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Defining a Security Council Mandate in Humanitarian Interventions

- The Legal Status of Explanations of Vote

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<thead>
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<th>Full Form</th>
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<tr>
<td>Fourth Hague Convention</td>
<td>Convention (IV) respecting the Laws and Customs of War on Land of 1907</td>
</tr>
<tr>
<td>Genocide Convention</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
</tr>
<tr>
<td>ILA Statement</td>
<td>International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law</td>
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<tr>
<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>P5</td>
<td>the five permanent members of the United Nations Security Council</td>
</tr>
<tr>
<td>R2P</td>
<td>Responsibility to Protect</td>
</tr>
<tr>
<td>SC</td>
<td>United Nations Security Council</td>
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<tr>
<td>SC Resolution 678</td>
<td>S/RES/678</td>
</tr>
<tr>
<td>SC Resolution 1244</td>
<td>S/RES/1244</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UN Charter</td>
<td>Charter of the United Nations</td>
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<tr>
<td>UNAT</td>
<td>United Nations Administrative Tribunal</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>World Summit Document</td>
<td>Outcome Document of the World Summit in 2005</td>
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1 Introduction

1.1 Background

On March 17, 2011 the United Nations (UN) Security Council (SC) adopted resolution 1973, authorizing, inter alia, member states to “take all necessary measures […] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya…”.\(^1\) Little dissent was raised against the actual wording of the resolution; a widespread consensus argued that the text constituted customary language of SC resolutions and supported the notion that “all necessary measures” implicitly authorized military intervention.\(^2\) However, the subsequent launching of NATO-led forces on Libyan territory voiced harsh criticism and rendered public debate over the implementation, scope and objectives of the authorized mandate. Statements made by delegates after the deliberations of SC Resolution 1973, explaining the reasons for their abstention from voting, suggest that the limits of the mandate were not entirely unequivocal.\(^3\) Though it was generally accepted that SC Resolution 1973 allowed for the use of military measures on Libyan territory for the protection of civilians, the controversial issue concerned whether the mandate also could be interpreted as authorizing the intervening states to pursue a far more political agenda under the guise of humanitarian ambitions; to actively achieve regime change, in retrospect an inevitable result of the UN-sanctioned operation.\(^4\)

The number of armed conflicts\(^5\) in the world is increasing at an alarming rate\(^6\) and the global number of people forcibly displaced is for the first time since the Second World War

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over 50 million.\textsuperscript{7} When states fail to ensure the protection of civilians, escalating violence and autocratic regimes, oftentimes resulting in gross violations of human rights and mass atrocities, call for immediate and urgent action from the international community.\textsuperscript{8} Despite political independence and territorial integrity still being fundamental concepts to the notion of state sovereignty, the historical development during the past 15 years indicates a shift towards a more humanitarian approach where sovereignty not merely grants states a certain set of rights, but also entails responsibilities.\textsuperscript{9} With the emergence of the concept of “Responsibility to Protect” (R2P), a principle emphasizing the duty of individual states to protects its population from genocide, war crimes, ethnic cleansing and crimes against humanity,\textsuperscript{10} humanitarian intervention as the prevailing approach has had substantial, yet controversial, impact on international relations.\textsuperscript{11}

When individual states manifestly fail to protect their population from mass atrocities, R2P is triggered for the international community, acting through the SC, to take the appropriate measures to protect civilians, including military intervention if deemed necessary. As military measures, authorized by the SC acting under Chapter VII of the Charter of the United Nations (UN Charter), constitute exceptions to the fundamental principles of state sovereignty\textsuperscript{12} and prohibition of violence,\textsuperscript{13} forceful actions by the international community on the basis of humanitarian objectives, entrenching the sovereignty of another state, the intervention must thus be highly motivated and well-anchored in the international legal framework. To determine the scope of such mandate require robust and concise resolutions adopted by the SC, leaving little room for ambiguity and diverging interpretations. Regardless of the judicial powers the SC possesses in order to maintain international peace and security according to the UN Charter,\textsuperscript{14} the council is concomitantly one of the most influential global, political actors. Adopted resolutions are oftentimes preceded by perennial diplomatic negotiations and political considerations, far

\textsuperscript{6} Pettersson & Wallensteen, \textit{Armed Conflict}, 1946-2014 p 536.  
\textsuperscript{8} Shaw, \textit{International Law} p 841.  
\textsuperscript{9} Bellamy & Reike, \textit{The Responsibility to Protect and International Law} pp 268–270.  
\textsuperscript{10} A/RES/60/1 para 139.  
\textsuperscript{11} Francis \textit{et al}, supra n 2 p 11.  
\textsuperscript{12} Article 2(1) of the UN Charter.  
\textsuperscript{13} Article 2(4) of the UN Charter.  
\textsuperscript{14} Article 24 of the UN Charter.
from all reflected in the actual wording of the promulgated text. Therefore, to completely ignore the statements made during the deliberations when interpreting SC resolutions would potentially risk overlooking the original intentions of their scope and the rational of authorization. However, to what extent it is convenient to approach the interpretation of these intricate decisions using conventional guidelines of treaty interpretations, primarily based on Article 31 of the Vienna Convention on the Law of Treaties (VCLT), is subject to debate, hence suggesting that another method of interpretation is more appropriately applied.\footnote{Wood, \textit{The Interpretation of Security Council Resolutions} p 85.}

### 1.2 Purpose, Research Questions and Limitations

The primary purpose of this thesis is to analyse how the scope of the mandate given through SC resolutions, authorizing military interventions based on R2P in order to avert successive humanitarian disasters, ought to be interpreted in light of explanations of vote. The vastly divergent interpretations of the admissible objectives of the military intervention in Libya and the wide scope of the mandate suggests that SC Resolution 1973 marks a global game changer in political, diplomatic and legal aspects. The resolution entailed consequences few had anticipated at its promulgation, jeopardizing not only the legitimacy of subsequent SC resolutions but more crucially impeding future interventions by the international community to protect civilians against mass atrocities in countries such as Syria. Thus, this renders it crucial to conduct a profound analysis of SC mandates authorizing military interventions for humanitarian protection purposes: Primarily, how should SC resolutions, and in particular those based on R2P, be categorized legally? What is the legal status of statements made during the deliberations or of explanations of vote made after the adoption of such resolutions? In light of the legal categorization of SC resolutions and statements, what are the appropriate interpretation methods that should be applied in order to decipher the true motives behind a resolution: should the VCLT strictly be applied concomitantly or does the peculiar context of SC resolutions, particularly those based on R2P, call for a different interpretation approach? In order to establish the intended scope of the mandate given, it is furthermore pertinent to examine the legal status of R2P: Does the concept merely grant a right for the international community to intervene or does it actually establish a duty to act in times of mass atrocities?
The thesis will not, however, focus on potential remedies for when a SC mandate is transcended. Moreover, the thesis will not further elaborate upon the role of regional arrangements as defined in Chapter VIII of the UN Charter, but focus will rather be on SC resolutions authorizing a mandate to forcibly intervene in another state’s affairs, whether state troops or NATO forces are employed.

1.3 Theory, Method and Material

The thesis will predominantly put emphasis on the interpretation of SC resolutions when these authorize intervention by military measures from a *lege lata* perspective. Primarily, a positivist approach will be employed, thus using traditional sources of law as defined in Article 38 of the Statute of the International Court of Justice (ICJ Statute) as primary sources, including international conventions and treaty law, customary law and general principles. In addition thereof, scholars and the most highly qualified publicists within the relevant field of study will serve as secondary sources of law in the analysis of applicable interpretation instruments for SC resolutions, what legal status explanations of vote should be afforded with and how the concept of R2P ought to be construed. Due to the political nature of SC resolutions and statements made in relation thereof, the studying of these legal sources will inevitably be influenced by the political considerations behind their implementation. Since R2P was initially introduced and emerged as a political commitment rather than a binding legal norm, the interpretation of this principle will consequently also include material beyond the recognized sources of international law, such as reports by expert bodies. Furthermore, the concept’s somewhat political aspirations, calls for an interdisciplinary approach, beyond the legal framework, using the methods of constructivism and New Haven School to examine how and why legal norms emerge. Where deemed necessary, case law will also to some extent be interpreted in order to strengthen the analysis further. Legal texts and documents will predominantly include the UN Charter, the ICJ Statue and the VCLT. Finally, having established the applicable legal framework on the various subjects analysed in the thesis using the relevant sources as described above, a case study on the situation in Libya will be conducted, hence applying the conclusions reached in previous chapters on a factual instance.

16 Article 52 of the UN Charter.
1.4 Terminology

Responsibility to Protect, R2P, refers to the concept, initially introduced by the International Commission on Intervention and State Sovereignty (ICISS) in their 2001 report “The Responsibility to Protect” (ICISS Report). For the purpose of this thesis, SC resolutions based on R2P will be considered resolutions confirming _lege lata_, thus assuming that R2P legitimizes foreign interference on domestic territory when gross violations of human rights occur. Hence, emphasis will not be on _if_ authorizing a mandate to forcibly intervene on humanitarian grounds is legal _per se_, but rather _how_ such mandate should be interpreted. Though a debatable topic, particularly in terms of the responsibility of the international community to intervene in humanitarian disasters and the implied consequences when this potential obligation is not fulfilled, the prevailing contention is that R2P constitutes a legitimate basis for humanitarian interventions under Chapter VII of the UN Charter.

1.5 Outline

Chapter 2 will be devoted to the different sources of international law. Emphasis in this chapter will be on customary international law in order to investigate to what extent statements, or explanations of vote, by individual states in relation to the adoption of SC resolutions should pertain any legal status. In addition, the legality of SC resolutions, in particular those authorizing military interventions based on R2P, will also be examined further in this chapter. Chapter 3 aims to analyse the conventional interpretation methods, emanating from the VCLT, and to what extent it is appropriate to approach SC resolutions and unilateral statements using the same methodology. Chapter 4 digests the concept of R2P and discusses its legal status in light of the intentions and rational behind the adoption of the concept, in order to determine to what extent these circumstances should impact the interpretation of SC resolutions based on R2P. Chapter 5 will attempt to do an in-depth analysis and a case study of SC Resolution 1973 on the situation in Libya, in light of the discussion and analysis in previous chapters. The final section of chapter 5 will raise some potential issues relating to the future development in the aftermath of the situation that occurred in Libya, which will be followed by concluding remarks in chapter 6.

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18 Further elaborated upon in chapter 4.
2 Sources of International Law

2.1 Introduction – The Legal Hierarchy
The recognized formal sources of international law are acknowledged in Article 38 of the ICJ Statute to include international conventions, international customary law, general principles and judicial decisions and teachings of the most highly qualified publicists. The first three; conventions, customs and principles, are all considered primary sources, while rulings and scholarly opinions belong to what is categorized as secondary sources of international law. The secondary sources of international law serve as guidance when determining the legal content of the primary sources and may contribute to the development and formation of international customs. Despite being criticized for not being inclusive and exhaustive, the list of the primary sources of international law enumerated in Article 38 has gained broad recognition as constituting the prevailing traditional approach. Since SC resolutions arguably are considered sources of customary international law, pertinent for the purpose of this thesis is to devote the remaining part of the chapter to examine the main components of customary international law and what legal value SC resolutions ought to be attributed with. In relation thereof, explanations of vote will be analysed in depth in order to establish the legal bearing of such announcements. Throughout the chapter, various aspects of humanitarian intervention based on R2P will be woven into each section, in relation to the general applicability of the rules on customary international law.

2.2 The United Nations Charter – Establishing the Legal Framework
In order to comprehend the legal scope of SC resolutions, it is crucial to primarily briefly set the framework under which the SC is authorized to adopt resolutions. The cardinal purpose of the UN is to maintain international peace and security as stipulated in the constitution of the organization, the UN Charter. Fundamental elements in the pursuit of

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22 Article 1 of the UN Charter.
this purpose are the Articles relating to the prohibition on the use of force\textsuperscript{23} and the recognition of state sovereignty, \textsuperscript{24} which emphasize territorial integrity and political independence. However, interference in another state’s domestic affairs by military means are explicitly\textsuperscript{25} granted by the UN Charter in two exceptional circumstances; in situations of self-defence\textsuperscript{26} and when the SC acts under Chapter VII of the UN Charter in times of imminent threats to international peace and security.\textsuperscript{27} It is at the SC’s discretion to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and thus "decide what measures shall be taken […] to maintain or restore international peace and security."\textsuperscript{28} Primarily, the SC shall resort to peaceful means\textsuperscript{29} and merely employ military measures when the former prove inadequate.\textsuperscript{30} Hence, the main responsibility of the SC is to ensure the maintenance of international peace and security\textsuperscript{31} and it is authorized to adopt binding decisions,\textsuperscript{32} in order to fulfil this obligation.\textsuperscript{33}

2.3 Customary International Law

2.3.1 The Different Components

Two significant features, one objective and one subjective, generally characterize customary international law. State practice, or \textit{usus}, is the objective part of customary international law while \textit{opinio juris}, the conviction that legal obligations are reflected in state practice, constitute the subjective element. Once a norm or obligation has attained status as international custom, it is binding upon all states, irrespective of an express consent to adhere it. \textit{Jus cogens}, defined in Article 53 of the VCLT, as a “\textit{peremptory norm of general international law}” is a distinct category of customary rules, which derives its legal status from its respective content rather than the source from which it stems.\textsuperscript{34} Whereas there is no

\begin{itemize}
  \item Article 2(4) of the UN Charter.
  \item Article 2(7) of the UN Charter.
  \item Implicitly, the UN Charter is argued to recognize a third exception; humanitarian intervention as a reaction to mass atrocities, which will be further examined under chapter 4.
  \item Article 51 of the UN Charter.
  \item Article 2(7) and Chapter VII of the UN Charter.
  \item Article 39 of the UN Charter.
  \item Article 41 of the UN Charter.
  \item Article 42 of the UN Charter.
  \item Article 24 of the UN Charter.
  \item Article 25 of the UN Charter.
  \item Article 24 of the UN Charter.
  \item Shaw, supra n 8 p 886.
\end{itemize}
widely accepted definition of what crimes constitute breaches of *jus cogens*, gross violations against civilians, including genocide, ethnic cleansing, crimes against humanity and war crimes, are generally associated with it.\(^{35}\)

### 2.3.2 State Practice as Evidence of Usus

Fundamentally, the criteria introduced in the *North Sea Continental Shelf cases* establish several objective requirements needed for customs to be widely accepted upon the international community; the duration, generality, extensiveness and uniformity of state practice.\(^{36}\) When interpreting and determining what should be included in the concept of state practice, one can embrace either an inclusive or exclusive approach.\(^{37}\) The latter constitutes a minority view that suggests that only physical acts can be evidence of *usus*.\(^{38}\) Accordingly, protests, resolutions and press statements condemning for example acts of humanitarian interventions would not be considered state practice.\(^{39}\) The predominant inclusive approach, on the other hand, embraces an all-encompassing perspective, where state practice could be said to derive from a wide range of sources; as a result from formal national legislation processes and authoritative rulings to informal press releases and statements from governmental officials related to meetings by international organizations.\(^{40}\)

One of the main reasons behind this contention is that a too restrictive approach towards state practice would simply not leave sufficient room for diplomatic negotiations and political persuasions.\(^{41}\) This clearly suggests that a more wide approach towards customs acknowledges the political context in which *inter alia* SC resolutions are adopted and the necessity to consider every dimension, whether it is legal, political or diplomatic.

