addition, the US demonstrated a 'new willingness to supply non-lethal aid - rations and medical equipment - directly to the military opposition to the Assad regime'.[887] Under the traditional approach to non-intervention, such direct assistance to opposition groups would be impermissible.[888] It is therefore significant that 'it received very little in the way of such condemnation from other [S]tates',[889] suggesting an evolution in relation to the application of the principle non-intervention permitting, or at a minimum tolerating, assistance to opposition groups in certain circumstances.

In April 2013, the US announced a doubling of aid to opposition groups in Syria to include non-lethal military assistance and humanitarian aid.[890] Following reports that the

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in.html>; Ruys, 'Of Arms, Funding and "Non-lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War', above n 838, [3].

[884] Michael Stephens, 'What is Qatar doing in Syria?' *The Guardian* (online), 8 August 2012, <https://www.theguardian.com/commentisfree/2012/aug/08/qatar-syria-opposition>.

[885] John Kerry, 'Remarks with Italian Foreign Minister Giulio Terzi and Syrian Opposition Council Chairman Moaz al-Khatib' (Speech delivered at Villa Madama, Rome, 28 February 2013) <http://www.state.gov/secretary/remarks/2013/02/205457.htm>; 'Kerry Pledges $60m in "Non-Lethal" Aid to Syrian Rebels', *BBC News* (online), 28 February 2013, <http://www.bbc.co.uk/news/world-middle-east-21612194>; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 662.

[886] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 662-3.

[887] 'Frustration Forces Western Shift on Syria', above n 869.

[888] *Nicaragua* [1986] ICJ Rep 14, [241]. See also Chapter II.

[889] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 663.

[890] United States Department of State, 'Secretary Kerry Announces Doubling of US Non-lethal Assistance to the Syrian Opposition and New Humanitarian Aid for the Syrian Crisis' (Press Release, PRN 2013/0453, 20 April 2013) < https://2009-2017.state.gov/r/pa/prs/ps/2013/04/207810.htm>.

Syrian government had used chemical weapons,[891] the US announced on 14 June 2013 that it would provide military assistance to Syrian opposition forces, 'different in scope and scale to what...[had] been provided before'.[892] Then President Barack Obama stated that '[t]he international community's credibility is on the line because we give lip service to the notion that these international norms are important'.[893] On 22 June 2013, the Foreign Ministers of the Friends of Syria Group (comprising the United States, United Kingdom, Saudi Arabia, Jordan, Egypt, United Arab Emirates, Qatar, Italy, Germany, France, and Turkey) agreed to 'provide urgently all the necessary materiel and equipment to the opposition on the ground, each country in its own way in order to enable them to counter brutal attacks by the regime and its allies'.[894] Following from this decision, communications equipment, including drones to provide logistical information, and financial support totalling $100 million was provided to pay salaries to the insurgents through a fund of the Syrian National Council.[895] Also in 2013, the Arab League justified assistance to Syrian opposition forces stressing 'the right of each member [S]tate, in accordance with its wish, to provide *all* means of *self-defense*, including *military* support to back the steadfastness of the Syrian people and the free army'.[896]

(c) Syria – summary of assistance provided to opposition groups

In *Nicaragua*, the ICJ examined whether

> there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an

[891] See, eg, 'Chemical Weapons Used in Syria, Says Turkey', *France 24* (online), 11 May 2013, <http://www.france24.com/en/20130511-chemical-weapons-syria-turkey>.
[892] 'US Says It Will Give Military Aid to Syria Rebels', *BBC News* (online), 14 June 2013, <http://www.bbc.co.uk/news/world-us-canada-22899289>.
[893] 'Syria crisis: China joins Russia in opposing military strikes', above n 718.
[894] 'Friends of Syria Will Arm Rebels for Fight against Assad and Hezbollah', *The Guardian* (online), 23 June 2013, <http://www.guardian.co.uk/world/2013/jun/22/us-arms-syria-rebels-assad-hezbollah>.
[895] Luiz Alberto Moniz-Bandiera, *The Second Cold War: Geopolitics and the Strategic Dimensions of the USA* (Springer, 2017), 268.
[896] *24th Arab Summit Issues Doha Declaration* (21-27 March 2013) <http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html>.

> internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.[897]

The Court found 'that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law'.[898] State practice in relation to Syria challenges this high watermark of the principle of non-intervention, with numerous States providing funding and non-lethal equipment to opposition groups in response to the commission of atrocity crimes by government forces.

While States have both covertly and overtly provided assistance to opposition groups in Syria, any traditional legal justification for this assistance (such as a Security Council resolution) has been notably absent.[899] This 'may indicate that these [S]tates feel that their actions are somehow inherently lawful thereby excluding the need to justify them'.[900] Although as Schmitt argues 'if such a right does exist, the level of suffering on the part of the civilian population must be very high before it vests, generally at a level understood to involve "gross and systematic" human rights violations'.[901]

State practice in relation to Syria has been couched in the language of protection of R2P, to 'help save lives'.[902] It is significant that even the provision of funds to opposition groups did not receive condemnation by other States as a violation of the principle of non-intervention. The Syrian conflict and the growing use of measures outside the UN framework may be indicative of the relative success of R2P, at least in terms of its influence on international policy-makers.[903] Despite the gridlock in the Security Council, individual

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[897] *Nicaragua,* [1986] ICJ Rep 14, [206].
[898] Ibid, [209].
[899] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 664.
[900] Ibid.
[901] Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 *Journal of National Security Law & Policy* 139, 151-152.
[902] Hague, 'Parliamentary Debates', above n 867.
[903] Jessica Almqvist, 'Enforcing the responsibility to protect through solidarity measures' (2015) 19(8) *The International Journal of Human Rights* 1002.

States and regional organisations have responded to events in Syria. While some scholars have lamented the failure of the Security Council to take action on Syria as indicating the death of R2P,[904] analysis of State practice in relation to the measures taken by individual States and the EU, reveals that reports of its death may be premature. The fact that foreign assistance to opposition groups in Syria has been framed in terms of protecting the lives of civilians may have contributed to acquiescence on the part of the international community to this practice. At the very minimum, such support now appears to be tolerated in situations where atrocity crimes are being perpetrated by the State against its own population.

D *Conclusion*

Between *Nicaragua* and the commencement of the Arab Spring, States had

> not generally expressed any support for an alteration of the principle of non-intervention so as to provide them with the right to provide arms and non-lethal military assistance to opposition forces, in or outside of civil war, and neither have they generally justified such action upon another controversial legal ground.[905]

For example, the support of Iran and Syria to Hezbollah in Lebanon had been largely covert,[906] while the support by Rwanda and Uganda to opposition groups in the Democratic Republic of the Congo, when acknowledged, was largely said to be justified on the basis of self-defence.[907] However, it is clear that States are now providing overt assistance to opposition groups in response to the commission of atrocity crimes.

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[904] See, eg, Saira Mohamed, 'Syria, the United Nations, and the Responsibility to Protect' (2012) 106 *American Society of International Law Proceedings* 223, 225; Muditha Halliyade, 'Syria – Another Drawback for R2P? An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention' (2016) 4(2) *Indiana Journal of Law and Social Equality* 215.

[905] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 652-653.

[906] See, eg, Amos Harel and Avi Issacharoff, 'Syria is Shipping Scud Missiles to Hezbollah', *Haaretz* (online), 13 April 2010, <http://www.haaretz.com/print-edition/news/syria-is-shipping-scud-missiles-to-hezbollah-1.284141>; 'Syria: Israel's Scud Accusations May Be Pretense for Attack', *Haaretz* (online), 15 April 2010, <http://www.haaretz.com/news/syria-israel-s-scud-accusation-may-be-pretense-for-attack-1.284315>; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 653.

[907] Although this justification was rejected by the ICJ in the case of Uganda's support for the Congo Liberation Movement: see *DRC v Uganda* [2005] ICJ Rep 168, [164]-[165]; Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 653.

This Chapter has argued that intercession has emerged, flowing from R2P, to animate current State practice in response to atrocity crimes. This Chapter has discussed the various forms of assistance to opposition groups which now appear to be permitted, or, at the very least, tolerated in practice. These forms of assistance range from the clearly permissible provision of strictly humanitarian aid provided without discrimination, to the far more contentious provision of arms to opposition groups. As discussed above, in Libya, States interpreted and implemented Security Council Resolutions, particularly Resolution 1973, to permit military personnel to provide training in intelligence and logistics, and the provision of arms, funding and non-lethal equipment to opposition forces. In Syria, in the absence of a Security Council mandate, States provided opposition groups with financial and non-lethal assistance, including food rations, intelligence, medicines, body armour and armoured vehicles.

This State practice reveals a significant departure from the ICJ's approach to non-intervention in *Nicaragua*, reaffirmed in *Democratic Republic of Congo v Uganda*, which provided that, with the exception of strictly humanitarian assistance provided without discrimination,[908] any form of assistance to opposition groups, lethal or non-lethal, was a violation of the principle of non-intervention. However, the Court made it clear that in order to be permissible such aid must be strictly non-discriminatory, for the purpose of preventing and alleviating human suffering and 'to protect life and health and secure respect for the human being'.[909] The Court found that humanitarian aid directed solely to the *Contras*, because it was provided only to them, was in breach of the principle of non-intervention.[910] In contrast to the standard for humanitarian aid set in *Nicaragua*, Security Council arms embargos in Libya, and EU restrictive measures in Syria, have both included explicit

[908] *Nicaragua* [1986] ICJ Rep 14, [242].
[909] Ibid, [242]; Kohen, above n 162, 163.
[910] *Nicaragua* [1986] ICJ Rep 14; Kohen, above n 162, 163.

exceptions for the provision of non-lethal equipment for 'humanitarian or protective use', revealing a significant change in State practice and indicating a change to the threshold for violating the principle of non-intervention through the provision of certain forms of assistance. Analysis of recent State practice in this Chapter in relation to the conflicts in Libya and Syria reveals that it may now be permissible to provide food rations, medicines, body armour and armoured vehicles and other non-lethal equipment to opposition groups in situations where they are helping to protect the population from atrocity crimes.

Further, even direct assistance by way of the provision of funds to aid daily activities was provided to opposition groups in the Syrian conflict, which whilst not overtly acknowledged as permissible was, at the very least, acquiesced in by other States. In addition, the provision of training and logistical support to opposition groups was provided by numerous States in both the Libyan and Syrian conflicts, with very little in the way of condemnation from the international community. Moreover, in the Libyan conflict, Resolution 1973 was broadly interpreted by several States as also allowing the arming of opposition groups to further the aim of the protection of civilians and civilian protected areas.[911] While this was objected to by a small number of States, France defended the lawfulness of this practice stating that '[a] group of civilians were about to be massacred so we took the decision to provide self-defensive weapons to protect those civilian populations under threat'.[912]

This new and emerging State practice indicates that States are interpreting the principle of non-intervention far more narrowly than the ICJ in *Nicaragua*, in order to maximise the permissible measures available to protect populations from atrocity crimes, consistent with the secondary duty under R2P. The evidence in this Chapter that there has

[911] On the ethics of arming opposition groups, see Pattison, above n 730.
[912] 'France 'won't rule out' more Libyan weapons drops', above n 811; Akande, 'France Admits to Arming Libyan Rebels – Was this Lawful?', above n 811.

been an evolution in the customary international law rule of non-intervention to permit the provision of assistance to opposition groups as a measure to suppress the commission of atrocity crimes, in the context of the evidence in support of a similar change to permit an expanded use of sanctions in Chapter V, adds support to the tentative conclusion drawn in Chapter V that the customary rule of non-intervention has evolved to permit States to undertake measures of intercession.

