Hacettepe University Graduate School of Social Sciences
Department of Peace Studies

INTERVENTION BY INVITATION WITHIN THE RESPONSIBILITY TO PROTECT FRAMEWORK

Haseenah Huurieyah WAN ROSLI

Master's Thesis

Ankara, 2019

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ACCEPTANCE AND APPROVAL

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ABSTRACT

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The Responsibility to Protect (R2P) was introduced as a response to Kofi Annan's plea to resolve the paradox of illegal humanitarian interventions versus inaction by the international community in the face of atrocity crimes. By shifting the discourse from 'sovereignty as control' to 'sovereignty as responsibility', R2P places primary responsibility on states to protect their population from atrocity crimes and shifts this responsibility to the international community when the state is 'unable' or 'unwilling' to protect. However, after it was adopted by the United Nations General Assembly, R2P has not yet been a solution to ongoing humanitarian crises as evinced by the current cases mainly due to the political impasse at the United Nations Security Council. In this vein, this thesis explores the place of the 'intervention by invitation' (IvI) within the R2P framework as an aspect of prevention and/or timely action that can resolve the impasse. Building on state consent, the invited states assume the collective responsibility to protect if the UNSC fails to respond to the mass atrocity crimes. In view of this, the responsibility of the inviting and intervening states is intertwined in the three-pillar implementation strategy of R2P.

As part of its Pillar I responsibilities, the state may request for military assistance in case of inability to protect the population and trigger Pillar II that is international assistance. Pursuant to the triggering of the responsibility of the international community, the intervening states may uphold the international community's Pillar II responsibility through 'preventive deployment'. In the event that the state is manifestly failing to protect its population and there arises a need for decisive action, when the Security Council fails to adopt a decision, such as for the authorisation of all necessary measures up to and including the use of force, based on the existing and applicable consent, the invited interveners can undertake the use of force in a 'timely and decisive' manner under Pillar III. Accordingly, to consider situations where an intervention is to take place, this thesis

proposes a newly formulated test known as ‘effective population protection legitimacy’ (EPPL) in order to ensure its effective and right implementation. The applicability and feasibility of this test is analysed through the case of Yemen.

Keywords

Intervention by Invitation (IvI), state consent, Responsibility to Protect (R2P), use of force, atrocity prevention, Yemen.

ÖZET

Koruma sorumluluğu (R2P), Kofi Annan'ın vahşet suçları karşısında uluslararası toplumun eylemsizliği ile yasadışı insani müdahaleler arasındaki paradoksu çözme yönündeki savunmasına bir cevap olarak ileri sürülmüştür. R2P, 'kontrol olarak egemenlik' söylemini 'sorumluluk olarak egemenlik' şeklinde değiştirerek topraklarında yaşayan nüfusu vahşet suçlarından korumayı devletlerin birincil sorumluluğu olarak belirlemekte ve devletin 'koruyamadığı' veya bunu yapmaya 'isteksiz olduğu' durumlarda ise bu sorumluluğu uluslararası topluma yüklemektedir. Bununla birlikte, Birleşmiş Milletler Genel Kurulu (BMGK) tarafından kabul edildikten sonra, R2P, esas olarak Birleşmiş Milletler Güvenlik Konseyi'ndeki siyasi çıkmazdan dolayı mevcut vakaların da ortaya koymuş olduğu üzere devam eden insani krizlere henüz bir çözüm olmamıştır. Bu bağlamda, bu tez, 'davet ile müdahale'nin (IvI) R2P çerçevesindeki yerini, çıkmazı çözebilecek önleme ve/veya zamanında eylemin bir yönü olarak incelemektedir. Davet edilen devletler, devlet rızasına dayanarak BMGK'nin kitlesel vahşet suçlarına cevap vermemesi durumunda kolektif sorumluluğu üstlenirler. Bunu göz önünde bulundurarak, davet eden ve müdahale eden devletlerin sorumluluğu, R2P'nin üç sütunlu uygulama stratejisinde iç içe geçmiştir.

Sütun I sorumluluklarının bir parçası olarak, bir devlet vatandaşlarını koruyamadığı durumda askeri destek talep edebilir ve böylelikle Sütun II'yi harekete geçirir, yani uluslararası yardımdan faydalanır. Uluslararası toplumun sorumluluğunun harekete geçirilmesine uygun olarak, müdahale eden devletler uluslararası toplumun Dayanak II sorumluluğunu 'önleyici konuşlandırma' yoluyla yerine getirebilirler. Devletin, vatandaşlarını korumakta açıkça başarısız olduğu, Güvenlik Konseyi'nin, mevcut ve geçerli rızaya dayalı olarak güç kullanımı yetkisi de dahil olmak üzere gerekli tüm tedbirleri alamadığı ve kati eyleme ihtiyaç duyulduğu durumlarda, davet edilmiş olan müdahil Dayanak III kapsamında 'zamanında ve kati' bir biçimde güç kullanımını üstlenebilir. Buna göre, bir müdahalenin gerçekleşmesi beklenen durumları gözden geçirmek amacıyla, bu tez, etkili ve doğru uygulamayı sağlamak adına 'nüfusu etkili koruma meşruiyeti' (EPPL) şeklinde adlandırdığı yeni bir test önermektedir. Bu testin uygulanabilirliği ve elverişliliği Yemen vakası aracılığıyla incelenmektedir.

Anahtar Kelimeler

Davetle müdahale (IvI), devlet rızası, koruma sorumluluğu (R2P), güç kullanımı, vahşet önleme, Yemen.

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ABBREVIATIONS

DRC	Democratic Republic of Congo
EPPL	Effective Population Protection Legitimacy Test
FAAC	Framework of Analysis for Atrocity Crimes
FYR	Former Yugoslav Republic
GCC	Gulf Cooperation Council
HRW	Human Rights Watch
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IDI	Institut de droit International
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ISIS	Islamic State of Iraq and Syria
IvI	Intervention by Invitation
NIAC	Non-International Armed Conflict
P5	Permanent Five Members of the United Nations Security Council
PDRY	People's Democratic Republic of Yemen
PNPA	Peace and National Partnership Agreement
R2P	Responsibility to Protect
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Commission
UNOCI	United Nations Operation in Côte d'Ivoire
UNPREDEP	United Nations Preventive Deployment Force
ONUB	United Nations Operation in Burundi
UNSC	United Nations Security Council

UNSG	United Nations Secretary-General
US	United States
USSR	Union of Soviet Socialist Republics
WSOD	World Summit Outcome Document
YAR	Yemen Arab Republic

INTRODUCTION

This thesis places the concept of Intervention by Invitation (IvI) within the Responsibility to Protect (R2P) framework and focuses on the collective responsibility of the intervening states, which also constitute a part of the international community. In essence, R2P was introduced to alleviate the tension between illegal unilateral humanitarian interventions and inaction by the international community in the face of mass atrocity crimes as experienced in the case of Rwanda in the 1990s.

As a term, R2P was first coined in 2001 in the report entitled 'The Responsibility to Protect', published by the International Commission on Intervention and State Sovereignty (ICISS). The report was presented as a solution to the then United Nations Secretary-General (UNSG) Kofi Annan's critical plea for a panacea to 'gross and systemic violations of human rights that offend every precept of our common humanity' (ICISS, 2001a, p. vii). The paradigm shift reflected in the report of the ICISS from 'sovereignty as control' to 'sovereignty as responsibility' serves as the bedrock of the R2P concept, notwithstanding the critical amendments made from one key document to another. Pursuant to the ICISS report, a revisited version of R2P was unanimously adopted in the 2005 World Summit Outcome Document (WSOD) under the UN General Assembly (UNGA) incorporated with Paragraph 138 and 139 into the resolution. This UN version of R2P is now only confined to exigency situations—namely genocide, war crimes, ethnic cleansing and crimes against humanity (UNGA, 2005b). Thereafter, the former UNSG Ban Ki-Moon defined the responsibility to protect under three pillars in order 'to develop a strategy for the effective implementation of R2P without imposing any revisions on the principle' (Gözen Ercan, 2016, p. 66). This approach is formulated as follows: Pillar I appertains to the protection responsibilities of the state; Pillar II concerns international assistance and capacity building; and Pillar III aims for timely and decisive response (UNGA, 2009, p. 9).

The bulk of the literature on R2P addresses three striking dimensions of the concept: (i) R2P's conflation with the infamous doctrine of 'humanitarian intervention' (HI), (ii) R2P's purported status as an 'international norm': whether it is merely a political or a

moral norm or it has evolved into a legal norm, and (iii) the responsibility to react, which is seen as a legitimation of the use of force in the face of mass atrocity crimes. With regards to the first aspect, a group of scholars argue that these two concepts are substantially distinct where R2P is deemed to be much broader than HI taking into account that R2P is comprised of three primary responsibilities namely responsibilities to prevent, to react and to rebuild with a greater emphasis on the prevention dimension (Gözen Ercan, 2016; Pattison, 2010). On the other hand, the sceptic view contends that R2P is merely a resurrection of HI or as cynically asserted by Cunliffe that R2P is worse than HI in view of its effect on international community, wherein the former imposes a 'duty' whereas the latter merely gives a 'prerogative' to international community to intervene (Cunliffe, 2011). Further, Hehir (2010) draws an analogy between R2P and HI, stating that R2P is merely a 'Trojan horse' or 'old wine in new bottle' (p. 251) as it is used as a pretext by hegemonic states to intervene in weaker states in order to legitimize their political interests (Bellamy, 2005; Gözen Ercan, 2016; Stahn, 2007). In a similar vein, Pandiaraj (2016) also argues that the abuse of R2P in the Libyan crisis corroborates the assertions that R2P and HI are one and the same.

With respect to the second aspect, R2P advocates have characterized it as 'emerging legal norm' in view of UNGA's unanimous adoption of WSOD in 2005, as well as the UNSC Resolution 1973 on Libya (Peters, 2011). In the meanwhile, among others Gözen Ercan (2016) classifies it as 'international moral norm' wherein R2P sets a 'moral standard of appropriate behaviour for states and the international community' (p. 148). On the other hand, some critics regard it as a 'political catchword', as it is still a newly developed concept and in its tender years, it was too early to be regarded as 'emerging legal norm' (Stahn, 2007).