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35 Brownlie, *supra* n 20 p 489 and Shaw, *supra* n 8 pp 88–89.
36 *North Sea Continental Shelf cases*, Judgment, ICJ Reports 1969 p 3, para 74.
38 D’Amato, *The Concept of Custom in International Law* pp 87–90.
2.3.3 *Opinio Juris* as the Subjective Element

In addition to the objective factor, customary international law also recognizes a subjective feature as generally determining for its existence. *Opinio juris* is the belief that state practice is rendered obligatory due to the existence of a rule of law requiring it. The main purpose of emphasizing states’ subjective notion is thus to distinguish what is perceived as legally binding rules from those that are not.\(^{42}\) In order for state practice to be considered *opinio juris* it has to concern a concrete, widespread norm. Whereas the norm could be inferred or implicitly suggested, it does not have to be universally applicable.\(^{43}\)

What sources constitute evidence of *opinio juris* is a highly controversial subject, where diverging scholarly opinions and judicial decisions indicate various interpretations, ranging from multilateral treaties to statements by state representatives.\(^{44}\) In general, only the belief by individual state’s that uniform, extensive and representative state practice reflects a legal obligation is sufficient for the formation of customs. Consequently, for state practice that is not too ambiguous or vague in terms of the above-mentioned criteria, additional evidence of *opinio juris* is not required.\(^{45}\) In light of section 2.3.2, this would imply that *opinion juris* is subordinate to the more objective criteria required for *usus*. Thus, if a state de facto has evidently adopted a rule as customary international law, a subsequent wish not to be bound by the rule has presumably little weight.

2.3.4 The Emergence of Customary International Law

The formation of customary international law is a rather informal process, considering how other primary sources are created (i.e. by treaty commitment or through convention ratification), and, as mentioned above, this process would normally require both an element of *usus* and *opinio juris*.\(^{46}\) However, states and the International Court of Justice (ICJ) generally tend to consider well-established practice, omitting the element of *opinio juris*, to be sufficient proof of customary international law. Nevertheless, the subjective element

\(^{45}\) Mendelson, *supra* n 42 p 289.
\(^{46}\) *ILA Statement, supra* n 40 p 2.
seems to be of greater weight the more ambiguous state practice is. This approach suggests that the formation process of customary rules is a sliding scale, where there seems to be a distinct correlation between the objective and subjective features: the more state practice, the less need for opinio juris and vice versa.

Acknowledged opinio juris requires the belief of the rule’s presumed obligatory character to concern a concrete norm (see section 2.3.3). Whereas the norm does not have to universally applicable it must be widespread and accepted by the greater international community. As chapter 4 on the legality of R2P will discuss, to what extent R2P is perceived as a binding norm is subject to debate. State practice, on the other hand, is the objective element of customary law, which stipulates duration, generality, extensiveness and uniformity as requirements. Opinio juris may be omitted as the subjective element when the endorsed rule is supported by explicit, unambiguous and uniform state practice (see section 2.3.3). Since foreign interference on state sovereignty to pursue a humanitarian agenda by nature is a controversial subject and a relatively new phenomenon, unequivocal and coherent state practice is logically scarce and limited. According to the above, this would consequently suggest that the objective element then must be accompanied by opinio juris when assessing the legality of R2P as constituting customary international law.

2.3.5 How to Legally Categorize Security Council Resolutions

2.3.5.1 On the General Classification of SC Resolutions

Resolutions by the SC are not legislation, nor are they considered judgments or treaties. Instead, the prevailing approach suggests that SC resolutions may form part of customary law. Being an organ of an intergovernmental organization, comprised of member states, actions by the SC are restricted by the framework defined in the UN Charter, which is indisputable recognized as a source of international law. Operating within this framework, the SC in general do not per se create customary international law but its resolutions are considered evidence of already existing practice (lex lata) or said to contribute to the

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47 Mendelson, supra n 42 pp 286–289.
48 ILA Statement, supra n 40 p 41.
49 Wood, supra n 15 p 79.
50 ILA Statement, supra n 40 pp 3–5.
51 Article 38 of the ICJ Statute and Shaw, supra n 8 p 67.
emergence of new norms (*lex ferenda*).\(^{52}\) SC resolutions may impose legally binding obligations when adopted as decisions, or merely constitute non-binding recommendations, without legal implications.\(^{53}\) Since this thesis aims to examine to what extent statements by individual states serve to define a mandate authorizing military measures for humanitarian purposes, the remaining part of the chapter will emphasize on statements made in light of these binding SC decisions (hereinafter referred to as “resolutions”).

2.3.5.2 Confirming *Lex Lata* or Containing Propositions *Lex Ferenda*?

SC resolutions interact with the international legal framework in two dimensions. Either they serve to confirm the validity of international norms and instruments or take on a more progressive approach in which SC resolutions aim to impact, qualify or modify already existing rules.\(^{54}\) In the former category, SC resolutions can be said to confirm customary law when declaratory statements *lex lata* are made. The latter resolutions, however, should be more delicately balanced as they suggest interference with already established norms, verging on *lex ferenda*. Since resolutions containing announcements *lex ferenda* may indeed contribute to formation or crystallization of new customary law,\(^{55}\) they raise pertinent questions of the scope of the SC’s mandate: if the SC takes on a discourse, caused by political ambitions or diplomatic compromises, in seeking to introduce a new approach to the existing international legal order, does not the SC concomitantly grant itself powers to override current framework at its own discretion?\(^{56}\) The majority view seems to embrace the former category of powers, that the SC should be confined to merely adopt resolutions *lex lata*. In the Tadić decision, the view that the powers of the SC are limited by the UN Charter was confirmed; “subjected to certain constitutional limitations, however broad its powers under the constitution may be”.\(^{57}\) A similar view was adopted in the Lockerbie case, where it was proclaimed that “all discretionary power of lawful decision-making derive from the law”, thus “it is not

\(^{52}\) *ILA Statement, supra* n 40 pp 55–56 and Jennings & Watts, *supra* n 34 pp 48–49.

\(^{53}\) Article 25 of the UN Charter.


\(^{55}\) *ILA Statement, supra* n 40 p 56.

\(^{56}\) Ibid.

\(^{57}\) *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Trial Chamber I, Case No IT-94-1-AR72, 2 October 1995, paras 28–29.
logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.\textsuperscript{58}

The above distinction indicates that in order to adequately determine whether a SC resolution may indeed contribute to the formation of customary international law, or merely confirms what already existing practice is, one must ascertain if the purported rule, which the resolution is based on, represents \textit{lex lata} or \textit{lex ferenda}. Thus, relevant for this thesis is to examine to what extent resolutions based on R2P to avert mass atrocities reflects customary rules or not-yet established practice. Because if R2P is not considered a binding legal norm, the SC might actually transgress its mandate stipulated by the UN Charter by authorizing actions not supported by the international legal framework. Or could there be a difference, if one element of the concept of R2P is considered an established norm whereas other distinctive features have not yet been embraced as customary laws? Sections 4.2 and 4.4 will further explore the various components or R2P and to what extent respective pillar is, or should be, afforded with different legal status.

2.3.5.3 \textit{State Practice versus Organ Practice – Why It Matters}

If the above-discussed distinction of SC resolutions refers to their actual content, another relevant classification relates to the resolutions’ embedded consequences. In this regard, there are two main categories; those resolutions that have external effects, thus impose obligations on third parties (mainly states), and those resolutions which legal obligations are confined to the internal framework of the UN, governing the structure and functioning of the organization.\textsuperscript{59} To make this categorization of resolutions is of relevance primarily because it is pertinent to determine to what extent the actions involved in the decision-making of a mandate authorizing humanitarian interventions could be considered practice of the organ itself, or practice afforded with each individual state, two classifications that pertain various interpretation approaches (elaborated upon in section 3.3.1).


\textsuperscript{59} Higgins, \textit{supra} n 21 p 25.
Whereas state practice serves as a guideline when interpreting whether a SC mandate has been exceeded, organ practice merely relates to the formation of rules of the organization. The adoption and subsequent implementation of SC resolutions authorizing mandates to avert mass atrocities entail both internal and external effects. The internal consequences refer to the adoption process of the resolution, where the decision of the SC should be regarded as evidence of practice of the organ itself. State practice, and the external effects of an adopted resolution, is demonstrated in the subsequent enactment and whether the implementation as such is done in accordance with the authorized mandate and the framework of the UN Charter.  

The above discussion inevitably raises the question whether it is possible that the SC would have the mandate to adopt resolutions based on R2P, since this would only confirm already existent lex lata, but its subsequent implementation would indicate a violation of the UN Charter? Such an interpretation seems highly improbable simply due to the reverse logic in permitting actions that cannot be executed. More likely, either the decision to adopt resolutions based on R2P is within or outside the framework of the SC, that is inside the scope of the UN Charter, hence subsequent implementation is either in accordance with the authorizing mandate or in violation thereof. Consequently, if the SC does actually possess the power to adopt resolutions based on R2P (a contention that is endorsed by the prevailing approach, elaborated upon in chapter 4), the legality of the implementation would presumably depend on how the scope of the mandate is defined and interpreted.

2.3.6 Unilateral Statements - The Legality of Explanations of Vote

Verbal acts, attributable to intergovernmental organizations such as the UN, are not considered independent sources of law per se but should rather be regarded as expressions of individual states, 61 an approach which has subsequently been endorsed as representing the general consensus. 62 Such verbal acts include press releases, diplomatic statements and policy statements, that may all implicitly or explicitly endorse what is considered customary international law according to the exclusive approach (see section 2.3.2) and contribute to

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60 Alvarez, International Organizations as Law-makers p 144–146.
61 ILA Statement, supra n 40 p 19.
62 Amnéus, supra n 37, footnote 364 at p 87.
its emergence, but do not in themselves, as previously stated, constitute legally binding rules.\textsuperscript{63}

Statements may be done \textit{in abstracto}, signified by comments of a more general character, or made in relation to a specific situation. Statements \textit{in abstracto} are in general given little weight as evidence of \textit{usus}. The ability or inability of statements to contribute to the formation of customs has been compared to the admissibility of evidence and the weight attributed to different categories of stronger or less strong evidence.\textsuperscript{64} Though general statements, in particular in relation to actions based on R2P, about an individual state’s position on the legality of R2P, may be “admissible” proof of state practice, they are consequently given little consideration in terms of weight as \textit{usus}.\textsuperscript{65} Rather, these statements should be regarded as expressions \textit{opinio juris}. More explicit protests and condemnations on the other hand, which are related to humanitarian interventions based on R2P in factual instances, have been said to have significant impact as demonstrating \textit{state practice}, and should thus not merely be recognized as evidence of \textit{opinio juris}.\textsuperscript{66}

Above sections indicate that statements relating to humanitarian interventions could be expressed as opinions on the general applicability of R2P as a binding norm, which should only be counted as evidence of \textit{opinio juris}, or be categorized as statements made on factual instances on humanitarian interventions, which may bear legal value as \textit{usus}. Consequently, a state could either condemn a resolution authorizing a mandate for the international community to intervene in the domestic affairs of another state to avert mass atrocities, or express its support for the adopted resolution, unilateral actions that are classified differently in the international legal framework. The second category of statements; condemnations or endorsements in factual instances of R2P, are all considered to belong to state practice. According to the reasoning in section 2.3.3, this would hence indicate that statements in actual instances of humanitarian interventions should logically be afforded with greater legal value than more speculative announcements in hypothetical situations.

\textsuperscript{63} \textit{Ibid} p 57.
\textsuperscript{64} \textit{ILA Statement, supra n 40 p 13.}
\textsuperscript{65} \textit{Ibid} p 15.
\textsuperscript{66} Amnéus, \textit{supra n 37 p 103–104.}
Furthermore, some scholars stress the difference between unanimously adopted resolutions and texts adopted by consensus, whereas the former may be proof of customary rules but the latter presumably merely suffice for the formation of *communis opinio juris*, or “overnight” customs, which would require further actions by states to be legally bound by it.  

Thus, what are the consequences when a resolution is adopted with consensus, but where states in subsequent explanations of vote, following the adoption, condemn the mandate the resolution authorized? Resolutions adopted by consensus are considered the feeblter category of the two classifications (unanimity v. consensus) whereas condemnations or protests seem to constitute stronger evidence of custom than statements in general on R2P. Hence, would this suggests that when the SC decides upon a resolution, where unanimity is not reached and states afterwards verbally oppose the adopted content, that these resolutions in general have lesser bearing as evidence of customary international rules, than unanimously adopted resolutions without subsequent objections? And if these resolutions weight little as proof of sources of international law, would this also affect the interpretation method applied? Also, to what extent is the interpretation of SC resolutions influenced by the fact that the UN Charter does not explicitly sanction the legal basis for the resolutions, but this rather derives from political commitments such as R2P? All these questions render it vital to further examine what factors should be taken into consideration when SC resolutions are interpreted and deconstructed.