States are clearly not suggesting that anything goes; there are indications that the decision making processes of States include explicit consideration of the necessity of such measures for the protection of civilians, and a reality check on what those opposition groups may do with any assistance provided. This can be seen clearly in the broad interpretation of Security Council Resolutions to permit the arming of opposition groups in Libya on the basis that those groups were using those weapons to help to protect the population from atrocities being carried out by government forces, and the provision of non-lethal assistance to opposition groups in Syria after assessing the capabilities and intentions of opposition groups.[913]

The underlying rationale for the provision of assistance in the Arab Spring has ostensibly been to enable opposition forces to fight brutal regimes that are committing atrocity crimes against their populations.[914] In Libya the question was whether such assistance could be provided under the authority provided under a Security Council mandate to 'protect civilians',[915] while in Syria the main justification initially advanced for the provision of assistance was 'to help save lives'.[916] This Chapter has argued that two elements

[913] 'Libya: France and Italy to Send Officers to Aid Rebels', above n 782; 'Obama Authorises Covert Aid to Libyan Rebels – Reports', above n 822; 'Nato Reviews Libya Campaign After France Admits Arming Rebels', above n 796.
[914] Henderson, 'The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces', above n 720, 672.
[915] SC Res 1973, UN Doc S/RES/1973.
[916] Hague, 'Parliamentary Debates' above n 867. This was later subsumed under collective self-defence.

of intercession can be seen in this current State practice in relation to the provision of assistance to opposition groups in Libya and Syria. The first element enables States to provide support to opposition groups, where such support would traditionally have been prohibited, revealing the expansive influence of intercession under R2P and the secondary duty on the international community under R2P's third pillar. The second element reveals the restraining influence of intercession in imposing restraint on States providing that support, obliging interceding States to ensure that the consequences of their assistance are explicitly considered, and form a conscious part of the decision-making process.

Intercession has now been examined in the context of sanctions in Chapter V, and assistance to opposition groups in this Chapter. The next Chapter will analyse the *Arms Trade Treaty* as a case study demonstrating the influence of intercession under R2P on treaty formulation and implementation.

VII ARMS TRADE TREATY

> The lack of internationally-binding rules on the arms trade contributed in causing intolerable loss and suffering throughout the world. We witnessed conventional arms being used to commit or facilitate violations of international humanitarian law or human rights law. While every State has the legitimate right to defend itself, that does not exempt them from their responsibility to reduce such a risk from occurring in the future. The [Arms Trade] Treaty is created not as a panacea, but as a powerful and meaningful instrument for States and civil society to enhance vigilance and better regulate the transfer of arms.[917]

A *Introduction*

In addition to the measures of intercession analysed in Chapters V and VI, which demonstrate a more expansive State practice in *response* to atrocity crimes, States have also looked for ways to *prevent* the commission of atrocity crimes by restricting the means by which those crimes can be perpetrated. This more proactive State practice, which aligns with R2P's second and third pillars, can be seen in the *Arms Trade Treaty*, highlighting the influence of R2P on treaty-making practice.

The trade in conventional arms has long been viewed as a legitimate practice by States, consistent with the exercise of sovereignty, however conceptualised, and crucial to the State's ability to defend itself.[918] States rely on the conventional arms trade to sustain their military and police forces. In addition, commerce in conventional arms 'is extensive, lucrative, and energetically encouraged by the governments of States in which they are manufactured'.[919] In *Nicaragua*, the ICJ held that 'in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid

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[917] Ambassador Mari Amano, Permanent Representative of Japan to the Conference on Disarmament (Speech delivered at the Signing Ceremony of the Arms Trade Treaty, New York, 3 June 2013) <http://www.un.emb-japan.go.jp/statements/amano060313.html>.

[918] The right of self-defence is enshrined in Article 51 of the *Charter of the United Nations*. See also Rachel Stohl and Suzette Grillot, *The International Arms Trade* (Polity Press, 2009), 138-139.

[919] Laurence Lustgarten, 'The Arms Trade Treaty: Achievements, Failings, Future' (2015) 64(3) *International and Comparative Law Quarterly* 569, 570.

for all States without exception'.[920] However, there is broad international agreement that 'the irresponsible and unregulated trade in conventional arms has devastating consequences for ordinary people across the globe'.[921]

The *Arms Trade Treaty*[922] entered into force on 24 December 2014.[923] It has been described as 'simultaneously an arms control regime, a trade treaty and a new instrument of international humanitarian and human rights law'.[924] This Chapter begins with a brief history of the *Arms Trade Treaty*, before turning to examine the language used in the treaty and obligations it imposes on States Parties. The Chapter contends that the prohibitions on certain trade in arms, and risk assessment requirements, contained in the *Arms Trade Treaty* reveal the influence of R2P on the development of treaty norms. This is the restraining influence of intercession under R2P and builds upon the element of restraint that has been shown in the previous case study Chapters (Chapters V and VI). The restraint on trade in conventional arms required by the *Arms Trade Treaty* completes the picture developed throughout this thesis of R2P influencing the principles of sovereignty and non-intervention (Chapter II), the practice of intercession (Chapters IV to VI), and now, in this Chapter, treaty-making practice. In requiring States Parties to explicitly undertake risk assessment processes before authorising transfers, and refrain from transferring arms in situations where there are atrocity crimes occurring, the *Arms Trade Treaty* requires States to undertake measures

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[920] *Nicaragua* [1986] ICJ Rep 14, [269].

[921] Jesse Clarke, Rachel Stohl, Clare da Silva, Gregory Suchan and John Duncan, 'Irresponsible Arms Trade and the Arms Trade Treaty' (2009) 103 *ASIL Proceedings 2009* 331, 331; *Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty* (15 December 2013) International Committee of the Red Cross <https://www.icrc.org/en/publication/4069-protecting-civilians-and-humanitarian-action-through-arms-trade-treaty>; SC Res 1261, UN SCOR, 54th sess, 4037th mtg, UN Doc S/RES/1261 (30 August 1999) [14].

[922] UN GAOR, 67th sess, 71st plen mtg, Agenda Item 94, UN Doc A/RES/67/234B (2 April 2013) ('*Arms Trade Treaty*').

[923] After two failed diplomatic conferences in July 2012 and March 2013, the Arms Trade Treaty was adopted by a majority vote in the General Assembly. 155 States voted yes, 3 States voted no (North Korea, Iran and Syria), and 22 States abstained (including Russia and China from the P5). See <https://www.un.org/disarmament/convarms/att/>.

[924] Matthew Bolton and Katelyn E James, 'Nascent Spirit of New York or Ghost of Arms Control Past?: The Normative Implications of the Arms Trade Treaty for Global Policymaking' (2014) 5(4) *Global Policy* 439, 447.

which are expressly intended to impact the behaviour of *other* States. It is for this reason that the *Arms Trade Treaty* reflects the secondary duty under, and the second and third pillars of, R2P.

B *The impetus for an Arms Trade Treaty*

Until the entry into force of the *Arms Trade Treaty* on 24 December 2014,[925] there was no all-encompassing international agreement regulating the global trade in conventional arms.[926] As UN Secretary-General Ban Ki Moon observed in March 2013, there were 'common standards for the global trade in armchairs but not the global trade in arms'.[927]

> This means that countries were free to buy and sell anything from Kalashnikovs, machine guns, mortars, shoulder-fired surface-to-air missiles and other small arms and light weapons (SALW) to larger conventional arms such as tanks and aircraft, with no commonly agreed norms of conduct governing those purchases. The absence of norms on arms made for decades of unregulated arms transfers from nonstate arms dealers, known as arms brokers, and free reign by [S]tates to transfer arms to infamous human rights abusers ranging from tyrants to terrorists.[928]

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[925] *Arms Trade Treaty* art 22(1).

[926] Although there were several regional agreements relating to the trade in conventional arms and international agreements relating to certain classes of weapons. See: *European Union Code of Conduct on Arms Exports* (1998); *Document of the Organisation for Security and Cooperation in Europe on Small Arms and Light Weapons* (2000); *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* (2002); *Organisation of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition* (2003); *Code of Conduct of the States of Central America on the transfer of arms, munitions, explosives and related material* (2005); *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons* (2005); *Economic Community of West African States Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials* (2006); *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975); *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, opened for signature 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983); *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993, 1974 UNTS 317 (entered into force 29 April 1997); *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999); *Convention on Cluster Munitions*, opened for signature 3 December 2008, 2688 UNTS 35 (entered into force 1 August 2010). For more on the historical precedents to the *Arms Trade Treaty* see Stuart Casey-Maslen, Andrew Clapham, Gilles Giacca and Sarah Parker, *The Arms Trade Treaty: A Commentary* (Oxford, Oxford University Press, 2016), 1-7.

[927] Ban Ki Moon, 'Secretary-General's remarks to Final United Nations Conference on the Arms Trade Treaty' (Speech delivered at UN Headquarters, New York, 18 March 2013) <http://www.un.org/sg/statements/index.asp?nid=6662>.

[928] Denise Garcia, 'Global Norms on Arms: The Significance of the Arms Trade Treaty for Global Security in World Politics' (2014) 5(4) *Global Policy* 425, 425.

1 *Campaigning towards an Arms Trade Treaty*

The possibility of a legally binding agreement regulating the international arms trade began in 1995 with a campaign commenced by Nobel Peace prize laureate Óscar Arias Sánchez, the former president of Costa Rica.[929] This campaign led to a group of Nobel Peace Prize laureates drafting the Nobel Peace Laureates' *International Code of Conduct in Arms Transfers* in 1997,[930] which 'set forth ambitious human rights standards for regulating arms transfers',[931] including prohibitions on transfers of arms to States that did not respect democratic rights or participate in the United Nations Register of Conventional Arms.[932] This was followed in 2001 by the far less ambitious *Framework Convention on International Arms Transfers*, which 'sought primarily only to codify [S]tates' existing international obligations'.[933] In 2003, a group of non-governmental organisations, including Amnesty International, Oxfam and the International Action Network on Small Arms launched the Control Arms campaign to 'pursue a robust arms trade treaty and to lobby [S]tates to their cause'.[934] In 2006, Control Arms delivered a global petition called 'Million Faces' to then

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[929] Sean D Murphy, 'UN Conference on Illicit Trade in Small Arms' (2001) 95(4) *American Journal of International Law* 901, 903; Dean M Hunter, 'Time to Reload: States Request More Time on the Arms Trade Treaty' (2013) 33(1) *Saint Louis University Public Law Review* 227, 234.

[930] Reproduced in UN Doc A/54/766-S/2000/146 (24 February 2000). The Code was supported by the Dalai Lama, José Ramos-Horta, Elie Wiesel, Betty Williams, Norman Borlaug, Adolfo Pérez Esquivel, Mairead Corrigan Maguire, Rigoberta Menchu, Joseph Rotblat, Desmond Tutu, and Lech Wałęsa. In addition, the code was sponsored by, *inter alia*, former US President Jimmy Carter, UK Foreign Secretary Robin Cook, and former UN Under-Secretary-General Brian Urquhart: Casey-Maslen, Clapham, Giacca and Parker, above n 926, 8, footnote 55. See also: Ernie Regehr, 'An International Code of Conduct for Arms Transfers' (1997) 18(2) *Ploughshares Monitor* <http://ploughshares.ca/pl_publications/an-international-code-of-conduct-on-arms-transfers/>; Sarah Parker, *Implications of States' Views on an Arms Trade Treaty* (UNIDIR, Jan 2008), 5; Hunter, 'Time to Reload: States Request More Time on the Arms Trade Treaty', above n 929, 234.

