

**LANCASTER UNIVERSITY**

**LAW SCHOOL**

**Opposition Groups as Parties to Internal Armed Conflicts and the  
Concept of the R2P: To What Extent Opposition Groups Could Play  
a Role for the Purpose of the Protection of Populations within the  
Concept of the R2P**

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## **Declaration**

**I declare that the thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere.**

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**I dedicate this thesis to my parents.**

## **Abstract**

This thesis focuses on opposition groups as parties to internal armed conflicts and the concept of the R2P. Accordingly, this research aims to examine the extent to which opposition groups, as parties to internal armed conflicts, could contribute to the objective of protecting civilian populations. The significance of this subject lies in the fact that although the primary objective behind the adoption of the R2P is to improve the protection provided for civilians within the context of internal armed conflicts, the framework regulating the R2P does not include any reference to opposition groups as a main party in internal armed conflicts. It is practically unseen how civilians could be effectively protected in internal armed conflicts without the involvement of opposition groups.

The concept of the R2P is used as an interpretive tool to determine the role of opposition groups in the protection of civilians. This research intends to define the elements related to the concept of civilian protection within the framework regulating internal armed conflicts and to trace any potential development after the adoption of the R2P. To this end, it attempts to consult and analyse the relevant primary and secondary materials, such as conventions, reports, cases, books and articles.

First, this project defines the concept of organised armed groups and evaluates how organised armed groups are bound by IHL. Second, this thesis determines the extent to which organised armed groups already have a responsibility to protect under the framework regulating internal armed conflicts. This assessment is based on the examination of selected obligations that are fundamentally related to the concept of civilian protection. Third, the research evaluates the extent to which the adoption of the R2P could contribute to the international recognition of the political organs of opposition groups. Finally, this thesis examines the international R2P and the role of

opposition groups. It focuses on the provision of arms to opposition groups by third states as well as the legality and scope of the authorised use of force for the purpose of civilian protection.

The research concludes that opposition groups could play a fundamental role in the protection of civilians within the context of internal armed conflicts. Like host states, opposition groups are bound by IHL. The level of civilian protection that opposition groups are required to provide depends on their level of organisation. Opposition groups already have a responsibility to protect under the existing rules of IHL. Since the adoption of the R2P concept, there have been indications that opposition groups could be politically recognised at the international level. It has been suggested that the right to self-determination can be relied upon to justify the struggle against repressive regimes. Opposition groups, under very strict conditions, could receive arms and other forms of help from third states for the mere purpose of civilians protection.

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## **List of Abbreviations**

ACRWC	African Charter on the Rights and Welfare of the Child
CIHL	Customary international humanitarian law
GCC	Gulf Cooperation Council
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	international Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDMC	Internal Displacement Monitoring Centre
IDPs	Internally displaced populations
IHL	International Humanitarian law
IHRL	international human rights law
ILC	International Law Commission
ISIS	Islamic State of Iraq and the Levant
NATO	North Atlantic Treaty Organisation
NLMs	National Liberation Movements
NTC	National Transitional Council
OIC	Organisation of the Islamic Conference
PLO	Palestinian Liberation Organization



R2P	Responsibility to Protect
SCSL	Special Court for Sierra Leone
SFA	Syrian Free Army
SMC	Supreme Military Council
SNC	Syrian National Council
SOC	Syrian Opposition Coalition
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
VCLT	Vienna Convention on the Law of Treaties

## Introduction

### Brief General Background

Since the end of the Cold War, there has been a dramatic shift in the types of challenges facing the international community. Various armed conflicts have erupted within states rather than between states. The changing nature of armed conflicts, causing the injury and death of millions of innocent people, has proven the inadequacy of the interstate system.<sup>1</sup> The reliance on the interstate system as the basis upon which the definition of international security is founded<sup>2</sup> has failed to face the new challenges. Hence, it has been deemed necessary to advance the efforts to reach a suitable formula for filling in the gap in the international legal system and insuring more effective responses to the new security challenges. It was considered essential to include the issue of the protection of civilians within the international system to strengthen the obligations imposed on the international community to protect populations during armed conflicts.<sup>3</sup>

Various efforts were advanced to further protect civilians in internal armed conflicts.<sup>4</sup> In an early stage, these attempts focused mainly on introducing the concept of human security, and redefining the notion of sovereignty.<sup>5</sup> They primarily intended

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<sup>1</sup> L. Axworthy, 'R to P and the Evolution of State Sovereignty', in J Genser & I Cotler (eds.), *the Responsibility to Protect the Promise of Stopping Mass Atrocities in our Time* (Oxford University Press, New York, 2012), at 8.

<sup>2</sup> S. M. Makinda, 'Sovereignty and International Security: Challenges for the United Nations' (1996) 2 *Global Governance* 149, at 152.

<sup>3</sup> See Report of the Security General on the Protection of Civilians in Armed Conflict (2005) UN Doc S/2005/740, 15, at para. 53.

<sup>4</sup> See *Our Global Neighborhood*, The Report of the Commission on Global Governance (Oxford University Press, New York, 1995).

<sup>5</sup> See UN Press Release SG/SM/4560, April 24, 1991 cited in G. M. Lyons & M. Mastanduno, *Beyond Westphalia?: state sovereignty and international intervention* (The Johns Hopkins University Press, USA, 1995), at 2; J. P. Cuellar, *report of the Secretary-General on the work of the organisation* (United Nations, New York, 1991); B. Boutros- Ghali, *an Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping, Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992* (New York, United Nations, 1992), available online at: [http://www.unrol.org/files/A\\_47\\_277.pdf](http://www.unrol.org/files/A_47_277.pdf); B. Boutros- Ghali, 'Empowering the

to enhance the protection provided for civilians by extending the definition of international peace and security.<sup>6</sup> As explicitly adopted in the UNSC resolution 1296,<sup>7</sup> intentionally targeting civilians ‘or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security’.<sup>8</sup> Nevertheless, despite their theoretical significance, the practical effectiveness of these efforts proved to be minimal.

The failure of these efforts to prevent international crimes and preserve peace and security was particularly clear in three cases; the Rwandan genocide of 1994,<sup>9</sup> the Bosnian massacre of 1995<sup>10</sup> and in the ethnic cleansing in Kosovo prior to the NATO military intervention in 1999.<sup>11</sup> In response to these horrific incidents, there has been almost an agreement that such an effective protection of vulnerable people could not possibly be achieved without the establishment of ‘a systematic and responsive framework of rules and procedures’.<sup>12</sup> It was considered essential to found a body that could contribute to the creation of such a system.<sup>13</sup> Thus, focusing on the necessity to solve the uncertainty surrounding the concept of sovereignty, the protection of human rights and the right of humanitarian intervention, the concept of the R2P was introduced

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United Nations’ (1991-1993) 71 *Foreign Affairs* 89, at 99; *Our Global Neighborhood*, The Report of the Commission on Global Governance (Oxford University Press, New York, 1995).

<sup>6</sup> See M. Makinda, ‘the United Nations and State Sovereignty: Mechanism for Managing International Security’ (1998) 33 (1) *Australian Journal of Political Science* 101, at 108.

<sup>7</sup> United Nations Security Council, *Security Council resolution 1296 (2000) [on protection of civilians in armed conflicts]*, 19 April 2000, S/RES/1296 (2000), available online at: <http://www.refworld.org/docid/3b00efb824.html>.

<sup>8</sup> *Ibid.*, at para. 5.

<sup>9</sup> Axworthy, (n 1), at 9; International Rescue Committee, *Mortality in the Democratic Republic of the Congo: An Ongoing Crisis* (2007), at ii, available online at: [http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7\\_congomortalitysurvey.pdf](http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf).

<sup>10</sup> See C. G. Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, Oxon, 2011), at 1.

<sup>11</sup> See O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing Ltd, Oxford, 2010), at 512.

<sup>12</sup> Axworthy, (n 1), at 11.

<sup>13</sup> *Ibid.*

for the first time by the ICISS in 2001.<sup>14</sup> The concept of the R2P further developed through time until it achieved its final version introduced by the World Summit document in 2005.<sup>15</sup>

Despite the fact that the introduction of the R2P is considered to be of crucial significance for the development of the concept of the protection of civilians, it still may raise some degree of uncertainty as to its effective implementation over internal armed conflicts. Even though the concept of the R2P paid notable attention to various obstacles that previously prevented effective protection of civilians such as; the notion of sovereignty, the principle of non-intervention and the role of the international community, the framework of the R2P did not include any explicit reference to primary actors in internal armed conflicts that are armed groups. Nonetheless, the absence of a direct inclusion of opposition groups within the framework of the R2P ought not to be taken as affirmative evidence declining any role that could be played by these groups for the purpose of protecting populations. In fact, the issue concerning the status of armed groups, and the role they could play under international law has been always a controversial one.

Generally, states have been considered to be the primary actors of the international community,<sup>16</sup> and therefore, their recognised governments are the main subjects of international law.<sup>17</sup> Nevertheless, there has been indications that as the international community has developed, entities other than states have started to emerge. Some of these entities exist and operate within the territories controlled by

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<sup>14</sup> The International Commission on Intervention and State Sovereignty (ICISS), *Report on the Responsibility to Protect*, December 2001.

<sup>15</sup> See United Nations General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available online at: <http://www.refworld.org/docid/44168a910.html>.

<sup>16</sup> R. Wolfrum & C. E. Philipp, 'The Status of the Taliban: Their Obligations and Rights Under International Law' (2002) 6 *Max Planck Yearbook of United Nations Law* 559, at 585.

<sup>17</sup> J. V. Essen, 'De Facto Regimes in International Law' (2012) 28 (74) *Utrecht Journal of International and European Law* 32.

functioning governments.<sup>18</sup> In fact, in some cases, non-state entities may exercise powers that go beyond the control of the parent states.<sup>19</sup> Moreover, such cases are evident in situations of internal armed conflicts where non-state entities take the form of armed groups and fight against the *de jure* governments.<sup>20</sup>

It is noteworthy to mention that one of the primary reasons behind the uncertainty surrounding the status of opposition groups as parties to internal armed conflict is attributed to the approach adopted under contemporary international law after the drafting of the four Geneva Conventions and the two Additional Protocols. After the adoption of the four Geneva Conventions of 1949, contemporary international law has adopted an objective measure based on the concept of protection.<sup>21</sup> The focus of Geneva Conventions was primarily to provide a minimum protection for non-participants in non-international conflicts rather than to grant rights to the parties to armed conflicts.<sup>22</sup> Nonetheless, although the approach of the Geneva Conventions represents a departure from the doctrine of belligerency adopted under traditional international law which explicitly recognised different criteria of opposition groups, the Geneva Conventions System still consider the capacity of armed groups. In the various attempts made to define non-international armed conflicts for the purpose of implementing IHL, significant attention was paid to the level of organisation that ought to be enjoyed by armed groups and their capability to undertake certain obligations.<sup>23</sup>

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<sup>18</sup> See M. Schoiswohl, 'De Facto Regimes and Human Rights Obligations-The Twilight Zone of Public International Law?' (2001) 6 *Austrian Review of International and European Law* 46, at 50.

<sup>19</sup> Y. Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21, at 23.

<sup>20</sup> See E. Lieblich, *International law and Civil Wars: Intervention and Consent* (Routledge, UK, 2013).

<sup>21</sup> See for ex. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Art. 3, available online at: <http://www.refworld.org/docid/3ae6b36c8.html>.

<sup>22</sup> H. A. Wilson, *International Law and The Use of Force by National Liberation Movements* (Oxford University Press, Oxford, 1988), at 44.

<sup>23</sup> L. C. Lootsteen, 'The concept of Belligerency in International Law' (2000) 166 *Military Law Review* 109.

Article 1 (1) of the second Additional Protocol of 1977 recognises opposition groups ‘which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.<sup>24</sup> It is suggested that the definition of opposition groups under the protocol intends to enhance the protection provided for civilians. It requires that the armed groups must reach certain level of capacity enabling them to comply with the Protocol.

The consideration of armed groups under contemporary international law for the purpose of civilians protection was further developed by the ICTY in the *Tadic* case.<sup>25</sup> As interpreted by the *Tadic* Trial Chamber, the definition of armed conflict provided by the Appeal Chamber is founded primarily on two criteria: ‘the intensity of the conflict and the organization of the parties to the conflict’.<sup>26</sup> The *Tadic* criteria provides a lower threshold in comparison to the formula provided in Article 1 (1) of the second Additional Protocol. It implies that an armed conflict may exist whether the armed group exercises territorial effective control or not. It also seems to eliminate the requirement as to the ability of the armed group to apply IHL.<sup>27</sup> Nevertheless, despite the fact that the increase importance of the concept of population protection has significantly contributed to the efforts toward further considering armed groups, such

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<sup>24</sup> See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, at Art. 1 (1), available online at: <http://www.refworld.org/docid/3ae6b37f40.html>.

<sup>25</sup> See *Prosecutor v. Dusko Tadic (a/k/a Dule)*, IT-94-1-AR, International Criminal Tribunal for the former Yugoslavia (ICTY), (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) 2 October 1995, at para. 70, available online at: <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

<sup>26</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, at para. 562, available online at: <http://www.refworld.org/docid/4027812b4.html>.

<sup>27</sup> A. Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian’ (2005) 183 *Military Law Review* 66, at 104.

consideration is still restricted to implement the obligations emanating from Common Article 3.

In fact, it is suggested that armed groups maintaining a lower capacity than the one adopted in *Tadic* case could be still considered for the purpose of satisfying the level of protection provided under Common Article 3.<sup>28</sup> It is asserted that the objective approach as well as the nature of Common Article 3 indicates that the obligations imposed by the Article are applicable regardless of the capacity of the armed groups.<sup>29</sup> In other words, armed groups would be considered for the purpose of applying Common Article 3 as far as an internal armed conflict emerged. Hence, the formula adopted by the ICTY in *Tadic* case seems to intend to further affirm the implementation of Common Article 3 rather than enhancing the protection provided under the framework regulating internal armed conflicts. It aims to further restrict the will of parties engaged in armed conflicts to acknowledge the applicability of Common Article 3.<sup>30</sup>

States' reactions to the crises in Libya and Syria indicates further development as to what is meant by the expression 'opposition groups' and what role they could play for the purpose of protecting populations. It suggests further focus on the status of opposition groups. The international reaction towards the Libyan and Syrian conflicts indicates that opposition groups could play roles that could go beyond the context of internal armed conflicts. It indicates the emergence of a new trend towards recognising opposition groups at the international level as the legitimate representatives of the people.<sup>31</sup> Moreover, such recognition may not only represent a high level of political

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<sup>28</sup> See Wilson, (n 22), at 44.

<sup>29</sup> Ibid.

<sup>30</sup> See Cullen, (n 27), at 88.

<sup>31</sup> See D. Akande, 'Self Determination and the Syrian Conflict- Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does This Mean and What Implications Does It Have?' (2012) *European Journal of International Law: Talk!*, available online at:

recognition, but it could suggest the emergence of a legal status based on the right to self-determination. The use of the expression ‘the legitimate representatives of the peoples’ to describe the Libyan and Syrian oppositions reveals some similarities between the status of opposition groups after the adoption of the R2P and the status of NLMs under international law where these groups are entitled to exercise the right to self-determination in behalf of their peoples.<sup>32</sup>

In fact, state practice as to the Libyan and Syrian situations does not only suggest that opposition groups maintaining the required capacity to protect could receive further international assistance including the supply of weaponry for the purpose of achieving such an objective, but it also indicates that such a capacity may impact the level of the international responsibility to react. As it will be explained in the project, it is argued, although debatable, the credibility and stability of opposition groups may not only speed up the process required for the authorisation of the use of force by the UNSC, but it could also facilitate the achievement of the practical objectives behind such an action on the ground.

It is noteworthy to mention that the absence of an explicit reference to the opposition groups/armed groups within the framework of the R2P does not mean that opposition groups cannot play a role within the concept of the R2P. It is undeniable that the primary objective behind the creation of the R2P is to enhance the level of protection provided for civilians.<sup>33</sup> Nevertheless, the various documents representing the R2P approached such an objective differently. Furthermore, the continued

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<http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>.

<sup>32</sup> See Akande, (n 31).

<sup>33</sup> See, ICISS, (n 14), at VII; Corten, (n 11), at 517.



development of the concept of the R2P through these documents indicates further role to be played by these groups for the purpose of protecting populations.

The primary task behind introducing the concept of the R2P by the ICISS in 2001<sup>34</sup> was to draft a text that could satisfy both the necessity for more effective capacity to intervene in cases of extreme violations of human rights and for responding to the demands of the UN member states to prevent any potential misuse of such a mechanism.<sup>35</sup> As it was argued in the ICISS report, ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states’.<sup>36</sup> Nevertheless, albeit the significance of the contribution made by the R2P as introduced by the ICISS as to violations committed in internal armed conflicts in general, the new concept did not pay direct attention to opposition groups as primary actors in such conflicts.

In fact, although the ICISS version of the R2P imposed an obligation to protect on host states, the primary focus of the R2P as introduced in 2001 was on the international responsibility to react through forcible intervention.<sup>37</sup> In other words, the narrow approach based on the concept of sovereignty as responsibility and the possibility to forcibly intervene did not leave sufficient room to consider any notable role to be played by opposition groups. Moreover, such an assertion finds support in the subsequent documents reintroducing the concept of the R2P.

The later documents representing the concept of the R2P revealed a departure from the heavy reliance on the threshold of intervention in favour of more focus on the

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<sup>34</sup> ICISS, (n 14).

<sup>35</sup> See Ibid; Corten, (n 11), at 517.

<sup>36</sup> ICISS, (n 14), at VIII.

<sup>37</sup> See M. Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking’ (2010) 35 (2) *Yale Journal of International Law*, 469, at 471.

concept of civilians protection. In its report, the High-Level Panel on Threats, Challenges and Change<sup>38</sup> stated that ‘[t]here is a growing recognition that the issue is not the ‘right to intervene’ of any State, but the ‘responsibility to protect... when it comes to people suffering from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease’.<sup>39</sup> Furthermore, unlike the ICISS, the report of the High Level Panel focused heavily on the responsibility to prevent.<sup>40</sup> In addition, even though the High-Level Panel’s report<sup>41</sup> continued to ‘apply threshold criteria for RtoP-based intervention’,<sup>42</sup> it intended to narrow its scope.<sup>43</sup> It did not only exclude the UNGA and regional organisations as alternatives to the UNSC authorisations, and restricted the implementation of the international responsibility on the UNSC authorisation,<sup>44</sup> but it also reconsidered the scope of the R2P.

The report of the High Level Panel explicitly recognised the emergence of ‘a collective international responsibility to protect,..., in the event of genocide and other large-scale killing, ethnic cleansing or other serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent’.<sup>45</sup> Hence, in contrast to the ICISS report, the Panel’s report excluded civil war, mass starvation, and natural or environmental catastrophes from the threshold of intervention. Nevertheless, as indicated above, it seemed to reduce the restrictions imposed on relying on forcible intervention regarding war crimes and crimes against

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<sup>38</sup> United Nations Secretary General’s High- Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, 65-66, at paras. 201-202.

<sup>39</sup> *Ibid.*, at para. 201.

<sup>40</sup> See *Ibid.*, at para. 203.

<sup>41</sup> *Ibid.*

<sup>42</sup> T. Chhabra & J. B. Zucker ‘Defining the Crimes’, in J Genser & I Cotler (eds.), *the Responsibility to Protect the Promise of Stopping Mass Atrocities in our Time* (Oxford University Press, New York, 2012), at 39.

<sup>43</sup> *Ibid.*

<sup>44</sup> High- Level Panel on Threats, (n 38), at para. 203.

<sup>45</sup> *Ibid.*

humanity by requiring the seriousness of the violation rather than on whether evidence exists that it amounts to large-scale or ethnic cleansing.<sup>46</sup> Therefore, as contended by Axworthy, what could be concluded from the work of the Panel is the necessity of creating ‘a framework governing international action to prevent or halt the suffering of civilian populations’ rather than regulating intervention *per se*.<sup>47</sup>

In the World Summit document of 2005, considered to be the most notable normative development of the R2P, the concept of sovereignty as responsibility was reintroduced in a more formal and detailed way.<sup>48</sup> In paragraph 138, the report imposed responsibility upon states to protect their citizens from ‘genocide, war crimes, ethnic cleansing and crimes against humanity’. It also encouraged the international community to help ‘states to exercise this responsibility and support the United Nations in establishing an early warning capacity’.<sup>49</sup>

Furthermore, in paragraph 139, the report outlined the obligations imposed upon other states once the responsibility to protect moved to the international community due to the failure of the state to fulfil its duties and protect its nation. It clearly stated, ‘[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations’ from being victims of the international crimes referred to previously.<sup>50</sup> Furthermore, since these peaceful methods can, in some cases, fail to protect citizens from the crimes mentioned above, as a last resort, the report referred to the option to ‘take collective action...through the

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<sup>46</sup> Chhabra & Zucker, (n 42), at 39.

<sup>47</sup> Axworthy, (n 1), at 13.

<sup>48</sup> See A. J. Bellamy, ‘Realizing the Responsibility to Protect’ (2009) 10 *International Studies Perspectives* 111, at 114; Badescu, (n 10), at 7.

<sup>49</sup> World Summit Outcome, (n 15), at para. 138.

<sup>50</sup> *Ibid*, at para. 139; see W. R. Pace & N. Deller, ‘Preventing Future Genocides: An International Responsibility to Protect’ (2005) 36 (4) *World Order* 15.

Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis, in cooperation with relevant regional organisations as appropriate'.<sup>51</sup>

Hence, it is apparent that the World Summit document has a wider approach as to the objective of protecting populations. Although it highly restricted the possibility to rely on forcible intervention, it added further emphasis on the responsibility to prevent and help to protect. The world Summit document introduced various options that could be implemented by the international community to protect, such as the use appropriate diplomatic, humanitarian and other peaceful means. It also further framed the scope of the R2P by restricting it to four international crimes representing violations of *jus cogens*. The R2P as introduced by the World Summit primarily focused on the objective of protection rather than the various actors involved. Yet, despite its normative significance, the legal status of the R2P is still contested.

### **The Legal Status of the R2P Concept: Political Concept, Soft Law or Hard Law**

The articulation of the R2P in the relevant documents, mentioned above, suggests that it is not a conclusively legal concept. The framework of the R2P, as represented in the various documents from 2001 to 2009, contains legal, moral and political elements.<sup>52</sup> It does not satisfy any of the requirements stated under Article 38 (1) of the Statute of the ICJ to be considered a source of international law.<sup>53</sup> The R2P concept has never been included in an international treaty,<sup>54</sup> it has not yet satisfied the elements of a settled state practice or *opinio juris* required for the emergence of

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<sup>51</sup> World Summit Outcome, (n 15), at para. 139.

<sup>52</sup> See ICISS, (n 14): A. S. Kolb, *The UN Security Council Members' Responsibility to Protect: A Legal Analysis* (Springer, Heidelberg, 2018), at 105- 110.

<sup>53</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946, at Art. 38 (1), available online at: <http://www.refworld.org/docid/3deb4b9c0.html>.

<sup>54</sup> Ibid, at Art. 38 (1) (a).

customary international law<sup>55</sup> and there has been no evidence yet to suggest that it has become a general principle of international law.<sup>56</sup>

Despite the significance of the R2P adoption by the heads of states in the World Summit document of 2005,<sup>57</sup> the legal status of this document is highly controversial.<sup>58</sup> The UNGA is not a law-making body; therefore, it does not have the capacity to create legally binding rules. According to Shaw, by nature, the UNGA is intended to function primarily as ‘a parliamentary advisory body’.<sup>59</sup> Therefore, unlike the UNSC, which has the capacity to adopt resolutions that bind states, resolutions issued by the UNGA are recommendatory in nature, ‘putting forward opinions in various issues with varying degrees of majority support’.<sup>60</sup> Therefore, the R2P, as adopted in the World Summit document, cannot be considered a source of binding international law. However, even though the UNGA resolutions are not legally binding, neither are they empty of any legal significance.

The UNGA resolutions could contribute to the emergence of new binding rules under international law. They could affirm the creation of consistent state practices pertaining to certain issues and facilitate the existence of international *opinio juris* that lead to the creation of new customary rules.<sup>61</sup> Nonetheless, this does not seem to be the case regarding the World Summit of 2005.

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<sup>55</sup> See ICJ *Statute*, (n 53), at Art. 38 (1) (b); Payandeh, (n 37), at 471.

<sup>56</sup> See *Ibid*, at Art. 38 (1) (c).

<sup>57</sup> See World Summit Outcome, (n 15).

<sup>58</sup> See Payandeh, (n 37), at 469; M. Welsh & M. Banda, ‘International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?’ (2010) 2 *Global Responsibility to Protect* 113, at 229.

<sup>59</sup> M. N. Shaw, *International law*, 6<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2008), at 115.

<sup>60</sup> *Ibid*, at 114-115.

<sup>61</sup> See *Ibid*, at 114.

During the debates that took place within the UNGA concerning the R2P, it was apparent that states were unwilling to legally bind themselves to such a concept.<sup>62</sup> Many states clearly affirmed that the R2P is neither a part of existing international law nor establishes legally binding obligations.<sup>63</sup> Others, including significantly outspoken advocates of the concept, asserted that it is not intended to create new laws.<sup>64</sup> Instead, they referred to the framework of the R2P adopted in the 2005 World Summit as a moral or political commitment.<sup>65</sup>

Although most states acknowledge that the R2P concept is rooted in existing international law, its legal character is limited to the first pillar concerning the primary responsibility of host states to protect their populations.<sup>66</sup> Unlike the legality of the first pillar of the R2P that was affirmed in many statements,<sup>67</sup> the legal status of the complementary responsibility of the international community to protect was either ignored or denied.<sup>68</sup> Therefore, the World Summit document cannot be relied on to establish the legality of the R2P. However, it has been argued that the concept of the R2P, as a whole, is not devoid of legal character.<sup>69</sup>

The R2P, and more specifically the complementary international responsibility to protect, as adopted in paragraph 139 of the World Summit document, can be

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<sup>62</sup> See Global Center for the Responsibility to Protect, *Implementing the Responsibility to Protect. The 2009 General Assembly Debates: An Assessment*, August 2009, at 5, available online at: <http://www.globalr2p.org/media/files/gcr2p-general-assembly-debate-assessment.pdf>.

<sup>63</sup> Ibid.

<sup>64</sup> See Philippines, Statement at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63<sup>rd</sup> Sess., 97<sup>th</sup> Plen. Mtg., UN Doc. A/63/PV.97 (23 July 2009) 10, at 11; Brazil, Statement at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63<sup>rd</sup> Sess., 97<sup>th</sup> Plen. Mtg., UN Doc. A/63/PV.97 (23 July 2009) 12, at 13; Singapore, Statement at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63<sup>rd</sup> Sess., 98<sup>th</sup> Plen. Mtg., UN Doc. A/63/PV.98 (24 July 2009) 6, at 7.

<sup>65</sup> Ibid.

<sup>66</sup> See Italy, Statement at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63<sup>rd</sup> Sess., 97<sup>th</sup> Plen. Mtg., UN Doc. A/63/PV.97 (23 July 2009) 27, at 27-28; Sudan, Statement at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63<sup>rd</sup> Sess., 101<sup>st</sup> Plen. Mtg., UN Doc. A/63/PV.101 (28 July 2009) 10, at 10-11.

<sup>67</sup> See Ibid.

<sup>68</sup> See Ibid.

<sup>69</sup> Welsh & Banda, (n 58), at 229.

described as a political commitment that does not yet have legal responsibilities.<sup>70</sup> Moreover, considering the articulation of the R2P concept and how states reacted to it, especially in 2005, the R2P can best be described as soft law.<sup>71</sup>

Although it is by nature a highly ambiguous idea, soft law can generally be defined as an intermediate stage ‘between fully binding treaties and fully political positions’.<sup>72</sup> In legal literature, the expression soft law is widely used to refer to ‘law-like promises or statements that fall short of hard law’.<sup>73</sup> Soft law often takes the form of an international instrument that has some of the characteristics of a formal convention, yet does not satisfy the conditions required for their legal formation.<sup>74</sup> More specifically, soft law has the character of law; however, it does not have its legally binding nature. Therefore, soft law does not create precise rights and obligations. However, it is contended that although soft law does not contain legally binding rules, it can still have legal consequences.<sup>75</sup> Moreover, according to Higgins’s argument, it can be asserted that soft law can play the role of influencing states. Higgins stated that:

[T]he passing of binding decisions is not the only way in which law development occurs. Legal consequences can also flow from acts which are not, in the formal sense, ‘binding’. And further, law is developed by a verity of non-legislative acts which do not seek to secure, in any direct sense, ‘compliance’ from Assembly members.<sup>76</sup>

As argued by Guzman and Meyer, soft law consists of ‘nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or

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<sup>70</sup> Welsh & Banda, (n 58), at 229.

<sup>71</sup> See C. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’, *International and Comparative Law Quarterly* (1989) 38 (4) 850.

<sup>72</sup> A. T. Guzman & T. L. Meyer, ‘International Soft Law’ (2010) 2 *Legal Analysis* 171, at 173.

<sup>73</sup> *Ibid*, at 174.

<sup>74</sup> *Ibid*, at 187.

<sup>75</sup> Welsh & Banda, (n 58), at 230.

<sup>76</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, New York, 1994), at 24.

represent promises that in turn create expectations about future conduct'.<sup>77</sup> Welsh and Banda further clarified that:

Soft laws interact in complex ways with the hard rules of law. For instance, soft laws can signal the direction of future legal developments, act as a precursor to binding treaties, or 'harden' into custom over time by mobilising state practice or providing evidence of *opinio juris*. They may also help shape legal interpretation of existing rules by emphasizing particular normative understandings and rules of international conduct... Articles 138 and 139 [of the World Summit], given their virtually unanimous endorsement, can be accepted as an authoritative interpretation of the Charter's provisions on sovereignty, human rights, and the use of force. Thus, even if the Outcome Document is not legally enforceable *per se*, it does represent an important step in the evolution of international protection law.<sup>78</sup>

In conclusion, the concept of the R2P is best considered as a form of soft law defined and influenced by existing principles of international law.<sup>79</sup> Accordingly, the World Summit document is intended to provide a pure framework that facilitates a smoother and more adjustable implementation of the existing laws rather than create new substantive rules.<sup>80</sup> The R2P, as introduced by the World Summit document, can be considered as a mechanism with the purpose of filling the gaps in the UN system by providing an ideal environment for an improved interaction between the relevant branches of international law. Furthermore, the advantage of such an interaction is not limited to providing a superior understanding of certain areas of international law, but also to facilitating the emergence of new substantive rules that are rooted in pre-existing laws.<sup>81</sup> Therefore, states' reactions towards the Libyan and Syrian opposition groups

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<sup>77</sup> Guzman & Meyer, (n 72), at 174.

<sup>78</sup> Welsh & Banda, (n 58), at 230.

<sup>79</sup> Payandeh, (n 37), at 471.

<sup>80</sup> A. J. Bellamy & C. Drummond, 'The Responsibility to Protect in Southeast Asia: Between Non-Interference and Sovereignty as Responsibility' (2011) 24 (2) *The Pacific Review* 179, at 181.

<sup>81</sup> See *Ibid.*



could be seen as a reinterpretation of the framework regulating internal armed conflicts based on the R2P.<sup>82</sup>

### **The Importance of This Research**

In accordance with the evaluation provided above regarding the evolution of the R2P concept, the consideration of opposition groups within the framework of the R2P is of crucial legal and practical significance. As the primary objective of the R2P concept, the protection of civilians must remain a focal point for all parties during times of hostility. As clarified by the UNSG, all concerned parties must ‘understand how their responsibilities for the protection of civilians should be translated into action’.<sup>83</sup> In the context of internal armed conflicts, it is expected that opposition groups will take control over significant parts of a territory. The control of some populated areas by these groups indicates that the host state has already lost its effective control over these parts of the territory; therefore, it could not be held responsible for fulfilling the first pillar of the R2P. Moreover, in order to preserve the required level of civilian protection, the authorities of a host state may be substituted by another entity that has the capacity to fulfil the responsibilities of the R2P. This entity could be the opposition group. In fact, the transfer of these responsibilities to the opposition could serve as a measure to prevent violations of *jus cogens* by these groups.

The significance of considering opposition groups for the implementation of the R2P is more apparent when the host state is the perpetrator of the violations of *jus cogens* against its population. In this case, as mentioned above, the host state should be

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<sup>82</sup> See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, at para. 53, available online at: <http://www.refworld.org/cases,ICJ,4023a2531.html>. ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’;

<sup>83</sup> Report of the Security General on the Protection of Civilians in Armed Conflict (2005) UN Doc S/2005/740, 15, at para. 53; Payandeh, (n 37), at 471.

considered unwilling to fulfil its mandates under the first pillar;<sup>84</sup> therefore, the responsibility to protect would be transferred to the international community.<sup>85</sup> The consideration of opposition groups for the purpose of civilian protection could facilitate the fulfilment of the responsibility to protect under the third pillar. It would provide third states a connection with a reliable entity in the territory that is willing to undertake responsibilities necessary for the protection of the population. In other words, the recognition of opposition groups within the framework of the R2P would make international intervention more effective.

Accordingly, the reactions of states towards the Libyan and Syrian opposition groups adhere to the developed approach of the R2P. Nonetheless, the reliance on state practice as to the Libyan and Syrian situations is not sufficient in itself to clarify the ambiguity surrounding the status of opposition groups and the roles that they could play in protecting civilians under international law. States' reactions to the Libyan and Syrian crises are represented in political statements. These statements could imply different meanings based on the intention of the issuers. Therefore, these statements ought to be interpreted in accordance with the existing laws. Nevertheless, the subject concerning opposition groups has always created a high level of controversy. There has not been a clear and complete framework regulating the roles that could be played by these groups for the purpose of protecting populations. The absence of a detailed legal framework for the status of opposition groups and their duty to protect populations creates a gap in the legal literature. Hence, it is essential to conduct intensive analysis in order to fill this gap.

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<sup>84</sup> See World Summit Outcome, (n 15), at para. 138.

<sup>85</sup> See *Ibid*, at para. 139.

## **The Rationale of Choosing the Libyan and Syrian Conflicts**

This thesis focuses primarily on two cases: the Libyan and Syrian conflicts. The focus on these two conflicts is justified for some significant reasons. First, the focus on the Libyan and Syrian conflicts in this research is attributed to the solid link between these two conflicts and the concept of the R2P. Since its adoption in the 2005 World Summit document, the R2P has been invoked during various humanitarian crises, including those in Darfur, Kenya, Gaza, Sri Lanka and Burma. Nonetheless, there have been no clear indications that the concept of the R2P led to timely and coordinated international action.<sup>86</sup> In fact, in some crises, contestation was made as to whether the concept of the R2P was relevant at all.<sup>87</sup>

In contrast, there have been many indications that the concept of the R2P is directly relevant to the Libyan and Syrian conflicts. In fact, Resolution 1970 concerning the Libyan crisis included an explicit reference to the R2P.<sup>88</sup> Moreover, the R2P has been clearly implemented, both directly and indirectly, in various statements made by states regarding these two conflicts. In many documents related to the Libyan and Syrian conflicts, various references have been made to the concept of the protection of civilians and the responsibility of the Libyan and Syrian opposition groups to offer this protection.<sup>89</sup>

Secondly, the Libyan and Syrian crises share some similarities as to their characteristics that make their use more logical and effective for achieving the primary objective of this project. The Libyan and Syrian crises satisfy the requirements of

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<sup>86</sup> See World Summit Outcome, (n 15).

<sup>87</sup> See Welsh & Banda, (n 58), at 113.

<sup>88</sup> See UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, 26 February 2011, S/RES/1970 (2011), available online at: <http://www.refworld.org/docid/4d6ce9742.html>.

<sup>89</sup> See S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) *Chinese Journal of International Law* 219.

internal armed conflict. Both armed conflicts erupted in Arab countries and constitute an important part of what is known as the Arab Spring.<sup>90</sup>

In general, the Libyan and Syrian opposition groups claim to represent the vast majority of their respective populations. Moreover, the Libyan and Syrian regimes are considered dictatorships and claimed to lose their legitimacy. The international community has shown great interest in these opposition groups. Many arguments and statements have been made by the representatives of states as to the capacities of the Libyan and Syrian opposition groups. There have been strong indications that various states are willing to work closely with these groups for the purpose of protecting civilians.<sup>91</sup>

Moreover, the Libyan and Syrian conflicts have developed in similar ways. They moved from civil unrests to internal armed conflicts. During the early stages of the Syrian conflict, it was viewed similarly to the Libyan crisis. Both the Libyan and Syrian opposition groups are labelled similarly based on their progress in their respective territories. Furthermore, states use the Libyan example to further encourage the development of Syrian opposition groups.

Although the Libyan and Syrian crises reveal some similarities, the outcomes of states' reactions towards these two conflicts have been significantly different. However, the different outcomes can be understood and explained based on political and legal grounds. Hence, studying these two cases side by side and focusing on their similarities and differences can help to understand the international reaction towards these two conflicts as well as how the R2P has contributed to such reaction.

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<sup>90</sup> The definition of Arab Spring is the media's name for a series of uprisings and protests throughout the middle east, beginning in December of 2010 including Egypt, Libya, Syria, Tunisia, and Yemen.

<sup>91</sup> See Talmon, (n 89), at 219.

## **The Focus of the Research and Methodology**

This research focuses on the concept of R2P in relation to opposition groups as parties to internal armed conflict. This project aims to evaluate the extent to which opposition groups could play a role in civilian protection in the context of internal armed conflicts following the adoption of the R2P. As stated above, because the concept of the R2P has no direct legal power and is best described as a soft law, it has been employed in this research as an interpretive tool to clarify the meaning of the existing laws and trace any potential changes and development with respect to the role of opposition groups in the protection of civilians.<sup>92</sup> Accordingly, the project intends to achieve two objectives. First, it attempts to examine the extent to which opposition groups have the responsibility to protect civilians under IHL. Second, it aims to trace any potential changes or developments regarding the protective role of opposition groups as a result of the implementation of the R2P.

To achieve these objectives, the research intends to address five issues. As a starting point, this thesis seeks to address two questions, namely, what the concept of organised armed groups means and how these groups are bound by IHL. Next, it discusses the matters concerning the extent to which opposition groups have a responsibility to protect civilians. Thereafter, it identifies the extent to which the adoption of the R2P could contribute to the international recognition of opposition groups. Finally, the project addresses how international accountability has changed as a result of the adoption of the R2P, especially in relation to opposition groups.

This study seeks to answer these questions by using a positivist methodology based on doctrinal research. The method is a literature-based quantitative research. Primary and secondary literature sources, such as conventions, reports, resolutions,

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<sup>92</sup> See *Namibia* (Advisory Opinion), (n 82), at para. 53.

cases, books, articles and other legal documents, were accessed through libraries and Internet databases and then analysed and used in the research process. No field study was conducted. It is important to clarify that the research does not intend to cover all of the issues related to the role of opposition groups in civilian protection and the R2P. Due to space constraints, the discussion in this research is limited to certain aspects related to the subject.

### **A Note on Terminology: Opposition Groups and Organised Armed Groups**

Generally, opposition groups and organised armed groups are two different terms. The term opposition group is usually used to refer to a body of people that have the intention of opposing and resisting establishment, either forcibly or non-forcibly.<sup>93</sup> These can exist and operate in times of war or peace. Opposition groups, according to this general meaning, could have different motives, characters and agendas.<sup>94</sup> In contrast, the term organised armed group, as clarified above, refers specifically to armed groups that already achieved certain levels of organisation qualifying them to be parties to internal armed conflicts.

Despite the fact that the terms opposition groups and organised armed groups are different, they can be used interchangeably in the context of internal armed conflicts. The utilisation of these two phrases as synonymous during internal armed conflicts is quite common in the legal literature. Despite the fact that it is a general term, the meaning of the expression opposition groups is often restricted by the definition of the concept of internal armed conflict. The emergence of internal armed conflict suggests that the intensity of the conflict has already achieved a high level of armed

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<sup>93</sup> See Oxford Dictionaries, available online at: <http://www.oxforddictionaries.com/definition/english/opposition>.

<sup>94</sup> See Essen, (n 17), at 32-33.

violence, and the non-state party to the conflict has achieved the level of organisation required for the implementation of common Article 3.<sup>95</sup>

In this thesis, the terms opposition groups and organised armed groups are used interchangeably, especially when the reference to armed groups is general, and no specification or emphasis is required. However, in certain parts of the thesis where more emphasis as to the structure of armed groups is needed, the phrase organised armed groups is used to specifically refer to those armed groups fighting on the ground, while the term opposition groups is utilised to refer to the wide structure of these groups, including the armed forces in the field as well as the political organs representing them internationally. Opposition group is also used to refer to these groups prior to qualifying as armed groups as defined under IHL.

### **The Structure of the Research**

The project responds to the research questions through a discussion organised into four chapters. Two of these chapters focus on issues related to the relationship between organised armed groups and the host state, and the other two focus on the relationship between opposition groups and the international community.

Chapter one focuses on the legal framework regulating organised armed groups as parties to internal armed conflicts and the concept of the R2P. It aims to further clarify the legal framework concerning organised armed groups as parties to internal armed conflicts. In order to do so, it evaluates two main issues: first, the development of the concept of ‘organised armed groups’, and second, the question of how organised armed groups could be bound by the rules of IHL. This chapter aims not only to determine the development of the legal framework related to organised armed groups

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<sup>95</sup> See L. Moir, *Internal Armed Conflict*, (Cambridge University Press, Cambridge, 2002), at, at 36.

under contemporary international law but also to indicate any potential development after the adoption of the R2P whenever possible.

Chapter two addresses the international obligations of organised armed groups for the purpose of civilian protection and the extent to which the R2P contributed to their interpretation and implementation. This chapter is divided into three sections. Section one relates to civilians' right to adequate food where the prohibition of starvation and the obligation to allow humanitarian assistance are evaluated. Section two addresses the prohibition of the act of forced displacement and the role of organised armed groups. Finally, section three focuses on IDPs and the responsibilities of organised armed groups.

Chapter three focuses on the international recognition of the political organs of opposition groups and the concept of the protection of populations. After addressing the issue related to the status of opposition groups as parties to internal armed conflicts and the protection of the population, the discussion in this chapter will be extended to examine the extent to which the protection of the population, as the cornerstone of the R2P, contributed to the recognition of the political organs of opposition groups. This chapter not only aims to determine the extent to which civilian protection contributed to the development of this recognition but also intends to determine the consequences of the recognition for the purpose of civilian protection. Based on the international reactions to the Libyan and Syrian crises, the chapter attempts to determine to what extent a new trend has been emerging with respect to the recognition of the political organs of opposition groups.

The chapter aims to explore the various levels of political recognition that could be granted to opposition groups and the extent to which the credibility and stability of these groups could impact such recognition. The chapter also focuses on the recognition



of an opposition group as the legitimate representative of the people as being the highest possible level of recognition. It attempts to determine to what extent the use of such expressions to recognise an opposition group could indicate that these groups are entitled to exercise the right to self-determination. More specifically, the chapter intends to examine the similarity and differences between the use of this expression within the context of the R2P and to refer to NLMs. The chapter, then, address the possibility to recognise these groups as the new government.

The fourth chapter examines the international R2P and the role of opposition groups. This chapter aims to determine the extent to which the involvement of opposition groups in the context of the R2P impacts the nature and scope of the international R2P. It addresses the possible measures and actions that could be advanced by third states to protect civilian populations and the extent to which the increased involvement of opposition groups following the adoption of the R2P has impacted the nature and scope of this international responsibility. Based on the reaction of the international community to R2P situations, this chapter examines two main issues related to third states' responsibilities. It first discusses the issue concerning the international R2P and the transfer of arms. The aim of this discussion is to trace any changes in the framework regulating the transfer of arms to the parties to internal armed conflicts and the extent to which the concept of civilian protection has played a role in such changes.

The chapter also examines the potential changes in relation to the international R2P and the authorised use of force after the adoption of the R2P. Additionally, it examines the extent to which the further involvement of opposition groups contributed to these changes. The focus on this part is on the Libyan case as the only example where the use of force was authorised by the UNSC after the adoption of the R2P.

## Chapter 1

### The Legal Framework Regulating Organised Armed Groups as Parties to Internal Armed Conflicts and the Concept of the R2P

#### 1.1 Introduction

Principally, states are considered to be the primary actors of the international community,<sup>1</sup> and therefore, their recognised governments are the main subjects of international law.<sup>2</sup> However, as the international community has developed, entities other than states have started to emerge. Some of these entities exist and operate within the territories controlled by functioning governments.<sup>3</sup> In fact, in some cases, non-state entities may exercise powers that go beyond the control of the parent states.<sup>4</sup> Moreover, such cases are evident in situations of internal armed conflicts where non-state entities take the form of armed groups and fight against the *de jure* governments.<sup>5</sup>

Although the phrase armed groups has been used occasionally to refer to these actors, it still seems to be too general to decisively clarify what is meant by such an expression. In other words, even though the phrase armed groups reflects the intention of these entities to resist and oppose,<sup>6</sup> it does not clearly identify the potential differences between these entities in nature, structure and motives. Groups opposed to governments could be of different types and adopt various characteristics.<sup>7</sup> The matter

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<sup>1</sup> R. Wolfrum & C. E. Philipp, 'The Status of the Taliban: Their Obligations and Rights Under International Law' (2002) 6 *Max Planck Yearbook of United Nations Law* 559, at 585.

<sup>2</sup> J. V. Essen, 'De Facto Regimes in International Law' (2012) 28 (74) *Utrecht Journal of International and European Law* 32.

<sup>3</sup> See M. Schoiswohl, 'De Facto Regimes and Human Rights Obligations-The Twilight Zone of Public International Law?' (2001) 6 *Austrian Review of International and European Law* 46, at 50.

<sup>4</sup> Y. Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21, at 23.

<sup>5</sup> See E. Lieblich, *International law and Civil Wars: Intervention and Consent* (Routledge, UK, 2013).

<sup>6</sup> See Oxford Dictionaries, available online at: <http://www.oxforddictionaries.com/definition/english/opposition>.

<sup>7</sup> See Essen, (n 2), at 32-33.

becomes more controversial as to the definition of organised armed groups. Another important issue that has been raised repeatedly is related to the applicability of IHL and organised armed groups. Although it is highly accepted that organised armed groups are bound by the rules of IHL, it is still problematic why and how these groups are bound by the concerned rules.

The aim of this chapter is to further clarify the legal framework concerning organised armed groups as parties to internal armed conflicts. In order to do so, two primary issues are addressed. First, the development of the concept of organized armed groups is evaluated. Second, the questions why and how organised armed groups could be bound by the rules of IHL. The objective of this chapter not only to determine the development of the legal framework related to organised armed group under contemporary international law, but also to indicate any potential development after the adoption of the R2P whenever it is possible.

## **1.2 The Development of the Concept of Organised Armed Groups: What is Meant by the Concept of Organised Armed Groups?**

The main objective of this section is to clarify what is meant by the concept organised armed groups. The objective of this section is achieved in two steps. First, the movement from the concept of recognition under traditional international law to the concept of population protection is discussed. Second, the concept of organised armed groups is defined.

### **1.2.1 The Departure from the Concept of Recognition: From Recognised Belligerents to Unrecognised Insurgents for the Purpose of more Population Protection**

Traditional international law recognises three different categories of armed groups: rebels, insurgents and belligerents.<sup>8</sup> The recognition of belligerency is the only act that justifies the internationalisation of civil war.<sup>9</sup> Nevertheless, despite the explicit recognition of armed groups under traditional international law, the act of recognition is discretionary and places attention on the interests of the recognising states, and it has minimal impacts on the protection of population.<sup>10</sup>

After the drafting of the four Geneva Conventions of 1949, contemporary international law departed from the concept of recognition and adopted different measures based on the concept of protection.<sup>11</sup> The focus of the Geneva Conventions was to provide the minimum protection for non-participants in non-international

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<sup>8</sup> See A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, Cambridge, 2010), at 1.

<sup>9</sup> See Lieblich, (n 5), at 76-78.

<sup>10</sup> See Ibid, at 81.

<sup>11</sup> See for ex. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Art. 3, available online at: <http://www.refworld.org/docid/3ae6b36c8.html>.

conflicts.<sup>12</sup> Although contemporary IHL considered the definition of non-international armed conflicts as a basis for its implementation, it did not ignore the status of armed groups. Various capacities of armed groups indicated in the various provisions intending to define internal armed conflicts.<sup>13</sup>

Unlike the recognition of armed groups under traditional international law, the implementation of modern IHL is not a discretionary act. The approach adopted under the Geneva Conventions allows for more involvement of various categories of armed groups for the purpose of population protection.<sup>14</sup> Moreover, to further clarify the way international law moved from the concept of recognition to the concept of population protection, the two systems, which are traditional international humanitarian law and contemporary international law, should be discussed.

### **1.2.1.1 The Recognition of Armed Groups under Traditional International Law**

Before the adoption of the four Geneva Conventions, different categories of armed groups were recognised based on the degrees of control over territory and recognition by the concerned governments.<sup>15</sup> Although traditional international law recognised the status of rebellions, it did not impose any international rights or obligations on such a status. The status of rebellion indicates that the existing situation is of a highly temporary and unsustainable nature.<sup>16</sup> In accordance with Kotzsch,

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<sup>12</sup> H. A. Wilson, *International Law and The Use of Force by National Liberation Movements* (Oxford University Press, Oxford, 1988), at 44.

<sup>13</sup> See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, at Art. 1 (1) & (2), available online at: <http://www.refworld.org/docid/3ae6b37f40.html>.

<sup>14</sup> See Liebllich, (n 5), at 81.

<sup>15</sup> Wilson (1988), (n 12), at 24; L. Oppenheim & H. Lauterpacht (eds.), *International Law: A Treatise (Disputes, War and Neutrality)*, 7<sup>th</sup> edn, Vol. II (Longman, London, 1952), at 209-216.

<sup>16</sup> See Wilson (1988), (n 12), at 23; R. A. Falk, 'Janus Tormented: The International Law of Internal War' in J. N. Rosenau (eds.), *International Aspects of Civil Strife* (Princeton University Press, Princeton, 1964), at 197.

‘domestic violence is called rebellion...so long as there is sufficient evidence that the police force of the parent state will reduce the seditious party to respect the municipal legal order’.<sup>17</sup> Accordingly, it was accepted that such a situation would not necessitate the implementation of the laws of war.<sup>18</sup> Instead, acts of rebellions would normally fall within the domestic jurisdiction of the concerned state, and they would be governed by its national laws.<sup>19</sup>

The absence of a positive recognition of rebellions under traditional international law suggests that it would be deemed unwarranted to provide these groups with any external support or assistance.<sup>20</sup> As asserted by Falk, any help from a third party state to the rebels would be considered a violation of the principle of non-intervention in the internal affairs of the parent state.<sup>21</sup> He went on to add that states that are not involved in the conflict would be under further obligation to disallow the use of its territory ‘as an organising base for hostile activities’.<sup>22</sup> Hence, although traditional international law explicitly recognised the status of rebellion, the recognition did not include any rights or obligations. It was for the benefit of the host state to govern the situation according to its domestic laws.

Rebels must progress to the status of insurgency before rights and obligations under international law apply.<sup>23</sup> Nonetheless, insurgents would only have rights and obligations in relation to states that recognise them as such.<sup>24</sup> Although traditional

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<sup>17</sup> L. Kotsch, *The Concept of War in Contemporary History and International Law* (Librairie E. Dorz, Geneva, 1956), at 230.

<sup>18</sup> R. P. Dhokalia, ‘Civil wars and International law’ (1971) 35 *The Indiana Journal of International Law* 219, at 224.

<sup>19</sup> *Prosecutor v. Dusko Tadic (a/k/a Dule)*, IT-94-1-AR, International Criminal Tribunal for the former Yugoslavia (ICTY), (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) 2 October 1995, at para. 96, available online at: <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

<sup>20</sup> Cullen (2010), (n 8), at 10.

<sup>21</sup> Falk, (n 16), at 198.

<sup>22</sup> *Ibid.*

<sup>23</sup> A. Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (2006) 88 *International Review of the Red Cross* 491, at 492.

<sup>24</sup> *Ibid.*

international law recognises insurgency, the status of insurgency is enfolded with a high degree of uncertainty.<sup>25</sup>

Insurgency had neither a clear set of conditions for its application<sup>26</sup> nor a detailed legal framework regulating the rights and obligations of such a status.<sup>27</sup> As noted by Wilson, as far as the status of insurgency is concerned, ‘there are no requirements for the degree of intensity of violence, the extent of control over territory, the establishment of a quasi-governmental authority, or the conduct of operations in accordance with any humanitarian principles’.<sup>28</sup> She went on to add that the only notable requirement justifying the recognition of an opposition group as insurgents is necessity.<sup>29</sup>

In fact, it was argued that the concept of insurgency was initially founded on a factual rather than legal basis.<sup>30</sup> In accordance with the US Supreme Court in the case of *The Three Friends*, insurgency indicates the existence of war in a material rather than a legal sense.<sup>31</sup> Furthermore, Falk asserted that insurgency is ‘a catch-all designation...It is an international acknowledgment of the existence of an internal war’.<sup>32</sup> Nevertheless, although no decisive conditions were established as to when armed groups could be legitimately recognised as insurgents, it is still possible to generally define the boundaries of the concept. It would be unjustifiable to assign the status of insurgency to a group challenging a legitimate government that still exercises sufficient control over the conflict.<sup>33</sup> It was argued that necessity as a condition for

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<sup>25</sup> See Wilson (1988), (n 12), at 24.

<sup>26</sup> Ibid.

<sup>27</sup> Cullen (2010), (n 8), at 11.

<sup>28</sup> Wilson (1988), (n 12), at 24.

<sup>29</sup> Ibid.

<sup>30</sup> See G. G. Wilson, ‘Insurgency and International Maritime Law’ (1907) 1 *The American Journal of International Law* 46; Wilson (1988), (n 12), at 24; Falk, (n 16), at 199.

<sup>31</sup> See U.S. Supreme Court, *The Three Friends* (1897), 166 U.S. 1, available online at: <http://supreme.justia.com/cases/federal/us/166/1/>.

<sup>32</sup> Falk, (n 16), at 199.

<sup>33</sup> See Wilson (1907), (n 30), at 46.

recognition suggests that the status of insurgency would be granted when the interests of the recognising state, whether it is the official government or a third party state, are affected by the ongoing situation in a manner necessitating the entrance into relations with the insurgents.<sup>34</sup>

As stated by Lauterpacht, the recognition of insurgency could be accorded ‘for reasons of convenience, of humanity, or economic interest’.<sup>35</sup> Moreover, as further clarified by Cassese, for rebels to be recognised as insurgents ‘(1) rebels should prove that they have effective control over some part of the territory and (2) civil commotion should reach a certain degree of intensity and duration’.<sup>36</sup> Despite the attempts made to clarify the possible criteria for insurgency, the status of insurgency by its nature is uncertain, providing the recognising state with a higher degree of discretion as to whether to establish a relation with the insurgents.<sup>37</sup> As noted by Lauterpacht, ‘any attempt to lay down the conditions of recognition of insurgency leads itself to misunderstanding’.<sup>38</sup> According to Falk, the recognition of insurgency ‘serves as partial internationalization of the conflict, without bringing the state of belligerency into being’.<sup>39</sup> He went on to add that such a status ‘permits third states to participate in an internal war without finding themselves “at war”’.<sup>40</sup>

The concept of insurgency ‘leaves each state substantially free to control the consequences of’ its relation with the insurgents.<sup>41</sup> Apart from granting insurgents the right to be regarded ‘as contestants-in-law, and not as mere law-breakers’,<sup>42</sup> the rights

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<sup>34</sup> Cullen (2010), (n 8), at 11.

<sup>35</sup> H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, Cambridge, 1947), at 276-277.

<sup>36</sup> A. Cassese, *International Law, 2<sup>nd</sup> edn* (Oxford University Press, Oxford, 2005), at 125.

<sup>37</sup> See Lauterpacht, (n 35), at 276-277.

<sup>38</sup> *Ibid*, at 276.

<sup>39</sup> Falk, (n 16), at 200.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*, at 199.

<sup>42</sup> R. Higgins, ‘International Law and Civil Conflict’ in E. Luard (eds.), *The International Regulation of Civil Wars* (New York University Press, New York, 1972), at 171.



and duties of such groups are primarily based on the agreement achieved with the recognising state.<sup>43</sup> Thus, the recognition of the status of insurgency does not lead to the implementation of IHL unless it is agreed on.<sup>44</sup> Nevertheless, the conflict would be automatically internationalised and the laws of war would be directly implemented once the rebels progress to the status of belligerency.<sup>45</sup>

The recognition of belligerency was deemed as granting the recognised opposition groups almost a similar status as that of states in international armed conflicts rather than recognising them as parties to internal armed conflict, *per se*.<sup>46</sup> Furthermore, such an assertion adheres to the fact that traditional international law recognised only states as members of the international community.<sup>47</sup> As asserted by Oglesby, '[a] *de facto* insurgent government recognised as a belligerent has international standing'.<sup>48</sup> Nevertheless, the legal personality granted to belligerents is partial and temporary for the purpose of warfare.<sup>49</sup> As a result, the act of recognition could create a grey area of contradictions or convergences between the *de jure* government and the rebelling *de facto* government regarding their sovereign rights during the time of hostilities.<sup>50</sup> Therefore, although the recognition of opposition groups such as belligerents in itself may seem *prima facie* clear, there is still a high degree of uncertainty not only as to the nature of the act of recognition but also in relation to the rights and obligations emanating from such recognition.