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3 On the Interpretation of Security Council Resolutions

3.1 Interpretation on a General Note

Guiding principles on the interpretation of SC resolutions are meagre, if not non-existent. Specific rules of interpretation have not yet been codified and scholarly opinions and authoritative judicial decisions are paucity. Only in one instance has the ICJ explicitly employed a method of construing SC resolutions. Thus, no systematic guidelines on how to construe the actual content of SC resolutions exist and any attempt of interpretation heavily relies on the VCLT as reflecting customary international law. However, to apply the rules of treaty interpretation by extension to the interpretation of resolutions by international organizations are far from uncontroversial, and adopting this standard approach concomitantly on resolutions elucidates the differences as well as the similarities between the two categories of sources. Despite both representing agreements and common aspirations of states or the parties, resolutions are constrained by an institutional framework, which dictate the permissible mandate and authority under which it may be adopted, and assert the collective view or will of the organ adopting it.

With SC resolutions, adopted in escalating humanitarian crises, the problematic aspects more rarely concern whether the SC has authorized actions ultra vires under Chapter VII. Rather, the disparate views relate to what extent this authority granted by the UN Charter has been transgressed in the subsequent implementation, hence depending on how the limits of the mandate are determined. Interpretation, whether it concerns a treaty or a SC resolution, is fundamentally a matter of legal nature. However, the political aspects involved when the SC adopts resolutions suggest that strictly applying conventional

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68 Wood, supra n 15 pp 74–76.
72 SC resolutions based on R2P to avert mass atrocities, though still controversial to some extent, is widely being recognized as a legitimate justification to forcibly intervene in another state’s affairs, see further section 4.4.2.
methods of interpretation may not embrace all dimensions characteristic for such resolutions. Thus, the following sections will examine and analyse to what extent it is appropriate to employ analogies of the customary rules of treaty interpretation in terms of SC resolutions and unilateral statements made in relation thereof to disclose the actual intentions and rational behind the text.

3.2 Customary Norms on Treaty Interpretation and Security Council Resolutions

3.2.1 VCLT – Its General Applicability
Predominantly, the international legal framework recognizes three approaches to treaty interpretation: the actual text, the context and the purpose and object. The “General rule of interpretation” stipulated in Article 31 of the VCLT is considered to comprise all three elements, and states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose.” The criterion of “good faith”, or *pacta sunt servanda*, is unquestionably essential in interpreting treaties as well as resolutions. However, the requisites of “ordinary meaning”, “context” and “object and purpose” are slightly trickier, at least in terms of its applicability *mutatis mutandis* on resolutions. In terms of the subjective requirement of an established *intention*, this criterion is not considered an independent element in treaty interpretation but should rather be ascertained from the text, context and object and purpose.

3.2.2 The Textual Approach
When interpreting the actual content, the wordings of any agreement serve as a benchmark and should have primacy over any conflicting view not supported by the text. According to the VCLT, the “ordinary meaning” refers to the standard language used in drafting

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73 Orakhelashvili, *supra* n 54 p 144.
75 Shaw, *supra* n 8 p 676 and VCLT Article 31(1).
77 Orakhelashvili, *supra* n 54 p 152.
treaties, thus emphasizing the words used. Though, given the diverging nature of SC resolutions, one should be cautious in assuming that identical terms in various resolutions always bear the same meaning. Surely, similar formulations may implicitly apply to the same factual circumstances, i.e. the authorizing of military intervention, where "all necessary measures" has been considered customary SC language for when the international community may intervene with the use of force on another state’s territory. However, in light of the prevailing political context under which the SC operates, the use of customary language may conceal the actual object behind a resolution. As further elaborated upon in section 3.3.2, one of the predominant objectives of the drafting process is inherently to frame a resolution in those terms and language that would appeal to the largest majority of the SC, hence securing the broadest support in a subsequent voting procedure. Customary language is by definition uncontroversial and palatable to most member states. Nevertheless, this ostensible incongruity between the use of conventional expressions in SC resolutions and the actual intentions of the adopted text indicate that customary norms on treaty interpretations in this regard may not be the most appropriate method of deciphering the entire scope of SC resolutions, thus suggesting a more all-encompassing approach.

3.2.3 The Effectiveness Principle: Focus on Object and Purpose

To interpret a treaty with reference to its object and purpose, whether it is declared or indiscernible, according to the effectiveness principle is to give the fullest weight and effect to the meaning of the treaty, a principle indisputably applicable to SC resolutions as well. In terms of SC resolutions, to ascertain the prevailing object imply, in addition to studying the annex and preambular paragraphs, that all circumstances leading up to the adoption of the resolution should be considered, including official statements by SC members, background documents such as Secretary-General Reports and previously adopted resolutions that the preambular paragraphs may refer to. Furthermore, the principle of

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79 Shaw, supra n 8 p 676.
80 Wood, supra n 15 p 89.
82 Francis et al, supra n 2 p 17 and Payandeh, supra n 2 p 383.
84 Wood, supra n 15 p 90.
effectiveness within an international organization involves an interpretation approach that takes into account the main purposes of the organization as well.\textsuperscript{86} In order to accomplish the overall objective of the UN,\textsuperscript{87} and in particular the SC acting as its executive organ, to maintain international peace and security,\textsuperscript{88} SC resolutions should thus be interpreted accordingly.

### 3.2.4 The Importance of the Context

Whereas the previous sections tentatively unravelled how the criteria of “ordinary meaning” and “object and purpose” in Article 31 of the VCLT concomitantly ought to be understood when interpreting SC resolutions, the following section will emphasize on the objective criteria of context in relation to the subjective conception of intention, particularly relevant to SC resolutions due to their context-driven nature.\textsuperscript{89} Since there are no “parties” to SC resolutions according to the traditional definition of this prerequisite, Article 31(2) is generally considered of little assistance in this regard.\textsuperscript{90} More significant though is the provision in Article 31(3), which refers to other matters to be taken into account, such as “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”\textsuperscript{91} A subsequent agreement on the interpretation (Article 31(3)(a)) or subsequent practice when the treaty is applied, reflecting an agreement regarding the interpretation (Article 31(3)(b)), would in terms of SC resolutions commensurate to a subsequent resolution on the anticipated interpretation or practice by individual SC members supporting such agreement. Indeed, such SC resolutions exist but not in abundance, hence the remaining part of this section will focus on the last provision

\textsuperscript{86} Shaw, \textit{supra} n 8 p 679.
\textsuperscript{87} Article 1(1) of the UN Charter.
\textsuperscript{88} Article 24 of the UN Charter.
\textsuperscript{90} According to Article 31(2) of the VCLT, “The Context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”
\textsuperscript{91} Article 31(3) of the VCLT.
of the same Article, which has been found to be particularly pertinent in the case of SC resolutions.92

Identifying any relevant rules of international law, including customary rules, (Article 31(3)(c)) when construing SC resolutions adopted in situations of mass atrocities is arguably one of the provisions of the VCLT that would have the greatest impact on deciphering the intention behind such resolutions. Whether the SC intended to embrace a resolution irrespective of prior legal obligations or because an actual duty to act exists, suggest how much weight the intention should be afforded with.93 When the same rational is applied to SC resolutions based on R2P, the status of R2P as either a right for the international community to intervene to avert humanitarian disasters or an obligation to do so would thus presumably affect how the SC mandate ought to be construed. If a legal obligation to intervene in humanitarian crises exists, a SC resolution which is intended to be based on such existing norm should be interpreted in light thereof, hence indicating a weaker intention. However, if R2P is merely considered a right to act, there is not a duty to intervene, thus suggesting a more authentic intention to avert mass atrocities.

Nonetheless, from a general perspective with regards to the interpretation of SC resolutions and the analogous applicability of VCLT, it is worth noting that the above conclusions also suggests that the context per se does not always provide valuable guidance in terms of untangling the intention behind resolutions. Furthermore, the legitimate basis for the resolution, by which the SC is granted authority to decide upon the topic at issue – whether it is explicitly stated in the Charter of the UN or more implicitly indicated such as R2P – should thus serve as a benchmark in how much weight “the context”, as elaborated upon in article 31(3) of the VCLT, should be taken into account.

3.2.5 “Other Supplementary Means”

Article 32 of the VCLT includes a list of supplementary means of interpretation, inter alia preparatory work, which should be retorted to when an interpretation according to the general rules in Article 31 do not adequately correspond to the intended outcome of the

92 Wood, supra n 15 pp 91–92.
93 Ibid.
treaty. 94 Even though not explicitly stated in Article 32, subsequent state practice, whereas not sufficient “to establish agreement of the parties regarding [the treaty’s] interpretation” (Article 31(3)(b)), may also shed some light on the intended interpretation. 95 The following implementation of SC resolutions may indeed reveal what the members of the SC actually intended, when diverging ambitions in terms of what has been authorized for in the mandate are disclosed through subsequent practice by states. In factual instances of interventions based on R2P, the content of the concept presumably expose whether the preceding SC resolution was based on a genuine intention to stop purportedly mass violation on human rights. Since R2P is considered to comprise of three fundamental elements; a responsibility to prevent, react and rebuild, 96 an execution of the mandate by states that evidently does not embody all of these factors, i.e. a genuine commitment to post-intervention measures, may thus indicate an intention in contradiction to the discernible legal justificatory grounds when the resolution was adopted.

3.3 Appropriate Interpretation Methods of Security Council Resolutions

3.3.1 SC Resolutions in General, and SC Resolutions Based on R2P Specifically
The previous sections have shown the limitations in stringently applying customary rules of interpretation on SC resolutions due to their particular characteristics, thus suggesting that a more felicitous methodology should be employed. As described more profoundly in section 2.3.5.1, the SC is neither a legislative nor judicial organ, but rather a political body with some legislature characteristics, appertained to it by the UN Charter. In terms of adopting resolutions, the SC could reaffirm already existing norms lex lata but should refrain from stipulating rules lex ferenda. Moreover, the adopted resolutions may be intended to have external or internal effects. This distinction is pertinent to emphasize because different interpretation methods apply depending on the resolutions’ embedded consequences; legal obligations imposed on third parties, such as states, require a more all-encompassing approach considering the vast majority of interests concerned of legal as well as political nature in those instances, whereas the later category by definition only involve internal affairs of the SC or UN. 97 The internal effects when the SC adopts

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94 Orakhelashvili, supra n 54 p 157 and Shaw, supra n 8 p 678.
95 Wood, supra n 15 p 95.
96 The ICISS report, supra n 17 at XI.
97 Wood, supra n 15 p 79.
resolutions primarily refer to the actual mandate of the SC itself. The debate does not necessarily concern whether the SC has the authority to adopt resolutions based on R2P, but the question at issue rather pertain to the subsequent implementation of such authorizing mandate. Thus, the following sections of this chapter will emphasize on the interpretation of SC resolutions with external effects, and in particular those based on R2P.

To embrace a restrictive interpretation approach in instances when the SC adopts resolutions that include military measures, infringing upon state sovereignty, may seem justifiable considering the vast implications such decisions might have on territorial integrity and political independence. However, such methodology might indeed impede the SC from efficiently executing its mandate when these resolutions are based on a genuine intention to actually maintain international peace and security.\(^98\) R2P is a peculiar concept in that it justifies forcible measures because interventions in times of mass atrocities by the international community, whilst not explicitly sanctioned by the UN Charter, are not in strict violation thereof.\(^99\) Interventions based on R2P are indisputable enforcement actions with external effects, thus restrictiveness to some extent should be observed when determining the scope of the SC mandate in light of above reasoning. At the same time, these resolutions are not pursued primarily in order to maintain international peace and security but to attain a humanitarian cause. Therefore, the above-mentioned could also indicate that if an authentic R2P-ambition is established, a less constricting interpretation approach seems attainable, whilst pursuing a different agenda in guise of humanitarian interventions arguably call for a more parochial methodology.

### 3.3.2 The Drafting Process: The Essence of SC Resolutions

Due to the nature of SC resolutions and the context under which they are adopted, it seems relevant to further consider the drafting process; not only for the purpose of interpretation but also to enlighten why statements potentially should be taken into account to determine the scope of the authorizing mandate. It is during the drafting process that common policy guidelines are outlined and diplomatic negotiations occur. Though there is no standard procedure for drafting resolutions, generally the process could be said to

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\(^99\) Further elaborated upon in section 4.1.
consist of five stages; an initial draft, informal discussions between state representatives, followed by informal consultations of the whole, discussions on each paragraph and finally a circulation of the official document. The most important stage during the drafting process is identified to be the second phase, characterized by intensive negotiations and diplomatic persuasion. These closed discussions aim to reach a consensus on the underlying policy agenda and ideology motives prior to the preparation of the revised text.\(^{100}\)

The main objective for the predominant part of the drafting processes is to unite disparate political ambitions and attain congruence on a text proposal which would secure unanimity, or at least consensus, in a subsequent vote in the SC.\(^{101}\) Thus, suggesting that the outcome of the most intense negotiations most certainly is reflected, if not explicitly so at least ambiguously, in the later adopted text. Equivocal language and vaguely defined terms would presumably indicate a less strong political consensus compared to a concisely written draft. Since collapsed negotiations and overruled resolutions that imped urgent actions and political progress, particularly in times of humanitarian crises, are in no SC member’s interest,\(^{102}\) superfluous wording and equivocal formulations are plausibly employed when a resolution is the product of somewhat dissimilar intentions on what should be done, but where there is a consensus that actions are required. Hence, it seems logical to assume that states would be more willing to accept vaguely defined resolutions expressed in terms of conventional and customary language by abstaining from voting, than rejecting the entire text by voting against the proposal. Nevertheless – and in addition to what has previously been discussed in section 3.2.2 regarding the textual approach – one should be cautious in uncritically embracing the customary wording of the resolution as reflecting the underlying intentions, since these could apparently be misleading for several stated reasons.

3.3.3 The Interpretation of SC Resolutions by Judicial Organs
In addition to what could be ascertained in terms of an appropriate approach on interpretation from analysing the process under which SC resolutions are adopted, a few judicial decisions might provide some useful guidance in this regard as well. The principal

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\(^{100}\) Wood, supra n 15 pp 80–81.

\(^{101}\) Ibid p 82.

\(^{102}\) Mahmoudi, supra n 89.
judicial authority on the interpretation of SC resolutions was long considered a brief passage by the ICJ in its 1971 Namibia Advisory Opinion, where the court proclaimed that “the language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25 […] having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolutions of the Security Council.” Though, the court did not emphasize on how the actual content should be perceived, but rather to what extent the resolution in this specific instance would entail any binding force, the criteria determining of the outcome; the terms of the resolution, the discussions leading to it, the Charter provisions invoked and all other circumstances that might assist in determining the legal consequences of SC resolutions, at least highlight imperative factors to consider when a resolution is interpreted.