[931] Hunter, 'Time to Reload: States Request More Time on the Arms Trade Treaty', above n 929, 234; Regehr, above n 930.

[932] Regehr, above n 930.

[933] Casey-Maslen, Clapham, Giacca and Parker, above n 926, 8; *Framework Convention on International Arms Transfers* (2001) <http://graduateinstitute.ch/faculty/clapham/marks-lexicon/NGOarmsframeworkconvention.pdf>; Mark Bromley, Neil Cooper and Paul Holtom, 'The UN Arms Trade Treaty: arms export controls, the human security agenda and the lessons of history' (2012) 88(5) *International Affairs* 1029, 1039.

[934] <http://www.controlarms.org/about-controlarms>. They continued to be a driving force throughout negotiations of the Arms Trade Treaty and their influence can be seen in the final version of the Arms Trade Treaty, particularly the explicit reference to gender-based violence in Article 7(4).

UN Secretary-General Kofi Annan, as public pressure for a global treaty regulating the international arms trade grew.[935]

In relation to the previously existing instruments regulating the trade in conventional arms, Clarke argues that the 'patchwork of regulations has left gaps, given rise to inconsistencies, and, in some cases, has not been rigorously enforced – all of which provides an environment for unscrupulous arms dealers to engage in the illicit and irresponsible trade in arms'.[936] Further, Stohl observes that 'gaping holes in the patchwork of international regulations remain as they do not cover every region, type of transfer, or activity related to the trade in arms'.[937] Indeed, during the initial exchanges of views in relation to the potential for an *Arms Trade Treaty*, many States noted that 'existing regional and international instruments were limited in scope, purpose and implementation, and that this resulted in insufficient restraints on arms transfers'.[938]

2 *Progress towards an Arms Trade Treaty at the United Nations*

In 2006, discussions at the United Nations began in earnest in relation to the possibility of a treaty to impose 'legally binding rules to regulate international transfers of conventional weapons and ammunition'.[939] Recognising

> that the absence of common international standards on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and

[935] Casey-Maslen, Clapham, Giacca and Parker, above n 926, 9.
[936] Clarke, Stohl, da Silva, Suchan and Duncan, above n 921, 331.
[937] Rachel Stohl, 'Putting the Arms Trade Treaty into Context: Perspectives on the Global Arms Trade, Existing Arms Trade Initiatives, and the Role of the United States' (2009) 103 *ASIL Proceedings* 333, 335.
[938] Elli Kytömäki, 'The Arms Trade Treaty's Interaction with Other Related Agreements' (Chatham House Research Paper, International Security Department, February 2015), 5.
[939] Ray Acheson, 'Starting somewhere: The arms trade treaty, human rights and gender based violence' (2013) 22(2) *Human Rights Discourse* 17, 17; UN GAOR, 61st sess, 67th plen mtg, Agenda Item 90, UN Doc A/RES/61/89 (6 December 2006); Knut Dőrmann and Louise Arimatsu, *International Law Summary: Adoption of a Global Arms Trade Treaty: Challenges Ahead* (2013) Chatham House <http://www.chathamhouse.org>, 2; Adam Arthur-Biggs, 'Lawmakers, Guns, & Money: How the Proposed Arms Trade Treaty can Target Armed Violence by Reducing Small Arms & Light Weapons Transfers to Non-State Groups' (2011) 44(4) *Creighton Law Review* 1311.

> terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development,[940]

the General Assembly passed Resolution 61/89 in December 2006. The resolution was co-sponsored by 77 States, and was passed with 153 votes in favour, 23 abstentions and only 1 vote against (from the United States).[941] The Resolution noted increasing international support for a legally binding instrument establishing a universal standard to regulate the transfers of conventional weapons, particularly small arms and light weapons.[942]

In 2009, the UN General Assembly resolved that a four week diplomatic conference on the *Arms Trade Treaty* would be held in July 2012.[943] The diplomatic conference was charged with reaching a consensus vote on 'a legally binding instrument on the highest possible common international standards for the transfer of conventional arms'.[944] During the diplomatic conference, Russia, China, India, Egypt, the Collective Security Treaty Organization, and the League of Arab States 'all expressed disapproval at the emphasis on human rights'[945] in negotiations and the draft treaty text. States widely agreed that diversion and illicit transfers should fall within the scope of the *Arms Trade Treaty*, however they did not agree that the treaty should prohibit transfers to all non-State actors.[946] China asserted that all States have 'sovereign rights to decide whether to give [a] green light or not to a certain arms trade transaction' and that the *Arms Trade Treaty* should not 'be misused for political purposes to interfere with the normal arms trade and internal affairs of any [S]tate'.[947] This position echoes the traditional conceptualisation of Westphalian sovereignty

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[940] UN GAOR, UN Doc A/RES/61/89.
[941] Bromley, Cooper and Holtom, above n 933, 1040.
[942] UN GAOR, UN Doc A/RES/61/89, 2.
[943] UN GAOR, 64th sess, 55th plen mtg, UN Doc A/RES/64/48 (2 December 2009). The resolution was passed with 151 votes, with only Zimbabwe opposing.
[944] Dőrmann and Arimatsu, above n 939, 2.
[945] Hunter, 'Time to Reload: States Request More Time on the Arms Trade Treaty', above n 929, 241.
[946] Ibid, 243; Denise Garcia, 'Arms Transfers Beyond the State-to-State Realm' (2009) 10 *International Studies Perspectives* 153.
[947] *Statement by the Chinese Delegation at the Great Debate of the United Nations Conference on the Arms Trade Treaty* (July 2012), <http:www.un.org/disarmament/ATT/statements/docs/20120709/20120706_China_E.pdf>.

as supreme control and absolute authority (discussed in Chapter II). After four weeks of negotiations, the diplomatic conference failed to reach consensus agreement on a draft treaty text. This was, in most part, due to arms exporting States, such as the United States of America, Russia, Cuba, North Korea and Venezuela, calling for more negotiating time.[948] The view that the trade in conventional arms fell within the exclusive competence of the State, and was therefore a matter for the State to decide freely, appeared to be dominant at this point in negotiations, reflecting the traditional conceptualisations of sovereignty and the principle of non-intervention, analysed in Chapter II.

Following the failure of the first diplomatic conference, ninety States, led by Mexico, issued a joint statement expressing their disappointment and confirming that they remained 'determined to secure an Arms Trade Treaty as soon as possible...[o]ne that would bring about a safer world for the sake of all humanity'.[949] This statement demonstrated strong support for international regulation of the trade in conventional arms and called into question whether the trade in conventional arms remained a matter solely within the exclusive competence of the State under the principles of sovereignty and non-intervention. In December 2012, the General Assembly passed a resolution to reconvene the diplomatic conference in March 2013.[950]

The second diplomatic conference was held in March 2013, presided over by Australia's Ambassador Peter Woolcott. However, it too failed to reach consensus agreement, this time due to formal opposition to the *Arms Trade Treaty* from North Korea,

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[948] Annyssa Bellal, 'Regulating international arms transfers from a human rights perspective' in Stuart Casey-Maslen (ed), *Weapons Under International Human Rights Law* (Cambridge University Press, 2013), 15; Bromley, Cooper and Holtom, above n 933, 1029.

[949] Mexico, 'Joint Statement on the Last Day of the Arms Trade Treaty' (Speech delivered at the United Nations, 2012) <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference/statements/27July_jointstatement.pdf>; Bolton and James, above n 924, 446.

[950] UN GAOR, 67th sess, 62nd plen mtg, Agenda Item 94, UN Doc A/RES/67/234 (24 December 2012). The vote was passed by 133 votes to nil, with 17 abstentions.

Iran, and Syria.[951] The draft treaty that had been tabled at the second diplomatic conference was then sent to the General Assembly by the British Ambassador, where it was adopted by an overwhelming majority vote on 2 April 2013.[952] On adoption of the *Arms Trade Treaty*, Costa Rica stated

> We are called to that task by the millions of peoples who have needlessly lost their lives because of the small arms and light weapons that flow unrestricted across borders. We are also called by the child soldiers who have been armed because of the lack of proper restrictions. We are called by the families that have been torn apart, the communities that have been destroyed, the societies that are terrorized and the victims of organized crime. Above all, we are called to this task by the millions of human beings who will be able to continue to live because of the decision we have taken today. They are the reason for the work we have done here, and they are the people for whom we will continue to work. This is a great achievement that we will never forget, but its true power lies not in the lives in touches, but in the lives it will save.[953]

Then UN Secretary General Ban Ki Moon observed that '[i]n adopting the Arms Trade Treaty, Member States came together to support a robust, legally binding commitment to provide a measure of hope to millions of people around the world'.[954] US Ambassador Samantha Power more clearly linked the adoption of the *Arms Trade Treaty* to the secondary duty under R2P, stating that 'R2P recognizes that the prevention of mass atrocities is an international concern. That's why the recently adopted Arms Trade Treaty, which will help prevent the illicit flow of arms to atrocity perpetrators, is so important'.[955]

With only three States voting against the adoption of the *Arms Trade Treaty*, a clear message was sent that principles of sovereignty and non-intervention would have to make way (particularly for the increasing number of States who have become parties to the treaty)

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[951] Casey-Maslen, Clapham, Giacca and Parker, above n 926, 12.
[952] UN GAOR, UN Doc A/RES/67/234B. 154 States voted yes, 3 States voted no (North Korea, Iran and Syria), and 23 States abstained (including Russia and China from the P5). See also <https://www.un.org/disarmament/convarms/att/>. The *Arms Trade Treaty* entered into force on 24 December 2014.
[953] UN GAOR, 67th sess, 71st plen mtg, Official Records, UN Doc A/67/PV.71 (2 April 2013), 21.
[954] Ban Ki Moon, 'Secretary-General's message to the High-level event on the Arms Trade Treaty' (Speech delivered by Ms. Angela Kane, High Representative for Disarmament Affairs, 25 September 2014) <http://www.un.org/sg/statements/index.asp?nid=8048>.
[955] Ambassador Samantha Power, US Mission to the United Nations, (Speech delivered at an Informal Interactive Dialogue on the Responsibility to Protect, New York, 11 September 2013) <https://2009-2017-usun.state.gov/remarks/5794>.

for regulation of the trade in conventional arms targeted at reducing its unacceptable humanitarian costs. After the vote, the representative of China (which had earlier objected on the basis of sovereignty) stated that his country had abstained from the vote because it objected to a non-consensus measure of arms control;[956] China did not express any objection on the basis of sovereignty or non-intervention, and did not vote against the adoption of the *Arms Trade Treaty* by the General Assembly. Indeed, the only objection on the basis of sovereignty in the various statements made in explanation of vote was raised by North Korea, one of only three States to vote against the resolution.[957] Just as the secondary duty on the international community under R2P was the catalyst for a reconceptualisation of principles of sovereignty and non-intervention that has inspired the practices of intercession examined in Chapters IV to VI, so it also inspired the development of the *Arms Trade Treaty* regulating State activities traditionally thought to be beyond legal control as an incident of sovereignty.