The third criticism addresses the use of coercive force by the international community; wherein the veto power of the five permanent UNSC members has been a source of heated debate in the academia as it effectively renders R2P ineffective (Hehir, 2010). This aspect also addresses the criticism on the potential misuse of R2P as evinced by the intervention in Libya that was couched in the language of R2P (Garwood-Gowers, 2013). This perceived legitimacy to militarily intervene in Libya in the pretext of R2P has led Chandler (2015) to ardently claim that 'R2P is dead'.

Another aspect of the literature on R2P concerns the paradigm shift on sovereignty where sceptics criticize it for 'dangerously undermining sovereignty' (Egerton, 2012, p. 77). In the meanwhile, others address the concern that it 'will become an instrument of abuse by the most powerful to others who worry that it will give the powerful an excuse to avoid international action' (Thakur & Weiss, 2009). However, R2P advocates perceive this shift as monumental since states are now accountable for any mass atrocity crimes committed within their territories thus they would no longer be untouchable on the grounds of state sovereignty and get off scot-free (Gözen Ercan, 2016; Thakur & Weiss, 2009).

Notwithstanding the rhetorical global political commitment by the international community to uphold R2P, the implementation seems to prove otherwise. In his first report on R2P, current UNSG António Guterres lamented: 'There is a gap between our stated commitment to the responsibility to protect and the daily reality confronted by populations exposed to the risk of genocide, war crimes, ethnic cleansing and crimes against humanity. To close that gap, we must ensure that the responsibility to protect is implemented in practice' (UNGA-SC, 2017). The disjuncture between state support for R2P and the reality is evident in the reports published[1] presenting the sharp rise in civilian deaths (particularly of women and children) while the international community remained aloof and stood by watching the four mass atrocity crimes perpetrated against them. As a consequence, there is a marked shift in the academic discourse of R2P post-Libyan intervention in addition to the recurrence of the inaction in Rwanda as manifested in Darfur, Sri Lanka, Syria and most recently in the Rohingya crisis. According to Hehir (2018), this stems from the political deadlock amongst the permanent members of the UNSC leading to inaction in the face of mass atrocity crimes. In this regard, Hehir (2018) uses a harsher tone to describe R2P by characterizing it as a 'hollow norm'.

In view of the international community's inaction to uphold R2P stemming from UNSC deadlocks, this thesis draws attention to an undermined aspect of R2P which would also help to circumvent such impasse. Hence, it focuses on the option of 'Intervention by Invitation' in view of the fact that it does not violate the prohibition on the use of force

[1] See Human Rights Watch (HRW), Amnesty International and International Crisis Group (ICG) for the statistics on upsurge in civilian deaths.

principle entrenched in Article 2(4) of the UN Charter (Gray, 2008; Nolte, 2010). As argued by Woocher (2012), state consent reconciles the dichotomy between prohibition on extraterritorial use of force and international community's responsibility to effectively respond to humanitarian crises. In a similar vein, since state consent does not violate the 'territorial and political independence of the state', a logical corollary that follows is that the 'intervening state' is not in breach of the non-intervention rule thereby rendering it to be within the limits of law (Hathaway et. al, 2013; Kenny & Butler, 2018; Lieblich, 2013). In this regard, the invited interveners may assume the responsibility of the international community and as such, they would assist states to meet their sovereign responsibilities when the latter are manifestly failing to protect their population from mass atrocity crimes. Since both frameworks are built on 'dual-actor involvement' proposition for effective implementation, this thesis maintains that their cardinal principles are thus working in tandem.

Notwithstanding the 'way out' of the catch-22 on the use of force, this novel framework should be implemented in accordance with IvI and the R2P frameworks. In the former, since the bulk of discussion addresses the issue on the legitimacy of government to invite external military assistance, this thesis proposes a new test labelled as 'effective protection population legitimacy' (EPPL) predicating on the 'protection principle'. As maintained by Lieblich (2013), this principle derives from the R2P framework when it was first introduced in the 2001 ICISS report. Accordingly, this novel test further augments the objective of this thesis in establishing a correlation between the two frameworks. In the meanwhile, it does not grant an automatic recourse to use force by the invited interveners if the situation on the ground does not require military assistance. Addressing the criticisms against the R2P, this thesis does not intend to pave a way for unauthorized interventions or reigniting the debate on the right to intervene. On the contrary, in order to render the application of R2P in IvI cases effective, it aims to find a correlation between the three-pillar approach as formulated by the former UNSG Ban Ki-moon in his 2009 Report with the cardinal principles of IvI based on the following three arguments: (i) states could fulfil their sovereign responsibility under Pillar I through state's request for military intervention; (ii) invited interveners could satisfy responsibility under Pillar II through preventive deployment; and lastly (iii) in the event

that the state manifestly fails to protect its populations in addition to a political deadlock in the UNSC, the invited interveners would be authorized to use force in a timely and decisive manner to protect populations from mass atrocity crimes .

It is important to note that the use of force by invited interveners is subject to a set of parameters as established in the 2004 Report of the Secretary-General's High-level Panel on Threats, Challenges and Change. These guidelines are essential to ensure that they do not exceed their mandate and that the intervention is effectively carried out. In this vein, different from the existing literature, this thesis brings IvI into the context of R2P, and Yemen into the focus as an exemplary case to demonstrate the application of this extended framework. In this regard, the attempt to seek for a feasible temporary recourse aims to demonstrate that 'R2P is not dead' and that there is still room for it to develop in the academia.

However, it is pertinent to note that this thesis is circumscribed with regards to the legality of IvI within the purview of international law. The use of force by invited interveners is still disputable. One the one hand, the restrictionist view asserts that IvI is illegal as it does not explicitly fall under the exceptions to prohibition on use of force namely self-defence as defined under UN Charter Article 51 and UNSC authorization to use force under Article 42 (Nolte, 2010; Fox, 2015). On the other hand, counter-restrictionist view contends that IvI can be considered as legal taking into account the force used is not against the territorial integrity of state, but instead at the behest of the inviting state in addition to the rule that consent precludes wrongfulness—i.e. contravenes the prohibition on use of force (Nicaragua v. USA, 1986). Embracing the latter approach, this thesis will not deal with the legality question and will proceed on the basis of the assumption that IvI is legal as long as it is based on the consent of the legitimate authorities of the state in question.

In this vein, the organization of the thesis will be as follows. Chapter 1 begins with a detailed conceptual background of R2P by extracting its key principles vis-à-vis the pivotal R2P documents. After the ICISS Report, it looks into the adoption of Paragraphs 138 and 139 in the 2005 WSOD and the 2009 UNSG report. Accordingly, it examines the role of state consent within the R2P framework and extends the three-pillar strategy

to the IvI framework. To this end, it provides a definition of and narrative literature review on both concepts. The narrative form that intends to 'draw together conceptual and theoretical ideas from a range of literature' will highlight the cardinal principles underpinning R2P and IvI. Accordingly, a correlation between these two concepts, which is deemed to be a gap in the discourse on R2P will be established (Kiteley & Stogdon, 2014).

Thereafter, Chapter 2 turns to the scope and assessment criteria of IvI wherein the bulk of discussion focuses on the assessment of governmental legitimacy within R2P framework. It also addresses the issues on assessment of consent and scope of application for IvI. The final section examines the parameters on the use of force as stipulated in the ICISS and 2004 UNSG reports and proposes a set of guidelines befitting the thesis framework. To achieve this, the discussion will adopt the content analysis method to generate a new framework premised on R2P and IvI concepts (Lune & Berg, 2017, p. 2). Within this discourse, it will also attempt to answer the main research question of 'how does the concept of IvI fit within the R2P Framework'?

In order to test the feasibility of this extended framework, Chapter 3 adopts the instrumental case-study method. As maintained by Lune and Berg (2017), since the instrumental case is meant to further clarify the principal issue in the research, the Yemeni crisis is studied in view of the circumstances pointing to the implementation of IvI within the R2P framework (p. 175). This chapter begins with a brief overview on the history and the key actors involved in the crisis. It then proceeds with an evaluation of the statements couched in the language of R2P and the IvI issued. Thereafter, it assesses the legitimacy of the government based on the test proposed in this thesis, which is named as 'effective population protection legitimacy test' in order to ensure that the inviting government has the right to issue an invitation within the limits of law. Upon establishing the legitimacy, the final part examines the implementation of the use of force vis-à-vis the R2P guidelines as established under the 2004 UNSG report.

CHAPTER 1

BUILDING BLOCKS OF THE RESPONSIBILITY TO PROTECT AND INTERVENTION BY INVITATION

This chapter expounds on the conceptual framework of R2P and IvI. It begins with a focus on R2P by tracing its process from the original propositions as established in the ICISS to its adoption under the roof of the UN. In doing so, key principles that are pertinent to the concept of IvI will be analysed. Pursuant to this, it embarks on an analysis of the underpinning principles of IvI — prohibition of the use of force and non-intervention. Given that IvI is grounded in state consent, it seeks to clarify and situate its role within the R2P framework. Thereafter, the final section attempts to extend the three-pillar strategy devised by the former UNSG Ban Ki-moon to the IvI framework. This is essential to ensure that both the state and the invited interveners discharge their responsibilities under the R2P framework accordingly.

1.1. CONCEPTUAL FRAMEWORK OF R2P: THE ICISS REPORT

State sovereignty has long been perceived as 'the essential building block' of not only the nation-state but also of the UN as evinced by Article 2(1) of the UN Charter (Cohen & Deng, 2016). According to Deng (2010), the notion of sovereignty has gone through four distinct phases with the initial phase traced back to the modern nation-state system. This system was derived from the Treaty of Westphalia in which state sovereignty was deemed absolute. Subsequently, the second phase came with the end of World War II in 1945 wherein the notion was confronted with democratic principles and an emerging concept of accountability—subjecting states to international scrutiny. At this phase, notwithstanding the noble intention of the international community to take action, their hands were tied owing to the principle of non-intervention as enshrined in Article 2(7) of the Charter. Following the post-Cold War era, in an attempt to preserve its initial notion despite the increased advocacy for human rights over sovereignty, the third phase revealed that vulnerable states began to retaliate against the then novel concept of

humanitarian intervention. In view of the perceived incompatibility between the principle of state sovereignty and respect for human rights, this phase sought to refine the notion by reconciling 'state sovereignty over its internal affairs with its responsibility for the welfare of its citizens' (Deng, 2010, pp. 355-356). Thereafter, the fourth phase reveals that the issue of internal displacement that was at the height of the fourth phase has spawned a novel understanding on state sovereignty based on sovereign responsibility. In addressing this critical issue, Cohen and Deng (2016) argue that 'states have primary responsibility to meet their obligations to their population, and if they are unable to do so, they are expected to request outside support' (p. 82). In this vein, R2P takes up on such re-characterization of sovereignty from 'sovereignty as control' to 'sovereignty as responsibility'. This novel understanding rests on the shift of the state's unfettered prerogative over its people and frontiers to circumscribing the prerogative by attaching duties and obligations that the states owe to its population (ICISS, 2001a, p. 13).