In 1951, the United Nations Administrative Tribunal (UNAT) in the Howrani and 4 others case had to construe the content of internal staff regulations, and pronounced in relation thereof that “(1) the interpretation must be a logical one; (2) it must be based upon an attempt to understand both the letter and the spirit of the rule, and (3) the interpretation must be in conformity with the context of the body of rules to which it belongs.” This approach seems to emphasize predominantly the context and the effectiveness principle as prevailing elements in the interpretation of internal rules of the UN. Even though this decision does not concern external affairs of the organization, but merely the internal relations, some tentative remarks may still serve as guidance on the general interpretation of internal documents of the UN. The decision stresses the importance of a teleological, cogent interpretation that is in coherence with the framework under which the rule was adopted, which seemingly could be considered conversely applicable on decisions or rules irrespective of their external or internal implications.

In the Tadić decision, the International Criminal Tribunal for the Former Yugoslavia (ICTY) had to interpret its own statute as part of the SC resolution establishing the court’s

104 Howrani and 4 others, UNAT Judgment No. 4, 27 April 1951.
mandate: 105 “Although the Statute of the International Tribunal is a sui generis instrument, and not a treaty, in interpreting its provisions [...] the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant.” 106 On elaborating upon this approach, the ICTY chose to adopt an interpretation method comprising of three elements; a literally and logical interpretation which would give effect to the statute’s object and purpose. 107 Apart from emphasizing the wording of the statute, the effectiveness principle in combination with a systematic tactic seem to evidently have had the largest impact on construing the meaning of the provisions, again stressing the importance of a cogent approach to give effect to the declared object.

The most recent case and the precedent that, in addition to the Namibia Advisory Opinion, provides the most useful guidance in terms of appropriate SC Resolution interpretation methods is the Kosovo Advisory Opinion from 2010. 108 In the Kosovo Advisory Opinion, the ICJ had to interpret whether SC Resolution 1244 prohibited the issuance of the declaration of independence. 109 The ICJ noted that the precarious characteristics of SC resolutions require an interpretation approach that takes into account factors usually not encompassed by the VCLT: “Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represent the view of the Security Council as a body.” 10 The ICJ also uttered with regards the explanations of vote and previous resolutions on the same topic that “the interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue.”

Despite that none of the above mentioned judicial decisions, except the Kosovo Advisory Opinion, explicitly deals with the interpretation of the actual content of SC resolutions, they all share some commonalities that might be of assistance when outlining some general remarks on how resolutions by the SC ought to be deconstructed. The reasoning in the Namibia Advisory Opinion emphasized, apart from the wordings of the text, the negotiations

105 S/RES/827.
106 The Tadić decision, supra n 57 para 18.
107 Ibid, paras 83, 87.
108 Svanberg, supra n 85 p 38.
109 Kosovo Advisory Opinion, supra n 69 p 444, para 101.
110 Ibid p 442 para 94.
during the *drafting process* and the *effectiveness principle* as determining factors on the resolution’s legality. In the *Howrani and 4 others case* and the *Tadić decision*, both concerning internal aspects of two different UN entities, the two tribunals established the importance of a *systematic and coherent approach* to give effect to the purpose and object. Finally, in *the Kosovo Advisory Opinion* the ICJ explicitly stated that statements may be considered in order to render the full scope of the mandate, and that the political context under which SC adopts resolutions call for a different interpretation method than what is stipulated by the VCLT. Consequently, when applied to SC resolutions, this would suggest that, in addition to the actual text, a systematic and teleological approach, considering all circumstances, including the political objectives behind the adoptions of resolutions, up until the resolution’s promulgation should be sought to assure that the purpose is given full effect.

3.4 The Role of Explanations of Vote in Defining a Security Council Mandate

3.4.1 Statements as a Source of Interpretation

SC resolutions could be defined as an agreement between states or members of the SC or an act of common aspirations of the SC or UN itself. Statements made by state representatives during or after deliberations, on the other hand, should not be afforded with the SC, but rather be regarded as expressions of individual states’ opinions. Undoubtedly, the adopted text, which embodies the agreement between the parties and demonstrate the joint attitude of the SC should have primacy over unilateral statements. Nonetheless, it is debatable to what extent statements, serving to explain the reasoning for voting in a particular way when the SC adopt resolution, should be taken into account when the scope of the mandate is questioned.\textsuperscript{111}

Statements may serve as either a primary source of interpretation to reveal the object and purpose behind a SC resolution,\textsuperscript{112} or as a supplementary mean when classified as part of the preparatory work.\textsuperscript{113} To use statements to render the object and purpose include an all-encompassing approach, taking into consideration all circumstances of the adoption, such

\textsuperscript{111} Orakhelashvili, *supra* n 54 p 156.
\textsuperscript{112} Wood, *supra* n 15 p 90.
\textsuperscript{113} *Ibid* p 93.
as informal statements to the press and more formally recorded explanations.\textsuperscript{114} Since SC resolutions are rarely self-contained (which means that they are usually established with reference to a prior Report or Letter by the Secretary-General), all documents that have been circulated during the drafting process are said to be part of the preparatory work, including verbatim records of statements. Since the distinction between primary and secondary rules of interpretation have been considered of less relevance when SC resolutions are interpreted compared to conventional treaty interpretation, whether a statement should be regarded as belonging to the former or later category of interpretation sources are thus less significant.\textsuperscript{115}

In this context, it furthermore seems pertinent to briefly examine to what extent statements made by one of the five permanent members of the SC (P5) ought to be interpreted any differently than statements made by non-permanent members of the council. Primarily, one must conclude that verbal statements, condemning the content of the resolution, whether those protests derive from one of the P5 or non-permanent members of the SC do not diminish the legal status of legally binding adopted resolutions.\textsuperscript{116} Nevertheless, statements, in particular those made by abstaining states, can still serve as guidance in terms of interpreting the intention behind the resolution by analysing their reason for abstention. In the \textit{Namibia Advisory Opinion} from 1971, the ICJ stated that the "positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions."\textsuperscript{117} To further highlight the legal significance of the abstention by one of the P5, compared to voting against a draft proposal, the court continued by concluding that "by abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote to the adoption of resolutions."\textsuperscript{118}

\begin{itemize}
  \item \textsuperscript{114} \textit{Ibid} p 90 and \textit{The Tadić decision}, supra n 57 paras 53, 92.
  \item \textsuperscript{115} Wood, \textit{supra} n 15 pp 93–95.
  \item \textsuperscript{116} Alvarez, \textit{supra} n 60 pp 91–92.
  \item \textsuperscript{117} \textit{Namibia Advisory Opinion}, supra n 69 p 10 para 22.
  \item \textsuperscript{118} \textit{Ibid}.
\end{itemize}

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abstentions from a non-permanent member do. Consequently, there seems to be a correlation between the probability for robust actions and the number of abstentions by the P5: the more abstaining votes, the less political bulwark, and vice versa.\textsuperscript{119} The elucidated differences in what legal consequences abstention or voting against a draft resolution entails depending on if the voting state is a member of the P5 or not, thus suggest that the votes’ respective interpretative value may potentially commensurate to what extent verbal statements made in relation thereof should be take into consideration.

### 3.4.2 Explanations of Vote Reveal the Genuine Intention of SC Resolutions?

As indicated in the above discussion, the intention is not considered a stand-alone requisite in neither treaty nor resolution interpretation. Instead, the intention should be unravelled in light of other determining factors such as the object, purpose, context and the text itself. In addition to the effectiveness principle and the blurry distinction between general rules and secondary means of interpretation, this suggest that a germane interpretation method of SC resolution to render the intention would include all relevant circumstances during the drafting process up until, or even after, the promulgation.

To take into account statements in which states provide an explanation for their position on a specific SC resolution seem particularly relevant in light of two circumstances, elucidated by the above discussion; the drafting process as a whole, and the language used in the resolution as such. The most important stage in terms of what is eventually decided to be included in the finalized text occurs during closed consultations between state representatives. The result of these intense diplomatic negotiations is often characterized by a slightly ambiguous resolution with vague, standard formulations. Particularly when these SC resolutions authorize a mandate to coercively intervene in another state’s affairs, thus infringing upon the sovereignty of that state, it is of vital importance to determine how the limits for this interference ought to be interpreted. A transgression of such mandate by the implementing actors would not only be in violation of the international legal framework but would also risk impeding the SC’s potential to resolutely act in future situations.\textsuperscript{120} The potential misuse of an evasively defined mandate by some members of


the SC in their pursuit of other, oftentimes, more political ambitions thus renders it essential to adequately approach SC resolutions in order to establish the scope of the mandate.

Unilateral statements after the resolution text has been formally adopted presumably reveal the epitome of the deliberations, whether the statement is in line with the voting of the state. It has been considered that if a statement differs from how the state chose to vote, the vote itself, let alone the statements, as “interpreting data”, do not prevail over the adopted text. Conversely, would not this imply that a subsequent explanation of vote, or a joint statement by several states, coherent with the voting of the state(s), should be attributed with greater weight? Logically, abstaining states would not feel the need to clarify their position in a subsequent statement if they were in full support of the resolution; its language as well as underlying intentions. Consequently, states may rather embrace a somewhat vague mandate defined by uncontroversial, standard language than vote against the resolution, if they concomitantly were aware of the possibility to verbally explain the actual intentions behind the equivocal words in light of the diplomatic negotiations after the adoption.

In line with the conclusions draws in section 3.2.4, the status of R2P as either a right for the international community to intervene in humanitarian disasters or an obligation to do so, furthermore seems to stress the importance of taking into account statements to a greater extent when construing authorizing mandates by the SC. If R2P is considered merely a right to act, which is arguably the prevailing contention, the intention to actually intervene based on humanitarian causes seems more genuine than if the SC had an obligation to adopt resolutions in those instances. Cogently, does it not seem logical to attribute statements “condemning” such right to intervene with greater legal status? If R2P was considered an obligation, thus implying legal consequences on states that refuse to adhere to the norm, it would seem superfluous to clarify your position, since a customary norm is binding upon the entire international community regardless of individual reservations. Thus, in the case with R2P it seems plausible to assume that subsequent explanations of vote rather aim to clarify the state’s position on the legality of the concept

121 Orakhelashvili, supra n 54 p 156.
122 See further section 3.2.3.
123 Shaw, supra n 8 pp 52–54.
as such or accepting R2P as a justificatory basis for intervention, but oppose how such mandate should be exercised in practice.
4 The Concept of “Responsibility to Protect”

4.1 Political Context and the International Legal Framework

Former Secretary-General Kofi Annan declared in 2000 in his Millennium Report, “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?” His statement was made in light of the recent inadequate military interventions characteristic of the post-Second World War era. The SC had authorized mandates acting under Chapter VII of the UN Charter to forcibly intervene in successive humanitarian disasters in states such as Rwanda, Sierra Leone and Kosovo, which raised concerns relating to the dilemma of the assumed inviolability of state sovereignty and the urgent need for intervention by the international community in order to cease mass atrocities.

Political independence and territorial integrity, guaranteed by Article 2(4) of the UN Charter, are fundamental features to preclude external military intervention: all states shall refrain from the use of force in the domestic affairs of another state. Nonetheless, the UN Charter explicitly permits collective coercive measures in situations of self-defence and imminent threats to international peace and security. Recent development suggest that a responsibility to protect civilians from mass atrocities rests upon the international community; an exception to the prohibition of violence that presumably legitimize foreign interference, despite the absence of a right to self-defence or an imminent threat to international peace and security. Enforcement actions, based on R2P are arguably not imperil to political independence and territorial integrity, thus Article 2(4) of the UN

125 Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? p 99.
126 S/RES/929 para 3.
129 Bellamy & Reike, supra n 9 p 271.
130 Payandeh supra n 2 p 358.
131 Article 51 of the UN Charter.
132 Article 39 of the UN Charter.
133 The ICISS report, supra n 17 p 3 and Payandeh supra n 2 p 358.
Charter is not violated. When a concept, such as R2P, not explicitly stated in the UN Charter, serves to justify humanitarian intervention, the insofar puzzle is of how to most adequately legally reconcile infringement upon individual states’ preeminent right to sovereignty with the critical human rights aspects.

4.2 The Fundamentals of R2P – “The Three Pillars”

Whether the concept of R2P should appertain any binding legal force is subject to diverging scholarly opinions, predominantly reflected in the disparate interpretations of the original purpose of introducing a concept which grants the international society a right to intervene in the internal affairs of another state whenever a humanitarian crisis severe enough is prevalent. Despite the disparate notions on the concept’s legally binding effects, at least a general consensus seems to exist on what the main features of R2P ought to be. The concept is defined as resting upon three so called “pillars”: the first stipulates that states bear the primary responsibility for protecting its population from gross violations of human rights, including crimes against humanity, ethnic cleansing, genocide and war crimes, the second pillar states that the international community has a responsibility to assist and encourage states in fulfilling their primary obligation, whereas the third pillar, and the most controversial one, grants a right for the international community to intervene and protect populations from gross violations of human rights, if a host state manifestly fails to do so.

To be able to fully comprehend the scope of the concept and the legal status it entails, one must further analyse the intended purpose in light of its historical development. To render whether a genuine intention to intervene for the purpose of humanitarian protection exists it thus seems relevant to examine not only how states perceive the various components of R2P, but also what legal status the concept should be attributed with.