The *Arms Trade Treaty* opened for signature on 3 June 2013[958] and entered into force on 24 December 2014,[959] having reached the required 50 ratifications in a surprisingly short period of time. On the entry into force of the *Arms Trade Treaty*, then UN Secretary-General Ban Ki-Moon said in a statement: 'From now on, the [S]tates parties to this important treaty will have a legal obligation to apply the highest common standards to their international

[956] UN GAOR, UN Doc A/67/PV.71.
[957] Ibid, 16.
[958] A total of 67 States signed the treaty that day at a formal signing ceremony in the Trusteeship Council Chamber.
[959] *Arms Trade Treaty* art 22(1). The *Arms Trade Treaty* has been signed by 130 States. Iceland and Guyana were the first States to ratify the treaty in July 2013. As at 28 December 2017, the *Arms Trade Treaty* has 92 States Parties: Albania, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Benin, Bosnia & Herzegovina, Bulgaria, Burkina Faso, Cabo Verde, Central African Republic, Chad, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saints Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines, Samoa, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tuvalu, United Kingdom, Uruguay, Zambia.

transfers of weapons and ammunition'.[960] As at 28 December 2017, the *Arms Trade Treaty* has 130 signatories and 92 States Parties[961] generating a significant change in State practice in relation to the international trade in conventional arms through the implementation of, in particular, the prohibitions on transfers of certain arms, and risk assessment provisions, contained in the treaty.

C *The Influence of R2P on the Arms Trade Treaty*

1 *Preamble, Principles and Purpose*

Analysis of the language used in the text of the *Arms Trade Treaty* demonstrates the influence of R2P on the development of treaty norms. This is particularly clear in the preamble, principles and purpose, which are important as they assist in interpretation of the treaty obligations as a whole.[962] The preamble explicitly acknowledges 'that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict and armed violence'.[963] In addition, part of the preamble sets forth a set of principles, which includes

> [r]especting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights.[964]

The reference to respect for international humanitarian law and international human rights brings to the fore one of the initial incentives for developing the *Arms Trade Treaty* in the first place – to reduce human suffering by establishing the highest possible common international standards for regulating or improving the regulation of the international trade in

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[960] Ban Ki Moon, 'Statement on the entry into force of the Arms Trade Treaty' (Speech delivered at UN Headquarters, New York, 23 December 2014) <http://www.un.org/sg/statements/index.asp?nid=8299>.
[961] <https://www.un.org/disarmament/convarms/att/>.
[962] *Vienna Convention on the Law of Treaties* art 31.
[963] *Arms Trade Treaty* preamble.
[964] Ibid, principles.

conventional arms.[965] This is consistent with the secondary duty on the international community under R2P to 'help to protect' populations from atrocity crimes by increasing regulation and restrictions on one of the means by which atrocity crimes may be perpetrated.

The influence of R2P can also be identified in another of the Treaty's principles, expressed as the

> responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems.[966]

This two-tier structure of responsibility for regulation of the international trade in conventional arms echoes R2P, with the primary responsibility falling on the individual State and the secondary responsibility falling on the international community (all States). It is significant that the language of R2P and the two-tier system of responsibility has been specifically incorporated into an international treaty, particularly a treaty concerning the trade in conventional arms. This reveals the impact of R2P on the development of treaty norms, with the language and concepts of R2P becoming mainstream and integrated into the treaty text. It will be argued below that this also demonstrates the contours of intercession in the implementation of the treaty obligations, particularly in the restraint required by the prohibitions on certain trade in arms and the risk assessment requirements.

The preamble also acknowledges considerations such as the principle of non-intervention and respect for the legitimate interests of States to acquire, produce, export, import, and transfer conventional arms.[967] As part of the context of the *Arms Trade Treaty*, these considerations will also aid in interpretation. They demonstrate the important balance in the treaty between traditional State freedoms to acquire and trade in arms as an exercise of sovereignty, and R2P's reconceptualisation of sovereignty as responsibility and the

[965] Ibid, art 1.
[966] Ibid, principles.
[967] Ibid.

recognition that there are international obligations to 'help to protect populations' that take precedence when atrocity crimes are being committed.

The influence of R2P in the choice of language used in the treaty text is also demonstrated in the express object and purpose of the treaty – the need for the highest possible common standards, and the emphasis on reducing human suffering and States taking responsible action.[968] This also highlights the shift in emphasis in international law more generally towards increased protection of the most vulnerable.[969]

Consistent with the rules regarding treaty interpretation, the preamble, principles and purpose can be used to aid in interpretation of the *Arms Trade Treaty*.[970] It is significant that the language and structure of responsibility of R2P has been incorporated into the treaty's preamble, principles and express purpose, as the influence of R2P will thus impact the interpretation of the treaty obligations as a whole. In this way, the *Arms Trade Treaty* is an instance of R2P at work, reinforcing and extending States Parties' own obligations under international human rights law and international humanitarian law. As argued below, it also demonstrates the restraining influence in the practice of intercession under R2P by impacting on the commission of atrocity crimes in other States by imposing restrictions on the supply of the means of committing those crimes.

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[968] Ibid, art 1: 'The object of this Treaty is to:
- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:
- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.'

[969] See, eg, United Nations Regional Information Centre for Western Europe, 'Secretary-General links arms trade regulation to responsibility to protect', (Media Release, 13 February 2013) <http://www.unric.org/en/latest-un-buzz/28214-secretary-general-links-arms-trade-regulation-to-responsibility-to-protect>; Power, above n 955.

[970] *Vienna Convention on the Law of Treaties* art 31(1) and (2).

2 *Scope*

The influence of R2P can also be seen in the scope of the *Arms Trade Treaty*, which is broad, although not comprehensive.[971] Article 2 establishes the categories of conventional arms that are covered by the *Arms Trade Treaty*.[972] The inclusion of small arms and light weapons within the scope of the treaty is of particular significance for the protection of populations from atrocity crimes, consistent with the secondary duty on States under R2P to use 'appropriate diplomatic, humanitarian and other peaceful means'[973] to help to protect populations. Of all conventional arms, small arms and light weapons in particular, the weapon of choice in an estimated 90 per cent of contemporary armed conflicts,[974] pose a grave threat to the well-being and lives of civilians due to their wide availability and use in non-international armed conflicts.[975] In 2000, then UN Secretary-General Kofi Annan recognised that 'in terms of the carnage they cause, small arms, indeed, could well be described as "weapons of mass destruction"'.[976] While the *Arms Trade Treaty* does not cover all weapons that can be used to commit atrocity crimes,[977] it will make it more difficult for States Parties to transfer conventional arms to recipients that violate international

[971] There is some debate about whether hand grenades or armed drones would be covered by the Arms Trade Treaty. See, eg, Dőrmann and Arimatsu, above n 939, 4; Matthew Bolton and Wim Zwijnenburg, 'Futureproofing is Never Complete: Ensuring the Arms Trade Treaty keeps pace with New Weapons Technology' (Working Paper #1, International Committee for Robot Arms Control, 2013).

[972] Article 2 of the *Arms Trade Treaty* states that the treaty applies to:

(a) Battle tanks;
(b) Armoured combat vehicles;
(c) Large-calibre artillery systems;
(d) Combat aircraft;
(e) Attack helicopters;
(f) Warships;
(g) Missiles and missile launchers; and
(h) Small arms and light weapons.

[973] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.

[974] Jayantha Dhanapala, 'Multilateral Cooperation on Small Arms and Light Weapons: From Crisis to Collective Response' (2002) 9(1) *Brown Journal of World Affairs* 163, 163.

[975] Rachel Stohl, 'Targeting Children: Small Arms and Children in Conflict' (2002) 9(1) *Brown Journal of World Affairs* 281, 281; Rachel Stohl, 'Under the Gun: Children and small arms' (2002) 11(3) *African Security Review* 17, 18.

[976] *We the Peoples: The Role of the UN in the 21st Century*, above n 1, 52.

[977] For example, tasers and armed drones are not expressly listed.

humanitarian law and international human rights law, and restrict the flow of conventional arms into States where atrocity crimes are occurring.

Article 2 is supplemented by Articles 3 and 4, which expand the scope of the treaty to include ammunition and munitions,[978] and parts and components, respectively, by requiring States Parties to 'establish and maintain a national control system to regulate the export' of these items and 'apply the provisions of Article 6 and Article 7 prior to authorizing the export'.[979]

The requirement to have an 'an effective and transparent national control system', which is stated in Article 5(5) (and also required by Articles 3 and 4), is significant in itself. As the EU has noted, the 'core requirement of establishing national arms control systems and national control lists is new to many States'.[980] The national control system requirement is a 'core obligation' of the *Arms Trade Treaty* as it is 'essential' to its effective implementation.[981] It is to be contrasted with weak pre-existing arms trade control systems in many States, which 'pose an inherent risk that transfer-related decisions are made with poor or no information at hand'.[982]

Article 2 also establishes the activities of international trade which are covered by the *Arms Trade Treaty*. These include 'export, import, transit, trans-shipment and brokering',

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[978] The inclusion of ammunition and munitions was a highly contentious issue during negotiations. See, eg, *Statement by Finland* (Statement made at the Final United Nations Conference on the Arms Trade Treaty, 18 March 2013), 2, <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference-ii/statements/18March_Finland.pdf>. For more on this see Susan O'Connor, 'Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and Its New Zealand Application' (2013) 11 *New Zealand Yearbook of International Law* 73, 85; Jamil Balga, 'The New International Law of Arms Trade: A Critical Analysis of the Arms Trade Treaty from the Human Rights Perspective' (2016) 3 *Indonesian Journal of International and Comparative Law* 583, 600-604.

[979] *Arms Trade Treaty* arts 3 and 4.

[980] European Union, 'Statement on Effective Treaty Implementation' (Statement delivered at the Third Conference of States Parties to the Arms Trade Treaty, Geneva, 12 September 2017) <https://eeas.europa.eu/headquarters/headquarters-homepage/32012/third-conference-states-parties-arms-trade-treaty-eu-statement-effective-treaty-implementation_en>.

[981] Casey-Maslen, Clapham, Giacca and Parker, above n 926, 169, [5.16].

[982] Elli Kytömäki, 'The Defence Industry, Investors and the Arms Trade Treaty' (Chatham House Research Paper, International Security Department, December 2014), 23.

combined under the umbrella term 'transfer' in the rest of the Treaty, of any of the conventional arms listed in Article 2.[983] During negotiations, 'China argued that loans, leases, and gifts should be entirely excluded from the ambit of the treaty, and that only activities involving actual sale and financial payment should be covered'.[984] 'Ultimately, states settled for constructive ambiguity in the text',[985] neither expressly including, nor excluding leases, loans, gifts or aid, and leaving it to States Parties to determine whether they will fall within the interpretation of the treaty through subsequent State practice.[986] In this regard, on ratification of the treaty, both Lichtenstein and Switzerland made declarations that their interpretations of 'transfer' would include non-monetary transactions such as leases, loans, gifts and aid within the scope of the *Arms Trade Treaty*.[987]

States are encouraged to apply the provisions of the *Arms Trade Treaty* to the broadest range of conventional arms;[988] it sets a floor rather than a ceiling. Indeed, the preamble expressly states that 'nothing in this Treaty prevents States from maintaining and adopting additional effective measures to further the object and purpose of this Treaty'.[989] The broad scope of the *Arms Trade Treaty* and its constructive ambiguity, permitting States to adopt a broader application of the treaty under a more expansive interpretation of 'transfer', emphasises greater action by States Parties and enhanced permission to engage in measures of intercession resulting from R2P.