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<sup>43</sup> Falk, (n 16), at 199.

<sup>44</sup> E. J. Castren, *Civil War* (Suomalainen Tiedeakatemia, Helsinki, 1966), at 207-223.

<sup>45</sup> See U.S. Supreme Court, *The Santissima Trinidad and The St. Sander* (1822), 20 U.S. 283, available online at: <http://supreme.justia.com/cases/federal/us/20/283/>; Lieblich, (n 5), at 76- 78.

<sup>46</sup> See *the Santissima Trinidad and The St. Sander*, (n 45); J. E. Bond, *Rules of Riot: Internal Conflict and the Law of War* (Princeton University Press, Princeton, 1992), at 51; Cullen, (n 8), at 17.

<sup>47</sup> See Bond, (n 46), at 51; Cullen (2010), (n 8), at 17.

<sup>48</sup> R. R. Oglesby, *Internal War and the Search for Normative Order* (Martinus Nijhoff, The Hague, 1971) at 78.

<sup>49</sup> H. A. Smith, 'Some Problems of the Spanish Civil War' (1937) 18 *British Year Book of International Law* 17, at 18-21.

<sup>50</sup> See Lieblich, (n 5), at 80.

Regarding the act of recognition, it is controversial whether the fulfillment of the aforementioned conditions is sufficient to oblige states to grant an opposition group the status of belligerency.<sup>51</sup> Some have argued that when the aforementioned requirements are satisfied, states would be under an obligation to recognise insurgents as belligerents.<sup>52</sup> For instance, Lauterpacht asserted that '[t]o refuse to recognise the insurgents as belligerents although [the] conditions are present is to act in a manner which finds no warrant in international law';<sup>53</sup> however, others have argued to the contrary.<sup>54</sup> It was contended that the right to recognise opposition groups as belligerents is a discretionary political act.<sup>55</sup>

As to the rights and obligations granted by the recognition of opposition groups as belligerents, the act of recognition produces rights and obligations between third state parties and belligerents on the one hand and the *de jure* governments and the opposition groups on the other hand. Regarding the relation between belligerents and a third state, the recognising state is under an obligation to remain neutral until the hostilities cease. Third party states are legally obligated to not intervene in the conflict whether in favour of the *de jure* government or the belligerents.<sup>56</sup> The obligation of neutrality means that the states must treat all parties to the dispute equally, or 'each sovereign in its respective areas of control'.<sup>57</sup>

Although the status of neutrality imposes an obligation on a third state to not directly intervene in the conflict, it does not prevent the establishment of relations with

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<sup>51</sup> See Castren, (n 44), at 173-177; Oppenheim, (n 15), at 250; Falk, (n 16), at 206; D. A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 11 *Case Western Reserve Journal of International Law* 37, at 39.

<sup>52</sup> Oppenheim, (n 15), at 250; Lauterpacht, (n 35), at 176.

<sup>53</sup> H. Lauterpacht, (n 35), at 176.

<sup>54</sup> See Elder, (n 51), at 39-41; Cullen, (n 8), at 21.

<sup>55</sup> See Cullen (2010), (n 8), at 21.

<sup>56</sup> See Falk, (n 16), at 203; Bond, (n 46), at 51.

<sup>57</sup> Y. M. Lootsteen, 'The concept of Belligerency in International Law' (2000) 166 *Military Law Review* 109.

the belligerents to a certain degree.<sup>58</sup> Even though belligerents as a group are not entitled to exercise diplomatic and other political rights normally enjoyed by *de jure* governments, they can enter into relations on a lower level with other states. It is argued that when the status of belligerency is granted, insurgents would be eligible to conduct informal negotiations with third states and enjoy certain positive rights.<sup>59</sup> For instance, belligerents would have the right to search neutral vessels on the high seas.<sup>60</sup> They would also be able to impose blockades on the high seas and prosecute any potential violators.<sup>61</sup> In general, the rule of neutrality aims to protect third states' interests by restricting the possibility of extending the impacts of hostilities to parties other than those involved.

Regarding relations between the *de jure* government and the belligerents, under the doctrine of belligerency, unlike before the act of recognition, both parties are obliged to apply the laws of war. As stated by Khairallah, when the status of belligerency is granted, 'the laws of war...become applicable to both parties in the conflict, not only for the conduct of hostilities but also for all other war activities, such as caring for the sick and wounded and prisoners of war.'<sup>62</sup> Nonetheless, although the recognition of the status of belligerency led to the application of the laws of war over the conflict,<sup>63</sup> the laws regulating war under traditional international law did not give sufficient weight to the concept of population protection. As Lieblich argued, 'a striking aspect of the early instruments of IHL, such as those adopted in the Hague conferences of 1899 and 1907, is the absence of explicit reference to the protection of civilians in

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<sup>58</sup> T. S. Woolsey, 'The Consequences of Cuban Belligerency' (1896) 5 (4) *The Yale Law Journal Company, Inc* 182.

<sup>59</sup> See *Ibid.*

<sup>60</sup> Lieblich, (n 5), at 81.

<sup>61</sup> *Ibid.*

<sup>62</sup> D. L. Khairallah, *Insurrection Under International Law: With Emphasis on the Rights and Duties of Insurgents* (Lebanon University, Beirut, 1973), at 28-29, cited in Wilson (1988), (n 12), at 36- 37.

<sup>63</sup> *Ibid.*

armed conflicts'.<sup>64</sup> It is apparent that neither the reference to the law of humanity in the Hague Convention (II) nor the rules embodied under the Hague law is sufficient to assert the existence of the concept of the protection of the population under traditional international law.

The reference to 'the laws of humanity and the requirements of the public conscience' in Martens Clause appeared for the first time in the preamble to the 1899 Hague Convention (II) concerning the laws and customs of war on land; however, as indicated in the preamble of the subsequent Hague Conventions of 1907, the reference was primarily intended to serve as an umbrella to provide further protection for people against certain harmful acts that were not prohibited by the pre-existing rules. Nevertheless, a high degree of uncertainty has always existed as to what was actually meant by the law of humanity and whether it entailed legal obligations or was simply a pure law of morality.<sup>65</sup> In other words, it was argued that acts violating the laws of humanity could not be criminalised until the legal statutes of the laws of humanity could be confirmed.

On the other hand, Hague Law, concluded at the Hague Conferences of 1899 and 1907,<sup>66</sup> is more concerned with regulating the conduct of hostilities. It aims to restrict the implementation of certain types of war methods that may cause unnecessary suffering.<sup>67</sup> More specifically, although the restrictions imposed by the Hague law constitute measures aiming to reduce the possibility that civilians would be direct

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<sup>64</sup> Lieblich, (n 5), at 173.

<sup>65</sup> D. Matas, 'Prosecuting Crimes Against Humanity: The Lessons of World War I' (1989) 13 *Fordham International Law Journal* 86, at 90.

<sup>66</sup> M. N. Shaw, *International law*, 6<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2008), at 1168.

<sup>67</sup> See International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available online at: <http://www.refworld.org/docid/4374cae64.html>.

targets of unjustified violence, there have been no indications that the concept of the protection of the population had existed as a principle under international law.

In summary, although traditional international law explicitly recognised three statuses of armed forces, more importantly, as clarified previously, the protection of civilians had never been considered a requirement to achieve the status of belligerency. In other words, although belligerents would be responsible for wrongful acts committed in the territory under their control in general, these violations would not affect their status.<sup>68</sup>

### **1.2.1.2 The Unrecognised Armed Groups under Modern International Law: The Capacity of Armed Groups and the Protection of Population**

Unlike traditional international law, modern international law adopted wider yet more sustainable measures as to the implementation of IHL over armed groups. The concept of population protection was considered the primary objective behind the application of IHL. Moreover, the increase in the significance of the concept of protection led to the establishment of a separate framework to regulate internal armed conflicts.<sup>69</sup> Nevertheless, the framework did not contain any reference to the concept of recognition regarding armed groups. Despite this, the departure from the concept of recognition is intentional. It accords with the nature and policy behind the adoption of the laws regulating internal armed conflicts under the four Geneva Conventions and their Additional Protocols, which are to expand the implementation of these laws for more effective population protection.<sup>70</sup>

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<sup>68</sup> Liebllich, (n 5), at 82.

<sup>69</sup> See Wilson (1988), (n 12), at 44.

<sup>70</sup> See Liebllich, (n 5), at 84.

In fact, despite the departure from the concept of explicit recognition under contemporary international law, the primary focus on the concept of protection during hostilities makes the consideration of armed groups as parties to internal armed conflicts more significant. It is unclear how the protection of population could be effectively achieved without binding all parties involved in the conflict, including armed groups, to adhere to the obligations emanating from the framework that regulates internal armed conflicts.

Contemporary IHL considered the definition of non-international armed conflicts as a basis for its implementation; however, it did not ignore the capacity of armed groups. The different attempts made to define internal armed conflicts indicate the relevance of the various capacities that could be obtained by armed groups based on the implementation of certain rules of IHL.<sup>71</sup>

The reference to the capacity of opposition groups was explicit in the definition of internal armed conflict stated under Article 1 (1) of the second Additional Protocol of 1977. In accordance with Article 1 (1), the internal armed conflict governed by the provisions of the Protocol is one that erupts between governmental armed forces and other armed groups that operate ‘under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.<sup>72</sup>

The definition of non-international armed conflict for the purpose of applying the Protocol was further clarified under Article 1 (2).<sup>73</sup> The provision excludes from the scope of the Protocol ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’.<sup>74</sup> It was argued

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<sup>71</sup> See *Additional Protocol II*, (n 13), at Art. 1 (1) & (2).

<sup>72</sup> *Ibid*, at Art. 1 (1).

<sup>73</sup> See *Ibid*, at Art. 1 (2).

<sup>74</sup> *Ibid*.

that the negative definition under Article 1 (2) was provided to identify ‘the lower threshold of the concept of armed conflict’.<sup>75</sup> Nonetheless, unlike Article 1 (1) of the second additional Protocol, Common Article 3 to the four Geneva Conventions did not include a clear measure for its application.<sup>76</sup>

It was argued that although Common Article 3 is considered to be the cornerstone for the framework regulating internal armed conflicts, it includes neither a reference to armed groups nor a definition of what is meant by internal armed conflict;<sup>77</sup> however, an examination of the nature of the Article and the policy behind its drafting suggests that the lack of a clear definition of non-international armed conflict is not a major shortcoming.<sup>78</sup> In fact, the non-definition approach adopted by Common Article 3 was considered by some scholars as an advantage, as it conformed to the policy behind the drafting of the Article.<sup>79</sup> According to Moir, the non-definition approach adopted by the Geneva Conventions reflects the drafters’ intentions to not restrict the scope of Common Article 3 to certain types of non-international armed conflicts.<sup>80</sup> Cistern argued that the absence of a definition of non-international armed conflict, and therefore the absence of an explicit reference to the parties to the conflict, was intentionally done to ensure a wider application of the Article.<sup>81</sup> Pictet further suggested that ‘the scope of application of the article must be as wide as possible’.<sup>82</sup> Nevertheless, this contention is highly criticised.<sup>83</sup>

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<sup>75</sup> See International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 1354, available online at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf).

<sup>76</sup> See International Committee of the Red Cross (ICRC), *Commentary on the Geneva Conventions of 12 August 1949*, vol. (VI), (1958), at 35.

<sup>77</sup> See *Third Geneva Convention*, (n 11), at Art. 3.

<sup>78</sup> See L. Moir, *Internal Armed Conflict*, (Cambridge University Press, Cambridge, 2002), at 32.

<sup>79</sup> See *Commentary on the Geneva Conventions*, (n 76), at 36; Moir, (n78), at 32; Castren, (n 44), at 85.

<sup>80</sup> Moir, (n 78), at 32.

<sup>81</sup> Castren, (n 44), at 85.

<sup>82</sup> See *Commentary on the Geneva Conventions*, (n 76), at 36.

<sup>83</sup> See Bond, (n 46), at 56-57; Moir, (n 78), at 37.

As noted by Moir, the unlimited application of Common Article 3 suggested by Pictet is dangerous. Moir asserted that such an approach, if adopted, would stretch the scope too wide and would cover low-intensity acts that had never been intended to be included under the Article.<sup>84</sup> The ICTY made productive efforts to further develop the definition of non-international armed conflict.<sup>85</sup> The ICTY aimed to provide a wider, more flexible definition of armed conflicts for the purpose of implementing Common Article 3.<sup>86</sup> As interpreted by the *Tadic* Trial Chamber, the definition of armed conflict provided by the Appeal Chamber is founded primarily on two criteria: ‘the intensity of the conflict and the organization of the parties to the conflict’.<sup>87</sup> According to the tribunal, these criteria are sufficient to differentiate an internal armed conflict from other activities not intended to be governed by international humanitarian law.<sup>88</sup>

In the *Delalic* case in 1998, the Trial Chamber considered this interpretation of the definition of internal armed conflict.<sup>89</sup> The chamber stated that to determine the existence of an internal armed conflict and differentiate it from other acts, such as civil unrest and terrorism, ‘the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved’.<sup>90</sup> The ICTR affirmed the validity of the two-element test in the *Akayesu* case, as described in the previous case.<sup>91</sup> To

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<sup>84</sup> Moir, (n 78), at 37.

<sup>85</sup> See *Prosecutor v. Dusko Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 70.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, at para. 562, available online at: <http://www.refworld.org/docid/4027812b4.html>.

<sup>88</sup> *Ibid.*

<sup>89</sup> See *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, at para. 184, available online at: <http://www.refworld.org/docid/41482bde4.html>.

<sup>90</sup> *Ibid.*, at para. 184.

<sup>91</sup> See *the Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, at para. 620, available online at: <http://www.refworld.org/docid/40278fbb4.html>.



decide whether an internal armed conflict existed in Rwanda, the tribunal ‘evaluate[d] both the intensity and organization of the parties to the conflict’.<sup>92</sup>

In addition, the *Tadic* definition expands the scope of non-international armed conflicts to include other potential parties. Unlike the definition provided in Article 1 (1) of the second Additional Protocol, which limits the existence of internal armed conflicts to situations involving the armed forces of *de jure* governments, the *Tadic* definition includes conflicts between armed groups. The recognition of *de facto* armed conflicts that emerge between armed groups without the involvement of official forces filled a huge gap caused by the restrictive definition in the second Additional Protocol and addressed the renewed nature of armed conflicts.<sup>93</sup> Hence, although the absence of a definition of non-international armed conflict broadens the scope of Common Article 3, this does not make the Article applicable in all situations of internal strife, as will be further explained later.<sup>94</sup>

It should be emphasised that although contemporary IHL imposes some duties on certain types of armed groups as parties to internal armed conflicts regardless of any act of recognition issued by the host state or by any other third state, it is still possible that governments would refuse to admit the existence of the conditions required for the application of the concerned law.<sup>95</sup> As asserted by Clapham, the admission of the emergence of a situation of an internal armed conflict producing certain obligations on armed groups could be ‘seen as an admission that the governments have lost a degree

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<sup>92</sup> *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, (n 91), at para. 620.

<sup>93</sup> See T. Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout’ (1998) 92 *The American Journal of International Law* 236, at 237.

<sup>94</sup> A. Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian’ 2005 (183) *Military Law Review* 66, at 84-85.

<sup>95</sup> Clapham, (n 23), at 493.

of control and has an “elevation” of the status of rebel’;<sup>96</sup> however, such an assertion ought not to be fully admitted without elaboration.

The recognition of the emergence of a situation of an internal armed conflict is still much less discretionary than the recognition of the status of armed groups under traditional international law. The designation of a situation as an armed conflict is a legal matter based on facts on the ground, whereas the recognition of armed groups under traditional international law is almost a political act. It is also significant to mention that the primary focus on the protection of the population after the adoption of the four Geneva Conventions makes the admission of the status of internal armed conflict a matter of international interest. Unlike traditional international law in which the recognition of the status of belligerency is impacted by the interest of the recognising state, the designation of the existence of an internal armed conflict goes beyond this and attracts the interest of the international community as a whole. For instance, the emergence of the status of an internal armed conflict allows the involvement of non-state actors, such as the ICRC. As included in Common Article 3, ‘an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’.<sup>97</sup>

It is argued that although the admission of the status of internal armed conflict by the host state could facilitate and accelerate the process of implementing IHL, it is not required to establish such a situation. The implementation of the obligations of the framework that regulates internal armed conflicts depends on the achievement of the threshold for the application of these obligations.<sup>98</sup> On many occasions, the emergence of the situations of internal armed conflicts were affirmed by UN resolutions regardless

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<sup>96</sup> Clapham, (n 23), at 493.

<sup>97</sup> *Third Geneva Convention*, (n 11), at Art. 3.

<sup>98</sup> Clapham, (n 23), at 496.

of the acceptance of the concerned governments.<sup>99</sup> For instance, the existence of an internal armed conflict's situation was referred to by the UNGA in relation to the situation in El Salvador.<sup>100</sup> The UNGA deemed that the situation existed between the government of El Salvador and the Frente Farabundo Marti para la Liberacion Nacional as an internal armed conflict requiring the implementation of IHL and the concerned rules of human rights.<sup>101</sup>

### **1.2.2 The Definition of the Concept of Organised Armed Groups: Organised and Non-Organised Groups (the Element of Organisation)**

The element of organisation qualifying an armed group to be labeled as an organised armed group is a quite general idea. There are different levels that indicate different capacities afforded to these armed groups. Although there is almost no consensus as to what is decisively meant by 'organised armed group', the 'collective and planned military activities would be the most significant element of proof'.<sup>102</sup> Furthermore, the operation of such armed groups under a responsible command is another piece of evidence confirming its organisation.<sup>103</sup> Nevertheless, such a requirement is not fundamental. In certain circumstances, an armed group could still be labeled as an organised armed group regardless of its command structure.<sup>104</sup> The control over a territory is another indication of the level of organisation achieved by the concerned armed group; however, it is still a quite flexible element. The armed group

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<sup>99</sup> See for ex. United Nations Commission on Human Rights Resolution on El Salvador, 1991/71, at para. 9; United Nations General Assembly Resolutions (UNGA) 45/172 and 46/133 on El Salvador.

<sup>100</sup> United Nations General Assembly Resolutions 45/172 and 46/133 on El Salvador.

<sup>101</sup> Ibid.

<sup>102</sup> K. Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate, Farnham, 2016), at 106.

<sup>103</sup> Y. Sandoz, 'International Humanitarian Law in the Twenty- First Century' (2003) 6 *Yearbook of International Humanitarian Law* 3, 14.

<sup>104</sup> See for ex. *Third Geneva Convention*, (n 11), at Art. 3.

could still be considered organised whether the control over the territory is permanent or temporary.<sup>105</sup>

Hence, to further clarify what is meant by organised armed groups for the purpose of implementing IHL, the concept is evaluated in relation to the relevant treaties. In addition to discussing the concept of organised armed groups under Article 1 (1) of the second Additional Protocol of 1977, which is considered to represent the highest level of organisation required for the implementation of IHL, the element of organisation under Common Article 3 is evaluated. The contributions made by some international tribunals as to the definition of the concept of organised armed groups for the purpose of applying Common Article 3 are observed. It is also relevant to examine the latest development in treaty law related to the concept of organised armed groups as defined under international criminal law as codified in the ICC Statute.<sup>106</sup>

### **1.2.2.1 The Second Additional Protocol and the Element of Organisation**

With regard to the definition of the concept of organised armed groups under Article 1 (1) of the second Additional Protocol, it is important to recall that the Additional Protocol restricted its scope to defined criteria of non-international conflict.<sup>107</sup> As a result, the level of organisation required by the Protocol is considered quite high.<sup>108</sup> The initial intention, as proposed by the ICRC, was to adopt ‘a broad definition based on material criteria [which is]: the existence of a confrontation between armed forces or other organized armed groups under reasonable command, i.e., with a

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<sup>105</sup> See Mastorodimos, (n 102), at 20-21; Moir, (n 78), at 106.

<sup>106</sup> United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available online at: <http://www.refworld.org/docid/3ae6b3a84.html>.

<sup>107</sup> See *Commentary on the Additional Protocols*, (n 75), at 1349.

<sup>108</sup> *Ibid.*

minimum degree of organization'.<sup>109</sup> Nevertheless, although the general idea of the proposal was accepted, the suggested criteria failed to achieve a sufficient consensus. Instead, a more restrictive formula was finally adopted and included in Article 1 (1) of the Protocol. In accordance with Article 1 (1), the principles contained in the Additional Protocol would only be applicable to armed conflicts:

[w]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>110</sup>

The wording of Article 1 (1) may lead to the assertion that in addition to organisation, the armed group ought to satisfy other requirements to implement the Protocol. It suggests that the organised armed group needs to operate under a responsible command and exercise a control over a territory 'as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.<sup>111</sup> Nevertheless, further elaboration on these elements clarifies that they are included in the features of organisation rather than being separate elements required for the application of the Protocol.<sup>112</sup>

Regarding the element of responsible command, there have been some indications that responsible command is a separate element that ought to be satisfied in addition to organisation.<sup>113</sup> Moreover, such a contention finds support in the jurisprudence of the ICTR and the SCSL.<sup>114</sup> Nonetheless, as observed by

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<sup>109</sup> *Commentary on the Additional Protocols*, (n 75), at 1349.

<sup>110</sup> *Additional Protocol II*, (n13), at Art. 1 (1).

<sup>111</sup> *Ibid.*

<sup>112</sup> Mastorodimos (2016), (n 102), at 20.

<sup>113</sup> See *the Prosecutor v. Alfred Musema (Judgement and Sentence)*, ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, at para. 254, available online at: <http://www.refworld.org/docid/48abd5791a.html>; *The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused)*, SCSL-04-14-T, Special Court for Sierra Leone, 2 August 2007, at para. 126, available online at: <http://www.refworld.org/docid/46e123dc2.html>.

<sup>114</sup> See *the Prosecutor v. Alfred Musema (Judgement and Sentence)*, (n 113), at para. 254; *The Prosecutor v. Moinina Fofana, Allieu Kondewa*, (n113), at para. 126.

Mastorodimos, there are no indications that the clarification provided by the ICTR regarding the element of responsible command contributes to the element of organisation in any way.<sup>115</sup>

As argued by Moir, the requirement of responsible command, as stated under Article 1 (1), could be described as being superfluous, considering the fact that these armed groups are already required to have a certain level of organisation.<sup>116</sup> Nonetheless, it ought to be emphasised that such a requirement is not completely meaningless. It still indicates that the Protocol would not be applicable for intermittent acts of individuals.<sup>117</sup> Instead, it requires the emergence of a conflict of a collective character for its implementation.<sup>118</sup> Nevertheless, it ought to be clarified that the requirement of responsible command does not mean that the organisation of the armed group must be founded on ‘a rigid military hierarchy’.<sup>119</sup> Instead, for the purpose of achieving the level of organisation required for the application of the Protocol, it would be enough to have ‘a de facto authority, sufficient both to plan and carry out concerted and sustained military operations and to impose the discipline required for the rules of the Protocol to be applied’.<sup>120</sup>

In addition to operation under a responsible command, the exercise of control over part of the territory by the armed group is required for the armed group to be organised according to the Protocol. The element of territorial control as required by the Protocol is quite restrictive.<sup>121</sup> The primary element for satisfying the requirement of territorial control under the Protocol is primarily related to the quality of such control

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<sup>115</sup> Mastorodimos (2016), (n 102), at 20.

<sup>116</sup> Moir, (n 78), at 105.

<sup>117</sup> Ibid.

<sup>118</sup> S. Junod, ‘Additional Protocol II: History and Scope’ (1983) 33 *The American University Law Review* 29, at 37.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Moir, (n 78), at 105.

rather than its proportion or duration.<sup>122</sup> As stated by Junod, for the armed group to be organised for the purpose of implementing the Protocol, the control over the territory ‘must be sufficient to enable opposition forces to carry out sustained and concerted military operations and to apply the Protocol. For example, they must be able to detain prisoners and treat them decently or to give adequate care to the sick and wounded’.<sup>123</sup> Accordingly, it ought to be sufficient that a certain level of stability is satisfied in the areas governed by the concerned armed groups.<sup>124</sup> Nevertheless, as argued by Mastorodimos, ‘this is not a *conditio sine qua non*’.<sup>125</sup> The control over the territory ought not to be permanent. Moreover, according to Mastorodimos, ‘even a small part of the National territory (e.g. 1 % of the whole) could be enough, depending on circumstances, for the ability to carry out military operations and implement the Protocol’.<sup>126</sup>

In addition to the element of responsible command and the control over part of the territory, Article 1 (1) of the second Additional Protocol also refers to the ability of the armed groups to implement the Protocol.<sup>127</sup> Nevertheless, it is quite difficult to consider the capability to apply the Protocol as an element regarding the definition of the concept of organised armed groups. The ability to implement the Protocol suggests that the armed group has already reached the required level of organisation stated under Article 1 (1).<sup>128</sup>

In fact, although it was argued that the wording of Article 1 (1) suggests that the armed groups ought to comply with the rules contained in the Protocol before the

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<sup>122</sup> Junod, (n 118), at 37.

<sup>123</sup> Ibid.

<sup>124</sup> See L. C. Green, *The Contemporary Law of Armed Conflict*, 2<sup>nd</sup> edn (Manchester University Press, Manchester, 2000), at 321.

<sup>125</sup> Mastorodimos (2016), (n 102), at 21.

<sup>126</sup> K. Mastorodimos, ‘Belligerency Recognition: Past, Present and Future’ (2014) 29 *Connecticut Journal of International Law* 301, at 313.

<sup>127</sup> See *Additional Protocol II*, (n 13), at Art. 1 (1).

<sup>128</sup> Mastorodimos (2016), (n 102), at 22-23.

Protocol becomes operational,<sup>129</sup> the prevailing view is that the pre-application of the law ought not be considered a requirement for the implementation of the Protocol.<sup>130</sup> As contended by Moir, the assertion that armed groups ought to apply the Protocol ‘before it becomes operational seems to introduce de jure reciprocity’.<sup>131</sup> It suggests that states would not be under an obligation to implement the Protocol unless the armed groups did so in the first place. Moreover, although the principle of reciprocity used to be relevant under the doctrine of belligerency,<sup>132</sup> it does not comply with the framework of the Geneva Conventions. It conflicts with the primary objective of contemporary IHL, which is to humanise internal conflicts.<sup>133</sup> The ICTY in the *Kupreskic* case clarified that ‘the defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants’.<sup>134</sup> Hence, as Cassese argued, the Protocol would be applicable as soon as the armed group has been proven ‘to be “responsible” and well-organised so as to live up to [the Protocol’s] standards’.<sup>135</sup>

It is noteworthy to mention that this strict criteria was criticised. It was argued that the focus on responsible command and the quality of the territorial control made it almost impossible for the armed group to reach the required criteria unless the situation would be as advanced as a classic civil war.<sup>136</sup> It was also asserted by Green that the

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<sup>129</sup> A. Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict’ (1981) *International and Comparative Law Quarterly* 416, at 425.

<sup>130</sup> Moir, (n 78), at 108.

<sup>131</sup> *Ibid.*

<sup>132</sup> Mastorodimos (2016), (n 102), at 22.

<sup>133</sup> *Ibid.*, at 23.

<sup>134</sup> *Prosecutor v. Kupreskic et al. (Trial Judgement)*, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000, at para. 511, available online at: <http://www.refworld.org/docid/40276c634.html>.

<sup>135</sup> Cassese (1981), (n 129), at 425.

<sup>136</sup> R. Abi-Saab, ‘Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern’ in Astrid J. M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff, Dordrecht, 1991) 209, at 216; Green, (n 124), at 66-67.



criteria adopted by the Protocol set ‘a threshold that is so high in fact, that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government’.<sup>137</sup> Further, it was argued that the inclusion of such criteria in the Protocol represents a restatement of the traditional doctrine of belligerency.<sup>138</sup> Though the Protocol relied on the identities of the parties to the conflict to determine the scope of its application, this does not mean that the Protocol was based on the traditional concept of belligerency.

An examination of the content of each concept shows that they are not identical.<sup>139</sup> As clarified by Lootsteen, even though the criteria adopted under the Protocol exclude ‘mere civil unrest’, they require a lower threshold than ‘state to state warfare’.<sup>140</sup> More specifically, unlike the doctrine of belligerency, which requires the rebels to found some type of governmental or administrative authority in the controlled territory, the criteria adopted under the Protocol requires only military control over part of the national territory.<sup>141</sup>

In addition, although the drafting process of Article 1 (1) of the Protocol reflected a clear intention to restrict the scope of its implementation,<sup>142</sup> the narrow approach of the Article was proven to be compatible with the nature of rights and obligations regulated by the Protocol. The Additional Protocol requires all parties to undertake specific actions to fulfil their obligations. The fulfilment of the positive duties under the Protocol would require certain criteria to ensure the capability to undertake

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<sup>137</sup> Green, (n 124), at 66-67.

<sup>138</sup> G. H. Aldrich, ‘The Laws of War on Land’ (2000) 94 *The American Journal of International Law* 42; M. R. Rwelamira, ‘The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949’, in *Swinarisk*, at 234-235, cited in Cullen (2005), (n 94), at 96.

<sup>139</sup> See Cullen (2005), (n 94), at 96-97.

<sup>140</sup> Lootsteen, (n 57), at 130.

<sup>141</sup> *Ibid.*

<sup>142</sup> See *Commentary on the Additional Protocols*, (n 75), at 1349.

such obligations.<sup>143</sup> The adoption of such a criteria under Article 1 (1) was meant to strengthen the primary purpose initially stated in Common Article 3, which is to provide more effective protection for populations.<sup>144</sup> Hence, to further clarify what is meant by the concept of organised armed groups, the concept will be further evaluated under Common Article 3, and the way it was subsequently developed under international law will be discussed.

### **1.2.2.2 Common Article 3 and the Element of Organisation: The Subsequent Development of the Concept under the Jurisprudence of the ICTY and the Status of the ICC**

As mentioned, although Common Article 3 was fundamentally founded on the concept of humanitarian protection, it did not include a clear measure of the scope of its application.<sup>145</sup> The uncertainty caused by not defining non-international armed conflict for the purpose of implementing the Article is exacerbated by the absence of references to the potential parties to a non-international armed conflict.<sup>146</sup> More specifically, Common Article 3 neither defined the concept of non-international armed conflict nor readopted the traditional differences between the various categories of opposition groups as a basis of application.

Nevertheless, as asserted by Moir, although no criteria for armed conflicts were provided in the Geneva Conventions, it is understood that ‘a degree of organisation is required on the part of the insurgents before an internal conflict can be said to exist under common Article 3’.<sup>147</sup> A situation that involves ‘a random group of looters and

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<sup>143</sup> See Ronen, (n 4), at 21.

<sup>144</sup> See Green, (n 124), at 66.

<sup>145</sup> See *Commentary on the Geneva Conventions*, (n 76), at 35.

<sup>146</sup> Wilson (1988), (n 12), at 44.

<sup>147</sup> Moir, (n 78), at 36.

rioters' is not expected to attain the intensity normally required to constitute armed conflict.<sup>148</sup> Nonetheless, although it was accepted that a certain level of organisation ought to be achieved by the insurgents to fall within the scope of Common Article 3, there has been no consensus on what constitutes this organisation. In other words, apart from the logical requirement of fulfilling the obligations contained in the Article, there has been uncertainty regarding the criteria to be satisfied before a situation can be considered an armed conflict.<sup>149</sup>

Considering that Common Article 3 'focus[es] on obligations of abstention',<sup>150</sup> the fulfillment of these obligations could easily be achieved. It was contended that Common Article 3 would be applicable whether or not the insurgents exercised territorial control.<sup>151</sup> In other words, the objective approach as well as the nature of the Article suggests that the obligations imposed by the Article are applicable regardless of the status of the opposition groups.<sup>152</sup> Particularly in the last paragraph of the Article, this contention indicates the unwillingness of the drafters to distinguish between the various categories of opposition groups; however, further development emerged as to the element of organisation required for the implementation of Common Article 3 under the jurisprudence of some international tribunals.<sup>153</sup>

The element of organisation was advanced by these tribunals as one of two factors required for the implementation of Common Article 3 over internal armed conflicts.<sup>154</sup> In a more recent judgment, a Trial Chamber of the ICTY has made a

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<sup>148</sup> Moir, (n 78), at 36.

<sup>149</sup> See Ibid, at 36-37.

<sup>150</sup> Ronen, (n 4), at 26.

<sup>151</sup> Ibid.

<sup>152</sup> Wilson (1988), (n 12), at 44.

<sup>153</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (n 87), at para. 562; *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgment)*, (n 89), at para. 184.

<sup>154</sup> *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 70; *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (n 87), at para. 562.

significant contribution to what is meant by an organised armed group for the purpose of implementing Common Article 3.<sup>155</sup> It was argued that to achieve the required level of organisation, indications ought to exist to show that the armed group has a command structure.<sup>156</sup> Moreover, the command structure should reflect a certain ‘level of logistics’<sup>157</sup> and discipline that shows the ability of these groups to apply ‘the basic obligations of Common Article 3’,<sup>158</sup> suggesting that these armed groups are ‘able to speak with one voice’.<sup>159</sup>

It is noteworthy to mention that the efforts made by the ICTY to define the concept of organised armed groups for the purpose of implementing Common Article 3 were impacted by the increased concern regarding the concept of population protection. One of the justifications provided by the Appeal Chamber in the *Tadic* case was that ‘a State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach’.<sup>160</sup> The concept of organised armed groups was further advanced and developed under the ICC Statute.<sup>161</sup> The Statute partly reintroduced the *Tadic* formula.<sup>162</sup> The ICC Statute provides a lower threshold of a non-international armed conflict in comparison with the formula provided in Article 1 (1) of the Additional Protocol. It implies that an armed conflict may exist whether the armed

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<sup>155</sup> See *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 July 2008, at paras. 199- 203, available online at: <http://www.refworld.org/docid/48ac30e22.html>; *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, at paras. 51 & 60, available online at: <http://www.refworld.org/docid/48ac3cc82.html>.

<sup>156</sup> *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, (n 155), at para. 199; *Prosecutor v. Haradinaj et al. (Trial Judgment)*, (n 155), at para. 60.

<sup>157</sup> *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, (n 155), at para. 201.

<sup>158</sup> *Ibid.*, at para. 202; *Prosecutor v. Haradinaj et al. (Trial Judgment)*, (n 155), at para. 60.

<sup>159</sup> *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, (n 155), at para. 203; *Prosecutor v. Haradinaj et al. (Trial Judgment)*, (n 155), at para. 60.

<sup>160</sup> *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 97.

<sup>161</sup> See UNGA, *ICC Statute*, (n 106), at Art. 8 (2).

<sup>162</sup> See *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 70; Mastorodimos (2016), (n 102), at 24.

group exercises effective territorial control or not. It also seems to eliminate the requirement of the ability of the armed group to apply international humanitarian law.<sup>163</sup>

Article 8 (2) of the ICC Statute indicates that the only requirement is the element of organisation.<sup>164</sup> Nevertheless, as interpreted by an ICC Chamber,<sup>165</sup> the required element of organisation is satisfied as long as ‘...such groups acted under a responsible command and had an operative internal disciplinary system; and (ii) had the capacity to plan and carry out sustained and concerted military operations, insofar as they held control of parts of the territory of the Ituri District’.<sup>166</sup> Despite the fact that the statement made by the ICC Chamber suggests a high level of organisation, it is argued that as far as the implementation of Common Article 3 is concerned, ‘even a non-organized group can generate an internal armed conflict’;<sup>167</sup> however, this argument seems to surpass the prevailing view advanced by some scholars, as clarified above.

It is noteworthy to mention that the absence of any requirement of a sufficient organisation of the armed groups for the purpose of applying Common Article 3 was advanced by the UNSC and the Commission on Human Rights on various occasions.<sup>168</sup> Nevertheless, there are indications that the implementation of Common Article 3 despite the absence of a sufficient level of organisation of the armed groups was advanced by the UNSC in consideration of some exceptional circumstances.<sup>169</sup> One of

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<sup>163</sup> Cullen (2005), (n 94), at 104.

<sup>164</sup> See UNGA, *ICC Statute*, (n 106), at Art. 8 (2).

<sup>165</sup> See *Prosecutor v Katanga et al.* (Decision on the Conformation of Charges) ICC-01/04-01/07 (30 September 2008), at para. 239.

<sup>166</sup> *Ibid.*

<sup>167</sup> Mastorodimos (2016), (n 102), at 25.

<sup>168</sup> United Nations Security Council, *Security Council resolution 794 (1992) [Somalia]*, 3 December 1992, S/RES/794 (1992), at para. 4, available online at: <http://www.refworld.org/docid/3b00f21137.html>; United Nations Security Council, *Resolution 1772 (2007) The Situation in Somalia*, 20 August 2007, S/RES/1772 (2007), at para. 19, available online at: <http://www.refworld.org/docid/46cbdf692.html>; Mastorodimos (2016), (n 102), at 17.

<sup>169</sup> See United Nations Security Council, *Security Council resolution 814 (1993) [Somalia]*, 26 March 1993, S/RES/814 (1993), at para. 13, available online at: <http://www.refworld.org/docid/3b00f21143.html>; *UNSC Resolution 1772 (20 August 2007)*, (n 168), at para. 19.

these unique circumstances was observed in the UNSC reaction towards the Somalia situation.<sup>170</sup>

It was argued that Common Article 3 would be applicable despite the absence of any organisation of the armed groups in situations in which a central government was collapsed.<sup>171</sup> It was asserted that the implementation of IHL over such armed conflicts despite the absence of sufficient organisation of the armed groups could be, at least theoretically, understood for two reasons. First, the absence of effective control by the government suggests that the traditional concern for non-interference in the internal affairs of the state, which usually supports a high level of armed group organisation, would be less relevant.<sup>172</sup> Second, in a failed state's situation, the national legal order would be highly distracted to the extent that no effective human rights protection could exist; hence, the implementation of IHL over such low intensity conflicts could serve as a lower yet internationally accepted alternative.<sup>173</sup>

It is noteworthy to mention that although such an approach by the UNSC may indicate an evolving development in the field regarding the level of armed groups' organisation required for the implementation of the IHL,<sup>174</sup> it is argued that due to the lack of sufficient state practices in situations of failed states and armed groups, it is difficult to indicate the emergence of a new view in support of such a contention.<sup>175</sup> In relation to Somalia, for example, the UNSC itself repeatedly emphasised 'the

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<sup>170</sup> See *UNSC Resolution 794* (3 December 1992), (n 168).

<sup>171</sup> R. Geiss, 'Armed Violence in Fragile States: Low- Intensity Conflicts, Spill over Conflicts, and Sporadic Law Enforcement Operations by Third Parties' (2009) 91 *International Review of the Red Cross* 127, at 136.

<sup>172</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986, at para. 205, available online at: <http://www.refworld.org/docid/4023a44d2.html>; Geiss, (n 171), at 136.

<sup>173</sup> Geiss, (n 171), at 136- 137.

<sup>174</sup> See Mastorodimos (2016), (n 102), at 17-18.

<sup>175</sup> Geiss, (n 171), at 137.

extraordinary nature’ and ‘the unique character’ of the situation in Somalia.<sup>176</sup> Furthermore, in the *Boskoski* case, the ICTY Chamber asserted that ‘resolutions by the UN Security Council, and by States or their officials, are made on a political, not legal, basis, and cannot be directly interpreted as evidence of, or a legal interpretation of, a factual state of affairs, despite the fact that such resolutions may have legal consequences’.<sup>177</sup>

In summary, though the recent practice of the UNSC indicates that no level of sufficient organisation of the armed groups is required for the implementation of Common Article 3, the practice is based on a political rather than a legal basis. It is primarily related to unique and exceptional situations rather than establishing a principle. Apart from the UNSC practice, it is obvious that armed groups ought to maintain a sufficient level of organisation to implement IHL; however, the required level of organisation varies. It depends on the nature of obligations that an armed group ought to undertake. While the complaint regarding the advanced and positive obligations under the second Additional Protocol is that it requires a high level of armed groups’ organisation, the adherence to the obligations under Common Article 3 requires a lower level of organisation. Although there has been no explicit reference to the R2P regarding the required level of organisation of armed groups to implement the rules of

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<sup>176</sup> United Nations Security Council, *Security Council resolution 1816 (2008) [on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia]*, 2 June 2008, S/RES/1816 (2008), available online at: <http://www.refworld.org/docid/48464c622.html>; United Nations Security Council, *Security Council resolution 1846 (2008) [on repressing acts of piracy and armed robbery at sea off the coast of Somalia]*, 2 December 2008, S/RES/1846 (2008), available online at: <http://www.refworld.org/docid/493e3f852.html>; United Nations Security Council, *Security Council resolution 1851 (2008) [on fight against piracy and armed robbery at sea off the coast of Somalia]*, 16 December 2008, S/RES/1851 (2008), available online at: <http://www.refworld.org/docid/4952044e2.html>;

These resolutions are concerned with the issue related to the repression of piracy. Nonetheless, they emphasised on the unique nature of the situation in Somalia. For ex, in para. 10 of resolution 1851, it is affirmed that ‘the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law’.

<sup>177</sup> *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, (n 155), at para. 192.

IHL, the variety of the required levels of organisation based on the nature of the obligations indicates the role played by the concept of population protection in such a matter.



### **1.3 The Applicability of International Law and Armed Groups: To What Extent Armed Groups Could be Bound by IHL**

The aim of this section is to answer these questions. To do so, the section is divided into two parts. In part one, direct compliance with the obligations of IHL by armed groups is discussed, which basically refers to the acceptance of these rules by the armed groups by consent. In part two, the indirect compliance with the obligations of IHL by armed groups is evaluated. Under this part, five possible justifications are evaluated. First, the principle of legislative jurisdiction is discussed. Second, the effect of treaties on third parties is described. Third, the claim of the representation of the state is presented. Fourth, customary international law is examined, and fifth, the rules *jus cogens* is described.

#### **1.3.1 Direct Compliance with the Obligations of IHL by the Armed Groups**

Direct compliance with the obligations of IHL by organised armed groups refers to the volunteer acceptance of these rules by organised armed groups. Moreover, such an acceptance could be made in different forms. The compliance with the rules of IHL by armed groups can be achieved through mutual agreements.<sup>178</sup> The drafting of a special agreement is encouraged by Common Article 3, which states that ‘[t]he Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’.<sup>179</sup> Common Article 3 further indicates that the conclusion of such an agreement should be

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<sup>178</sup> M. Mack & J. Pejic, ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts’ (2008) *International Commission of the Red Cross*, at 15.

<sup>179</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (*First Geneva Convention*); Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (*Second Geneva Convention*), at Art. 3.

encouraged, whether between a state and an armed group or between several armed groups.<sup>180</sup>

Adherence to a special agreement between the state and an organised armed group could be facilitated by the fact that the implementation of Common Article 3 does not indicate any changes in the status of the parties to the conflict.<sup>181</sup> In other words, the host state may still enter into an agreement based on the application of common Article 3 without providing the armed group with any legal status.<sup>182</sup> Furthermore, since it is based on the consent of the parties involved, the content of a special agreement could be limited to specific rules regulating internal armed conflicts. It might also extend beyond the legal framework concerning internal armed conflict to include other rules related to international armed conflict and human rights.<sup>183</sup> In fact, being primarily concerned with the protection of civilians,<sup>184</sup> IHL is supposed to encourage the adoption of higher standards than those included under Common Article 3.<sup>185</sup>

These expanded agreements have been achieved in the past.<sup>186</sup> For example, after a notable role played by the ICRC as a third party, the parties involved in the conflict in the Republic of Bosnia and Herzegovina reached a special agreement,<sup>187</sup> which exceeded the standards usually applied to internal armed conflicts. Although the parties to the conflict based their agreement to apply IHL on Common Article 3, they included various other standards concerned with international armed conflicts.

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<sup>180</sup> *Second Geneva Convention*, (n 179), at Art. 3.

<sup>181</sup> See *Ibid.*

<sup>182</sup> Moir, (n 78), at 32; Castren, (n 44), at 85; See *Commentary on the Geneva Conventions*, (n 76), at 36.

<sup>183</sup> See Mack & Pejic, (n 178), at 16-17.

<sup>184</sup> See Lieblich, (n 5), at 84; Wilson (1988), (n 12), at 44.

<sup>185</sup> See *Prosecutor v. Dusko Tadic aka "Dule"* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), (n 19), at para. 73.

<sup>186</sup> See *Ibid.*

<sup>187</sup> Mack & Pejic, (n 178), at 17.

As stated by the ICTY, ‘this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only’.<sup>188</sup> In another agreement achieved in 1990 between the government of El Salvador and the *Frente Farabundo Mari para la Liberacion Nacional*, the parties to the internal armed conflict agreed to extend the scope of the agreement beyond the content of Common Article 3 to include a commitment to comply with the second Additional Protocol and certain principles of human rights.<sup>189</sup>

If such an agreement cannot be achieved between parties to internal armed conflicts, organised armed groups might still unilaterally commit themselves to implement certain rules of IHL.<sup>190</sup> Such unilateral declarations made by armed groups to comply with IHL, which could also be referred to as ‘declarations of intent’, have various advantages.<sup>191</sup> Although armed groups are already obliged to comply with the rules of IHL, a unilateral declaration made by an organised armed group could serve as an affirmative statement of compliance. Furthermore, despite the fact that armed groups may issue such a declaration for purely political purposes, it still provides a better chance for third parties to become involved.<sup>192</sup>

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<sup>188</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, (n 19), at para. 73.

<sup>189</sup> *San Jose Agreement on Human Rights*, U.N. Doc. No. A/44/971-S/21541, The United Nations and El Salvador 1990-1995, United Nations Blue Books Series, vol. IV. (New York: United Nations, Dept. of Public Information, 1995), at 108-109, also available online at: [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/pa\\_es\\_07261990\\_hr.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/pa_es_07261990_hr.pdf).

<sup>190</sup> Mack & Pejic, (n 178), at 19.

<sup>191</sup> *Improving Compliance with International Humanitarian Law*, International Commission of the Red Cross (ICRC), *Background Paper Prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law*, Cambridge, June 2004, at 6.

<sup>192</sup> Mack & Pejic, (n 178), at 19.

Armed groups could be further persuaded to adopt a code of conduct to establish a mechanism that facilitates adherence to the rules of international humanitarian law by members of their group.<sup>193</sup> Despite the fact that a code of conduct is less public by nature than the other methods mentioned, it is expected to lead to a more effective application of IHL.<sup>194</sup>

In fact, since unilateral declarations and codes of conduct may be issued unilaterally by opposition groups in the absence of the consent and involvement of the host state, third parties have more opportunities to participate not only in encouraging the adoption of these instruments but also in their effective implementation.<sup>195</sup> It has also been suggested that the involvement of a third party might ensure a reasonable balance between the opposition group's political motivations for agreeing to these instruments and the legal advantages of their application.

Third states could play a notable role in advancing the conclusion of such settlements. By exercising their political powers under the third pillar of the R2P<sup>196</sup> as well as the obligation 'to ensure respect' from common Article 1,<sup>197</sup> third states are expected to encourage the parties to internal armed conflict to comply with international humanitarian law by adopting a suitable mechanism. The role of third states fall within the peaceful methods mentioned paragraph 139 of the World Summit.<sup>198</sup> It states: '[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with

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<sup>193</sup> O. Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups*, (Small Arms Survey, Graduate Institute of International and Development Studies, Geneva, 2012), at 10.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Improving Compliance with International Humanitarian Law*, (n 191), at 6-7.

<sup>196</sup> See United Nations General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, at para. 139, available online at: <http://www.refworld.org/docid/44168a910.html>.

<sup>197</sup> *Second Geneva Convention*, (n 179), at Art. 3.

<sup>198</sup> World Summit Outcome, (n 196), at para. 139.

Chapters VI and VIII of the Charter, to help to protect populations' from being victims of genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>199</sup>

### **1.3.2 Indirect Compliance with the Obligations of IHL by the Armed Groups**

#### **1.3.2.1 Legislative Jurisdiction**

One of the most common justifications for why and how an organised armed group could be bound by the rules of IHL is based on the principle of legislative jurisdiction,<sup>200</sup> which could be defined as the power to create rules.<sup>201</sup> The principle of legislative jurisdiction basically means that armed groups are obligated to apply the concerned rules of IHL because the host state consented to do so.<sup>202</sup> The international rules could obtain their binding nature directly if they are contained in self-executing treaties or indirectly by being adopted in domestic laws.<sup>203</sup> Moreover, although the doctrine of legislative jurisdiction was advanced to bind armed groups by treaty law, it could still serve as a legal basis to obligate these groups to obey to CIHL.<sup>204</sup>

The primary advantage of implementing the principle of legislative jurisdiction to justify the binding nature of the rules of IHL to armed groups is its conclusive nature. It suggests that the involved organised armed groups would be obligated to apply all the rules of IHL that the host state agreed to, regardless of the armed group's consent.<sup>205</sup> Further, it serves as a legal basis to bind the armed groups to all the related rules of

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<sup>199</sup> World Summit Outcome, (n 196), at para. 139.

<sup>200</sup> See Moir, (n 78), at 53-54; S. Sivakumaran, 'Binding armed opposition groups', (2006) 55 *International and Comparative Law Quarterly* 369, at 381-393.

<sup>201</sup> I. Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edn (Oxford University Press, Oxford, 2008), at 299.

<sup>202</sup> J. K. Kleffner, 'the Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 *International Review of the Red Cross* 443, at 445.

<sup>203</sup> See Mastorodimos (2016), (n 102), at 79.

<sup>204</sup> Kleffner, (n 202), at 445.

<sup>205</sup> Sivakumaran, (n 200), at 382.

international law, such as IHRL and ICL, that the host state accepted being bound by.<sup>206</sup> Nevertheless, in practice, the implementation of the principle of legislative jurisdiction may not be as promising as it is supposed to be. It was contended<sup>207</sup> that the principle of legislative jurisdiction as a basis to bind organised armed groups by international rules finds indirect support in some of the provisions of the Ottawa Convention, the Convention on the Prohibition of the Development, Prohibition, Stockpiling and Use of Chemical Weapons and on Their Destruction.<sup>208</sup> Though there is no direct reference to armed groups in the Convention, Article 9 states that:

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.<sup>209</sup>

The UNSC in resolution 1379 encourages all parties to armed conflicts to respect:

the relevant provisions of applicable international law relating to the rights and protection of children in armed conflict, in particular the Geneva Conventions of 1949 and the obligations applicable to them under the Additional Protocols thereto of 1977, the United Nations Convention on the Rights of the Child of 1989, the Optional Protocol thereto of 25 May 2000, and the amended Protocol II to the Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, ...and the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction...<sup>210</sup>.

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<sup>206</sup> Kleffner, (n 202), at 445- 446.

<sup>207</sup> See Mastorodimos (2016), (n 102), at 79-80.

<sup>208</sup> United Nations, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997, available online at: <http://www.refworld.org/docid/3ae6b3ad0.html>; The Convention was concluded by the Diplomatic Conference on an International Total Ban on Anti-Personnel Land Mines at Oslo on 18 September 1997. In accordance with its Article 15, the Convention was opened for signature at Ottawa, Canada, by all States as of 3 December 1997. By resolution 52/38/A, the General Assembly of the United Nations welcomed the conclusion of the Convention at Oslo and requested the Secretary-General of the United Nations to render the necessary assistance and to provide such services as may be necessary to fulfil the tasks entrusted to him.

<sup>209</sup> Ibid, at Art. 9.

<sup>210</sup> United Nations Security Council, *Security Council resolution 1379 (2001) [on the protection of children in armed conflicts]*, 20 November 2001, S/RES/1379 (2001), at para. 8 (a), available online at: <http://www.refworld.org/docid/3c4e94561c.html>.

As argued by Maslen and Herby, although it is not widely accepted, it is indicated that some parties to the Ottawa Convention implicitly understood the provisions of the treaty to be applied to all parties to armed conflicts, including armed groups.<sup>211</sup> Nonetheless, such a contention does not seem to be recognised by the CIHL Study.<sup>212</sup> The CIHL study did not include any reference to armed groups as potential holders of the obligations under the Ottawa Convention.<sup>213</sup> Moreover, as Zegveld asserted, despite the fact that various IHL treaties apply obligations to all parties involved in armed conflicts, including armed groups, the Ottawa Convention exclusively binds states.<sup>214</sup> Nevertheless, although the absence of consent as a requirement to bind armed groups by the rules of IHL in accordance with the principle of legislative jurisdiction may theoretically expand the implementation of IHL, it still raises some practical issues.

One of the major problems that impacts the effective implementation of the principle of legislative jurisdiction is attributed to its nature. The principle of legislative jurisdiction suggests that it is founded on the active nationality jurisdiction rather than territoriality.<sup>215</sup> Furthermore, such an assertion would have a direct effect on the scope of the applicable rules of IHL over armed groups. It implies that the concerned rules of IHL would be exclusively applied to the members of the armed groups who carry the nationality of the host state;<sup>216</sup> however, as asserted by Sivakumaran, other members of the armed groups would still be bound by the rules of IHL as long as parent states are

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<sup>211</sup> S. Maslen & P. Herby, 'An International Ban on Anti-personnel Mines: History and Negotiation of the "Ottawa Treaty"' (1998) 38 *International Report of the Red Cross* 693, at 699.

<sup>212</sup> J. M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law: Rules, Vol. 1* (Cambridge University Press, Cambridge, 2005), 282.

<sup>213</sup> *Ibid.*, at 282-283.

<sup>214</sup> L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, Cambridge, 2002), at 177; See also, M. Sassoli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 *Yearbook of International Humanitarian Law* 45, at 63.

<sup>215</sup> Kleffner, (n 202), at 445- 448; Sivakumaran, (n 200), at 384-385.

<sup>216</sup> Kleffner, (n 202), at 445- 448.

members of the concerned IHL treaties.<sup>217</sup> Although such a finding helps reduce the gap that may result from the implementation of the legislative jurisdiction as a basis to bind organised armed groups, it still fails to justify why organised armed groups constituted as international belligerents from non-ratified states could be bound by the rules of IHL. Moreover, although such an argument does not raise legal issues regarding the implementation of Common Article 3, considering the fact that the Geneva Conventions are ratified by all states, it still raises concerns as to the other treaties, such as the second Additional Protocol.<sup>218</sup>

The other practical difficulty is related to the parties to the armed conflicts: the host state and the armed group. Regarding the host state, the principle of legislative jurisdiction would be deemed ineffective to bind an organised armed group in a situation in which the host state adopts a dualist system requiring the state to transfer its international obligations into domestic laws to bind its nationals.<sup>219</sup> Nevertheless, such a contention has a limited effect. Not only do many states adopt a monist approach,<sup>220</sup> but some of IHL treaties also contain self-executing Articles ensuring the direct application of their obligations domestically.<sup>221</sup> Regarding the armed group, it is highly doubtful that armed groups would actually accept applying the rules that the host state they are fighting against accepted. In this case, the implementation of the rules of IHL could be understood as an acceptance of the legitimacy of the government that the armed groups are fighting against.<sup>222</sup> Hence, the practical effectiveness of the principle of legislative jurisdiction could be questionable; however, although the legislative

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<sup>217</sup> Sivakumaran, (n 200), at 384-385.

<sup>218</sup> Kleffner, (n 202), at 445- 448.

<sup>219</sup> See Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009), at 28-29; Cassese (1981), (n 129), at 429.

<sup>220</sup> See J. Nijman and A. Nollkaemper, *New Perspectives on the Divide Between National and International Law*, (Oxford University Press, Oxford, 2007), at 380.

<sup>221</sup> Mastorodimos (2016), (n 102), at 81.

<sup>222</sup> Ibid.



jurisdiction may not be a satisfactory explanation for how the rules of IHL could bind organised armed groups for legal and practical matters, it is still one of the most common justifications.

### 1.3.2.2 The Effect of Treaties on Third Parties

The effect of treaties on third parties, as introduced by Cassese,<sup>223</sup> is primarily founded on Articles 34, 35 and 36 of VCLT.<sup>224</sup> Although Article 1 of VCLT explicitly limits its implementation to states,<sup>225</sup> Cassese based his argument on the assertion that the concerned Articles of VCLT are of a customary nature and that third parties are potential subjects of international law.<sup>226</sup>

In accordance with the Articles of VCLT, two conditions must be satisfied before third parties could be bound by a treaty's obligations. First, the intention of the contracting parties to bind third parties by the obligations of the concerned treaty must be proven.<sup>227</sup> Second, the concerned obligations must be accepted by third parties.<sup>228</sup>

Regarding the first requirement concerning the intention of the contracting states to bind armed groups, it is argued to be practically problematic to prove.<sup>229</sup> On various occasions, the intention of the contracting states could be indicated by the language used in the concerned instruments.<sup>230</sup> Common Article 3 contains a reference to 'each party to the conflict',<sup>231</sup> and the 1954 Hague Convention on Cultural Property and Amended Protocol II to the Convention on Certain Conventional Weapons

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<sup>223</sup> See Cassese (1981), (n 129), at 423.

<sup>224</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available online at: <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>225</sup> *Ibid.*, at Art. 1.

<sup>226</sup> See Cassese (1981), (n 129), at 423; See also, Moir, (n 78), at 53.

<sup>227</sup> *Vienna Convention on the Law of Treaties*, (n 224), at Arts. 35 & 36; Cassese (1981), (n 129), at 423; Sivakumaran, (n 200), at 378.