135 Stahn *supra* n 125 p 102.
136 A/63/677.
137 Francis, *et al.*, *supra* n 2 p 18.
138 A/RES/60/1 paras 138-139.
4.3 Historical Development

4.3.1 Changing Perspectives

As the principal subjects of international law, states bear the primary responsibility to adhere and commit to certain standards and principles in order to comply with the international legal framework.\textsuperscript{139} State responsibility was long considered closely linked with sovereignty in terms of control: Sovereign states were in absolute control to perform whatever activities the ruling authorities deemed necessary in their own territory, exclusively protected under international law from foreign interference.\textsuperscript{140} However, over the last 15 years the global trend has been shifting towards a more humanitarian approach, where the concept of sovereignty instead ought to be understood in terms of responsibility and accountability for the welfare of one’s civilian population.\textsuperscript{141}

4.3.2 The ICISS Report: A Significant First Step

The main idea that state sovereignty implies responsibilities was initially introduced by the ICISS in their 2001 report ICISS Report,\textsuperscript{142} but the concept of R2P has been reaffirmed and adopted in various settings since.\textsuperscript{143} ICISS, a committee consisting of international experts appointed with the main mandate to develop a global political consensus on how the international community should respond to rampant humanitarian crises in terms of gross violations of human rights, concluded that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”\textsuperscript{144} The ICISS Report included a comprehensive approach on humanitarian crises framing intervention to predominantly embrace three essential elements: a responsibility to prevent, react and rebuild.\textsuperscript{145} The responsibility to prevent stressed the importance of exhausting prevention measures rather than rushing to intervention.\textsuperscript{146} When prevention measures fail to resolve a successive humanitarian crisis, the responsibility of the broader

\textsuperscript{139} Hall, Principles of International Law p 239.
\textsuperscript{140} Francis et al, supra n 2 p 12.
\textsuperscript{141} The ICISS report, supra n 17 p 3.
\textsuperscript{142} Ibid.
\textsuperscript{143} Arbour, supra n 134 p 447; A/59/565 para 201, A/59/2005 paras 6-22 and A/RES/60/1 paras 138-139.
\textsuperscript{144} The ICISS report, supra n 17 at VIII.
\textsuperscript{145} Ibid at XI.
\textsuperscript{146} Ibid at 3.1.
community to react to compelling situations is triggered, where the least intrusive measures should be adhered to primarily.\textsuperscript{147} A responsibility to protect was concluded to also entail post-intervention obligations, to demonstrate a genuine commitment to ensure sustainable peace building and promote good governance.\textsuperscript{148}

Despite successfully introducing and garnering broad support for the main notion that state sovereignty entails not merely rights but also obligations, stemming from the consensual contention that mass atrocities are unacceptable, the framework introduced by the ICISS did not in itself gain wide recognition.\textsuperscript{149} The language of the report was considered too vague and it received criticism for its content; the proposed “code of conduct” for the use of the veto by one of the P5 of the SC with respects to actions needed to avert gross violations of human rights was rejected,\textsuperscript{150} and the suggested possibility to permit unilateral interference in domestic affairs without an authorizing SC mandate was dismissed.\textsuperscript{151} A more in-depth analysis in section 4.3.4 will address and examine how the initial concept of R2P to consist of three essential elements of responsibility was elaborated upon in later adopted documents, and to what extent this is reflected in the perceived binding mechanism’s associated with R2P and the criticism raised.

\subsection*{4.3.3 A Global Consensus in the Outcome Document of the 2005 World Summit}

If the framework of R2P introduced in the ICISS Report was the product of an expert committee, the Outcome Document of the World Summit (World Summit Document) adopted in 2005 constituted a much more authoritative agreement, recognized worldwide for bringing clarity to the scope of R2P.\textsuperscript{152} In an unanimous statement, predominantly viewed as a political manifestation by the participating Heads of State and Government, the adopted R2P principle elaborated upon the fundamental features introduced in the ICISS Report in terms of the presumed responsibility to prevent, protect and rebuild, but it

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} Ibid at 4.1.
\item \textsuperscript{148} Ibid at 5.1.
\item \textsuperscript{149} Bellamy & Reike, supra n 9 p 273; Hamilton, \textit{The Responsibility to Protect, from Document to Doctrine – But What of Implementation?} p 292 and Stahn, supra n 125 p 103.
\item \textsuperscript{150} The ICISS report, supra n 17 at 6.21.
\item \textsuperscript{151} Ibid at 8.4.
\item \textsuperscript{152} Bellamy & Reike, supra n 9 p 268 and Stahn, supra n 125 p 101.
\end{enumerate}
\end{footnotesize}
reframed R2P as consisting of three distinctive pillars. As described in section 4.2, the responsibility to protect a civilian population from mass atrocities primarily rests upon the host state, but a collective responsibility for the international community is triggered when states fail to fulfil this obligation. The content of the World Summit Document has later been affirmed in Reports of the Secretary-General endorsed in subsequent SC resolutions and United Nations General Assembly (UNGA) resolutions, which further seem to emphasize the global trend of recognizing the prevailing effects of human intervention over state sovereignty.

The World Summit Document was embraced by world leaders because it did not only specify the scope of R2P, by defining what crimes were to be included in the concept (…’a responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’), but because it clarified the roles and responsibilities of the different actors involved ("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 […] should peaceful means be inadequate and national authorities are manifestly failing to protect their populations"). Despite the broad positive response the concept received, some states opposed the actual framing of the principle, claiming it too undermine the Charter, to legitimize intervention not expressly authorized by the SC, and being too insubstantial because the judicial power to forcibly intervene in humanitarian crises already seemed to exist according to international law. The legal nature of the principle was also questioned, and some states, most vociferously the United States, opposed the idea that the SC, acting on behalf of the international community, should have an obligation to intervene.

153 Arbour, supra n 134 p 447; Bellamy & Reike supra n 9 p 273 and A/RES/60/1 paras 138-139.
154 A/63/677 paras 49–65.
156 A/RES/63/308.
157 A/RES/60/1 para 138.
158 A/RES/60/1 para 139.
4.3.4 A Comparative Analysis: Two Diverging Views

A closer examination of the outcomes of the ICISS Report and the World Summit Document implies that the criticism raised addressed to some extent disparate issues. Whereas the vague language, the broad definitions and the lack of coherent support in the international framework seems to have been the main concerns of the ICISS Report, the concept of R2P defined in the World Summit Document was denounced due to the potential legal implications the concept would entail. Without clarifying how R2P ought to be implemented in practice, perhaps the concept that emerged in 2001 managed to gain wide support because it seemed to have been a harmless action to embrace a vague concept which merely elevated a conspicuous fact: State sovereignty should entail state responsibilities. Considering the historical context and the prevailing political climate under which R2P was initially introduced, a rejection of the fundamental contention that state sovereignty should yield to humanitarian consideration, seem in retrospect to have been neither a viable nor appropriate possibility, unless political expulsion by the entire global community was an aspiration. In 2005, despite replacing the vague and broad definitions with distinct features and explicit clarifications of the scope of the concept, R2P was partially rejected on other grounds: its indicated implications did not appear coherent with some states’ initial unwillingness to embrace R2P as a framework that would potentially impose legal obligations on the international community. This standpoint must also be considered in light of the context under which the World Summit Document was adopted: it was predominantly a political manifestation to attain a common viewpoint rather than a collective commitment to agree upon an emerging norm.

The conjunction of political ambitions and lack of legal considerations apparently resulted in a somewhat ambiguous framework in terms of its embedded consequences. Compared to vaguely defined principles, a precise definition of any concept, whether it is of a legally binding character or not, clearly elucidates its potential effects upon implementation. An equivocally stated concept of R2P in 2001 was not fearsome because its content was not defined, and its enclosed consequences, while not predictable, were far from being outlined. However, the consensual appraisal of the clarified scope of R2P in 2005 led to a concomitant awareness of its possible implications. Noteworthy, its potential consequences seem to have revealed disparate concerns of a much more political nature: despite being members of the P5, Russia and China expressed reservations about the potential misuse of
a principle that would legitimize actions in contradiction to the UN Charter, while the United States, on the other hand, was not concerned with the right to intervene but rejected the implications of non-compliance and inaction inferred by an obligation to react.

Moreover, it is worth noting that the elements of R2P that was unanimously embraced by all states in both 2001 and 2005 was the features that was later affirmed as the indisputable pillar one – which states that the primary responsibility to avert mass atrocities rests upon the host state – while the legality of the concept in terms of the role of the international community, framed predominantly in pillar three, remained questionable and unresolved.

4.4 The Legal Status of R2P: Political Fact or Emerging Norm?

4.4.1 R2P and Its Precarious Status
To determine what legal status the concept of R2P in terms of pillar three should pertain is a highly controversial topic and subject to vastly diverging opinions: should R2P merely be considered a right for the international community to interfere when mass atrocities are committed or should this be regarded as a binding commitment that entails legal implications?

The main reason it is considered of vital importance to determine the defined status of any legal instrument rests upon its embedded consequences: not fulfilling a recognized right to act does not imply legal accountability, whereas non-compliance with an established legal norm entails unpleasant outcomes. Primarily, one can conclude that there is not a widely recognized definition or even agreement on the legal status of R2P. None of the key documents, including the ICISS Report and the World Summit Document, are acknowledged sources of international law according to Article 38 of the ICJ Statute. While law-declaring UNGA resolutions and reports by the Secretary-General can contribute to the formation of customary international law and thus constitute evidence of

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164 Bellamy, Responsibility to Protect: The Global Effort to End Mass Atrocities p 4.
165 According to Article 38 of the ICJ Statute, (a) international conventions, (b) international customs, (c) general principles and (d) judicial decisions and teaching of the most highly qualified publicists are the recognized sources of international law.
opinio juris, they are not recognized as sources of international law per se. As seen in section 4.3.4, the criticism raised when R2P was elaborated upon in 2005, primarily concerned the assumed role of the international community. Similarly, the following sections will demonstrate that the legal status of pillars two and three seems to be mostly debated with, whereas pillar one and the role of the host state is of less contention. As the following section will show, whether R2P should be regarded as a binding emerging legal norm, or merely an expression for a political commitment appears to depend on what the original purpose and intended implications ought to have been.

4.4.2 Old Wine in New Bottle?
To what extent the principle of R2P as such involved an emerging norm de facto or merely re-stated an already established legal concept is debatable. The presumed enforceability of the first pillar; that the primary responsibility to protect civilians from mass atrocities rests upon the host state, has been subject to the least diverging interpretations. Since the 2001, the articulation of the first pillar has been considered a global, political commitment to shared beliefs to emphasize a peremptory norm of international law, which imposed no new legal duties on states. This obligation was already considered jus cogens and its introduction only reaffirmed existing practice. Support for this standpoint is predominantly derived from the well-established and clearly stated obligation stated in Article 1 of the 1948 Genocide Convention, that genocide “is a crime under international law which [states] undertake to prevent and to punish”. Individual states’ adherence to the Genocide Convention is thus considered an undisputed obligation embedded in customary international law. Nonetheless, the responsibility of the international community to prevent mass atrocities that fall outside the scope of the Genocide Convention is subject to far more diverging opinions.

166 Stahn, supra n 125 p 101.
167 Ibid p 110.
168 Yearbook of the International Law Commission, supra n 76 p 247.
169 Arbour, supra n 134 p 450; Bellamy & Reike, supra n 9 p 285 and Deng, Impact on State Failure on Migration p 20.
The former UN High Commissioner for Human Rights Louise Arbour argues that it is reasonable to assume that the intention during the draft of the World Summit Document, when crimes against humanity, war crimes and ethnic cleansing were enlisted as part of R2P, must have been to expand the obligations of the international community beyond instances of genocide.\textsuperscript{172} Arbour, endorsed by other prominent scholars,\textsuperscript{173} suggests – predominantly based on analogies drawn from the judgments of the ICJ on \textit{Bosnia and Herzegovina v. Serbia and Montenegro case} – that three elements of responsibility would logically trigger a duty for the international community, and implicitly the SC, to intervene in humanitarian disasters; the element of influence, proximity and information.\textsuperscript{174}

The first element is related to capacity, geographically as well as politically, to effectively influence the actors committing genocide;\textsuperscript{175} similarly, the second element of proximity emphasizes an holistic approach in that powerful states, irrespective of their geographic distance to the committed crimes, are expected to react to alleged crimes commensurate with their capabilities, reach and advanced technology;\textsuperscript{176} and the last prerequisite puts greater responsibility on states with first-hand and prior knowledge and intelligence of the perpetuated crimes.\textsuperscript{177} This interpretation of the third pillar as legally binding inevitably puts an extra pressure on P5 not to use their vetoes when mass atrocities are allegedly occurring, which would implicitly establish “guidelines” for how and when the SC is obliged to intervene. Furthermore, one could easily pose the question that if the predominant goal in 2001 was to establish a political consensus that mass atrocities could no longer be deemed solely a matter of domestic concern, is it not plausible to concomitantly assume that simply a clarification of R2P in 2005 of what is already established practice would be superfluous, thus the intentions must have been to adopt a wider framework?

However, such an extensive interpretation is not supported by the prevailing approach embraced by most scholars, which suggests that the third pillar of R2P is not a legal norm

\textsuperscript{172} Arbour, \textit{supra} n 134 p 451.
\textsuperscript{173} Glanville, \textit{supra} n 163 p 300.
\textsuperscript{174} \textit{Bosnia and Herzegovina v. Serbia and Montenegro case}, \textit{supra} n 70 para 430.
\textsuperscript{175} Arbour, \textit{supra} n 134 p 453.
\textsuperscript{176} \textit{Ibid} p 454.
simply because it has not been appropriately legislated.\textsuperscript{178} Consequently, R2P should be considered a non-binding political commitment, which can merely serve as evidence of customary international law, thus legitimizing interference in the domestic affairs of another state.\textsuperscript{179}

\textbf{4.4.3 An Alternative Approach}

Since the ambiguous interpretation of the intended enforceability of R2P for the international community purportedly stems from a tension between legal considerations and political ambitions, only considering traditional approaches to sources of international law seems thus in this respect too parochial. Instead, an interdisciplinary collaboration beyond the realm of international law to comprehend the rationale behind R2P’s existence might provide some guidance on how the concept most appropriately ought to be understood. All states recognize the obligation to be bound by international regimes but in order to obtain further evidence as to why states accept their autonomy to be restrained,\textsuperscript{180} the following section will emphasize on the theories of constructivism and the New Haven School, which both discuss the emergence of legal norms but where the former theory addresses \textit{how} rules are formed and the latter emphasizes the reason \textit{why}.