In the meanwhile, the ICISS also adopts a two-level responsibility approach albeit the restrictions placed on the shift of responsibility from state(s) to that of the international community. Deng asserts that the responsibility assumed by the international community serves as a means for nations to hold their governments accountable, taking into account that 'only the international community … has the leverage and clout to persuade national governments and other concerned actors to discharge their responsibilities in this regard, or otherwise face the consequences of the vacuum left by irresponsible or unresponsive sovereignty' (Deng, 2010, p. 370). In view of this, the ICISS Report outlines that the international community is expected to assume its responsibility to protect in cases (i) 'where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure', and (ii) 'the state in question is unwilling or unable to halt or avert it' (ICISS, 2001a, p. xi). Pursuant to this, the following section will reveal that the shift of actors from states to international community draws a similarity to the IvI framework—from the host state to the invited interveners. Building on this intersection, the basis of both frameworks rests on a dual-actor involvement, which will be extensively discussed below.

In light of the two-level responsibility, there are three significant aspects of state responsibility established in the ICISS report. The first pertains to the protection of the

state's population and safeguarding of its welfare. Secondly, it entails dual responsibility: internally towards the population and externally towards the international community. Thirdly, it creates accountability for acts of commission and omission (ICISS, 2001a, p. 13). In this regard, three main responsibilities have been defined. These are the responsibilities to prevent, to react and to rebuild. The crux of the tripartite responsibility lies in the responsibility to prevent as clearly indicated in the ICISS: 'Prevention is the single most important dimension of the responsibility to protect' (ICISS, 2001a, p. xi). Further, the ICISS report suggests that preventive measures have to be exhausted before intervention is even contemplated (ICISS, 2001a, p. 24). In a similar vein, invited interveners are responsible to first exhaust the use of force for preventive purposes before resorting to military intervention. It is also important to note that in contrast to the subsequent UNSG reports, the discussion on the preventive aspect in the ICISS report alludes 'to the prevention of violent conflict, rather than the prevention of mass atrocities per se', which later came to be referred to as 'atrocity prevention' (p. 24). In this regard, this thesis will situate the discussion on IvI primarily under Pillar II considering it as part of the 'atrocity prevention' discourse.

The ICISS report further identifies the impediments in strengthening preventive capacity, for instance lack of political commitment both from the targeted state and the international community, as well as lack of coordination in preventive efforts owing to different interests and shortage of *ad hoc* funds for unrestricted development. However, according to Sharma and Welsh (2015), 'in the years following the publication of the ICISS recommendations, some of the very challenges referred to by the commissioners facilitated the side-lining of the preventive component of R2P' (p. 3). In light of this, since the interest of interveners would be primarily based on preventing spill over of the conflict and maintaining regional and global stability, there will be sufficient political will to re-direct the focus back to the preventive aspect of R2P.

With regards to responsibility to react, the preventive measures are supplanted only when one of the following circumstances take place: (i) preventive measures fail to resolve or contain the situation, or (ii) a state is unable or unwilling to redress the situation (ICISS, 2001a, p. 29). However, it should be noted that even if one of these two situations were to take place, it does not give an automatic right to state(s) or the international community

to adopt intrusive measures as the word ‘may’ implies that implementation is still subject to facts on the ground. As laid down under the responsibility to prevent, the ICISS (2001a) reminds that ‘less intrusive and coercive measures should always be considered before more coercive and intrusive ones are applied’ (p. 29). Accordingly, regarding the most resisted aspect of R2P, the Commission puts forward the following question: ‘Where should we draw the line in determining when military intervention, is *prima facie* defensible’? (ICISS, 2001a, p. 31). In response, the Commission asserts that ‘cases of violence which so genuinely shock the conscience of mankind,’ or which present such a clear and present danger to international security, that they require coercive military intervention’ are two instances triggering military intervention (p. 31). However, in the following section, it will be revealed that the scope has been restricted pursuant to the adoption of WSOD in 2005. Besides, the Commission also provides a thorough elaboration on the ‘criteria threshold’ prior to military action, which will be discussed in the following chapter under the section of parameters on the use of force.

Turning to the third fundamental element of R2P, responsibility to rebuild is undertaken after military intervention has been carried out in order to establish ‘a durable peace, and promoting good governance and sustainable development’ (ICISS, 2001a, p. 39). This responsibility builds on the collaboration between the international community and local authorities, particularly on the key role of interveners in ensuring that the conditions of post-intervention are conducive for a sustainable reconstruction. The ICISS (2001a) notes that rebuilding is integral to R2P as a solid foundation laid for development is essential to prevent the recurrence of conflict. Furthermore, the Commission analyses the main obstacles in implementing this responsibility with regards to the three key areas of security, justice and economic development (pp. 40-43). However, given that this responsibility is subsequently dropped in the WSOD report, an analysis on this vis-à-vis the IvI framework will not be provided.

It is noteworthy that notwithstanding the Commissioners’ attempt to shift the language of intervention from the contentious idea of the ‘right to intervene’ to the ‘responsibility to protect’, the initial response to R2P was not widely well received. This is due to the attention drawn to the 9/11 and the ‘war on terror’ discourse in addition to the dissent of

member states on the ‘responsibility to react’ component that was considered to be legitimizing ‘humanitarian intervention’ (Gözen Ercan, 2016). Despite these hurdles, as can be gleaned from the following section, former UNSG Kofi Annan persisted with it and enabled R2P’s institutionalization within the UN framework.

1.2. R2P UNDER THE ROOF OF THE UNITED NATIONS

Pursuant to the ICISS report, the attempts to institutionalize R2P were further advanced under the roof of the UN beginning with two reports published by the former UNSG Annan in 2004 and 2005. A major breakthrough in the R2P framework came with UNSC’s unanimous adoption of the 2005 WSOD. Following Annan, the former UNSG Ban Ki-moon devised a three-pillar strategy in his 2009 UNSG report based on the refined version of R2P. This three-pillar approach later formed the basis for a further discussion on R2P in the subsequent UNSG reports.

1.2.1. R2P in Reports Prior to the World Summit Outcome Document

In 2004, Annan first attempted to place R2P within the UN framework by introducing it in Part 3 of the ‘Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change’ entitled ‘A More Secure World: our shared responsibility’. Part 3 of the report dealt with ‘Collective Security and the Use of Force’, wherein it focused on establishing guidelines prior to the use of force. In this report, the Secretary-General strictly reminds that ‘the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities…, which can properly be considered a threat to international security and as such provoke action by the Security Council’ (UNGA, 2004, p. 56). Whilst noting a few cases of humanitarian disasters, Annan mentions that states owe responsibilities to their population and that the international community has a responsibility to protect populations suffering from ‘avoidable catastrophe’ (UNGA, 2004, p. 56).

Annan further underscores that although prevention is emphasized, the UNSC can authorize the use of force under Chapter VII as a last resort ‘in the event of genocide and

other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent' (UNGA, 2004, p. 57). In this report, prior to the advancement of the R2P concept, he points out the contradictions of the UN Charter; despite its affirmation to protect basic human rights, there appears to be lack of implementation by the UNSC due to the fear of contravening principle of non-intervention in the event that any action is taken for humanitarian purposes (UNGA, 2004, pp. 65-66). Building on this, in view of the shift towards 'sovereignty as responsibility', he stresses that the crux of R2P lies in the responsibility of states and the international community to protect, not of states' right to intervene. For an effective implementation of R2P, he reiterates the three responsibilities as established in the ICISS with a particular emphasis on the legitimacy on the use of force. In addressing this issue, he proposes six criteria prior to the use of force, similar to those established by the ICISS. Therefore, for a better understanding, this aspect is discussed in the following chapter under the section 'parameters on the use of force'.

Subsequent to the 2004 UNSG report, Annan continued his efforts to endorse R2P in his 2005 report entitled 'Report on UN Reform: In Larger Freedom'. In this report, Annan underscores the need to 'move from an era of legislation to an era of implementation' in order to ensure that state perpetrators are held accountable for failing to protect population from mass atrocity crimes (UNGA, 2005a, p. 35). Annan further emphasises that the primary responsibility lies in the state and that it is only shifted to the international community as part of the 'collective responsibility' in the event of inability or unwillingness to protect (UNGA, 2005a, p. 35). As noted by Gözen Ercan (2016), the criteria for intervention were done away with in this report in order to align it with the initial conceptualisation of R2P where the emphasis lies with prevention (p. 62). Such emphasis is further pursued in the WSOD.

1.2.2. World Summit Outcome Document

On 24 October 2005, the UNGA members unanimously adopted the 'World Summit Outcome Document'. This is considered as a watershed for R2P taking into account that

it is the first 'endorsement of R2P within the framework of the UN' (Gözen Ercan, 2016, p. 62). Under the section entitled 'Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity', R2P is succinctly summarized in the Paragraphs 138 and 139, and a reference is also made to it under Paragraph 140. By virtue of Paragraph 138, it is established that:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability (UNGA, 2005b).

In comparison to the ICISS report, WSOD has confined the scope of mass atrocity crimes to only four, which are often referred to as 'mass atrocity crimes' for reasons of brevity. According to Gözen Ercan (2016), the narrowed scope is to ensure that R2P is 'less ambiguous and in the meanwhile, less flexible…. [and] the change in the limits of R2P can be seen as an expected outcome of institutionalisation in a large venue where consensus cannot be achieved without compromise' (p. 64). In addition, the state's responsibility is extended so as to encompass the incitement of mass atrocity crimes as well, and in comparison to the ICISS report, it appears that WSOD is more concise considering that the responsibility prescribed is within the confines of international criminal law. In brief, WSOD still retains the principle where the primary responsibility to protect populations from the mass atrocity crimes lies with the state. On the part of the international community, its responsibility is further defined in Paragraph 139 as follows:

> The international community, *through the United Nations*, also *has the responsibility* to use appropriate diplomatic, humanitarian and other *peaceful means*, in accordance with *Chapters VI and VIII* of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are *prepared* to take collective action, in a timely and decisive manner, *through the Security Council*, in accordance with the Charter, *including Chapter VII*, on a *case-by-case basis* and in cooperation with relevant regional organizations as appropriate, should *peaceful means be inadequate* and national authorities are *manifestly failing* to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (UNGA, 2005b).