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[983] The physical movement of conventional arms within a State and their international movement where those arms remain under that State's ownership and control are not covered by the Arms Trade Treaty: See *Arms Trade Treaty* art 2(3). See also: Yasuhito Fukui, 'The Arms Trade Treaty: Pursuit for the Effective Control of Arms Transfer' (2015) 20(2) *Journal of Conflict & Security Law* 301, 315.
[984] Casey-Maslen, Clapham, Giacca and Parker, above n 926, 66, [2.21].
[985] Ibid.
[986] *Vienna Convention on the Law of Treaties* art 31(3).
[987] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&lang=en#EndDec>; Casey-Maslen, Clapham, Giacca and Parker, above n 926, 66, footnote 42. This is consistent with the interpretation of 'transfer' in other arms control treaties, such as the *Anti-Personnel Landmine Convention*, which has been interpreted to include import, export, gift and sale: Stuart Maslen, *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on Their Destruction* (Oxford University Press, 2004), 128; Fukui, above n 983, 314.
[988] *Arms Trade Treaty* art 5(3).
[989] Ibid, preamble.

3 *The prohibitions and risk assessments*

The most vital parts of the *Arms Trade Treaty* are the prohibitions on certain transfers of arms and the risk assessment requirements. As demonstrated below, these provisions reveal the influence of the secondary duty under R2P, the second and third pillars of implementation of R2P (introduced in Chapter III), and the restraining influence of intercession under of R2P.

(a) Prohibitions

Article 6 sets out explicit prohibitions on certain transfers of conventional arms. States Parties are expressly prohibited from transferring conventional arms, ammunition/munitions and parts and components where it would violate obligations under measures adopted by the UN Security Council acting under Chapter VII, in particular arms embargoes.[990] States Parties are also prohibited from transferring arms where it would violate any international obligations under international agreements to which the State is a party in particular those relating to the transfer of or illicit trafficking in conventional arms.[991] As States are already obliged to comply with any UN Security Council measures under Chapter VII and international agreements they are party, these prohibitions do not appear to add anything new.

Contrastingly, the prohibition in Article 6(3) is significant and novel. It prohibits a State Party from transferring arms where it has

> knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party'.[992]

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[990] Ibid, art 6(1).
[991] Ibid, art 6(2).
[992] Ibid, art 6(3). A specific reference to serious violations of Common Article 3 to the 1949 Geneva Conventions, which had been in the draft treaty text tabled at the first diplomatic conference, did not make it into the final text of Article 6(3). In this regard, Switzerland made an interpretive declaration when the treaty

The Article 6(3) prohibition on arms transfers 'formulates a substantive (primary) rule that prohibits the transfer of conventional arms in specific circumstances…[and] helps to reinforce well-established norms of international conventional and customary law'.[993]

The requirement of 'knowledge at the time of authorisation' in Article 6(3) requires a State Party to know of the existence of a causal link between the transfer and a forthcoming atrocity crime; the State must have knowledge at the time of authorising the transfer that the arms to be transferred would be used to commit one or several of the crimes listed.[994] Jørgensen argues that it may be extremely difficult to establish conclusively that a State supplied arms with knowledge that those arms would be used to commit atrocity crimes.[995] During its statements made in explanation of vote, Russia stated that

> the term "knowledge" in legal English is a considerably broader conception that "to be informed of" and indicates full conviction of something based on all aggregate data…. a conclusion as to the existence or absence of knowledge can be reached only be the exporting State itself. In the context of the ATT, Russia will rely on its own understanding of the term "knowledge"…as "possesses reliable knowledge".[996]

The knowledge standard appears to be a high one, certainly much higher than a mere suspicion or likelihood that the transferred arms would be used to commit atrocity crimes.[997] Kellman suggests that the standard 'is higher than strict liability but lower than international

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was adopted by the General Assembly on 2 April 2013 that: 'It is our understanding that the words 'other war crimes as defined by international agreements to which it is a Party' encompass, among others, serious violations of Common Article 3 to the 1949 Geneva Conventions – instruments that enjoy universality': United Nations General Assembly Department of Public Information, 'Overwhelming Majority of States in General Assembly Say 'Yes' to Arms Trade Treaty to Stave off Irresponsible Transfers that Perpetuate Conflict, Human Suffering' (Press Release, 23 April 2013) <http://www.un.org/News/Press/docs/2013/ga11354.doc.htm>; Dőrmann and Arimatsu, above n 939. The Swiss statement was endorsed by Ireland, and New Zealand has also said that 'the full range of IHL should apply to prohibited transfers': Dőrmann and Arimatsu, above n 939.

[993] Nina HB Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108 *American Journal of International Law* 722, 725.

[994] The requirement of knowledge is a legal standard 'not often used in international arms control treaties': Barry Kellman, 'Controlling the Arms Trade: One Important Stride for Humankind' (2014) 37 *Fordham Journal of International Law* 687, 711. For a detailed discussion of the knowledge standard in the *Arms Trade Treaty*, see: Casey-Maslen, Clapham, Giacca and Parker, above n 926, 204-209.

[995] Jørgensen, above n 993, 729.

[996] UN GAOR, UN Doc A/67/PV.71, 10.

[997] See Casey-Maslen, Clapham, Giacca and Parker, above n 926, 204-207.

criminal law's requirement of intention to aid and abet the wrongful act'.[998] Further, that knowledge may refer to the following:

> (1) An authorized official's own inquiries produce information, or the authorized official should have undertaken such inquiries; (2) information is publicly available, including reports by the United Nations, other governments, the media, and relevant *publicists*; (3) information is brought to the official by an outside source such as an NGO; and (4) circumstances are sufficiently unusual to put reasonable officials on notice, in light of their entire legal responsibilities, of a suspicious purpose for a particular transfer.[999]

Any transfer which is authorised in circumstances where an authorised official knew about the risks that those conventional arms would be used to commit atrocity crimes (including, as the quotation above makes clear, where the circumstances should have 'put reasonable officials on notice') is an international wrong, which may give rise to State responsibility.[1000] In this regard, Japan has stated that the 'global arms trade [should] no longer [be] unrestricted or in the dark'.[1001] Jørgensen argues that the *Arms Trade Treaty* enhances 'the mechanisms and the ability to hold states to account so they can't evade responsibility by saying they were just engaging in ordinary trade or by allowing individuals to be scapegoats'.[1002] On this, Japan has stated that with 'the adoption of the Arms Trade Treaty, we now have a solid basis to assess whether States are conducting their arms transfers responsibly or not. With the scope of items and activities covered in the Treaty, States can be held accountable for their actions'.[1003]

The fact that there is a requirement on States Parties to refrain from transferring conventional arms, even if only applies in limited circumstances where the requisite Article

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[998] Kellman, above n 994, 712.
[999] Ibid (emphasis original).
[1000] For more on State responsibility in the context of the *Arms Trade Treaty*, see: Jørgensen, above n 993; Clare da Silva, 'Framework and Core Standards of an Arms Trade Treaty' (2009) 103 *ASIL Proceedings 2009* 336, 338. Cf: Anna Stavrianakis, Leng Xinyu and Zhang Binxin, *Arms and the responsibility to protect: Western and Chinese involvement in Libya* (1 November 2013) Saferworld <http://globalinitiative.net/wp-content/uploads/2017/01/saferworld-arms-and-the-r2p-in-libya-2014.pdf>, 15; John Duncan, 'The Arms Trade Treaty: A Supporting Government Perspective' (2009) 103 *ASIL Proceedings 2009* 341, 342.
[1001] Amano, above n 917.
[1002] Alex Frew McMillan, 'Casting a Wider Net: Holding arms supplying states responsible for war crimes', August 2014, http://www.cuhk.edu.hk/english/features/prof-jorgensen-nina.html; Jørgensen, above n 993.
[1003] UN GAOR, UN Doc A/67/PV.71, 25.

6(3) knowledge standard is reached, means that there will need to be a domestic process for making that assessment in *every* case. Indeed, the obligation on States Parties to 'establish and maintain a national control system to regulate the export'[1004] of conventional arms, ammunition and munitions, and parts and components, combines with the Article 6(3) prohibition 'to make the ATT the most comprehensive arms control treaty in existence'.[1005] The *Arms Trade Treaty* requires States Parties to have domestic processes to explicitly consider the consequences of their transfers of conventional arms and items before authorising any transfers, where such considerations would not have been previously required, demonstrating the restraining influence of intercession under R2P.

While some States may already do this as best practice in trade in conventional arms,[1006] the requirement that States follow an express procedure prior to their decision to transfer arms to other States demonstrates the influence of R2P on the *Arms Trade Treaty* and the secondary duty on the international community to 'help to protect populations' from atrocity crimes. In this way, R2P can be seen to be motivating the development of treaty norms by requiring States Parties to undertake measures which are expressly intended to impact the behaviour of other States, consistent with the secondary duty under R2P, and the second and third pillar of its implementation (analysed in Chapter III). By restricting the means by which atrocity crimes can be perpetrated in pursuit of R2P's second pillar – international assistance and capacity building – States Parties can be seen to be assisting other States to avoid failing in their primary responsibility to protect their citizens. Further, in making timely and decisive decisions under the treaty's required domestic processes, and explicitly considering the situation into which conventional arms and items are being

[1004] *Arms Trade Treaty* arts 2, 3 and 4.
[1005] O'Connor, above n 978, 84.
[1006] See, eg, statements by the United States that their approach to arms transfers is the gold standard: Clarke, Stohl, da Silva, Suchan and Duncan, above n 921; Jennifer L Erickson, 'Saint or Sinner? Human Rights and US Support for the Arms Trade Treaty' (2015) 130(3) *Political Science Quarterly* 449.

transferred and the likely consequences flowing from their transfer, States Parties can also be seen to be implementing R2P's third pillar.

(b) Risk Assessments

In the absence of knowledge which would trigger the Article 6(3) prohibition examined above, Article 7 imposes a duty on States Parties to carry out a risk assessment prior to authorising the export of conventional arms. Article 7(1) requires a State Party, in an objective and non-discriminatory manner, to:

> assess the potential that the conventional arms or items:
> (a) would contribute to or undermine peace and security;
> (b) could be used to:
> i. commit or facilitate a serious violation of international humanitarian law;
> ii. commit or facilitate a serious violation of international human rights law;
> iii. commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
> iv. commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.[1007]

The standard for the refusal to authorise the export is 'overriding risk of any of the negative consequences'[1008] listed in Article 7(1).[1009] This is a lower standard than the knowledge standard required for the Article 6(3) prohibition. In the explanation of vote in the General Assembly, Trinidad and Tobago, speaking on behalf of the Caribbean Community ('CARICOM'),[1010] stated

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[1007] *Arms Trade Treaty* art 7(1). Article 7(4) requires that in their risk assessment States Parties 'take into account the risk of the conventional arms…or items…being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children'. The *Arms Trade Treaty* 'is the first global, legally binding treaty to recognise the links between the international arms trade and gender-based violence': Helena Whall and Allison Pytlak, 'The Role of Civil Society in the International Negotiations on the Arms Trade Treaty' (2014) 5(4) *Global Policy* 453, 458.

[1008] *Arms Trade Treaty* art 7(3).

[1009] During negotiations and campaigning, NGOs, including the Control Arms Campaign, had called for an even lower standard of 'substantial risk'. However, this was changed to 'overriding risk' at the insistence of the United States, in line with its national approach to arms export licensing. Anna Stavrianakis, 'Legitimising liberal militarism: politics, law and war in the Arms Trade Treaty' (2016) *Third World Quarterly*, doi:10.1080/0146597.2015.1113867, 9.

[1010] The Member States of CARICOM are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago.