According to constructivism, all states belong to the same society based on commonly accepted institutions, sets of values and rules.\textsuperscript{181} How states perceive their role and identity is strongly reflected in their pursued interests and the behaviour of prominent actors influence what societal structures are created.\textsuperscript{182} Constructivism predominantly envisages the \textit{how} in the formulation of legal norms as a result of the process of changed interests and identities. Thus, how much room for change (i.e. the emergence of new norms) societies permit correlates to how much responsibility should logically be attributable to powerful actors, implicitly the P5.\textsuperscript{183}

\textsuperscript{178} Bellamy & Reike, \textit{supra} n 9 p 268 and Stahn, \textit{supra} n 125 p 101.
\textsuperscript{179} Strauss, \textit{A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect} p 32.
\textsuperscript{180} Klamberg, \textit{Power and Law in International Society} pp 1–3.
\textsuperscript{183} Wendt, \textit{Anarchy is What States Make of It: The Social Construction of Power Politics} p 396.
The introduction of R2P in 2001 indicates that the creation of such political structure was caused by a paradigm shift based on congruent existing values of how human security was to be perceived. In light of previous sections (see section 4.3.4), the application of the constructivist theory to understand the embedded legal obligations of R2P reveals a discrepancy: the mutual recognition for common values does not correspond to a commensurate commitment by the international community to be legally obliged to respond to mass atrocities. This suggests that powerful actors, the only entities according to the constructivist theory with the potential to actual influence the emergence of new norm, while eager to emphasize humanitarian intervention, did not fully consider, intentionally or not, the legal implications of doing so. If the changed perspective on human security should equal a responsibility for the influential actors to intervene, the P5 surely never intended to accept this responsibility.

If constructivism focuses on how norms emerge, the New Haven School intends to enhance the process behind law-making by elevating how the content of rules is to be understood. The theory is policy-oriented in that it stresses the correlation between power and authority. How the content of the law is perceived is thus related to whether a state is a bystander or one of the forefront actors: the implementation, interpretation and adoption of legal instruments depend on what policy goals and virtues the leading entities choose to pursue. The theory has received vast criticism for the extensive possibility it provides for a subjective interpretation by individual states’ to pursue their own agendas in guise of perceived shared contentions, and the lack of predictability when the pursuit for common policy goals dictates the content of the law.

In terms of how R2P’s bindingness ought to be interpreted in light of the above, several apparent tensions may be identified. International and national security along with human rights are all virtues that the entire international community seeks to promote. However, the prevention of mass atrocities ultimately entails forcible measures in another state’s domain, which inevitably violate territorial integrity. When the political agenda is legitimate, humanitarian intervention based on R2P is considered justified. But what are the

184 Bring, Mahmoudi och Wrange, Sverige och Folkrätten p 38.
186 Bring et al, supra n 184 p 38.
187 Ibid.
consequences when states, under the guise of “vital” virtues, pursue ambitions purely based on self-interest? Humanitarian intervention on false premises risks not only undermining the legality of R2P _per se_ but the avoidance of responsibility, that would logically primarily be imposed on powerful states, amounting to their capacity to introduce new norms, might also have detrimental effects on successive humanitarian disasters.
5 The Case of Libya

5.1 Introduction

Having established the legal framework in previous chapters of the methods of interpretation and the legal status of R2P, the analysis of the thesis can now turn to a case study of the situation in Libya, and examine how the mandate in a SC resolution authorizing humanitarian intervention ought to be interpreted particularly in light of explanations of vote.

Never before had the SC adopted a resolution which authorized military measures under Chapter VII of the UN Charter explicitly based on R2P.\(^{188}\) Hence, SC Resolution 1973 inevitably marked a shift in not only the SC’s attitude towards the use of military means for the purpose of humanitarian protection, but also the international community’s perception of how to respond to mass atrocities.\(^{189}\) That the rest of the world bears a responsibility to intervene when the host state manifestly fails to protects its population from mass atrocities had been officially recognized as a legitimate ground for responding to gross violations of human rights well before SC Resolution 1973 was adopted.\(^{190}\) The violence by the Libyan regime was condemned almost universally by states and international organizations, thus the issue in Libya was not if the international community had a responsibility to protect, but rather how this acknowledged right to intervene should be performed.\(^{191}\) No one questioned whether an imminent threat of mass atrocities existed, which are prerequisites stipulated by the UN Charter in order for forcibly actions under Chapter VII to be allowed.\(^{192}\) With the former repressive dictator Muammar Gaddafi’s public utterances (“any Libyan who takes arms against Libya will be executed”),\(^{193}\) and with the rapid collapse of Benghazi, the country’s second largest city, no one could plausibly argue that military measures would be in violation of the UN Charter, despite not explicitly sanctioned. However, the subsequent implementation of the mandate raised harsh criticism


\(^{189}\) Bellamy, *supra* n 188 p 263 and Genser & Stagno Ugarte, *supra* n 4 p 413.

\(^{190}\) S/RES/1674 and S/RES/1894.


\(^{192}\) Article 42 of the UN Charter.

related to its declared limits and true motives, and revealed vastly diverging interpretations of the overall purpose of the intervention; to protect the civilian population from mass atrocities or coerce the despot Gaddafi to relinquish power?²⁹⁴

5.2 Background

When examining the implications of SC Resolution 1973, it is pertinent for the analysis to primarily highlight the idiosyncrasies of this particular resolution. In addition to constituting the first factual instance where the SC explicitly authorized a military mandate based on R2P, the resolution’s promulgation was also characterized by circumstances normally not extant when the SC adopts resolutions. The rapid time frame of events and escalating violence in combination with an autocratic, ruthless dictator called for urgent and resolute military measures by the international community to protect the Libyan population. The imminent threat of widespread mass atrocities significantly reduced the number of viable options for the SC to intervene with other than military measures.²⁹⁵

In the wake of the developing Arab Spring in early 2011, the Libyan people engaged in anti-regime protests and mass demonstration against the repressive leadership. The violent response by the government escalated as the protests increased in number and intensity. The augmented civil unrest and the alliance of opposition forces were countered with tanks, machine guns and snipers, as the Libyan regime quickly lost control of strategic parts of the country.²⁹⁶ The exacerating situation was condemned by the international community,²⁹⁷ and in particular the criticism by leading regional organizations, including the Gulf Cooperation Council, Organization of the Islamic Conference and the League of Arab States, played a large role in the subsequent response. Without the strong condemnation and demand for the immediate cessation of mass atrocities from influential actors of the Arab world, Russia and China later expressed that they would have vetoed the

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²⁹⁴ Bellamy, supra n 188 p 267 and Payandeh, supra n 2 p 383.
²⁹⁵ Bellamy, supra n 188 p 269.
²⁹⁶ Genser & Stagno Ugarte, supra n 4 pp 397–399 and Payandeh, supra n 2 p 372.
The deep concern caused by the continuous reports of massive human rights violations eventually resulted in the adoption of SC Resolution 1970, in which the situation in Libya was referred to the ICC, coercive sanctions were imposed, and the responsibility of the Libyan regime to protect its population emphasized. Nonetheless, did the sanctions nor the referral to the ICC lead to a decrease in the violence. As the opposition troops progressed further and gained control over numerous strategically important cities and infrastructure, the counterattacks by the Gaddafi regime aggravated and did by March include air strikes and heavy artillery fires, against oppositional targets as well as civilians. Further actions were indisputably required, and on March 17, 2011 the SC historically agreed upon Resolution 1973.

5.3 Security Council Resolution 1973

5.3.1 Military Intervention for Human Protection Purposes

In the preambular paragraphs of SC Resolution 1973, the SC condemned “the gross and systematic violation of human rights” and expressed its “grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian causalities.” The situation in Libya was determined to continuously “constitute a threat to international peace and security,” and the SC concluded that it acted “under Chapter VII of the UN Charter.” A no-fly zone was established, and the banning of all flights in Libyan airspace was decided upon. In addition, the responsibility of the Libyan authorities to comply with their obligations under international law to protect its population was further reiterated. Having established the existence of a legal justificatory ground for the mandate in above-mentioned paragraphs, the SC in operative paragraph 4 of the resolution defined, though in a highly vague

198 Bellamy, supra n 188 p 266.
200 Ibid paras 9–21, including an arm embargo, travel ban and the freezing of assets.
201 Ibid pmbl para 9.
204 Ibid pmbl para 3.
205 Ibid pmbl para 21.
206 Ibid pmbl para 22.
207 Ibid paras 6–12.
208 Ibid paras 17–18.
209 Ibid pmbl para 4 and operative para 3.
manner, how the mandate should be executed out by member states: “to take all necessary measures [...] to protect civilians and civilian populated areas [...] while excluding a foreign occupation force of any form on any part of Libyan territory.” 210 Shortly after SC Resolution 1973 was adopted, foreign interference on Libyan soil was a fact. With NATO assuming command over the military operation, attacks, with the objective to avert the perpetuated mass atrocities, were being carried out against military targets that would force regime-loyal troops to retreat. However, already upon the resolution’s promulgation, the five states that abstained from voting, including China, Russia, Brazil, Germany and India, 211 implied disparate views on the resolution’s content, a notion that was later confirmed when the implementation of the mandate was initiated. 212 The underlying objective was criticized and the five abstaining states, except Germany, denounced how the mandate had been severely exceeded in that the use of military forces in Libya did not adequately protect the civilian population but rather caused additional causalities. 213 It was undisputed that the mandate explicitly authorized for the use of force for human protection purposes; the wording of SC Resolution 1973, “all necessary measures”, is usually considered the code word for military intervention. 214 However, deconstructing the various parts of the resolution, including the context, objective and purpose, and analysing the presumed intention in light thereof, suggest that an all-encompassing interpretation, particularly with reference to the various explanations of vote made by state representatives, could reveal whether the mandate was actually transgressed.

5.3.2 Deconstructing the Content

5.3.2.1 Context – The Drafting Process and “Relevant Rules of International Law”

Before further investigating in detail the actual text of SC Resolution 1973, it is pertinent to set the frame for the analysis by deconstructing the context under which the resolution was adopted, in light of the conclusions in section 3.2.4. SC Resolution 1973 was preceded by SC Resolution 1970, which was unanimously 215 adopted on February 26, 2011. 216 SC

211 S/PV.6498 p 3.
212 Genser & Stagno Ugarte, supra n 4 pp 397–399.
214 Genser & Stagno Ugarte, supra n 4 p 413.
215 S/PV.6491 p 2.
Resolution 1970, also endorsed by influential regional actors such as the Arab League, the African Union and the Organization of the Islamic Conferences, condemned the gross and systematic violations of human rights in Libya and urged for an immediate ceasefire.\textsuperscript{217} The resolution was fairly uncontroversial in that it did not impose any military measures Libyan territory, nevertheless it sanctioned coercive measures under Article 41 of the UN Charter. States, most obstreperously the Russian Federation, supported by China, India and Brazil, instead emphasized that the settlement of the situation could only be solved by political means, thus the intention by adopting SC Resolution 1970 was never to resort to the use of armed forces.\textsuperscript{218} However, as the situation in Libya rapidly deteriorated, inaction could no longer be justified and more tenacious actions were demanded in order to thwart the successive humanitarian crisis. Thus, the SC in resolution 1973 affirmed, unequivocally, “the international community’s determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government”,\textsuperscript{219} and for the first in its history the SC authorized military actions explicitly with reference to R2P.\textsuperscript{220} Although, R2P was, and still is, considered a legitimate basis to forcefully interfere in another state, the boundaries of such authorization are undefined; what measures does such a mandate actually permit?

Section 3.2.4 examined to what extent Article 31(3)(c) of the VCLT and the context as such should be taken into consideration when treaty provisions concomitantly are applied to the interpretation of resolutions. In this regard, R2P as a concept may in itself provide some valuable guidance on how to construe the underlying intention behind SC Resolution 1973. Article 31(3)(c) identifies the existence of “any relevant rules of international law” as one determining factor in the process of deconstructing the true meaning of the text. As discussed in section 3.2.4, if R2P is perceived as either an obligation for the international community to intervene or merely a right to do so when the situation is severe enough, might actually reveal whether the purpose of humanitarian protection is thus genuine: the intention behind an obligation to act is arguably weaker than an aspiration to intervene driven by voluntarily commitments. As ascertained in section 4.4.2, the prevailing contention is that R2P should be considered a non-binding political commitment, which

\begin{footnotes}
\item[216] S/RES/1970.
\item[218] S/PV.6491 p 4.
\end{footnotes}
ought to legitimize foreign interference sanctioned by the SC, but where the concept should not be perceived as imposing obligations on the international community to act in times of mass atrocities. Consequently, this interpretation inevitably supports the notion that the intervention in Libya indeed was driven by true humanitarian ambitions, which would indicate that the mandate was not transgressed in the subsequent implementation. However, this interpretation of the purpose behind R2P as pivotal for the objective of all humanitarian interventions authorized by the SC must be regarded in light of other decisive factors, such as the objective and purpose and wording of the text, in order to give the fullest effect to the wordings in the text.

5.3.2.2 Objective and Purpose

The discernible objective and purpose of Resolution 1973 have been relatively unquestioned; “to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya…” as stated in paragraph 4. This goal was unequivocally endorsed by several prominent states, whether they were in favour of the resolution or abstained from voting, including the United States (“The Council’s purpose is clear – to protect innocent civilians […]”221, the United Kingdom (“The central purpose of the resolution is clear: to end the violence, to protect civilians and to allow the people of Libya to determine their own future”222 and the Russian Federation (“we are consistent and firm advocates of the protection of the civilian population”).223

However, statements made right after the resolution was adopted, might indicate that more obscure and impalpable objectives were prevalent. The effectiveness principle, as defined in 3.2.3, suggests that in order to give the fullest weight and effect to the meaning of a text – whether it is a treaty or resolution by the SC – reference should always be made to the object and purpose. But what if the object and purpose are ambiguous and certain circumstances infer that the implicit aim is not equivalent to what is explicitly stated? Studying the annex and preambular paragraphs in SC Resolution 1973 obviously supports the perspicuous purpose.224 Nevertheless, the statements leading up to the adoption, particularly those uttered during the deliberations, indicate a contradictory interpretation. Explanations of respective member of the SC, particularly the ones that abstained from

221 S/PV.6498 p 5.
222 Ibid p 4.
223 Ibid p 8.
voting, right after SC Resolution 1973 was adopted, support the notion that the intention might not have been genuinely humanitarian. During the negotiations, claims had been made that provisions in the draft – paragraphs that were later incorporated in the finalized text – “could potentially open the door to large-scale military intervention”, accusations that were denied to hold any real substance. Furthermore, whether the underlying objective were primarily based on humanitarian protection purposes, seems to be reflected in states’ concerns with what the mandate actually permitted, thus where the limits for “all necessary measures” were to be drawn. Abstaining states explained upon promulgation that they were most reluctant to accept the vaguely defined mandate and the wide interpretation of how the mandate ought to be implemented, enabled by the customary language of the text.