As the Paragraph suggests, the responsibility of the international community concerns both prevention and response. In the former, similar to the state's responsibility, the international community has the responsibility to prevent mass atrocity crimes in two situations: (i) when states fail to uphold their responsibility, or (ii) when they require assistance from outside. As noted by Bellamy (2006), compared to the version of the ICISS, the WSOD sets a higher yardstick for the 'responsibility to react' to take place, as it has to be proven that states are not merely 'unable or unwilling' but 'manifestly failing' to protect the population. As noted by Gözen Ercan (2016), the criteria for legitimacy is done away with and instead supplanted with 'case-by-case' evaluation criterion owing to the insistence of China and the United States (US) (p. 63). Further, the 'right authority' criterion has been restricted only to the UNSC without any possible referral to the UNGA in cases of deadlock and the proposal on the restraint on the use of veto powers of the Permanent Five (P5) is also dropped (UNGA, 2005b).

More importantly, the softer tone adopted in WSOD wherein the international community is 'prepared to take collective action' suggests that member states do not intend to impose a legal duty but instead attempts to establish 'a political commitment' on the part of international community (Gözen Ercan, 2016, p. 64). In view of Paragraphs 138 and 139, Bellamy (2010) notes that in comparison to the ICISS report, the watered-down version of R2P in WSOD—to which Weiss (2006) refers to as 'R2P-lite'—ends up 'emphasizing international assistance to states (pillar two), downplaying the role of armed intervention, and rejecting criteria to guide decision-making on the use of force and the prospect of intervention not authorized by the UN Security Council' (p.143). Despite these criticisms, the unanimous adoption of WSOD has paved the way for the UNSG to further efforts on the implementation of R2P. In this vein, the 2009 report is the first comprehensive report to set out the R2P framework within the UN machinery, which also postulated the three-pillar strategy in accordance with the unanimous adoption of R2P in the 2005 WSOD (see Gözen Ercan, 2016, p. 66). This report was followed by reports of the UNSG on the implementation of R2P on a yearly basis.

1.2.3. The UN Secretary-General's 2009 Report on R2P

Tracing the evolution of R2P with reference to the UNSG reports, the monumental 2009 UNSG report sets the foundation for the operationalization of R2P from a mere concept to an effective policy. Ban postulated a three-pillar strategy, adopting a 'narrow but deep approach' (Bellamy, 2015, p. 45). In this regard, it adopts a narrow approach given that mass atrocity crimes are limited to the four crimes as established under Paragraphs 138 and 139 of WSOD. On the other hand, the implementation is 'deep' since the strategy is to employ all prevention and protection instruments available to all actors at the national and international levels (UNGA, 2009, p.8).

In this vein, Ban establishes the three pillars of R2P as follows: The primary responsibility lies with the state (Pillar I). This is followed by and/or supplemented with the commitment of the international community to render assistance to states in fulfilling their responsibilities (Pillar II). Finally, Pillar III focuses on the international community's timely and decisive response when a state 'is manifestly failing to provide such protection' (UNGA, 2009, p. 9). Ban underscores that this novel strategy prioritizes the prevention aspect and is only supplanted with 'early and flexible response' befitting to the specific circumstances of each conflict if the former falls through. Further, Ban also highlights that these pillars are not subject to chronological sequencing and they have equal bearings on implementation to the extent that the entire edifice of R2P would collapse if they were not equally strong (UNGA, 2009, p. 9). In light of this, a detailed analysis on the three pillars is integral for their extension to the IvI framework.

Pillar I places the primary responsibility on the state to protect its population from the incitement and/or commitment of the four mass atrocity crimes. This pillar is deemed to be the bedrock of R2P with the aim of establishing responsible sovereignty. The recommendations outlined are divided into two levels: (i) within internal workings of state (the state level)—i.e. engaging and facilitating local actors—and (ii) extending to the international platform—i.e. becoming parties to human rights instruments and upholding the obligations flowing from these treaties.

Pillar II is concerned with the commitment of the international community to assist states with capacity-building to protect their people from the four mass atrocity crimes (including their incitement). Additionally, their responsibility also entails extending prompt assistance to perilous states that are deemed to be on the verge of conflicts breaking up within their territories. Ban also points out that Pillar II plays a crucial role in a situation where 'national political leadership is weak, divided or uncertain about how to proceed, lacks the capacity to protect its population effectively, or faces an armed opposition that is threatening or committing crimes and violations relating to the responsibility to protect' (UNGA, 2009, p. 15) as opposed to the situation where the state is resolute in commission of mass atrocity crimes in which Pillar III is considered to be more appropriate to address the crisis. It is noteworthy that the use of force is affirmed to be a measure of last resort. Hence, it can be employed for non-coercive purposes, i.e. preventive or peacekeeping deployment, or in more coercive ways, in cases where international military assistance is required to respond to mass atrocity crimes being committed.

When a state is manifestly failing to protect its population, Pillar III— where the international community is required to take 'timely and decisive response' to prevent and halt mass atrocity crimes comes into operation. The measures falling under Pillar III are comprised of pacific means under Chapter VI, and coercive measures enlisted under Chapter VII, which can be simultaneously undertaken with regional arrangements under Chapter VIII (UNGA, 2009, p. 9). Pillar III allows the international community to pursue humanitarian intervention only upon the UNSC's authorization (Gözen Ercan, 2016, p. 67). In view of the responsibilities of the UN to effectively implement Pillar III, the Secretary-General is obligated to inform both the UNSC and the UNGA on 'what it needs to know, not what it wants to hear' (UNGA, 2009, p. 26) in addition to urging the P5 to refrain from employing veto in cases of manifest failure (UNGA, 2009, p. 27). As per Gözen Ercan's (2016) analysis, the suggestion for the voluntary restraint on veto under the roof of the UN is highlighted again five years after its first mention in Annan's 2004 report (p. 67). In the meanwhile, the Secretary-General also suggests reinstating the criteria prior to the use of force as previously suggested by the ICISS to ensure effective and consistent implementation of R2P (UNGA, 2009, p. 27).

Despite Ban's attempt to effectively implement R2P based on the three-pillar strategy, the Global South have raised concerns on the third pillar, particularly on the possible abuses by hegemonic states driven by national interests to legitimize unilateral intervention (Gözen Ercan, 2016, p. 70). Therefore, in an attempt to subdue these concerns, Ban mainly focuses on the preventive aspect of R2P in the subsequent reports. Accordingly, in the years that followed, the main themes of the R2P specific reports of the UNSG consisted of 'early warning, assessment, and R2P'; 'regional and sub-regional arrangements'; 'timely and decisive response'; 'state responsibility and prevention'; 'international assistance and R2P'; 'a vital and enduring commitment'; 'mobilizing collective action'; 'accountability for prevention' and 'from early warning to early action'. Hence, it is possible to observe that under the former and current UNSGs, the primary focus is placed on the preventive measures of R2P both at the level of individual states and the international community.

Based on this overview of the building blocks of R2P, the subsequent sections introduce the concept of IvI and analyse the role of state consent within the R2P framework. To this end, a general framework of IvI is provided by examining the established norms of the prohibition of the use of force and the principle of non-intervention in the internal affairs of states.

1.3. INTERVENTION BY INVITATION WITHIN THE R2P FRAMEWORK

The concept of IvI is not established based on a set of codified rules laid down in the primary sources of international law (Byrne 2016; Wippman 1996) but its origins lie in the indirect implications of well-established principles such as the prohibition on the use of force, sovereign equality and non-intervention. Thus, it should not come as a surprise that this concept is built on different modalities as it has evolved through different eras with its point of origin in the belligerency doctrine to effective control doctrine and to date the protection legitimacy doctrine (Lieblich, 2013).

In view of this, the definition of IvI is not rooted in a single authoritative document but is extracted from a myriad of academic works that have attempted to define it in accordance

with the major features of IvI. As a starting point, in his seminal work on IvI, Nolte (2010) defines it as 'military intervention by foreign troops in an internal armed conflict at the invitation of the government of the State concerned' (para. 1). This definition is similar to Lieblich's (2013), in which he defines 'consensual intervention' as every forcible intervention—unilateral or multilateral—in an internal armed conflict, undertaken in practice, in part or in whole, for the benefit of one of the parties, regarding which genuine consent can be inferred, whether explicitly or implicitly' (pp. 15-16). Notwithstanding the distinction made by Lieblich (2013) with regards to IvI and 'consensual intervention' paradigms, for the purposes of this thesis, these two terms will be used interchangeably. Taking a step further, according to Institut de droit International (hereinafter referred to as IDI), the term IvI is a 'contradiction in se', since intervention generally denotes an element of coercion or 'dictatorial interference' as suggested by Jennings and Watts (IDI, 2009, p. 372). Therefore, as proposed in Resolution 1975, it is better to adopt the term 'military assistance on request' as the element of 'coercion' is done away with (p. 374). Notwithstanding this criticism, as far as this thesis is concerned, this is merely a matter of term characterization, which eventually leads to the same concept of IvI. Thus, for the sake of terminological consistency, the term 'IvI' will be adopted with reference to the broad definition as provided by Nolte (2010).

1.3.1. Prohibition on the Use of Force vis-à-vis IvI and R2P

IvI rests on three interlinked and well-established norms of international law—namely (i) the prohibition of the threat and use of force; (ii) the principle of non-intervention that is linked with principle of sovereign equality; and (iii) the principle of equal rights and self-determination of peoples (Wippman, 1996; Doswald-Beck, 1986; Gray, 2008; Fox, 2015). With reference to the prohibition on the use of force, Article 2(4) of UN Charter sets down a blanket prohibition wherein it declares that states are prohibited from using force 'against territorial integrity or political independence of any state'. Notwithstanding the blanket prohibition, it is still subject to two limited exceptions as established under the framework of the UN Charter. The two exceptions are Article 42— which refers to the authorization of the UNSC as part of the collective security understanding and Article

51—inherent right of self-defence, which can be carried out individually or collectively (UN, 1945).