<sup>228</sup> *Vienna Convention on the Law of Treaties*, (n 224), at Art. 34; Cassese (1981), (n 129), at 423.

<sup>229</sup> See Sivakumaran, (n 200), at 378.

<sup>230</sup> See *Ibid.*

<sup>231</sup> Mastorodimos (2016), (n 102), at 82.

explicitly states that ‘each Party to the conflict shall be bound’ by the rules of the treaties. Though the reliance on the concerned texts may be sufficient to reflect the intention of the contracting states to bind organised armed groups, the issue is more difficult to resolve when applying the second Additional Protocol.<sup>232</sup> Nevertheless, Cassese provided three valid justifications to indicate the intention of the contracting parties regarding binding organised armed groups by the provisions of the second Additional Protocol.<sup>233</sup>

First, the intention of the contracting parties could be drawn from the relation between Common Article 3 and the second Additional Protocol. Under Article 1 (1), the drafters of the Additional Protocol explicitly confirmed the primary purpose of the instrument, which is to improve and supplement ‘Article 3 common to the Geneva Conventions...without modifying its existing conditions of application’. This means that ‘the effects of the two instruments are inseparably connected’.<sup>234</sup> Therefore, as long as an internal armed conflict occurs in a contracting party, both Common Article 3 and the second Additional Protocol would be applied to the organised armed group. The second justification to bind organised armed groups by the obligations of the second Additional Protocol is founded on the requirements provided under Article 1 (1) of the Protocol, which have been evaluated previously.<sup>235</sup> As further clarified by Cassese:

In short, the Protocol only begins to apply when rebels prove to be able to, and do in fact, implement it. This being so, it would plainly be absurd to contend that the rebels must comply with the Protocol, in order for it to become applicable, yet do not acquire any rights or duties. There would be no reason for insurgents to fulfil[l] the obligations deriving from the Protocol if they could not benefit from the rights it confers, once the

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<sup>232</sup> Cassese (1981), (n 129), at 423-424.

<sup>233</sup> See *Ibid*, at 424-425.

<sup>234</sup> *Ibid*, at 424.

<sup>235</sup> See *Additional Protocol II*, (n 13), Art. 1 (1).

Protocol becomes applicable as a result of their compliance...A contrary interpretation would render the whole Protocol nugatory.<sup>236</sup>

The third argument advanced by Cassese was based on Article 6 (5) of the Protocol.<sup>237</sup> According to the Article, ‘at the end of the hostilities the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained’.<sup>238</sup> The Article constitutes an obligation on ‘the authorities in power’, whether it is the host state or the organised armed group, in case they succeeded in overthrowing the government and gain power.<sup>239</sup> As further clarified by Cassese:

If this duty is made incumbent on the rebels once they seize power in the territory or in part of the territory, it is logical to maintain that the other rules of the Protocol also bind the rebels before that final moment. Otherwise one could reach the strange conclusion that the Protocol, while it does not grant any legal status to rebels, nevertheless takes them into account once they have attained power.<sup>240</sup>

It is also argued by Mastorodimos that the intention of the contracting parties to bind organised armed groups by the rules of the concerned IHL treaties could be founded on the object and purpose behind the drafting of these treaties, which is to provide sufficient protection of civilians.<sup>241</sup> Moreover, such an object would not be achieved unless all parties to the internal conflict, including the organised armed groups, adhere to the obligations of IHL treaties. More specifically, the intention of the contracting states to humanise the internal armed conflicts would not be recognised unless the involved organised armed groups have obligations in addition to the

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<sup>236</sup> Cassese (1981), (n129), at 424-425.

<sup>237</sup> See *Additional Protocol II*, (n 13), at Art. 6 (5).

<sup>238</sup> *Ibid.*

<sup>239</sup> Cassese (1981), (129), at 427.

<sup>240</sup> *Ibid.*

<sup>241</sup> Mastorodimos (2016), (n 102), at 83.

contracting states.<sup>242</sup> Moreover, such a contention finds further support after the adoption of the R2P. It is in the same line with the obligations under the first pillar of the R2P. As stated under Paragraph 138 of the World Summit:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.<sup>243</sup>

The obligation stated above is general. It requires the host state to undertake any steps necessary to provide the required level of protection. The acceptance of the host state to bind organised armed groups by IHL rules seems a basic step towards preventing the commitment of the four international crimes by these groups.

Regarding the second requirement, which is stated under Article 35 of VCLT concerning the acceptance of IHL obligations by the organised armed groups, the matter should be assessed on a case-by-case basis.<sup>244</sup> Moreover, the assent of the organised armed groups to be bound the rules of IHL could exist in various ways, such as ‘by a unilateral declaration addressed to the Government, by tacit compliance with the Protocol, by a request to the ICRC to intervene and guarantee respect for the Protocol, or by any other similar means’.<sup>245</sup> Organised armed groups are expected to accept adherence to certain rules of IHL to achieve specific purposes. The assent of these groups to fulfill IHL obligations could increase their political legitimacy. It may also encourage the host state to further respect IHL rules regarding the members of these organised armed groups.<sup>246</sup>

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<sup>242</sup> Mastorodimos (2016), (n 102), at 83.

<sup>243</sup> World Summit Outcome, (n 196), at para. 138.

<sup>244</sup> See Cassese (1981), (n 129), at 428.

<sup>245</sup> Ibid.

<sup>246</sup> Mastorodimos, (n 102), at 83.

Regarding the form that acceptance should take to produce its effects, the original Article adopted by ILC in 1966 considered implicit acceptance sufficient for the purpose of binding third parties;<sup>247</sup> however, Article 35 of VCLT affirmed that third parties must expressly accept to be bound by the concerned rules in writing.<sup>248</sup> Moreover, as contended by the ICTY Appeals Chamber in *Blaski*, the enactment of a domestic law by a third party in relation to the concerned international obligations satisfies the requirement of written acceptance provided under Article 35 of VCLT.<sup>249</sup> As Mastorodimos argued, such a contention could be applied to organised armed groups as third parties involved in internal armed conflicts. In other words, implicit written acceptance could be sufficient to bind these groups by the concerned rules of IHL;<sup>250</sup> however, although the effect of treaties on third parties could serve as a basis to justify binding organised armed groups by the rules of IHL to some extent, it still raises some issues regarding its effectiveness.

First of all, it should be emphasised that although such a justification was founded on the assertion that the concerned Articles of the VCLT<sup>251</sup> are of a customary nature and are applied to all third parties, including organised armed groups,<sup>252</sup> this contention is still uncertain.<sup>253</sup> Moreover, although if it could be proven that the content of these Articles could be implemented on a customary basis to states as third parties, it is still not established that a similar customary rule exists regarding non-state entities

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<sup>247</sup> United Nations General Assembly, *Report of the International Law Commission, Yearbook of the International Law Commission*, 23 July 1999, A/54/10, at Art. 31, available online at: <https://www.ilsa.org/jessup/jessup16/Batch%201/VCLT%201966%20commentary.pdf>.

<sup>248</sup> *Vienna Convention on the Law of Treaties*, (n 224), at Art. 35.

<sup>249</sup> *Prosecutor v. Blaskic* (Judgment on the Request of the Republic of Croatia for Review of the Decision on Trial Chamber II of 18 July 1997) ICTY-95-14 (29 October 1997), at para. 26, available online at: <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

<sup>250</sup> Mastorodimos (2016), (n 102), at 84.

<sup>251</sup> See *Vienna Convention on the Law of Treaties*, (n 224), at Arts. 34 & 36.

<sup>252</sup> Cassese (1981), (n 129), at 423.

<sup>253</sup> See A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2000), at 10.

such as third parties.<sup>254</sup> As Sivakumaran argued, '[t]he customary rule may be limited *ratione personae*'.<sup>255</sup>

Second, the argument advanced by Cassese in relation to the effect of treaties on third parties to bind organised armed groups was based on the contention that organised armed groups are subjects of international law.<sup>256</sup> Nonetheless, this assertion is not fully accepted.<sup>257</sup> As indicated in Common Article 3(4) and other IHL instruments, organised armed groups may carry certain obligations regardless of their status under international law.<sup>258</sup>

Third, although the effect of treaties on third parties is supposed to be considered an indirect tool to ensure compliance with the rules of IHL by organised armed groups, it is still conditioned on the acceptance of these groups.<sup>259</sup> Hence, the implementation of the rules of IHL by organised armed groups in accordance with the concept of the effect of treaties on third parties would be highly selective based on the willingness of these groups.<sup>260</sup> Thus, it could raise issues regarding the equality between states and organised armed groups as parties to internal armed conflicts.<sup>261</sup>

### **1.3.2.3 Claims of Representation of the State**

The third basis upon which organised armed groups could be bound by the rules of IHL is the claim of representation of the state. As argued in the commentary, '[i]f the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country'.<sup>262</sup> The claim of

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<sup>254</sup> Sivakumaran, (n 200), at 377.

<sup>255</sup> Ibid.

<sup>256</sup> See Cassese (1981), (n 129), at 423; See also, Moir, (n 78), at 53.

<sup>257</sup> Mastorodimos (2016), (n 102), at 83.

<sup>258</sup> See Ibid.

<sup>259</sup> *Vienna Convention on the Law of Treaties*, (n 224), at Art. 34; Cassese (1981), (n 129), at 423.

<sup>260</sup> Sivakumaran, (n 200), at 379.

<sup>261</sup> Mastorodimos (2016), (n 102), at 85.

<sup>262</sup> *Commentary on the Geneva Conventions*, (n 76), at 37; Moir, (n 78), at 55.

representation of the state does not only accord with the principle of representation required for statehood and the recognition of governments,<sup>263</sup> but it is also in line with the law of state responsibility as stated under Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts.<sup>264</sup>

One of the advantages of the implementation of this approach is that it found the binding nature of the rules of IHL on organised armed groups to be collective entities rather than individual entities. Therefore, it avoids the gaps that may result from applying the principle of legislative jurisdiction.<sup>265</sup> Nevertheless, the implementation of the claim of representation of the state provides a much higher threshold regarding the application of the rules of IHL by organised armed groups. More specifically, it requires that to bind organised armed groups by the related obligations of IHL, these groups must reach an advanced level of organisation that is not expected to be achieved at an early stage of the internal conflict.<sup>266</sup> It suggests that before armed groups were bound by the rules of IHL, they must have achieved a *de facto* governmental organisation indicating their intention to become the new government of the state.<sup>267</sup> Hence, such a justification would not be sufficient to ensure effective application of the rules of IHL throughout the conflict.

It would also be problematic if the organised armed group aims to establish a new state in the controlled territory rather than substituting the current government. In this case, it would be difficult to bind these groups by the rules of IHL in accordance with this justification.<sup>268</sup> Nevertheless, although it is generally accepted that

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<sup>263</sup> See Kleffner, (n 202), at 451.

<sup>264</sup> United Nations General Assembly Resolution 56/83, *the Articles on Responsibility of States for Internationally Wrongful Acts* (2001), 12 December 2001, at Art. 10 (1) & (2).

<sup>265</sup> Kleffner, (n 202), at 452.

<sup>266</sup> See Zegveld, (n 214), at 15.

<sup>267</sup> Kleffner, (n 202), at 452.

<sup>268</sup> Moir, (n 78), at 55-56.

international treaties bind states from their creation, this does not apply to treaties related to IHL or IHRL.<sup>269</sup>

It is also argued that the claim of representation of the state would have limited affects as a basis to bind armed groups if these groups claim to represent specific ethnic groups rather than representing the state.<sup>270</sup> Although this limited representation still justifies the implementation of the claim of the representation of the state as a basis to bind the armed groups, it still raises issues regarding the status of the armed group under international law.<sup>271</sup>

Similar to the objection made against the legislative jurisdiction, it is asserted that even in a case in which an armed group claims to represent the state as a whole, the group may still reject adherence to IHL treaties that the host state they are fighting against accepted; however, this argument could be countered on two bases. First, unlike the principle of legislative jurisdiction, the claim of representation of the state ‘focus[s] on the present factual circumstances and the position to which an organized armed group aspires in the future’.<sup>272</sup> Accordingly, it would be highly doubtful that organised armed groups would refuse to adhere to the concerned IHL rules. It is to the advantage of these groups to adhere to the related rules of IHL. It helps organised armed group ‘to recognize its independent responsibilities as an entity that resembles a government and aspires to represent the state in the future’.<sup>273</sup>

Second, the claim of state representation suggests that the organised armed group exercises ‘*de facto* governmental functions proceeds bottom-up...[r]ather than

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<sup>269</sup> See *Prosecutor v. Delalic* (Appeals Judgment) ICTY-96-21 (20 February 2001), at para. 111, available online at: <http://www.icty.org/x/cases/mucic/acjug/en/ce1-aj010220.pdf>; See also, M. T. Kamminga, ‘State Succession in Respect of Human Rights Treaties’ (1996) 7 *European Journal of International Law* 469.

<sup>270</sup> Mastorodimos (2016), (n 102), at 87.

<sup>271</sup> Ibid.

<sup>272</sup> Kleffner, (n 202), at 453.

<sup>273</sup> Ibid.



starting with the state against whom an organized armed group is fighting'.<sup>274</sup> It is expected that an armed group that achieved such an advanced level of structural organisation and has the intention to become the new government of the state would adhere to the rules of IHL. Compliance with the rules of IHL by the organised armed group in this situation could reflect the concern of these groups regarding 'their legitimacy in the eyes of other states and the international community at large'.<sup>275</sup>

It has been indicated that the link between the political legitimacy of the organised armed group and the binding nature of IHL rules in accordance with the claim of the representation of the state gained further support after the adoption of the R2P.<sup>276</sup> Various criticisms were made of the Libyan and Syrian opposition groups for not being able or willing to respect IHL during the hostilities.<sup>277</sup> Also, although no reference to an organised armed group/opposition groups was made in the framework that regulates the concept of the R2P, the international reactions to the Libyan and Syrian conflicts suggested the emergence of a new trend towards recognising opposition groups as the legitimate representative of the people. As will be discussed in chapter three, even though this recognition is purely political, it still produces rights and obligations.<sup>278</sup> It could also be considered a step towards international recognition of the armed group as

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<sup>274</sup> Kleffner, (n 202), at 453.

<sup>275</sup> Ibid, at 452-523.

<sup>276</sup> See US State Department, Daily Press Briefing, 12 December 2012, available online at: <http://www.state.gov/r/pa/prs/dpb/2012/12/201930.htm#SYRIA>; S. Talmon, 'Recognition of the Libyan National Transitional Council' (2011) 15 (16) *American Society of International Law: Insight*. Available online at: <http://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council>.

<sup>277</sup> See United Nations Office of the High Commissioner for Human Rights, Independent International Commission of Inquiry on the Syrian Arab Republic established pursuant to United Nations Human Rights Council Resolutions S-17/1, 19/22 and 21/26, Periodic Update, 20 December 2012, at para. 17; See Populations at Risk: Current Crisis, *Global Center for the Responsibility to Protect*, available online at: <http://www.globalr2p.org/regions/syria>; O. Corten & V. Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of *jus contra bellum* and *jus in bello*' (2013) 18 *Journal of Conflicts & Security Law* 59, at 62.

<sup>278</sup> See Talmon (2011), (n 276).

the new government.<sup>279</sup> Hence, it is to the advantage of the armed group to comply with the rules of IHL in accordance with the approach of the claim of the representation of the state to gain further legitimacy and to advance the process of its recognition.

In summary, although it has been indicated that the claim of state representation gained further support after the adoption of the R2P, it is still not sufficient in itself to ensure the effective application of IHL by organised armed groups. It not only limits the implementation of IHL to a certain stage of the armed conflict, but it also requires a very advanced level of organisation for the opposition group.

#### **1.3.2.4 Customary International Law**

One of the most effective justifications to bind organised armed groups by IHL is found in the customary nature of IHL. It is based on the assertion that organised armed groups have a legal personality as subject to international law; therefore, they are bound by customary international law. Although it is internationally accepted that NLMs, and to some extent, *de facto*, entities have temporary and limited legal personality, the matter becomes much more controversial regarding organised armed groups in relation to Common Article 3.<sup>280</sup> Nonetheless, it is generally accepted that in some cases, armed groups with no status could still be bound by certain rules of customary IHL.<sup>281</sup>

As advanced by the Darfur Commission of Inquiry, ‘all insurgents that have reached a certain threshold of organization, stability and effective control of territory,

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<sup>279</sup> See US State Department, Daily Press Briefing, (n 276); See also, US Senate, Committee on Foreign Relations, Libya and War Powers, Hearing, S. Hrg. 112-89, 28 June 2011, at 39, available online at [http://fas.org/irp/congress/2011\\_hr/libya.pdf](http://fas.org/irp/congress/2011_hr/libya.pdf).

<sup>280</sup> Mastorodimos (2016), (n 102), at 89.

<sup>281</sup> W. Walker, ‘the International Law Applicable to Guerrilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives’ (1988) 21 *New York Journal of International Law and Policy* 147, at 154.

possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts'.<sup>282</sup> This statement suggests that armed groups have to achieve a certain level of organisation to obtain the legal personality that allows them to obtain rights and carry duties under IHL. In other words, it indicates that although they are parties to internal armed conflicts, some armed groups may not be bound by certain rules of IHL.

Another issue raised by some commentators<sup>283</sup> is related to whether organised armed groups could participate in the creation of CIHL. Although it is controversial, this issue was addressed by the ICTY.<sup>284</sup> In accordance with the ICTY Appeal Chamber in the *Tadic* case, the practice of armed groups involved in internal armed conflict may contribute to the creation of customary IHL.<sup>285</sup> Nevertheless, this contention was rejected by the ICRC study.<sup>286</sup> Though it is uncertain whether organised armed groups could participate in the foundation of CIHL, it is clear that these groups are bound by these rules. The reliance on the international legal personality to bind organised armed groups by the rules of IHL has significant advantages.

Regarding the advantages of binding organised armed groups by IHL based on its customary nature, two main arguments could be advanced. First, the CIHL approach binds organised armed groups by the concerned rules of IHL as almost an independent entity from the states they are fighting against. Unlike the principle of legislative

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<sup>282</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, at para. 172, available online at: [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

<sup>283</sup> See C. C. Emanuelli, 'Comments on the ICRC Study on Customary International Humanitarian Law' (2006) 44 *Canadian Yearbook of International Law* 437, at 444; See also, M. H. Hoffman, 'the Application of International Humanitarian Law in Sri Lanka: A Compliance Based Case Study on the Rules of War' (2001) 30 *Israel Yearbook of Human Rights* 209.

<sup>284</sup> See *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 102.

<sup>285</sup> *Ibid.*

<sup>286</sup> J. M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (ICRC and Cambridge University Press, Cambridge, 2005), at XXXVI.

jurisdiction, this approach does not base the binding nature of IHL rules on the acceptance of the states. Instead, it is the international society as a whole that binds these groups.<sup>287</sup> Moreover, this assertion strengthens compliance with the obligations of IHL by the armed groups; however, as argued by Kleffner, 'it needs to be acknowledged that the argument does not entirely detach the construction of the binding force of IHL on organized armed group from states'.<sup>288</sup> Second, in contrast to the principle of legislative jurisdiction, the reliance on the legal personality of organised armed groups to bind them by customary IHL deals with these groups as a collective entity rather than individuals.<sup>289</sup>

It is noteworthy to mention that despite the advantages of applying this approach to bind organised armed groups, it still suffers from certain disadvantages. There are two main arguments that could be made against the reliance on the legal personality of the armed groups to bind them by customary IHL. First, the implementation of this approach may raise objections by states because the reliance on the legal personality to bind them by customary IHL indicates the acceptance of the legitimacy of these groups;<sup>290</sup> however, as asserted by Kleffner, this argument cannot be fully accepted because 'it confuses personality with legitimacy. The fact that a given entity enjoys certain rights under international law and is subject to certain obligations does not necessarily confer legitimacy on that entity. Indeed, even states as the undisputed and only primary subjects of international law are not necessarily legitimate'.<sup>291</sup> Second, the reliance on this approach to bind organised groups by IHL raises issues related to the equality of the concerned state regarding the applicable rules of IHL to internal

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<sup>287</sup> Kleffner, (n 202), at 454.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid, at 455; Mastorodimos (2016), (n 102), at 92.

<sup>290</sup> Kleffner, (n 202), at 455.

<sup>291</sup> Ibid.

armed conflicts. While states would be bound by treaty and CIHL, organised armed groups would be only bound by CIHL.<sup>292</sup>

### 1.3.2.5 *Jus Cogens* Rules

*Jus Cogens* rules are also referred to as peremptory norms of international law. As defined under Article 53 of VCLT, *jus cogens* ‘is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.<sup>293</sup> These rules are superior and considered to be higher than any other rules of international law. They could be of a treaty or customary nature.<sup>294</sup> Moreover, due to their fundamental nature, *jus cogens* rules apply to states as well as non-state actors.<sup>295</sup> It is argued that organised armed groups are bound by the rules of *jus cogens* regardless their status under international law. They are bound by these peremptory rules as individuals rather than as collective entities.<sup>296</sup>

It is well established that many principles of IHL have the status of *jus cogens*; therefore, they are applied to all parties to armed conflicts including armed groups. In its Advisory Opinion as to the Legality of the Threat or Use of Nuclear Weapons, the ICJ considered the principle of distinction between combatants and non-combatants, and the principle that prohibits the use of weapons with indiscriminate effects and those

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<sup>292</sup> Mastorodimos (2016), (n 102), at 92.

<sup>293</sup> *Vienna Convention on the Law of Treaties*, (n 224), at Art. 53.

<sup>294</sup> K. Hossain, ‘the Concept of Jus Cogens and the Obligation under the UN Charter’ (2005) 3 *Santa Clara Journal of International Law* 72, at 73.

<sup>295</sup> Mastorodimos (2016), (n 102), at 92.

<sup>296</sup> See S. Miyazaki, ‘the Application of the new International Humanitarian Law’ (1988) 20 *International Review of the Red Cross* 184, at 188; R. Provost, *International Human Rights and International Humanitarian Law* (Cambridge University Press, Cambridge, 2002), at 150.

causing unnecessary harm as ‘cardinal principles ...constituting the fabric of humanitarian law’.<sup>297</sup>

Moreover, as stated by the Turkish National Commission of Inquiry in its report as to the Israeli attack on the humanitarian aid convey to Gaza, the principle of distinction ‘goes beyond simply reflecting customary international law but constitutes *jus cogens*’.<sup>298</sup> Furthermore, many international crimes that could be committed during internal armed conflicts such as torture,<sup>299</sup> genocide,<sup>300</sup> and crimes against humanity<sup>301</sup> have the status of *jus cogens*; therefore, the prohibition of committing them apply equally to states as well as armed groups.

The reliance on the rules of *jus cogens* to bind armed groups by IHL is effective in general for few reasons. First, it binds armed groups as individuals regardless the status of these groups. Second, it attracts international responsibility which enhance the compliance by these groups.<sup>302</sup> However, this approach still raises some problems. First, this approach has limited applicability due to the fact that not all IHL rules have the status of *jus cogens*. Second, it does not explain how the armed groups are bound by these rules before they qualify as *jus cogens*.<sup>303</sup> However, after the adoption of the R2P, the implementation seems to have a wider and more effective application.

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<sup>297</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, at para. 78, available online at: <http://www.refworld.org/docid/4b2913d62.html>.

<sup>298</sup> The Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convey to Gaza on 31 May 2010, at 83-84, available online at: <http://www.mfa.gov.tr/data/turkish%20report%20final%20-%20un%20copy.pdf>.

<sup>299</sup> See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, at para. 466, available online at: <http://www.refworld.org/docid/3ae6b7560.html>; see also, *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgment)*, (n 89), at para. 454.

<sup>300</sup> See *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice (ICJ), 28 May 1951, at 23; see also, T. Meron, ‘International Criminalization of Internal Atrocities’, (1995) 89 *American Journal of International Law* 554, at 556.

<sup>301</sup> See *Prosecutor v. Kupreskic et al. (Trial Judgment)*, (n 155), at para. 520.

<sup>302</sup> Mastorodimos (2016), (n 102), at 94.

<sup>303</sup> *Ibid.*

The World Summit limited the scope of the R2P to four commonly recognized international crimes under international law, genocide, crimes against humanity, war crimes and ethnic cleansing.<sup>304</sup> It considered the commitment of these international crimes as violation of *jus cogens*.<sup>305</sup> Thus, the R2P does not only add ethnic cleansing as a separate international crimes to the potential violation of *jus cogens*, but it also considers any serious violations of IHL constituting international crimes as a breach of *jus cogens*.

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<sup>304</sup> See World Summit Outcome, (n 196), at paras. 138-139.

<sup>305</sup> See C. G. Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, Oxon, 2011), at 131.

## **1.4 The Concept of Organised Armed Groups and the Concept of the R2P**

This section is related to the definition of organised armed groups and the concept of the R2P. It is divided into two parts. In the first part, theoretical evaluation as to the definition of organised armed groups with the concept of the R2P is conducted. In the second part, the concept of organised armed groups and the concept of the R2P in state practice is addressed, where direct references to the Libyan and Syrian armed groups are made.

### **1.4.1 A Theoretical Analysis**

As clarified previously, the framework of the R2P has no reference to armed groups as parties to internal armed conflicts. Hence, it is not possible to explicitly deduce a definition of the concept of organised armed groups from this framework. It is also uncontested that there is insufficient state practice regarding the implementation of the R2P. Therefore, state practice cannot be ultimately relied upon to trace any development in this regard. However, this does not mean that the concept of the R2P does not recognise the importance of the concept of organised armed groups in relation to civilian protection. In fact, the significance of the concept of organised armed groups on the implementation of the R2P in internal armed conflicts could be still implicitly deduced from the elements constituting the concept of the R2P and the policy behind its adoption.

Efforts towards expanding and developing the definition of the concept of organised armed groups were advanced under the jurisprudence of international tribunals in the 1990s. One of the justifications provided by the Appeal Chamber in the *Tadic* case for expanding the definition was to enhance the level of protection provided



to civilian populations during internal armed conflicts.<sup>306</sup> It further added that ‘a [s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach’.<sup>307</sup> This assertion aligns with the approach of the R2P.

The main objective behind the adoption of the R2P is to ensure that civilians are protected better and more effectively during internal armed conflicts. To achieve this primary objective, the R2P reinterpreted the notion of sovereignty, introducing it as responsibility.<sup>308</sup> The concept of sovereignty as responsibility has a humanitarian basis. It primarily aims to restrict the authorities of the parent state.<sup>309</sup> It conditions the exercise of sovereignty by states on the fulfilment of certain obligations related to their responsibility to protect civilians.<sup>310</sup>

In the 2005 World Summit outcome document, which is considered to be the most notable normative development of the R2P, the concept of sovereignty as responsibility was introduced as the cornerstone of the concept of the R2P.<sup>311</sup> In paragraph 138, the report imposed a responsibility upon states to protect their citizens from ‘genocide, war crimes, ethnic cleansing and crimes against humanity’. It also encouraged the international community to help ‘states to exercise this responsibility and support the United Nations in establishing an early warning capacity’.<sup>312</sup>

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<sup>306</sup> See *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (n 19), at para. 97.

<sup>307</sup> *Ibid.*

<sup>308</sup> See World Summit Outcome, (n 196), at paras. 138-139; W. W. Burke-White, ‘Adoption of the Responsibility to Protect’, in J Genser & I Cotler (eds.), *the Responsibility to Protect the Promise of Stopping Mass Atrocities in our Time* (Oxford University Press, New York, 2012), at 21.

<sup>309</sup> See World Summit Outcome, (n 196), at para 138; see D. Aronofsky, ‘The International Legal Responsibility to Protect against Genocide, War Crimes and Crimes against Humanity: Why National Sovereignty Does Not Preclude its Exercise’ (2007) 13 *ILSA Journal of International & Comparative Law* 317, at 318.

<sup>310</sup> Burke-White, (n 308), at 21; Aronofsky, (n 309), at 317; C. C. Joyner, ‘The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention’ (2007) 47 *Virginia Journal of International Law* 693, 718-720.

<sup>311</sup> Badescu, (n 305), at 7.

<sup>312</sup> World Summit Outcome, (n 196), at para 138.

In the context of internal armed conflicts, it is possible that the government may not be able to effectively control the state territory. Being the primary objective of the concept of the R2P, civilians ought to be protected by all parties throughout the occurrence of hostilities. The UNSG clarified that the concept of the protection of civilians aims to help all the concerned parties to ‘understand how their responsibilities for the protection of civilians should be translated into action’.<sup>313</sup> In the context of internal armed conflicts, it is highly expected that armed groups would take control over a significant part of the territory.

The control of some populated areas by armed groups indicates that the host state has already lost actual and effective control over these parts of the territory; therefore, it could not be responsible for failing to fulfil its responsibilities under the first pillar of the R2P.<sup>314</sup> Moreover, in order to preserve the required level of civilian protection, the authorities of the host state might have to be substituted by another entity with the capacity to fulfil the responsibilities as required by the R2P. This entity could be the armed group. The expert conference held in 2011, which was co-organised by the IDMC and Geneva Call based in Geneva, concluded that organised armed groups could play a role in protecting civilians ‘where the State is unable or unwilling to do so’.<sup>315</sup> In fact, the transfer of these responsibilities to armed groups could serve as a measure to prevent the violation of *jus cogens* by these groups.

The significance of considering armed groups for the implementation of the R2P is more apparent when the host state is the perpetrator of the violation of *jus cogens*

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<sup>313</sup> Report of the Security General on the Protection of Civilians in Armed Conflict (2005) UN Doc S/2005/740, 15, at para. 53.

<sup>314</sup> See World Summit Outcome, (n 196), at para 138; Burke-White, (n 308), at 21; L. Axworthy, ‘R to P and the Evolution of State Sovereignty’, in J Genser & I Cotler (eds.), *the Responsibility to Protect the Promise of Stopping Mass Atrocities in our Time* (Oxford University Press, New York, 2012), at 13.

<sup>315</sup> *Internal Displacement Monitoring Centre, Armed Non-State Actors and the Protection of Internally Displaced People*, June 2011, at 4.

against its population. In this case, as mentioned above, the host state would be considered unwilling to fulfil its mandates under the first pillar;<sup>316</sup> therefore, the responsibility to protect would be transferred to a third party with the capacity to do so.<sup>317</sup> This third party could be the armed group involved as long as it has the required capacity to protect as defined under IHL.

The potential development of the level of organisation required to be maintained within armed groups after the adoption of the concept of the R2P could be linked to the scope of the concept as introduced in the 2005 World Summit.<sup>318</sup> The World Summit limited the scope of the R2P to four commonly recognised international crimes under international law: genocide, crimes against humanity, war crimes and ethnic cleansing.<sup>319</sup> It considered the commitment of these types of international crimes as a violation of *jus cogens*.<sup>320</sup> The reliance on the rules of *jus cogens* to bind armed groups by IHL implies that armed groups would be bound as individuals regardless of their status. It also attracts international responsibility, which enhances the compliance of these groups.<sup>321</sup> Thus, in accordance with the concept of the R2P, armed groups are obligated to not commit any violation of *jus cogens* regardless of the level of organisation maintained. Therefore, the implementation of the R2P enhances the level of protection provided to civilians by lowering the level of organisation required to bind armed groups by IHL. However, this approach was criticised due to its restrictive scope.<sup>322</sup>

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<sup>316</sup> See World Summit Outcome, (n 196), at para 138.

<sup>317</sup> See Ibid, at para 139.

<sup>318</sup> See Ibid, at paras. 138-139; Axworthy, (n 314), at 8.

<sup>319</sup> See World Summit Outcome, (n 196), at para 138-139; Aronofsky, (n 309), at 317.

<sup>320</sup> See Badescu, (n 305), at 131.

<sup>321</sup> Mastorodimos (2016), (n 102), at 94.

<sup>322</sup> Ibid.

In fact, not all IHL rules have the status of *jus cogens*.<sup>323</sup> As a result, if this approach were adopted, it would have a limited impact and would restrict the application of IHL by armed groups to selective rules.<sup>324</sup> Nevertheless, this contention does not adequately consider why the concept of the R2P was created and how it works.<sup>325</sup> Although no direct reference was made to the dimensions of the R2P in the World Summit and the subsequent documents, it is agreed that the R2P constitutes three dimensions: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.<sup>326</sup> Moreover, although the responsibility to prevent was argued to have been highly neglected, this dimension of the R2P is still the most significant.<sup>327</sup>

The responsibility to prevent, as defined by Strauss, refers to the prevention of the ‘root causes of the [four international] crimes’, which form the scope of the R2P.<sup>328</sup> This means that the concerned party is responsible for preventing the emergence of ‘situations of massive and serious violations of human rights or humanitarian law’ that could lead to the violation of *jus cogens*.<sup>329</sup> Thus, the implementation of this preventive measure requires adherence to various rules of IHL and IHRL. Organised armed groups would be obligated not only to respect and apply their obligations under Common Article 3<sup>330</sup> and the second Additional Protocol,<sup>331</sup> if applicable, but also to ensure compliance with certain rules of IHRL. In other words, the concept of the R2P intends

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<sup>323</sup> Mastorodimos (2016), (n 102), at 94.

<sup>324</sup> Ibid.

<sup>325</sup> See E. Strauss, *The Emperor’s New Clothes?: The United Nations and the Implementation of the Responsibility to Protect* (Nomos, Baden-Baden, 2009), at 25-36.

<sup>326</sup> Ibid, at 26.

<sup>327</sup> R. Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University, Cambridge, 2006), at 257; A. J. Bellamy, ‘Conflict Prevention and the Responsibility to Protect’ (2008) 14 (2) *Global Governance* 135, at 135; R. Salk, ‘Strengthening the Responsibility to Prevent: Reforming the United Nations’ Genocide and Mass Atrocity Prevention Efforts Through Emphasis on Rules of Law’ (2015) 46 *Georgetown Journal of International Law* 561, at 572.

<sup>328</sup> Strauss, (n 325), at 27.

<sup>329</sup> Ibid, at 28-29.

<sup>330</sup> See *Third Geneva Convention*, (n 11), at Art. 3.

<sup>331</sup> See *Additional Protocol II*, (n 13).

to ensure a more effective compliance with the rules of IHL as well as to affirm and strengthen the complementary nature of the relationship between IHL and IHRL in the context of an internal armed conflict.<sup>332</sup> Indeed, that each of these crimes covers various types of violations is a firmly established fact.<sup>333</sup>

The reliance on *jus cogens* is argued to be a basis for binding armed groups and expanding the scope of obligations beyond IHL to include some fundamental principles of IHRL that bind all the subjects of international law.<sup>334</sup> The Commission of Inquiry on Syria asserted that ‘at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind States, individual, non-State collective entities, including armed groups’.<sup>335</sup> Further, the United Nations Mission to the Republic of South Sudan mentioned the following:

The most basic human rights obligations, in particular those emanating from peremptory international law (*ius cogens*) bind both the State and armed opposition groups in times of peace and during armed conflict. In particular, international human rights law requires States, armed groups and others to respect the prohibitions of extrajudicial killing, maiming, torture, cruel inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict-related sexual violence, sexual and other forms of slavery, the recruitment and use of children in hostilities, arbitrary detention as well as of any violations that amount to war crimes, crimes against humanity, or genocide.<sup>336</sup>

Although the approach adopted under the R2P binds members of armed groups, as individuals, in accordance with *jus cogens* norms under IHL and IHRL regardless of

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<sup>332</sup> See K. Fortin, *The Accountability of Armed Groups under Human Rights* (Oxford University Press, Oxford, 2017), at 21-23.

<sup>333</sup> See UNGA, *ICC Statute*, (n 106), Arts. 6, 7 & 8; See also, A Cassese, *International Criminal Law*, 2<sup>nd</sup> edn (Oxford University Press, Oxford, 2008), at 81-147.

<sup>334</sup> Fortin, (n 332), at 20.

<sup>335</sup> United Nations Human Rights Council (UNHRC), ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (16 August 2012) UN Doc A/HRC/21/50.

<sup>336</sup> United Nations Mission (UNMISS), ‘Conflict in South Sudan, A Human Rights Report’ (8 May 2014), at para. 18, available online at:

<https://reliefweb.int/sites/reliefweb.int/files/resources/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf>.

the level of organisation enjoyed by these groups, it still has a limited impact as a protective tool. This suggests that it imposes a negative rather than positive duty on each individual to refrain from committing acts that violate the norms of *jus cogens*. Nonetheless, it does not justify how an armed group, as a whole, could take collective action to prevent the existence of such violations. In fact, recent debates and reports have suggested that the level of organisation maintained by armed groups is necessary not only for the application of IHL but also IHRL.<sup>337</sup>

It was asserted that ‘the application of human rights standards to non-State actors is particularly relevant in situations where they exercise some degree of control over a given territory and population’.<sup>338</sup> Further, as observed by the special Rapporteur Alston, ‘it is especially appropriate and feasible to call for an armed group to respect human rights norms “when it exercises significant control over territory and population and has an identifiable political structure”’.<sup>339</sup>

#### 1.4.2 State Practice

Even though there is still insufficient state practice with respect to the definition of organised armed groups under the concept of the R2P, some indications in relation to the importance of organised armed groups as to the application of the R2P could be deduced from the Libyan and Syrian conflicts. Moreover, since the assessment of the concept of organised armed groups following the adoption of the R2P will be primarily based on the states’ response towards the Libyan and Syrian crises, it is essential to

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<sup>337</sup> Fortin, (n 332), at 19.

<sup>338</sup> OHCHR, *International Protection of Human Rights in Armed Conflict* (UN New York, Geneva, 2011) at 25, available online at: [http://www.ohchr.org/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf).

<sup>339</sup> OHCHR, ‘Report on the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Sri Lanka’ (27 March 2006) UN Doc E/CN.4/2006/53/Add.5, at para. 26, available online at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G06/121/17/PDF/G0612117.pdf?OpenElement>.

provide a brief background describing how these groups progressed. The evaluation of the status of the Libyan and Syrian armed groups will be founded on the established principles of IHL, as discussed in the previous sections.

#### 1.4.2.1 The Libyan Armed Groups and the Element of Organisation

The international response to the Libyan conflict considered a successful implementation of the R2P. The concept of the R2P was explicitly stated in UNSC resolution 1970.<sup>340</sup> The states' reaction to the conflict was argued to be speedy and fruitful. The Libyan armed groups received significant international support, whether it was political, financial or military in nature.<sup>341</sup>

Without ignoring the significance of the political considerations of third state parties,<sup>342</sup> the high level of organisation achieved by the Libyan armed groups was one of the primary factors leading to such consequences.<sup>343</sup> In other words, despite the fact that the political harmony among third states, and most importantly the permeant five members in the UNSC was the key element leading to the effective international action to protect the Libyan population,<sup>344</sup> the status of the Libyan opposition groups was highly considered by the international community. Yet, the Libyan armed groups had

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<sup>340</sup> See UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, 26 February 2011, S/RES/1970 (2011), available online at: <http://www.refworld.org/docid/4d6ce9742.html>.

<sup>341</sup> See UNSC Verbatim Record (25 February 2011) UN Doc S/pv/6491,7, available online at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%20PV%206491.pdf>; D Akande, 'Does SC Resolution 1973 Permits Coalition Military Support for the Libyan Rebels?' (2011) *European Journal of International Law: Talk!*, comment 6, available online at: <http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/>; P. Thielborger, 'the Status and Further of International Law after the Libyan Intervention' (2012) 4 *Goettingen Journal of International Law* 11, at 20; O. Corten, *The Law Against War: the Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing Ltd, Oxford, 2010), at 312.

<sup>342</sup> See O. Corten & V. Koutroulis, 'the Illegality of Military Support to Rebels in the Libyan War: Aspects of *jus contra bellum* and *jus in bello*' (2013) 18 *Journal of Conflicts & Security Law* 59, at 72.

<sup>343</sup> See *Examiner*, *The Libyan Revolution: A Brief Summary*. Available online at: <http://www.examiner.com/article/the-libyan-revolution-a-brief-summary>.

<sup>344</sup> See Corten & Koutroulis, (n 342), at 72.

to progress from one stage to another until they reached the required level of organisation.<sup>345</sup>

The roots of the opposition to Gaddafi regime could be linked to the peaceful protest that took place in front of the Benghazi police station, in 15 of February 2011, after a human rights activist was detained.<sup>346</sup> The protest subsequently evolved into a number of peaceful demonstrations that, over time, became confrontations with the military forces. Almost two days later, in 17 of February, the National Conference for the Libyan Opposition called for a ‘Day of Rage’.<sup>347</sup> The attitude of the Libyan military and security forces became more feudal, and the protesters became direct targets of violence.<sup>348</sup>

At this stage, there were no signs that the Libyan opposition achieved either the requirements stated under Article 1 (1) of the second Additional Protocol of 1977<sup>349</sup> or the broad and more fixable criteria provided by the ICTY in the *Tadic* case.<sup>350</sup> In fact, the status of the Libyan opposition, in this capacity, fell within the scope of Article 1 (2) which primarily aimed to exclude ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’ from the scope of the Protocol.<sup>351</sup>

Nevertheless, although the Libyan opposition, during this stage of the conflict, had not achieved a level of organisation required by IHL, the situation would not be fully governed by domestic laws. In other words, despite the consensus that this status

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<sup>345</sup> See *Examiner, The Libyan Revolution: A Brief Summary*, (n 343).

<sup>346</sup> *Cornell University Library, Arab Spring: A Research & Study Guide, The Libyan Revolution, F.B.-17* (February 17<sup>th</sup>), available online at: <http://guides.library.cornell.edu/content.php?pid=259276&sid=2163152>.

<sup>347</sup> *Cornell University Library, Arab Spring*, (n 343).

<sup>348</sup> *Ibid.*

<sup>349</sup> See *Additional Protocol II*, (n 13), at Art. 1 (1).

<sup>350</sup> See *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 70.

<sup>351</sup> *Additional Protocol II*, (n 13), at Art. 1 (2).



does not lead to the implementation of IHL, the host state is still bound by the principles of IHRL.<sup>352</sup> Even though, at this early stage of the conflict, the Libyan opposition was not qualified enough to be recognised as being party to an internal armed conflict, the opposition amassed greater capacity as the conflict developed.

The aggressive attitude of the Libyan forces dramatically changed the situation, and a battle erupted in Benghazi. Subsequently, the protests spread across the country, with a significant increase in the number of army and security officers who decided to join the opposition groups.<sup>353</sup> The Libyan opposition groups, the rebels, started to behave like fairly organised armed groups.<sup>354</sup> Although the Libyan opposition had not achieved a sufficient degree of effective control over the territory at this stage, and there were no clear indications of these armed groups' capability in terms of applying IHL,<sup>355</sup> it was likely that the opposition satisfied the *Tadic* two-element test.<sup>356</sup> The conflict reached a certain degree of intensity and the opposition achieved a level of organisation sufficient to indicate that the situation went beyond crises such as civil unrest and terrorism.<sup>357</sup>

In response to the speedy progress on the ground, the Libyan opposition founded the NTC, in 27 of February, in Benghazi as a new transitional government with the primary objective of overthrowing Gaddafi regime.<sup>358</sup> After the transitional government was established, the Libyan armed groups were able to control more major cities on the eastern side of the country.<sup>359</sup> They were believed to exercise effective control over large areas of Libya. Therefore, it is clear that the Libyan armed groups acquired a

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<sup>352</sup> Lieblich, (n 5), at 84.

<sup>353</sup> *Examiner, The Libyan Revolution: A Brief Summary*, (n 343).

<sup>354</sup> See *Ibid.*

<sup>355</sup> See Cullen (2005), (n 94), at 104.

<sup>356</sup> See *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (n 87), at para. 562.

<sup>357</sup> See *Ibid.*

<sup>358</sup> *Examiner, The Libyan Revolution: A Brief Summary*, (n 343).

<sup>359</sup> *Ibid.*

greater capacity than that defined in the *Tadic* case.<sup>360</sup> The troops on the ground started to operate under the command of a single responsible entity, and they effectively controlled a significant part of the Libyan territory. Moreover, achieving this capability suggests that the conflict satisfied the requirements under Article 1 (1) of the second Additional Protocol of 1977.<sup>361</sup>

In fact, as Green argued, it is likely that the Libyan opposition would still meet the criteria provided under Article 1 (1) of the second Additional Protocol even if the Article were to be interpreted as strictly mandating that the rebels be ‘well established and [having] set up some form of *de facto* government’.<sup>362</sup> At an advanced stage of the conflict, the NTC introduced itself as a new transitional government with the primary objective of replacing Gaddafi regime.<sup>363</sup> It is also worth mentioning that the achievement of this capacity suggests that the opposition would be, at least theoretically, able to implement the protocol.<sup>364</sup> Hence, the Libyan opposition could be said to have reached the level of organisation required for the implementation of the second Additional Protocol.<sup>365</sup>

#### **1.4.2.2 The Syrian Armed Groups and the Element of Organisation**

With regard to the Syrian opposition, the situation is much more problematic than in Libya. Unlike the Libyan opposition, which has gradually moved from one stage to another, the progression of the Syrian opposition has been neither stable nor clear. States have responded to these groups with reluctance, and international support is

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<sup>360</sup> See *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (n 87), at para. 562.

<sup>361</sup> See *Additional Protocol II*, (n 13), at Art. 1 (1).

<sup>362</sup> See Green, (n 124), at 66-67.

<sup>363</sup> See *Examiner, The Libyan Revolution: A Brief Summary*, (n 343).

<sup>364</sup> See *Additional Protocol II*, (n 13), Art. 1 (1).

<sup>365</sup> See *Ibid.*

inconsistent.<sup>366</sup> The conduct of these groups on the ground is criticised,<sup>367</sup> and international efforts have attempted to improve the organisation of the Syrian armed groups.<sup>368</sup>

Without ignoring the importance of the continuing differing political dynamics between the Libyan and Syrian conflicts and how states have reacted to them,<sup>369</sup> the lack of sufficient organisation is one of the main reasons for their failure to reach a similar outcome in Syria as in the Libyan case. National interests from third states, both those directly neighbouring Syria and powerful Western states, have contributed significantly to the complexity of the Syrian situation and delayed agreement on an effective decision.<sup>370</sup> Despite this, one of the main legal justifications for this delay is argued to be the uncertainty as to the stability and credibility of the Syrian armed groups.

There are various theories about the roots of the Syrian revolution. It began in the first week of March 2011 as a peaceful protest initially targeted against the failure of Assad's regime to fulfil its commitment towards improving the country's political and economic situation.<sup>371</sup> The situation worsened significantly within a few weeks as a result of the excessive force used by the Syrian authority against protesters. As a consequence, the peaceful protest developed into 'a full-scale armed rebellion'.<sup>372</sup>

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<sup>366</sup> See M. N. Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 *Journal of National Security Law & Policy* 139.

<sup>367</sup> See Libya and Tunisia Come out Against Syrian Opposition, 24 November 2012, available online at: <http://www.frontpagemag.com/2012/dgreenfield/libya-and-tunisia-come-out-against-syrian-opposition/>; E. O'Bagy, *Middle East Security Report 9: The Free Syrian Army* (the Institute for the Study of War, Washington DC, 2013), at 6, available online at: <http://www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf>.

<sup>368</sup> See Syria crises: Guide to armed and political opposition: Guide to the Syrian rebels, *BBC News*, 13 December 2013, available online at: <http://www.bbc.co.uk/news/world-middle-east-24403003>.

<sup>369</sup> See S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) *Chinese Journal of International Law* 219; Corten & Koutroulis, (n 342), at 72.

<sup>370</sup> *Ibid.*

<sup>371</sup> See 10 simple points help you understand the Syrian conflict, news.com.au, available online at: <http://www.news.com.au/world/simple-points-to-help-you-understand-the-syria-conflict/storyfndir2ev-1226705155146>.

<sup>372</sup> *Ibid.*

Despite occurring at an early stage, this confrontation was considered to still be under the control of the official Syrian forces, leading to the assumption that the conflict fell within the exception provided under Article 1 (2) of the second Additional Protocol.<sup>373</sup> The situation therefore appeared to exceed the scope of the Syrian domestic jurisdiction, even after the formation of the SFA.<sup>374</sup>

The establishment of the SFA over July and August of 2011 was an initial indication that the Syrian opposition was progressing in a manner similar to that of Libya.<sup>375</sup> However, the facts on the ground indicated the opposite. Even though various armed groups seemed to be, *prima facie*, fighting Assad's regime under the banner of the SFA, with time it has become clear that the SFA's leadership has minimal or even non-existent operational control over these groups.<sup>376</sup> The operations on the battlefield indicate that the fighting groups that are assumed to constitute the FSA lack the required level of unity.<sup>377</sup> Some of these fighting groups are mostly comprised of foreign jihadists rather than genuine Syrian freedom fighters. These jihadist groups obviously have different agendas besides helping the Syrian people overthrow Assad's regime and establishing a new democratic system.<sup>378</sup> The failure of the Syrian armed groups to reach a sufficient level of organisation was thus established at this stage.

In response to the inability of the FSA's leadership to exercise sufficient control over the troops on the ground, the Syrian opposition, encouraged by some Western and Arab countries, declared its intention to establish a more operational and centralised structure.<sup>379</sup> As a consequence, the SMC was formed in December 2012.<sup>380</sup> One of the

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<sup>373</sup> See *Additional Protocol II*, (n 13), at Art. 1 (2).

<sup>374</sup> See 10 simple points help you understand the Syrian conflict, (n 371).

<sup>375</sup> See *Examiner, The Libyan Revolution: A Brief Summary*, (n 343).

<sup>376</sup> See O'Bagy, (n 367), at 6.

<sup>377</sup> See *Ibid.*

<sup>378</sup> See 10 simple points help you understand the Syrian conflict, (n 371).

<sup>379</sup> See *Syria crises: Guide to armed and political opposition*, (n 368).

<sup>380</sup> O'Bagy, (n 367), at 6.

primary objectives behind the SMC's creation is to have 'a more moderate and stronger alternative to the jihadist rebel groups in Syria'.<sup>381</sup> The objective of the new structure is to achieve better organisation and unity.

Nonetheless, despite the fact that many armed groups fall under the umbrella of the SMC, a significant number have continued to operate independently and carry out different agendas.<sup>382</sup> In fact, the affiliated groups are believed to operate independently of one another under different commanders.<sup>383</sup> As O'Bagy noted, the authority of the SMC 'is based on the power and influence of these rebel leaders. Its legitimacy is derived from the bottom up, rather than top-down, and it has no institutional legitimacy apart from the legitimacy of the commanders associated with the council'.<sup>384</sup> Therefore, the SMC in itself is not structurally effective; its command and powers come from the cooperation of each of its members.<sup>385</sup> The leadership is considered to serve as a representative of these groups in the media rather than commanding and controlling their activities on the ground.<sup>386</sup>

Further, some independent, extremist Islamic groups have gained additional troops and fighting power. They play a central role in the armed confrontation with Assad's regime. As a result, the ideological and strategic differences between these groups and the more moderate ones has become more apparent.<sup>387</sup> The conflicts of interest between these various groups has even led to a few armed clashes between them.<sup>388</sup>

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<sup>381</sup> Syria crises: Guide to armed and political opposition, (n 368).

<sup>382</sup> See Ibid.

<sup>383</sup> See Ibid.

<sup>384</sup> O'Bagy, (n 367), at 6.

<sup>385</sup> Ibid.

<sup>386</sup> Syria crises: Guide to armed and political opposition, (n 368).

<sup>387</sup> See Islamist Rebels in Syria reject National Coalition, *BBC News-Middle East*, 25 September 2013, available online at: <http://www.bbc.co.uk/news/world-middle-east-24239779>.

<sup>388</sup> See Ibid.

The absence of a clear structure and an effective, responsible command has attracted considerable criticism. Several state officials emphasise the importance of unifying the Syrian armed groups under the command of one responsible entity and following a clear and accepted agenda.<sup>389</sup> The assertion is that the Syrian armed groups should show clear signs of stability and credibility before a formal and final statement regarding their status can be granted.<sup>390</sup> Hence, this requirement is believed to represent the difference between the Libyan and Syrian cases. From a legal point of view, it can be considered one of the key elements in the application of the R2P in relation to the status of armed groups. In fact, statements made by states declaring that the Syrian armed groups must obtain a higher level of organisation are often accompanied by affirmative proclamations that these groups must ensure the effective implementation of IHL and IHRL.<sup>391</sup> Therefore, the requirements advanced by states regarding the Syrian armed groups are aimed at ensuring that these groups provide better protection for civilians.

Despite this, there are reports that some armed groups belonging to the Syrian opposition have committed extreme IHL violations.<sup>392</sup> Some extremist groups from the Syrian opposition are believed to have committed war crimes and crimes against humanity, which not only affect other minorities, such as the Shia sect and Christians, but also other Sunni groups alleged to be pro-government supporters.<sup>393</sup> Furthermore,

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<sup>389</sup> See Council of the European Union, Council Conclusions on Syria, 3199<sup>th</sup> Foreign Affairs Council Meeting, Brussels, 19 November 2012, available online at:

[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/133598.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/133598.pdf); S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) *Chinese Journal of International Law* 219, at 221.

<sup>390</sup> US State Department, Daily Press Briefing, 13 November 2012, available online at: <http://www.state.gov/r/pa/prs/dpb/2012/11/200477.htm#SYRIA>.

<sup>391</sup> See Council of the European Union, Council Conclusions on Syria, (n 389).

<sup>392</sup> United Nations Office of the High Commissioner for Human Rights, Independent International Commission of Inquiry on the Syrian Arab Republic established pursuant to United Nations Human Rights Council Resolutions S-17/1, 19/22 and 21/26, Periodic Update, 20 December 2012, at para. 17.

<sup>393</sup> See Populations at Risk: Current Crisis, *Global Center for the Responsibility to Protect*, available online at: <http://www.global2p.org/regions/syria>.

these violations indicate that the Syrian opposition has been unwilling, or at least unable, to effectively implement the principles of IHL.

Accordingly, even though the Syrian armed groups have achieved a capacity that exceeds the status defined under Article 1 (2) of the second Additional Protocol,<sup>394</sup> it is difficult to state whether these groups satisfy the requirements of Article 1 (1).<sup>395</sup> There has not been an indication yet that the Syrian opposition, as a whole, operates under a responsible command or exercises the stable and effective territorial control required to implement the second Additional Protocol. Nevertheless, it should be clarified that the failure of the Syrian armed groups to meet the criteria of the second Additional Protocol does not fully exclude it from being a recognised party to an internal armed conflict under international law.

It is still possible for these armed groups to pass the *Tadic* two-element test.<sup>396</sup> The conflict has reached a certain degree of intensity and the opposition achieved a level of organisation that is sufficient to indicate that the Syrian conflict exceeds the scope of other crisis situations, such as civil unrest and terrorism.<sup>397</sup> This contention finds further support in the subsequent application of the *Tadic* two-element test by some bodies; this includes the United Nations Special Rapporteur, which applied the test to the situation in the occupied Palestinian territories,<sup>398</sup> and the independent expert of the Commission on Human Rights, which applied it to the situation in Somalia.<sup>399</sup>

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<sup>394</sup> See *Additional Protocol II*, (n 13), Art. 1 (2).

<sup>395</sup> See *Ibid.*, at Art. 1 (1).

<sup>396</sup> See *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (n 87), at para. 562.

<sup>397</sup> See *Ibid.*

<sup>398</sup> United Nations General Assembly, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967*, U.N. Doc. A/56/440 (2001), para. 13, available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/565/49/PDF/N0156549.pdf?OpenElement>.

<sup>399</sup> See United Nations Commission on Human Rights, *Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Mona Rishmawi, pursuant to Commission resolution 1996/57 of 19 April 1996*, 3 March 1997, E/CN.4/1997/88, at paras. 54-55, available online at: <http://www.refworld.org/docid/3ae6b0700.html>.

Moreover, although achieving this status would not bind the Syrian opposition under the second Additional Protocol, these groups would still be required to ensure civilian protection to a certain extent, as defined under Common Article 3.



## 1.5 Conclusion

The main focus of this chapter was on the legal framework concerning armed groups as parties to internal armed conflicts. The primary object of this chapter was not only to determine the elements of such a framework, but also to trace any potential development of these elements under contemporary IHL. It was evidenced that the main focus on the concept of the protection of population under contemporary IHL contributed to the development of the framework regulating armed groups. Moreover, this development is in conformity with the approach adopted under the R2P. It was clarified that the concept of the R2P could already serve as a tool to further clarify and strengthen the implementation of some elements, or at least., open the door for further development in the future. The chapter intended to address two main issues related to the framework of armed groups. First, the definition of the concept of organised armed groups. Second, why and how organised armed groups are bound by the rules of IHL.

With regard to the definition of the concept of organised armed groups, two issues were discussed. First, the movement from recognised to unrecognised armed groups. Second, the definition of the concept of organised armed groups under contemporary IHL. As to the first issue, it was argued that although the concept of the recognition of armed groups under traditional seems to be *prima facie* clear, it was proven to be enfolded with a high degree of uncertainty. It is discretionary act of a political nature, places attention on the interests of the recognising states, and it has minimal impacts on the protection of the population. In contrast, the concept of unrecognised armed groups adopted under contemporary IHL proved to be more effective as to the protection of populations. The adoption of the definition of internal armed conflicts rather than the concept of recognition to apply IHL provides better involvement and compliance by these groups as to the application of the concerned

rules of IHL. It focuses on the capacity of these groups to carry out the required obligations.