> The regulation and control of the global arms trade is the responsibility of all States, particularly arms producers and exporters…The States of CARICOM…welcome the provisions in the ATT that prohibit a State part from authorizing a transfer of conventional arms if it would be in violation of non-derogable norms under international law.[1011]

Jørgensen submits that 'overriding risk' is a high threshold 'suggesting that the risk of negative consequences needs to be significant for the export to be precluded'.[1012] New Zealand has stated that it will interpret the concept of overriding risk as substantial risk.[1013] Lichtenstein has similarly declared that overriding risk

> encompasses…an obligation not to authorize the export whenever the [S]tate party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered.[1014]

When taken together, the obligations on States Parties under Articles 6 and 7 provide more comprehensive protection for populations from atrocity crimes and may address any concerns about the high standard of knowledge required to trigger the Article 6(3) prohibition on arms transfers.

It has been suggested that the standard of 'overriding risk' in the Article 7 risk assessment requirement could suggest a 'balancing exercise between the risk of serious violations on the one hand and the contribution to peace and security on the other',[1015] which may undermine the primacy of international humanitarian law and international human rights law[1016] and expose civilians to increased risk of harm. McDonald argues that:

> A State could, for example, seize upon the term 'overriding risk', in Article 7(3) to justify an export intended to help a government end a civil war, notwithstanding the latter's systematic

[1011] UN GAOR, UN Doc A/67/PV.71, 21-22.
[1012] Jørgensen, above n 993, 728.
[1013] *Declaration of New Zealand upon ratification of the ATT*, 2 September 2014, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>; Casey-Maslen, Clapham, Giacca and Parker, above n 926, 275, [7.92]-[7.94].
[1014] *Declaration of Lichtenstein upon ratification of the ATT*, 16 December 2014, <https://treaties.un.ogr/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>; Casey-Maslen, Clapham, Giacca and Parker, above n 926, 276, [7.94]. These relevant instances of subsequent State practice contribute to the interpretation of the *Arms Trade Treaty*: *Vienna Convention on the Law of Treaties* art 31(3)(b).
[1015] Dőrmann and Arimatsu, above n 939, 5; Stavrianakis, Xinyu and Binxin, above n 1000, 11.
[1016] Caroline Green, Deepayan Basu Ray, Claire Mortimer and Kate Stone, 'Gender-based violence and the Arms Trade Treaty: reflections from a campaigning and legal perspective' (2013) 21(3) *Gender & Development* 551, 561.

> violation of human rights norms. In the eyes of the exporting State, the contribution the shipment is intended to make to 'peace and security' (Art 7(1)(a)) would 'override' the importing State's lack of respect for human rights.[1017]

The Arms Trade Treaty Implementation Toolkit prepared by the United Nations Office of Disarmament Affairs provides two possible interpretations of 'overriding risk':

> One possible interpretation of Article 7(3) is that the exporting State, after conducting its assessment and considering mitigating measures, should weigh the risk of negative consequences against expected positive consequences of the export. In this interpretation, if the risk of negative consequences outweighs the likelihood of positive consequences, the exporting State should not authorize the export.
>
> The ATT does provide guidance as to what constitute positive consequences of an export: the transfer contributing to peace and security. It is up to each authorizing State to weigh whether a transfer is more likely to contribute to peace and security than to engender negative consequences.
>
> Another interpretation could be that the exporting State should determine whether the risk of negative consequences outweighs the likelihood that those consequences would not occur.[1018]

Further, a 2013 briefing paper from the Geneva Academy of International Humanitarian Law and Human Rights notes that

> [t]his provision remains extremely contentious. Read in concert with the remainder of Article 7, it appears to create a significant potential loophole because a transfer that would otherwise be unlawful under the article might nevertheless be authorized and "legal" if a [S]tate party claims to have determined that its effect on peace and security would be positive.[1019]

The risk assessment required by Article 7 only applies to exports to States and not any other means of transfer of arms, such as gifts or loans. On this issue, the Human Rights Council has urged

> all States to refrain from transferring arms to those involved in armed conflicts when said States assess, in accordance with their applicable national procedures and international obligations and standards, that such arms are sufficiently likely to be used to commit or facilitate serious violations or abuses or international human rights law or international humanitarian law.[1020]

[1017] Glenn McDonald, 'Worth the Paper? The Arms Trade Treaty', *E-International Relations*, <http://www.e-ir.info/2013/04/17/worth-the-paper-the-arms-trade-treaty/>.
[1018] *Arms Trade Treaty Implementation Toolkit: Module 6 Export* (21 August 2015) UNODA <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2015/08/2015-08-21-Toolkit-Module-6.pdf>, 18.
[1019] *Academy Briefing Paper No 3: The Arms Trade Treaty* (Geneva Academy of International Humanitarian Law and Human Rights, 2013), 20.
[1020] *Report of the Human Rights* Council, 24th sess, Agenda Item 1, UN Doc A/HRC/RES/24/35 (27 September 2013).

The Human Rights Council resolution was adopted with a vote of 42 to 1, with 4 abstentions.[1021] Such an approach to the *Arms Trade Treaty* would expand the risk assessment requirements to include all forms of transfer of conventional arms to all parties, which would enable States Parties to more readily satisfy their secondary duty under R2P to 'help to protect populations' from atrocity crimes.[1022]

Kellman argues that the Article 7 risk assessment 'means that an exporting State may not claim legal innocence for its arms transfers on the grounds that, under its regulatory system it made no inquiry about the risk that the purchaser of the exported arms will use them to violate international law'.[1023] It has removed the defence of wilful blindness,[1024] and the very existence of the assessment process suggests increased transparency and more informed decisions about the transfer of conventional arms and items in situations at risk of atrocity crimes.[1025] Indeed, the obligation on States Parties to 'establish and maintain a national control system to regulate the export'[1026] means that States Parties are required to have domestic processes in place prior to authorising transfer of conventional arms and items, where such considerations would not have been previously required. More significantly than this, however, this Chapter demonstrates that the *Arms Trade Treaty* creates a positive and active duty on exporting States to actually enquire as to the risks of their arms transfers. This is R2P's third pillar at work, in that the State is required to actively consider what other States will do with the arms, and, if atrocity crimes are apprehended, to actively attempt to stop them by refusing to export.

[1021] Ibid.
[1022] The process for amendment is set out in Article 20 which allows for amendments to be proposed six years after the entry into force of the *Arms Trade Treaty* and thereafter on a three yearly basis.
[1023] Kellman, above n 994, 714.
[1024] Ibid.
[1025] Ibid, 720.
[1026] *Arms Trade Treaty* arts 3, 4 and 5.

In 2013, in Resolution 2117,[1027] the Security Council urged States to consider signing and ratifying the *Arms Trade Treaty* as soon as possible, and encouraged 'States, intergovernmental, regional and sub-regional organizations that are in a position to do so to render assistance in capacity-building to enable States Parties to fulfil and implement the Treaty's obligations'.[1028] The call to all States to consider signing, ratifying, or acceding to the *Arms Trade Treaty* was reiterated in 2015 in Resolution 2220.[1029] By urging States to ratify the *Arms Trade Treaty*, the international community can assist States to uphold their primary protection obligations, consistent with the commitment of the international community to provide international assistance to assist States in fulfilling their protection responsibilities (R2P's second pillar).

It can thus be seen that the prohibitions on certain arms transfers, and risk assessment requirements, in the *Arms Trade Treaty* demonstrate the significance and influence of R2P, and its capacity to contribute to the development of treaty norms. The *Arms Trade* Treaty is a form of intercession inspired by R2P in terms of its imposition of risk assessment requirements and transfer prohibitions, intended to avert atrocity crimes by denying the tools necessary to carry out those crimes. States Parties are required to explicitly consider the impact of their transfers of conventional arms, including ammunition/munitions and parts and components, in their required decision making processes. In requiring States Parties to explicitly undertake risk assessment processes before authorising transfers, and refrain from

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[1027] SC Res 2117, UN Doc S/RES/2117. The resolution was passed by a vote of 14 in favour with none against (Russia abstaining). Russia abstained on the basis that the resolution 'lacked an important provision on the unacceptability of transferring small arms and light weapons to non-State actors': UN SCOR, 68th sess, 7036th mtg, UN Doc S/PV.7036 (26 September 2013); United Nations Security Council, 'Security Council Adopts First-ever Resolution Dedicated to Question of Small Arms, Light Weapons' (Press Release, SC/11131, 26 September 2013).

[1028] SC Res 2117, UN Doc S/RES/2117, [19].

[1029] SC Res 2220, UN Doc S/RES/2220. The resolution was passed by a vote of 9 in favour, none against, and the abstentions of Angola, Chad, China, Nigeria, Russian Federation, and Venezuela. Those abstaining objected to the lack of wording that specifically addressed the illicit transfer of arms to non-State actors: UN SCOR, 70th sess, 7447th mtg, UN Doc S/PV.7447 (22 May 2015), 4 (Angola), 5 (Chad), 7 (Russia), 8 (China), 8 (Venezuela).

transferring arms in certain situations, the *Arms Trade Treaty* requires States to undertake measures which are expressly intended to impact the behaviour of other States, under the mantle of R2P. States Parties can thus help fulfil their responsibilities under R2P's second and third pillars by assisting States to not fail in their primary obligations through restricting the means of perpetrating atrocity crimes, and by making timely and decisive decisions not to transfer arms to a confirmed or suspected perpetrator of atrocity crimes.

D *Conclusion*

The perpetration of atrocity crimes requires access to the means to commit those crimes. The *Arms Trade Treaty* was developed, and now operates, against a background of competing interests, with protection of the most vulnerable from atrocity crimes being of particular relevance for R2P. As argued in Chapter III, R2P is fundamentally about duty: the primary duty of States to protect their citizens from atrocity crimes[1030] and the novel secondary duty of the international community to 'use appropriate diplomatic, humanitarian and other peaceful means' to 'help to protect populations' from atrocity crimes.[1031] The secondary duty acknowledges, in part, that:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[1032]

As US Ambassador Samantha Power highlighted in a statement to the Informal Interactive Dialogue on the Responsibility to Protect, the *Arms Trade Treaty* is an example of the multilateralization of efforts to prevent atrocities.[1033]

The fact that an international treaty regulating the trade in conventional arms exists at all is significant. The fact that it has been achieved now that R2P is a dominant international

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[1030] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 138.
[1031] Ibid, para 139.
[1032] Ibid.
[1033] Power, above n 955.

paradigm is no mere coincidence. This Chapter has demonstrated that the influence of R2P on the development of treaty norms can be seen throughout the *Arms Trade Treaty*, in respect of the language and concepts used, and in the obligations imposed on States Parties. The language and structure of responsibility of R2P has been incorporated into the Treaty's preamble, principles and express purpose, and will impact the interpretation of the treaty obligations as a whole.

In addition, examination of the *Arms Trade Treaty* revealed the restraining influence of intercession under R2P, encompassed within the risk assessment requirements and prohibitions on certain transfers. In requiring Member States to explicitly undertake risk assessment processes before authorising transfers, and refrain from transferring arms in situations where there are atrocity crimes occurring or anticipated, the *Arms Trade Treaty* requires States to undertake measures which are expressly intended to impact the behaviour of other States, in satisfaction of the secondary duty and responsibility on the international community under R2P's second and third pillars.