In view of Article 42, the current R2P framework is in line with this legal exception since the UNSC is given the sole authority to use force in a timely and decisive manner when confronted with mass atrocity crimes. In comparison with the ICISS report, the 'right authority' proposal —where the UNGA under the 'Uniting for Peace' procedure acts upon in place of the UNSC in the event of political impasse— was done away with to ensure that any issue stemming from contravention of this prohibition does not arise in the future. Notwithstanding the clear wording of Paragraph 139, Orford (2011) argues that R2P has shifted international law on the use of force 'by providing legal authorization for certain kinds of activities' (p. 25). Based on this argument, Orford seems to suggest that the use of force for R2P purposes falls beyond the permissible scope under Chapter VII, thereby infringing prohibition on use of force. Contrary to her contention, given that the UNSC is obligated to determine 'existence of any threat to the peace' (UN, 1945) prior to its authorization to use force, any commission of mass atrocity crimes is regarded as a threat to peace since the overspill of mass atrocity crimes could cause not only regional but also global instability (Pandiaraj, 2016). In this regard, the force used by the UNSC to either prevent or halt the commission of mass atrocity crimes still falls within the permissible scope of the legal exception under Chapter VII of the UN Charter.

Apart from the legal exceptions, another exception[2] to the use of force (albeit its contested status) is a concept known as 'intervention by invitation'. A logical corollary flowing from Article 2(4) is that the use of force is regarded as lawful provided that it does not contravene the 'territorial integrity or political independence' of states (Perkins, 1986). As such, the force used in this regard is considered as a 'manifestation of that state's agency and political independence' (Byrne, 2016, p. 99).

[2] Some scholars contend that the force used in IvI is not an exception to Article 2(4) as the principle exclusively addresses the issue of coercive force. Thus, it falls outside the realm of prohibition as the 'invitation' issued is to support and strengthen the 'territorial integrity or political independence of the state' (Le Mon, 2003; Wippman, 1996).

Based on this line of reasoning, consent to use force in the territory of host-state therefore offsets the prohibition (Hathaway et.al, 2013; Kenny & Butler, 2018; Lieblich, 2013; Mon, 2003), as it does not undermine the two qualifications set out above. To further substantiate, scholars argue that the prohibition on the use of force was formulated to circumscribe the use of force at the inter-state level rather than to impose restriction within the domestic jurisdiction of state. As such, it enables states to invite external forces to use force within its own territory with the aim of resolving internal conflicts (Fox, 2015; Gray, 2008, p. 67). In other words, as per Bannelier's (2013) assertion, Article 2(4) is inoperative in cases of IvI 'because there is no use of force of one state against another, but two states co-operating together within an internal strife' (p. 860) Pursuant to this, it is logical to conclude that this prohibition does not apply in cases of internal strife and therefore, IvI does not violate Article 2(4) of the UN Charter.

In an attempt to resolve the legal ambiguity of IvI, Lieblich (2013) lists four sources to support the deduction made from Article 2(4): (i) Article 3(e) of the Definition of Aggression; (ii) Article 8bis of the Rome Statue of the International Criminal Court; (iii) Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles); and (iv) Draft Articles on Responsibility of International Organizations. Pursuant to the first two sources, the following definition is first set out in Article 3(e) followed by its adoption as one of the listed crimes of aggression in Article 8bis : '[the] use of armed forces of one State which are within the territory of another state with the agreement of the receiving State, in contravention of the conditions provided for in the agreement …' (Rome Statute; UNGA Res. 3314). Based on this definition, Lieblich (2013) argues that if the use of force is carried out in conformity with the covenant of the 'receiving state', the intervention is therefore excluded from the definition of 'aggression' and deemed 'lawful'. To further substantiate such deduction, Article 20 of Draft Articles stipulates that a valid consent precludes wrongfulness of an act by a state vis-à-vis the consenting state (UN, 2001). Therefore, force that is used in the territory of another state is generally prohibited by virtue of Article 2(4) but in this set of circumstances the act is thus precluded from wrongfulness on the ground that consent was issued by the targeted state. In the same vein, the next section reveals that the host state consent also relaxes the principle of non-intervention.

1.3.2. From Prohibition of Intervention to Consensual Intervention

Several attempts have been made to define intervention, where some have equated it with the term ‘interference’ whilst others strived to situate it within its ‘essence’ of coercion and imposition of sovereign will onto another state (Vincent, 1971). Corresponding to this, Vincent (1971) formulates an approximate definition of intervention as an ‘ activity undertaken by a state, a group within a state, a group of states or an international organization which interferes coercively in the domestic affairs of another state’ (p. 13). In addition, as Jennings and Watts (1997) suggests, intervention is divided into two areas of internal and external affairs of states wherein the former concerns the domestic matters whereas the latter deals with external relations with other states. Prior to making a case for consensual intervention, it is thus appropriate to first analyse the framework of ‘prohibited intervention’.

According to Jennings and Watts (1997), the principle of non-intervention is built on interference that is dictatorial, as opposed to interference per se. The latter type of interference is therefore impliedly permissible, such as for instance, military assistance that is given to another state to repress a rebellion (as cited in Doswald-Beck, 1986, p. 191). As a starting point, the principle of non-intervention is evidently established as part of customary international law (Doswald-Beck, 1986, p. 208) and augmented by Article 2(7) of the UN Charter wherein the UN is not permitted to intervene in matters that are within the domestic jurisdiction of states (UN, 1945).

Furthermore, this issue has been dealt with by the UNGA in two prominent declarations. The first is the ‘UN Declaration on Non-Intervention’ which asserts that ‘No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any State’ (UN, 1965). The second is the ‘UN Declaration on Friendly Relations’, which establishes it as a duty of states to ‘refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State’ (UN, 1970). Accordingly, as clearly stated in the 1970 Declaration, as well as the Nicaragua case of the ICJ, the essence of the ‘prohibition intervention’ rests on the element of ‘coercion’ in which the ‘targeted state’ is deprived of ‘the possibility to decide freely on a matter within its sovereign discretion’ (Talmon, 2013, p. 248).

In view of the legal substantiation in support of the non-intervention rule, Fox (2015) suggests that this principle is a relative concept and that the prohibition only applies depending on the type of the intervention that is carried out. In an attempt to determine the acts constituting unlawful interventions, scholars have linked this rule to the principle of 'sovereign equality' wherein any intervention that is in breach of this principle leads to a contravention of the non-intervention norm. In support of this assertion, Shaw (2005) maintains that this principle is impliedly derived from the principle of 'sovereign equality' as entrenched in Article 2(1) of the UN Charter. The premise is that all states are deemed equal to each other at the international platform therefore states are prohibited from interfering in the domestic affairs of another sovereign state. Shaw (2005) also notes that these two principles are complementary to each other as reflected in the 'Corfu Channel' case where the ICJ asserts that 'between independent states, respect for territorial sovereignty is an essential foundation of international relations' (UK v. Albania, 1949, p. 35).

Therefore, turning back to the issue of 'acts constituting unlawful intervention', Talmon (2013) posits that the act of political recognition of opposition per se does not constitute unlawful intervention, as it does not violate state sovereignty whereas acts of material support to the opposition with the objective of overthrowing the incumbent government is deemed unlawful. Further, the ICJ in the Nicaragua case observes that non-intervention rule applies 'in matters in which each State is permitted, by the principle of state sovereignty, to decide freely ... intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones' (Nicaragua v. USA, 1986). Accordingly, examples of such choices would be in 'political, economic, social and cultural system, and the formulation of foreign policy' (Nicaragua v. USA, 1986).

Notwithstanding the principle of non-intervention, similar to the exceptions to the prohibition of the use of force, there are several near-unanimous exceptions to this norm. These are the inherent right of self-defence and UNSC authorization as enshrined in Chapter VII of the UN Charter, as well as IvI in which element of coercion is dispensed with (Fox, 2015, p. 818). The concept of IvI has witnessed a discernible shift; from reluctance to acquiescence in the intervention to overtly implementing the doctrine by justifying the intervention as lawful within international law paradigm (Kenny & Butler,

2018). As per Fox's (2015) assertion, the leading case that relaxes the rigid norm of non-intervention traces back to the obiter in Nicaragua judgment where the court observes that 'it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is *already allowable at the request of the government of a state*, were also to be allowed at the request of the opposition' (Nicaragua v. US, 1986, p. 5). This particular passage suggests that the application of non-intervention yields to cases where incumbent governments consent to external intervention.

As maintained by Fox (2015), the exclusive right given to incumbent governments to invite external forces into their territory does not violate the 'territorial and political independence of the state' and conversely if this right is exercised by opposition groups, the foreign intervention would contravene that independence (p. 5). Hence, given that an invitation to request for military assistance is a manifestation of a state's sovereign authority, a logical corollary that follows is that the 'intervening state' is not in breach of the non-intervention rule provided that the incumbent government issues the invitation.

1.3.4. State Consent within the R2P Framework

According to Woocher (2012), state consent reconciles the dichotomy between prohibition on extraterritorial use of force and international community's responsibility to effectively respond to humanitarian crises. Building on this, consent to use force for the primary purpose of protecting populations from mass atrocity crimes further augments the premise that IvI does not contravene the prohibition on the use of force as force is used to protect the population from mass atrocity crimes, not for any other purpose, such as to reinstate sovereignty.

Further, as argued by Hathaway et al. (2013), this thesis also maintains that since invitation could only be issued by a legitimate government, the ability to request for external military assistance when facing R2P violations is said to be 'an act of sovereignty: an invocation of a power that only the state itself possesses' (p. 541). Given that only states hold this prerogative, consent therefore aims to reinforce state sovereignty

as opposed to undermining it. In this respect, IvI provides a mechanism for states to uphold their sovereign responsibility in the event that state institutions are incapable of fulfilling it. State consent thus provides assurance that failing states are able to leverage military assets of stronger states for the protection of its population from mass atrocity crimes.

Taking a step further, Hathaway et al. (2013) contends that the concept of IvI that is based on state consent is similar to the underlying premise of the UNSC intervention. In the latter, since the UNSC authorization to intervene is grounded in the consent of 193 member states, the theory of IvI that expands on this institution therefore aims to provide 'a more robust set of tools for consent-based intervention to meet states' sovereign responsibility' (Hathaway et al., 2013, p. 540).