In relation to the definition of organised armed groups, although the concept is controversial, it still could be defined. It was argued that even though the second Additional Protocol requires a high level of organisation as to the armed groups for the purpose of its application, Common Article 3 requires less restrictive definition. Despite the fact that Common Article 3 included no reference to organised armed groups, the required level of organisation could be still defined. Without ignoring the contributions made by some scholars,<sup>400</sup> the most significant effort as to the definition of the concept of organised armed groups was advanced by the ICTY.<sup>401</sup>

One of the justifications provided by the Appeal Chamber in *Tadic* case for such a development was that '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.<sup>402</sup> This new approach in conformity with the approach adopted under the R2P. The primary aim of the R2P is to provide better and more effective protection of civilians during armed conflicts. It achieved this object by modifying the notion of sovereignty. The R2P restricted the authorities that could be exercised by states through the notion of sovereignty. It conditions the exercise of sovereignty by states on the fulfillment of some obligations related to their responsibility to protect civilians. Hence, the concept of the R2P gives more weight to the people of the state. It affirms the approach advanced by the ICTY. Therefore, although no clear state practice exists yet as to the impact of adopting the R2P on the

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<sup>400</sup> See Moir, (n 78), at 36; see also, Ronen, (n 4), at 26; Wilson (1988), (n 12), at 44.

<sup>401</sup> See *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, (n 87), at para. 562; *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgment)*, (n 89), at para. 184.

<sup>402</sup> *Prosecutor v. Dusko Tadic (a/k/a Dule)*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (n 19), at para. 97.

definition of organised armed groups, it could be suggested that the implementation of the R2P would support such a development in this regard.

As to the main issue related to why and how organised armed groups are bound by the rules of IHL, two options were discussed. The first option was the direct compliance with the obligations of IHL by the armed groups. It refers to the situations where armed groups voluntarily consent to be bound by certain rules of IHL. Although such a method may lead to limited application of IHL due to the fact that armed groups would be free to decide which rules they could be bound by, it still opens the door for third states to insure better and more effective application of these rules. It was asserted that the adoption of the R2P contributes to the effectiveness of this approach. Third state will have more room to participate in such process under the third pillar of the R2P concerning international responsibility to protect.

The second option was the indirect compliance with the obligations of IHL by the armed groups. Five potential approaches were advanced. First, the principle of legislative jurisdiction. Second, the effect of treaties on third parties. Third, the claim of the representation of the state. Fourth, customary international law. Fifth, the rules of *jus cogens*. It was contended that none of these approaches is conclusive. As discussed in section two, each one of these approaches has its advantages and disadvantages.

Nevertheless, further development could be indicated as to three of these approaches after the adoption of the R2P. States' reactions towards the Libyan and Syrian crisis indicate the emergence of a new trend towards recognising organised armed groups as the legitimate representatives of the people. It was argued that the compliance with the rules of IHL in accordance with the approach of the claim of the representation of the state adds to legitimacy of armed groups for the purpose of such

recognition. The concept of the R2P could also enhance the compliance with the rules of IHL by organised armed groups in accordance with the approach related to the effect of treaties on third parties. It put more pressure on host states to accept to bind these groups by IHL treaties. This contention finds support under the first pillar of the R2P.<sup>403</sup> requiring host states to undertake any steps necessary to provide the required level of protection.

The other potential contribution of the R2P is related to the *jus cogens*. One of the arguments made against *jus cogens* approach is that it has limited applicability. It applies to limited number of rules. Nevertheless, the concept of the R2P expands the scope of *jus cogens* as to violations committed in internal armed conflicts. It refers to ethnic cleansing as a separate international crime. It also considers the commitment of international crimes, in general, as violations of *jus cogens*. The R2P intends to enhance the level of protection provided for civilians by binding members of armed groups individually not to commit violations to *jus cogens*. Nevertheless, it still encourages armed groups to achieve the highest possible level of organisation to increase protection provided in internal armed conflicts and enable organised armed groups to take positive role in such a process. In the next Chapter, the obligations of organised armed groups as to the protection of civilians will be evaluated.

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<sup>403</sup> World Summit Outcome, (n 196), at para. 138.

## Chapter 2

# The International Obligations of Organised Armed Groups for Population Protection, and the Extent to which the R2P Contributed to their Interpretation and Implementation

### 2.1 Introduction

It is well established that organised armed groups as parties to internal armed conflicts are bound by IHL. Depending on the level of organisation they enjoy, organised armed groups could be bound by the obligations relating to Common Article 3 and the second Additional Protocol of 1977.<sup>1</sup> They could be also required to apply IHRL in the territories they control. This chapter discusses certain obligations of IHL imposed on organised armed groups as parties to internal armed conflicts, to protect civilians. It aims to achieve two objectives. The main objective is evaluating whether organised armed groups already have a responsibility to protect under the current framework regulating internal armed conflicts. In other words, the extent to which elements constituting the concept of the R2P could be identified within the framework regulating the duties imposed on organised armed groups in internal armed conflicts will be determined. The second objective is to trace any potential development regarding the obligations of organised armed groups to protect civilians. To do so, the analysis is based in both IHL and IHRL.

Since IHL is binding on organised armed groups as parties to internal conflicts, this implicitly suggests that organised armed groups are also obliged to obey at least the non-derogable principles of IHRL.<sup>2</sup> Also, the link between IHL and IHRL facilitates

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<sup>1</sup> International Displacement Monitoring Center (IDMC), *Global Overview 2006*, at 13.

<sup>2</sup> J. Pejic, 'the Right to Food in Situations of Armed Conflict: The Legal Framework' (2001) 83 *International Review of the Red Cross* 1097, at 1098.

the implementation of the mechanisms founded by these two bodies of law to ensure respect for the rights of civilians and to strengthen the fulfilment of the obligations associated with these rights by organised armed groups.<sup>3</sup>

Due to the limitations and objectives of the chapter, the analysis will be restricted to selected obligations. The chapter is divided into three sections. Section one relates to the right of civilians to adequate food where the prohibition of starvation and the obligation to allow humanitarian assistance are evaluated. Section two is concerned with the prohibition of the act of forced displacement and the role of organised armed groups regarding this displacement. Section three focuses on IDPs and the responsibilities of organised armed groups toward these groups.

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<sup>3</sup> Pejić, (n 2), at 1098-1099.

## **2.2 The Right of Civilians to Adequate Food: The Prohibition of Starvation and the Allowance of Relief and Humanitarian Assistance and the Role of Organised Armed Groups**

This section focuses on the right to food and the role of organised armed groups in time of war. It is divided into three parts. First, it discusses the right to adequate food between IHL and IHRL. Second, it evaluates the prohibition on starvation and the obligations imposed on organised armed groups. Third, it examines humanitarian assistance and the role of organised armed groups.

### **2.2.1 The Right to Adequate Food between IHRL and IHL: IHL Complements the Right to Food under IHRL**

The right to adequate food is one of the most basic and fundamental human rights. It ought to be granted to all human beings, whether in times of peace or war. It refers to freedom from starvation and access to safe and nutritious food. The right to food means that food must be physically and economically accessible, and available in sufficient quantity and quality to all individuals, with no discrimination based on race, colour, sex, language, age, religion, political or other opinions, national or social origin, property, birth or other status.<sup>4</sup>

The main reference point to the right to adequate food is located within the UDHR.<sup>5</sup> Article 25 of the UDHR states, '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food'.<sup>6</sup> Although the UDHR is not a binding international legal instrument, it provided

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<sup>4</sup> See National Economic & Social Rights Initiative, *What is the Human Rights to Food*, available online at: <https://www.nesri.org/programs/what-is-the-human-right-to-food>.

<sup>5</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), at Art. 25, available online at: <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>6</sup> Ibid.

a reference point for the human rights legislation following it. For instance, Article 11 of the International Covenant on Economic, Social and Cultural Rights refers to the right to adequate food in detail. It states:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, ...
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
  - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>7</sup>

References to the right to food were made in other treaties, such as the Convention on the Right of Child<sup>8</sup> and the American Declaration on the Rights and Duties of Man.<sup>9</sup> Nonetheless, unlike IHRL, IHL does not contain any explicit reference to the right to adequate food. Moreover, this applies to the frameworks regulating both international armed conflicts and internal armed conflicts. Even though IHL includes no mention to such a right, it still contains various provisions intending to ensure ‘that persons or groups not or no longer taking part in hostilities are not denied food or access to it’.<sup>10</sup>

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<sup>7</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, at Art. 11, available online at: <http://www.refworld.org/docid/3ae6b36c0.html>.

<sup>8</sup> See United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, at Arts. 24 & 27, available online at: <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>9</sup> See Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, at Art. 11, available online at: <http://www.refworld.org/docid/3ae6b3710.html>.

<sup>10</sup> Pejic, (n 2), at 1098.



Reality has shown that the displacement of civilians is a primary cause of starvation in internal armed conflict. Consequently, one of the primary objects of IHL is providing civilians with all necessary means to remain in their homes, thereby ensuring that their basic needs are met, including those related to food.<sup>11</sup> IHL complements IHRL regarding the right to adequate food in two ways. First, it prohibits starvation. Second, it regulates the access of international relief and humanitarian assistance. Organised armed groups as parties to internal armed conflicts are obligated not to use starvation as a method of war and are required to allow and facilitate the access of humanitarian assistance.

### **2.2.2 The Prohibition of Starvation**

Parties to armed conflicts, whether international or internal, are not completely free to choose the methods and means of warfare. They are bound by IHL not to apply methods and means of war that may cause unnecessary damage or excessive harm. In the context of internal armed conflict, organised armed groups ought to conduct themselves in accordance with the principles of proportionality and due diligence.<sup>12</sup> They must not use war methods leading to unnecessary suffering, and they must distinguish between military and civilian objects.<sup>13</sup> One of the restrictions that parties to armed conflicts ought to obey is not using starvation as a method of warfare.<sup>14</sup> Therefore, organised armed groups may not intentionally implement starvation to achieve success on the ground.<sup>15</sup>

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<sup>11</sup> Pejic, (n 2), at 1100.

<sup>12</sup> M. John-Hopkins, 'Regulating the Conduct of Urban Warfare: Lessons from Contemporary Asymmetric Armed Conflicts' (2010) 92 *International Review of the Red Cross* 469, at 479.

<sup>13</sup> *Ibid.*

<sup>14</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts Protocol II*, 8 June 1977, 1125 UNTS 609, at Art. 14, available online at:

<http://www.refworld.org/docid/3ae6b37f40.html>.

<sup>15</sup> *Ibid.*

As stated under the Statute of the ICC, '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions', is a war crime when committed in international armed conflict.<sup>16</sup> Moreover, although there is no similar provision in the ICC Statute criminalising starvation in internal armed conflict, Pejic argued, 'this act does constitute a war crime under customary international law'.<sup>17</sup>

It is noteworthy to mention that the use of starvation as a method of warfare was legitimate and acceptable under IHL. For instance, in response to the failed attempt to declare independence in Biafra, a member of the Nigerian government asserted that 'starvation is a legitimate weapon of war'.<sup>18</sup> Similarly, a British Foreign Secretary argued that starving the enemy is legitimate method of war that has been utilised in the past.<sup>19</sup> However, the use of starvation as a method of war was expressly prohibited after the adoption of the Additional Protocols in 1977.<sup>20</sup> Furthermore, it is now recognised as a norm of customary international law.<sup>21</sup>

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<sup>16</sup> United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, at Art. 8 (b) (xxv), available online at:

<http://www.refworld.org/docid/3ae6b3a84.html>.

<sup>17</sup> Pejic, (n 2), at 1099-1100.

<sup>18</sup> Chief Anthony Enahoro, Federal Commissioner for Information and Labor of Nigeria, quoted in L. Garrison, 'the "Point of No Return" for the Biafrans', *New York Times Magazine*, 8 September 1968, 102, cited in G. A. Mudge, 'Starvation as Means of Warfare' (1969-1970) 4 *International Lawyers* 228.

<sup>19</sup> Statement of British Foreign Secretary, *Hansard* Vol. 786 No 143 c 953, cited in, E. Rosenblad, 'Starvation as a Method of Warfare-Conditions for Regulation by Convention' (1973) 7 *International Lawyers* 252, at 253.

<sup>20</sup> See international Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, at Art. 54 (1), available online at:

<http://www.refworld.org/docid/3ae6b36b4.html>; *Additional Protocol II*, (n 14), at Art. 14.

<sup>21</sup> J. M Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (ICRC and Cambridge University Press, Cambridge, 2005), at Rule 53, available online at: <http://www.refworld.org/docid/5305e3de4.html>.

As defined in the Commentary on the Additional Protocols, starvation ‘means the action of subjecting people to famine, i.e., extreme and general scarcity of food’.<sup>22</sup> The prohibition of starvation under IHL is only applicable to ‘the intentional starvation of civilians’.<sup>23</sup> Therefore, the prohibition does not include situations where starvation is an incidental or unavoidable consequence of military actions.<sup>24</sup> Organised armed groups may not be held responsible if the starvation of civilians under their territorial control resulted from unseen or unavoidable causes. Nonetheless, deciding whether the starvation was incidental or intentional is quite a delicate task.<sup>25</sup> Therefore, each instance ought to be evaluated on a case-by-case basis.

The prohibition of intentional starvation is forbidden under IHL not only when it results on death, but also when the lack of food leads civilians to suffer hunger.<sup>26</sup> Moreover, the prohibition under IHL is not only limited to the act of starvation in itself, it also includes other intentional military activities potentially leading to starvation.<sup>27</sup> IHL imposes explicit obligations on organised armed groups to avoid the conduct of any military activities that may lead to starvation. They are under an obligation not ‘to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works’, when the purpose of such action is starvation.<sup>28</sup> Accordingly, the obligation imposed on organised armed groups regarding the prohibition of starvation

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<sup>22</sup> International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), at 1456.

<sup>23</sup> International Institution of International Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary* (Sanremo, 2006), at 46.

<sup>24</sup> *The Manual on the Law of Non-International Armed Conflict with Commentary*, (n 23), at 46.

<sup>25</sup> See S. Sivakumaran, *the Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012), at 424.

<sup>26</sup> J. Pejic, (n 2), at 1099.

<sup>27</sup> S. Sivakumaran, (n 25), at 424.

<sup>28</sup> *Additional Protocol II*, (n 14), at Art. 14.

is of a preventive nature. It makes organised armed groups responsible for preventing actions leading to starvation. This formula conforms with the preventive dimension as defined under the framework of the R2P.<sup>29</sup> Hence, it can be argued that, in relation to the prevention of starvation, just the like host states under the first pillar of the concept of the R2P organised armed groups have a primary responsibility to protect civilians.

Organised armed groups are under a duty not to attack ‘works and installations containing dangerous forces such as dams, dykes and nuclear electrical generating stations’.<sup>30</sup> Consequently, the obligation imposed on organised armed groups in relation to the prohibition of starvation goes beyond the concept of territorial control. IHL requires organised armed groups to obey certain obligations necessary for the protection of populations regardless who controls the attacked territory. Therefore, although the concept of effective control is necessary for the implementation of certain duties, organised armed groups are still bound by IHL rules in areas controlled by the other party. Organised armed groups are responsible for protecting civilians, regardless of who controls them. This approach goes beyond the concept of sovereignty as responsibility, as introduced within the framework of the R2P.<sup>31</sup>

As noted in the Commentary to the Protocols ‘the verbs [employed in Article 14 of the second Protocol] “attack”, “destroy”, “remove” and “render useless” are used in order to cover all possibilities, including pollution, by chemical or other agents, of water reservoirs, or destruction of crops by defoliants’.<sup>32</sup> As a result, Pejic argues, ‘the deployment of landmines in agricultural areas or in irrigation works with the specific

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<sup>29</sup> See E. Strauss, *The Emperor's New Clothes?: The United Nations and the Implementation of the Responsibility to Protect* (Nomos, Baden-Baden, 2009), at 26.

<sup>30</sup> *Additional Protocol II*, (n 14), at Art. 15.

<sup>31</sup> See United Nations General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, at paras. 138-139, available online at:

<http://www.refworld.org/docid/44168a910.html>.

<sup>32</sup> *Commentary on the Additional Protocols*, (n 22), at 655.

purpose of precluding their use for the sustenance of the civilian population would likewise constitute a violation of that prohibition' falls within the scope of the prohibition.<sup>33</sup> As noted in the Commentary to the Protocols, the inclusion of the phrase 'such as' in the Article suggests that the provided list of 'protected objects is merely illustrative'.<sup>34</sup> The primary purpose behind adopting an illustrative approach was avoiding overlooking other indispensable objects and providing the Article with further flexibility for the better protection of civilians.<sup>35</sup> This flexible approach suggests that the concept of the R2P could play a notable role in further expanding the scope of the prohibition of starvation. It is noteworthy to mention that parties to internal armed conflict may enter into agreements affirming their obligations regarding the prevention of starvation.

In a bilateral agreement signed in 2002 between the government of the Republic of Sudan and the Sudan People's Liberation Movement, the parties intended 'to refrain from targeting or intentionally attacking civilian objects or facilities, such as schools, hospitals, religious premises, health and food distribution centres, or relief operations, or objects or facilities indispensable to the survival of the civilian population and of a civilian nature'.<sup>36</sup> Similarly, in 2009, the government of the Philippines signed an agreement with the Moro Islamic Liberation Front where they agreed to commit to the same obligations stated above.<sup>37</sup>

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<sup>33</sup> J. Pejic, (n 2), at 1099.

<sup>34</sup> *Commentary on the Additional Protocols*, (n 22), at 655.

<sup>35</sup> S. Sivakumaran, (n 25), at 425.

<sup>36</sup> Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, 10 March 2002, at Art. 1 (b), available online at:

[http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_020331\\_Agreement%20to%20Protect%20Non-Combatant%20Civilians%20from%20Military%20Attack.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_020331_Agreement%20to%20Protect%20Non-Combatant%20Civilians%20from%20Military%20Attack.pdf).

<sup>37</sup> Agreement on the Civilian Protection Component of the International Monitoring Team, 27 October 2009, at Art. 1 (b), available online at: <https://peace.gov.ph/2016/01/agreement-civilian-protection-component-international-monitoring-team-imt/>.

## 2.2.3 Relief and Humanitarian Assistance

### 2.2.3.1 Humanitarian Assistance under IHL and IHRL

Another obligation imposed by IHL on organised armed groups as parties to internal armed conflicts is the duty to accept and facilitate humanitarian relief access. Although the right to humanitarian assistance is not specifically addressed under IHRL, it still could be founded on the fundamental right to life.<sup>38</sup> Establishing the right to humanitarian relief on IHRL helps fill in the gaps in the framework regulating humanitarian assistance under IHL. Certain obligations are related to the right to humanitarian relief, such as the obligation imposed on parties to armed conflict ensuring that civilians under their territorial control are adequately provided with food and other necessary goods and ‘the duty to cooperate with humanitarian organisations cannot be deduced literally from IHL’.<sup>39</sup> Moreover, ‘the development of IHRL will reinforce and advance the establishment of the majority of norms concerning humanitarian assistance in armed conflict as part of customary law’.<sup>40</sup>

More specifically, the contention is that the link between the right to humanitarian relief and the right to life suggests an obligation of parties to armed conflict to ‘bestow the right to receive humanitarian assistance offered by third parties on all the victims of all conflicts’.<sup>41</sup> It also helps provide the necessary limitations to the right to life. Even though the right to life, as the basis of the right to humanitarian

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<sup>38</sup> See United Nations Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, available online at: <http://www.refworld.org/docid/45388400a.html>; R. A. Stoffels, ‘Legal regulation of humanitarian assistance in armed conflicts: Achievements and gaps’ (2004) (86) *International Review of the Red Cross* 515, at 516.

<sup>39</sup> Stoffels, (n 38), at 516.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, at 518.

assistance, is of a non-derogable nature, it still can be restricted. In the context of armed conflict, IHL founds ‘the substance of this right and the limitations to it’.<sup>42</sup>

The right to humanitarian assistance, as addressed by IHL, is founded on two fundamental principles: distinguishing between the civilian population and combatants; and ensuring respect, protection and humane treatment for people not or no longer participating in the hostilities.<sup>43</sup> Furthermore, unlike IHRL, IHL contains various Articles to advance and organise humanitarian assistance and relief actions ‘on behalf of civilians in armed conflict’.<sup>44</sup>

As to the binding nature of the right to humanitarian assistance on the parties to armed conflicts, the right to humanitarian assistance is founded in the fundamental norms of both IHRL and IHL. Hence, as asserted by the ICJ, the right to humanitarian assistance creates duties of an *erga omnes* nature for all parties to an armed conflict.<sup>45</sup> This part of the chapter aims to discuss the role of organised armed groups as parties to internal armed conflict related to humanitarian assistance and relief actions.

### **2-2.3.2 Humanitarian Assistance in the Context of Internal Armed Conflicts: General Principles and Requirements**

In general, it is the primary responsibility of each state to provide assistance and protection for civilians within its territory. In the context of internal armed conflicts, it is argued that each party to the conflict, whether the state or the organised armed groups, is obliged to provide the necessary protection and assistance for civilians in the

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<sup>42</sup> Stoffels, (n 38), at 518.

<sup>43</sup> See Resolution XXVIII of the 20<sup>th</sup> International Conference of the Red Cross and Red Crescent (Vienna, 1965).

<sup>44</sup> M. Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge University Press, Cambridge, 2012), at 194.

<sup>45</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986, at para. 218, available online at: <http://www.refworld.org/cases/ICJ.4023a44d2.html>.

territory under its control.<sup>46</sup> Nevertheless, in certain cases, the responsible party could be unable or unwilling to provide this necessary humanitarian assistance. In these cases, international assistance would be essential. The hierarchy of providing assistance for civilians in armed conflict situations and the link between territorial control and the obligation to provide assistance is in line with the language used under the framework of the R2P, as clarified above.<sup>47</sup> It suggests the implementation of the concept of sovereignty as responsibility and establishes the role the international community could play in providing necessary assistance.

The organisation of humanitarian assistance and relief actions in internal armed conflicts are dealt with under Article 18 (2) of the second Additional Protocol.<sup>48</sup> According to Article 18 (2):

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.<sup>49</sup>

In accordance with Article 18 (2) of the second Protocol, for humanitarian assistance to conform with the principles of IHL, certain measures ought to be considered. It is not enough that the assistance is of a humanitarian nature; it must also be conducted without any adverse distinction. The humanitarian character of the assistance would be proven if the objective behind the relief action is to provide the affected civilians with necessary humanitarian relief.<sup>50</sup> Regarding the requirement of

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<sup>46</sup> Jacques, (n 44), at 194.

<sup>47</sup> See United Nations General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, at paras. 138-139, available online at: <http://www.refworld.org/docid/44168a910.html>.

<sup>48</sup> *Additional Protocol II*, (n 14), at Art. 18 (2).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Commentary on the Additional Protocols*, (n 22), at 817.



non-discrimination and impartiality, as stated in the Commentary on the Protocol, this means the humanitarian assistance ‘must resist any temptation to divert relief consignments or to favour certain groups or individuals rather than others because of personal preferences’.<sup>51</sup>

Though this Article is significant in establishing the general grounds for providing humanitarian assistance, it still focuses on the providers of the relief action rather than the parties to the conflict. In fact, most of issues arising from humanitarian assistance in the context of internal armed conflict could be attributed to the reactions of the parties to the conflict to such assistance. The consent of organised armed groups to such assistance and the right of these groups to deny their access are discussed below.

### **2.2.3.3 Humanitarian Assistance, the Principle of Non-Intervention and the Consent of Organised Armed Groups**

One of the most common reasons that a party to an internal armed conflict may reject the access of humanitarian assistance is that the proposed humanitarian relief constitutes illegitimate interference in the conflict.<sup>52</sup> Unlike the first Additional Protocol which explicitly affirms that the supply of humanitarian relief is not considered interference in the conflict,<sup>53</sup> the second Additional Protocol is empty of any express reference to such issues. However, Common Article 3 could still serve as a basis for establishing similar legal ground.<sup>54</sup>

Under Paragraph (2), Common Article 3 states that ‘[an] impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to

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<sup>51</sup> *Commentary on the Additional Protocols*, (n 22), at 817.

<sup>52</sup> Jacques, (n 44), at 200.

<sup>53</sup> *Additional Protocol I*, (n 20), at Art. 70 (1)

<sup>54</sup> See International Committee of the Red Cross (ICRC), *Commentary on the Geneva Conventions of 12 August 1949*, vol. (VI), (1958), at 41.

the Parties to the conflict'.<sup>55</sup> Furthermore, as Pictet commented, 'an impartial humanitarian organisation [is] now being legally entitled to offer its services. The Parties to the conflict may, of course, decline the offer if they can do without it. But they can no longer look upon it as an unfriendly act'.<sup>56</sup>

The issue was also further elaborated by the ICJ in the *Nicaragua* case.<sup>57</sup> In response to the humanitarian assistance provided by the US government to the opposition groups in Nicaragua, the court asserted that:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whether their political affiliations or objectives cannot be regarded as unlawful intervention, or as any other way contrary to international law.<sup>58</sup>

The court went on to add, in order that, for the humanitarian relief to be legitimate and not be in violation with the principle of non-intervention, it 'must be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their independents'.<sup>59</sup>

Regarding the principle of consent as a requirement for the access of humanitarian aid, the matter is underlined under Article 18 of the second Additional Protocol.<sup>60</sup> In accordance with the Article, humanitarian assistance cannot be provided until the consent of the government in power is obtained.<sup>61</sup> Nonetheless, as stated in the Commentary on the Protocols, in certain cases where there is an absence of actual

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<sup>55</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, at Art. 3, available online at: <http://www.refworld.org/docid/3ae6b36c8.html>.

<sup>56</sup> *Commentary on the Geneva Conventions of 12 August 1949*, (n 54), at 41.

<sup>57</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 45), at para. 242.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, at para. 243.

<sup>60</sup> *Additional Protocol II*, (n 14), at Art. 18.

<sup>61</sup> *Ibid.*

authority and the humanitarian needs are serious, consent as a requirement for providing humanitarian relief is presumed.<sup>62</sup> Moreover, this assumption goes with the assertion made above that humanitarian assistance is provided on behalf of the affected civilian populations and it is not a privilege given to the government.<sup>63</sup> Even though the Article refers only to the consent of the state, state practice suggests that the consent of any organised armed groups is crucial for ensuring easy and safe access to humanitarian relief in areas controlled by these groups.

It is also argued that, in cases where there is direct access to the areas controlled by organised armed groups, it is not required to receive the consent of the parent state. In other words, the consent of the organised armed group is enough to authorise access of the humanitarian aid to areas under their control as long as these areas are accessible without passing through areas under government authority.<sup>64</sup> State practice indicates that requesting prior consent from the host state is the initial step followed by third states and international organisations before providing humanitarian aid in areas under the control of armed groups.<sup>65</sup> Although state practice supports such a view, the reaction of the international community towards the Syrian crisis may reveal the emergence of a new position in state practice for the purpose of protecting affected populations.

After demanding that all parties to the conflict, particularly the Syrian government, allow and facilitate the access of humanitarian aid in various situations,<sup>66</sup>

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<sup>62</sup> *Commentary on the Additional Protocols*, (n 22), at 1479.

<sup>63</sup> See Jacques, (n 44), at 194.

<sup>64</sup> M. Bothe & K. J. Partsch & W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, The Hague, 1982), at 696.

<sup>65</sup> Stoffels, (n 38), at 535.

<sup>66</sup> See United Nations Security Council (UNSC) Resolution 2139 (2014), UN Doc. S/RES/2139, adopted in 7116<sup>th</sup> meeting, 22 February 2014, at para. 4, available online at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2139\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2139(2014)).

the UNSC adopted resolution 2165.<sup>67</sup> The significance of the resolution stems from the fact that it authorised the delivery of humanitarian aid to areas controlled by Syrian armed groups without the consent of the Syrian authorities.<sup>68</sup> Moreover, the UNSC expanded the mandate for 12 months under resolution 2258, adopted in 2015.<sup>69</sup> In a statement made by the European Commission, this action by the UNSC was welcomed and described as ‘a step forward’ in the process of further protecting the Syrian population.<sup>70</sup> Even though it is not sufficient in itself to establish a new rule regarding the access of humanitarian assistance, the decision made by the UNSC, in the present situation, it is an important step towards protecting the population.

#### **2.2.3.4 Denial of Humanitarian Assistance in Internal Armed Conflicts**

Failure to provide necessary humanitarian relief could stem from neutral causes not related to the attitudes of the parties to the conflict, such as the intensity of the conflict or the impossibility of providing aid workers with the security required to carry out the aid activities.<sup>71</sup> In some cases, humanitarian assistance could be rejected by parties to internal armed conflicts. The refusal of humanitarian assistance could result from preventing entry to the country in which the internal armed conflict emerged or refusing entrance to certain areas controlled by the other party to the conflict.<sup>72</sup>

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<sup>67</sup> United Nations Security Council (UNSC) Resolution 2165 (2014), UN Doc. S/RES/2165, adopted in 7216<sup>th</sup> meeting, 14 July 2014, available online at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2165\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2165(2014)).

<sup>68</sup> Ibid, at para. 2.

<sup>69</sup> United Nations Security Council (UNSC) Resolution 2258 (2015), UN Doc. S/RES/2258, adopted in 7595<sup>th</sup> meeting, 22 December 2015, available online at:

<http://www.un.org/press/en/2015/sc12179.doc.htm>.

<sup>70</sup> European Commission, *UN Security Council Resolution on humanitarian access inside Syria "a step forward": Statement*, (15 July 2014).

<sup>71</sup> C. Rottensteiner, ‘The denial of humanitarian assistance as a crime under international law’ (1999) (39) *IRRC* 555.

<sup>72</sup> Ibid.

The refusal of humanitarian assistance could be used by a party to an internal armed conflict as a war strategy to lead to starvation.<sup>73</sup> Hence, it is argued that the refusal of humanitarian assistance should not be determined only by concerned parties to the conflict. As stated in the ICRC commentary on the protocols:

If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place.<sup>74</sup>

Accordingly, organised armed groups as parties to internal armed conflict are obligated to accept international humanitarian assistance as long as it is essential for the survival of civilians under their territorial control and the assistance satisfies the requirements of impartiality and non-discrimination.<sup>75</sup> In other words, organised armed groups must have legitimate reasons to deny the access to humanitarian aid.<sup>76</sup> '[A]rbitrary or capricious' reasons cannot serve as a basis for such a denial.<sup>77</sup>

Organised armed groups could refuse humanitarian relief based on violations of Article 18 of the second Protocol. They could argue that the aid is not 'humanitarian and impartial in character and conducted without any adverse distinction'.<sup>78</sup> They could also base the rejection on grounds related to military necessity.<sup>79</sup> Organised armed groups may also refuse the supply of humanitarian aid on the grounds that 'the foreign relief personnel may hamper military operations or can be suspected of unnatural behaviour in favour of the other party to the conflict'.<sup>80</sup> Nevertheless, military necessity cannot be allowed to cause starvation. The prohibition of starvation is a rule from which

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<sup>73</sup> *Commentary on the Additional Protocols*, (n 22), at 1479; Rottensteiner, (n 71), at 555; Jacques, (n 44), at 197.

<sup>74</sup> *Commentary on the Additional Protocols*, (n 22), at 1479.

<sup>75</sup> See *Ibid.*

<sup>76</sup> *Ibid.*, at 819.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Additional Protocol II*, (n 14), at Art. 18 (2).

<sup>79</sup> M. Bothe, 'Relief Actions: The Position of Recipient State', in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff, Dordrecht, 1989) 91, at 95.

<sup>80</sup> *Ibid.*

no derogation may be made.<sup>81</sup> Hence, preventing starvation must prevail over any claims of military necessity related to rejecting humanitarian assistance.<sup>82</sup>

On various occasions, the UNSC explicitly considered the unjustified rejection of humanitarian assistance by armed groups as a violation of IHL.<sup>83</sup> Consequently, it seems that, in case no legitimate reason to refuse the access of humanitarian relief arises, organised armed groups would be under a positive obligation under CIHL to accept and facilitate the access of humanitarian assistance.

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<sup>81</sup> *Commentary on the Additional Protocols*, (n 22), at 1479.

<sup>82</sup> *Ibid.*

<sup>83</sup> United Nations Security Council (UNSC) Resolution 851 (1993), UN Doc. S/RES/891, adopted in 3254<sup>th</sup> meeting, 15 July 1993, at para. 19, available online at: <http://unscr.com/en/resolutions/doc/851>; United Nations Security Council (UNSC) Resolution 794 (1992), UN Doc. S/RES/793, adopted in 3145<sup>th</sup> meeting, 3 December 1992, at para.5; United Nations Resolution 773 (1992), UN Doc. S/RES/733, adopted in 3039<sup>th</sup> meeting, 23 January 1992, at para. 7.

## **2.3 Prohibition of Forced Movement of Civilians and the Role of Organised Armed Groups**

This section examines the prohibition of forced movement of civilians and the duties imposed on organised armed groups in this regard. First, it clarifies the nature and legality of the forced displacement of civilians in internal armed conflicts. Second, it discusses the forced displacement of civilians by organised armed groups as an illegal act that may amount to an international crime.

### **2.3.1 The Nature and Legality of the Forced Displacement of Civilians and its Conditions**

The displacement of civilians could be voluntary, resulting from the hardship of armed conflict, or forced. In accordance with the rules of IHL, only forced displacement of the civilian population without providing legitimate purpose is prohibited.<sup>84</sup> Therefore, while an organised armed group could still lawfully displace or evacuate the population under their control for military or security purposes, the displacement of civilians by these groups would be deemed illegitimate if it was done arbitrarily.<sup>85</sup> In accordance with Principle 6 of the UN Guiding Principles on Internal Displacement, '[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence'.<sup>86</sup> The parameters of arbitrary displacement of civilians includes displacement in armed conflict situations; displacement founded on policies of apartheid, ethnic cleansing, or actions aimed to

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<sup>84</sup> E. Mooney, 'Displacement and the Protection of Civilians under International Refugee Law', in H. Willmot and others (eds.), *Protection of Civilians* (Oxford University Press, Oxford, 2016) 177, at 188.

<sup>85</sup> *Ibid.*

<sup>86</sup> UN High Commissioner for Refugees (UNHCR), Guiding Principles on Internal Displacement, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109, at principle 6 (1), available online at: <http://www.refworld.org/docid/3c3da07f7.html>.

change the ethnic, religious, or racial composition of the targeted population; and displacement of civilians when it is applied as a collective punishment.<sup>87</sup>

Internal armed conflicts are the primary reason for the movement of civilians. Nevertheless, the eruption of internal armed conflicts is not a cause leading to the movement of civilians. Rather, the lack of effective adherence to the principles of IHL and IHRL during the conflict may lead to the forced movement of civilians. As argued by Jacques, the forced displacement of civilian population often emerges as a result ‘of systematic human rights abuses and violations of the laws of war’ by one of the parties to the internal armed conflict, the host state or the organised armed group.<sup>88</sup> As one of the fundamental principles of IHL, the principle of distinction provides a framework preventing the emergence of such a situation.<sup>89</sup> According to Lavoyer:

[D]uring armed conflict, the civilian population is entitled to an immunity intended to shield it as much as possible from the effects of war. Even in time of war, civilians should be able to lead as normal a life as possible. In particular, they should be able to remain in their homes; this is a basic objective of international humanitarian law.<sup>90</sup>

Although not explicitly included in any human rights conventions, the prohibition of the forced displacement of civilians could be still concluded from various human rights provisions.<sup>91</sup> It constitutes a violation of Article 12 (1) of the ICCPR concerning the right to freedom of movement and choice of residence.<sup>92</sup> The prohibition of the forced displacement of civilians finds support also in provisions concerning the right to privacy. It constitutes a violation of Article 17 (1) of the ICCPR relating to the

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<sup>87</sup> Guiding Principles on Internal Displacement, (n 86), at principles 6 (2) (a), (b), and (e).

<sup>88</sup> Jacques, (n 44), at 19.

<sup>89</sup> Mooney, (n 84), at 185.

<sup>90</sup> J. Lavoyer, ‘Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC’ (1995) 35 *IRRC* 162, at 170.

<sup>91</sup> Jacques, (n 44), at 21.

<sup>92</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at Art. 12 (1), available online at: <http://www.refworld.org/docid/3ae6b3aa0.html>.



protection from interference with one's home,<sup>93</sup> and Article 11 (1) of the ICESCR concerning the right to adequate housing.<sup>94</sup> Unlike the rules of IHL prohibiting the forced displacement of civilians, the concerned provisions of IHRL have a derogable nature. They may not be applied in extraordinary circumstances, such as emergency situations.<sup>95</sup>

The first reference to the issue of forced displacement under IHL was made under Article 49 of the Civilians Convention.<sup>96</sup> The Article deals specifically with the forced displacement of civilians in occupied territory.<sup>97</sup> Common Article 3 did not include any reference to this issue.<sup>98</sup> The legal framework regulating internal armed conflicts remained empty of any reference to the prohibition of forced displacement until the adoption of the second Additional Protocol in 1977.<sup>99</sup> Article 17 of the second Additional Protocol explicitly approached matters concerning the forced displacement of civilians. Moreover, in accordance with the 2005 ICRC study on CIHL, the prohibition of displacement of civilians is a norm of customary international law.<sup>100</sup> Such a prohibition is founded under both treaty and customary laws, and it obligates parties to internal armed conflicts, the host state and organised armed groups.<sup>101</sup>

Article 17 of the second Additional Protocol distinguishes between the displacement of civilians within the territory of a contracting party and forced displacement outside this territory.<sup>102</sup> The Article reads:

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<sup>93</sup> *International Covenant on Civil and Political Rights*, (n 92), at Art. 17 (1).

<sup>94</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights*, (n 7), at Art. 11 (1).

<sup>95</sup> Jacques, (n 44), at 22.

<sup>96</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, at Art. 49, available online at: <http://www.refworld.org/docid/3ae6b36d2.html>.

<sup>97</sup> *Ibid.*

<sup>98</sup> See *Ibid.*, at Art. 3.

<sup>99</sup> See *Additional Protocol II*, (n 14), at Art. 17.

<sup>100</sup> Henckaerts & Doswald-Beck, (n 21), at 457.

<sup>101</sup> Jacques, (n 44), at 71.

<sup>102</sup> *Additional Protocol II*, (n 14), at Art. 17.

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.<sup>103</sup>

In accordance with paragraph 1 of Article 17, the displacement of the civilian population is prohibited, unless it is necessary for the security of civilians or it is demanded by imperative military reasons. As stated in the official commentary on the Protocols, ‘It is self-evident that a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited’.<sup>104</sup> Thus, organised armed groups may request the displacement of civilians when it is essential to protect them from being a target of a harmful military act. Furthermore, it is a well-established rule of customary international law that, in accordance with the principle of distinction and the prohibition of the use of human shields, armed groups are under an obligation to remove civilians in the territory under their control from areas that might be considered military objects.<sup>105</sup> Accordingly, when civilian populations under the territorial control of organised armed groups are exposed to serious and unavoidable danger, these armed groups are obligated to conduct immediate displacement; otherwise, they will be in violation of the principle of distinction. Nevertheless, the security of the civilian population, as an exception from the general prohibition of forced movement of civilians, has been highly criticised.<sup>106</sup>

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<sup>103</sup> *Additional Protocol II*, (n 14), at Art. 17.

<sup>104</sup> *Commentary on the Additional Protocols*, (n 22), at 1472.

<sup>105</sup> Henckaerts & Doswald-Beck, (n 21), at 74-76, Rule 24.

<sup>106</sup> See Jacques, (n 44), at 53.

It was contended that the reference to the security of civilians as an exception weakens the prohibition embodied in the Article,<sup>107</sup> providing parties to internal armed conflicts with an easy excuse to override the prohibition and justify the unlawful practice of forced movement.<sup>108</sup> One example of an abusive application of this exception is related to the Burundi's *regroupment* policy.<sup>109</sup> It was asserted that the primary purpose behind the process followed by the Burundi government was preventing any support the FNL could obtain from the local population.<sup>110</sup> This contention was strengthened by the fact that the vast majority of those forcibly displaced were Hutu. Furthermore, as argued by Cohen and Deng, it was quite evident that the process of displacement of civilians conducted by the Burundi government was ethnically targeted, thus representing a form of ethnic cleansing.<sup>111</sup> Accordingly, organised armed groups alleging the existence of such exceptions is not enough; clear evidence must be provided ensuring that the displacement of civilians is necessary for their security.

Regarding the displacement of civilians for military purposes, exacting standards are required to deem such an action lawful. As explained by the ICRC, to determine the legality of such an action, each case ought to be considered separately.<sup>112</sup> The ICRC went further to add, 'imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group'.<sup>113</sup> It is also unlawful

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<sup>107</sup> Jacques, (n 44), at 53.

<sup>108</sup> Ibid.

<sup>109</sup> See Amnesty International (IA), 'Burundi-forced relocation; new patterns of human rights abuses' (15 July 1997), AI Index AFR 16/019/1997, at 3.

<sup>110</sup> HRW, 'Burundi: emptying the hills- regroupment camps in Burundi' (1 July 2000), can be accessed online at: <https://www.hrw.org/legacy/reports/2000/burundi2/>.

<sup>111</sup> R. Cohen & F.M Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, (the Brookings Institute, Washington D.C, 1998), at 41.

<sup>112</sup> *Commentary on the Additional Protocols*, (n 22), at 1472- 1473.

<sup>113</sup> Ibid.

under IHL to use the displacement of civilians as a method for preventing the local support of civilians to a party to the conflict.<sup>114</sup> More specifically, the forced displacement of civilians could not be used by armed groups as a war tactic to ‘weaken the support base of adversaries and punish those who are perceived to support them, and to reward their own fighters’.<sup>115</sup>

It is not enough that one of these two situations—security of civilians or imperative military reasons—exist to deem displacement of civilians by organised armed groups legal. The lawfulness of the movement is based on the conditions under which such a displacement is conducted. Therefore, the act of civilian displacement would be deemed unlawful, even if it was founded on one of the two exceptions mentioned above, as long as the requirements stated under Article 17 (1) were not applied.<sup>116</sup> It is a customary rule of international law to ensure ‘all possible measures be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated’.<sup>117</sup> In accordance with the Guiding Principles on Internal Displacement, in all circumstances, the displacement of civilians ‘shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected’.<sup>118</sup> Furthermore, the displacement must be temporary and limited to the purpose behind it.<sup>119</sup> For instance, as stated by HRW, the government of Burundi failed to provide the displaced civilians with adequate food, water and suitable housing, and it was not able to decisively determine the period of displacement.<sup>120</sup>

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<sup>114</sup> Jacques, (n 44), at 56.

<sup>115</sup> IDMC, *Global Overview*, (n 1), at 16-17.

<sup>116</sup> *Additional Protocol II*, (n 14), at Art. 17 (1).

<sup>117</sup> Henckaerts & Doswald-Beck, (n 21), at 463, Rule 131; Guiding Principles on Internal Displacement, (n 86), at principle 7 (2).

<sup>118</sup> Guiding Principles on Internal Displacement, (n 86), at principle 7 (2).

<sup>119</sup> *Ibid*, at principle 6 (3).

<sup>120</sup> HRW, ‘Burundi: emptying the hills- regroupment camps in Burundi’, (n 110).

With regard to paragraph 2 of Article 17 concerning the forced displacement of civilians outside the territory of the contracting party, the prohibition of such an action is absolute.<sup>121</sup> Regarding the ICRC, the intention of the drafters suggests that the reference to ‘their own territory’ in the Article refers ‘to the whole territory of a country’.<sup>122</sup> The ICRC went on to add that the obligation not to forcibly displace civilians outside the territory applies to both the host state and the armed groups involved.<sup>123</sup> Although organised armed groups may legally require the displacement of civilians to an area within the territory of the state for security or military purposes, they cannot, under any circumstances, force civilians to move outside the national territory.

### **2.3.2 The Forced Displacement of Civilian Populations as an International Crime**

The forced displacement of civilians could be conducted by organised armed groups in violation of Article 17 of the second Additional Protocol.<sup>124</sup> The forced displacement of civilians might be carried out as a step towards, or a part of committing, the crime of ethnic cleansing. As clarified by the Special Rapporteur of the Commission on Human Rights, ‘The term ethnic cleansing refers to the elimination by the ethnic group exercising control over a given territory of members of other ethnic groups. A wide variety of methods are used to accomplish this end, including... transfer or relocation of population by force’.<sup>125</sup>

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<sup>121</sup> Jacques, (n 44), at 65.

<sup>122</sup> *Commentary on the Additional Protocols*, (n 22), at 1472.

<sup>123</sup> *Ibid*; Jacques, (n 44), at 65.

<sup>124</sup> *Additional Protocol II*, (n 14), at Art. 17 (1).

<sup>125</sup> United Nations General Assembly, ‘Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Prepared by Mr Tadeusz Mazowiecki’ (17 November 1992) UN Doc. A/47/666, at para. 9.

The unlawful forced displacement of civilians is considered, under Article 147 of the fourth Geneva Convention, as a grave breach of the Convention.<sup>126</sup> Moreover, as defined under Article 85 (5) of the first Additional Protocol of 1977, grave breaches to any of the four Geneva Conventions or their Additional Protocols ‘shall be regarded as a war crime’.<sup>127</sup> Under Article 20 (a) (vii) of the ILC, the ‘unlawful deportation or transfer or unlawful confinement of protected persons’ is considered a war crime.<sup>128</sup> The Statute of the ICC followed the same example as the ICTY,<sup>129</sup> the ICTR<sup>130</sup> and the SCSL,<sup>131</sup> considering the deportation or transfer of civilian populations a crime against humanity.<sup>132</sup> Though the criminalisation of such acts is well established under the rules governing international armed conflicts, there is a high level of ambiguity regarding this matter under the framework regulating internal armed conflicts.

Although prohibiting the act of forced displacement of civilians is observed under the framework regulating internal armed conflicts, the criminalisation of such acts has not been as clear.<sup>133</sup> Until the foundation of the *ad hoc* international tribunals in the 1990s, there was no indication that the rules governing internal armed conflicts included individual criminal responsibility.<sup>134</sup> As clearly stated in the Final Report of the Commission of Experts on war crimes in the former Yugoslavia, the customary

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<sup>126</sup> *Fourth Geneva Convention*, (n 96), at Art. 147.

<sup>127</sup> *Additional Protocol I*, (n 20).

<sup>128</sup> International Law Commission, ‘Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session’ (1996), UN Doc. A/CN.4/L.532.8.

<sup>129</sup> See United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, at Art. 5 (d), available online at: <http://www.refworld.org/docid/3ae6b3952c.html>.

<sup>130</sup> See *Ibid.*, at Art. 3 (d).

<sup>131</sup> See United Nations Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, at 2 (d), available online at: <http://www.refworld.org/docid/3dda29f94.html>.

<sup>132</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, at Art. 7 (1) (d), available online at: <http://www.refworld.org/docid/3ae6b3a84.html>.

<sup>133</sup> Jacques, (n 44), at 145.

<sup>134</sup> D. Plattner, ‘Penal Reparation of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts’, *International Committee of the Red Cross* (1993) 409, at 414.

international law concerning internal armed conflicts does not seem to contain any rules regarding ‘the concept of war crimes’.<sup>135</sup>

The absence of any reference to personal criminal responsibility in the early efforts to found the framework regulating internal armed conflicts is attributed to the high attention paid to national sovereignty by contracting states.<sup>136</sup> As argued by the Appeal Chamber in *Tadic* case, ‘State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts—at least not the mandatory universal jurisdiction involved in the grave breaches system’.<sup>137</sup> Therefore, the Article in the Geneva Conventions related to ‘grave breaches’ does not include any reference to illegal activities committed in violation of Common Article 3.<sup>138</sup>

The second Additional Protocol, adopted specifically to further regulate internal armed conflicts, does not include any article concerning grave breaches or personal criminal responsibility.<sup>139</sup> Nevertheless, because of civil wars and their awful effects, serious attempts have been made to modify the framework regulating internal armed conflicts to include personal criminal responsibility for grave breaches. Such efforts have been advanced by growing concerns regarding the importance of human rights protection, and the belief that claims related to national sovereignty do not justify violations of fundamental human rights.

In accordance with the Appeals Chamber of the ICTY in the *Tadic* case, ‘regardless of whether [the concerned grave breaches of the laws] were committed in

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<sup>135</sup> Final report of the Commission of Experts established pursuant to SC Resolution 780, 27 May 1992, UN Doc.S/1994/674, at para. 52.

<sup>136</sup> L. Lopez, ‘Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts’ (1994) 69 *New York University Review* 916, at 929.

<sup>137</sup> *Prosecutor v. Dusko Tadic aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, at para. 80, available online at: [http://www.refworld.org/cases/ICTY\\_47fdb520.html](http://www.refworld.org/cases/ICTY_47fdb520.html).

<sup>138</sup> Jacques, (n 44), at 146.

<sup>139</sup> *Ibid.*

internal or international armed conflicts’,<sup>140</sup> these breaches still raise questions about personal criminal responsibility.<sup>141</sup> Unlike the ICTY, the Statute of ICTR explicitly refers to personal criminal responsibility. As stated under Article 4 of the ICTR, ‘The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977...’.<sup>142</sup> Later, personal criminal responsibility for grave violations of Common Article 3 was affirmed under Article 8 (2) (c) of the Statute of the ICC.<sup>143</sup> The forced displacement of civilians is explicitly categorised as a war crime under the Statute of the ICC. In accordance with the Rome Statute of the ICC, the forced displacement of civilians in internal armed conflicts for reasons relating to the conflict without legitimate justifications constitutes a war crime.<sup>144</sup>

The international reaction regarding the situation in Syria indicates a need for further development regarding the criminalisation of the act of forcible displacement committed during internal armed conflicts. As affirmed by the UN Commission of Inquiry, the arbitrary and forcible displacement of civilians was one of the serious violations of international law committed by Syrian armed groups.<sup>145</sup> The Commission went on to add that the orders issued by ISIS to all Kurdish civilians living under the territorial control of the terrorist group ‘cannot be justified on the grounds either of the security of the civilians involved or of military necessity’.<sup>146</sup> Moreover, in accordance

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<sup>140</sup> *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, (n 137), at para. 129.

<sup>141</sup> *Ibid.*

<sup>142</sup> UNSC, *Statute of the International Criminal Tribunal for Rwanda*, (n 129).

<sup>143</sup> UNGA, *ICC Statute*, (n 132), at Art. 8 (2) (c).

<sup>144</sup> *Ibid.*, at Art. 8 (2) (e) (viii).

<sup>145</sup> United Nations General Assembly, ‘Report of the Independent Commission of Inquiry on the Syrian Arab Republic’ (2014) UN Doc A/HRC/25/65, at para.144 (Seventh Report of the Syria COI).

<sup>146</sup> *Ibid.*, at para. 135



with the Commission's findings, the acts of ISIS constitute 'a widespread and systematic attack against the Kurdish civilian population' that reaches the threshold of 'the crime against humanity of forcible displacement', and 'to the war crime of displacing civilians'.<sup>147</sup>

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<sup>147</sup> UNGA, 'Report of the Independent Commission of Inquiry on the Syrian Arab Republic', (n 145), at para. 135.

## 2.4 IDPs and the Role of Organised Armed Groups

This section addresses IDPs and the role of organised armed groups. First, it provides a general overview as to the principles concerning IDPs. Second, it evaluates the obligations imposed on organised armed groups to provide IDPs with food, water and healthcare. Third, the section examines the duties of organised armed groups as to displaced women. Fourth, it discusses the obligation imposed on organised armed groups as to the unity of displaced families.

### 2.4.1 General Principles Regarding IDPs

After discussing the prohibition of forced displacement of civilians, the IDPs resulting from such acts, and the protection provided by organised armed groups for these groups, must be evaluated. As a concept, IDPs refer to persons ‘who [have] been obligated to move within the borders of [their] own country because of an armed conflict or internal unrest’.<sup>148</sup> Unlike refugees who cross the borders of their own countries looking for a safe harbour in other, neighbouring states,<sup>149</sup> IDPs remain within the national territory.<sup>150</sup> Therefore, IDPs could end up in areas controlled by either the government or the organised armed groups.

The expert conference held in 2011, co-organised by the IDMC and Geneva Call in Geneva, concluded that organised armed groups could play a role in protecting IDPs ‘where the State is unable or unwilling to do so’.<sup>151</sup> The language used reflects some similarity with the formula provided under the concept of the R2P regarding the

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<sup>148</sup> M. C. Hickel, ‘Protection of Internally Displaced Persons Affected by Armed Conflict: Concept and Challenges’, *International Review of the Red Cross* 83 (843) 699, at 701.

<sup>149</sup> Mooney, (n 84), at 177-178.

<sup>150</sup> See Hickel, (n 148), at 701.

<sup>151</sup> *Internal Displacement Monitoring Centre (IDMC), Armed Non-State Actors and the Protection of Internally Displaced People*, June 2011, at 4.

responsibility of third states to protect.<sup>152</sup> As it was included within the framework of the R2P, ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states’.<sup>153</sup>

The subject of IDPs is not directly addressed by IHL. However, if the IDPs were not involved in the hostilities, they would be covered by the general protection provided for civilian populations under IHL.<sup>154</sup> Unlike the framework regulating international armed conflicts, there are not as many rules regarding the protection of IDPs during internal armed conflicts. IDPs in internal armed conflicts would benefit from the protection provided under IHRL in times of both peace and war. The importance of IHRL regarding protection for IDPs provided by organised armed groups as parties to internal armed conflicts increased after the adoption of the R2P. The responsibility to prevent requires further adherence to the rules of IHRL to eliminate activities that may lead to serious violations of *jus cogens*.

As previously stated under section one, IHL deems organised armed groups responsible to take all necessary measures to ensure that IDPs under their control are ‘received under satisfactory conditions of shelter, hygiene, health, safety and nutrition’.<sup>155</sup> Moreover, under Principle 18 of the Guiding Principles on Internal Displacement:

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe

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<sup>152</sup> See the International Commission on Intervention and State Sovereignty (ICISS), *Report on the Responsibility to Protect*, December 2001, at VIII.

<sup>153</sup> *Ibid.*

<sup>154</sup> Jacques, (n 44), at 185.

<sup>155</sup> *Additional Protocol II*, 8 June 1977, (n 14), at Art. 17 (1).

access to: (a) Essential food and potable water; (b) Basic shelter and housing; (c) Appropriate clothing; and (d) Essential medical services and sanitation.

3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.<sup>156</sup>

#### **2.4.2 Organised Armed Groups and the Rights of IDPs to Food, Water and Healthcare**

A primary issue IDPs suffer from is the lack of an adequate standard of living.<sup>157</sup>

As the UN Office for the Coordination of Humanitarian Affairs OCHA stated:

A principal cause of mortality for internally displaced persons, as with refugees and other war-affected populations, is malnutrition. Lack of food kills on its own and malnourished individuals are more susceptible to disease. Poor sanitation and contaminated water supplies also contribute to high death rates. Similarly, those without adequate shelter and clothing are more susceptible to life-threatening diseases and exposure to severe weather conditions.<sup>158</sup>

The lack of adequate food and water supplies in IDPs camps could have many explanations. The poor food and water conditions in IDPs camps could be caused by natural factors related to the geographical locations of the camps, or the nature and intensity of the conflicts. These poor living conditions could also result from the inability or unwillingness of the parties to internal armed conflicts or the international community to provide IDPs with the required support and care.<sup>159</sup> Recent practice has shown that the absence of the required level of food and water supplies may be

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<sup>156</sup> Guiding Principles on Internal Displacement, (n 86), at Art. 18 (1).

<sup>157</sup> See Ibid.

<sup>158</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Handbook for Applying the Guiding Principles on Internal Displacement*, 1 November 1999, at 37, available online at: <http://www.refworld.org/docid/3d52a6432.html>.

<sup>159</sup> IDMC, *Global Overview*, (n 1), at 73.

intentional when used by parties of the conflict as strategies of war.<sup>160</sup> As stated in the report of the International Crisis Group on Sudan, issued in 2002:

Instead of adopting a “hearts and minds” strategy to peel away [armed groups] SPLA popular support, the government has consistently targeted the “stomachs and feet” of civilians. By actively encouraging their displacement and steadily undermining their ability to feed and support themselves, including by destroying livestock, the government has sought to leave civilians in broad swathes of eastern and southern Sudan as vulnerable as possible. Famine in the war-torn regions is not a by-product of indiscriminate fighting but a government objective that has largely been achieved through manipulation, diversion and denial of international humanitarian relief. The calculation seems to be that a dispirited and enfeebled population will be unable to assist the insurgency. However, this has done little to persuade southerners that there is any place for them in a Sudan governed by the current leadership in Khartoum, and it poses a direct challenge to the international community’s responsibility to protect innocent civilians from the worst excesses of armed conflict.<sup>161</sup>

Another issue just as important as the supply of food and water is providing IDPs with adequate access to healthcare. As noted by the IDMC, although most health issues IDPs normally suffer from are treatable, these diseases lead to the death of a significant percentage of IDPs, especially children, due to the lack of access to healthcare and medication.<sup>162</sup> Besides the breakdown of the health system in the regions directly affected by hostilities, and the natural causes related to the geographical and unstable locations of IDPs camps,<sup>163</sup> more specific factors could negatively affect the provision of healthcare and medication for IDPs. For instance, the lack of sufficient financial resources significantly affects the level of healthcare provided during war time.

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<sup>160</sup> See International Crisis Groups, ‘Ending Starvation as a Weapon of War in Sudan’ (14 November 2002), at 2-3, available online at: <file:///C:/Users/Uzer/Downloads/Ending Starvation as a Weapon of War in Sudan.pdf>.