5.3.2.3 “All Necessary Measures”

Inaction in the case of Libya could no longer be justified as the successive humanitarian crisis deteriorated. Whereas all states were unanimous in their condemnation of the gross and systematic human rights violations, some members of the SC remained unconvinced that force was the panacea to the situation in Libya. Operative paragraph 4 of the resolution, which serves as the legitimate basis for the use of force, is also the paragraph that has been subject to the most controversial and diverging interpretations: How should “all necessary measures” be understood and how much force should be acceptable before concluding that the mandate has been transcended?

Despite “all necessary measures” is considered customary SC language and used as a code word for authorizing a military intervention, the wording itself remained vague and ambiguous. In addition, when such equivocal expression is used in combination with a relatively undefined concept such as R2P, this renders it even more crucial to determine how the text should be interpreted to give the fullest effect to the meaning of the words. First of all, one can conclude that “necessary” has different meaning depending on the context of the legal framework. According to a constitutional rights perspective, “necessary” and “proportionality” are intertwined, in that there is an apparent correlation between the two principles. Hence, the application of “all necessary measures” entails a least-
restrictive means test, which fundamentally suggests that all measures taken must be proportionate to the objective, and no action may go beyond what is strictly necessary to achieve the overall purpose. However, an equivalent understanding according to international law, and in particular the international humanitarian legal framework, does not exist. In fact, such interpretation would be both unusual and incongruous and does not correspond to how the SC has acted in the past. If the SC were to apply a least-restrictive means test in all its conducts, its possibilities to act efficiently and determinedly would be severely confined, which would most certainly also be contra-productive to its overall objective: to maintain international peace and security. Rather, the prevailing approach suggests that this concept of “all necessary measures” in the context of coercive actions authorized by the SC ought to be understood in terms of excessiveness and rationality: not every single measure needs to commensurate to the objective, but in general the use of force should not be extensive and must bear a relation to the objectives of the resolution to some extent.

Consequently, “all necessary measures” evidently seems to relate to the objective, in that it serves as the limit for how much force the mandate permits. In previous actions by the SC – where adopted resolutions have not explicitly been based on R2P or humanitarian protection purposes – the objective has usually been more unequivocally defined. In i.e. SC Resolution 678, the SC authorized member states to employ “all necessary measures” in order to uphold and implement Resolution 660 and all subsequent resolutions and to restore international peace and security. Despite, being controversial in other aspects, there seems to at least have been a consensus regarding the scope of the resolution: the objective of the use of “all necessary measures” was to force the withdrawal of Iraqi troops from Kuwait territory, which would concomitantly imply an immediate cessation of foreign presence. However, when resolutions by the SC are based on R2P, the objective is to protect a civilian population from mass atrocities, a responsibility that is triggered for the international community once the host state manifestly fails to fulfil its own obligations. But what

231 Payandeh, supra n 2 p 385.
232 Ibid and Akande, supra n 230.
233 S/RES/678 para 2.
234 S/PV.2963.
threshold determines when this purpose is fulfilled, hence when the military intervention should cease and foreign troops retreat? If mass atrocities evidently are caused by a repressive dictator, is it not logical to presume that a civilian population could only be properly protected once the despot relinquishes power? And if a resigning tyrant is implicitly the ostensible definition of the scope of the mandate, the underlying intention with the intervention logically seems to be a determining factor for whether the mandate was also transgressed; because it only seems legit that a leader of a state is forced to resign as a result of foreign interference given that the intervention as such was primarily motivated by humanitarian aspirations.

5.3.2.4 “Excluding a Foreign Occupation Force”

Before the analysis turn to further examining the statements made during the deliberations and the subsequent voting procedure, in order to convey how the mandate ought to be understood in light of the above reasoning, the explicit exclusion of “foreign occupation force” in SC Resolution 1973 will be mentioned briefly. With the prohibition of foreign occupation force many argued that the SC also excluded the deployment of ground troops. However, to simply draw this conclusion would be misleading. Occupation in the context of international law refers to the exercise of effective control over the territory of a state by another state. Hence, to merely deploy ground troops would not imply the besieging of Libyan territory. Consequently, one should note that the SC deliberately chose not to use the expression “ground forces” but instead it merely aimed to inhibit the possibility that a military intervention in Libya would result in an occupation. Seemingly, such interpretation fits with the political context, especially in the aftermath of recent, criticized occupations in Afghanistan and Iraq. Whereas the exclusion of foreign occupation forces imply that the intention of the SC members were not to besiege Libya, such provision does not necessarily support the notion that a regime change was conversely precluded.

236 Payandeh, supra n 2 p 385.
237 Article 42 of the Annex to the Fourth Hague Convention of 1907.
238 Payandeh, supra n 2 p 385-386.
5.3.3 Revealing the Intention: Was the Mandate Transgressed?

5.3.3.1 Political Aims in Guise of Humanitarian Purposes?
After deconstructing the context, wording and object in previous sections, this part of the chapter will be dedicated to construe whether the explicit purpose commensurate to the implicit intentions, thus suggesting if the mandate authorized in SC Resolution 1973 was transgressed or not. Critical voices have been raised, both during the deliberations and in statements following the implementation, on the uncertainties about the scope of the mandate and how much force SC Resolution 1973 really authorized: were the ambitions of the international community truly based on humanitarian convictions, or was the concept of R2P used as a smoke screen to pursue a more political agenda; to force Gaddafi relinquish power?

5.3.3.2 On the Interpretation of SC Resolution 1973 in Light of Statements
Section 3.3.3 on how SC resolution have previously been interpreted in practice, suggests that in addition to the actual text, a systematic and teleological approach, considering all circumstances, including the political context, up until the resolution’s promulgation to assure that the purpose is given full effect, should be sought. When the SC adopts resolutions with consensus, these resolutions are generally considered a weaker category of sources of international law compared to unanimously adopted resolutions. In addition, protests against the specific content of a resolution, particularly when these statements are in line with how the state previously voted, are recognized to have a stronger legal bearing than statements in abstracto on for example the general applicability of a legal concept. Applied to the case of Libya – in addition to what has been stated in section 5.3.2.1 concerning the presumable intention behind a resolution based on a right to act rather than a legal obligation, and in section 5.3.2.2 regarding the effectiveness principle – this reasoning would imply that the interpretation of SC Resolution 1973 would logically take into account statements to a greater extent than what is customary in order to reveal the true ambitions. SC Resolution 1973 was not adopted unanimously, and states did in subsequent explanations of vote harshly condemn how the mandate had been implemented. Furthermore, it is the first time R2P explicitly constituted the legitimate basis for a military intervention by the international community. In general, a narrow

240 See section 2.3.6.
interpretation is called upon when resolutions infringe upon the presumed inviolability of state sovereignty and political independence. However, such parochial approach is not motivated when an actual genuine intention to intervene based on humanitarian protection purposes can be established, thus justifying a more extensive interpretation method, taking into account all relevant circumstances. However, if measures are taken in order to primarily achieve an agenda other than what falls within the realm of R2P, such resolutions should be construed in a stricter manner.

5.3.3.3 Explanations of Vote on the Promulgation of SC Resolution 1973

Statements are considered as either belonging to what is referred to as primary means of interpretation according to Article 31 of the VCLT, or as “other supplementary means”, as stated in Article 32 of the VCLT. However, this distinction has been regarded of less relevance when the provisions of the VCLT are concomitantly applied to SC resolution, which suggests that all statements – regardless of whether they are made prior to the adoption of a resolution or in a subsequent context – may have legal bearing. Upon the promulgation of SC Resolution 1973, the opinions on how the mandate ought to be implemented in practice so that the use of force would not infringe on the territorial integrity of the Libyan state more than the mandate permitted, vastly diverged. Also, the criticism raised during discussions in the SC in the months following the launch of NATO troops on Libyan soil, even more seems to reveal that the actions ostensibly adopted for humanitarian protection purposes was indeed a pretext to pursue political objectives.

China, Russia, Brazil, Germany and India all abstained from voting when SC Resolution 1973 was adopted. The predominant part of the subsequent explanations of vote indicate that the reason for abstaining (and not voting against the resolution, thus hampering any imperative actions) was not to be regarded as a condonance of the atrocious crimes committed by the Libyan regime; “Our vote today should in no way be interpreted as condoning the behaviour of the Libyan authorities or as disregard for the need to protect civilians and respect”, as

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241 See section 3.3.1.
242 See section 3.4.1.
243 S/PV.6498.
244 S/PV.6531.
uttered by the Brazilian representative. Rather, they were all of the opinion that force would exacerbate the situation and not provide a solution to attain the objective.\textsuperscript{246} Based on the interpretation of respective states’ explanation for abstaining to vote, it seems palpable that their reluctance to not employ military measures as a last resort was principal as well as prudential. The Russian Federation expressed concerned on “how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be” and that “provisions were introduced into the text that could potentially open the door to large-scale military intervention.” Yet, ”guided by this basic principle as well as by the common humanitarian values that we share with both the sponsors and other Council members, Russia did not prevent the adoption of this resolution.”\textsuperscript{247}

Furthermore, China was also “gravely concerned by the continuing deterioration of the situation in Libya” but endorsed that it was imperative to “support the Security Council’s adoption of appropriate and necessary action to stabilize the situation in Libya as soon as possible and to halt acts of violence against civilians”.\textsuperscript{248} That China had common principal as well as practical concerns as the Russian Federation does the following extract clearly elucidate: “China is always against the use of force in international relations. In the Security Council’s consultations on resolution 1973 (2011), we and other Council members asked specific questions. However, regrettably, many of those questions failed to be clarified or answered. China has serious difficulty with parts of the resolution.”\textsuperscript{249}

Germany did not support a military intervention, not primarily on principal grounds but rather due to concerns on what the mandate really authorized, and the fatal consequences a potential transgression could have on the development in the region: “We have very carefully considered the option of using military force — its implications as well as its limitations. We see great risks. The likelihood of large-scale loss of life should not be underestimated. If the steps proposed turn out to be ineffective, we see the danger of being drawn into a protracted military conflict.”\textsuperscript{250}

\textsuperscript{246} Bellamy & Williams, supra n 191 p 843.
\textsuperscript{247} S/PV.6498 p 8.
\textsuperscript{248} Ibid p 10.
\textsuperscript{249} Ibid.
\textsuperscript{250} Ibid p 5.
India was evidently of the same opinion regarding how a vaguely defined mandate could possibly be misused: “We also do not have clarity about details of enforcement measures, including who will participate and with what assets, and how these measures will exactly be carried out.”

Brazil was more explicit in its critique on the underlying intentions related to the explicit objective, emphasizing, “the text of resolution 1973 (2011) contemplates measures that go far beyond that call. We are not convinced that the use of force as provided for in paragraph 4 of the resolution will lead to the realization of our common objective — the immediate end to violence and the protection of civilians. We are also concerned that such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good.”

5.3.3.4 Subsequent Statements In the Aftermath of the Implementation

If explanations of vote made right after the adoption of SC Resolution 1973 indicate a profound adversary against the principal and practical implications on implementing a vaguely defined mandate based on R2P, subsequent discussions in the SC in the aftermath of the intervention in Libya, reveal that these initial concerns to a large extent were realized. Some statements were more explicit than others, but reading between the lines, the implied message could hardly be misunderstood: The use of force in Libya was indeed beyond what was necessary in order to achieve the objective purpose of protecting civilians from mass atrocities, which would indicate the pursuance of an agenda other than limited to promoting and ensuring the protection of civilians, hence implying that the mandate was actually transgressed.

During the discussions, which were aimed to address the pressing need to ensure more effective protection for civilians in the conduct of hostilities, the Russian Federation emphasized that “the noble goal of protecting civilians should not be compromised by attempts to resolve in parallel any unrelated issues.” Whilst, Brazil was more imperceptible in its critique, they implied that implementation had not been coherent with the primary objective: “When the

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251 Ibid p 6.
252 Ibid.
253 S/PV/6531.
Council does authorize the use of force, such as in the case of Libya, we must hold ourselves to a high standard. The Council has a responsibility to ensure the appropriate implementation of its resolutions.”

South Africa and China were more categorical in their reproach. The South African representative expressed concerns of the implementation of SC Resolution 1973 in relation to its overall objective; “…we have witnessed some important advances as the Security Council adopted resolutions giving practical expression to our collective desire” and emphasized that “these resolutions have noble intentions focused on our common desire to protect civilian lives.”

Despite, that the resolutions were ostensibly based on genuine humanitarian protection purposes, it was concluded that, “the implementation of these resolutions appears to go beyond their letter and spirit.”

Furthermore, South Africa also directly addressed the politically sensitive question – and ultimately as legally relevant – of whether a political agenda in guise of humanitarian purposes had been pursued: “It is important that [the international community] should nonetheless comply with the provisions of the United Nations Charter, fully respect the will, sovereignty and territorial integrity of the country concerned, and refrain from advancing political agendas that go beyond the protection of civilian mandates, including regime change.”

The Chinese representative raised similar concerns: “The international community and external organizations can provide constructive assistance, but they must observe the principles of objectivity and neutrality and fully respect the independence, sovereignty, unity and territorial integrity of the country concerned. There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians.”

Regarding how to interpret what coercive measures the adoption of SC Resolution 1973 would infer in practice, China stated that “the original intention of resolutions 1970 (2011) and 1973 (2011) was to put an end to violence and to protect civilians […] we are opposed to any attempt to wilfully interpret the resolutions or to take actions that exceed those mandated by the resolutions”, which seemingly indicates an implementation of the mandate de facto in contradiction to its objective purpose.
5.3.3.5 Concluding Remarks

In conclusion, the above discussions clearly suggest that the diverging views on the subsequent military intervention in Libya, especially the greater political weight the abstention from influential members of the P5 including China and Russia would imply, support the notion that the mandate authorized in SC Resolution 1973 was actually transgressed. Moreover, the various statements made both after the adoption of the resolution but also in the months following the military intervention, suggest that states were not only questioning the underlying intentions behind authorizing military measures in Libya, but that a prevailing reason for abstaining from voting seems to also have been related to how the use of force, as a mean to achieve the objective – to protect the Libyan population – was motivated. Germany abstained from voting in favour because it was concerned with “the implications as well as its limitations” forceful measures inferred, and expressed in relation thereof that “the likelihood of large-scale loss of life should not be underestimated”. India and Brazil expressed similar concerns; the Indian diplomat opposed “how these measures will exactly be carried out” while the Brazilian representative declared that it “was not convinced that the use of force […] will lead to the realization of [the SC’s] common objective”. The core of the criticism made by the Russian Federation lied in “how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be” and that “provisions were introduced into the text that could potentially open the door to large-scale military intervention.” Hence, does this not suggest that military interventions based on R2P – which naturally seem to include a less defined and clearly outlined objective compared to other situations when the SC has authorized the use of force to explicitly attain a certain goal – not necessarily infer a transgression of the mandate when regime change is an inevitable outcome to halt the perpetrated mass atrocities?