In this vein, the cardinal principles of both IvI and R2P frameworks are working in tandem as states are given primacy to either issue consent in the former or to protect the population in the latter. The involvement of secondary actors—invited interveners in the former and international community in the latter—are therefore contingent on states' ability or willingness to consent or to protect. As established in the following figure, a dual-actor involvement exists in both frameworks.

Pursuant to Figure 1 (see below), the primary actor for both frameworks is the state, and absence thereof would not entail the dual-actor involvement. Under the IvI framework, it is only feasible if two actors are involved, namely the state issuing invitation and the intervener(s) receiving invitation. In other words, if there were lack of evidence for the issuance of invitation or that of intervening states accepting the invitation, it would not fall under the case of IvI.

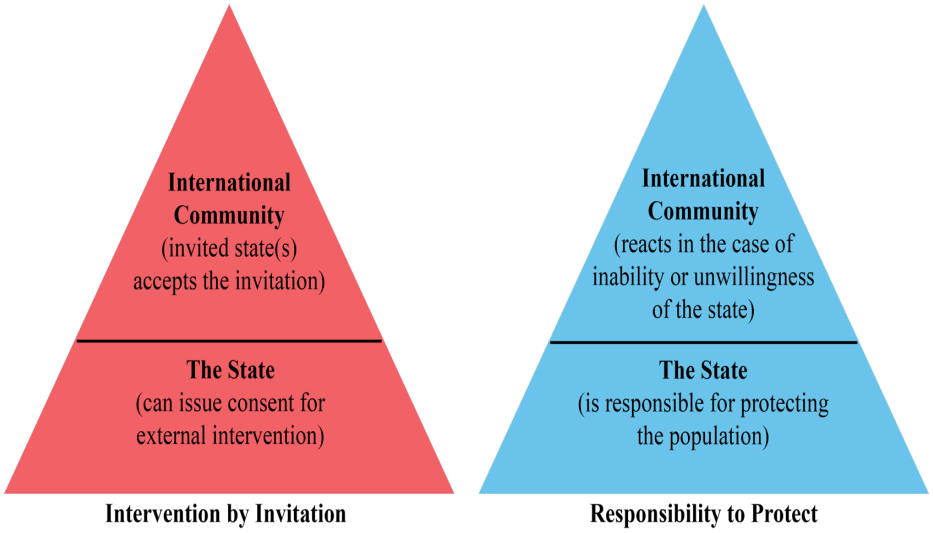

Figure 1. Comparison of dual-actor involvement in the cases of IvI and R2P

Similarly, within the R2P paradigm, if there is lack of evidence that states are manifestly failing to protect due to their 'inability' or 'unwillingness' to protect, the international community does not have the right to assume this responsibility. In light of this similarity, the following discussion seeks to outline the intersections between the three-pillars of R2P and the cardinal principles of IvI.

1.4. THE THREE-PILLAR STRATEGY AND THE IvI FRAMEWORK

Pursuant to the three-pillar strategy devised by the former UNSG Ban, this section seeks to extend the three pillars to the IvI framework in order to further strengthen responsible protection for both host states and intervening states. In this regard, Pillar I entails the host state's responsibility to request for external assistance. Given that Pillar II and III entail the responsibility of invited interveners, the former concerns the responsibility to authorize 'preventive deployment' whereas the latter concerns the responsibility to use force in a 'timely and decisive' manner.

1.4.1. Pillar I: State's Responsibility to Request for External Assistance

It is well established that essentially within the R2P paradigm, the concept of sovereignty shifts the orthodox understanding of absolute sovereignty to 'sovereignty as

responsibility'. Pursuant to this shift, the ensuing question would be as to how Pillar I on state responsibility could be upheld in cases of IvI. According to Hathaway et al. (2013), in the event where there is a breakdown of state institutions — for instance the police force, military and judiciary, states 'may consent to intervention by others when they cannot meet their responsibilities alone' (p. 540). Building on this, since the state is deemed 'unable' to protect its population, a feasible recourse could be found in IvI wherein states may opt to invite external forces to assist them in upholding their state responsibility under Pillar I. Thus, in view of the three-pillar strategy, the issuance of consent is a manifestation of Pillar I responsibility. In a similar vein, based on Paragraph 138, this thesis argues that the act of issuing invitation for military intervention is deemed as 'appropriate and necessary means' to prevent mass atrocity crimes from taking place. In the meanwhile, pursuant to the 'dual responsibility' as established in the ICISS, this thesis contends that the issuance of consent for military intervention is an internal manifestation of its responsibility towards the population and an external manifestation towards the international community. In the latter, the affected state ensures that by issuing consent, prompt military assistance is provided to prevent any spill over of mass atrocity crimes that could negatively affect sovereignty of neighbouring states.

Conversely, if the state refuses to request for military intervention when it is 'manifestly failing to protect its population, the government is deemed to contravene its Pillar I responsibility. This is in line with Cohen and Deng's (2016) assertion that states are under the duty to accept offers of humanitarian assistance from the international community. Despite the fact that this assertion was made in the context of IDPs, this thesis seeks to extend this principle to the current framework since the shift on state sovereignty, which remains the crux of R2P is also derived from the 'Guiding Principles on Internal Displacement'. In particular, Principle 25(2) is relevant to this framework, which is formulated as follows:

> International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance (UN, 1998).

Expanding on this principle, this thesis argues that in the event where a population is threatened with mass atrocity crimes or confronted with its commission, invited interveners have the right to offer military assistance. Therefore, under this framework, affected states are responsible to accept military assistance from them and this can be manifested by the issuance of invitation for military assistance, failure of which would be in contravention to Pillar I. At this stage, although this responsibility does not constitute the R2P framework, this thesis suggests that this aspect should be given consideration in the evolving discussion on R2P.

However, in the event that the incumbent government is unwilling to request for intervention, this right would then be transferred to the opposition group if the aim of external intervention were to protect its population from mass atrocity crimes. Be that as it may, this right does not automatically grant the opposition group to invite but it is subject to an official declaration from the UNGA authorizing the opposition to issue consent. Therefore, in addition to the responsibilities attached to states under R2P framework, it is maintained that states are also responsible to request for military assistance when they are unable to protect their population from mass atrocity crimes (Bellamy, 2009). In this regard, failure to do so may lead to the subversion of governmental legitimacy. In sum, under this framework, the additional responsibility of state under Pillar I is as follows:

1. To request for military assistance when the state is unable to protect its population;
2. To accept military assistance from third party states when they offer such assistance with the objective of assisting the affected states in meeting their Pillar I responsibility.

1.4.2. Pillar II: Responsibility of Invited Interveners to Authorize 'Preventive Deployment'

As established in Chapter 1, mass atrocity prevention is the fundamental constituent of the R2P from its initial conceptualization to its subsequent amendments as demonstrated in UNSG reports. Pursuant to the military dimension, the commission suggested

'consensual preventive deployment'[3] as a potentially effective measure to deter outbreak and escalation of violent conflict, with the case of UN Preventive Deployment Force (UNPREDEP) in Macedonia as point of reference (ICISS, 2001a, p. 25).

Thereafter, in his 2009 report, Ban broadened this aspect vis-à-vis the three-pillar strategy. As he suggests, Pillar II is not exclusively confined to peaceful measures, but it also encompasses military assistance working in tandem with peaceful measures. Hunt and Bellamy (2011) assert that notwithstanding the prevalent presumption that use of force falls under Pillar III of R2P, Ban has made it clear that the international community may opt to render military assistance to states in order to uphold Pillar II responsibilities.

In this regard, preventive deployment is relevant in cases where states are 'unable' to uphold their Pillar I responsibility thereby necessitating international assistance under Pillar II in the form of military aid. With reference to the three main forms that may fall under Pillar II assistance namely encouragement, capacity building and protection assistance, invited interveners may assist states that are facing with threats of mass atrocity crimes by employing protection measures where the use of force is required. In comparison to the first two forms, the protection measures are directly implemented to the beleaguered states to ensure that the outbreak of mass atrocity crimes is promptly prevented. Hence, taking into account the 'use of force' and 'nature' of protection assistance required, its implementation is subject to consent of host state. At the same time, Ban specifically analyses the role of 'preventive deployment' as an effective measure to prevent not only the outbreak but also the escalation of mass atrocity crimes (UNGA, 2009, p.18). Hunt and Bellamy (2011) further assert that 'the deployment may be intended as a show of force, to conduct peace support operations … or to provide support to local police and civil authorities' (p. 306).

Under this framework, the invited interveners could fulfil this responsibility by authorizing preventive deployment as a form of deterrence prior to the outbreak of mass atrocity crimes. This is particularly relevant in cases where the incumbent government

[3] Interchangeably used with peacekeeping missions. Diehl et al. (1998) explains that 'preventive deployment' is a type of peacekeeping mission with the primary objective to prevent either outbreak or escalation of war.

has proven to uphold Pillar I responsibility (within its capacity) but is unable to do so when confronted with atrocities perpetrated by the opposition leading to loss of effective control (Lieblich, 2013). Besides, this viable recourse ensures that the re-occurrence of politically motivated UNSC interventions as evinced by Libyan intervention would be avoided and that global stability is preserved at an early stage (Woocher, 2012). In addition, preventive deployment authorized by invited interveners is also pivotal when the host state refuses to issue consent to UN preventive deployment or that there is a lack of political will in the UN to authorize it. In view of the latter, given that the interests of interveners would primarily be based on preventing the spill over of the conflict and maintaining regional and global stability, there is sufficient political will to authorize preventive deployment to prevent the outbreak of mass atrocity crimes.

As pointed out in the 2004 UNSG report, the main hurdles in military deployment lie in the ambiguity of the mandate issued resulting in its failure to adapt to the evolving state on the ground, in addition to the lack of essential resources required to effectively execute it (Bellamy, 2009). In the latter, the UNSG lamented on the fact that the there is a paucity of personnel for peacekeeping missions along with the insufficiency in logical capabilities to transport the peacekeepers (UNGA, 2004, p. 59). In an attempt to circumvent these impediments, the UNSG affirmed the European Union's proposal to provide military forces for an effective deployment at its disposal (UNGA, 2004, p. 60).

In this regard, invited interveners who constitute international community may also take up this role in lieu of the UN-mandated peacekeeping forces and European Union for a more effective and rapid deployment of forces when confronted with mass atrocity crimes. As pointed out by Bellamy (2009), in view of the peacekeeping missions deployed by both the UN and regional organizations, for instance in Central African Republic/Chad and Afghanistan, mass atrocity crimes were successfully prevented upon reinstating state authority and strengthening state institutions (p. 147).