<sup>161</sup> ‘Ending Starvation as a Weapon of War in Sudan’, (n 160), at 2-3.

<sup>162</sup> IDMC, *Global Overview*, (n 1), at 72.

<sup>163</sup> *Ibid.*

The absence of adequate health services could be caused by the lack of security or freedom of movement.<sup>164</sup> Consequently, to facilitate the access to health services, organised armed groups are responsible for ensuring the security of medical teams, as well as IDPs, in areas under their control. They are also obliged not to restrict the movement of IDPs in a manner that could prevent them from obtaining adequate levels of healthcare. Moreover, healthcare and access to necessary medication must be provided for all IDPs, regardless their ethnic origin or religious background. Organised armed groups ought to allow access to health services on a non-discriminatory basis.<sup>165</sup>

### **2.4.3 The Obligations of Organised Armed Groups towards Displaced Women**

Besides the general support and care that organised armed groups ought to provide for all IDPs without discrimination, further protection must be provided for women and children, as they are more vulnerable than other categories of war victims. As clarified at the UN's Fourth World Conference on Women, '[w]omen and children constitute some 80 per cent of the world's millions of refugees and other displaced persons, including internally displaced persons'.<sup>166</sup> Reports regarding the IDPs in various conflicts, such as in Sudan, the Democratic Republic of Congo and Chad, stated that women and children were victims of rape and other types of sexual violence.<sup>167</sup> Moreover, Jacques argued, 'Gender-based violence may have serious implications for the health of displaced women, including an increased risk of infection from HIV/AIDS and other sexually transmitted infections (STIs), as well as unwanted pregnancies'.<sup>168</sup>

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<sup>164</sup> IDMC, *Global Overview*, (n 1), at 72.

<sup>165</sup> See *Ibid.*

<sup>166</sup> The United Nations Fourth Conference on Women, 'Platform for Action: Women and Armed Conflict' (Beijing, September 1995), at para. 136, available online at: <http://www.un.org/womenwatch/daw/beijing/platform/armed.htm>.

<sup>167</sup> IDMC, *Global Overview*, (n 1), at 67.

<sup>168</sup> Jacques, (n 44), at 190.

Although the legal framework governing internal armed conflicts did not pay direct attention to the elevated vulnerability of women as potential victims, various general rules could obligate organised armed groups to provide additional protection for internally displaced women. Even though Common Article 3 does not directly refer to gender-based acts of violence, the prohibition of such acts could be indicated. The general prohibition provided under Article 3 (1) (a) and (c) could cover certain criminal acts of a gender-based nature.<sup>169</sup>

Article 3 (1) (a) prohibits ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’.<sup>170</sup> Article 3 (1) (c) prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment’.<sup>171</sup> Article 4 (2) (e) of the second Additional Protocol explicitly states that it is absolutely prohibited at all times and in all situations to subject women to any acts affecting their ‘personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’.<sup>172</sup> As the primary purpose behind the adoption of the second Additional Protocol is elaborating on and clarifying the meaning of Common Article 3, the ‘explicit proscription of rape and other kinds of sexual and physical violence [under the Protocol] should be respected by the parties to all internal armed conflicts’.<sup>173</sup>

Although neither Common Article 3 nor the second Additional Protocol includes any provision entailing individual criminal responsibility, the Statute of the ICTR has recognised that infractions of the non-derogable rules in Common Article 3

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<sup>169</sup> Jacques, (n 44), at 190.

<sup>170</sup> *Third Geneva Convention*, (n 55), at Art. 3 (1) (a).

<sup>171</sup> *Ibid*, at Art. 3 (1) (c).

<sup>172</sup> *Ibid*, at Art. 4 (2) (e).

<sup>173</sup> *Commentary in the Geneva Conventions*, (n 54), at 135.

and the second Additional Protocol should be regarded as offences against international law. According to Article 3 of the Statute of the ICTR:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

...

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

...

(h) Threats to commit any of the foregoing acts.<sup>174</sup>

Moreover, Article 3 of the Statute explicitly states, ‘The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: ‘(g) Rape;’.<sup>175</sup> Similarly, the Statute of the International Tribunal for the Former Yugoslavia states in Article 5, on ‘Crimes Against Humanity’ that ‘The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: “(g) rape;”’.<sup>176</sup>

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<sup>174</sup> UNSC, *Statute of the International Criminal Tribunal for Rwanda*, (n 129), at Art. 4, available online at: <http://www.refworld.org/docid/3ae6b3952c.html>.

<sup>175</sup> *Ibid*, at Art. 3.

<sup>176</sup> *Ibid*, at Art. 5.



#### 2.4.4 The Obligation of Organised Armed Groups to Preserve the Unity of Displaced Families

Another obligation organised armed groups ought to fulfil in relation to IDPs under their control is the preservation of family unity. Principally, members of the same family ought not to be separated during the act of displacement. Thus, organised armed groups must undertake reasonable efforts to avoid the separation of family members during the transfer of civilians from evacuated areas to IDPs camps under their control.<sup>177</sup> Furthermore, such an obligation is not only founded on the rules of IHL, but it also finds support in various provisions of IHRL.<sup>178</sup>

Article 16 (3) of the UDHR affirms, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.<sup>179</sup> Moreover, a similar Paragraph is adopted under Article 23 of the ICCPR.<sup>180</sup> Article 8 (1) of the ECHR states, 'Everyone has the right to respect for his private and family life'.<sup>181</sup> Moreover, being linked with the idea of fundamental freedom and privacy, the concepts related to the protection of family life mean that the authorities must avoid interfering with the family, and also make sufficient efforts to prevent interference by third parties.<sup>182</sup> The ICCPR provides that '[e]veryone has the right to protection against such interference or attacks'.<sup>183</sup> Furthermore, the UN Human Rights Committee has

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<sup>177</sup> Jacques, (n 44), at 202.

<sup>178</sup> See for ex. UNGA, *Universal Declaration of Human Rights*, (n 5), at Art. 16 (3); UNGA, *International Covenant on Civil and Political Rights*, (n 92), at Art. 23 (1); Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, at Art. 8 (1), available online at: <http://www.refworld.org/docid/3ae6b3b04.html>; Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, at Art. 11 (1), available online at: <http://www.refworld.org/docid/3ae6b36510.html>.

<sup>179</sup> UNGA, *Universal Declaration of Human Rights*, (n 5), at Art. 16 (3).

<sup>180</sup> UNGA, *International Covenant on Civil and Political Rights*, (n 92), at Art. 23 (1).

<sup>181</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (n 178), at Art. 8 (1), available online at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>182</sup> See UNGA, *Universal Declaration of Human Rights*, (n 5), at Art. 16 (3).

<sup>183</sup> UNGA, *International Covenant on Civil and Political Rights*, (n 92), at Art. 17 (2).

interpreted this language as requiring protection ‘against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons’.<sup>184</sup>

The concept of non-interference in family life also appears in various international instruments related to the rights of the child. The rights of the child support protection of the family unity by ensuring the child is ‘not be separated from his or her parents’.<sup>185</sup> The unity of internally displaced families is more significant when it comes to the rights of the child. Children are more vulnerable than other war victims. The separation of children from their families does not only violate certain rules of IHL and IHRL, but it also makes them more vulnerable as objects of serious violence and abuses such as forced prostitution, forced recruitment and sexual assault.<sup>186</sup> Therefore, a duty imposed on armed groups to ensure the unity of the internally displaced families under their control during hostilities helps eliminate the potential for serious violations. In other words, the fulfilment of such an obligation by organised armed groups could be considered as an exercise of their responsibilities to prevent.

Similarly, IHL requires respect for family life in the context of armed conflicts. In accordance with the ICRC based on the practice and *opinion juris* of states, the obligation to respect family life is part of customary international law in both international and internal armed conflicts.<sup>187</sup> The ICRC’s customary law study further added, ‘In cases of displacement, all possible measures must be taken such that the civilians concerned are received under satisfactory conditions...and that members of the

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<sup>184</sup> Human Rights Committee, General Comment 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation, 1988, at 1; See M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, (2d ed. 2005), at 379.

<sup>185</sup> UNGA, *Convention on the Rights of the Child*, (n 8), at Art. 9.

<sup>186</sup> United Nations General Assembly, ‘Report of the Expert of the Secretary-General, Ms Graca Machel: Impact of Armed Conflict on Children’ (26 August 1996), A/51/306, at para. 69, available online at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/51/306](http://www.un.org/ga/search/view_doc.asp?symbol=A/51/306); K. Gulick, ‘Protection of Family Life’, in W. Kalin, R. C. Williams, K. Koser and A. Solomon (eds.), *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges* (American Society of International Law, Washington, DC, 2010), at 291.

<sup>187</sup> Henckaerts & Doswald-Beck, (n 21), at Rule 105.

same family are not separated'.<sup>188</sup> Moreover, as Gulick argued, this customary right imposes an equal obligation on any party exercising control over a civilian population to make as much effort as is within its power to ensure the unity of internally displaced families.<sup>189</sup> Besides the initial, primarily negative, duty imposed on armed groups to preserve the unity of internally displaced families, IHL requires organised armed groups to fulfil another obligation of a remedial nature.<sup>190</sup>

In cases where family members are dispersed because of the intensity of the hostilities, or during the process of displacement, IHL holds organised armed groups responsible to undertake certain steps to facilitate the reunification of internally displaced families.<sup>191</sup> IHL recognises two main obligations that organised armed groups should fulfil. First, organised armed groups should allow families to know the fate of their missing relatives.<sup>192</sup> Second, organised armed groups are obligated to facilitate communication between separated family members and improve the possibility for reunification.<sup>193</sup>

Since the drafting of the Guiding Principles, the right of families to know the fate of their disappeared relatives has been improved and extended under both IHRL and IHL.<sup>194</sup> The ACRWC was the first human rights convention to address the rights of children to have access to essential information regarding missing or absent family members.<sup>195</sup>

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<sup>188</sup> Henckaerts & Doswald-Beck, (n 21), at Rule 131.

<sup>189</sup> Gulick, (n 186), at 303.

<sup>190</sup> See *Ibid*, at 302.

<sup>191</sup> See *Additional Protocol II*, (n 14), at Art. 4 (3) (b).

<sup>192</sup> Henckaerts & Doswald-Beck, (n 21), at 421.

<sup>193</sup> See *Additional Protocol II*, (n 14), at Art. 4 (3) (b).

<sup>194</sup> Gulick, (n 186), at 308.

<sup>195</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), at Art. 19 (3), available online at: <http://www.refworld.org/docid/3ae6b38c18.htm>. The Charter entered into force in 1999.

The 2005 ICRC study on CIHL indicated that organised armed groups are under an obligation to ‘take all feasible measures to account for persons reported missing because of armed conflict and must provide their family members with any information it has on their fate’.<sup>196</sup> It argued that such a rule has a customary nature and applies to both international and internal armed conflicts. Moreover, the duty of organised armed groups to collect and deliver information about missing family members was affirmed in many agreements between states.<sup>197</sup>

In a resolution adopted in 1974, the UNGA clearly stated, ‘the desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible, and that provision of information on those who are missing or who have died in armed conflicts should not be delayed merely because other issues remain bending’.<sup>198</sup>

IHL provides the most detailed guidance on the right to reunification and its implementation.<sup>199</sup> Unlike IHRL, which implicitly recognises such a right, IHL refers directly to the right to reunification in various provisions.<sup>200</sup> Although such an assertion has merit, it ought to be realised that a new trend recognising the right of families to reunion has emerged under IHRL.<sup>201</sup> The strongest commitment in this regard is contained in the ACRWC.<sup>202</sup> According to Article 25 (2) (b) of the ACRWC ‘all

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<sup>196</sup> Henckaerts & Doswald-Beck, (n 21), at 421.

<sup>197</sup> *Additional Protocol II*, (n 14), at Art. 4 (3) (b).

<sup>197</sup> Henckaerts & Doswald-Beck, (n 21), at 421.

<sup>198</sup> United Nations General Assembly Resolution 3220 (XXIX), Assistant and Cooperation in Accounting for Persons who are Missing or Dead in Armed Conflicts, Plenary Meeting 2278<sup>th</sup>, 6 November 1974, available online at: <https://documents-dds.ny.un.org/doc/RESOLUTION/GEN/NR0/738/22/IMG/NR073822.pdf?OpenElement>.

<sup>199</sup> See Gulick, (n 186), at 303.

<sup>200</sup> *Ibid*, at 303-304. ‘the ICCPR and ECHR, the CRC should be read as implicitly recognizing a right to family reunification for IDPs that would apply uniformly in times of peace, conflict and natural disaster’.

<sup>201</sup> See OAU, *African Charter on the Rights and Welfare of the Child*, (n 195), at Art. 25 (2) (b); See also Protocol on the Protection and Assistance to Internally Displaced Persons, art. 4 (h) (‘Member states undertake to... facilitate family reunification’), which is not limited to cases of reunification involving children. The Protocol is part of the Pact on Security, Stability and Development of the Great Lakes Region, adopted by the International Conference on the Great Lakes Region, Dec. 16, 2006.

<sup>202</sup> OAU, *African Charter on the Rights and Welfare of the Child*, (n 195), at Art. 25 (2) (b).

necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters'.<sup>203</sup>

The general principle is stated under Article 4 (3) of the second Additional Protocol.<sup>204</sup> Although Paragraph 3 of Article 4 is meant to underline the principles concerning the protection of children in internal armed conflicts, it includes the idea that 'all appropriate steps shall be taken to facilitate the reunion of families temporarily separated' by organised armed groups.<sup>205</sup> Furthermore, in accordance with the commentary on the protocols, organised armed groups must do the best they can do to enable the reunion of families.<sup>206</sup> Not only should armed groups remove any restrictions and allow members of dispersed families to search for their relatives, but they must also take a positive part and effectively participate in the process itself. Organised armed groups are expected to fulfil their duty not only by participating in the search process, but also by cooperating with the concerned international organisations, such as the Central Tracing Agency of the ICRC, Red Cross or Red Crescent Society.<sup>207</sup>

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<sup>203</sup> OAU, *African Charter on the Rights and Welfare of the Child*, (n 195), at Art. 25 (2) (b).

<sup>204</sup> *Additional Protocol II*, (n 14), at Art. 4 (3) (b).

<sup>205</sup> *Ibid.*, at Art. 4 (3) (b).

<sup>206</sup> *Commentary on the Additional Protocols*, (n 22), at 1379.

<sup>207</sup> *Ibid.*

## 2.5 Conclusion

This chapter focused on examining certain obligations for protecting civilians imposed on organised armed groups by IHL. The aim was to determine the extent to which organised armed groups already have these responsibilities under the frameworks regulating internal armed conflicts, and whether the adoption of the R2P has had any contribution.

In section one, obligations relating to the right to adequate food under IHL were discussed. It was clarified that organised armed groups are under a duty not to use starvation as a method of war, as this is considered a war crime. The obligation imposed on organised armed groups is not limited to the act of starvation itself; it covers any act that may lead to it. Consequently, organised armed groups have a responsibility to prevent actions leading to starvation. This prohibition is restricted to intentional, rather than accidental, starvation.

Section one also addressed the duty of organised armed groups to accept and facilitate the access of humanitarian assistance. Organised armed groups are obligated to allow access to humanitarian aid if the aid satisfies the requirements stated in the second Additional Protocol. Although state practice suggests that the request of prior consent of the host state is required before providing humanitarian aid in areas under the control of armed groups, the UNSC reaction towards the Syrian crisis indicated potential changes. It authorised the delivery of humanitarian assistance to areas controlled by Syrian armed groups without the consent of the Syrian authorities.

Section two evaluated the prohibition of the forced displacement of civilians and the role of organised armed groups. Although organised armed groups can lawfully displace or evacuate the population under their control for military or security purposes, the displacement of civilians by these groups would be deemed illegitimate if it was

done arbitrarily. The lawfulness of the movement is based on the conditions upon which such a displacement is conducted. The forced displacement of civilians in internal armed conflicts for reasons relating to the conflict without legitimate justifications constitutes a war crime,<sup>208</sup> or crime against humanity.

Section three addressed the obligations imposed on organised armed groups to protect IDPs. IHL imposes a general obligation upon organised armed groups to take all necessary measures to ensure that IDPs under their control receive satisfactory shelter, hygiene, health, safety and nutrition. In addition, organised armed groups have further duties towards women and displaced families. These duties are of a preventive nature. Adherence to these obligations by organised armed groups prevents international crimes.

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<sup>208</sup> UNGA, *ICC Statute*, (n 16), at Art. 8 (2) (e) (viii).

## Chapter 3

# The Recognition of Opposition Groups at the International Level after the Adoption of the Concept of the R2P: The Recognition of the Libyan and Syrian Oppositions as the Legitimate Representative of the People, Political and Legal Consequences

### 3.1 Introduction

After evaluating the relationship between organised armed groups and parent states in the previous chapters, the relationship between opposition groups and the international community is addressed. In this chapter, the recognition of these groups at the international level is discussed. State practice, after the adoption of the concept of the R2P, has indicated the possibility that the political structure of organised armed groups may be, under certain circumstances, recognised at the international level. Such recognition would go beyond the context of internal armed conflict to suggest certain degree of support and acceptance of these recognised groups by the international community.<sup>1</sup> Despite the great differences between the international reactions to the Libyan and Syrian crises, an examination of both cases suggests that a new trend to grant the opposition groups a status at the international level has been emerging since the adoption of the R2P.

State practice towards the Libyan and Syrian oppositions indicated that the political structure of opposition groups could be recognised in various ways reflecting

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<sup>1</sup> See US State Department, Daily Press Briefing, 12 December 2012, available online at <http://www.state.gov/r/pa/prs/dpb/2012/12/201212201930.htm#SYRIA>; S. Talmon, 'Recognition of the Libyan National Transitional Council' (2011) 15 (16) *American Society of International Law: Insight*, available online at: <http://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council>.



different levels of political support.<sup>2</sup> At certain stages of the Libyan and Syrian conflicts, many states recognised the NTC and the SOC as the legitimate representatives of their peoples. Such a status was considered to reflect a high degree of political recognition. It also indicated the emergence of some potential legal consequences.<sup>3</sup>

The aim of this chapter is to examine to what extent the process of recognising the political structure of the opposition groups has developed after the adoption of the concept of the R2P. To evaluate this development, the chapter is divided into two main sections. Section one addresses the political recognition of the opposition groups as representatives. Section two discusses the legal recognition of the opposition group. In the first part of section two, the potential link between the use of the phrase the legitimate representative of the people and self-determination is clarified. In the second part of the section, the categorisation of the opposition group as the legitimate representative of the people and the recognition of this group as the new government of the state is examined.

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<sup>2</sup> See Obama Recognizes Syrian Opposition Group, *ABC News*, 11 December 2012, available online at: <http://abcnews.go.com/Politics/OTUS/exclusive-president-obama-recognizes-syrian-opposition-group/story?id=17936599>; US State Department, Daily Press Briefing, , 12 December 2012, (n 1).

<sup>3</sup> See D. Akande, 'Self Determination and the Syrian Conflict- Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does This Mean and What Implications Does It Have??' (2012) *European Journal of International Law: Talk!*, available online at: <http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>.

## **3.2 The Political Recognition of the Opposition Groups after the Adoption of the R2P**

In this section, the issue concerning the political recognition of the opposition groups after the adoption of the R2P is addressed. In order to do so, three tasks are undertaken. First, the political act of recognition is defined. Second, the various levels of political recognition that could be granted to opposition groups is outlined. Third, the recognition of opposition groups as the legitimate representatives of the peoples, as the highest level of political recognition is evaluated. The aim is to trace any potential requirements and consequence of such recognition.

### **3.2.1 The Political Act of Recognition**

As Kelsen stated, '[t]he term "recognition" may be said to be comprised of two quite distinct acts: a political act and a legal act'.<sup>4</sup> Nevertheless, unlike the legal act of recognition, the political act does not produce any legal consequences.<sup>5</sup> It is an arbitrary act exercised by the recognising state reflecting its intention to establish a certain degree of political relations with the recognised entity.<sup>6</sup> Furthermore, being within the arbitrary discretion of the recognising state,<sup>7</sup> the political act of recognition can be contingent on certain requirements.<sup>8</sup> Although it does not lead to any legal rights or obligations, the act of political recognition could be of political and practical importance for the recognised entity.<sup>9</sup> It refers to the political existence of the recognised group and adds some legitimacy to its financial situation.<sup>10</sup> It is noteworthy that, even though the act of

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<sup>4</sup> H. Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 (4) *The American Journal of International Law* 605.

<sup>5</sup> S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) *Chinese Journal of International Law* 219, at 231.

<sup>6</sup> Kelsen, (n 4), at 605

<sup>7</sup> Ibid.

<sup>8</sup> Talmon (2013), (n 5), at 231.

<sup>9</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1).

<sup>10</sup> Talmon (2013), (n 5), at 231.

political recognition is different from the act of legal recognition, state practice has shown a link between these two types of recognition.<sup>11</sup>

As Talmon (2013) commented, ‘recognition is an incremental process’.<sup>12</sup> It usually starts with political recognition that may develop from one stage to another; then, when certain requirements are satisfied, further steps can be followed to grant legal recognition.<sup>13</sup> In other words, the act of political recognition has no legal consequences, but, as a critical initial step, it can lead to legal recognition whenever the concerned group achieves the required capacity under international law.<sup>14</sup> The importance of the act of political recognition as a prerequisite for the legal recognition of opposition groups has increased after the implementation of the R2P over the Libyan and Syrian crises. The Libyan case is considered a successful implementation of the R2P for protecting the population, and the Syrian situation is considered a failure of the international community to react to the extreme violations committed by the Assad regime against its people. However, both cases emphasise the solid link between the political act of recognition and the legal recognition of opposition groups as new governments. In other words, the level of political recognition granted in each case played a notable role in the decision whether to recognise the opposition group as the new government.<sup>15</sup>

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<sup>11</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1).

<sup>12</sup> Talmon (2013), (n 5), at 230.

<sup>13</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1).

<sup>14</sup> Kelsen, (n 4), at 605.

<sup>15</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1).

### 3.2.2 The Different Levels of the Political Recognition of the Opposition Groups

Though the international community reacted to the crises in Libya and Syria quite differently, states' reactions to these two conflicts indicated a movement towards further recognising opposition groups for implementing the R2P. The treatments of both cases by a significant number of states have indicated the emergence of some general guidelines as to how opposition groups could be recognised politically.<sup>16</sup>

The international reaction to the Libyan situation was unusually fast and effective from regional and international organisations. However, states' prepositions as to the Libyan opposition groups have carefully developed from one stage to the next.<sup>17</sup> At the early stage following the eruption of the conflict, states treated the matter with high degrees of caution. Such reluctance could be attributed to the uncertainty surrounding the situation on the ground, as clarified in chapter one. Consequently, the NTC was carefully recognised by a number of states 'as a 'legitimate and credible interlocutor', 'legitimate political interlocutor,' or 'valid interlocutor for the Libyan people''.<sup>18</sup> Furthermore, although the use of this new form of recognition may not have had any legal affects,<sup>19</sup> it showed some signs of acceptance.<sup>20</sup> Over time, and as some signs of stability and credibility began to emerge in favour of the opposition, states were willing to grant higher degrees of political recognition.<sup>21</sup> At this stage, the NTC was recognised by some states as 'the legitimate representative of the Libyan people'.<sup>22</sup>

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<sup>16</sup> See Obama Recognizes Syrian Opposition Group, (n 2); US State Department, Daily Press Briefing, 12 December 2012, (n 1).

<sup>17</sup> S. Talmon, 'Recognition of the Libyan National Transitional Council' (2011) 15 (16) *American Society of International Law: Insight*, available online at: <http://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Talmon (2013), (n 5), at 233.

<sup>20</sup> Talmon (2011), (n 17).

<sup>21</sup> *Ibid.*

<sup>22</sup> See for ex. Germany recognises Libya rebels as sole government, *BBC News*, available online at: <http://www.bbc.co.uk/news/world-europe-13753422>.

States reactions to the Syrian opposition have reflected higher degrees of reluctance and uncertainty, even from some regional organisations and neighbouring states.<sup>23</sup> After the formation of the SOC,<sup>24</sup> which replaced the SNC,<sup>25</sup> the member states constituting the GCC<sup>26</sup> unanimously issued an immediate statement recognising the SOC as ‘the legitimate representative of the brotherly Syrian people’.<sup>27</sup> Unlike the GCC, the Arab League was unwilling to grant the SOC such a status of recognition. Even though the league, which had already suspended the membership of Syria,<sup>28</sup> welcomed the foundation of the new Syrian coalition, it was reluctant to recognise it as the representative of the Syrian people.<sup>29</sup> Some member states were not ready to withdraw the political recognition from the Syrian government,<sup>30</sup> and others doubted the effectiveness of the SOC.<sup>31</sup> The Ministerial Council of the league ‘‘urged regional and international organisations to recognise it as a legitimate representative for the aspirations of the Syrian people’, and called it ‘a legitimate representative and a primary negotiator with the Arab League’’.<sup>32</sup>

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<sup>23</sup> See Arab League gives hesitant welcome to Syria opposition coalition, *Ahram online*, 13 November 2012, available online at: <http://english.ahram.org.eg/NewsContent/2/8/57939/World/Region/Arab-League-gives-hesitant-welcome-to-Syria-opposi.aspx>.

<sup>24</sup> The coalition was established after a formal agreement was signed Sunday evening in the Qatari capital of Doha by Moaz al- Khatib, the newly-elected head of the united entity, and George Sabra, the new head of major opposition group the Syrian National Council (SNC). See Six Gulf states recognize new Syrian opposition bloc, *Channel*, 13 November 2012, available online at: <http://1tv.ge/news-view/43916?lang=en>.

<sup>25</sup> See Syria Crisis: Guide to Armed and Political Opposition, *BBC News*, 17 October 2013, available online at: <http://www.bbc.co.uk/news/world-middle-east-15798218>.

<sup>26</sup> The GCC constitutes of six-member states; Saudi Arabia, Bahrain, The United Arab Emirates, Oman, Qatar and Kuwait.

<sup>27</sup> In a statement made by the GCC chief Abdullatif al-Zayani. See Six Gulf states recognize new Syrian opposition bloc, *Channel*, 13 November 2012, available online at: <http://1tv.ge/news-view/43916?lang=en>.

<sup>28</sup> See Syria suspended from Arab League, *The Guardian*, 12 November 2012, available online at: <http://www.theguardian.com/world/2011/nov/14/syria-suspension-arab-league-assad-isolated>.

<sup>29</sup> See Arab League gives hesitant welcome to Syria opposition coalition, (n 23).

<sup>30</sup> See *Ibid*.

<sup>31</sup> See Libya and Tunisia Come out Against Syrian Opposition, 24 November 2012, available online at: <http://www.frontpagemag.com/2012/dgreenfield/libya-and-tunisia-come-out-against-syrian-opposition/>.

<sup>32</sup> Arab League gives hesitant welcome to Syria opposition coalition, (n 23). Arab League reaffirmed its recognition of the Syrian opposition as ‘the legitimate representative of the aspirations of the Syrian people’ during the meeting that held on November 2013 between Arab League and the SNC. See

The uncertainty regarding the most suitable status to grant the Syrian opposition groups was more obvious at the international level. States recognised the Syrian opposition in various ways. Besides being recognised as ‘the legitimate representative of the Syrian people’ or ‘the (sole/only) legitimate representative of the Syrian people’ by some states, such as France,<sup>33</sup> Turkey,<sup>34</sup> Italy,<sup>35</sup> the UK<sup>36</sup> and the USA at a late stage,<sup>37</sup> the SOC was described by other states in distinct ways indicating different levels of political recognition.<sup>38</sup> As argued by Talmon (2013), besides its recognition as ‘the legitimate representative of the Syrian people and the sole legitimate representative of the Syrian people’, the SOC was given at least four different statuses.

For instance, the SOC has been categorised as

- (i) a legitimate representative for [of] the aspirations of the Syrian people;
- (ii) legitimate representatives of the aspirations of the Syrian people;
- (iii) a legitimate representative of the Syrian people;
- (iv) legitimate representatives of the Syrian people.<sup>39</sup>

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Syrian National Coalition meets with Arab League, *Daily News Egypt*, 11 February 2013, available online at: <http://www.dailynewsegypt.com/2013/02/11/syrian-national-coalition-meets-with-arab-league/>.

<sup>33</sup> See France recognises Syria opposition coalition, *Aljazeera English*, 14 November 2012, available online at: <http://www.aljazeera.com/news/middleeast/2012/11/20121113174633204988.html>.

<sup>34</sup> See Statement by Mr Ahmet Davutoglu, Minister of Foreign Affairs of Turkey, at the 39<sup>th</sup> Session of the OIC Council of Foreign Ministers, *Djibouti*, 15 November 2012, available online at: [http://www.mfa.gov.tr/statement-by-mr\\_-ahmet-davutoglu\\_-minister-of-foreign-affairs-of-turkey\\_-at-the-39th-session-of-the-oic-council-of-foreign-m.en.mfa](http://www.mfa.gov.tr/statement-by-mr_-ahmet-davutoglu_-minister-of-foreign-affairs-of-turkey_-at-the-39th-session-of-the-oic-council-of-foreign-m.en.mfa).

<sup>35</sup> See EU follows Italy’s move to recognize Syrian opposition coalition, *RT QUESTION MORE*, 19 November 2012, available online at: <http://rt.com/news/syria-opposition-eu-representative-099/>.

<sup>36</sup> See UK: Syrian opposition ‘sole legitimate representative’ of the people, *The Guardian*, 20 November 2012, available online at: <http://www.theguardian.com/world/2012/nov/20/uk-syrian-opposition-sole-legitimate-representative-people>.

<sup>37</sup> See Obama recognizes Syrian opposition coalition, (n 2).

<sup>38</sup> For ex. The Nordic and Baltic countries accepted the SOC ‘as legitimate representatives of the Syrian people’. See Friends of Syria meeting in Marrakech, 12 December 2012, Nordic-Baltic Intervention, available online at: <http://www.mfa.is/media/manrettindi/Syrland-yfirlysing-121212.pdf>; also, The EU at an early stage, considered the SOC as ‘the legitimate representatives of the aspirations of the Syrian people’. See Council of the European Union, Council Conclusions on Syria, 3199<sup>th</sup> Foreign Affairs Council Meeting, Brussels, 19 November 2012, available online at: [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/133598.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/133598.pdf).

<sup>39</sup> Talmon (2013), (n 5), at 227.

Furthermore, after conducting a brief linguistic analysis, Talmon (2013) suggested three possible ways to recognise an opposition group politically as ‘representatives of a people during a civil war’.<sup>40</sup> These are:

- (i) a representative/representatives of the aspirations of a people;
- (ii) a representative/representatives of a people; or
- (iii) the (sole) representative of a people.<sup>41</sup>

Moreover, without ignoring the significance of the linguistic examination to distinguish between these statuses, state practice has further clarified the gradual relation between these stages of political recognition.<sup>42</sup> In certain situations, states have used different statements to show their intention to move from one stage to another and grant opposition groups higher degrees of political recognition. These various phrases to imply different levels of recognition were gradually applied to the Syrian opposition.

For instance, the EU recognised the SOC as ‘the legitimate representatives of the aspirations of the Syrian people’<sup>43</sup> at an early stage. The EU Council said, ‘The EU looks forward to this new coalition continuing to work for full inclusiveness, subscribing to the principles of human rights and democracy and engaging with all opposition groups and all sections of Syrian civil society’.<sup>44</sup> Moreover, such a statement indicates the provisional nature of the recognition. As commented by Talmon (2013), the statement made by the EU Council suggests that ‘several EU member states still had strong reservations about the Opposition Coalition in terms of how representative it was and its democratic commitment’.<sup>45</sup>

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<sup>40</sup> Talmon (2013), (n 5), at 228.

<sup>41</sup> Ibid.

<sup>42</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1).

<sup>43</sup> Council of the European Union, Council Conclusions on Syria, (n 38).

<sup>44</sup> Ibid.

<sup>45</sup> Talmon (2013), (n 5), at 221.

Less than three weeks later, and after a meeting with the head of the SOC, the EU Council issued a new statement recognising the SOC ‘as legitimate representatives of the Syrian people’.<sup>46</sup> Unlike the initial recognition mentioned above, the acceptance of the SOC by the EU ‘as legitimate representatives of the Syrian people’ was accompanied by a statement welcoming the recent efforts made by the coalition ‘to set up its structures and to become more operational and inclusive’.<sup>47</sup> Nevertheless, the EU went on to add that it ‘encourages the Coalition to continue working on these goals and to remain committed to the respect of the principles of human rights, inclusivity, democracy and engaging with all opposition groups and all sections of Syrian civil society’.<sup>48</sup> Therefore, even though such a statement suggests a higher degree of recognition when compared with the acceptance of the SOC as ‘the legitimate representatives of the aspirations of the Syrian people’,<sup>49</sup> it does not intend to grant the SOC unconditional or complete political recognition.

In another example, the US seemed to recognise the SOC in various capacities. The initial attempt to assess the status of the SOC took place in a press meeting at the US State Department.<sup>50</sup> In his comment on the French move towards recognising the SOC as ‘the sole legitimate representative of the Syrian people’, Spokesperson of the US State Department Mark C. Toner, after indicating some reservations, described the SOC as ‘a legitimate representative of the Syrian people’.<sup>51</sup> Toner’s statements throughout the meeting not only indicated that the recognition of an opposition group as ‘the sole legitimate representative of the Syrian people’ represents a high degree of

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<sup>46</sup> Council of the European Union, Council Conclusions on Syria, (n 38).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> See US State Department, Daily Press Briefing, 13 November 2012, available online at: <http://www.state.gov/r/pa/prs/dpb/2012/11/200477.htm#SYRIA>.

<sup>51</sup> Ibid.



political recognition requiring the fulfillment of high standards, but also showed that the US was still unwilling to provide the SOC full political recognition.<sup>52</sup> Though Mr Toner repeatedly expressed US support to the SOC, he also indicated some signs of uncertainty regarding the most suitable status for the Syrian opposition. On many occasions during the meeting, Toner stressed that the SOC must demonstrate clear signs of stability and credibility before a formal and final statement of recognition could be granted.<sup>53</sup> However, almost four weeks later, the US preposition to the status of the SOC took a different turn.

In an interview, the US President Barack Obama announced the US formal recognition of the SOC as ‘the legitimate representative of the Syrian people’.<sup>54</sup> The statement did not only reflect the US intention to provide the SOC with a higher degree of political recognition but also pointed to a specific justification to grant the status. President Obama explicitly based the recognition of the SOC on the ground that the Syrian opposition ‘is ... inclusive enough, is reflective and representative enough of the Syrian population’.<sup>55</sup>

The state practices towards recognising the Libyan and Syrian opposition groups suggest that the political act of recognition can take various types. Although it is discretionary and does not produce any legal consequences, each formula of political recognition seems to reflect different levels of support and acceptance. States’ attitudes towards the Libyan and Syrian cases indicate that the use of the expression ‘the legitimate representative of the people’ is a key element in recognition. It suggests a high, if not the highest, degree of political recognition.<sup>56</sup> In fact, the recognition of an

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<sup>52</sup> See US State Department, Daily Press Briefing, 13 November 2012, (n 50).

<sup>53</sup> Ibid.

<sup>54</sup> Obama Recognizes Syrian Opposition Group, (n 2).

<sup>55</sup> Ibid.

<sup>56</sup> See France recognises Syria opposition coalition, (n 33); US State Department, Daily Press Briefing, 12 December 2012, (n 1); Obama Recognizes Syrian Opposition Group, (n 2).

opposition group as ‘the legitimate representative of the people’ was described as granting such a group full political recognition.<sup>57</sup>

Unlike the international reaction to the Libyan case, state practices regarding the Syrian opposition reflected a much higher degree of uncertainty and hesitation.<sup>58</sup> The absence of a common agreement whether to grant the SOC such a status among states seems to be a fundamental factor delaying the legal recognition. Therefore, it is essential for the purpose of this section to determine why the states’ reactions were different towards recognising the Libyan and Syrian oppositions. In the next subtitle, the recognition of an opposition group as ‘the legitimate representative of the people’ is discussed. The aim is to determine the differences between the Libyan and Syrian cases that led to different outcomes.

### **3.2.3 The Recognition of an Opposition Group as the Legitimate Representative of the People: Potential Requirements and Consequences**

Though state practice has shown that the recognition of an opposition group as ‘the legitimate representative of the people’ is highly important, it is still a purely political act. However, although the use of the expression to describe opposition groups fighting against the *de jure* government has no legal consequences, it is not without impact. Such recognition, although political, indicates significant changes in a situation.<sup>59</sup> These changes are related to the political status of the official government as well as the opposition group.

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<sup>57</sup> See ‘Friends of Syria’ recognise opposition, *Middle East- Aljazeera English*, 12 December 2012, available online at: <http://www.aljazeera.com/news/middleeast/2012/12/201212124541767116.html>.

<sup>58</sup> See for ex. US State Department, Daily Press Briefing, 13 November 2012, (n 50).

<sup>59</sup> See J. V. Essen, ‘De Facto Regimes in International Law’ (2012) 28 (74) *Utrecht Journal of International and European Law* 32, at 42-45.

State governments are primarily the representatives of the people in the eye of international law.<sup>60</sup> Hence, the recognition of the opposition from such a perspective could be a sign that the functioning government has already lost its legitimacy, and that a new representative of the people should be selected; that is, the recognition of an opposition group as ‘the legitimate representative of the people’ suggests that no other legitimate representative exists at that time.<sup>61</sup> It is noteworthy that the concept of illegitimacy is enfolded with a high degree of uncertainty. As argued by Arend and Beck, ‘no international consensus [has emerged yet] as to what constitutes an ‘illegitimate’ regime’.<sup>62</sup> Nevertheless, the ambiguity surrounding what an ‘illegitimate government’ means seems to decrease after the adoption of the R2P. As asserted by Talmon, states’ reactions towards the Libyan and Syrian conflicts indicate the emergence of an international consensus ‘that governments which [sic] use excessive force against their own population to secure their position lose their legitimacy and must or should go’.<sup>63</sup>

As to the Libyan case, at the regional level, the OIC, the Arab League and the African Peace and Security Council strongly condemned Qaddafi’s reactions to the protest. The Arab League went even further and suspended Libya’s membership in the organisation.<sup>64</sup> Moreover, in an extraordinary session, the Council of the Arab League emphasised the necessity ‘to provide the Libyan people with urgent and continuing

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<sup>60</sup> See H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, Cambridge, 1947), at 87.

<sup>61</sup> Talmon (2013), (n 5), at 238.

<sup>62</sup> A. C. Arend & R. J. Beck, *International Law and the Use of Force: Beyond the Charter Paradigm* (Routledge, Oxon, 1993), at 193.

<sup>63</sup> Talmon (2013), (n 5), at 238.

<sup>64</sup> See A. Hehir, ‘Introduction: Libya and the Responsibility to Protect’, in A. Hehir & R. Murray (eds.), *Libya: The Responsibility to Protect and the future of Humanitarian Intervention* (Palgrave Macmillan, UK, 2013), at 4.

support, as well as the necessary protection from the serious violations and grave crimes committed by the Libyan authorities, which have consequently lost their legitimacy'.<sup>65</sup>

At the international level, further statements condemned the attitude of Gaddafi's regime. The UN High Commissioner for Human Rights, the UN Special Advisor on the Prevention of Genocide and the Special Advisor on the Responsibility to Protect all issued statements emphasising the need to protect the Libyan population.<sup>66</sup> Moreover, upon a request submitted by the UN Human Rights Council, in an unprecedented turn of events, the UNGA unanimously suspended the membership of Libya on March 1, 2011.<sup>67</sup> Furthermore, in an open statement condemning the extreme violations committed by Gaddafi's regime, US President Barack Obama affirmed that Gaddafi 'has lost legitimacy with his people'.<sup>68</sup> Almost a week later, the European Council, after strongly condemning the violent repression committed by the Libyan authorities against their people 'and the gross and systematic violation of human rights', declared that the Libyan regime lost all legitimacy.<sup>69</sup>

In relation to the Syrian situation, the Arab League condemned the grave violations committed by the Syrian regime against its people, and decided to suspend the membership of Syria at the organisation.<sup>70</sup> The OIC, at its fourth extraordinary

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<sup>65</sup> League of Arab States, Council Resolution 7360, The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in its Extraordinary Session on The Implications of the Current Events in Libya and Arab Position, 12 March 2011, Submitted to President of the UN Security Council as S/2011/137, available online at: [http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya\\_19\\_Outcome\\_League\\_of\\_Arab\\_States\\_Meeting.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_19_Outcome_League_of_Arab_States_Meeting.pdf).

<sup>66</sup> A. J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) *Ethics & International Affairs* 1; G. Evans, *Ending Mass Atrocity Crimes: The RtoP Balance Sheet After Libya* (2011), at 2, available online at: <http://www.gevans.org/speeches/speech443.html>.

<sup>67</sup> See Hehir, (n 64), at 4.

<sup>68</sup> Obama: Qaddafi has lost legitimacy with his people, *CBS News*, 3 of March 2011, available online at: <http://www.cbsnews.com/news/obama-qaddafi-has-lost-legitimacy-and-must-leave/>.

<sup>69</sup> Extraordinary European Council, Declaration on Developments in Libya and the Southern Neighbourhood Region, 11 March 2011, Council Doc. EUCO 7/1/11, available online at: [http://europa.eu/rapid/press-release\\_DOC-11-2\\_en.htm](http://europa.eu/rapid/press-release_DOC-11-2_en.htm).

<sup>70</sup> See Syria suspended from Arab League, *The Guardian*, 12 November 2012, available online at: <http://www.theguardian.com/world/2011/nov/14/syria-suspension-arab-league-assad-isolated>.

summit, suspended Syria's membership.<sup>71</sup> At the international level, High Representative Catherine Ashton, on behalf of the EU, clearly stated that the EU noted 'the complete loss of Bashar al-Assad's legitimacy in the eyes of the Syrian people and the necessity for him to step aside'.<sup>72</sup> The White House issued a statement affirming that 'neither the international community nor the Syrian people accept' the legitimacy of the Assad's regime.<sup>73</sup> In his remark to the UNGA on the situation in Syria, the UNSG, Ban-Ki-moon affirmed that 'it has been evident that President Assad and his government have lost all legitimacy'.<sup>74</sup> Based on these observations, it could be asserted that the official government's loss of legitimacy (a potential prerequisite for the recognition of an opposition group as 'the legitimate representative of the people') is satisfied in both cases.

Nonetheless, it ought to be clarified that although such an action represents a new movement towards founding the legitimacy of governments on the concept of population protection, the action has no legal power.<sup>75</sup> The legitimacy of governments concerns the political rather than legal status of governments. Therefore, as a matter of international law, illegitimate governments are still recognised functioning governments.<sup>76</sup>

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<sup>71</sup> See the Organization of Islamic Cooperation Suspended the Membership of Syria at the Extraordinary Summit, Republic of Turkey- Ministry of Foreign Affairs, available online at: <http://www.mfa.gov.tr/the-organization-of-islamic-cooperation-suspended-the-membership-of-syria-at-the-extraordinary-summit.en.mfa>.

<sup>72</sup> See Statement by High Representative Catherine Ashton on behalf of the EU on EU action following the escalation of violent repression in Syria, *Aljazeera Blogs*, 18 August 2011, available online at: <http://blogs.aljazeera.com/topic/syria/syria-aug-18-2011-1749>.

<sup>73</sup> Statement by the Press Secretary on Syria, Office of the Press Secretary- The White House, 21 December 2011, available online at: <http://www.whitehouse.gov/the-press-office/2011/12/21/statement-press-secretary-syria>.

<sup>74</sup> New York, 7 June 2012-Secretary-General's remarks to the General Assembly on the situation in Syria, Latest Statements, 7 June 2012, available online at: <http://www.un.org/sg/statements/index.asp?nid=6109>.

<sup>75</sup> D. Akande, 'Which entity is the Government of Libya and Why Does It Matter?' (2011) *European Journal of International Law: Talk!*, available online at: <http://www.ejiltalk.org/which-entity-is-the-government-of-libya-and-why-does-it-matter/>.

<sup>76</sup> Ibid.

With regard to the status of opposition groups, it is useful to recall the statement made by US President Obama after recognising the SOC as ‘the legitimate representative of the Syrian people’. He said that the SOC ‘is now inclusive enough, is reflective and representative enough of the Syrian population’.<sup>77</sup> That is, for an opposition group to gain recognition as ‘the legitimate representative of the people’ there should be some indications that the opposition has already achieved a certain level of representativeness. Talmon (2013) asserted that the representativeness of the opposition ‘refers to the qualitative diversity of the represented sections or segments of society’.<sup>78</sup> Being representative enough for recognition as ‘the legitimate representative of the people’ may require the opposition group to be inclusive ethnically and geographically. It may also require that both men and women be represented.<sup>79</sup>

The recognition of the opposition as ‘the legitimate representative of the people’ may be contingent on the achievement of a reasonable degree of permanency. The requirement of permanency as a basis of political recognition indicates the importance of achieving ‘certain political, organisational and institutional structure, both of the group’s leadership and on the ground’.<sup>80</sup> It is noteworthy that, although there seems to be growing consensus on these requirements, states still enjoy high degrees of discretion in interpreting exactly what is meant by ‘representativeness’ and ‘permanency’ for the purpose of recognising opposition groups.<sup>81</sup> Nonetheless, the

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<sup>77</sup> Obama Recognizes Syrian Opposition Group, (n 2).

<sup>78</sup> Talmon (2013), (n 5), at 240.

<sup>79</sup> See US State Department, Daily Press Briefing, 8 November 2012, available online at <http://www.state.gov/r/pa/prs/dpb/2012/11/200347.htm#SYRIA>.

<sup>80</sup> Talmon (2013), (n 5), at 241.

<sup>81</sup> For example, although the US and other states recognized the SOC in the ground that it was representative and inclusive enough, Canada was reluctant to recognize the SOC as ‘the sole legitimate representative of the Syrian people’ due to the absence of clear sign of representativeness and inclusiveness. Canadian Foreign Affairs Minister John Baird said Canada ‘still has some concerns about the opposition, such as its ability to send clear messages and include the coalition’s religious minorities’. See Canada holds off recognizing Syrian opposition, Baird says, *CBC News*, 12 December 2012, available online at: <http://www.cbc.ca/news/world/canada-holds-off-recognizing-syrian-opposition-baird-says-1.1136853>.

implementation of these two measures over the Libyan and Syrian oppositions could help to spot the differences between these two cases.

In the Libyan case, the issues concerning the representativeness and permanency of the Libyan opposition groups are less complicated. As mentioned previously, after the protests spread across Libya and the number of army and security officers who decided to join the opposition groups increased,<sup>82</sup> the Libyan opposition groups began to act as loosely organised armed groups.<sup>83</sup> In response to the speedy progress on the ground, the opposition founded the NTC in Benghazi as a new transitional government with the primary objective of overthrowing the Qaddafi regime.<sup>84</sup>

After the establishment of the transitional government, the opposition was able to control more major cities in the eastern side of the country.<sup>85</sup> At this stage, the NTC was not only considered to be exercising effective control over large areas of Libya but it also declared its intention to become the recognised government of the country. It was clear that, after the foundation of the NTC, the Libyan opposition was able to back its organised armed groups fighting on the ground with a significant degree of political capacity.<sup>86</sup> It was also proven that the opposition was exercising territorial control over significant parts of the country.<sup>87</sup> Therefore, it is obvious that the Libyan opposition enjoyed the high degrees of political, organisational and institutional structure necessary to satisfy the requirement of permanency. Even though the ethnical, religious and geographical simplicity of the Libyan situation made the representativeness of the

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<sup>82</sup> *Examiner, The Libyan Revolution: A Brief Summary*, available online at: <http://www.examiner.com/article/the-libyan-revolution-a-brief-summary>.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Essen, (n 59), at 32.

<sup>87</sup> See *Examiner, The Libyan Revolution: A Brief Summary*, (n 82).

opposition less complex, the representation of the oppositions by some well-regarded Libyan diplomats at the international level was a key element. It was argued that such a representation provided the Libyan oppositions with great international stability and credibility.<sup>88</sup>

Aside from those who decided to resign or join the opposition, other diplomats chose to take roles more active in the Libyan situation.<sup>89</sup> For example, Ibrahim Dabbashi, Libya's deputy ambassador at the UN, called for 'Qaddafi to step down as the country's ruler', and if he refused, Dabbashi claimed that, 'the Libyan people... [would] get rid of him'.<sup>90</sup> He also referred to UN Libyan diplomats as representatives of the Libyan people rather than the government.<sup>91</sup> On the same day, Mr Shalgham, the Libyan representative at the UNSC, described the situation in Libya as 'very dangerous'.<sup>92</sup> He went on to add, 'Libyans are asking for democracy; they are asking for progress; they are asking for freedom; and they are asking for their rights'.<sup>93</sup> Mr Shalgham ended his speech with an appeal: 'Please, United Nations, save Libya. No to bloodshed. No to the killing of innocents. We want a swift, decisive and courageous resolution'.<sup>94</sup>

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<sup>88</sup> E. Lieblich, 'Consensual Intervention and the Responsibility to Protect: Responsibility to Protect's Place within the Legal Framework of Consensual Intervention in Internal Armed Conflict', in J Hoffmann & A Nollkaemper (eds.), *Responsibility to Protect from Principle to Practice* (Amsterdam University Press, Amsterdam, 2012) 139, at 148.

<sup>89</sup> Ibid, at 147.

<sup>90</sup> 'Libyan UN Diplomats: Qaddafi Should Resign', *CBS News* (21 February 2011), available online at: <http://www.cbsnews.com/news/libyan-un-diplomats-qaddafi-should-resign/>

<sup>91</sup> Ibid.

<sup>92</sup> UNSC Verbatim Record (25 February 2011) UN Doc S/pv/6490,5, available online at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%20PV%206490.pdf>.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.



The significance of the preposition adopted by the Libyan representative can be deduced from statements made by states during the UNSC debates.<sup>95</sup> Many states referred to the representation of the Libyan peoples by the Libyan diplomat as a key element in facilitating the adoption of the UNSC resolutions.<sup>96</sup> India, Nigeria and Brazil described his speech as persuasive.<sup>97</sup> South Africa and France welcomed the UNSC response to the requests made by the Libyan representative.<sup>98</sup>

The issues related to the representativeness and permanency of the Syrian opposition groups reflect a higher degree of uncertainty and complexity. As to the element of representativeness, it is highly doubtful that the SOC represents all religious and ethnic groups in the country.<sup>99</sup> As observed by the Independent International Commission of Inquiry established by the UN Human Rights Council, although the vast majority of the Sunni community supported the Syrian opposition, other minorities constituting important parts of the Syrian population remained in favour of the Syrian regime.<sup>100</sup> Some of these pro-government minorities were targets of attacks carried out by armed groups belonging to the Syrian oppositions.<sup>101</sup>

In addition to the majority of Sunnis who supported the oppositions and the other minorities who remained under the authority of the regime, the Kurds remained independent.<sup>102</sup> In accordance with the commission, the Kurds ‘have clashed with

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<sup>95</sup> See UNSC Verbatim Record (25 February 2011) UN Doc S/pv/6491,7, available online at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%20PV%206491.pdf>.

<sup>96</sup> See *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> See Canada holds off recognizing Syrian opposition, Baird says, *CBC News*, (n 81).

<sup>100</sup> UN Office of the High Commissioner for Human Rights, Independent International Commission of Inquiry on the Syrian Arab Republic established pursuant to United Nations Human Rights Council Resolutions S-17/1, 19/22 and 21/26, Periodic Update, 20 December 2012, at para. 14-21.

<sup>101</sup> *Ibid.*, at para. 17.

<sup>102</sup> UN Office of the High Commissioner for Human Rights, Independent International Commission of Inquiry on the Syrian Arab Republic, (n 100) at para. 27.

government forces and anti-government armed groups over control of territory'.<sup>103</sup> In fact, the SOC itself declared that it only represented '80 percent of all opponents'.<sup>104</sup> In other words, in accordance with the SOC statement, 20 percent of the opponents did not accept the representativeness of the Syrian opposition groups.

In addition to the lack of sufficient political acceptance, some fighting groups on the ground challenged the representation of the SOC.<sup>105</sup> Furthermore, the rejection of the leadership of the SOC by some fighting groups not only weakened the level of representativeness enjoyed by the SOC but also affected its permanence and stability. In a statement read out loud by the political leader of Liwa al-Tawhid, eleven Islamist armed groups explicitly refused the authority of the SOC as a representative of the opposition 'and [called] for the opposition to unite under an 'Islamic framework''.<sup>106</sup>

Almost two months later, the main Islamist armed groups in Alepoo, Al-Nusra Front and Liwa Al-Tawhid, reaffirmed the rejection of the leadership of the SOC and declared their intention to found an Islamic state in the Syrian territory.<sup>107</sup> The stability of the SOC was further impacted by the eruption of some armed clashes between ISIS, an offshoot of al-Qaeda, and some moderate armed forces.<sup>108</sup> Therefore, although illegitimacy of the Syrian regime could be established to allow recognition of the SOC as 'the legitimate representative of the Syrian people', the level of representativeness

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<sup>103</sup> UN Office of the High Commissioner for Human Rights, Independent International Commission of Inquiry on the Syrian Arab Republic, (n 100) at para. 27.

<sup>104</sup> See Syrian Opposition Coalition to Open Office in Turkey, *RIANOVOSTI*, 23 November 2012, available online at: <http://en.ria.ru/world/20121123/177698440.html>.

<sup>105</sup> See Islamist Rebels in Syria reject National Coalition, *BBC News-Middle East*, 25 September 2013, available at: <http://www.bbc.co.uk/news/world-middle-east-24239779>.

<sup>106</sup> These eleven groups are: Al-Nusra Front, Ahrar Al-sham, Liwa Al-Tawhid, Liwa Al-Islam, Sugur Al-sham, Harakat fajr al-sham al- Islamiya, Harakat al-Nour al-Islamiya, Kataib Nour al-din al zinki, Liwa al-Ansar, Tajammu Fastaqim KamaUmmirat- Alepoo and 19 Division. See Islamist Rebels in Syria reject National Coalition, (n 105).

<sup>107</sup> See Two largest Islamic Groups reject Syria opposition bloc, *The Voice OF Russia- radio*, 19 November 2012, available online at: [http://voiceofrussia.com/2012\\_11\\_19/Largest-Islamic-groups-reject-new-Syria-opposition-coalition/](http://voiceofrussia.com/2012_11_19/Largest-Islamic-groups-reject-new-Syria-opposition-coalition/).

<sup>108</sup> See Islamist Rebels in Syria reject National Coalition, (n 105).

and permanency exercised by the SOC is problematic. Even though the uncertainty as to whether the SOC satisfied the requirements of representativeness and permanency could be attributed to the absence of clear standards determining what is meant by each element, the representativeness and permanency enjoyed by the Syrian opposition are still unclear when they are compared to those exercised by the Libyan opposition.

Even though the Libyan and Syrian cases led to different outcomes, they both indicated the emergence of some general guidelines as to how and when opposition groups are recognised by states. It is noteworthy that, although the recognition of the opposition as ‘the legitimate representative of the people’ has no legal impacts, it can still provide the recognised entity with some advantages. In accordance with Talmon (2011):

- (1) It legitimizes the struggle of the group against the incumbent government;
- (2) it provides international acceptance;
- (3) it allows the group to speak for the people in international organisations and represent it in other states by opening ‘representative offices’;
- and (4) it usually results in financial aid.<sup>109</sup>

It is also witnessed from the Libyan and Syrian cases that a high level of political recognition may facilitate the legal recognition of the opposition. It could be considered as an initial stage required to ensure the stability and credibility of these groups before they could be granted certain rights and obligations. Hence, in the next section, the legal recognition of opposition groups will be addressed.

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<sup>109</sup> Talmon (2011), (n 17).

### **3.3 The Legal Recognition of Opposition Groups After the Adoption of the Concept of the R2P**

In this section, the legal recognition of the political structure of the opposition groups is discussed. In order to do so, the section is divided into three parts. First, the legal act of recognition is defined. Second, the potential link between the recognition of the political structure of the opposition group as the legitimate representative of the people and the right to self-determination is evaluated. Third, the extent to which the recognition of these entities as the legitimate representative of the people could facilitate their legal recognition as new governments is examined.

#### **3.3.1 The Legal Act of Recognition**

As clarified by Lauterpacht, the act of recognition can refer to ‘recognition as governed by law’ or ‘recognition as determined by decisive considerations of national interests’.<sup>110</sup> The legal act of recognition is the foundation of a fact rather than ‘the expression of a will’.<sup>111</sup> It is based on the idea that international law cannot ignore the emergence of new facts as long as they do not violate any international legal principles.<sup>112</sup> Therefore, unlike the political act of recognition, which is discussed above, legal recognition creates a legal status comprising rights and obligations under international law.<sup>113</sup>

As outlined in the previous chapter, an opposition group is party to an internal armed conflict and can therefore gain a legal status under contemporary international law. Based on its capacity, an opposition group can be granted the status of belligerency

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<sup>110</sup> Lauterpacht, (n 60), at 87.

<sup>111</sup> Kelsen, (n 4), at 608.

<sup>112</sup> Lauterpacht, (n 60), at 91.