The legal restraint on States Parties to the *Arms Trade Treaty* in relation to the transfer of conventional arms is itself a means of intercession, intended to avert atrocity crimes by denying the tools necessary to carry out those crimes. Simultaneously, the *Arms Trade Treaty* is also an instance of self-restraint inspired by R2P, in that it seeks to ensure that States do not aid or abet atrocity crimes in another State by transferring conventional arms. In this way, the *Arms Trade Treaty* is both R2P at work in terms of reinforcing States' own obligations of restraint under international human rights law and international humanitarian law, as well as a form of intercession inspired by R2P in terms of its imposition of risk assessment requirements and transfer prohibitions which are intended to impact on the commission of atrocity crimes in other States.

VIII CONCLUSION

> R2P remains very much an evolving concept, neither the panacea that some had hoped for nor the hollow promise that others resigned themselves to expect.[1034]

A *Introduction*

Despite repeated declarations of 'never again' in response to the commission of atrocity crimes, civilians have continued to be the victims of such crimes. This thesis began with the question posed by then UN Secretary-General Kofi Annan in 2000: '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?'.[1035] This thesis demonstrated that by 2005 the international community had a conceptual answer to this question in the form of R2P.

Drawing on the adoption of R2P by the international community at the 2005 UN World Summit, this thesis developed an original conceptual tool of intercession to capture and explain the change in State practice in recent years as to the increasing utilisation of measures less than the use of force in response to atrocity crimes occurring in other States. This thesis has examined measures of intercession including diplomatic actions, sanctions, assistance to opposition groups, and the *Arms Trade Treaty*. The concept of intercession, which encapsulates this new and emerging State practice animated by the secondary duty of the international community under R2P, has resulted in both an expansion in the permissible measures and situations in which States can intervene, without using force, in response to atrocity crimes occurring in other States, and a simultaneous restraint on the formulation and imposition of those measures.

[1034] Madeleine K Albright and Richard S Williamson, 'The United States and R2P: From words to action' (Report of the Working Group on the Responsibility to Protect, United States Institute of Peace, United States Holocaust Memorial Museum, and the Brookings Institution, 2013).
[1035] *We the Peoples: The Role of the UN in the 21st Century*, above n 1, 48.

B *Traditional conceptualisations of sovereignty and non-intervention*

Chapter II outlined the foundational international law concept of sovereignty and the principle of non-intervention, and their traditional conceptualisations. In doing so, Chapter II set a baseline for the analysis that followed in the rest of the thesis, against which the contemporary State practice in Chapters V to VII was examined.

1 *Sovereignty*

Chapter II explored the historical (pre-Westphalian) conceptualisation of sovereignty, and the Westphalian conceptualisation of sovereignty as supreme control and absolute authority. It demonstrated that under the traditional Westphalian conceptualisation of sovereignty, international law was not concerned with the internal activities of the State – the State had the right to do whatever it liked within its territory. Further, States were prohibited from interfering in another State's internal activities regardless of what atrocities may have been occurring there. Sovereignty was supreme.

However, as Chapter II showed, the humanitarian cost of such a view, which required States to stand idle while atrocities unfolded in another State, increasingly came to be seen as unacceptable. By the end of World War I, the 'cult of sovereignty that placed the [S]tate above the law'[1036] was being called into question. Atrocities carried out during World War II, and in more recent conflicts at the end of the 20th century, including Rwanda and Kosovo, exposed the hazards inherent in an international system founded upon absolute sovereignty. Indeed, as Chapter II demonstrated, the manifest indifference of Westphalian sovereignty was the subject of great critique, and appeared no longer tenable. The idea that international law should also protect the rights of individuals, and no longer turn a blind eye to the internal activities of a State, began to gain traction.

[1036] O'Connell, *The Power and Purpose of International Law*, above n 89, 47.

2 *The principle of non-intervention*

Chapter II also focussed analysis on the principle of non-intervention, considered the most important consequence of sovereignty. Under the principle of non-intervention, no State or group of States has the right to intervene, directly or indirectly, in the internal or external affairs of another State. As demonstrated in Chapter II, the principle of non-intervention is recognised as being customary international law.[1037] States have repeatedly reaffirmed that '[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.[1038] Chapter II demonstrated that the high-watermark of the principle of non-intervention was set by the ICJ in *Nicaragua*, where the Court regarded only the cessation of aid and imposition of economic measures, and the provision of strictly humanitarian aid without discrimination, not to be in violation of the principle of non-intervention.

Chapter II found an inherent problem in the traditional conceptualisations of sovereignty and the principle of non-intervention, which raised uncomfortable questions about the extent to which these concepts shield delinquent States and prevent other States from taking effective action in response to atrocity crimes.

C *R2P*

Chapter III identified that R2P rests on a reconceptualisation of sovereignty as responsibility; States no longer have supreme control and absolute authority, but now have a responsibility, as a manifestation of sovereignty itself, to protect their populations and those within their territory from atrocity crimes. Sovereignty is no longer supreme; international

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[1037] *Nicaragua* [1986] ICJ Rep 14, [246]; Shaw, above n 725, 1147.

[1038] *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, UN Doc A/RES/20/2131, [1]; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Doc A/RES/25/2625.

law no longer turns a blind eye to the internal activities of a State. Flowing from the reconceptualisation of sovereignty as responsibility, R2P emerged as the conceptual solution to the problems inherent in Westphalian sovereignty that were seen in Chapter II.

Chapter III analysed the concept of R2P, from its original formulation in the 2000 ICISS report, to its adoption by the international community at the 2005 UN World Summit, and the three pillar approach to its implementation. It identified that R2P is fundamentally about duty. The primary duty is placed upon States to protect their citizens from atrocity crimes. While incredibly important, the primary duty is relatively uncontentious. Indeed, even States wary of the concept of R2P have readily accepted the primary duty to protect their own populations from atrocity crimes.

Chapter III demonstrated that the novel secondary duty is expressed in the *2005 World Summit Outcome* document as a responsibility of the international community to 'use appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes, and a willingness to take action through the Security Council when States 'manifestly fail' in their primary duty to protect their populations.[1039] The Chapter identified that the secondary duty raised critical questions about how this duty interacts with the concept of sovereignty, and whether it may permit actions that might traditionally have been regarded as impermissible pursuant to the principle of non-intervention. Chapter III noted that although many commentators have argued that R2P supports the use of armed force in furtherance of its noble aim of gaining greater respect for human rights, State practice and *opinio juris* in support of this principle is notoriously patchy. The argument advanced in this thesis is that it is through measures short of the use of force that the greatest potential of R2P can be realised.

[1039] *2005 World Summit Outcome*, UN Doc A/RES/60/1, para 139.

Chapter III demonstrated that an important part of the concept of R2P is the emphasis placed on measures less than the use of force when States are acting under the second and third pillar in accordance with the secondary duty of the international community. Further, Chapter III highlighted that the element of restraint was a key component of R2P and the three pillar approach to implementation, as noted during the debates in the General Assembly. Chapter III found in R2P a powerful new concept of statecraft, which responded to the weaknesses inherent in Westphalian sovereignty (analysed in Chapter II). In this way, R2P was shown to be something more than empty rhetoric.

D *Intercession*

Chapter IV began by demonstrating how the concept of R2P, after its acceptance by the international community at the 2005 UN World Summit, could come to influence State practice. It analysed theories that explain the influence of international norms on State behaviour. It identified that, regardless of which approach was taken, each of the theories agreed with the central hypothesis that international norms – the power of ideas – can motivate, and change, State behaviour. This was identified as being important for R2P, which rests on the idea of sovereignty reconceptualised as responsibility (analysed in Chapter III). This suggested the pathway through which R2P could become something more than just empty rhetoric; it could motivate, change, and shape State behaviour.

Having shown in theory the ability of a conceptual norm such as R2P to influence State practice, Chapter IV introduced this thesis' original conceptual tool of intercession, as a particular instance of R2P. Intercession refers to measures less than the use of armed force taken by States pursuant to the secondary duty under R2P to 'use all appropriate diplomatic, humanitarian and other peaceful means … to help to protect populations from genocide, war

crimes, ethnic cleansing, and crimes against humanity'.[1040] Intercession builds on the secondary duty under R2P, and has led to an expansion in the use by States of non-forceful measures of intervention in response to atrocity crimes occurring in other States. It has simultaneously led to restraint on the formulation and imposition of those measures.

Chapter IV highlighted the broader range of actions States now feel able to take as a result of their embrace of the concept of intercession under R2P, some of which fall outside the traditional boundaries of permissible conduct under the principle of non-intervention, reflecting the embrace by States of the reconceptualization of sovereignty as responsibility. These instances of intercession include the swift engagement of the international community in Kenya following the post-election violence (examined in Chapter IV); the design and implementation of targeted sanctions in Libya, Syria, Sudan, the Central African Republic, and the Democratic Republic of the Congo (Chapter V); the overt support to opposition groups in Libya and Syria (Chapter VI); and the influence of intercession under R2P on the development of treaty norms in the *Arms Trade Treaty* (Chapter VII).

Intercession provided the conceptual framework underlying the evolution in State practice in the diverse areas examined in the case studies in Chapters V to VII, giving effect to the secondary duty under R2P by responding to atrocity crimes with measures short of the use of armed force. Intercession is the most dynamic area in current practice implementing R2P. It captures and explains the significant change in State practice, and assists to understand the ways in which this reflects a re-aligned conceptualisation of the limits imposed by sovereignty on State responses to atrocity crimes occurring in other States.

[1040] Ibid.

E *Case study: sanctions*

Chapter V examined sanctions as a case study of the implementation of measures of intercession by States, in the process demonstrating the influence of R2P on this evolving State practice. Analysis of contemporary regional and unilateral sanctions practice, which (unlike sanctions authorised by the Security Council) is limited by other principles of international law such as non-intervention, demonstrated that contemporary sanctions practice is more expansive than previously.

Chapter V demonstrated that R2P is influencing the sanctions practice of regional organisations and individual States, resulting in a more expansive sanctions practice. In the DRC, the EU imposed an arms embargo nearly nine months *before* the UN sanctions, and the EU sanctions regime continues to include travel bans and asset freezes which are more expansive than the UN sanctions. In addition, the US imposed travel bans and asset freezes, and an embargo on conflict minerals, measures that were broader than the UN sanctions. In relation to Sudan, the EU imposed an embargo on exports of arms, munitions and military equipment and a ban on the provision of technical and financial assistance related to military activities months *before* the imposition of the UN sanctions regime. The African Union suspended the participation of Côte d'Ivoire in AU activities, and ECOWAS imposed travel bans and asset freezes. In the CAR, the US imposed sanctions that were more expansive than the UN sanctions. In Libya, the US imposed sanctions *before* the UN sanctions, and other States also took unilateral action in freezing the assets of individuals who were not yet, but would eventually be, designated by the UN. Finally, in Syria, in the absence of a Security Council mandate, sanctions have been imposed at a regional and unilateral level.

This practice not only demonstrates the breadth of modern sanctions practice, but also the restraint exercised by regional organisations and States in formulating and imposing

measures in such a way that they minimise impact on the general population. In relation to DRC, Sudan, and Syria, the EU imposed targeted sanctions in the form of travel bans, asset freezes, and embargoes. In relation to Côte d'Ivoire, the AU and ECOWAS imposed measures targeted at the government and designated individuals. Individual States have similarly imposed targeted sanctions in relation to the conflicts in DRC, the CAR, Libya, and Syria. Much of this practice has been accompanied by statements stressing the careful targeting of sanctions to avoid adverse consequences for civilians, and their focus on measures which will directly contribute to depriving those committing atrocity crimes of the ability to continue to do so.