However, in the event that states are 'unwilling' to issue consent for preventive deployment, it is contended that that the international community may pressure or coerce unwilling states to issue consent via non-military measures such as threats to impose economic sanction (Bellamy, 2009). This is reflected in the peacekeeping mission

conducted by Australia in the East Timor (formerly governed by Indonesia) crisis. According to Bellamy (2009), in the wake of mass murder perpetrated by the Indonesian government, the international community acknowledged the need for peacekeeping deployment but was categorically rejected by Indonesia. Hence, in view of the US threat to veto the continuation of World Bank loans that could result in economic paralysis, Indonesia eventually consented to the deployment of Australian forces (p. 148). Based on this case, this thesis suggests that in the event where 'preventive deployment' is necessary to prevent the outbreak of mass atrocity crimes, the international community may provide an impetus for the unwilling states to eventually yield and issue consent for invited interveners to deploy peacekeeping missions. However, it should be noted that the consent issued in this situation is disputable as the element of coercion involved may lead to a contravention of the external validity of consent, as will be discussed in Chapter 2.

As for the Pillar II responsibility for invited interveners, it is maintained that they have an additional responsibility to ensure that the inviting government is proven to be 'legitimate', as analysed in the following chapter. This aspect is crucial under this framework since the deployment may be consented by a government committing mass atrocity crimes. To prove this point, Bellamy (2013) notes that it would be unconscionable if deployment were authorized to assist the Rwandan regime responsible for the genocide. Under this framework, in the event that the invited interveners were to knowingly support the inviting government perpetrating the mass atrocity crimes, they would then be deemed to contravene R2P and should be held legally accountable.

Further, if governmental legitimacy is questionable after positioning preventive deployment, Bellamy (2009) asserts that 'although military deployments for R2P purposes benefit from host state consent, once they are in place they should prioritize civilian protection over the need to maintain host government support in cases where one cannot be established except at the expense of the other' (p. 148). To substantiate his contention, he refers to the deployment of United Nations Operation in Côte d'Ivoire (UNOCI) led by France in 2002. In this case, the incumbent President Gbagbo requested for international assistance (Pillar II) in the form of peacekeeping mission to set up a buffer zone between the government and rebel forces. However, the peacekeepers subsequently realized that the deployment was consented as a pretext for Gbagbo to

legitimize his actions. As a result, the commission of mass atrocity crimes by Gbagbo regime led to a change in mandate implementation. The peacekeepers' refusal to carry out the initial mandate resulted in sporadic attacks by Gbagbo forces and in response; the international community resorted to coercive measures under Pillar III. Notwithstanding the negative repercussions resulting from the shift in mandate, primacy was given to protecting population and prevention of mass atrocity crimes (Bellamy, 2009).

Building on this principle, the invited interveners hold the same standard of responsibility to protect as the UN mandated peacekeeping missions. If consent was issued by an illegitimate government, in line with Bellamy's (2009) contention, it is submitted that the invited interveners have the responsibility to change its peacekeeping mandate in accordance with R2P principles, wherein protection of population from mass atrocity crimes should always be prioritized over any other mandate. However, notwithstanding this responsibility, the reality on the ground is far detached from the proposed course of action. As argued by Gallagher (2015), given that the deployment is subject to host state consent, the political will of invited interveners will definitely pander to the inviting government's interests. In view of this, the possibility of changing mandate to protect population from mass atrocity crimes at the expense of straining relationship with inviting government (who is an ally) is very low.

Turning into state practice, two prominent cases of peacekeeping missions were deployed in Former Yugoslav Republic of Macedonia and Burundi. According to the 2009 UNSG report, the deployment of United Nations Preventive Deployment Force (UNPREDEP) in FYR Macedonia from 1992 to 1999 was hailed as a success (UNGA, 2009, p. 18). UNPREDEP was the first UN peacekeeping mission that explicitly set out a preventive mandate wherein 'UN peacekeepers were deployed before the outbreak of violent conflict, instead of after hostilities had erupted' (Williams, 2015, p. 230). The incumbent head of state President Gligorov requested the UN to deploy military and police units to prevent spill over of ethnic violent conflict plaguing Macedonia's neighbouring countries Serbia and Albania (Ackermann & Pala, 1996; Breau, 2006). It was alleged that the governmental military resources were poorly equipped owing to the confiscation of 'heavy weaponry, aircraft and border-monitoring equipment' by Yugoslav National Army prior to its disintegration thus compelling Gilgorov to request for military

assistance in the event of an external attack (Williams, 2015, p. 232). Pursuant to the request, the UNSC adopted Resolution 908 affirming that UNPREDEP is comprised of a consolidated military and civilian mandate to monitor and report any activities that may destabilize country and for deterrent purposes (UNSC, 1994). In view of its military mandate, the UN peacekeepers installed 'fixed observation posts (OPs) along the borders, temporary observation posts (OPTs), and patrols by foot, vehicle, and helicopter' in addition to facilitating the patrolling of 'border crossings and custom stations' (Ackermann & Pala, 2015, p. 92).

As affirmed in the ICISS report, the presence of UN Peacekeepers along the borders had successfully deterred any hostility from FYR Macedonia (ICISS, 2001a, p. 58). The statement made holds true in the Cupino Brdo Incident that could have led to a violent conflict between Serbia and Macedonia. Cupino Brdo is a place where a memorial for a battle in World War II was located at and given the long-standing tradition of commemorating the battle's anniversary, the presence of Serbian troops in the area spawned a retaliation from Macedonia, namely dispatching military troops as it claimed that the hill was within its borders. To prevent any escalation, UNPREDEP set up a UN buffer zone around the hill, which was abided by both parties until May 1995 when Serbian troops infiltrated it. In response, UNPREDEP troops confronted the Serbian troops of their non-compliance eventually resulting in them leaving the area. As maintained by Williams (2015), the firm response taken by UNPREDEP was crucial to deter violent engagement between the two.

In contrast with the peacekeeping missions in Macedonia, the UN peacekeepers in Burundi were deployed after a civil war has erupted in 1996. Accordingly, political parties signed the Arusha Peace and Reconciliation Agreement for Burundi to reinstate stability in the country. To ensure a smooth implementation of the peace accord, with the consent of the incumbent government, United Nations Operation in Burundi (ONUB) was deployed with the mandate to oversee execution of ceasefire agreement and ensuring civilian protection from violence (Lotze & Martins, 2015). In December 2004, ONUB's troops successfully managed to demobilize opposition groups and disarm rebels in addition to safeguarding the area by carrying out patrolling across borders (Boutellis, 2015). At the same time, the presence of ONUB had also resulted in a smooth political

transition process, in which democratic elections took place without any trace of violence from the warring parties (Lotze & Martins, 2015). In view of these cases, it is essential for invited interveners to place a preventive mandate prior to deployment of peacekeeping troops. Under this framework, invited interveners will be in fulfilment of their Pillar II responsibility if preventive deployment was stationed when the population is threatened with mass atrocity crimes.

Further, it is important to note that peacekeeping missions need not necessarily be under the command of the UN. To substantiate this, in the case of Sierra Leone in 2000, the British forces took lead in the preventive deployment operation (UNGA, 2009). In the event where the UN is not able to act immediately due to lack of political will, invited interveners may offer their military units thereby assuming the role of UN peacekeepers. Based on this case, this thesis argues that peacekeeping troops deployed by invited interveners would therefore be permissible as long as it is deployed with the consent of the host state.

1.4.3. Pillar III: Responsibility of Invited Interveners to Use Force in a 'Timely and Decisive' Manner

Prior to the emergence of the R2P discourse, the concepts of unilateral intervention and humanitarian intervention without UNSC authorization took precedence in the academia. However, in view of the fact that these measures were in contravention of the UN Charter, R2P was proposed to circumvent the illegality of humanitarian intervention. As previously established, the initial proposal on the 'right authority' criterion where the matter could be delegated to the UNGA or regional organizations, and the proposal on restraint to use veto were dropped in the subsequent UNSG reports. In effect, the issue of UNSC political deadlock is yet to be resolved, as manifested in the ongoing humanitarian crises for instance in Syria and Palestine. Therefore, in light of Paragraph 139 of WSOD, the ensuing question would be, 'What happens when the UNSC fails to take a timely and decisive response in the face of mass atrocity crimes?' In response, the answer could be found in the role of invited interveners. In line with Paragraph 139 of WSOD, the invited interveners which constitute part of the international community would be prepared to

use force in a timely and decisive manner in the event that the UNSC is unable (e.g. lack of military resources) or unwilling (lack of political will) to do so. Thus, to resolve this persistent quandary within the discourse of R2P, this thesis attempts to circumvent it by providing a feasible recourse for every state to invite external forces in the face of mass atrocity crimes.

This framework does not aim to supplant the UNSC authorization for intervention but seeks to complement IvI with UNSC authorization by providing another recourse for states to uphold their sovereign responsibility in the event that there is a deadlock in the UNSC. In the 2004 UNSG report, Annan mentions that the inaction of international community is due to the fear that the intervention might contravene the principle of non-intervention (UNGA, 2004). In view of this, since IvI that is grounded in state consent, it does not violate the said norm, the 'inaction' could be resolved by allowing invited interveners to use force for the purpose of protecting the population from mass atrocity crimes. Taking a step further, this thesis maintains that if R2P is premised on protection of population and that the role of invited interveners may contribute to achieving this, this proposition should also be given consideration in the evolving discussion of R2P.

Under this framework, the use of force in response to the commission of mass atrocity crimes is triggered when 'preventive deployment' authorized by invited interveners is not sufficient to prevent its outbreak and when the state is manifestly failing to protect its population, which could be due to the state's 'inability' or 'unwillingness' to protect. Therefore, in such circumstances, upon receiving invitation to use force from the host state, the invited interveners are responsible to use force in a 'timely and decisive manner' if there is an inaction from the UNSC due to the political deadlock. This thesis further contends that the consented use of force under Pillar III will be viewed positively by member states, as the force used does not undermine state sovereignty. However, the use of force under this framework is subjected to a set of guidelines that is derived from the ICISS and the 2004 UNSG reports. This is to ensure that the invited interveners do not arbitrarily use force and that their use of force does not further exacerbate the conflict. The following chapter provides an in-depth analysis on this aspect.