<sup>113</sup> Kelsen, (n 4), at 608-609.

or insurgency.<sup>114</sup> After the adoption of the concept of the R2P, it was indicated that an opposition group could gain a higher degree of legal recognition at the international level. State practice suggested that an opposition group could be recognised by states as ‘the legitimate representative of a people’. As asserted in the previous section, it is the prevailing view that the recognition of the Libyan and Syrian opposition groups as the legitimate representative of the peoples is intended to have political effects.<sup>115</sup> Nevertheless, there has been some indications that such recognition may have, or at least lead to, some legal consequences.

On the one hand, the same expression has been used previously to refer to a NLMs.<sup>116</sup> In these situations, the expression ‘the legitimate representative of the people’ refers to ‘organised groups fighting on behalf of a whole “people” against colonial powers’<sup>117</sup> rather than an opposition group fighting against the *de jure* government. It is well established that the NLMs are provided with international status, which allows them to achieve their political objectives.<sup>118</sup> They have distinct legal personalities producing certain rights and obligations.<sup>119</sup> Therefore, the categorization of any NLMs as ‘the legitimate representative of the people’ is legal rather than political recognition.

Nevertheless, it was argued that the use of the term ‘the representative of the people’ to refer to the cases discussed in the previous section, and in particular the

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<sup>114</sup> See A. Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian’ (2005) 183 *Military Law Review* 66; L. C. Lootsteen, ‘The Concept of Belligerency in International Law’ (2000) 166 *Military Law Review* 109.

<sup>115</sup> See Talmon (2011), (n 17).

<sup>116</sup> For further details as to the NLMs see M. N. Shaw, *International Law*, 6<sup>th</sup> edn (Cambridge University Press, Cambridge, 2008), at 245- 248.

<sup>117</sup> A. Cassese, *International Law 2ed edn* (Oxford University Press, Oxford, 2005) at 140.

<sup>118</sup> Ibid.

<sup>119</sup> See United Nations General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625 (XXV), available online at: <http://www.refworld.org/docid/3dda1f104.html>; Shaw, (n 116), at 247- 248.

Syrian opposition, suggests the emergence of a certain link between the utilisation of this expression and the right to self-determination.<sup>120</sup>

On the other hand, in a few cases, the implementations of the expression ‘the legitimate representative of a people’ as an advance form of political recognition were accompanied by references to the abilities of the oppositions to establish new governments.<sup>121</sup> For instance, in an official statement issued by the Ministry of Foreign Affairs, Slovenia affirmed that recognising the legitimacy of the NTC as a representative of the Libyan people ‘strengthened its internal political position’ in a manner that might facilitate the establishment of a new government.<sup>122</sup> In another example, France recognised the SOC as ‘the only legitimate representative of the Syrian People and thus as the future provisional government of a democratic Syria’.<sup>123</sup> Hence, these two potential legal status will be evaluated in this section.

### **3.3.2 The Recognition of Opposition Groups as the Legitimate Representative of the People and the Right of Self-Determination**

#### **3.3.2.1 The Foundation of the Principle of Self-Determination and its Primary Objectives: The Right to Self-Determination against Colonialism and Occupation**

The right of people to rule themselves was one of the primary objectives of the new international legal system.<sup>124</sup> It was considered a fundamental requirement

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<sup>120</sup> See Akande, (n 3).

<sup>121</sup> See France recognises Syria opposition coalition, (n 33); Slovenian Government recognises Libyan National Transitional Council, Ministry of Foreign Affairs- REPUBLIC OF SOLIVINA, 20 July 2011, available online at: <http://www.mzz.gov.si/nc/en/newsroom/news/article/3247/29269/>.

<sup>122</sup> Ibid.

<sup>123</sup> France recognises Syria opposition coalition, (n 33).

<sup>124</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Art. 1 (2), available online at: <http://www.refworld.org/docid/3ae6b3930.html>.

for international peace and security and was seen as important for the emergence of the new community of nations.<sup>125</sup> The right to self-determination was indicated in Article 1 of the UN Charter. It was also referred to in various UNGA resolutions.

The first reference to the principle of self-determination by the UNGA was made in resolution 421 D (V) of 1950, which was adopted mainly to receive recommendations from the Commission on Human Rights concerning the right to self-determination.<sup>126</sup> Nearly two years later, the UNGA made further efforts to articulate the principle of self-determination under contemporary international law in resolution 545 (VI) intending to further clarify the significance of such a right for international peace and security.<sup>127</sup> In 1960, the UNGA adopted the Declaration on the Granting of Independence to Colonial Countries and People (declaration 1514 (XV)) affirming that colonialism constitutes a threat to international peace. The Declaration emphasised the importance of ending colonialism and supporting the right of all peoples ‘to complete freedom, the exercise of their sovereignty and the integrity of their national territory’.

As to the scope and nature of the right to self-determination as formed under the UN System, it is well established, as explicitly affirmed in the official documents outlined above, that the right to self-determination was primarily meant to be exercised against colonial domination, occupation and racist regimes.<sup>128</sup> In fact, even if one of

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<sup>125</sup> A. Cristescu, ‘The Right to Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments’ *Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (United Nations, New York, 1981), at 24.

<sup>126</sup> United Nations General Assembly Resolution 421D (V) Draft International Covenant on Human Rights and Measures of Implementation: Further Work of the Commission on Human Rights, 317<sup>th</sup> plenary meeting, 4 December 1950, at para 6.

<sup>127</sup> United Nations General Assembly Resolution 545 (VI) Inclusion in the International Covenant or Covenants on Human rights of an article relating to the right of peoples to self-determination, 375<sup>th</sup> plenary meeting, 5 February 1952, at the preamble.

<sup>128</sup> See international Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed*

these situations existed, that besides being concerned with the right to self-governance, the right to self-determination would pay significant attention to the importance of providing the newly independent states with a certain degree of internal stability.<sup>129</sup>

Resolution 1514 (XV), under Article 6, made clear reference to the principle of the territorial integrity of newly independent states as a condition of the legitimate exercise of such a right. It literally stated: '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.<sup>130</sup> Mills points out that this article 'provided the state-centric foundation for...the resistance to applying self-determination beyond colonial territories'.<sup>131</sup> It imposed an obligation upon those who were entitled to rely on the principle of self-determination to limit their exercise of self-determination to the borders previously established by colonialism. The limitation of the scope of self-determination to the situation of anti-colonialism was also stated under the Declaration on Principles of International Law.<sup>132</sup>

The Declaration explicitly confirmed that the right to self-determination ought not to 'be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'.<sup>133</sup> It was asserted that the inclusion of this statement in the resolution reflects the intention of the international community to constitute 'a social

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*Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, at Art. 1 (4), available online at: <http://www.refworld.org/docid/3ae6b36b4.html>.

<sup>129</sup> R. H. Jackson, *Quasi- States: Sovereignty, International Relations, and the Third World* (Cambridge University Press, Cambridge, 1990), at 26-27.

<sup>130</sup> United Nations General Assembly, Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and People, 947<sup>th</sup> plenary meeting, 14 December 1960, at Art. 6.

<sup>131</sup> K. Mills, 'Human Rights in the Emerging Global Order: New Sovereignty?' (Macmillan Press LTD, Hampshire and London, 1998), at 69.

<sup>132</sup> UNGA Resolution 2625 (XXV), (n 119), at the preamble.

<sup>133</sup> *Ibid.*



and legal system that is relatively stable'.<sup>134</sup> Moreover, in a community constituted primarily of states, the achievement of such stability requires the preservation of the territorial boundaries of newly independent states. In fact, the strong connection between the principle of internal stability and the legitimate application of self-determination has led some commentators to assert that when 'a territory [is] decolonised the right to self-determination ends and territorial integrity reigns supreme'.<sup>135</sup>

Further, the willingness to provide decolonised states with a certain degree of internal stability also impacted how the word 'peoples' was defined under contemporary international law.<sup>136</sup> It was contended that the efforts to preserve the borders of newly independent states, as defined by colonies, and the efforts to prevent any potential attempt for further modification of these borders, led to the identification of those who are entitled to claim the right to self-determination unprecedentedly. It was noted that, in the early stages following the articulation of the principle of self-determination, the right emerging from the principle of self-determination was given to all peoples 'living within the borders of a former colonial entity', regardless of their ethnic, cultural and religious backgrounds.<sup>137</sup> During the discussions that took place in the third committee concerning the draft of Article 1 of the covenants, few comments were made regarding the suggested meaning of the word peoples.<sup>138</sup>

It is clear that there has been an attempt to define the word peoples in a manner that strengthens the stability in newly formed states. As argued by some delegates, the

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<sup>134</sup> R. McCorquodall, 'Human Rights and Self-determination' in M Sellers, *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (Berg, Oxford, 1996) 9, at 19.

<sup>135</sup> Mills, (n 131), at 70.

<sup>136</sup> *Ibid.*, at 44.

<sup>137</sup> *Ibid.*

<sup>138</sup> See *Official Records of the General Assembly, sixth Session, Third Committee*, 366th meeting, at para. 25, 29, 397<sup>th</sup> meeting, at para. 5 & 399<sup>th</sup> meeting, at para. 5.

word peoples, as included in the UN Charter, was intended to be used to refer to the right of communities to freely ‘choose their own form of government’.<sup>139</sup> It was emphasised that the concept of peoples, as employed in the principle of self-determination, ought to be understood to mean ‘the multiplicity of human beings constituting a nation, or the aggregate of the various national groups governed by a single authority’.<sup>140</sup> It is noteworthy that even though linking the meaning of peoples to the territories in which they lived before the decolonisation process is an effective way to enhance the territorial integrity of newly independent states, it may increase the potential abuse of the principle of self-determination.<sup>141</sup> In other words, it was asserted that the complete focus on territorial integrity may lead to an indirect transformation of the rights emerging from the principle of self-determination from peoples to governments.<sup>142</sup> In fact, as noted by Jackson, defining peoples in such a way could modify the nature of the right to self-determination. It would change the nature of such a right from being a basic human right to be a sovereign right.<sup>143</sup>

Therefore, it is obvious that the restrictive general principles regulating self-determination as initially formed under the UN Charter System do not apply to the Libyan and Syrian peoples. Despite the fact that the Libyan and Syrian regimes could be considered dictatorships, they are not considered colonial or occupation powers. Nevertheless, such a contention ought not to be taken as affirmative statement to deny any possibility that the Libyan and Syrian Peoples may rely on the right to self-determination against their own governments. In fact, the recognition of the Libyan and Syrian oppositions as the legitimate representatives of the concerned peoples indicates

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<sup>139</sup> *Official Records of the General Assembly, sixth Session, Third Committee*, 366<sup>th</sup> meeting, at para. 25.

<sup>140</sup> *Official Records of the General Assembly, sixth Session, Third Committee*, 397<sup>th</sup> meeting, at para. 5.

<sup>141</sup> See Jackson, (n 129), at 157-59.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*, at 158.

some similarity with the status previously granted to NLMs for the purpose of exercising the right to self-determination. Thus, it seems to be essential to consider such a possibility for the Libyan and Syrian oppositions.

### **3.3.2.2 The Right to Self-determination and the Recognition of NLMs as Representatives of Peoples: The status of NLMs and the Recognition of the Libyan and Syrian Oppositions as the Representatives of the Peoples**

Even though the right to self-determination is granted to peoples, the right to self-determination ought to be practically exercised by a legally recognised structure.<sup>144</sup> In other words, although the right is primarily given to people, those people are required to gather under an internationally recognised structure that is qualified to obtain a specific legal personality necessary to exercise the rights and obligations emanating from the principle of self-determination.<sup>145</sup> International law grants the right to people to govern themselves by recognising a qualified entity as the ultimate representative of those people. In state practice, the recognition of NLMs as the legitimate representatives of the peoples has been considered as evidence to grant the concerned people the right to self-determination. More specifically, the phrase ‘the representative of people’ has been implemented to suggest the emergence of a link between the concerned entity and the right to self-determination.<sup>146</sup>

The UNGA, on various occasions, recognised NLMs as the legitimate representatives of peoples to indicate that these groups are legally qualified under international law to act on behalf of the concerned people in relation to their rights to

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<sup>144</sup> S. Senese, ‘External and Internal Self-Determination’ (1989) 16 *Social Justice* 19, at 20.

<sup>145</sup> See J. Crawford, the Rights of Peoples: ‘Peoples’ or ‘Governments’? in J Crawford (ed.) *the Rights of Peoples* (Oxford University Press, Oxford, 1988) 55, at 56.

<sup>146</sup> See Akande, (n 3).

self-determination.<sup>147</sup> The approach of the UNGA was apparent, for instance, in relation to the PLO,<sup>148</sup> the African National Congress in South Africa,<sup>149</sup> the South West Africa People's Organization in Namibia<sup>150</sup> and the African Party for the Independence of Guinea and Cape Verde in Guinea Bissau.<sup>151</sup>

The link between considering a group as the legitimate representative of the people and the right to self-determination was, in particular, apparent in relation to the PLO. The UNGA (under paragraph 23 of resolution 37/43 of 1982) explicitly urged 'all States, competent organizations of the United Nations system, specialized agencies and other international organizations to extend their support to the Palestinian people through its sole and legitimate representative, the [PLO], in its struggle to regain its right to self-determination and independence in accordance with the Charter of the United Nations'.<sup>152</sup> As consequence of such recognition, the PLO, as the sole legitimate representative of the Palestinian people, was entitled to enter into various legal agreements with the occupied power, Israel.<sup>153</sup>

In the Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995,<sup>154</sup> mutual recognition was made by both parties. The

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<sup>147</sup> See Y. Gokce, 'Recognition of External Right to Self-determination and Syria Case' (2013) IV (2) *Law & Justice Review* 277, 285.

<sup>148</sup> See United Nations General Assembly Resolution 37/43, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, 90<sup>th</sup> plenary meeting, 3 December 1982, available online at: <http://www.un.org/documents/ga/res/37/a37r043.htm>.

<sup>149</sup> See United Nations General Assembly Resolution 41/35, Policies of apartheid of the Government of South Africa, 64<sup>th</sup> plenary meeting, 10 November 1986, available online at: <http://www.un.org/documents/ga/res/41/a41r035.htm>; Gokce, (n 147), at 289.

<sup>150</sup> See United Nations General Assembly Resolution 35/227, Question of Namibia, 111<sup>th</sup> plenary meeting, 6 March 1981, at para. 4, available online at: <http://www.un.org/documents/ga/res/35/a35r227e.pdf>.

<sup>151</sup> See United Nations General Assembly Resolution 2918 (XXVII), Question of Territories under Portuguese administration, 2084<sup>th</sup> plenary meeting, 14 November 1972, at para. 2.

<sup>152</sup> See UNGA Resolution 37/43, (n 148).

<sup>153</sup> See for ex. Declaration of Principles on Interim Self-Government Arrangements, done at Washington, 13 September 1993, 32 ILM (1993), 1527; the Agreement on the Gaza Strip and the Jericho Area, done at Cairo, 4 May 1994, 33 ILM (1994).

<sup>154</sup> See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, done at Washington, D.C., September 28, 1995, at the preamble, available online at: <http://www.unsco.org/Documents/Key/Israeli->

agreement includes various references to the rights of the Palestinian people to govern themselves through a recognised structure.<sup>155</sup> Moreover, as affirmed by the ICJ in its Advisory Opinion as to the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, these multiple references embodied in the agreement indicate the recognition of the right of the Palestinian people to self-determination.<sup>156</sup> The court generally stated that the emergence of the Palestinian people for the purpose of implementing the right to self-determination is definite.<sup>157</sup>

Furthermore, as argued by the ICJ, such recognition was apparent in the exchange of letters of 9 September 1993 between the representatives of the PLO and the Israeli government.<sup>158</sup> In fact, the recognition of the PLO as the legitimate representative of the Palestinian people was explicitly affirmed by the Prime Minister of Israel in an official speech concerning the peace agreements signed with the PLO.<sup>159</sup> As Talmon asserted, such recognition ‘was considered by Israel to be a prerequisite for the conclusion of these agreements with the Palestinians and constituted legal recognition of the PLO’.<sup>160</sup>

It is noteworthy to mention that when the right to self-determination is recognized, certain legal consequences emerge.<sup>161</sup> These consequences have direct impacts on the rules regulating armed conflicts. As asserted in the previous chapter,

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[Palestinian%20Interim%20Agreement%20on%20the%20West%20Bank%20and%20the%20Gaza%20Strip.pdf](#).

<sup>155</sup> See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, (n 154), at the preamble.

<sup>156</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 182–183, at para.118, available online at: <http://www.icjci.org/docket/files/131/1671.pdf>.

<sup>157</sup> *Ibid*, at para.118.

<sup>158</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (n 156), at para.118.

<sup>159</sup> See Israel Ministry of Foreign Affairs, 107 Israel-PLO Mutual Recognition—Letters and Speeches, 10 September 1993, available online at: <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook9/Pages/107%20Israel-PLO%20Mutual%20Recognition-%20Letters%20and%20Spe.aspx>.

<sup>160</sup> Talmon (2013), (n 5), at 235.

<sup>161</sup> Akande, (n 3).

when internal armed conflicts erupted, third state would be under an obligation, emanating from the prohibition on the use of force and the principles of non-intervention, not to provide assistance, in particular, to the opposition groups.<sup>162</sup> Nevertheless, the principle of non-intervention, as well as the prohibition on the use of force, would be applied differently when the right of external self-determination is granted. Those people, as represented by their recognized legal structure, would be entitled to receive international assistance and support.<sup>163</sup>

In resolution 2625 (XXV), or the Declaration on the Principles of International Law, adopted in 1970,<sup>164</sup> considered by the ICJ as customary law, by virtue of the consensus,<sup>165</sup> it was clearly stated that ‘peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter’.<sup>166</sup> Also, under resolution 2621 (XXV), passed in 1970, the UNGA requested all its members to ‘render all necessary moral and material assistance to the peoples of colonial territories in their struggle to attain freedom and independence’.<sup>167</sup> Nevertheless, although resolutions 2625 (XXV) and 2621 (XXV) admitted the right of these recognised legal structures as the legitimate representatives of the peoples to be internationally supported, these resolutions did not decisively clarify the legitimate boundaries of such assistance.<sup>168</sup> Particularly, it was left unclear whether such assistance could justify military

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<sup>162</sup> Akande, (n 3).

<sup>163</sup> A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995), at 197-198.

<sup>164</sup> UNGA Resolution 2625 (XXV), (n 119), at the preamble.

<sup>165</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, at para. 188, available online at: <http://www.refworld.org/docid/4023a44d2.html>.

<sup>166</sup> UNGA Resolution 2625 (XXV), (n 119).

<sup>167</sup> United Nations General Assembly Resolution 2621 (XXV), Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1836<sup>th</sup> plenary meeting, 13 October 1970.

<sup>168</sup> Akande, (n 3).

support.<sup>169</sup> Nevertheless, the uncertainty as to what such support could include was notably decreased in the subsequent resolutions.

In resolution 3070 (XXVIII), adopted in 1973, the UNGA recognised the right of peoples to rely on ‘all available means, including armed struggle’,<sup>170</sup> and commanded all member states ‘to offer moral, material and any other assistance to all peoples struggling for the full exercise of their inalienable right to self-determination and independence’.<sup>171</sup> Furthermore, the scope of the assistance that could be provided to NLMs as the legitimate representatives of the peoples in regard to their right to self-determination was further clarified in the resolution concerning the situation in Namibia mentioned earlier.<sup>172</sup> In resolution 35/227, passed in 1980, the UNGA explicitly called for ‘increased and sustained support and material, financial, military and other assistance...’.<sup>173</sup>

The recognition of a legal structure as the legitimate representative of the peoples fighting for their right to self-determination also has significant impact on the law regulating armed conflicts. Despite the absence of any support from most western states,<sup>174</sup> the UNGA adopted resolution 3103 (XXVIII) clarifying the status of armed conflict involving NLMs.<sup>175</sup> This resolution considered armed struggles carried out in accordance with the right to self-determination against ‘colonial and alien domination’

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<sup>169</sup> B. R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000), at 214.

<sup>170</sup> United Nations General Assembly Resolution 3070, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, 2185<sup>th</sup> plenary meeting, 30 November 1973, at para. 2.

<sup>171</sup> UNGA Resolution 3070, (n 170), at para. 3.

<sup>172</sup> UNGA Resolution 35/227, (n 150), at para. 4.

<sup>173</sup> *Ibid.*

<sup>174</sup> See Roth, (n 169), at 213.

<sup>175</sup> United Nations General Assembly Resolution 3103, Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, 2197<sup>th</sup> plenary meeting, 12 December 1973.

to be of international status.<sup>176</sup> Furthermore, such a contention was affirmed and it gained the status of a hard law after the adoption of the additional Protocols to the four Geneva Conventions of 1949 in 1977. The types of armed conflicts exercised in conformity with the right of self-determination against ‘colonial domination and alien occupation and against racist regimes’ were included under the First additional Protocol regulating international armed conflicts, and not the second Additional Protocol concerning internal armed conflicts.<sup>177</sup>

Hence, it is obvious that the categorisation of NLMs as the legitimate representatives of the peoples for the purpose of exercising the right to self-determination is legal recognition. It provides the recognised structure with a legal personality. The armed struggle undertaken in conformity with the right to self-determination would be considered as an international armed conflict as affirmed under Article 1 (4) of the first Additional Protocol. The recognition of a structure as the legitimate representative of a people entitles such a structure to receive various types of support, including military assistance. In other words, as long as an entity is recognised as the legitimate representative of a people, in accordance with the principles discussed above, a third state would be able to provide support without violating the principles on the prohibition on the use of force and non-intervention.

With regard to the Libyan and Syrian situations, as clarified in the previous section, many states used the phrase ‘the legitimate representative of the people’ to describe the political structures of these groups. As clarified above, if such a status was applied to suggest the entitlement of the Libyan and Syrian people to the right of self-determination, significant legal impacts would emerge as to the legal framework

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<sup>176</sup> UNGA Resolution 3103, (n 175), at para. 3.

<sup>177</sup> See *Additional Protocol I*, (n 128), at Art. 1 (4).



regulating these armed conflicts. It would reduce the restrictions imposed by the principles on the use of force and non-intervention as to the potential role of third state concerning these conflicts. The legitimate representatives of the Libyan and Syrian peoples would be entitled to receive international support, including military assistance. Nevertheless, the mere use of the term ‘the legitimate representative of the concerned people’ is not sufficient in itself to assert the existence of such a status. In fact, in order to determine whether such status given to these groups was intended to suggest the entitlement of these groups to exercise the right to self-determination on behalf of their peoples, the intention of the recognising states must be examined.

As to whether state practice towards the Libyan and Syrian oppositions indicated the emergence of a new trend supporting such a right within the context of the R2P, it can be generally argued that the mere use of an expression may not be sufficient to reflect the intention behind its implementation. Usually, it would be essential to examine the actual intention behind applying a certain description or advancing a statement. In regard to the Libyan and Syrian situations, many powerful western states such as the US, the UK and France were among the states recognising the Libyan and Syrian oppositions as the legitimate representatives of their peoples. During the process of articulating the right to self-determination under the UN System, there were various indications that these states were not willing to recognise such a right as it was proposed by the UNGA.<sup>178</sup> Most western states faced the efforts made by Socialist and Third World bloc states to advance a resolution recognising further rights for peoples fighting for their self-determination. For instance, in 1973, during the

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<sup>178</sup> Roth, (n 169), at 215.

process of drafting resolution 3103 (XXVIII), it was witnessed that many western states were opposed to the project, or at least abstained from attending the meetings.<sup>179</sup>

More specifically, state practice also suggested that many states recognising the Libyan and Syrian oppositions as the legitimate representatives of their peoples had rejected the implementation of such an expression to indicate any legal status for the recognised entity in the past.<sup>180</sup> For example, although UNGA resolution 35/227, passed in 1981, recognised the South West Africa People's Organization as 'the sole and authentic representative of the Namibian people',<sup>181</sup> many western states were unwilling to grant such a status. The representative of the UK, in a statement that also reflected the point of view of other states such as Canada, West Germany, France and the US, explicitly refused any type of violence from any party to the Namibian conflict. It was also affirmed that 'it is only through negotiations that Namibia can begin its life as a truly independent sovereign State', and that 'the people of Namibia have the right to choose their own Government through free and fair elections'.<sup>182</sup>

In addition, as clarified in the previous section, many states recognising the Libyan and the Syrian oppositions as the legitimate representatives of their peoples explicitly affirmed that such recognition is of a purely political nature.<sup>183</sup> It was indicated that such recognition was neither intended to provide these entities with an internationally legal personality nor to produce legal rights and obligations. Hence, although the Libyan and Syrian oppositions were recognised in a similar way to that granted previously to NLMs, it did not intend to produce the same legal consequences. However, even though the recognition of the Libyan and Syrian oppositions as the

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<sup>179</sup> Roth, (n 169), at 213.

<sup>180</sup> Akande, (n 3).

<sup>181</sup> UNGA Resolution 35/227, (n 150), at para. 4.

<sup>182</sup> 35 GAOR, 109<sup>th</sup> Plenary meeting, para. 123-126 cited in Roth, (n 169), at 215.

<sup>183</sup> See for ex. US State Department, Daily Press Briefing, 12 December 2012, (n 1).

legitimate representatives of the concerned peoples is not sufficient in itself to establish a link with the right to self-determination, this ought not to fully deny such a possibility.

### **3.3.2.3 Self-Determination as a Human Right and the Concept of Representative Government: To What Extent Do the Syrian People Have a Right to Self-Determination within the Context of the R2P against their Government?**

One of the primary objectives behind the adoption of UNGA resolution 545 (VI), one of the earliest UNGA resolutions concerning the articulation of the right to self-determination, was to enhance the efforts to include an explicit reference to the right ‘of all people and nations to self-determination’ in a future international convention.<sup>184</sup> In response, the two international covenants on human rights, the ICCPR<sup>185</sup> and the ICESCR,<sup>186</sup> included a direct reference to the right to self-determination in the first article of each covenant. Article 1 of both covenants clearly states: ‘[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.<sup>187</sup>

It is noteworthy that during the discussion in the third committee of the UNGA concerning the draft of this Article, many objections were submitted as to the nature and scope of such a right.<sup>188</sup> Furthermore, one of these objections was based on the assertion that self-determination is a collective right rather than an individual right.<sup>189</sup>

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<sup>184</sup> UNGA Resolution 545 (VI), (n 127), at para. 1.

<sup>185</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available online at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>186</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available online at: <http://www.refworld.org/docid/3ae6b36c0.html>.

<sup>187</sup> *International Covenant on Civil and Political Rights*, (n 185), at Art. 1; *International Covenant on Economic, Social and Cultural Rights*, (n 186), at Art. 1.

<sup>188</sup> See Cristescu, (n 125), at 8.

<sup>189</sup> *Ibid.*

Therefore, it ought not to be included in a treaty concerned with the regulation of individuals' human rights. Nevertheless, such an argument was countered on the grounds that, even though self-determination is a collective right, its recognition is undoubtedly essential for the enjoyment of other individual human rights.<sup>190</sup> In other words, it was argued that, although the right to self-determination is 'the right of a group of individuals in association, it [is] certainly the prerogative of a community, but the community itself consisted of individuals and any encroachment on its collective right would be tantamount to a breach of their fundamental freedoms'.<sup>191</sup>

It was also asserted that the right to self-determination was indicated in Article 2 (1) of the UDHR, which 'guarantee[s] human rights and freedoms to all without distinction of any kind'.<sup>192</sup> It was further contended that the inclusion of the right to self-determination in the Universal Declaration could easily be spotted in numerous articles.<sup>193</sup> Hence, in order to ensure consistency with the UDHR, the right to self-determination ought to be included in the covenants.<sup>194</sup> In other words, it was argued that since the right to self-determination is considered 'a basic human right',<sup>195</sup> the absence of an explicit reference to it would deem the covenant incomplete.<sup>196</sup>

In fact, it was asserted that even though the covenants are concerned with individual human rights, they already include references to some collective rights, such as 'the right to freedom of association',<sup>197</sup> which makes the reference to the right to

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<sup>190</sup> *Official Records of the General Assembly, sixth Session, Third Committee*, 366<sup>th</sup> meeting, at para. 26.

<sup>191</sup> Cristescu, (n 125), at 4.

<sup>192</sup> *Official Records of the General Assembly, Fifth Session, Third Committee*, 309<sup>th</sup> meeting, at para. 60.

<sup>193</sup> *Official Records of the General Assembly, Fifth Session, Third Committee*, 310<sup>th</sup> meeting, at para. 7.

<sup>194</sup> See *Official Records of the General Assembly, Fifth Session, Third Committee*, 310<sup>th</sup> meeting, at para. 7.

<sup>195</sup> See *Ibid*, at para. 19.

<sup>196</sup> *Official Records of the General Assembly, Fifth Session, Third Committee*, 309<sup>th</sup> meeting, at para. 60.

<sup>197</sup> *Official Records of the General Assembly, Fifth Session, Third Committee*, 311<sup>th</sup> meeting, at para. 5.

self-determination is consistent with the structure of the Covenants. Thus, the inclusion of the right to self-determination in these conventions does not only affirm the human rights nature of this right, but also it reflects its permanency. Nevertheless, the scope of such a right to self-determination is not unlimited.

It is argued that contemporary international law, as a general rule, recognises the government of the state as the only representative of the people.<sup>198</sup> In other words, as long as peoples exercised their self-determination, and gained their independence, they would not have any separate rights or obligations under international law from the rights and obligations granted to their governments.<sup>199</sup> As Talmon (2013) asserted, the people would be ‘mediatized’ by the State, i.e. the people as a legal person has been subsumed into the State’.<sup>200</sup> Therefore, although the right to self-determination is granted to the people, it ought to be exercised by their governments.<sup>201</sup> The right of a people to freely decide its political, economic, social and cultural systems would be, primarily, claimed by the state itself against any external interference.<sup>202</sup> Accordingly, a single people would not be granted a right to self-determination against its own government. As a consequence, international law would not legally recognise any other entity claiming to be ‘the legitimate representative of the people’ in their exercise of the right to self-determination against the *de jure* government. Nevertheless, although such a contention represents the general rule under contemporary international law, some exceptions may exist under certain circumstances.<sup>203</sup>

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<sup>198</sup> Crawford, (n 145), at 56.

<sup>199</sup> Talmon (2013), (n 5), at 235.

<sup>200</sup> Ibid.

<sup>201</sup> Crawford, (n 145) 55, at 56.

<sup>202</sup> See UNGA Resolution 2625 (XXV), (n 119), at para. 1.

<sup>203</sup> See *Quebec* Case held by the Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 SCR 217, at para. 138, available online at: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1643/index.do>.

As clarified previously, the implementation of the right to self-determination is restricted by other principles, one of which is the principle of territorial integrity. The balance between the right to self-determination and territorial integrity was affirmed in UNGA resolutions. For instance, the Declaration on Principles of International Law explicitly confirmed that the right to self-determination ought not to ‘be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states’.<sup>204</sup> Nevertheless, unlike other UNGA resolutions passed previously, the Declaration, under paragraph 7 as mentioned above, went further to adopt a unique approach. The Declaration seems to condition the preservation of the territorial integrity of states in conformity with the principle of equal rights and self-determination.<sup>205</sup> Furthermore, the Resolution considered the possession ‘of a government representing the whole people of the territory without distinction as to race, creed or colour’ as a measure to determine the compatibility of states with the principle of self-determination.<sup>206</sup> As Pentassuglia contended the formula adopted in paragraph 7 seems to ‘implicitly suggests a link between territorial integrity and the existence of a ‘government representing the whole people belonging to the territory without distinction as to race, creed or colour’’.<sup>207</sup>

Noteworthy to mention is that the inclusion of the phrase ‘without distinction as to race, creed or colour’ has been argued to have a minimal legal impact.<sup>208</sup> Summers asserted that “‘race” [as included in paragraph 7 of Resolution 2625 (XXV)] [is]

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<sup>204</sup> UNGA Resolution 2625 (XXV), (n 119), at para. 7.

<sup>205</sup> Ibid.

<sup>206</sup> See Ibid.

<sup>207</sup> G. Pentassuglia, ‘State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View’ (2002) 9 *International Journal on Minority and Groups Rights* 303, at 311.

<sup>208</sup> See P. Thornberry, ‘the Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism’ in G. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht, 1993) 101, at 117.

presumably rendering “colour” superfluous’.<sup>209</sup> However, the formula, as adopted under paragraph 7, enhanced the legality of the struggle of NLMs against racist regimes.<sup>210</sup> The phrase deemed the activities conducted by NLMs to be consistent with the UN Charter. Nonetheless, although the wording of paragraph 7 of Resolution 2625 (XXV) seems to restrict its implementation to certain situations, the subsequent interpretations of the Resolution significantly extended its scope. More specifically, various efforts have been made to further broaden what is meant by the concept of ‘representative government’.<sup>211</sup>

Unlike Resolution 2625 (XXV) which limited the scope of paragraph 7 to cases related to racist regimes, the Vienna Declaration of 1993 extended the concept of a representative government to cover the whole population of a state. After affirming the link between the right to self-determination and territorial integrity, the Declaration went on to add that in order to be in conformity ‘with the principle of equal rights and self-determination of peoples’, the government ought to be representing ‘the whole people belonging to the territory without distinction of any kind’.<sup>212</sup> Furthermore, such an approach was subsequently reaffirmed under the Declaration on the Occasion of the Fiftieth Anniversary of the UN adopted in 1995.<sup>213</sup> The concept of a representative government and its relation with the right to self-determination was further developed in the Committee on the Elimination of Racial Discrimination.<sup>214</sup>

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<sup>209</sup> J. Summers, *People and International Law*, 2<sup>nd</sup> edn (Martinus Nijhoff, Leiden, 2014), at 228.

<sup>210</sup> Ibid, at 228-229.

<sup>211</sup> See United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted in Vienna on 25 June 1993, at I (2), available online at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>; United Nations General Assembly, *Declaration on the Occasion of the 50th Anniversary of the United Nations : resolution / adopted by the General Assembly.*, 9 November 1995, A/RES/50/6, at 2-3, available online at: <http://www.refworld.org/docid/3b00f1940.html>; Pentassuglia, (n 207), at 311.

<sup>212</sup> Vienna Declaration and Programme of Action, (n 211), at I (2).

<sup>213</sup> UNGA, *Declaration on the Occasion of the 50th Anniversary of the United Nations*, (n 211), at 2-3.

<sup>214</sup> General Recommendation XXI (48), Committee on the Elimination of Racial Discrimination, General Recommendation 21, the right to self-determination, (Forty-eighth session, 1996), U.N. Doc

Under paragraph 4 of General Recommendation XXI (48) adopted on 8 March 1996, the committee asserted that ‘the rights of all peoples to pursue freely their economic, social and cultural development without outside interference’ suggest the existence of ‘the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination’.<sup>215</sup> Therefore, ‘governments are to represent the whole population without distinction as to race, colour, descent, national, or ethnic origins’.<sup>216</sup> Summers commented that the interpretation provided by the Committee on the Elimination of Racial Discrimination indicates that the initial formula adopted under paragraph 7 of Resolution 2625 (XXV) has been significantly broadened to include ‘any ethnic or national group within a state’.<sup>217</sup>

Although the innovative approach adopted under paragraph 7 of Resolution 2625 (XXV) and developed in subsequent documents intended to provide a more sophisticated balance between the right to self-determination and territorial integrity,<sup>218</sup> it raised a high degree of controversy on its exact meaning.<sup>219</sup> The uncertainty is mostly related to whether the failure of the government to represent its people may lead to the negation of territorial integrity. In other words, to what extent the absence of a representative government can lead to the existence of the right to secession was debated on. In particular, the matter is significantly important to cases involving multinational states.<sup>220</sup>

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A/51/18, annex VIII at 125 (1996), at para. 4, available online at: <http://www1.umn.edu/humanrts/gencomm/genrexxi.htm>.

<sup>215</sup> General Recommendation XXI (48), (n 214), at para. 4.

<sup>216</sup> Ibid.

<sup>217</sup> Summers, (n 209), at 228.

<sup>218</sup> Ibid, at 225.

<sup>219</sup> See Thornberry, (n 208), at 115-118.

<sup>220</sup> See *Quebec Case*, (n 203), at para. 138.



Generally, unlike the state which consists of a single people, in a multinational state which comprises more than one people, it is contended that each group has to be able to exercise the right to self-determination.<sup>221</sup> Moreover, the denial of such a right for a group of people living within a state, by its government, may lead to the entitlement of the right to secession.<sup>222</sup> As clarified by the Canadian Supreme Court in the *Quebec* Case in 1998, one of the situations in which the right to secession can be recognised under international law is when ‘a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development’.<sup>223</sup>

The implementation of paragraph 7 of Resolution 2625 (XXV) to justify secession was more apparent in Russia’s reaction in relation to the cases of Abkhazia and South Ossetia.<sup>224</sup> Abkhazia and South Ossetia were two ethnic regions that used to be part of Georgia. They used to organise themselves as ‘de facto autonomous entities’.<sup>225</sup> In 2008, tension between Georgia and these two regions developed overtime into armed conflict. After the end of the conflict, Russia recognised Abkhazia and South Ossetia as two independent states.<sup>226</sup> The Russian formal declaration was not only based on political justifications, but also it included some legal grounds.<sup>227</sup> As stated by the representative of the Ministry of Foreign Affairs of the Russian Federation:

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<sup>221</sup> See A. Cassese, ‘The Self-determination of Peoples’ in Louis Henkin (ed.), *the International Bill of Rights- the Convention on Civil and Political Rights* (Columbia University Press, USA, 1981) 92, at 93-94.

<sup>222</sup> See Cassese (2005), (n 163), at 110-124.

<sup>223</sup> *Quebec* Case, (n 203), at para. 138.

<sup>224</sup> See Statement by the Ministry of Foreign Affairs of the Russian Federation, 26 August, At 6.

<sup>225</sup> C. Ryngaert & S. Sobrie, ‘Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia’ (2011) 24 *Leiden Journal of International Law* 467, at 481.

<sup>226</sup> Gokce, (n 147), 285.

<sup>227</sup> Ryngaert & Sobrie, (n 225), at 481.

In taking this decision, the Russian Federation was guided by the provisions of the Charter of the United Nations, the Helsinki Final Act and other fundamental international instruments, including the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. It should be noted that under the Declaration, every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence, to promote through their action the principle of equal rights and self-determination of peoples, and to possess a government representing the whole people belonging to the territory. There is no doubt that Mikheil Saakashvili's regime is far from meeting those high standards set by the international community.<sup>228</sup>

Hence, it seems that Russia based its legal argument on the contention that the peoples of Abkhazia and South Ossetia were entitled to exercise the right to secession as a result of denying their internal right of self-determination by the government of Georgia. Nonetheless, various states challenged the Russian's recognition by relying on the principle of sovereignty and territorial integrity.<sup>229</sup> In fact, the report of International Fact-Finding Mission on the Conflict in Georgia explicitly rejected the Russian contention. It clearly stated that:

The 'internal' aspect of the right to self-determination, to be realised within the framework of a state, does not infringe on the territorial integrity of the state concerned. However, if the right to self-determination is interpreted as granting the right to secession (external right to self-determination), the two principles are incompatible.<sup>230</sup>

It was argued that even though the cases where states relied on the denial of the right of peoples to internal self-determination by their governments to assert the emergence of the right to secession cannot be considered precedents under international law, they are not empty of any significance. They still could indicate the emergence of

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<sup>228</sup> Statement by the Ministry of Foreign Affairs of the Russian Federation, (n 224).

<sup>229</sup> See Ryngaert & Sobrie, (n 225), at 482.

<sup>230</sup> Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, September 2009, at 136, available online at: <http://rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf>.

a new customary rule. Nevertheless, such a new rule would require a stable general practice and *opinio juris* for its existence.<sup>231</sup>

Furthermore, as long as the content of paragraph 7 of resolution 2625 (XXV) is concerned, it is argued that the reliance on this formula to suggest the emergence of a right to secession represents an extremely expansive interpretation that goes beyond the intended meaning of the paragraph.<sup>232</sup> It was asserted that even though the formula provided under paragraph 7 created a link between the concept of government representative and territorial entirety, it did not include any reference to remedial secession. In other words, it was contended that the argument supporting the right to secession within the context of paragraph 7 was based on negative implication rather than an explicit finding in the text.<sup>233</sup> It was also noted that there have been no indications suggesting that states intended to consider remedial secession as an option during the process of drafting the resolution.<sup>234</sup>

In fact, a restrictive interpretation based on the wording of the paragraph would lead to the contention that the formula is concerned with the whole people of the state rather than some distinct groups.<sup>235</sup> As Thornberry commented, the reference in the text to ‘the whole people’ indicates that the right to self-determination ought to be advanced by ‘the people of the State as unified group’.<sup>236</sup> He went on to add that ‘[t]he non-recognition of the existence of distinct peoples apart from the people of the State as a

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<sup>231</sup> Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, (n 230), at 140; T. Gazzini, ‘Criteria for Statehood as Applied by the EU’s Independent Fact-Finding Mission on the Conflict in Georgia’ (2009) *European Journal of International Law: Talk!*, available online at: <http://www.ejiltalk.org/criteria-for-statehood-as-applied-by-the-eus-independent-fact-finding-mission-on-the-conflict-in-georgia/>; J. Crawford, *the Creation of States in International Law*, 2nd edn (Oxford University Press, Oxford, 2006), at 119-120.

<sup>232</sup> Pentassuglia, (n 207), at 311.

<sup>233</sup> Summers, (209), at 233.

<sup>234</sup> *Ibid*, at 233-234.

<sup>235</sup> Thornberry, (208), at 115.

<sup>236</sup> *Ibid*.

whole must be accounted for in any interpretation of the text'.<sup>237</sup> Moreover, Pentassuglia argued that the formula provided in paragraph 7 of resolution 2625 (XXV) suggests that it is 'the whole people, not individual groups comprising it, to be entitled to react to repressive regimes'.<sup>238</sup> In other words, it is asserted that although it is the prevailing view not to recognise any right to secession under paragraph 7, the content of the paragraph indicates that the whole people constituting the population of a state may be entitled to exercise the right to self-determination against their own government.<sup>239</sup>

The approach adopted in paragraph 7 constitutes explicit departure from the traditional common view that the right of internal self-determination is to be exercised by governments on behalf of their peoples against any external interference. It provides peoples as a whole the right to take remedial action against repressive regimes. It also opens the possibility for those peoples to be represented by entities other than their own governments for the purpose of exercising the right to self-determination.

As clarified previously, although the right to self-determination is primarily given to people, those people are required to gather under an internationally recognised structure to exercise the right to self-determination.<sup>240</sup> Hence, the implementation of the formula included under paragraph 7 could facilitate the recognition of a legal structure as a legitimate representative of a people in its struggle against an oppressive regime. Moreover, in this case, the use of the phrase 'the legitimate representative of the people' would go beyond its common use referring to situations involving occupation powers

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<sup>237</sup> Thornberry, (208), at 115.

<sup>238</sup> Pentassuglia, (n 207), at 311.

<sup>239</sup> See Ibid.

<sup>240</sup> See Crawford, (n 145), at 56.

and NLMs to cover conflicts that erupt between peoples and their governments.<sup>241</sup> In general, as clarified above, the recognition of the right of peoples to self-determination against their own governments has significant legal impacts as to the legal framework regulating armed conflicts.<sup>242</sup>

Moreover, as long as the concept of the R2P is concerned, there is no doubt that the implementation of paragraph 7 of resolution 2625 (XXV) would contribute to the concept of the R2P. It would theoretically strengthen its legal framework which would enhance the effectiveness of its implementation over internal armed conflict. It is also noteworthy to mention that the application of the formula provided under paragraph 7 within the context of the R2P would contribute to its clarity. The concept of the R2P could further frame the scope of paragraph 7. It may help to clearly define what is meant by the concept of ‘government representative’. Instead of being ambiguous and open to various interpretations, the failure of the government to represent its people would be limited to situations involving extreme violations of human rights constituting breaches of *jus cogens*. In other words, for the purpose of implementing the concept of the R2P, peoples would be entitled to exercise the right to self-determination when they were being victims of one of the four crimes mentioned in paragraph 139 of the World Summit.<sup>243</sup>

As to the Libyan and Syrian situations, it is apparent that there is only a single people in each state. Each single people formed the concerned state. Therefore, the issue concerning the right to secession would be less relevant. Also, although Gaddafi and

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<sup>241</sup> See United Nations General Assembly Resolution 41/35, Policies of apartheid of the Government of South Africa, 64<sup>th</sup> plenary meeting, 10 November 1986, available online at <http://www.un.org/documents/ga/res/41/a41r035.htm>; Gokce, (n 147), at 289.

<sup>242</sup> See Roth, (n 169), at 214.

<sup>243</sup> United Nations General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, at para. 139, available online at: <http://www.refworld.org/docid/44168a910.html>.

Assad regimes are still not founded on discrimination on the grounds of race, creed or colour,<sup>244</sup> they still could be considered dictatorships giving certain minorities or groups favorable treatment in comparison to the rest of the populations. There has been clear evidence that these regimes have oppressed their peoples. During these two conflicts various extreme violations of human rights were committed against the Libyan and Syrian peoples, including violations of *jus cogens*. There is no doubt that the commitment of these violations goes beyond the measure adopted in paragraph 7 which is the failure of the government to represent its whole people. Therefore, the formula included under paragraph 7 could be applied over the Libyan and Syrian situations.

Hence, the Libyan and Syrian peoples would be able to exercise the right to self-determination against their own governments. As a consequence, the political structures of the Libyan and Syrian oppositions could be internationally recognised for the purpose of exercising the right to self-determination in accordance with this interpretation of paragraph 7. Nevertheless, it ought to be clarified that although the formula provided under paragraph 7 could be considered a basis justifying the right of peoples to exercise the right to self-determination against their oppressive governments, this interpretation is still not authoritative. It is only one of various interpretations advanced to clarify the meaning of the paragraph. As stated by Summers, the formula adopted in paragraph 7 'is capable of multiple interpretations and their strength and relevance may vary over time'.<sup>245</sup> However, the absence of consensus as to the exact meaning of this formula does not mean it is empty of any significance. It still could serve as a starting point for a new trend that may emerge over time.

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<sup>244</sup> Akande, (n 3).

<sup>245</sup> Summers, (n 209), at 239.

### 3.3.3 The Legal Act of Recognition as a New Government and the Potential Impact of the R2P

It is the common policy of many states to limit their recognition to states rather than governments. Such policy was explicitly adopted by various states such as the UK, the US and other Commonwealth countries.<sup>246</sup> However, the adoption of such a policy ought not to deem statements made by these states as to the recognition of governments empty of any political and legal significance.<sup>247</sup> Also, although state practice has shown that the recognition of governments is a political rather than a legal act based usually in the interest of the recognising state, such an act produces legal consequences.<sup>248</sup> The recognition of a government suggests that the recognised government is accepted in the international community as being capable to act on behalf of the concerned state.<sup>249</sup>

Although the reactions of some states to the Libyan and Syrian cases indicate the emergence of a link between the political recognition of an opposition group as ‘the legitimate representative of a people’ and its legal recognition as the new government of the state, the recognition of a government, as a legal act, must still be founded on legal facts.<sup>250</sup> As asserted by Talmon (2013), ‘the recognition of a group of people as a “government” is the ‘establishment of the fact that the group satisfies the conditions for government status in international law’.<sup>251</sup> Hence, it seems to be essential for the purpose of this section to briefly outline these legal requirements.

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<sup>246</sup> S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, Oxford, 1998), at 3.

<sup>247</sup> See Ibid, at 5; C. Naticchia, ‘Recognizing States and Governments’ (2005) 35 *Canadian Journal of Philosophy* 27.

<sup>248</sup> Shaw, (n 116), at 482.

<sup>249</sup> Talmon, (n 246), at 28.

<sup>250</sup> See Lauterpacht, (n 60), at 87-92.

<sup>251</sup> Talmon (2013), (n 5), at 234.

State practice has shown that the recognition provided by states usually includes certain criteria.<sup>252</sup> Although no agreement exists among states as to the nature of these criteria, the element of *effectiveness* seems to be a common requirement.<sup>253</sup> As a requirement of recognition, effectiveness has been defined by states in various ways. Nevertheless, the common feature of all these definition is the new entity's ability to be 'in control of, at least, the larger part of the territory as well as its administration and that such control is not just of a temporary nature but of consolidated one'.<sup>254</sup> Therefore, as argued by Talmon (2013), for an entity to exercise the territorially effective control required for government status, 'it must be in possession of the machinery of states which, as a rule, requires control of the State's capital'.<sup>255</sup>

It is essential to clarify that, despite the significance of the concept of territorially effective control, state practice has exposed uncertainty as to whether the exercise of certain degree of effective control over a territory is sufficient to satisfy the criteria required for a government's recognition. For example, in 1965, Rhodesia declared its independence by citing its right to national sovereignty. However, though the government was exercising effective control over its territory, its unilateral declaration of independence was rejected by the international community. The universal refusal was based on violation of *jus cogens*.<sup>256</sup>

Another example suggesting that the exercise of territorially effective control does not necessarily lead to a government's status is in the effective and speedy reaction of the international community to the Haitian situation in 1991.<sup>257</sup> Although

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<sup>252</sup> See D. Harris, *Cases and Materials on International Law*, 7<sup>th</sup> edn (Thomson Reuters, London, 2010), at 130-162

<sup>253</sup> See Ibid, at 130.-162; Crawford, (n 231), at 39-50.

<sup>254</sup> R. Wolfrum & C. E. Philipp, 'The Status of the Taliban: Their Obligations and Rights Under International Law' (2002) 6 *Max Planck Yearbook of United Nations Law* 559, at 571.

<sup>255</sup> Talmon (2013), (n 5), at 233.

<sup>256</sup> M. S. McDougal & W. M. Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', (1968) 62 (1) *the American Journal of International Law* 1.

<sup>257</sup> See D. Malone, 'Haiti and the International Community: A Case Study' (1997) 39 (2) *Survival* 126.



the military regime that overthrew the legitimate government in 1991 was exercising effective control over Haitian territory, the international reaction to the situation indicated that the exercise of effective control over a given territory was not sufficient to assert the legitimacy of a government.<sup>258</sup> In fact, as indicated in UNSC resolution 940, the international community continued to recognise the democratically elected government as the legitimate authority in Haiti despite its lack of effective control on the ground.

Further evidence strengthening the view that governments may be considered sovereign despite their lack of effective control over territories is found in the recognition of transitional and interim governments by the international community. In certain cases, transitional or interim governments are considered capable of enjoying sovereign rights even if they have no effective territorial control. Such a sentiment obvious in the international community's treatment of the situations in Iraq and Somalia.<sup>259</sup> Even though the transitional governments in these two countries had almost no control over territories beyond their capitals, the international community considered their consents sufficient to legalise the external forcible interventions.<sup>260</sup>

*Prima facie*, the previous examples could suggest the emergence of a trend under international law in favour of certain values over the concept of territorial effective control. These values, as indicated by the incidents above, are the fulfilment of *jus cogens* obligations, the protection of the will of the people and the enhancement of democracy and the support of the newly founded regimes. They generally fit within

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<sup>258</sup> S. M. Makinda, 'the United Nations and State Sovereignty: Mechanism for Managing International Security' (1998) 33 (1) *Australian Journal of Political Science* 101, at 111.

<sup>259</sup> In relation to the Iraqi situation, see UNSC Res. 1546 (5 June 2004); in regard to the situation in Somalia and the intervention of Ethiopia in favor of the transitional government, see UNSC Verbatim Record (26 December 2006) UN Doc S/pv/5614, 3.

<sup>260</sup> In relation to the Iraqi situation, see UNSC Res. 1546 (5 June 2004); in regard to the situation in Somalia and the intervention of Ethiopia in favor of the transitional government, see UNSC Verbatim Record (26 December 2006) UN Doc S/pv/5614, 3.

the wide concept of human security.<sup>261</sup> Therefore, there is no doubt that such a contention, were it to prevail, would conform to the new concept of R2P.<sup>262</sup> It would present the concept of the R2P with a legal foundation. Nevertheless, further examination of these examples illustrates that the actions of the international community towards the incidents mentioned above were motivated by non-legal factors. The reaction of the international community was based on political rather than legal considerations.<sup>263</sup> However, though these examples may not contribute to the emergence of a new legal trend, they do reflect inconsistency in the implementation of the concept of territorially effective control in state practice.

Although the exercise of effective control over territory as a criteria for recognition is usually enfolded with ambiguity, the matter could be more problematic if the concerned entity were party to an internal armed conflict. It has been asserted that, in an ongoing civil war, the *de jure* government could continue to be the ultimate representative of the state as long as it could exercise a sufficient degree of resistance.<sup>264</sup> It has also been contended that recognising an entity participating in the conflict as a government of the state could be considered not only as ‘a premature recognition’ but also a violation of the principle of non-intervention in the internal affairs of the concerned state.<sup>265</sup> Accordingly, for an opposition group to gain government status, it must exercise effective control over the entire territory of the state, otherwise the recognising state would be in violation of the principle of non-intervention. The

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<sup>261</sup> See *Our Global Neighborhood*, The Report of the Commission on Global Governance (Oxford University Press, New York, 1995).

<sup>262</sup> See World Summit Outcome, (n 243), at para.138.

<sup>263</sup> G. M. Lyons & M. Mastanduno, *Beyond Westphalia? State sovereignty and international intervention* (The Johns Hopkins University Press, USA, 1995), at 81-82; See Makinda, (n 258), at 112.

<sup>264</sup> Wolfrum & Philipp, (n 254), at 572-573.

<sup>265</sup> *Ibid.*

requirement that an opposition group exercise effective control over the whole territory seems to be the prevailing view after the adoption of the R2P.<sup>266</sup>

In accordance with the US State Department spokesperson, the US recognised the NTC as the new Libyan government in two incremental steps. First, the US provided the NTC with political recognition as ‘the legitimate representative of the Libyan people’. Then, when Al Qaddafi’s regime lost control of the country, the US was able to take a legal step and recognise the NTC as the new government of Libya.<sup>267</sup> The reason behind the adoption of such a policy requiring the exercise of effective control over the whole territory before the legal recognition could be granted was clarified by the legal advisor to the US State Department.<sup>268</sup> He stated that the US policy is not ‘to recognise entities that do not control entire countries because then they are responsible for parts of the country that they don’t control’.<sup>269</sup> He went on to add, the US ‘is reluctant to derecognize leaders who still control parts of the country because then [that could absolve] them of responsibility in the areas that they do control’.<sup>270</sup>

Therefore, although the exercise of effective control over the entire territory by the oppositions is still a fundamental element for legal recognition, the policy behind such a requirement has changed. While the requirement is founded primarily on the principle of non-intervention, it is based on the idea of the R2P. Furthermore, such a change finds support in the concept of sovereignty as responsibility, as explained in the first chapter.

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<sup>266</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1); See US Senate, Committee on Foreign Relations, Libya and War Powers, Hearing, S. Hrg. 112-89, 28 June 2011, at 39, available online at: [http://fas.org/irp/congress/2011\\_hr/libya.pdf](http://fas.org/irp/congress/2011_hr/libya.pdf).

<sup>267</sup> See US State Department, Daily Press Briefing, 12 December 2012, (n 1).

<sup>268</sup> See US Senate, Committee on Foreign Relations, Libya and War Powers, (n 266), at 39.

<sup>269</sup> Ibid

<sup>270</sup> See Ibid.

### **3.4 Conclusion**

This chapter addressed the issue concerning the international recognition of the political organ of the opposition groups following the adoption of the R2P. It aimed to examine the extent to which the international community's reaction towards opposition groups has changed following the implementation of the R2P concept. In order to achieve this objective, the chapter was divided into two sections: section one focused on the political recognition of the opposition groups as representatives of the peoples, and section two discussed the legal recognition of the opposition groups.

Section one revealed that states' action towards the Libyan and Syrian oppositions indicated that the political structure of opposition groups could be recognised in various ways, reflecting different levels of political support. It also clarified that even though this recognition is purely political with no legal consequences, the recognition of an opposition group as 'the legitimate representative of the people' is highly relevant. Such recognition indicates significant changes in the status of the opposition group and represents the highest possible level of political recognition. It further suggests that the functioning government has already lost its legitimacy and that a new representative of the people should be selected, that is, the recognised opposition group.

The conclusion also conveyed that in order to qualify as the representative of the people, an opposition group should satisfy two requirements: representativeness and permanency. Although states still exercise a high level of discretion in determining the scope of these requirements, it is still possible to generally define them. While representativeness refers to the inclusiveness of the opposition groups in ethnic and geographical terms, permanency indicates that the opposition groups maintain certain a political, organisational and institutional structure. The final argument was that the

political recognition of opposition groups as the representatives of the people might facilitate their legal recognition.

Section two addressed the legal recognition of the opposition groups, discussing two main issues: first, the recognition of the opposition groups as the representative of the people and the right to self-determination and, second, the recognition of the opposition group as a new government. With regard to the recognition of opposition groups and the right to self-determination, this section asserted that the recognition of opposition groups as the legitimate representatives of the people indicates a similarity between the status opposition groups and NLMs. Nevertheless, the discussion clarified that the recognition of opposition groups similar to that granted previously to NLMs does not mean that the recognition would provide the opposition groups with the same legal status and produce the same legal consequences.

Section two also explained that although a link between opposition groups and NLMs cannot be established, the right to self-determination could still be advanced to legally justify the struggle against the functioning government. It argued that the most recent interpretation of paragraph 7 of Resolution 2625 (XXV)<sup>271</sup> suggests that the people of a state have a right to self-determination against repressive regimes. In other words, the contention was that although it is the prevailing view not to recognise any right to secession under paragraph 7, the content of the paragraph indicates that people together constituting the population of a state may be entitled to exercise the right to self-determination against their own government. The section also examined the possibility of recognising an opposition group as the new government of the state and evaluated the traditional requirements.