5.4 Regime Change – An Inevitable Corollary?

A responsibility to protect is triggered for the international community when a civilian population falls victim to mass atrocities and the host state is either unwilling or unable to avert the crimes. Whilst the threshold for when this responsibility ought to be activated is

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261 S/PV.6498 p 5.
262 Ibid p 6.
263 Ibid.
265 S/RES/678.
still to some extent ambiguous, the objective criterion for when a state could be considered to have fulfilled this right is arguably even more evasive. As stated above, the SC had prior to the situation in Libya never authorized coercive measures explicitly based on the concept of R2P. Thus, the implications of what such permission would infer in practice logically lacked any precedence. Since the purported atrocities embraced by the concept of R2P are oftentimes caused by an autocratic regime, how should the international community be able to protect civilians from an oppressive leader without targeting the behaviour of the regime in question? Is a strict distinction between human protection aspirations and regime change agenda even possible? Above discussions suggest that such separation at least is necessary due to the fact that military actions pursued in guise of an R2P-agenda, is not sanctioned by the international legal framework such intervention would be in violation of the principles of state sovereignty, territorial integrity and political independence. But what if regime change is an inevitable corollary of an humanitarian intervention, thus measures directed at the leadership merely serve as admissible means to achieve the overall objective, rather than constituting an objective per se?

In the case of Libya, the intervening states were not permitted to actively pursue regime change, a contention endorsed by not only political actors and legal commentators but also the resolution text itself, which did not overtly sanction such objective. However, as above reasoning also supports, SC Resolution 1973 did not explicitly preclude the possibility to deploy foreign, ground troops on Libyan territory, and the language of the resolution did not in this case enjoin any direct prohibitions on the limits of the mandate other than what is customary. If the member states were to effectively execute the mandate, does this not imply that all measures, given that they were considered “necessary”, were permitted – regardless if they contributed to the weakening of the Gaddafi regime or even were committed with that discernible intention?

Whether the end justifies the means in the instances with military interventions based on R2P remains seemingly unresolved. Nevertheless, with regards to the above analysis, perhaps the issue with the pursuance of an indiscernible agenda could have been eliminated.

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266 Payandeh, supra n 2 p 396.
267 Bellamy & Williams, supra n 191 pp 848–849.
268 Payandeh, supra n 2 388.
269 Ibid p 387.
if the scope of the mandate in SC Resolution 1973 would have been clarified in more defined terms. Most of the reluctance towards a unanimous espousal of military measures seems to address this particular question: How the mandate ought to be implemented, and to what extent military resources, tactics and strategies should be employed to fulfil the common desire to avert the mass atrocities. Plausibly, a clarification in this regard would have certainly reduced some of the sceptic demurs against the actual intentions behind the resolution, and the potential undermining of future actions based on the concept of R2P.

5.5 The Future Impact of the Case in Libya

5.5.1 Impeding Future Responses and Undermining R2P
That the military intervention in Libya was controversial from many aspects is fairly indisputable.270 Usually, two crucial concerns in particular are addressed in this regard; how these unsettled disputes between states on the interpretation of SC Resolution 1973 may inhibit the possibility to reach consensus in responding to future humanitarian disaster, and whether the application of SC Resolution 1973 could risk undermining the legality of the concept of R2P.271

5.5.2 The Inadequate Actions in Syria
The most disastrous consequences of the discrepancy in opinions on the interpretation of how much force was permitted in the case of Libya, is the lack of resolute actions by the international community in Syria a tragic evidence of. The SC is not able to unite behind a substantial resolution, condemning the brutal oppressions committed against the Syrian population, and authorizing the measures required to halt the escalating humanitarian crises.272 Instead, what could almost be characterized as a proxy war between influential members of the P5 is occurring, where political protests are far more prevalent than substantial legal objections. China and Russia apparently use their veto powers to impede the adoption of yet another resolution that would enable foreign interference beyond what has been authorized: “The situation in Syria cannot be considered in the Council separately from the

270 Payandeh supra n 2 p 397 and Bellamy & Williams, supra n 191 pp 846–847.
271 Bellamy & Williams, supra n 191 p 847.
Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect.\(^\text{273}\) Even though the initial draft resolution in October 2011 on Syria did not sanction a military intervention – which was emphasized in particular by the US representative who stated that, “Others claim strong Security Council action on Syria would merely be a pretext for military intervention. Let there be no doubt: this is not about military intervention; this is not about Libya. That is a cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people”\(^\text{274}\) – the evident reluctance by the same states that condemned the use of force in Libya underlines the urgency of the situation.

Whether it is only the perception that regime change is the ulterior purpose or an underlying intention de facto, it seems to impact to what extent it is possible to reach a consensus between states on the use of force in the domestic territory of another state.\(^\text{275}\) Thus, the application of R2P in factual instances plausibly reveal a dichotomy in the effect it has to achieve its objective: Whereas explicit reference to R2P clearly emphasizes the collective interest to halt mass atrocities and to put normative pressure on the international community to act, the concept’s fully impact to a large extent seems contingent upon geopolitical values and interests.\(^\text{276}\) In the case of Syria, it is seemingly this balance of national interests, legal considerations and the opinion of what the international ought to do in times of mass atrocities that impedes a military intervention, due to how the concept was (mis)interpreted in the case of Libya.\(^\text{277}\)

This ostensibly arbitrary adoption and implementation suggests that R2P yields for other, more politically relevant interests, which is made possible through the concept’s indefinite scope and non-binding legal character. Consequently, this presumably indicates that the use of R2P as a façade to pursue other agendas, does not only influence to what extent states are actually willing to intervene in humanitarian crises when a responsibility to protect is triggered for the international community, but concomitantly also risk undermining the

\(^{273}\) S/PV.6627 p 3.
\(^{274}\) Ibid p 8.
\(^{275}\) Bellamy & Williams, supra n 191 p 848.
\(^{276}\) Hehir, The Permanence of Inconsistency: Libya, the Security Council and the Responsibility to Protect p 152.
\(^{277}\) Ibid p 158.
legality of the concept itself, when subjective, political considerations ultimately determine when an humanitarian intervention is required.

5.5.3 Questioning the Validity of R2P

The apparent misuse of R2P when an agenda of political nature is pursued in guise of humanitarian ambitions has raised concerns with regards to the legality of the concept as such. One of the more influential voices in this respect must inarguably be Valerie Amos, the former Under-Secretary-General for Humanitarian Affairs and Emergency Relief, whom concluded in the aftermath of the Libyan intervention that “the adoption of resolution 1973 (2011) on Libya and the authorization and subsequent use of force and other measures to protect civilians has prevented civilian deaths and injury […] but it has also raised concerns in terms of the potential undermining of the protection of civilians agenda and its important role in providing a framework for action in future crises.” In the same context, South Africa, one of the states that abstained from voting when SC Resolution 1973 was adopted, uttered that “such actions [the implementation of resolutions beyond the letter and spirit] will undermine the gains made in this discourse and provide ammunition to those who have always been sceptical of [R2P].” Whereas, human protection is considered a legal basis for intervention with coercive means, it should not be regarded as a legal activity synonymous with regime change. However, the above reasoning indicates that when military actions are treacherously claimed to be based on R2P, not only is the implementation to be questioned but more crucially the validity of the concept as even constituting a legitimate ground to infringe on state sovereignty and political independence seems to be debatable.

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278 S/PV.6531 p 4.
279 Ibid.
280 Bellamy & Williams, supra n 191 p 846.
6 Final Remarks

6.1 Summary: The Curious Incident of Libya

The precarious characteristics of the case in Libya; the intransigence signified by Gaddafi, the imminent threat of a rampant humanitarian disaster and the rapid escalation of events; all suggest that the outcomes of SC Resolution 1973 may not be appropriately applied on situations of the same character in general. Libya constitutes the first example of when the SC explicitly based a military intervention on the notion of R2P, thus officially recognizing the legality of the concept as such. Whereas, there seems to have been a consensus that R2P legitimized for the use of force, the vastly diverging opinions upon the adoption of SC Resolution 1973 rather elucidate concern relating to how a military mandate based on humanitarian protection purposes ought to be implemented in practice. Usually, the scope of a military intervention is clearly defined in the text of the resolution; hence the objective of the operation is also the threshold for when the use of force should cease and foreign troops retreat. However, when a military authorization is based on R2P, the goal is to avert or halt mass atrocities, which are oftentimes directly caused by an oppressive dictator. Whilst, the broad mandate authorized in SC Resolution 1973 did not exclude that regime change may be an inevitable corollary of the military intervention, the wording of the text did certainly not sanction an agenda to actively force Gadaffi to relinquish power.

The interpretation of SC resolutions requires an all-encompassing approach, taking into account not only a textual method but also the political context and intentions behind the measures. Consequently, in order to determine whether the mandate in Libya was transgressed requires an interpretation of the authorization of “all necessary measures […] to protect the civilians”, in light of all relevant circumstances leading up to the promulgation of the resolution. Hence, when construing such a vaguely defined mandate as stipulated in SC Resolution 1973, adopted without unanimity, states’ respective explanations of vote, should unquestionably serve as a legitimate source of interpretation in rendering the underlying intentions. Evidently, all members of the SC agreed upon the urgent need to protect the Libyan population from the mass atrocities committed by the Gadaffi regime, but whether this was the primary objective of states remains highly controversial, thus suggesting that the mandate was de facto exceeded.

Bellamy & Williams, supra n 191 p 840 and Hehir, supra n 276 p 140.
6.2 Conclusion

The situation in Libya was inarguably not characteristic for how the SC usually resorts to the use of force. Nevertheless, some aspects of the adoption and subsequent implementation of SC Resolution 1973 may still be applicable in future interventions based on R2P. To military intervene in the domestic affairs of another state constitutes an exception to the fundamental principles of state sovereignty, territorial integrity and political independence, as stipulated in the UN Charter. Hence, cautiousness should be exercised and SC resolutions authorizing such mandate should logically be interpreted in a parochial manner. However, to apply a too narrow approach when foreign interference is based on humanitarian protection purposes has been considered counterproductive in that it might actually impede the SC to take the actions it deems necessary to halt the successive humanitarian disaster. Thus, a broader interpretation approach – beyond the quintessence of the VCLT – might then be the most appropriate method, taking into account all relevant circumstances leading up the adoption of the resolution in order to give the fullest effect to the actions permitted in the mandate. Such teleological, systematic method would include statements, whether they have been made prior to the adoption, right after the promulgation or in subsequent international fora, in order to render the true motives of the resolution. There is however a clear distinction to highlight in this respect in terms of the genuine ambitions or intentions behind authorizing coercive measures based on humanitarian protection purposes. If SC resolutions are adopted to ostensibly achieve the responsibility of the international community to protect a civilian population, in guise of the pursuance of political aspirations, a strictly narrow interpretation approach is instead called upon. To what extent an authentic R2P-agenda is prevalent or not seems to also depend on states’ perception of the concept itself. Whereas R2P is widely acknowledged as a legitimate right to intervene, it should not be considered an obligation to act in times of mass atrocities. Consequently, if states adopt resolutions based on a political commitment rather than a legal obligation, this would suggest a stronger intention when voluntarily measures are employed. The authorization of military actions in SC resolutions – irrespective of their legitimate basis – is usually characterized by vague, customary language, which oftentimes would call for a clarification from the state representatives present during the drafting process. Thus, in order to encompass the entire scope of a resolution that legitimizes such violations on the essence of state sovereignty, it only seems logical and justifiable to consider every circumstance of legal value.
References

TREATIES

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Charter of the United Nations, adopted 26 June 1945

Statute of the International Court of Justice, adopted 26 June 1945


Vienna Convention on the Law of Treaties, adopted 22 May 1969

TABLE OF CASES AND ADVISORY OPINIONS

The International Court of Justice

North Sea Continental Shelf cases, Judgment, ICJ Reports 1969 p 3


Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986 p 14

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United Kingdom, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 p 3

Territorial Dispute, Libya Arab Jamahiriya/Chad, Judgment of 3 February 1994


Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010 p 403

United Nations Appeals Tribunal

Howrani and 4 others, UNAT Judgment No. 4, 27 April 1951
International Criminal Tribunal for the former Yugoslavia

Prosecutor v Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Trial Chamber I, Case No IT-94-1-AR72, 2 October 1995

UNITED NATIONS

General Assembly resolutions
2005 World Summit Outcome, GA Res. 60/1, 24 October 2005, UN Doc A/RES/60/1 (2005)


Security Council resolutions, provisional verbatim records and press releases

Provisional Verbatim Record, 29 November 1990, UN Doc S/PV.2963 (1990)
Provisional Verbatim Record, 26 February 2011, UN Doc S/PV.6491 (2011)
Provisional Verbatim Record, 17 March 2011, UN Doc S/PV.6498 (2011)
Provisional Verbatim Record, 10 May 2011, UN Doc S/PV.6531 (2011)
Provisional Verbatim Record, 4 October 2011, UN Doc S/PV.6627 (2011)


Reports, Notes and Press Releases of the Secretary-General


Note by the Secretary-General, Follow-up to the Outcome of the Millennium Summit, A/59/565, 2 December 2004, UN Doc A/59/565 (2004)

Press Release, SG/SM/13408-AFR/2119, Outraged Secretary-General Calls for Immediate End to Violence in Libya, 22 February 2011, UN Doc SG/SM/13408-AFR/2119 (2011)


International Law Commission

BIBLIOGRAPHY

Books


**Journals**


**OFFICIAL DOCUMENTS**

Position Paper of the People’s Republic of China on the United Nations Reform, 7 June 2005

INTERNET SOURCES

Articles


Statistics
UCDP/PRIO Armed Conflict Dataset, version 4-2015

UNHCR (2014) *Global Trends 2014: A World at War*
http://www.unhcr.org/556725e69.html (2015-09-03)

REPORTS


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