This sanctions practice not only demonstrates the influence of R2P on State practice implementing measures of intercession. It also suggests an evolution in approaches to the principle of non-intervention. There appears now to be a greater scope to impose regional or unilateral sanctions without offending this principle than previously would have been understood. This suggests that intercession, inspired by R2P which itself is inspired by the reconceptualisation of sovereignty as responsibility, is causing an evolution in the customary international law principle of non-intervention. Whether this evolution is fully complete, such that it could definitively be said that the customary principle has been modified, may be difficult to determine without additional future practice. However, the body of State practice assessed in Chapter V is already highly significant, and strongly suggests that R2P now permits States to undertake measures of intercession in response to atrocity crimes that would previously have been impermissible.

F *Case study: assistance to opposition groups*

Chapter VI examined the increase in overt support to opposition groups, through analysis of State responses in relation to the contemporary conflicts in Libya and Syria, as a

more drastic, but still non-forceful, form of intercession. This Chapter demonstrated that there is an emerging practice of States undertaking, and other States permitting or at a minimum tolerating, assistance to opposition groups in response to atrocity crimes, which may also be modifying the application of the principle of non-intervention.

1 *Libya*

In relation to the conflict in Libya, Chapter VI demonstrated that States interpreted Security Council Resolutions very broadly, such that the provision of training in intelligence and logistics, arms, funding, and non-lethal equipment to opposition forces, were all deemed to fall within the mandate. This Chapter also demonstrated restraint in the provision of assistance to opposition groups, with assistance being provided to opposition groups only in where that assistance contributed to the protection of civilians, rather than generally. Although there was subsequent academic criticism that some States had over-reached into regime change, Chapter VI demonstrated that the initial broad interpretations of what was permissible assistance were generally well received by the international community. In order to protect the Libyan population, measures that would traditionally have been a violation of the principle of non-intervention under the high-watermark of *Nicaragua* were not treated as being in violation by the great majority of States, despite not having been explicitly authorised by the Resolutions. This practice demonstrated intercession under R2P at once providing a more expansive range of measures to the international community to respond to atrocity crimes, and a simultaneous restraint on those measures.

2 *Syria*

In the case of Syria, Chapter VI demonstrated that State practice also challenged the high watermark of the principle of non-intervention, with numerous States providing funding and non-lethal equipment to opposition groups in response to the commission of atrocity

crimes by government forces. The practice of States in relation to Syria has been to provide assistance to opposition groups in the form of funding, intelligence and non-lethal equipment. This is a significant evolution in State practice, reflective of the secondary duty under R2P to help to protect populations from atrocity crimes, even when the Security Council is deadlocked and unable to act. This practice also demonstrated the restraining influence of intercession under R2P, as the provision of assistance to opposition groups has been limited to items and equipment that will help to protect the population from atrocity crimes.

Chapter VI therefore demonstrated that States are interpreting the principle of non-intervention far more narrowly than the ICJ in *Nicaragua,* in order to maximise the permissible measures available to protect populations from atrocity crimes, permitting assistance to opposition groups in certain circumstances, consistent with the secondary duty under R2P. Taken together with the evidence in support of a change in the customary international law principle of non-intervention to permit sanctions in Chapter V, the evidence examined in this Chapter that there is a similar evolution permitting the provision of assistance to opposition groups as a measure to suppress the commission of atrocity crimes supports the tentative conclusion drawn in Chapter V that the customary rule of non-intervention has evolved to permit States to undertake measures of intercession (as understood in this thesis).

Chapter VI highlighted two elements of intercession in the new State practice it examined. The first element enables States to provide support to opposition groups, where such support would traditionally have been prohibited, revealing the expansive influence of intercession under R2P and the secondary duty on the international community under R2P's third pillar. The second element reveals the restraining influence of intercession in imposing restraint on States providing that support, obliging interceding States to ensure that the

consequences of their assistance are explicitly considered, and form a conscious part of the decision-making process.

G *Case study: Arms Trade Treaty*

Chapter VII used the *Arms Trade Treaty* as a case study, demonstrating the influence of intercession under R2P on the development of treaty norms and the implementation of treaties. The fact that an international treaty regulating the trade in conventional arms exists at all is significant. The fact that it has been achieved now that R2P is a dominant international paradigm is no mere coincidence. Through the *Arms Trade Treaty*, States Parties can be seen to be engaged in a more proactive State practice, which aligns with R2P's second and third pillars, *preventing* the commission of atrocity crimes by restricting the means by which those crimes can be perpetrated. With only three States voting against the adoption of the *Arms Trade Treaty*, a clear message was sent that principles of sovereignty and non-intervention would have to make way (particularly for the increasing number of States who have become parties to the treaty) for regulation of the trade in conventional arms targeted at reducing its unacceptable humanitarian costs.

Chapter VII demonstrated that the influence of R2P can be seen throughout the *Arms Trade Treaty*, in respect of the language and concepts used, and in the obligations imposed on States Parties. The language and structure of R2P has been incorporated into the Treaty's preamble, principles and express purpose, and will impact the interpretation of the treaty obligations as a whole. In addition, Chapter VII revealed the influence of intercession under of R2P encompassed within the risk assessment requirements and prohibitions on certain transfers in Articles 6 and 7 of the treaty. In requiring Member States to explicitly undertake risk assessment processes before authorising *every* transfer, and refrain from transferring arms in situations where there are atrocity crimes occurring or anticipated, the *Arms Trade*

Treaty requires States to undertake measures which are expressly intended to impact the behaviour of other States, in satisfaction of the secondary duty and responsibility on the international community under R2P's second and third pillar.

Chapter VII also demonstrated that the legal restraint on States Parties to the *Arms Trade Treaty* in relation to the transfer of conventional arms is itself a means of intercession, intended to avert atrocity crimes by denying the tools necessary to carry out those crimes. Simultaneously, the *Arms Trade Treaty* is also an instance of self-restraint inspired by R2P, in that it seeks to ensure that States do not aid or abet atrocity crimes in another State by transferring conventional arms. In this way, the *Arms Trade Treaty* is both R2P at work in terms of reinforcing States' own obligations of restraint under international human rights law and international humanitarian law, as well as a form of intercession inspired by R2P in terms of its imposition of risk assessment requirements and transfer prohibitions which are intended to impact on the commission of atrocity crimes in other States. The impact of intercession, inspired by R2P, therefore also extends to the drafting and interpretation of treaties, demonstrating the pervasive influence of intercession on international law and practice.

H *Reconceptualisations of sovereignty and non-intervention*

Viewing the new and emerging State practice analysed in the case study Chapters V to VII through the prism of intercession, revealed the power of ideas (in this case, R2P) to animate change in international law through, in particular, the reconceptualisations of sovereignty and the principle of non-intervention.

The adoption of R2P at the 2005 World Summit reflected an evolution in the conceptualisation of sovereignty, such that 'sovereignty should not and will not be allowed to

be used as a license to kill and brutalize people'.[1041] As seen in Chapter III, the concept of R2P is founded upon the reconceptualisation of sovereignty as responsibility, necessarily including a responsibility of the State to protect its own citizens from atrocity crimes. This is a significant normative evolution, providing the solution to the problems inherent in Westphalian sovereignty identified in Chapter II.

It is now generally accepted that States do have a legal obligation to protect their populations, and those within their territory, both in times of war and times of peace. This thesis demonstrated that the traditional conceptualisation of sovereignty has been replaced by a reconceptualisation of sovereignty as responsibility. States no longer have supreme control and absolute authority, but have a responsibility to protect their populations and those within their territory from atrocity crimes. Further, the international community is able to act (intercede) should there be a manifest failure to provide such protection: sovereignty is no longer supreme.

In addition, the new and emerging State practice analysed in Chapters IV to VII revealed that States are interpreting the principle of non-intervention far more narrowly than the ICJ in *Nicaragua*, in order to maximise the permissible measures available to respond to atrocity crimes, consistent with the secondary duty under R2P. The influence of R2P on State practice was seen in acts of intercession in response to atrocity crimes (or an apprehension of atrocity crimes) including: the swift engagement of diplomatic measures in Kenya following the post-election violence; the design and implementation of targeted sanctions in Libya, Côte d'Ivoire, DRC, Sudan, the CAR, and Syria; overt support to opposition groups in Libya and Syria; and the influence of intercession under R2P on the development of treaty norms in the *Arms Trade Treaty*.

[1041] Pandiaraj, above n 376, 813.

This thesis has demonstrated that the secondary duty on the international community under R2P has inspired an important evolution in State practice to permit the taking by States of measures of intercession in response to atrocity crimes in other States. This practice is significant not only for its existence, but also for what it reveals about the evolving customary international law of non-intervention, which – reflecting the reconceptualisation of sovereignty as responsibility that has been inspired by R2P, as seen in Chapters II and III – now permits, but does not require, the international community to intervene in situations that would traditionally have been off limits pursuant to the principle of non-intervention as a domestic matter. This expansion in permissible conduct can be seen most clearly in the increasing use of intercession by the international community – 'appropriate diplomatic, humanitarian and other peaceful means' to help to protect populations from atrocity crimes.

Complementing the analysis in Chapters V and VI which demonstrated the ability of intercession inspired by R2P to animate State practice, and to lead to an evolution in the customary international law rule of non-intervention, Chapter VII showed that intercession inspired by R2P also now influences States in the drafting and interpretation of treaties. Accordingly, the case study Chapters of this thesis showed the impacts of intercession, motivated by R2P, across State practice, customary international law and the law of treaties. Bearing out the examination in Chapter IV of how this thesis' concept of intercession could have an impact, the case study Chapters have shown that intercession is a powerful concept of statecraft which has come to profoundly influence international law and the practice of States.

I *Conclusion*

Intercession under R2P has provided a conceptual solution to the failings of Westphalian sovereignty from a humanitarian perspective by articulating when and how

States *may* respond to atrocity crimes in other States. R2P does not impose an enforceable legal obligation on the international community 'to engage in unilateral or collective intervention in response to every situation of mass atrocity'.[1042] However, this thesis has demonstrated that R2P is of legal significance, in the context of intercession, for four key reasons. First, it has led to a re-interpretation by commentators, and then by States, of the principle of sovereignty. Second, it has resulted in an evolution of customary international law to permit the taking an expanded range of measures of intercession in response to, or anticipation of, the commission of atrocity crimes. Third, it has inspired the emergence of a new State practice undertaking such measures of intercession, accompanied by the required restraint in so doing. Fourth, it has influenced treaty making and interpretation.

While a great deal of existing scholarship has focussed on the coercive aspects of R2P, focussing on the use of military force in humanitarian interventions, this thesis built upon a smaller body of scholarship which focuses on the non-forcible aspects of R2P. The conceptual framework of intercession developed in this thesis can explain this new State practice of taking a range of non-forceful actions in response to atrocity crimes occurring in other States, which has led to an expansion in both the permissible measures and situations in which States can intervene, and a simultaneous restraint on the formulation and imposition of those measures.

The close examination of State practice undertaken in this thesis demonstrated that R2P has served as the inspiration for a re-conceptualisation of the scope of permissible State responses to atrocity crimes occurring in other States, charting a way forward for the international community which is at once sensitive to State sovereignty but also responsive to humanitarian imperatives. Sovereignty is no longer supreme, because R2P has influenced

[1042] Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept', above n 28, 402; Brunée and Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?', above n 30, 208.

practice, customary international law and treaties to give States permission to undertake a broader range of non-forceful measures of intercession to prevent and stop atrocity crimes.

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