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<sup>271</sup> See UNGA Resolution 2625 (XXV), (n 119), at para. 7.

In sum, although no direct changes have emerged on the legal status of opposition groups after the adoption of the R2P, some indirect legal impact is still indicated. States' action in response to the situation in Libya and Syria suggest the emergence of a new trend towards recognising opposition groups as the legitimate representative of a people whenever they satisfy certain conditions. Even though this status is purely political and has no legal consequences, it is still of crucial importance in political and practical terms. It was indicated that the political recognition of opposition groups as the legitimate representative of a people was applied by some states as a preliminary move before granting them legal recognition.

## Chapter 4

### **The International Responsibility to Protect the Population after the Adoption of the R2P: Responsibilities of Third States and Opposition Groups**

#### **4.1 Introduction**

This chapter covers third states' responsibilities with respect to the protection of civilians with a focus on the possible role played by opposition groups. The significance of this chapter lies in the ambiguity surrounding the role that could be played by third states in the protection of civilians within the context of internal armed conflicts.

The uncertainty regarding the decisive role that might be exercised by third states in protecting civilian populations is related to the nature of IHL itself. Despite the fact that the primary objective of modern IHL was to enhance the protection provided to populations during hostilities, it has done so by primarily focusing on the parties to armed conflict rather than on third states.<sup>1</sup> Furthermore, as far as internal armed conflicts are concerned, modern IHL was intended to impose restrictions that would reduce the possibility of third states' involvement in the conflict. These restrictions were considered effective means to limit the negative effects of internal armed conflicts.<sup>2</sup> Nevertheless, following the adoption of the R2P, further attention has been paid to third states' protective responsibility. Third states are expected to play a more active role to prevent, react and rebuild.

The primary aim of this chapter is to determine the kind of responsibilities placed on third states to ensure the improved and more effective protection of the

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<sup>1</sup> H. A. Wilson, *International Law and The Use of Force by National Liberation Movements* (Oxford University Press, Oxford, 1988), at 44.

<sup>2</sup> *Ibid.*

population during armed conflicts. Given the constraints of the project, the chapter focuses on selected issues. Accordingly, it is divided into three sections.

Section one is concerned with the international R2P and IHL and intends to provide a legal basis for the international R2P. Section two focuses on the issue related to the supply of arms to opposition groups for the purpose of protecting civilians. It aims to examine two possibilities. First, it evaluates the legality of the unilateral arming of opposition groups. Second, this section examines the possibility of basing the legality of the supply of arms on the explicit authorisation of the UNSC and the extent to which the concept of the R2P contributed to the issue. Section three discusses the issues related to the use of force for the purpose of protecting civilians. It evaluates the authorised use of force to protect civilians. It intends to evaluate the legality of such an authorisation and to determine its scope. The discussion in section three is primarily focused on the Libyan case since it is the only case where the authorisation of the UNSC was granted.



## 4.2 The International Responsibility to Protect and IHL

Section one aims to address two main issues related to the international R2P and the framework of IHL. First, the theoretical and legal foundation of the international R2P is discussed. Second, the prevention and reaction as dimensions of the international responsibility are addressed.

### 4.2.1 The International Responsibility to Protect: Theoretical and Legal Foundation

As clarified previously, the R2P is generally best described as soft law.<sup>3</sup> Moreover, as contended by Stahn, though the first pillar of the R2P concerning the primary responsibility of the host state to protect its population is well established under international law, the second and third pillars of the R2P related to the subsidiary international responsibilities to help to protect are surrounded by a high degree of uncertainty.<sup>4</sup> It is highly controversial to what extent international law recognises direct and decisive positive responsibilities of the international community concerning the second and the third pillars of the R2P.<sup>5</sup>

Although arguable, one of the possible ways to establish the legality of the international responsibility to protect as to internal armed conflict is to base it on the content of Common Article 1 to the four Geneva Conventions.<sup>6</sup> Common Article 1

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<sup>3</sup> H. Breakey, 'The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast' in A Francis and others (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (United Nations University Press, Tokyo, 2012) 62, at 70.

<sup>4</sup> C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *The American Journal of International Law* 99, at 118-120.

<sup>5</sup> *Ibid.*

<sup>6</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention);

reads as follows: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’.<sup>7</sup> The content of common Article 1 was later reaffirmed under Article 1 (4) of the first Additional Protocol.<sup>8</sup> Although common Article 1 as well as the first Additional Protocol are primarily concerned with international armed conflicts, it is argued that the obligation to respect and ensure respect embodied in these documents is also applicable to internal armed conflicts.<sup>9</sup>

As asserted by the ICJ in the *Nicaragua* case of 1986, the general obligation to respect and ensure respect enacted under common Article 1 applies over the obligations related to internal armed conflicts included under common Article 3 to the four Geneva Conventions of 1949.<sup>10</sup> Though it is important to emphasize that this does not mean Common Article 1 provides more protection than Common Article 3, this argument only refers to third state responsibilities to protect. In accordance with the ICJ, the general obligation to respect and ensure respect ‘does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression’.<sup>11</sup>

The obligation to respect and ensure respect is two-sided. The first part of the obligation is ‘to respect’, which is a restatement of the provisions of the Geneva

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Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention), at Art. 1.

<sup>7</sup> *Geneva Conventions*, (n 6), at Art. 1.

<sup>8</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, at Art. 1 (4), available online at:

<http://www.refworld.org/docid/3ae6b36b4.html>.

<sup>9</sup> *Improving Compliance with International Humanitarian Law*, International Commission of the Red Cross (ICRC), *Background Paper Prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law*, Cambridge, June 2004.

<sup>10</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986, at para. 220, available online at: <http://www.refworld.org/docid/4023a44d2.html>.

<sup>11</sup> *Ibid.*

Conventions of 1929.<sup>12</sup> As Brollowski asserted, the obligation imposed on states under common Article 1 to respect ‘should be understood as a repetition of the general obligation of States derived from the principle of *pacta sunt servanda* that requires States to adhere to their treaty obligations in good faith’.<sup>13</sup> Hence, it implies that states are obligated to undertake all possible means to ensure that the relevant principles of IHL are adhered to by all natural and legal persons under their jurisdictions.<sup>14</sup>

The second part of the obligation embodied under common Article 1 is ‘to ensure respect’. States parties to the Geneva Conventions are not only obliged to ensure their own adherence to the principles of international humanitarian law, but are under a general obligation to undertake all possible legal means to ensure effective universal respect for these principles. The extensive scope of Common Article 1 finds further support in various diplomatic statements and other international instruments.<sup>15</sup>

As stated in the resolution adopted by the 1968 Tehran Conference on Human Rights in Armed Conflict, states parties to the Geneva Conventions are required ‘to take steps to ensure the respect of [IHL] in all circumstances by other States, even if they are not themselves directly involved in an armed conflict’.<sup>16</sup> More recently, the ICJ in the *Wall Advisory Opinion* commented that in accordance with Common Article 1, ‘every State party to that Convention, whether or not it is a party to a specific conflict,

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<sup>12</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 303, at Art. 25; Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 343, at Art. 82; H. Brollowski, ‘The Responsibility to Protect and Common Article 1 of the Geneva Conventions and Obligations of Third States’, in J Hoffmann & A Nollkaemper (eds.), *Responsibility to Protect from Principle to Practice* (Amsterdam University Press, Amsterdam, 2012) 93, at 95.

<sup>13</sup> Brollowski, (n 12), at 95.

<sup>14</sup> L. B. Chazournes & L. Condorelli, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective interest’, (2000) 837 *International Review of the Red Cross*, available online at: <https://www.icrc.org/eng/resources/documents/misc/57jqcp.htm>.

<sup>15</sup> *Ibid.*

<sup>16</sup> Human Rights in Armed Conflicts, Resolution XXIII, adopted by the International Conference on Human Rights, Tehran, 12 May 1968, available online at: <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=378384ED19F0CFEAC12563CD0051D2B4>.

is under an obligation to ensure that the requirements of the instruments in question are complied with'.<sup>17</sup> Such a view puts the implementation of the principles of IHL concerning the protection of civilians at the center of the international community's interests.<sup>18</sup> This assertion has a link with the R2P, particularly in relation to the third pillar concerning the international responsibility to protect. More specifically, being a third state's responsibility, the obligation to ensure respect is in line with the second and third pillars of the R2P that are the international responsibility to help host state to protect and to protect.<sup>19</sup>

As clarified previously, paragraph 139 of the World Summit outlined the obligations imposed upon other states once the responsibility to protect moves to the international community, due to the failure of a state to fulfil its duties and protect its population. It states: '[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations' from being victims of genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>20</sup> Further, since these peaceful methods can, in some cases, fail to protect citizens from the crimes mentioned above, as a last resort, the report refers to the option to 'take collective action...through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis, in cooperation with relevant regional organisations as appropriate'.<sup>21</sup>

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<sup>17</sup> *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, at para. 158, available online at: <http://www.refworld.org/docid/414ad9a719.html>.

<sup>18</sup> Chazournes & Condorelli, (n 14).

<sup>19</sup> See UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available online at: <http://www.refworld.org/docid/44168a910.html>.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

As clarified in the ICISS report representing the initial attempt to introduce the concept of the R2P, the complementary responsibility of the international community was intended to attain three objectives: prevention, reaction and rebuilding. The report states that the ‘prevention option should always be exhausted before intervention is contemplated’.<sup>22</sup> It adds: ‘[t]he exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied’.<sup>23</sup>

Thus, the implementation of the obligation ‘to ensure respect’ as embodied in common Article 1 within the framework of the R2P provides two layers of application. Firstly, the obligation to ensure respect may be implemented to strengthen the international responsibility to prevent. More specifically, the reliance on Common Article 1 provides third states with a legal basis to prevent the commitment of international crimes in armed conflicts. This preventative responsibility could be achieved by ensuring that parties to internal armed conflicts adhere to the principles of IHL during hostilities,<sup>24</sup> as briefly addressed in chapter one.

Secondly, it was argued that the obligation included under Common Article 1 could provide third states with an opportunity to take a positive action when preventative measures fail and violations to IHL exist, especially when these violations constitute breaches of *jus cogens*. The implementation of the obligation to ensure respect under the framework of the R2P, to advance the international responsibility to prevent and react, benefits also from the interplay between the R2P and other branches of international law. Being mainly concerned with the international responsibility to protect, the second and third pillars of the R2P could allow the employment of the

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<sup>22</sup> The International Commission on Intervention and State Sovereignty (ICISS), *Report on the Responsibility to Protect*, December 2001, at XI.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Improving Compliance with International Humanitarian Law*, (n 9).

principles of international responsibility to further frame and clarify the meaning of the obligation to ensure respect.<sup>25</sup> Being concerned with violations of *jus cogens*, the R2P establishes a link with certain Articles of the ILC.

The matter concerning international responsibility was the central focus of Chapter III of the ILC Draft Articles. The primary objective of this chapter was to establish international responsibility for serious breaches of peremptory norms of general international law.<sup>26</sup> The approach adopted under Chapter III of the ILC Draft Articles is in conformity with the general understanding provided under Common Article 1 that the rules of IHL are *erga omnes*; thus, they should be protected for the interest of the international community.<sup>27</sup> However, Articles 40 and 41 provide a more restrictive and framed interpretation of the general obligation provided under Common Article 1.

In accordance with paragraph (1) of Article 40, international responsibility ‘is entailed by a serious breach ... of an obligation’ emanating from peremptory norm of international law.<sup>28</sup> Accordingly, in order to entail international responsibility, two criteria must be satisfied. First, a breach of the peremptory norms of general international law must exist. Second, the breach must be of a serious nature.<sup>29</sup> Moreover, a serious breach of a peremptory norm of general international law is defined

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<sup>25</sup> See M. Sassoli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 401.

<sup>26</sup> See International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Chapter III, available online at: <http://www.refworld.org/docid/3ddb8f804.html>.

<sup>27</sup> M. Ragazzi, *The Concept of International Obligations Erga Omnes*, (Oxford University Press, Clarendon, 1997), at 152-153.

<sup>28</sup> ILC, *Draft Articles*, (n 26), at Art. 40.

<sup>29</sup> *Ibid.*

‘as one which involves “a gross or systematic failure by the responsible State to fulfil the obligation” in question’.<sup>30</sup>

The article further clarified that ‘the word “serious” signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable’.<sup>31</sup> It also emphasised that in order to consider such a violation as systematic, the breach must be conducted ‘in an organized and deliberate way’. Whereas, as asserted by Article 40 of the ILC, the term “gross” refers to the intensity of the violation or its effects.<sup>32</sup> Moreover, in, order to determine the seriousness of such a breach, various measures could be consulted. These measures would include the intention to breach the norm, ‘the scope and number of individual violations and the gravity of their consequences for the victims’.<sup>33</sup>

The analysis of the content of Article 40 of the ILC would lead to the assertion that the Article could serve as a basis for the third pillar of the R2P adopted by the World Summit concerning the subsidiary international responsibility to protect. The implementation of Article 40 over internal armed conflicts would suggest that the international responsibility would be entailed when the host state intentionally committed serious and systematic violations of *jus cogens* against its population. Furthermore, the intentional commitment of these breaches indicates that the host state

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<sup>30</sup> United Nations General Assembly (UNGA), *Report of the International Law Commission*, GA Official Records, Fifth- Third Session, Supplement No. 10 (A/56/10), 23 April- 1June and 2 July- 10 August 2001, at 285, available online at: <http://www.un.org/documents/ga/docs/56/a5610.pdf>.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

is unwilling to fulfil its obligations under the first pillar of the R2P.<sup>34</sup> Therefore, the international community ought to fulfil its duties under the third pillar.<sup>35</sup>

## **4.2.2 The International Responsibility to Protect: Prevention and Reaction**

### **4.2.2.1 The International Responsibility to Prevent and IHL**

In addition to the straightforward obligation ‘to respect and ensure respect’,<sup>36</sup> common Article 1 suggests the existence of a negative obligation imposed on third states ‘to neither encourage a party to an armed conflict to violate international law nor take action that would assist in such violations’.<sup>37</sup> Furthermore, such an obligation is affirmed under Article 16 of the ILC.<sup>38</sup> According to Article 16 of the ILC Articles ‘[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State’.<sup>39</sup>

One of the most relevant and obvious examples of the negative obligation embodied under common Article 1 is the transfer of arms and other equipment to the parties to an internal armed conflict, which are known to be used in perpetrating international crimes.<sup>40</sup> It is a well-established rule that the supply of arms to the host state is considered lawful, whereas the arming of the opposition by a third state is

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<sup>34</sup> See World Summit Outcome, (n 19), at para. 138; L. Axworthy, ‘R to P and the Evolution of State Sovereignty’, in J Genser & I Cotler (eds.), *the Responsibility to Protect the Promise of Stopping Mass Atrocities in our Time* (Oxford University Press, New York, 2012) at 8.

<sup>35</sup> See World Summit Outcome, (n 19), at para 139.

<sup>36</sup> *Geneva Conventions*, (n 6), at Art. 1.

<sup>37</sup> *Improving Compliance with International Humanitarian Law*, (n 9), at 2.

<sup>38</sup> ILC, *Draft Articles*, (n 26), at Art. 16.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Improving Compliance with International Humanitarian Law*, (n 9), at 2.



deemed an illegal act under international law in general.<sup>41</sup> Nevertheless, after the adoption of the R2P, it was indicated that changes had emerged regarding the matter concerning the transfer of weapons to parties to internal armed conflicts. The reactions of states to the conflicts in Libyan and Syria suggest the emergence of a new trend towards supporting the view that the supply of arms to parties to internal armed conflicts could be either broadened or narrowed, depending on the implementation of the concept of the protection of population as it is included in the framework of the R2P as it will be discussed in section two.

#### **4.2.2.2 The International Responsibility to React and IHL**

The international responsibility is entailed when serious breaches of peremptory norms are conducted by a party to an internal armed conflict. As a result of such breaches, third-party states would be under an obligation to react. It is suggested that the international responsibility regarding such violations could be divided into negative and positive obligations.<sup>42</sup>

With regard to the negative obligations imposed on third-party states, in accordance with paragraph (2) of Article 41 in the case that a serious breach of a peremptory norm emerged, all states would be under an initial obligation not to recognise such a situation as lawful. This situation also obligates third-party states not to provide any aid or assistance that may contribute to maintaining such a situation.<sup>43</sup> Furthermore, as to the non-recognition obligation, this refers to an initial reaction measure that is of a collective nature. The collective non-recognition of a breach of a

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<sup>41</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 247.

<sup>42</sup> See UNGA, *Report of the International Law Commission*, (n 30), at 286.

<sup>43</sup> ILC, *Draft Articles*, (n 26), at Art. 41.

peremptory norm of international law can be considered to represent a minimum necessary response by the international community to such a breach.<sup>44</sup>

In addition to the obligation not to recognise a situation resulting from a breach of *jus cogens*, third-party states are under another negative obligation, that is, not to provide aid or assistance that may contribute to the maintaining of the situation emanating from such a violation.<sup>45</sup> Moreover, such an obligation not to aid or assist is different from that established under Article 16 of the ILC, as discussed previously. As clarified by the commentary, the obligation underlined under Article 41 ‘deals with conduct "after the facts", which assists the responsible State in maintaining’ such a situation.<sup>46</sup> It also adopts a lower threshold than the one required under Article 16. Unlike Article 16 of the ILC, which requires a state be held responsible for providing aid or assistance if that state had ‘knowledge[d] of the circumstances of the internationally wrongful act’,<sup>47</sup> Article 41 deems any aid or assistance illegal in all circumstances.<sup>48</sup>

With regard to the positive obligation to react, Article 41 (1) sets the general grounds for this international responsibility. It places all states under an obligation to ‘cooperate to bring to an end through lawful means any serious breaches’ of peremptory norms, as elaborated previously.<sup>49</sup> Nevertheless, the Article did not specify what types of cooperation states could undertake. As clarified by the commentary, this cooperation could be advanced through international institutions such as the UN or by adopting non-institutional measures.<sup>50</sup> However, Article 41 did not include a reference to any

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<sup>44</sup> See C. Tomuschat, ‘International Crimes by States: An Endangered Species?’ in K. Wellens (ed.) *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff, The Hague, 1998) 253, at 259.

<sup>45</sup> See ILC, *Draft Articles*, (n 26), at Art. 41 (2).

<sup>46</sup> UNGA, *Report of the International Law Commission*, (n 30), at 290.

<sup>47</sup> ILC, *Draft Articles*, (n 26), at Art. 16.

<sup>48</sup> UNGA, *Report of the International Law Commission*, (n 30), at 291.

<sup>49</sup> ILC, *Draft Articles*, (n 26), at Art. 41 (1).

<sup>50</sup> UNGA, *Report of the International Law Commission*, (n 30), at 287.

measures that could be implemented by third-party states to end serious breaches to peremptory norms. Therefore, the Article seems to aim to encourage further cooperation among states rather than to suggest certain reaction measures. The international responsibility for serious breaches of peremptory norms of international law was further elaborated under Article 48 of the ILC Draft Articles.<sup>51</sup>

Article 48 concerns with the invocation of responsibility by third states in the basis of collective interest. In accordance with Article 48 of the ILC, in the event that serious breaches to peremptory norms existed, third states would be entitled to claim from the responsible state:

- (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
- (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.<sup>52</sup>

It is noteworthy to mention that the reference to ‘the beneficiaries of the obligation breached’ is of significant importance. It indicates that the international responsibility could be implemented by third states not only in behalf of the injured state, but also in behalf of other beneficiaries of the obligation violated. As commented by Sassoli, ‘[t]hose beneficiaries will often be the individual war victims’.<sup>53</sup> Moreover, the inclusion of other beneficiaries other than the injured state is of crucial significance for internal armed conflicts. Article 48 suggests that a third state could hold the host state responsible for committing serious violations against its civilians. Hence, the contention provided under Article 48 of the ILC could serve as a legal ground for the third pillar of the R2P concerning the responsibilities of third states to protect. In fact,

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<sup>51</sup> See ILC, *Draft Articles*, (n 26), at Art. 48.

<sup>52</sup> *Ibid*, at Art. 48 (2).

<sup>53</sup> Sassoli, (n 25), at 427.

when Article 48 is read in conjunction with Article 40 of the ILC, discussed previously, it would be found that the conclusion would lead to a quite similar concept of international responsibility to that formulated under the third pillar of the R2P.<sup>54</sup> The international responsibility would be entailed on behalf of civilians in accordance with the third pillar of the R2P when the host state failed to fulfil its obligations under the first pillar by intentionally committing serious breaches of *jus cogens* against its population.

It is worth mentioning that although the ILC Draft Articles did not determine certain measures to be applied by third states, it explicitly excluded, under Article 50 (1), the use of measures that may contain the use of force or violations of fundamental human rights.<sup>55</sup> The commentary to the ILC relied on a statement made previously by General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights on the effect of economic sanctions on civilian populations. It restated the Committee's statement that 'it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country'.<sup>56</sup>

Although the restriction as to the violations of fundamental human rights is absolute, the use of force could be still used to react to serious breaches of *jus cogens*. In other words, despite the fact that the use of force is not recognised as a counter measure under the framework of *jus in bello*, it still could be adopted under the framework of *jus ad bellum* to react to serious violations of IHL. Nevertheless, this would be restricted to the authorisation of the use of force by the UNSC as confirmed

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<sup>54</sup> World Summit Outcome, (n 19), at para. 139.

<sup>55</sup> ILC, *Draft Articles*, (n 26), at Art. 50 (1).

<sup>56</sup> UNGA, *Report of the International Law Commission*, (n 30), at 335.

under the World Summit Outcome.<sup>57</sup> In fact, the matter has gained further importance and clarity after the military intervention in Libya conducted in accordance with UNSC resolution 1973, as it will be discussed in detail in section three.<sup>58</sup>

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<sup>57</sup> See World Summit Outcome, (n 19), at para. 139.

<sup>58</sup> See United Nations Security Council, *Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, 17 March 2011, S/RES/1973(2011), available online at: <http://www.refworld.org/docid/4d885fc42.html>.

### **4.3 The International Responsibility to Protect and the Transfer of Arms to Opposition Groups**

This section discusses the issue related to the legality of arming opposition groups after the adoption of the R2P. It aims to determine the extent to which the adoption of the R2P contributed to the subject. In order to do so, the section is divided into two parts. Part one is concerned with arming opposition groups without the authorisation of the UNSC. Part two focuses on arming opposition groups based on implicit authorisation by the UNSC.

#### **4.3.1 Arming Opposition Groups Without the Authorisation of the UNSC as a Potential Development: Unilateral Support by a Third State**

The transfer of weapons to the opposition groups by a third state has been of central importance in relation to the debate as to internal armed conflicts. Before the foundation of the UN Charter, it was widely accepted that any act intended to arm the opposition groups before they are internationally recognised as belligerents would constitute an illegal act against the host state, however, such an act would be deemed legal as long as the opposition groups achieved the status of belligerency.<sup>59</sup> Nonetheless, such an act, if committed by a third state, would not be without a price. The transfer of arms to the belligerents by a third state, although possible, would impact the third state's status of neutrality.<sup>60</sup> The obligation of neutrality means that the states have to treat all parties to the dispute equally, or 'each sovereign in its respective areas

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<sup>59</sup> E. Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, Oxon, 2013), at 67.

<sup>60</sup> See International Conferences (The Hague), *Hague Convention (XIII) concerning the rights and duties of neutral powers in naval war*, 18 October 1907, at Art. 6, available online at: <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A6C539D278975467C12563CD0051759C>.

of control'.<sup>61</sup> According to Falk, after the recognition of rebellions as belligerents, any 'interventionary participation [by a third state] on behalf of either the incumbent or the insurgent is an act of war against the other'.<sup>62</sup>

As affirmed under Article 6 of Hague Convention XIII concerning the rights and duties of neutral powers in naval war, it is prohibited under the rules of neutrality to supply, whether directly or indirectly, a belligerent group 'war-ships, ammunition, or war material of any kind'.<sup>63</sup> Furthermore, as Dinstein contended, although no similar provision was included in Hague Convention V respecting the rights and duties of neutral powers and persons in case of war on land, it is undutiful that the same rule is still applicable as to the status of neutrality on land.<sup>64</sup> However, the legal status of the transfer of arms to an opposition group by a third state changed after the adoption of the UN Charter.

Although the issue concerning the transfer of arms has not been regulated throughout the twenty century under international law,<sup>65</sup> the matter was decided by the ICJ in the *Nicaragua* case of 1986.<sup>66</sup> The issue regarding the supply of arms to opposition groups was included in the part concerning the law on the use of force and non-intervention considered authoritative in nature.<sup>67</sup> Furthermore, such a finding was subsequently reaffirmed by the court in the case concerning *Armed Activities on the Territory of the Congo* of 2005.<sup>68</sup> Although the supply of arms to the host state is

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<sup>61</sup> L. C. Lootsteen, 'The concept of Belligerency in International Law' (2000) 166 *Military Law Review* 109.

<sup>62</sup> R. A. Falk, 'Janus Tormented: The International Law of Internal War' in J N Rosenau (eds.), *International Aspects of Civil Strife* (Princeton University Press, Princeton, 1964), at 203.

<sup>63</sup> The Hague, (n 60), at Art. 6.

<sup>64</sup> Y. Dinstein, *War, Aggression and Self-Defence*, 5<sup>th</sup> edn (Cambridge University Press, Cambridge, 2011), at 28.

<sup>65</sup> Lieblich, (n 59), at 69.

<sup>66</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 247.

<sup>67</sup> C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford University Press, Oxford, 2008), at 75.

<sup>68</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities*), at paras. 161-163.

generally considered lawful, the arming of the opposition by a third state is deemed an illegal act.<sup>69</sup> Nevertheless, even though the finding of the ICJ has been the prevailing view under international law, states' reactions regarding the conflicts in Libya and Syria indicates the existence of a different interpretation or understanding that is worth examining.

The UNSC exercised its authority under Chapter VII of the UN Charter, and adopted resolution 1970. Although the resolution did not authorise the use of force, it was crucial for several reasons. First, the resolution implicitly considered the situation in Libya as an internal armed conflict, which was clear when it referred to 'the serious violations of human rights and international humanitarian law[s]...being committed'.<sup>70</sup> Second, it made the connection between the situation in Libya and the concept of the R2P clear by 'recalling Libyan authorities' responsibility to protect its population'.<sup>71</sup> Third, and more importantly to the discussion in this section, the resolution imposed an arms embargo that ought to be implemented by member states.<sup>72</sup> Paragraph 9 of resolution 1970 reads as:

all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories...<sup>73</sup>

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<sup>69</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 247.

<sup>70</sup> United Nations Security Council, *Security Council resolution 1970 (2011)*, 26 February 2011, S/RES/1970 (2011), at the preamble, available online at: <http://www.refworld.org/docid/4d6ce9742.html>.

<sup>71</sup> *Ibid.*

<sup>72</sup> See *Ibid.*, at para. 9.

<sup>73</sup> See UNSC, *SC resolution 1970 (2011)*, (n 70).



A few weeks later, on the 17th of March 2011, the UNSC adopted resolution 1973.<sup>74</sup> The resolution not only reaffirmed and strengthened the obligation imposed under paragraph 9 of resolution 1970 mentioned above concerning the arms embargo,<sup>75</sup> but it went further to authorise states to ‘take all necessary measures, notwithstanding, [the arms embargo], to protect civilians and civilian populated areas under threat of attack’.<sup>76</sup> In response to these resolutions, many states started to arm the Libyan opposition or at least declared their intention to do so.<sup>77</sup>

One of the arguments that was advanced to justify such an action was founded on the expression ‘the Libyan Arab Jamahiriya’, as included in paragraph 9 of resolution 1970,<sup>78</sup> to assert that the arms embargo was adopted, primarily, to target Gaddafi regime rather than the Libyan opposition.<sup>79</sup> Another argument relied heavily on the language used in resolution 1973 by heavily relying on the authorisation to take all necessary measures is made ‘notwithstanding’ the arms embargo. As argued by Hillary Clinton, the creation of a no-fly zone and the authorisation of the use of force to protect civilians ‘effectively amended or overrode the absolute prohibition on arms to anyone in Libya’.<sup>80</sup> Nevertheless, these arguments have been highly challenged as to their validity to establish a legal basis for the concerned action.

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<sup>74</sup> UNSC, *SC resolution 1973 (2011)*, (n 58).

<sup>75</sup> See *Ibid*, at paras. 13-16.

<sup>76</sup> See *Ibid*, at para. 4.

<sup>77</sup> See Libya: Obama does not rule out arming rebel forces, *BBC News-Africa*, 30 March 2011, available online at: <http://www.bbc.co.uk/news/world-africa-12902450>; N. Hopkins, ‘Nato reviews Libya campaign after France admits arming rebels’, *The Guardian*, 29 June 2011, available online at: <http://www.theguardian.com/world/2011/jun/29/nato-review-libya-france-arming-rebels>.

<sup>78</sup> O. Corten & V. Koutroulis, ‘the Illegality of Military Support to Rebels in the Libyan War: Aspects of *jus contra bellum* and *jus in bello*’ (2013) 18 *Journal of Conflicts & Security Law* 59, at 64.

<sup>79</sup> See R. Booth, ‘Arming Libya Rebels not Allowed by UN Resolutions, Legal Experts Warn US’, *The Guardian*, 30 March 2011, available online at: <http://www.theguardian.com/world/2011/mar/30/arming-libya-rebels-america-warned>.

<sup>80</sup> See a statement made by Hillary Clinton in a press Conference in London quoted in R Booth, ‘Arming Libya Rebels not Allowed by UN Resolutions, Legal Experts Warn US’, *The Guardian*, 30 March 2011, available online at: <http://www.theguardian.com/world/2011/mar/30/arming-libya-rebels-america-warned>.

As to the argument restricting the implementation of the arms embargo to the Libyan authorities rather than the fighting armed groups, it was asserted that such an argument violated the wording of the resolution imposing the embargo.<sup>81</sup> It also in contrary to the practice of the UNSC.<sup>82</sup> The paragraphs concerning the arms embargo in resolutions 1970 and 1973 were inclusive in nature. They intended to apply the embargo over the whole territory of Libya. The territorial nature of the arms embargo suggests that member states were under an obligation to refrain from transferring weapons to the Libyan territory regardless of the parties to the concerned conflict.<sup>83</sup> Moreover, such a contention finds support in the practice of the UNSC.

In similar situations, when the UNSC adopted arms embargos similar in wording and nature to the ones under discussion, there were agreements to apply the embargos comprehensively over the whole territory of the concerned states with no exceptions whatsoever.<sup>84</sup> Furthermore, in other situations, when the UNSC intended to limit the impact of the arms embargo to a specific party to the conflict, the provision concerning the arms embargo would be subjective rather than territorial in nature. In other words, the UNSC would explicitly refer to the party being a subject to the embargo rather than leaving the matter to the unilateral interpretation of its member states.<sup>85</sup> For instance, in resolution 1807 adopted in March 2008, concerning the situation in the Congo, the UNSC explicitly limited the effects of the arms embargo

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<sup>81</sup> Booth, (n 79).

<sup>82</sup> D. Akande, 'Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?' (2011) *European Journal of International Law: Talk!*, available online at: <http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels>.

<sup>83</sup> Booth, (n 79).

<sup>84</sup> Akande, (n 82).

<sup>85</sup> See United Nations Security Council, *Security Council Resolution 1807 (2008) [on renewal of measures on arms embargo against all non-governmental entities and individuals operating in the Democratic Republic of the Congo]*, 31 March 2008, S/RES/1807 (2008), at paras. 1-2, available online at: <http://www.refworld.org/docid/47f5f16a2.html>.

included under paragraph 1 to non-governmental groups operating in the territory of the Congo.<sup>86</sup>

With regard to the other argument founded mainly on the wording of resolution 1973, although it has merit when it is limited to the linguistic meaning of the provision, it clearly ignores the established principles concerning the legal status of arming opposition groups under international law.<sup>87</sup> More specifically, despite the fact that the inclusion of the word ‘notwithstanding’ in paragraph 9 of resolution 1973 indicates that the UNSC authorisation given to member states ‘to take all necessary measures to protect civilians and civilian populated areas’,<sup>88</sup> altering the absolute nature of the arms embargo, it did not deem the supply of arms to the opposition legal.<sup>89</sup> In fact, such a contention, if accepted, would suggest that a unilateral supply of arms to the opposition is lawful unless an arms embargo is adopted. It is noteworthy to mention that the controversy as to the lawfulness of unilaterally arming the opposition without explicit authorisation of the UNSC was more apparent in regard to the Syrian conflict.<sup>90</sup>

In various stages of the Syrian conflict, many states supplied or at least intended to supply arms to the Syrian opposition.<sup>91</sup> After the foundation and recognition of the

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<sup>86</sup> UNSC, *SC resolution 1807*, (n 85), at para. 1.

<sup>87</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 247.

<sup>88</sup> See UNSC, *SC resolution 1973 (2011)*, (n 58), at para. 4.

<sup>89</sup> M. Milanovic, ‘Can the Allies Lawfully Arm the Libyan Rebels?’ (2011) *European Journal of International Law: Talk!*, available online at: <http://www.ejiltalk.org/can-the-allies-lawfully-arm-the-lybian-rebels>.

<sup>90</sup> See M. N. Schmitt, ‘Legitimacy versus Legality Redux: Arming the Syrian Rebels’ (2014) 7 *Journal of National Security Law & Policy* 139.

<sup>91</sup> See *Ibid.*

FSA, states such as France,<sup>92</sup> Saudi Arabia,<sup>93</sup> Qatar,<sup>94</sup> UAE, Turkey,<sup>95</sup> Libya<sup>96</sup> and some European countries including the UK,<sup>97</sup> after lifting the arms embargo imposed by the EU earlier,<sup>98</sup> were involved in the arming process of the Syrian opposition. In September 2014, Obama, the US President, after obtaining authorisation from Congress, declared his intention to supply arms to moderate groups in Syria in support of their fight against Assad's regime and ISIS.<sup>99</sup> However, neither the political act of recognition,<sup>100</sup> the lifting of the arms embargo nor the authorisation by a domestic authority is sufficient enough to deem such an act lawful under international law.

In accordance with UNGA resolution 2625 (XXV)<sup>101</sup> considered to be reflecting customary international law,<sup>102</sup> the transfer of weaponry to opposition groups is in violation of the principles of international law. The resolution affirmed that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>103</sup>

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<sup>92</sup> See P. Mabut, 'France admits it directly supplied arms to Syrian "rebels"' *World Socialist Web Site*, 27 August 2014, available online at: <http://www.wsws.org/en/articles/2014/08/27/frsy-a27.html>.

<sup>93</sup> See I. Black, 'Syria crisis: Saudi Arabia to spend millions to train new rebel force', *The Guardian*, 7 November 2013, available online at: <http://www.theguardian.com/world/2013/nov/07/syria-crisis-saudi-arabia-spend-millions-new-rebel-force>.

<sup>94</sup> See R. Khalaf & A. Fielding, 'Qatar bankrolls Syrian revolt with cash and arms' *Financial Times*, 16 May 2013, available online at: <http://www.ft.com/cms/s/0/86e3f28e-be3a-11e2-bb35-00144feab7de.html#axzz3NSXZuHCT>.

<sup>95</sup> See Schmitt, (n 90).

<sup>96</sup> See Who is supplying weapons to the warring side in Syria? *BBC News*, 14 June 2013, available online at: <http://www.bbc.co.uk/news/world-middle-east-22906965>.

<sup>97</sup> See *Ibid*.

<sup>98</sup> See I. Traynor, 'UK forces EU to lift embargo on Syria rebel arms' *The Guardian*, 28 May 2013, available online at: <http://www.theguardian.com/world/2013/may/28/uk-forced-eu-embargo-syria-rebel-arms>.

<sup>99</sup> See Z. J. Miller, 'Congress Votes to Arm Syrian Rebels' *Time*, 18 September 2014, available online at: <http://time.com/3399746/congress-votes-to-arm-syrian-rebels/>.

<sup>100</sup> See Corten & Koutroulis, (n 78), at 65.

<sup>101</sup> United Nations General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625 (XXV), available at: <http://www.refworld.org/docid/3dda1f104.html>.

<sup>102</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at paras. 187-190.

<sup>103</sup> UNGA Resolution 2625 (XXV), (n 101).

The principle embodied in UNGA resolution 2625 (XXV) was applied and, later on, by the ICJ in the *Nicaragua* case in 1986.<sup>104</sup> The court explicitly stated that although ‘the supply of arms and other support’ to opposition groups does not amount to an armed attack, it constitutes a violation of the principles of the non-use of force and non-intervention in the internal affairs of the concerned state.<sup>105</sup> The ICJ reaffirmed its finding in the case concerning the *Armed Activities on the Territory of the Congo* of 2005. It explicitly considered the commitment of such an act as in breach of the prohibition on the use of force and the principle of non-intervention regardless of the objective behind it.<sup>106</sup>

In the *Nicaragua* case, the ICJ went further to examine state practice to determine whether a new customary rule emerged, or has been emerging, justifying the support of the opposition as an exception to the general principle of non-intervention.<sup>107</sup> In accordance with the court, in order to assert the existence of such a customary rule, two elements ought to exist, a well-established state practice and *opinio juris sivenecessitatis*.<sup>108</sup> Furthermore, after generally evaluating state practice in regard to supporting opposition groups, the ICJ argued that although the support of oppositions by a third state exists in state practice, it has never been backed by sufficient *opinio juris*.<sup>109</sup>

As Gray commented, in order to decide whether *opinio juris* emerged in support of such a practice, the court had to examine the grounds advanced by states to justify their actions. Moreover, by doing so, it would be apparent that states never attempted

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<sup>104</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 247.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Case Concerning Armed Activities on the Territory of the Congo*, (n 68), at paras. 161-163.

<sup>107</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 206.

<sup>108</sup> *Ibid.*, at para. 207.

<sup>109</sup> *Ibid.*, at paras. 207-208.

to legalise their actions in support of opposition groups by asserting the emergence of new exceptions to the principles of the use of force or non-intervention.<sup>110</sup> In contrast, as observed by the court, states usually based their actions in support of the opposition groups on political rather than legal grounds.<sup>111</sup>

It is also noteworthy to mention that the judgment of the ICJ is of a general nature, suggesting that such prohibition would be applicable regardless of the status of the opposition group. In other words, the supply of arms would be still considered illegal, regardless of whether the opposition exercise territorial effective control and operated under responsible command. Hence, the unilateral attempts to arm the Libyan and Syrian oppositions cannot be legally justified under international law. However, although states' reactions towards the Libyan and Syrian oppositions cannot be deemed lawful, they are not emptied of any significance. In fact, unlike state practice as to the possibility to support the opposition groups before the adoption of the R2P, states' attitudes towards the Libyan and Syrian opposition indicate that the supply of arms was advanced as a legal option. Moreover, although such a practice is not sufficient enough to constitute *opinio juries* required for the emergence of a new customary law, it indicates the evolvement of a new trend that may further develop overtime.

#### **4.3.2 Arming the Opposition Groups under the Authorisation of the UNSC as a Potential Development: Implicit Authorisation**

As mentioned above, even though the unilateral supply of arms to the opposition groups by a third state is not considered lawful under international law, it would be in conformity with the principles of international law as long as it is explicitly authorised

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<sup>110</sup> Gray, (n 67), at 77.

<sup>111</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 208; Gray, (n 67), at 77.

by the UNSC.<sup>112</sup> Moreover, although no explicit authorisation was granted by the UNSC to transfer weaponry to the Libyan opposition groups, many states supplying or intending to supply arms to the Libyan opposition advanced the argument that such an authorisation was implicitly granted.<sup>113</sup> It was argued that such an authorisation was granted under paragraph 4 of resolution 1973 authorising member states to ‘take all necessary measures, notwithstanding, [the arms embargo], to protect civilians and civilian populated areas under threat of attack’.<sup>114</sup>

It was contended that military operations fall within the scope of the phrase ‘all necessary measures’.<sup>115</sup> Furthermore, such a contention finds support in the previous practice of the UNSC. In similar situations, when the UNSC used the same expression, it was uncontested that such a formula employed by the UNSC to authorise the use of force under Chapter VII of the UN Charter.<sup>116</sup>

Such a practice was witnessed in many UNSC resolutions such as resolution 794 in regard to the situation in Somalia,<sup>117</sup> resolution 836 as to the crisis in Bosnia and Herzegovina,<sup>118</sup> resolution 929 concerning Rwanda,<sup>119</sup> and resolution 1464 as to the situation in Ivory Coast.<sup>120</sup> Therefore, it is certain that the reference to the situation in

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<sup>112</sup> See Lieblich, (n 59), at 66.

<sup>113</sup> See Akande, (n 82), at comment 6.

<sup>114</sup> See UNSC, *SC resolution 1973 (2011)*, (n 58), at para. 4.

<sup>115</sup> P. Thielborger, ‘the Status and Further of International Law after the Libyan Intervention’ (2012) 4 *Goettingen Journal of International Law* 11, at 20.

<sup>116</sup> See O. Corten, *the Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing Ltd, Oxford, 2010) at 312.

<sup>117</sup> United Nations Security Council, *Resolution 794 (1992) Adopted by the Security Council at its 3145th meeting, on 3 December 1992*, 3 December 1992, S/RES/794 (1992), available online at: <http://www.refworld.org/docid/3b00f21137.html>.

<sup>118</sup> United Nations Security Council, *Resolution 836 (1993) Adopted by the Security Council at its 3228th meeting, on 4 June 1993*, 4 June 1993, S/RES/836 (1993), at para.10, available online at: <http://www.nato.int/ifor/un/u930604a.htm>.

<sup>119</sup> United Nations Security Council, *Resolution 929 (1994) Adopted by the Security Council at its 3392nd meeting, on 22 June 1994*, 22 June 1994, S/RES/929 (1994), at para. 3, available online at: <http://www.refworld.org/docid/3b00f15c50.html>.

<sup>120</sup> United Nations Security Council, *Security Council Resolution 1464 (2003) on the situation in Côte d'Ivoire*, 4 February 2003, S/RES/1464 (2003), at para. 9, available online at: <http://www.refworld.org/docid/3f45dbdf0.html>.

Libya as constituting ‘a threat to international peace and security’<sup>121</sup> and the authorisation of the UNSC to ‘take all necessary measures’ suggests that the use of force against Gaddafi regime is authorised under Chapter VII.<sup>122</sup> Having achieved that ‘Operation Unified Protector’ was in conformity with resolution 1973, it could be asserted that such an authorisation altered the absolute nature of the arms embargo imposed previously by the UNSC in resolutions 1970 and 1973.

It is not envisaged to lawfully launch a military operation in the territory of another state without waiving the legal impacts of the arms embargo. The forcible intervention in the territory of a state in accordance with a UNSC resolution requires the transfer of arms and other necessary equipment to undertake such an operation. Nonetheless, it would still be controversial to the extent to which such an authorisation allows the supply of arms to other parties involved in the conflict. In other words, although such an authorisation permits the participating states to transfer weaponry for their own use, it is still not decisively clear whether it is allowed to supply arms to an opposition group involved in the conflict.<sup>123</sup>

Arming the Libyan opposition groups was not mentioned as an option during the discussion leading to the drafting of resolution 1973.<sup>124</sup> Nevertheless, the arguments advanced after the adoption of the resolution proved the matter to be highly controversial.<sup>125</sup> It was contended that despite the fact that resolution 1973 constitutes an exception from the general prohibition on the use of force, such an exception ought to be applied restrictively.<sup>126</sup> As Macak asserted, resolution 1973 limits the authorised

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<sup>121</sup> See UNSC, *Security Council resolution 1973 (2011)*, (n 58), at the preamble.

<sup>122</sup> Thielborger, (n 115), at 19-20.

<sup>123</sup> See Corten & Koutroulis, (n 78), at 59.

<sup>124</sup> See Milanovic, (n 89), at comment 6.

<sup>125</sup> See L. Trevelyan, ‘Libya: Coalition divided on arming rebels’ *BBC News- Africa*, 29 March 2011, available online at: <http://www.bbc.co.uk/news/world-africa-12900706>.

<sup>126</sup> K. Macak, Comment in ‘Does SC Resolution 1973 Permits Coalition Military Support for the Libyan Rebels?’ (2011) *European Journal of International Law: Talk!*, comment 6, available online at:



use of force to member states, and it did not refer to the possibility that the UNSC mandates could be fulfilled indirectly or through the co-operation with other non-state entities.<sup>127</sup> He went further to add that such a finding finds support in paragraphs 4 and 8 of the resolution strictly authorising states to act ‘nationally or through regional organizations or arrangements’.<sup>128</sup>

The supply of arms to the Libyan opposition groups was also challenged by states and regional organisations. For instance, although Russia abstained, besides China, from the SC meeting that led to the adoption of the resolution, Moscow generally criticised the military operation against Libya for exceeding the remit of resolution 1973.<sup>129</sup> In regard to the arming of the Libyan opposition, Russia’s Foreign Minister, Sergei Lavrov, described it as being ‘a very crude violation of UN Security Council resolution 1970’.<sup>130</sup> Nonetheless, although such an assertion has merit when linked to the content of resolution 1970, it ignores the legal impacts and objectives behind the adoption of resolution 1973.

The African Union Commission Chief Jean Ping considered the supply of weaponry to the Libyan opposition as being ‘dangerous and puts the whole region at risk’.<sup>131</sup> He went further to emphasise the possible negative consequences of the transfer of arms to the opposition groups fighting against Gaddafi’s regime. These various problems possibly resulting from arming the opposition are ‘the risk of civil war, risk

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<http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/>.

<sup>127</sup> Macak, (n 126), at comment 6.

<sup>128</sup> UNSC, *SC resolution 1973 (2011)*, (n 58), at the preamble; K Macak, Comment to D Akande, ‘Does SC Resolution 1973 Permits Coalition Military Support for the Libyan Rebels?’ (2011) *European Journal of International Law: Talk!*, comment 6, available online at: <http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/>.

<sup>129</sup> See Libya: Russia decries French arms drop to Libya rebels, *BBC News- Europe*, 30 June 2011, available online at: <http://www.bbc.co.uk/news/world-europe-13979632>.

<sup>130</sup> See *Ibid.*

<sup>131</sup> See Libyan: AU condemns French arms drop to rebels, *BBC News- Africa*, 30 June 2011, available online at: <http://www.bbc.co.uk/news/world-africa-13970412>.

of partition of the country, the risk of “Somalia-sation” of the country, risk of having arms everywhere... with terrorism’.<sup>132</sup> Chief Jean Ping also stressed the fact that these serious problems, if they existed, would not only make the situation in Libya worse, but they would significantly affect other neighbouring states.<sup>133</sup> However, these criticisms, if taken as a whole, would suggest that such a transfer of arms would be done freely with no restrictions. Moreover, this matter was clearly noted and considered by other states advocating the supply of weaponry to the opposition.<sup>134</sup>

On the other hand, others strongly support the legality of arming the Libyan opposition as a part of the military operations launched against Gaddafi’s regime. It was argued that the supply of weaponry to the opposition, either directly or indirectly, could still be justified as one of the necessary measures authorised by the UNSC in resolution 1973 as long as it is restricted to the purpose of protecting the population.<sup>135</sup> It was argued that the reference to acting ‘nationally or through regional organizations or arrangements’<sup>136</sup> was intended to encourage states to fulfil the UNSC mandates rather than to restrict the implementation of resolution 1973.<sup>137</sup>

As Akande contended, the adoption of the restrictive approach would suggest that NATO, as a regional organisation, would not be permitted under the resolution to co-operate with non-member states to fulfil the mandates of resolution 1973.<sup>138</sup> He went further to add that the authorisation made by the UNSC to member states to act nationally does not mean that states are restricted to work individually on their own. In

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<sup>132</sup> See Libyan: AU condemns French arms drop to rebels, (n 131).

<sup>133</sup> See Ibid.

<sup>134</sup> See France ‘won’t rule out’ more Libyan weapon drops, *Chanel 4 News*, 30 June 2011, available online at: <http://www.channel4.com/news/france-wont-rule-out-more-libyan-weapon-drops>; N. Hopkins, ‘Nato reviews Libya campaign after France admits arming rebels’ *The Guardian*, 29 June 2011, available online at: <http://www.theguardian.com/world/2011/jun/29/nato-review-libya-france-arming-rebels>.

<sup>135</sup> See Milanovic, (n 89), at comment 9.

<sup>136</sup> UNSC, *SC resolution 1973 (2011)*, (n 58), at the preamble.

<sup>137</sup> Akande, (n 82), at comment 6.

<sup>138</sup> Ibid.

fact, it rather intended to extend the scope of the authorisation by implying that states could act unilaterally and not only collectively through regional organisation or multilateral arrangements.<sup>139</sup> Accordingly, it was argued that member states were authorised by the UNSC resolution to act individually, either through their own forces or other non-state entities.<sup>140</sup>

The arming of the Libyan opposition was also advocated for by states. The supporting states not only sought to assert the lawfulness of the transfer of arms to the Libyan opposition, but they also intended to determine certain measures required for such an act to achieve its objectives.<sup>141</sup> Although the UK did not officially announce its intention to supply weapons to the Libyan opposition, it did not eliminate such a possibility. As affirmed by David Cameron, the UK Prime Minister, although the arms embargo imposed by resolution 1970 is of a territorial nature ensuring its application over the whole territory of Libya, the authorisation under resolution 1973 to take all necessary measures justifies the arming of the opposition in specific circumstances. In other words, he leaves such an option open as long as it becomes necessary to achieve the objective behind the UNSC resolution, which is the protection of the population and populated areas.<sup>142</sup> The UK Minister of Defense followed a similar line by asserting that the UNSC resolutions concerning Libya could be interpreted in a manner that justifies the supply of defensive weapons to the Libyan opposition.<sup>143</sup>

Even though the US seemed to take a similar approach to the one adopted by the UK, President Barack Obama went a bit further by stating that the US would provide

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<sup>139</sup> Akande, (n 82), at comment 6.

<sup>140</sup> Ibid.

<sup>141</sup> See D. Akande, 'France Admits to Arming Libyan Rebels- Was this Lawful?' (2011) *European Journal of International Law: Talk!*, available online at: <http://www.ejiltalk.org/france-admits-to-arming-libyan-rebels-was-this-lawful/>.

<sup>142</sup> Quoted in UK takes steps to expel five Libyan diplomats- Hague, *BBC News-UK*, 30 March 2011, available online at: <http://www.bbc.co.uk/news/uk-12908241>.

<sup>143</sup> Quoted in Hopkins (n 77).

assistance to the Libyan opposition ‘in the form of humanitarian aid, medical supplies and communications equipment’.<sup>144</sup> In fact, one day later, it was reported that Obama secretly authorised covert aid to the Libyan opposition.<sup>145</sup>

Unlike the UK and the US, France explicitly admitted supplying weaponry to the Libyan opposition.<sup>146</sup> French military chiefs affirmed that ‘French planes had dropped consignments of machine guns, rocket-propelled grenades and anti-tank missiles to rebels in the western Nafusa mountains’.<sup>147</sup> As asserted by a French diplomat, the transfer of defensive arms to the Libyan opposition was primarily done for the purpose of protecting the Libyan population from instant danger. Therefore, such an act was in conformity with the UNSC resolutions concerning the Libyan conflict.<sup>148</sup> He went on to emphasise that no further weapons would be transferred, and if a decision was made to do so, it would be determined on a cases by case basis.<sup>149</sup> Hence, it could be indicated that even though France explicitly supported the view that the Libyan opposition ought to be armed to the extent required to ensure a certain degree of population protection, it did not intend to establish a general rule applicable to similar situations.

The French approach was supported by Akande.<sup>150</sup> He considered the transfer of arms by France to the Libyan opposition groups a necessary measure to provide the Libyan population with instant protection. Nevertheless, he stressed the possibility that such an action may exceed the objectives behind it. The supplied arms could be used by the opposition to achieve other objectives that go beyond the mere protection of

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<sup>144</sup> Quoted in Libya: Obama does not rule out arming rebel forces, (n 77).

<sup>145</sup> See Ibid.

<sup>146</sup> Akande, (n 141).

<sup>147</sup> See Hopkins, (n 77).

<sup>148</sup> Quoted in France ‘won’t rule out’ more Libyan weapon drops’, (n 134).

<sup>149</sup> Ibid.

<sup>150</sup> See Akande, (n 141).

population such as the overthrow of the regime, as it will be further discussed in the next section.<sup>151</sup> It is apparent that the utilisation of these weapons by the opposition to reach other objectives would not only violate the authorisation provided by the UNSC, but may also raise the supplying state's responsibility.

In sum, although the UNSC did not explicitly authorise the supply of arms to the Libyan opposition, it was argued that such an act was justified as one of the necessary measures authorised under resolution 1973 to protect the Libyan population and populated areas. Nevertheless, the reaction to the Libyan situation showed a very restrictive implementation of this measure. The supportive states not only limited the supply of arms in regard to their amount and types, but they also stressed the fact that the Libyan situation reflected unique circumstances.

It is also noteworthy to mention that although the status of the opposition groups was not explicitly mentioned, during the debate, it is still important to the issue concerning the supply of arms to opposition groups. As affirmed by the supporters of the view that resolution 1973 implicitly authorises the arming of the opposition, the supplying of weaponry must be restricted to the purpose of protecting population. They also confirmed that these weapons ought to be of defensive nature.<sup>152</sup> Therefore, it could be argued that in order for the supply of arms to achieve these objectives certain requirements ought to be satisfied.

First, the opposition groups have to unite under responsible command insuring the use of these weapons for the purposes mentioned. Second, in order to effectively protect population and populated areas, the opposition groups need to exercise stable territorial effective control. It is unseen how an opposition group could fulfill its

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<sup>151</sup> See Akande, (n 141).

<sup>152</sup> See France 'won't rule out' more Libyan weapon drops', (n 134).

obligation as to the protection of population without exercising effective control over them. Third, the supply of arms for defensive means suggests that these arms do not have to be used for other purposes. For instance, the supplied arms ought not to be used to target other populated areas under the control of the *de jure* government. Thus, it could be asserted that it is important that opposition groups show clear indications of their ability to respect and fulfil their obligations under IHL. These requirements, if confirmed, would suggest that in order to deem the arming of the opposition groups legal, these groups ought to achieve a status quite similar to the one defined under Article 1 (1) of the second Additional Protocol.<sup>153</sup>

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<sup>153</sup> See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, at Art. 1 (1), available online at: <http://www.refworld.org/docid/3ae6b37f40.html>.

#### 4.4 The International Responsibility to Protect and the Authorised Use of Force

Resolution 1973 represents the first mandate by the UNSC for the use of force based on the concept of the R2P against a *de jure* government.<sup>154</sup> The implementation of the R2P over the Libyan crisis indicated an important development in the *jus ad bellum* framework. It reflected the emergence of a new trend supporting the view that the authorisation of the use of force under Chapter VII could be granted for the purpose of protecting population.<sup>155</sup> Some consider the Libyan precedent as a step towards the realisation of the concept of the R2P and as a consequence where the legality of the military operations is recognised. Others have raised doubts on the lawfulness of certain aspects of the operation. Nevertheless, they have refrained from directly asserting the illegality of the operation.<sup>156</sup>

The debates, which took place after the end of ‘Operation Unified Protector’ in Libya, indicated that in order to consider such an operation legal, it ought to be restricted to the purpose of protecting the population. It must not aim to unnecessarily overthrow the regime. Further, it should not target the national infrastructure and destroy the military’s capacity.<sup>157</sup> More specifically, even though there has been a consensus among the vast majority of states that the use of force against the Libyan regime is in conformity with the UNSC resolution 1973, the third states’ reliance on force to back up the Libyan opposition groups was highly controversial. Based on the Libyan case, this section aims to determine the legality of the use of force for the purpose of protecting civilians and its legitimate boundaries. The Syrian crisis is not

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<sup>154</sup> G. Ulfstein & H. F. Christiansen, ‘The legality of NATO Bombing in Libya’ (2013) 62 *International and Comparative Law Quarterly* 159, at 161.

<sup>155</sup> See UNSC, *SC resolution 1973 (2011)*, (n 58); Corten & Koutroulis, (n 78), at 59.

<sup>156</sup> See Corten & Koutroulis, (n 78), at 59.

<sup>157</sup> *Ibid.*

covered in this discussion since the UNSC did not authorise the use of force in this case.

#### 4.4.1 The Legal Basis for the Use of Force and the R2P

The main objective of ‘Operation Unified Protector’ was to implement the UNSC resolutions 1970 and 1973, which were adopted in 2011.<sup>158</sup> In resolution 1970 issued on 26 February, the UNSC urged the Libyan authorities to respect IHRL and IHL,<sup>159</sup> referred the matter to the ICC,<sup>160</sup> founded an arms embargo<sup>161</sup> and adopted targeted sanctions against high-ranking Libyan officials.<sup>162</sup>

Subsequently, in resolution 1973 adopted on 17 March, the UNSC ‘[c]ondemn[ed] the gross and systematic violations of human rights’ committed by the Libyan authorities; further, acting under Chapter VII of the UN Charter, it demanded the immediate establishment of a ceasefire and authorised member states ‘to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack’ and ‘to enforce compliance’ with the no-fly zone. It has been effectively argued that the use of force against the Libyan regime was founded on the authorisation included in these provisions.<sup>163</sup>

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<sup>158</sup> See NATO Secretary General, ‘NATO Secretary General’s statement on no-fly zone over Libya’ (NATO, 23 March 2011); NATO Secretary General’s statement on Libya no-fly zone’ (NATO, 24 March 2012).

<sup>159</sup> UNSC, *SC resolution 1970 (2011)*, (n 70), at para. 2.

<sup>160</sup> *Ibid.*, at para. 4.

<sup>161</sup> *Ibid.*, at para. 10.

<sup>162</sup> *Ibid.*, at para. 15.

<sup>163</sup> See US White House, Office of the Press Secretary, ‘Remarks by the President in Address to the Nation on Libya’ (28 March 2011), available online at: <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>; UK FCO, ‘Joint Statement by UK Prime Minister and French President’ (28 March 2011), available online at: <https://www.gov.uk/government/news/libya-joint-statement-by-uk-prime-minister-and-french-president>; ‘HM Government’s note on Legal Basis for deployment of UK forces and military assets’, *The Guardian* (London, 21 March 2011), available online at: <https://www.theguardian.com/law/2011/mar/21/government-legal-military-action-libya>; the Communique of the Paris Summit (France, Spain, Germany, Canada, Qatar, Poland, Denmark, Italy, Greece, Norway, Belgium, UK, the Netherlands, Iraq, United Arab Emirates, United States, Jordan, Morocco), ‘Paris Summit for the Support of the Libyan People – Communique’, (19 March 2011).



As clarified previously, the UNSC's practice suggests that the expression 'all necessary measures' included in resolution 1973<sup>164</sup> covers subsequent military operations.<sup>165</sup> In similar situations, when the UNSC used the same expression, it was well-established that such a formula was employed to authorise the use of force under Chapter VII.<sup>166</sup> This practice was witnessed in many UNSC resolutions, such as resolution 794 on the situation in Somalia,<sup>167</sup> resolution 836 on the crisis in Bosnia and Herzegovina,<sup>168</sup> resolution 929 concerning Rwanda,<sup>169</sup> resolution 1464 on the situation in the Ivory Coast<sup>170</sup> and resolution 1264 in relation to the situation in Timor.<sup>171</sup> Therefore, the reference to the situation in Libya as constituting 'a threat to international peace and security'<sup>172</sup> and the authorisation of the UNSC to 'take all necessary measures' certainly suggests that the use of force against Gaddafi regime was authorised under Chapter VII.<sup>173</sup> Moreover, this contention was heavily endorsed by the intervening states.

France relied on resolution 1973 as a strong legal basis to justify the use of force against the Libyan authorities.<sup>174</sup> Further, the UK government argued that the UNSC adopted resolution 1973 'as a measure to maintain or restore international peace and security under Chapter VII' of the UN Charter.<sup>175</sup> The UK also asserted that 'this Chapter VII authorisation to use all necessary measures provides a clear and

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<sup>164</sup> UNSC, *SC resolution 1973 (2011)*, (n 58).

<sup>165</sup> Thielborger, (n 115), at 20; See M. N. Schmitt, 'Wings over Libya. The No-Fly Zone in Legal Perspective' (2011) 36 *The Yale Journal of International Law* 45, 47–48.

<sup>166</sup> See Corten, (n 116) at 312.

<sup>167</sup> UNSC, *SC resolution 794 (1992)*, (n 117).

<sup>168</sup> UNSC, *SC resolution 836 (1993)*, (n 118), at para.10.

<sup>169</sup> UNSC, *SC resolution 929 (1994)*, (n 119), at para. 3.

<sup>170</sup> UNSC, *SC resolution 1464 (2003)*, (n 120), at para. 9.

<sup>171</sup> United Nations Security Council, *Security Council resolution 1264 (1999) [Timor]*, 15 September 1999, S/RES/1264 (1999), available online at: <http://www.refworld.org/docid/3b00f1e35c.html>.

<sup>172</sup> See UNSC, *SC resolution 1973 (2011)*, (n 58), at the preamble.

<sup>173</sup> Thielborger, (n 115), at 19-20.

<sup>174</sup> See 'Joint Statement by UK Prime Minister and French President' (28 March 2011), (n 163).

<sup>175</sup> 'HM Government's note on Legal Basis for deployment of UK forces and military assets', (n 163).

unequivocal legal basis for deployment of UK forces and military assets to achieve the resolution's objectives'.<sup>176</sup> Many other states participating in the campaign launched and controlled by NATO<sup>177</sup> made similar declarations.<sup>178</sup>

In a speech delivered to explain his decision to use force in Libya, Obama explicitly made the following announcement: 'I authorized military action to stop the killing and enforce U.N. Security Council Resolution 1973'.<sup>179</sup> Furthermore, even though he advanced various arguments to provide a justification for this decision, the concept of the R2P was evidently one of the main bases for his justification.<sup>180</sup> Obama clearly stated that 'we are naturally reluctant to use force to solve the world's many challenges. But when our interests and values are at stake, we have a responsibility to act'.<sup>181</sup> He argued that the use of force in Libya was implemented as a last resort after it was established that the Libyan regime failed to fulfil its responsibility to protect its citizens.

Obama further stated that 'having tried to end the violence without using force, the international community offered Qaddafi a final chance to stop his campaign of killing, or face the consequences. Rather than stand down, his forces continued their advance, bearing down on the city of Benghazi, home to nearly 700,000 men, women and children who sought their freedom from fear'.<sup>182</sup> Moreover, he contended that NATO as well as the other intervening states who decided to join the military campaign,

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<sup>176</sup> 'HM Government's note on Legal Basis for deployment of UK forces and military assets', (n 163).

<sup>177</sup> See 'NATO and Libya (Archived)', available online at:

[http://www.nato.int/cps/ic/natohq/topics\\_71652.htm](http://www.nato.int/cps/ic/natohq/topics_71652.htm).

<sup>178</sup> the Communique of the Paris Summit, (n 163).

<sup>179</sup> See US White House, Office of the Press Secretary, 'Remarks by the President in Address to the Nation on Libya', (n 163).

<sup>180</sup> S. Groves, 'Obama Wrongly Adopts U.N. "Responsibility to Protect" to Justify Libyan Intervention' (2011) *The Heritage Foundation*, available online at: <http://www.heritage.org/africa/report/obama-wrongly-adopts-un-responsibility-protect-justify-libya-intervention>.

<sup>181</sup> US White House, Office of the Press Secretary, 'Remarks by the President in Address to the Nation on Libya', (n 163).

<sup>182</sup> Ibid.

such as the UK, France, Canada, Denmark, Norway, Italy, Spain, Greece, Turkey, Qatar and the United Arab Emirates, have done so to fulfil their responsibilities in defending the Libyan people.<sup>183</sup> It is, therefore, apparent that Operation Unified Protector was authorised by the UNSC and was not explicitly challenged by any state. It was also established that the formula ‘all necessary measures’ covers the use of force.<sup>184</sup> Nevertheless, the states’ reaction towards the Libyan situation reflected a high level of uncertainty with respect to the scope of the authorisation. This topic is discussed in the next section.

#### **4.4.2 The Scope of the Authorised Use of Force and the R2P**

##### **4.4.2.1 The Scope of Authorisation on the Use of Force: General**

Although the Libyan precedent supported the view that the use of force could be authorised by the UNSC for the purpose of protecting civilians, it raised some serious questions with respect to the limitations of such an authorisation. The wording of the UNSC resolution 1973 suggests that the resolution was drafted in a general manner and that it intended to impose very limited restrictions on its application.<sup>185</sup>

The resolution requires that the participant states notify the UNSC through the UNSG of their intention to act in accordance with the authorisation and to cooperate with the UNSG.<sup>186</sup> Moreover, regarding the measures that member states could rely on to implement the resolution, apart from excluding the deployment of ‘a foreign occupation force of any form on any part of Libyan territory’,<sup>187</sup> the resolution did not

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<sup>183</sup> US White House, Office of the Press Secretary, ‘Remarks by the President in Address to the Nation on Libya’, (n 163).

<sup>184</sup> See Schmitt, (n 165), 47–48.

<sup>185</sup> UNSC, *SC resolution 1973 (2011)*, (n 58).

<sup>186</sup> *Ibid*, at para. 4.

<sup>187</sup> UNSC, *SC resolution 1973 (2011)*, (n 58), at para. 4.

include any other restrictions. It was not limited to a certain time or until a specific objective is achieved.<sup>188</sup> Nevertheless, the resolution was restricted to the objectives to be achieved.

Even though the UNSC resolution 1973 authorised member states to take ‘all necessary measures’, it restricted the implementation of these measures to achieve two goals. These two objectives are to protect ‘civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’ and ‘to enforce compliance with the ban on flights’.<sup>189</sup> Nevertheless, it was asserted that the military operations indicated a shift in the objectives from the mere protection of civilians to the massive military support of the Libyan opposition. The military operations targeted the Libyan infrastructure and aimed to overthrow of the Gaddafi regime. Hence, it is essential to determine the extent to which these objectives were in conformity with the primary target of the operation as stated in resolution 1973.<sup>190</sup>

#### **4.4.2.2 The Scope of Authorisation on the Use of Force: Targeted Objects**

The states’ initial reaction to the resolution 1973 by the UNSC was to prevent the emergence of a humanitarian catastrophe that might be perpetrated by the Libyan army. On 28 March 2011, Obama made an official statement summarising the primary objective behind the military operations in Libya:

We struck regime forces approaching Benghazi to save that city and the people within it. We hit Qaddafi’s troops in neighboring Ajdabiya, allowing the opposition to drive them out. We hit Qaddafi’s air defenses, which paved the way for a no-fly zone. We targeted tanks and military assets that had been choking off towns and cities, and we

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<sup>188</sup> See M. Payandeb, ‘The United Nations, Military Intervention, and Regime Change in Libya’ (2012) 52 *Virginia Journal of International Law* 355, at 384.

<sup>189</sup> UNSC, *SC resolution 1973 (2011)*, (n 58).

<sup>190</sup> *Ibid.*

cut off much of their source of supply. And tonight, I can report that we have stopped Qaddafi's deadly advance.<sup>191</sup>

A few weeks later, NATO began to expand the scope of the military operations, targeting the infrastructure of the Libyan regime. Various military and economic objects were attacked. It was argued that some of these targeted objects could not be linked to the primary objective behind the campaign that entailed the protection of civilians from threat of attack.<sup>192</sup> According to Pommier, 'not all the military operations [in Libya] seemed to have a direct link to the prevention of acts against civilians'.<sup>193</sup>

Nonetheless, as the French Minister of Foreign Affairs asserted, '[p]rotecting the population [as aimed by UNSC resolution 1973] isn't simply neutralizing Gaddafi's armoured vehicles and planes, it's also weakening his military capabilities, command posts and supply networks'.<sup>194</sup> This view also finds support in the language used in the subsequent UNSC resolution concerning the situation in Cote d'Ivoire.<sup>195</sup> In resolution 1975, the UNSC authorised the member states to implement all necessary means 'to protect civilians under imminent threat of physical violence'.<sup>196</sup> It is apparent that the expression used in resolution 1975<sup>197</sup> is stricter than that included in resolution 1973.<sup>198</sup> The UNSC's intention to limit the use of force to 'imminent threat'<sup>199</sup> with respect to

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<sup>191</sup> US White House, Office of the Press Secretary, 'Remarks by the President in Address to the Nation on Libya', (n 163).

<sup>192</sup> Corten & Koutroulis, (n 78), at 68.

<sup>193</sup> B. Pommier, 'The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond' (2011) 93 *International Review of the Red Cross* 1063, at 1078.

<sup>194</sup> Press conference given by Alain Juppé, Ministred' Etat, Minister of Foreign and European Affairs (excerpts), Brussels, May 23, 2011, available online at: <https://franceintheus.org/spip.php?article2365>.

<sup>195</sup> United Nations Security Council, *Security Council resolution 1975 (2011) [on targeted sanctions against individuals meeting the criteria set out in resolution 1572 (2004) on arms embargo against Côte d'Ivoire]*, 30 March 2011, S/RES/1975 (2011), available online at: <http://www.refworld.org/docid/4d9ac4ea2.html>.

<sup>196</sup> Ibid, at para. 6.

<sup>197</sup> Ibid.

<sup>198</sup> UNSC, *SC resolution 1973 (2011)*, (n 58); Corten & Koutroulis, (n 78), at 70.

<sup>198</sup> UNSC, *SC resolution 1975 (2011)*, (n 195), at para. 6.

<sup>198</sup> Corten & Koutroulis, (n 78), at 70.

<sup>198</sup> UNSC, *SC resolution 1973 (2011)*, (n 53); Payandeb, (n 188), at 389; Corten & Koutroulis, (n78), at 70.

<sup>199</sup> UNSC, *SC resolution 1975 (2011)* (n 195), at para. 6.

the situation in Cote d'Ivoire indicates that the word 'threat' in resolution 1973 implies a greater scope in terms of the forcible measures that the member states could apply against Gaddafi regime.

The expansive implementation of the UNSC resolution with respect to the applicable forcible measure against the Libyan authorities is not new. A similar approach was adopted against Saddam Hussein after the invasion of Kuwait in 1991. In the Gulf War, the international coalition extended its mandate beyond the Iraqi troops in Kuwait to cover objects inside the territory of Iraq.<sup>200</sup> Hence, it could be established that objects other than troops in the field could be targeted as long as such an attack is a necessary measure to fulfil the objectives behind the adoption of the UNSC. More specifically, attacks directed at the Libyan infrastructure would be deemed legal in as far as they are necessary to 'protect civilians and civilian populated areas'.<sup>201</sup>

#### **4.4.2.3 The Scope of the Authorisation on the Use of Force and the Protection and Support of Opposition Groups/Armed Groups**

One of the main arguments advanced against the military operations in Libya was based on grounds that the military support of the Libyan opposition groups was not in conformity with resolution 1973.<sup>202</sup> The argument was that the authorisation provided under the resolution intended to neither protect nor support the Libyan opposition groups. There was only one ultimate objective that was to be implemented restrictively, namely, the protection of civilians.

With regard to the protection provided to the Libyan armed groups, the argument from a legal point of view indicated a difference between civilians and

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<sup>200</sup> Corten & Koutroulis, (n 78), at 70.

<sup>201</sup> UNSC, *SC resolution 1973 (2011)*, (n 53); Payandeb, (n 188), at 389; Corten & Koutroulis, (n 78), at 70.

<sup>202</sup> Ulfstein & Christiansen, (n 154), at 168-169.

rebels.<sup>203</sup> The interpretative guidance of the ICRC on the notion of direct participation in hostilities made this distinction clear: '[f]or the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians'.<sup>204</sup> Accordingly, the Libyan armed groups cannot be included under the term 'civilians'.<sup>205</sup>

Based on this, the argument was that resolution 1973 authorised the use of force to protect the Libyan civilians and not the Libyan armed groups. Nevertheless, although the principle of distinction is well-established under IHL, it does not necessarily mean that the UNSC, via resolution 1973, intended to exclude the Libyan opposition groups from the protection provided under paragraph 4.<sup>206</sup> As Payandeb asserted, '[t]o the contrary, the Security Council authorized the use of force not only to protect civilians, but also to protect civilian-populated areas under threat of attack'.<sup>207</sup>

The inclusion of the phrase 'civilian-populated areas' in resolution 1973 intended to extend the scope of protection. The protection provided under resolution 1973 was not limited to the Libyan civilians; however, it goes beyond and covers specific territorial areas. In other words, the authorisation granted under the resolution aimed to provide protection to civilians as well as 'geographical zones populated by civilians'.<sup>208</sup> Moreover, Ulfstein and Christiansen contend that '[t]his widely extends the mandate, permitting NATO and its allies to also protect cities and towns held by

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<sup>203</sup> See J. M. Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says about the Relationship between the Jus in Bello and the Jus ad Bellum' (2012) 17 *Journal of Conflict & Security Law* 117, 124.

<sup>204</sup> N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009), at 27.

<sup>205</sup> Ibid.

<sup>206</sup> Payandeb, (n 188), at 386.

<sup>207</sup> Ibid.

<sup>208</sup> Ulfstein & Christiansen, (n 154), at 163.

rebel force as well as protecting rebel forces present in such area'.<sup>209</sup> However, this protection ought to be restricted to its specific meaning under the resolution.

With regard to the possibility of supporting the opposition groups, the authorization granted under resolution 1973 was believed to have enabled this act by the member states.<sup>210</sup> In fact, some of the coalition members were observed to have already sent military advisors to provide the Libyan opposition with the necessary advice and training.<sup>211</sup> Further, it was evident that, during the campaign, NATO intended to provide direct air support to the Libyan opposition groups. It was also apparent that the NATO air attacks targeting the Libyan army significantly contributed to the progress of the Libyan opposition groups on the ground, helping them conquer additional areas and, finally, win the battle.<sup>212</sup>

Payandeb argued that the support provided to the Libyan opposition groups was a natural result of the military operations. He further asserts that the military operations intended primarily to target Gaddafi regime as the main source of threat to the Libyan civilians. Moreover, the military attacks weakened the capabilities of Gaddafi's forces, which consequently enhanced the strength of the opponents of the regime.<sup>213</sup> Payandeb goes on to clarify that '[i]n a civil war, the combating parties necessarily act within civilian territories. The insurgents were Libyan people, living among civilians, and Libyan attacks against insurgents were therefore in most instances carried out against territories inhabited by civilians'.<sup>214</sup> Nonetheless, the observation of the Libyan situation suggests that the strategies implemented by the coalition went beyond the

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<sup>209</sup> Ulfstein & Christiansen, (n 154), at 163.

<sup>210</sup> See Lehmann, (n 203), at 117; Payandeb, (n 188), at 386; Corten & Koutroulis, (n 78), at 73-74.

<sup>211</sup> See A. Cowell & R. Somaiya, 'France and Italy will Also send Advisors to Libya Rebels', *New York Times*, 20/4/2011, available online at: <http://www.nytimes.com/2011/04/21/world/africa/21libya.html>.

<sup>212</sup> See Ulfstein & Christiansen, (n 154), at 169.

<sup>213</sup> Payandeb, (n 188), at 387.

<sup>214</sup> *Ibid.*



mere protection of civilians. It also indicated that the support provided to the Libyan opposition groups was intentional rather than accidental.<sup>215</sup>

It was apparent that the areas under the control of Gaddafi's forces were not under threat of attack by the Libyan authorities. In fact, Gaddafi intended to provide protection to the people living in these areas who were his supporters. On the contrary, these areas were attacked by NATO and the Libyan armed groups. The NATO air attacks purportedly facilitated serious violations of IHL on the part of the Libyan opposition groups in areas known to be loyal to the Gaddafi regime.<sup>216</sup> The intervening states are believed to have made the decision to take a part in the conflict and support the Libyan opposition.<sup>217</sup>

The coordination between NATO and the Libyan opposition groups, which led to the progress of these groups on the ground, was argued to have constituted a violation of the UN principle of impartiality. The principle of impartiality refers to the obligation imposed on the intervening states to remain neutral about the political objectives of the parties involved in the conflict.<sup>218</sup> Unless explicitly specified in the UNSC authorisation, member states ought not to support the political agenda of any party to the conflict. Corten and Koutroulis emphasise that 'the text of resolution 1973 (2011) reveals a conception based on impartiality and non-interference in the political matters of the Libyan people'.<sup>219</sup> They further add that '[t]he only imperative, which explains the somewhat unexpected adoption of the resolution, is the protection of civilians. This

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<sup>215</sup> See C. Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire' (2011) 60 *International and Comparative Law Quarterly* 767, at 771-772.

<sup>216</sup> Ulfstein & Christiansen, (n 154), at 169; Akande, (n 82).

<sup>217</sup> See Pommier, (n 193), at 1063.

<sup>218</sup> See C. Pippan, 'The 2011 Libyan Uprising, Foreign Military Intervention and International Law' (2011) 2 *Juridikum: Zeitschrift für Kritik-Recht-Gesellschaft* 159.

<sup>219</sup> Corten & Koutroulis, (n 78), at 74.

refers to civilians of all sides, supporting either the Gaddafi government or the opposition'.<sup>220</sup>

One of the main arguments advanced by NATO to justify the support provided to the Libyan opposition groups was founded on the acceptance of the Libyan opposition 'as the new effective government of Libya, rather than Resolution 1973'.<sup>221</sup> Nonetheless, this argument cannot be advanced as a legal basis. As Ulfstein and Christiansen argued, 'consent from rebels would only be relevant once they had secured sufficient control of Libyan territory'.<sup>222</sup> More specifically, before consent could be considered, it is essential that opposition groups become the official authority in the country. In addition, consent ought to be issued before the situation reaches the level of an internal armed conflict.<sup>223</sup> To sum up, the authorisation of the use of force does not justify the support of opposition groups. In the next section, the discussion is advanced to cover the protection of civilians and regime change.

#### **4.4.2.4 The Scope of the Authorisation on the Use of Force and Regime Change**

The most controversial question raised following the implementation of the UNSC resolution 1973 was whether member states were authorised to overthrow the Gaddafi regime.<sup>224</sup> The matter is related to the extent to which the necessity criterion justifies a regime change as a measure to protect civilians.<sup>225</sup> According to some, the overthrow of repressive regimes would be necessary in certain cases to protect the civilian population.<sup>226</sup> Others argued that a regime change cannot be advanced as a

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<sup>220</sup> Corten & Koutroulis, (n 78), at 74.

<sup>221</sup> Ulfstein & Christiansen, (n 154), at 169.

<sup>222</sup> Ibid.

<sup>223</sup> Gray, (n 67), at 81.

<sup>224</sup> See M. Chulov, 'Arab League to Reiterate Backing for Libya No-fly Zone', *The Guardian* (Mar. 22, 2011), available online at: <https://www.theguardian.com/world/2011/mar/22/arab-league-libya-no-fly>.

<sup>225</sup> See Payandeb, (n 188) at 387.

<sup>226</sup> See Henderson, (n 215), at 771.

necessary measure for the purpose of protecting civilians unless it is explicitly stated in the UNSC resolutions.<sup>227</sup>

During the debates on the Libyan situation, there were various indications supporting the view that the UNSC did not intend to categorically eliminate the possibility of overthrowing the Gaddafi regime on the basis of resolution 1973. The argument made was that the UNSC's reaction towards the Libyan crisis indicated that the democratic aspect of the Libyan conflict was as important as the protection of human rights for the purpose of ending the violence.<sup>228</sup> Under paragraph 1 of resolution 1970, the UNSC 'demand[ed] an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population'.<sup>229</sup>

In resolution 1973, the UNSC '[s]tresse[d] the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people'.<sup>230</sup> It was considered highly unexpected that the legitimate demands of the Libyan civilians could be achieved without changing the Gaddafi regime.<sup>231</sup> Nonetheless, even though the reference to the legitimate demands of the Libyan people in the UNSC resolutions indicated a certain level of support by the Libyan civilians against their repressive government, it still could not serve, in itself, as a legal basis for justifying the reliance on force by member states to overthrow the regime. However, as Payandeb contends, the reference to 'the legitimate demands of the population'<sup>232</sup> in resolution 1973 does not lack significance; it 'does indicate that the authorisation to use force has to be regarded within the overall context of the conflict, which was not only

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<sup>227</sup> See R. Naiman, 'Surprise War for Regime Change in Libya is the Wrong Path', *Foreign Policy Focus* (Apr. 4, 2011), available online at: [http://fpif.org/surprise\\_war\\_for\\_regime\\_change\\_in\\_libya\\_is\\_the\\_wrong\\_path/](http://fpif.org/surprise_war_for_regime_change_in_libya_is_the_wrong_path/); Pommier, (n 193), at 1063; Corten & Koutroulis, (n 78), at 59.

<sup>228</sup> Payandeb, (n 188), at 388.

<sup>229</sup> UNSC, *SC resolution 1970 (2011)*, (n 70), at para. 1.

<sup>230</sup> UNSC, *SC resolution 1973 (2011)*, (n 53), at para. 2.

<sup>231</sup> Payandeb, (n 188), at 388.

<sup>232</sup> UNSC, *SC resolution 1973 (2011)*, (n 53), at para. 2.

about human rights violations, but also about the realization of the political rights of the Libyan people'.<sup>233</sup>

Another argument based on the sanctions targeting the Gaddafi regime was also advanced to justify the legality of overthrowing the Libyan government. According to this assertion, even though the UNSC did not explicitly allow a reliance on force to change the Libyan regime, it implemented various forcible measures against the Libyan authorities. The aim of these forcible measures was to gradually weaken the regime and limit its abilities.<sup>234</sup> In resolution 1970, the UNSC imposed a travel ban and froze the assets of not only Gaddafi and his family members but also other high-ranking officials of his government.<sup>235</sup>

In resolution 1973, the UNSC decided to extend the effect of the financial sanctions to cover 'all funds, other financial assets and economic resources ..., which are owned or controlled, directly or indirectly, by the Libyan authorities, ..., or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them'.<sup>236</sup> Nevertheless, although the implementation of these forcible sanctions reflected the intention of the international community to limit the power that could be exercised by the Libyan authorities, they still cannot justify the reliance on force to overthrow the regime. In fact, as Payandeb contended, despite the fact that the main purpose behind the implementation of these sanctions was to weaken the Libyan authorities in order to end the violence on civilians, 'they also supported the struggle of the Libyan opposition against the regime'.<sup>237</sup> Furthermore, such an expansive

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<sup>233</sup> Payandeb, (n 188), at 388.

<sup>234</sup> Ibid.

<sup>235</sup> See UNSC, *SC resolution 1970 (2011)*, (n 70), at paras. 15, 16, 17, 18, 19, 20 & 21.

<sup>236</sup> UNSC, *SC resolution 1973 (2011)*, (n 53), at para. 19.

<sup>237</sup> Payandeb, (n 188), at 388.

understanding of the UNSC resolutions 1970 and 1973 goes beyond the acceptable boundaries of interpretation and violates the practice of the UNSC.

As stated earlier, although states have a degree of discretion to interpret the necessity criterion based on the circumstances at hand,<sup>238</sup> they are not fully free. States are still restricted by certain rules and principles. As argued by the ICJ in the *Nicaragua* case, ‘the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be “necessary” for that purpose’.<sup>239</sup> It further emphasises that ‘whether a measure is necessary to protect the essential security interests of a party is not ... purely a question for the subjective judgment of the party; the text does not refer to what the party “considers necessary” for that purpose’.<sup>240</sup>

More specifically, the *Institut de droit international*, at its 2011 Rhodes session, adopted a similar approach.<sup>241</sup> Article 9 of the resolution adopted by the institute concerning the ‘Authorization of the Use of Force by the United Nations’ states the following:

The objectives, scope and modes of control of each authorization should be strictly interpreted and implemented. When the use of force is authorized, it shall be conducted proportionately to the gravity of the situation and in full compliance with international humanitarian law.<sup>242</sup>

Moreover, Article 10 states that ‘[i]n no case may a previous authorization be invoked for any purpose beyond its specific objectives, time and scope’.<sup>243</sup> This

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<sup>238</sup> See A. J. Bellamy & P. D. Williams, ‘The New Politics of Protection? Cote d’Ivoire, Libya and the Responsibility to Protect’ (2011) 87 *International Affairs* 825, at 845; Schmitt, (n 165), at 57.

<sup>239</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10), at para. 282.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Institut de droit international*, 2011 Rhodes session, 10th Commission, Sub-Group D, resolution on the ‘Authorization of the Use of Force by the United Nations’ (9 September 2011), at Art. 9, available online at: [http://www.idi-iiil.org/app/uploads/2017/06/2011\\_rhodes\\_10\\_-D\\_en.pdf](http://www.idi-iiil.org/app/uploads/2017/06/2011_rhodes_10_-D_en.pdf).

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*, at Art. 10.

understanding of the element of necessity ought to be considered when interpreting the UNSC resolutions to determine the accurate scope of their implementation. With regard to the Libyan situation, a matter of great controversy relates to whether the expression in the UNSC resolution 1973 referring to ‘all necessary measures to protect civilians and civilian populated areas’<sup>244</sup> justifies the military support of the Libyan opposition groups and regime change.<sup>245</sup>

The UNSC’s practice was believed to suggest that in case a regime change becomes a necessity, the UNSC would explicitly authorise it.<sup>246</sup> This was the case with the situation in Haiti in 1994. The UNSC, through resolution 940, explicitly authorised member states ‘to use all necessary means to facilitate the departure from Haiti of the military leadership...the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti’.<sup>247</sup>

The UNSC did not grant such an explicit authorisation through resolution 1973.<sup>248</sup> Hence, the overthrow of Gaddafi’s regime as a part of the operation is contended to have exceeded the scope of the authorisation provided by the UNSC. To the contrary, the formula used in resolution 1973 indicated that the UNSC excluded a regime change as a measure necessary to protect the Libyan population.<sup>249</sup> The resolution affirmed the responsibility of the Libyan authority to protect civilians, as restated its ‘strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya’.<sup>250</sup> Hence, the UNSC’s intention

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<sup>244</sup> UNSC, *SC resolution 1973 (2011)*, (n 53), at the preamble.

<sup>245</sup> Corten & Koutroulis, (n 78), at 71.

<sup>246</sup> See UN Security Council, *Security Council resolution 940 (1994) [UN Mission in Haiti]*, 31 July 1994, S/RES/940 (1994), available online at: <http://www.refworld.org/docid/3b00f15f63.html>.

<sup>247</sup> Ibid.

<sup>248</sup> See UNSC, *SC resolution 1973 (2011)*, (n 53).

<sup>249</sup> Corten & Koutroulis, (n 78), at 72.

<sup>250</sup> UNSC, *SC resolution 1973 (2011)*, (n 53), at the preamble.

appears to have been to encourage the Libyan authorities to cooperate rather than to enforce a regime change.

It was also observed that, during the debates on the UNSC resolution 1973, there was clear uncertainty among member states as to whether to rely on force to protect the Libyan civilians.<sup>251</sup> In fact, it was argued that one of the primary reasons for the successful adoption of the resolution was the confirmation that the ultimate objective behind resolution 1973 would be the mere protection of the Libyan population, accompanied by an affirmative statement to respect the sovereignty and political independence of Libya.<sup>252</sup> As pointed out by Amr Moussa, the Secretary-General of the Arab League, the UNSC authorised only the protection of the civilian population and not the overthrow of the Libyan regime.<sup>253</sup> Moreover, during the military operations in Libya, the communications between NATO and the concerned organs of the UN indicated that NATO continued to affirm that its operation in Libya was primarily launched for the mere purpose of protecting the civilians.<sup>254</sup>

Another assertion supporting the view that the overthrow of the Gaddafi regime was in violation of resolution 1973—and therefore, international law—was founded on the states' reaction to Saddam Hussein's regime during the Gulf War in 1991. Despite the fact that the UNSC resolution 678 contained the same expression as resolution 1973, namely, 'to use all necessary means',<sup>255</sup> the member states did not extend the meaning of authorisation to justify the overthrow of the Iraqi regime or even support the Kurdish armed groups against the Iraqi's regime.<sup>256</sup> However, notwithstanding the fact that the

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<sup>251</sup> Pommier (n 193), at 1068.

<sup>252</sup> See Corten & Koutroulis, (n 78), at 72.

<sup>253</sup> See Chulov, (n 224).

<sup>254</sup> Pommier, (n 193), at 1077-1078.

<sup>255</sup> United Nations N Security Council, *Security Council resolution 678 (1990) [Iraq-Kuwait]*, 29 November 1990, S/RES/678 (1990), at para. 2, available online at:

<http://www.refworld.org/docid/3b00f16760.html>.

<sup>256</sup> See Corten & Koutroulis, (n 78), at 73.

prevailing view still suggests that a regime change cannot be advanced as an objective in itself, whether directly or through supporting opposition groups, there has been a new trend emerging as to the legality of regime change.

As an intermediary approach to the question of regime change under the UNSC resolution 1973, the argument could be made that although the advancement of a regime change as an objective would be in violation of the UNSC resolution 1973, it could still be a lawful result of the implementation of certain forcible measures intending to protect civilians.<sup>257</sup> Moreover, this contention is based on the distinction between regime change as an objective behind the use of force and regime change as a consequence of forcible intervention.<sup>258</sup>

This approach is founded on the differentiation between objectives, measures and consequences with respect to the UNSC authorisation.<sup>259</sup> Even though the protection of civilians and civilian-populated areas was the primary objective of the UNSC resolution 1973,<sup>260</sup> the resolution did not ‘elaborate on the admissible means that [might] be employed in order to implement and achieve this goal’.<sup>261</sup> Furthermore, despite the fact that regime change is not a lawful measure in accordance with the strict interpretation of the UNSC resolutions, it could still be a consequence of implementing other legitimate means. Payandeb clarifies this as follows:

While regime change might not have been a legitimate goal in itself, the distinction between means and ends suggests that it might constitute a legitimate consequence of measures that were carried out for the protection of civilians. Measures that were employed in order to keep the Gadhafi regime from attacking the civilian population at the same time contributed to the actions of the opposition against the regime. Therefore,

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<sup>257</sup> Payandeb, (n 188), at 388-389.

<sup>258</sup> See J. Linarelli, ‘When Does Might Make Right? Using Force for Regime Change’ (2009) 40 *Journal of Social Philosophy* 343.

<sup>259</sup> Payandeb, (n 188), at 388-389.

<sup>260</sup> UNSC, *SC resolution 1973 (2011)*, (n 53), at the preamble.

<sup>261</sup> Payandeb, (n 188), at 388.



a strict distinction between the objective of human rights protection and measures that might lead to regime change cannot be upheld.<sup>262</sup>

For instance, although the destruction of the Libyan air force, air defence systems and military infrastructure was necessary to protect Libyan civilians who faced continuous threat, it significantly weakened the Gaddafi regime and provided the Libyan opposition with military privileges on the ground.<sup>263</sup> The application of these forcible measures by member states was the primary reason behind the overthrowing of the Gaddafi regime.<sup>264</sup> Further, as long as the main purpose behind the application of these measures is to protect the civilian population, the action would be deemed legal regardless of the intention of the intervening states. On this point, Payandeb contends that '[t]he mere fact that the intervening states were at the same time also contributing to the overthrow of Gadhafi or even acting with the political intention of achieving this goal does not render their attacks illegal'.<sup>265</sup> Moreover, this contention finds support in the ICJ's finding on the *Nicaragua case* when the court relied on objective facts rather than the intention of the US to determine whether it planned to change the regime in Nicaragua.<sup>266</sup> To sum up, although regime change may result from implementing lawful measures necessary for the protection of civilians, it cannot be advanced as an objective nor a measure unless specified by the UNSC.

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<sup>262</sup> Payandeb, (n 188), at 389.

<sup>263</sup> See Ulfstein & Christiansen, (n 154), at 169- 170.

<sup>264</sup> Ibid.

<sup>265</sup> Payandeb, (n 188), at 389.

<sup>266</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (n 10).

## 4.5 Conclusion

This chapter focused on the international R2P. It aimed to trace the development of the responsibilities of third states for the purpose of protecting civilians in the context of an internal armed conflict and the extent to which the adoption of the R2P contributed.

Through section one, this chapter aimed to present a legal foundation for the concept of the international R2P based on the rules of IHL. It concluded that the legality of the international R2P could be founded on the obligation to ‘ensure respect’, as contained in Article 1 of the four Geneva Conventions and Article 1 (4) of the first Additional Protocol. This section also clarified that the rules of IHL as well as the ILC Articles could provide a legal foundation for the international responsibility to prevent and react.

Section two discussed the issue related to arming opposition groups, arguing that it is illegal to unilaterally supply arms to the opposition groups. Nevertheless, arming the opposition groups could have a legal basis with respect to the implicit authorisation of the UNSC. The section concluded that even though the UNSC did not explicitly permit the supply of arms to the Libyan opposition, this action was indicated to have been indirectly authorised. Arming the opposition could be justified as a necessary measure authorised under resolution 1973 to protect the Libyan population. Nevertheless, the implementation of this measure would be highly restrictive. The supportive states would not only have to limit the supply of arms in terms of the amount and type of weapons but would also have to consider each case separately.

Section three addressed the issue related to the use of force by third states to protect the population. It presented the argument that ‘Operation Unified Protector’ in Libya demonstrated the international community’s commitment to protect civilians.

The R2P was operationalised and implemented in practice through resolutions 1970 and 1973 to the highest possible level. The authorisation of the use of force could justify the expansion of the military operations to cover attacks on objects other than the troops on the ground, provided that this action is necessary for the protection of civilians. The discussion also clarified that, in certain cases, authorisation could be relied upon to provide the opposition groups with protection. Nevertheless, the support of the opposition groups in isolation would not be permitted.

The chapter concluded that international law does not legalise the use of force for the mere purpose of overthrowing governments, thereby violating certain principles of international law, such as the principle of sovereignty, the principle of non-intervention and the political independence of other states.<sup>267</sup> Therefore, states ought to not freely advance regime change as a measure to protect civilians. An authorisation granted by the UNSC to use force does not mean that member states are entitled to overthrow the government. In fact, a regime change cannot be an objective of any military operations unless specifically authorised by the UNSC.<sup>268</sup> Nonetheless, a regime change could be the consequence of applying other measures intending to protect civilian populations.

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<sup>267</sup> Ulfstein & Christiansen, (n 154), at 169.

<sup>268</sup> Corten & Koutroulis, (n 78), at 72.

## **Conclusion**

Since the 1990s, significant change has occurred with respect to the types of issues facing the international community. One of the most critical challenges is the widespread proliferation of internal armed conflicts and the lack of adequate legal frameworks that serve to regulate these types of conflicts. In response to the changing nature of armed conflicts, various efforts have been made by the international community to fill this gap. One of the most remarkable and comprehensive solutions to be advanced by numerous states involves the introduction of the concept of the R2P. However, although the R2P primarily aims to protect civilians embroiled in internal armed conflicts, it does not include any explicit reference to opposition armed groups as parties to internal armed conflicts. The concept of the R2P focuses on the responsibilities of host states under pillar one and on the responsibilities of the international community under pillars two and three. Hence, it is apparent that further efforts are required to determine the extent to which opposition groups have a responsibility to protect civilians.

This thesis focused on opposition groups as parties to internal armed conflicts and the concept of the R2P. The aim of this project was to examine the extent to which opposition groups can play a role in the protection of civilians within the realm of R2P. This thesis attempted to provide a detailed framework to regulate the role of opposition groups in relation to their parent states and the international community (third states) for the purpose of civilian protection. In order to achieve this general objective, this thesis was divided into two main parts. The first part concerned the regulation of the relationship between opposition groups and host states; this was detailed in chapters

one and two. The second part dealt with the regulation of the relationship between opposition groups and third states; this issue was addressed in chapters three and four.

In this thesis, it was argued that opposition groups, as parties to internal armed conflicts, already have a responsibility to protect civilians. The level of protection that these groups are required to provide is dependent on the degree of organisation they possess. Following the adoption of the concept of the R2P, it was indicated that further emphasis should be placed on opposition groups to enhance compliance with the rules that are already in existence under IHL. The implementation of R2P as an interpretive tool<sup>1</sup> further clarified and strengthened the existing obligations of IHL regarding the responsibility of opposition groups to protect civilian populations. Furthermore, states' practices in relation to the Libyan and Syrian crises indicated the emergence of potential changes as to the role of opposition groups in the protection of civilians.

The international reaction to the Libyan and Syrian situations has suggested that more weight should be placed on the political organs of opposition groups at the international level. Moreover, it has been asserted that the application of the R2P may facilitate a reliance on the argument that the right to self-determination can be used to justify armed struggles against repressive regimes. It has also been concluded that the adoption of the R2P indicates the emergence of a new trend regarding the use of force by third states for the purpose of civilian protection. Reliance on the use of force can be indirect, such as through the arming of opposition groups, or direct, as through the authorised use of force by the UNSC. In order to further evaluate the findings of this project, a brief summary of each chapter is provided.

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<sup>1</sup> See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, at para. 53, available online at: <http://www.refworld.org/cases/ICJ.4023a2531.html>. 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.

As a starting point, chapter one aimed to evaluate the framework used to regulate armed groups in their position as parties to internal armed conflicts. Due to the limitations of this project, the chapter focused on two main issues that are most relevant to the concept of civilian protection. First, the definition of the concept of organised armed groups was evaluated. Second, the question of how to bind organised armed groups by the rules of IHL was addressed. Additionally, the chapter tested the relationships that exist between R2P and these issues.

It was found that the concept of the civilian population, the cornerstone of R2P, plays a fundamental role within the framework that serves to regulate internal armed conflicts in general and within the role of opposition groups in particular. It was asserted that although modern IHL has shifted away from the practice of recognising armed groups as the basis of its application, it has been shown to be more effective for the purpose of protecting civilians. The adoption of definition of ‘internal armed conflict’ under contemporary IHL reduced the political discretion attached to the traditional concept of recognition and enhanced the level of protection provided to civilian populations.

This chapter also argued that though the concept of organised armed groups is associated with a high degree of uncertainty, it is still a definable concept. As defined within the framework that regulates internal armed conflicts, the concept of organised armed groups is addressed at varying levels, thus reflecting the various capacities of armed groups to carry out certain obligations that are necessary for the protection of civilian populations. While the definition of organised armed groups provided in Article 1 (1) of the second Additional Protocol represents the highest level of organisation that an organised armed group may achieve under IHL, the definition required for the

implementation of Common Article 3 represents the lowest level of organisation that armed groups must attain in order to fulfil their obligations under IHL.

In an effort to enhance the degree of protection provided to civilian populations, the ICTY provided a less restrictive definition of organised armed groups for the purpose of applying Common Article 3. It was also established that although the recent practice of the UNSC indicates that no level of sufficient organisation on the part of armed groups is required for the application of Common Article 3, the practice is based on a political rather than legal basis.

Additionally, it was concluded in this chapter that there are two main methods of binding organised armed groups by the rules of IHL. First, organised armed groups can be bound voluntarily by consenting to apply certain rules of IHL. Moreover, it was explained that the significance of direct compliance stems from the fact that it facilitates the involvement of third states in the process leading to better compliance with IHL by armed groups. Third states would have more room to participate in such processes under the third pillar of R2P, which concerns the international responsibility to protect civilians. Importantly, the ability of third states to encourage opposition groups to enhance their compliance with both IHL and IHRL could serve as an effective preventive measure.

This chapter also clarified that in addition to voluntarily compliance with IHL, there are five principles that can be utilised to bind organised armed groups by the rules of IHL. These five potential approaches to indirect compliance are: the principle of legislative jurisdiction, the effect of treaties on third parties, the claim of representation of the state, customary international law and the rules of *jus cogens*. It was contended, however, that none of these approaches is conclusive, and each has its own advantages and disadvantages. Therefore, reliance on more than one principle at the same time is

required to ensure comprehensive compliance with IHL on the part of organised armed groups.

It was concluded that following the adoption of the R2P, further development regarding the issue of how to bind organised armed groups by IHL could be traced. Although the concept of R2P does not include legal obligations, it can be used as an interpretive tool to clarify and strengthen the obligations that already exist under IHL.<sup>2</sup> The international reactions to the Libyan and Syrian crises suggested that opposition groups can be recognised as legitimate representatives of the people.

It was argued in this chapter that compliance with the rules of IHL, in accordance with a claim regarding the representation of the state, can add to the legitimacy of opposition groups and allow them to be recognised at the international level. Additionally, this chapter asserted that R2P can be used to enhance compliance with the rules of IHL on the part of organised armed groups if applied in conjunction with an approach relating to the effects of treaties on third parties. In such an instance, additional pressure is placed on host states to accept efforts to bind these groups by IHL treaties. This contention finds support under the first pillar of the R2P,<sup>3</sup> which requires host states to undertake all steps necessary to provide the required level of protection. In other words, although the R2P is not the source of these legal duties, it could still serve as a tool to strengthen compliance with these obligations.<sup>4</sup>

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<sup>2</sup> See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, (n 1); A. J. Bellamy & C. Drummond, 'The Responsibility to Protect in Southeast Asia: Between Non-Interference and Sovereignty as Responsibility' (2011) 24 (2) *The Pacific Review* 179, at 181.

<sup>3</sup> UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, at para. 138, available online at: <http://www.refworld.org/docid/44168a910.html>.

<sup>4</sup> See M. Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking' (2010) 35 (2) *Yale Journal of International Law*, 469.



Another potential contribution of the R2P is related to the concept of *jus cogens*. One argument against the *jus cogens* approach is that it has limited applicability, only applying to a limited number of rules. Nevertheless, the concept of R2P expands the scope of *jus cogens* as it relates to violations committed during internal armed conflicts. Indeed, the R2P considers ethnic cleansing to be a separate international crime. The R2P also considers the execution of international crimes, in general, to be violations of *jus cogens*. The R2P is intended to enhance the level of protection provided to civilians by individually binding members of armed groups to pledges that they will not commit violations of *jus cogens*. Nevertheless, the R2P still encourages armed groups to achieve the highest possible level of organisation in order to increase civilians protection during times of internal armed conflicts; the R2P also enables organised armed groups to adopt positive roles in such processes. In the subsequent chapter, the obligations of organised armed groups regarding the protection of civilians were evaluated.

After addressing questions concerning the definition of organised armed groups, and after explaining how such armed groups could be bound by IHL and how R2P could be used as a tool to enhance compliance with the rules of IHL, the discussion was narrowed in chapter two to an examination of the extent to which organised armed groups have a responsibility to protect civilians. In order to achieve this objective, the chapter evaluated various important obligations that fall under IHL and IHRL. Due to the limitations of this project, the chapter focused on three comprehensive obligations that are most relevant to a group's responsibility to protect civilians according to the framework used to regulate internal armed conflicts. The aim of this chapter was to use the concept of the R2P as a tool to identify the elements related to civilian protection that exist within these obligations.

Regarding a population's right to adequate food supplies, it was clarified that unlike IHRL, IHL does not include any direct reference to such a right; however, IHL does regulate this right by imposing two obligations on organised armed groups. These two obligations are: the obligation not to intentionally starve civilian populations and the duty to facilitate access to humanitarian assistance. With regard to the prohibition on starvation, this chapter argued that organised armed groups are under a strict obligation not to use starvation as a method of war—indeed, it constitutes a war crime to implement starvation as a war technique. It was also concluded that the scope of this obligation covers all intentional acts that may lead to starvation. As a result, this chapter asserted that organised armed groups have a responsibility to prevent the emergence of starvation. More specifically, organised armed groups have a responsibility to prevent the commission of a war crime by eliminating any roots that may lead to the starvation of civilian populations.

Regarding such groups' duty to accept and facilitate access to humanitarian assistance, it was contended in this chapter that so long as the requirements of the second additional protocol are met, organised armed groups are under an affirmative obligation to accept and allow access to humanitarian aid in areas under their control. It was concluded that although the consent of the host state is a well-established requirement for legitimate access to such aid, UNSC practices employed following the adoption of the R2P indicated the existence of significant development regarding the consent requirement for the purpose of further protecting civilian populations during times of internal armed conflicts. In fact, the UNSC authorised the delivery of humanitarian aid to civilians under the territorial control of opposition groups without obtaining the consent of the Syrian government.

The second requirement discussed in chapter two was the obligation imposed on organised armed groups not to forcibly displace civilians. In fact, it was argued that organised armed groups have an affirmative responsibility to protect the civilians under their control. While such groups are obligated to safely transfer populations, under their control to safer areas, when it is necessary, organised armed groups are prohibited from forcibly displacing civilians for purposes other than security or military reasons. This chapter established that the illegitimate displacement of civilians by organised armed groups may amount to the commitment of either a war crime or a crime against humanity. Therefore, the prohibition against ordering such a movement falls within the preventive dimension and concerns the responsibility of organised armed groups to protect the civilians under their territorial control.

The third obligation addressed in chapter two concerned the obligation of organised armed groups to protect IDPs. It was asserted that organised armed groups are under a general obligation to adopt all necessary measures to ensure that the IDPs under their control are granted satisfactory conditions with respect to shelter, proper hygiene, health, safety and nutrition. Moreover, organised armed groups have additional duties towards women and displaced families; notably, these duties are of a preventive nature. As such, adherence to these obligations on the part of organised armed groups prevents the commitment of international crimes.

Chapter three addressed the relationship between organised armed groups and the international community (third states) with respect to the international recognition of the political organs of opposition groups. The objective of this chapter was to evaluate all developments that might emerge regarding the international recognition of opposition groups following the adoption of the R2P; in particular, the chapter examined the political and legal recognition of opposition groups.

With regard to the political recognition of opposition groups, the international reactions to the Libyan and Syrian crises allowed for the determination that the political structure of opposition groups can be recognised in various ways, thus indicating varying levels of international political support. It was also asserted that despite the purely political nature of such an act, the recognition of an opposition group as ‘the legitimate representative of the people’ is practically significant, as it represents the highest level of political recognition. Such recognition indicates that the *de jure* government has already lost its legitimacy and that a new representative of the people should be selected—i.e., the recognised opposition group.

The chapter also argued that the political recognition of opposition groups as representatives of the people may facilitate their legal recognition. With respect to the elements of representation and permanence as the potential requirements of such recognition, it was asserted that while representation refers to the inclusiveness of opposition groups, both ethnically and geographically, permanence indicates that a given opposition group is able to maintain certain political, organisational and institutional structure.

With regard to the legal recognition of opposition groups, the chapter asserted that although the recognition of an opposition group as the ultimate legitimate representatives of the people suggests a similarity to NLMs, this does not mean that such recognition would grant opposition groups the same legal status or therefore produce similar legal consequences. Nevertheless, it was concluded that the right to self-determination could still be relied upon to legally justify the struggle against *de jure* governments, as can be deduced from paragraph 7 of resolution 2625 (XXV).<sup>5</sup> Yet

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<sup>5</sup> See United Nations General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, 1883<sup>rd</sup> plenary meeting, 24 October 1970, at para. 7.

this is just one of the interpretations that could be implemented to understand the meaning of paragraph 7 of resolution 2625 (XXV). This chapter also outlined that opposition groups can be recognised as new governments.

Chapter four evaluated the international responsibility to protect as well as the role of opposition groups in such an endeavour. This chapter aimed to trace any developments that occurred following the adoption of the R2P. It was determined that one possible method of providing a legal foundation for the international responsibility to protect within the framework of IHL is to embrace Common Article 1 of the four Geneva Conventions and Article 1 (4) of the first Additional Protocol. Then the issue related to the possibility of arming opposition groups for the purpose of protecting civilians was addressed. This chapter clarified that although it would be illegal to unilaterally provide armed groups with weaponry, it would still be possible to base an arming action on an implicit authorisation from the UNSC.

It was concluded in this chapter that though the UNSC did not explicitly allow for the supply of arms to Libyan opposition groups, such an act was indirectly authorised as a necessary measure for the purpose of protecting civilians under resolution 1973. Nevertheless, reliance on the expression ‘all necessary measures’ to justify the supply of arms to armed groups ought to be exceptionally restrictive. Supplying states should not only be required to limit the supply of arms in terms of their amount and type, they should also be compelled to consider each case separately.

Finally, the chapter evaluated the possibility of authorising the use of force for the purpose of protecting civilian populations. The aim was not only to determine the legal basis for such a forcible act, but also to determine its scope. References were made to opposition groups when it was relevant. It was argued that the concept of the R2P was operationalised and implemented in practice to the highest possible degree through

resolutions 1970 and 1973. This section asserted that this authorisation could be used to justify the expansion of the scope of the use of force to cover objects other than troops on the ground—so long as it could be established that such an action would be necessary for the protection of civilians. It was clarified that the inclusion of the phrase ‘civilian-populated areas’ in resolution 1973 was intended to extend the scope of protection to cover specific territorial areas. In other words, authorisation regarding the use of force could be used to provide protection for both civilians and armed groups.

It was also concluded that international law does not permit the use of force for the sole purpose of overthrowing a government. Such an act would violate certain principles of international law, including the principle of sovereignty, the principle of non-intervention and the political independence of other states.<sup>6</sup> It was asserted that regime change cannot be the objective of any military operation, unless specifically authorised by the UNSC.<sup>7</sup> Nonetheless, regime change might be a consequence of the application of other measures intended to protect civilian populations. It was concluded in this chapter that the use of force cannot be advanced by third states in an effort to support opposition groups on the ground. Nonetheless, opposition groups may benefit from the use of force, provided that the primary purpose behind such an action is the protection of civilians.

In general, this research has shown that there is common ground between IHL and R2P—i.e., the concept of civilian protection. This common ground allows for the concept to be utilised as an interpretive tool in order to better understand the obligations imposed on opposition groups with regard to civilian protection. Although it does not

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<sup>6</sup> G. Ulfstein & H. F. Christiansen, ‘The legality of NATO Bombing in Libya’ (2013) 62 *International and Comparative Law Quarterly* 159, at 169.

<sup>7</sup> O. Corten & V. Koutroulis, ‘the Illegality of Military Support to Rebels in the Libyan War: Aspects of *jus contra bellum* and *jus in bello*’ (2013) 18 *Journal of Conflicts & Security Law* 59, at 72.

possess a legal status as a concept, the R2P allows for further clarification regarding the meaning and scope of the obligations already in existence under IHL.

It is important to mention the words that Nathalie Herlemont Zoritchak made delivered as very firm recommendations to states, just two years before the crisis in Libya: ‘For the state, the responsibility to protect is primarily to demonstrate a real willingness to apply IHL, without any possible diplomatic exemption...’.<sup>8</sup> The same outcome should be applied to opposition groups as primary actors who are also responsible to implement IHL.

The actual willingness of parties to internal armed conflicts, specifically opposition groups, to comply with and apply IHL without exception is sufficient to assert that opposition groups have met their responsibility to protect under IHL. This research has clarified that this is the primary objective to be achieved in the effort to ensure better protections for civilians during times of internal armed conflict. The concept of R2P ought to be treated as a tool that contributes to the application of IHL for the purpose of civilian protection.<sup>9</sup> The problem is not in the law, the concept of civilian protection is well established under IHL and other branches of international law, as shown throughout the research.

The real challenge is how these legal rules could be interpreted in accordance with the primary objectives behind them, and more importantly, how the compliance with these legal rules by the members of the international community could be ensured. This what can be achieved by relaying on the concept of the R2P. Although it is not

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<sup>8</sup> See Nathalie Herlemont-Zoritchak, ‘Droit d’ingérence et droit humanitaire: les faux amis’, in *Revue Humanitaire, Enjeux, Pratiques, Débats*, 23 December 2009 cited in B. Pommier, ‘The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond’ (2011) 93 *International Review of the Red Cross* 1063, at 1080.

<sup>9</sup> See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, (n 1).

entirely legal concept, the R2P still could significantly contribute to the effective application of IHL. In fact, being mostly a political rather than legal idea or, as advanced in this project, soft law is an advantage. It provides the concept of the R2P with further flexibility and a wider scope as to its utilisation. It could be used as an effective mean to restrict the political will of the members of the international community. Furthermore, although it does not produce rights and obligations, being a form of soft law allows the R2P to interact with hard laws, such as IHL, IHRL and ICL. It may not only impact the interpretations of the relevant branches of international law, but it may also facilitate the emergence of new binding rules concerning the protection of civilians. Therefore, a better application of IHL would be achieved.

It should be noted that although this research may contribute to the clarification of the subject, it has also reflected the need for further elaboration. Despite the significant role that can be played by opposition groups in the realm of civilian protection within the context of internal armed conflicts, little attention has been given to the subject in the literature. Most of the published work as to the concept of the R2P was written by non-lawyers who intended to look at the topic from different perspectives. Further, the majority of efforts that have been made with respect to the implementation and development of the R2P have focused primarily on host states' responsibilities to protect; secondary focus has been placed on the subsidiary role of the international community in the protection of civilians.

In the context of internal armed conflicts, it is unclear how civilian populations can be effectively protected without the significant and fundamental involvement of opposition groups. It is recommended that additional efforts be made to further clarify the fundamental nature of the role of opposition groups in the protection of civilians. The reference to opposition groups as parties to internal armed conflicts was explicitly



made, for instance, in the second Additional Protocol; hence, it is not impossible to include opposition groups in an international document similar to the ICISS<sup>10</sup> or the World Summit in an effort to further elaborate upon the role that these groups could play in the protection of civilians.

As has been emphasised multiple times in this research, R2P is not law—it does not impose any legal obligations and therefore does not have the power to bind either states or non-state actors. The R2P is described as a political concept and, at best, as soft law; thus, it can be thought of as an interpretive lens.<sup>11</sup> Hence, it is recommended that the Libyan case be further analysed in order to determine the roots of the negative consequences. For instance, it is important to determine whether it was the concept of R2P itself or other factors, such as the capacity of the Libyan opposition groups to offer protection, that was ineffective. Such an evaluation should not be limited to armed groups on the ground; rather, it should also include the political organs that represent these groups internationally. More importantly, additional attention ought to be paid to the solidity of the link between the two organs that constitute opposition groups.

Due to space constraints, the scope of this research was limited to certain aspects related to the role of opposition groups in the protection of civilians. Hence, it is recommended that the concept of the R2P be utilised to further enhance the clarity and understanding of other aspects related to this topic. Furthermore, due to its comprehensive approach, the concept of the R2P can serve as a valid tool to explore other branches of international law, such as IHRL and ICL. Finally, it is strongly hoped that this thesis will contribute to the literature and inspire other scholars to further elaborate upon this topic.

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<sup>10</sup> See the International Commission on Intervention and State Sovereignty (ICIS), *Report on the Responsibility to Protect*, December 2001.

<sup>11</sup> See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, (n 1).

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