In short, under this framework, the following are the three requirements that need to be satisfied before resorting to military intervention under Pillar III:

(i) Preventive deployment is inadequate to protect the population from mass atrocity crimes;
(ii) The state is manifestly failing to protect its population due to its inability or unwillingness to do so;
(iii) There is evidence of political impasse leading to inaction of UNSC.

CHAPTER 2

SCOPE AND ASSESSMENT CRITERIA OF INTERVENTION BY INVITATION

This chapter embarks on an assessment of consent issued by the host government. The bulk of discussion centres on the internal validity of 'right authority' criterion that determines the legitimacy of the government. The analysis on legitimacy firstly examines the traditional tests of 'recognition' and 'effective control'. Thereafter, it closely examines the newly formulated tests of 'protection legitimacy' as proposed by Kenny and Butler (2018) and 'effective protection of civilians' by Lieblich (2013). Building on these tests, this thesis will then attempt to reconcile them under what it labels as 'effective population protection legitimacy test' to further harmonize the assessment within the R2P framework. In the meanwhile, it also dissects the scope of application on external military intervention with regards to negative equality principle, incumbent government principle and parameters on the use of force.

2.1. ASSESSMENT OF CONSENT

2.1.1. Distinction Between External and Internal Validity of Consent

According to the International Law Commission (ILC), consent may create legal impact if it is 'clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers' (UN, 2001). This set of conditions are further clarified by Ruys and Ferro (2016) who assert that the 'intrinsic validity' of consent as affirmed in international law is contingent on four conditions, namely (i) right authority (issued by the highest representative of state, (ii) external threshold, (iii) time of issuance (*ex ante* as opposed to *ex post*), and (iv) duration of consent (p. 81). Notwithstanding the significance of the latter two conditions in consent assessment, this thesis does not seek to analyse them as they fall outside the scope of analysis.

Lieblich (2013) categorises the first two requirements under internal and external aspects of validity. The former relates to the legitimacy of state representative whereas the latter concerns vitiating elements that could render consent invalid. Proceeding from this, the internal aspect deals with the competency of the 'issuer' wherein it enquires whether or not the consent is issued by a legitimate government representing the state. Accordingly, there are two prominent issues that need to be addressed: (i) legitimacy of government and (ii) state attribution (Doswald-Beck, 1986; Lieblich, 2013; Bannelier, 2013). On the first issue, it is argued that since the internal validity aspect of host-state consent draws similarity to the 'right authority' criterion of R2P as established in the ICISS, the right authority within the IvI framework thus hinges on the assessment of governmental legitimacy. Given that this issue forms the bulk of this thesis thus requiring a detailed analysis, Section 2.1.2. addresses this issue accordingly.

Pursuant to the second issue, Byrne (2016) maintains that consent could only be issued by a 'requisite official' representing the government in his official capacity (p. 117). This issue is also raised in Article 20 of Draft Articles of State Responsibility (hereinafter referred to as Draft Articles) wherein it enquires whether the agent or person who gave consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State) (UN, 2001). In reply to this dilemma, Article 7(2) of Vienna Convention on the Law of Treaties (hereinafter referred to as Vienna Convention) provides that there are three officials who are automatically regarded as representing the state, namely heads of state, heads of government and ministers of foreign affairs (UN, 1961). It is maintained that this aspect is important to avoid any potential for abuse, which has been the primary objection put forth by critics (Nolte, 2010, para. 23). State practice also appears to adhere to this condition. For instance, in the case of Jordan in 1958, King Hussein who was the highest representative of Jordan issued the invitation and in the most recent case of Iraq in 2014, it was the Iraqi foreign minister who requested for intervention against ISIL (Byrne, 2016, p. 117).

In a similar vein, the consent to use force in the face of mass atrocity crimes must also be issued by requisite officials according to Article 7(2) of Vienna Convention. However, in the event where there are competing claims of legitimacy, this requirement may be done

away with, subject to an official UNGA declaration affirming that the incumbent government has lost its legitimacy due to its commission of mass atrocity crimes. In this case, the 'requisite officials' may emanate from the opposing government whose legitimacy is acquired upon proving that the invitation is issued to protect the population from mass atrocity crimes perpetrated by the incumbent government.

Turning to the external threshold of a 'valid and genuine consent', Lieblich (2013) enquires whether it was granted 'merely as a product of coercion or other consent-vitiating circumstances' (p. 18). Additionally, Nolte (2010) categorically states that the element of duress vitiates the invitation issued by host-states (para. 18). Although this aspect is extensively covered in contract law, its lack of legal standing in international law requires reference to several UNGA resolutions. For instance, the ILC commentary on the Draft Articles clearly establishes that 'consent must be freely given [… and] may be vitiated by error, fraud, corruption or coercion (UN, 2001) in addition to the resolution of IDI wherein it emphasizes the 'free expression of the will' to render the consent valid (IDI, 2011). In a similar vein, Articles 49 to 52 of the Vienna Convention also state that the vitiating elements of fraud, corruption and coercion would render consent invalid (UN, 1961). Therefore, at the very least, it is well established that consent must be voluntary and reflects the true intention of consenting state for it to be deemed valid.

A case in point is the French intervention in Mali in 2013 where Bannelier and Christakis (2013) note that 'free consent' was undoubtedly given by Malian government prior to the intervention for the purpose of subduing terrorist groups. However, the issue of external threshold was raised in the case of 1976 Syrian intervention in Lebanon whereby the UNSC disputed the validity of consent issued by Lebanese government due to former's attempt in coercing Lebanese government to make constitutional amendments (Lieblich, 2013, p 24). In addition, the 1990 Iraqi invasion in Kuwait suffers from a similar issue wherein it is alleged that the consent issued by the Free Provisional Government of Kuwait was a result of coercion by the Iraqi government (Lieblich, 2013). Building on this aspect, it is contended that this principle applies to the extent that the incumbent government still retains its 'protection legitimacy', which will be discussed in the following section. As briefly analysed in the Indonesian case, in the event where the perpetrated government is unwilling to consent to the use of force either under Pillar II

or Pillar III, the international community may 'coerce' perpetrated government to either request or accept military assistance in the form of harmless threats. It should be noted that this proposed exception is only applicable when the incumbent government is unwilling to invite due to its commission of mass atrocity crimes. If the situation falls short of mass atrocity crimes, the invitation issued is therefore rendered invalid since the absence of exigent circumstance does not necessitate use of force.

2.1.2. Form of Consent

The literature on IvI also deals with form of consent wherein it enquires whether a valid invitation is solely confined to explicit or active consent thereby precluding any form of implicit or passive consent. In an attempt to tackle this issue, Bannelier-Christakis (2016) asserts that the 'action-reaction' paradigm—state B's reaction to state A's conduct—defines the relations between states. In view of this, passive consent may be valid based on the maxims '*qui tacit consentire videtur si loqui debuisset ac potuisset*'[4] and '*volenti non fit injuria'*.[5] However, if passive consent were deemed sufficient, it would leave room for abuse as intervening states (particularly hegemonic states) are able to justify their IvI on the basis of implied consent to the detriment of the host states (Bannelier-Christakis, 2016). In view of the potential abuse, the commentary on the Draft Articles requires consent to be expressly given and as such it rejects presumed consent by states (UN, 2001, para. 6). Notwithstanding this position, the court in Democratic Republic of Congo (DRC) *v.* Uganda holds a different view wherein passive consent in the manifestation of tolerance or absence of any objection is regarded as valid (ICJ, 2005). Further, the US drone strikes against Al-Qaeda and Taliban within the territory of Pakistan is argued to have been legitimized on the basis of 'implied consent'. Since there is lack of objection by Pakistani government, it suggests their acquiescence to the strikes (Bannelier-Christakis, 2016). O'Connell (2010) went further by qualifying it to not only an 'express consent' but that it also needs to be made public (p.18) but this has been rejected by Byrne (2016) in view of the absence of legal proof to substantiate this condition. In a similar

[4] He who keeps silent is held to consent if he must and can speak (see Cambodia v Thailand, ICJ, 1962).
[5] To a willing person, no injury is done (see Choquette, 2016).

vein, the general rule of 'explicit consent' should apply under this framework. In certain cases, the explicit consent can be given *ex post facto*.

2.1.3. Restriction of Valid Consent

Upon establishing a valid consent, the discussion turns to the limitation of consent in which the determination hinges on the subject matter of intervention. According to Choquette (2016), there is a consensual agreement that consent is restricted by two factors; (i) consent in favour of opposition, which will be analysed in the following section and (ii) in contravention of international law (p. 148). Pursuant to the second restriction, although it has been established that the issuance of consent by incumbent government is a manifestation of its sovereign authority and that it precludes wrongfulness of otherwise a prohibited act, it nevertheless is subject to the conditions set out in Articles 16, 20 and 26 of the Draft Articles.

As per Choquette's (2016) assertion, Article 16 renders consent given in support of a wrongful act as unlawful for instance consent issued by apartheid regimes to further augment their apartheid policies in the state or to commit crimes against a particular group of the population (p. 148). Following from this, any kind of military assistance extended on the ground of 'legitimate consent by the government' is therefore rendered invalid and unlawful. Based on Article 20, consent only precludes to the 'extent that the act remains within the limits of ... consent'. In light of this, Byrne (2016) raises the question whether consent can render lawful any action taken by the intervening state that is in clear prohibition of international law, such as *jus cogens* or international humanitarian law (p. 120)? Article 26 of the Draft Articles clearly prohibits consent that is issued in violation of 'peremptory norms' thereby excluding any possibility of states justifying commission of crimes on the basis of a valid consent (UN, 2001). With regards to the latter, in the context of drone strikes, O'Connell opines that the use of drone strikes by the US in a consenting state would still be considered unlawful if the conflict does not reach the threshold of an armed conflict[6] (as cited in Byrne, 2016). However, Henriksen seems to

[6] O'Connell maintains a restrictionist view on this where she contends that drone strikes that have not reached the 'armed conflict' threshold is still subjected to International Human Rights Law (IHRL) (as opposed to International Humanitarian Law (IHL)). Under IHRL, targeted killings of civilians in situations

take a different view on this as he contends that the effect of consent precludes 'the unlawfulness of the use of force by one state in another state, even in cases where the use of force would have been unlawful if carried out by the consenting state' (as cited in Byrne, 2016, p. 121). The stance taken by Henriksen takes on dangerous path as he is suggesting that consent of the host state should exculpate any crimes short of violations of *jus cogens* that might have been committed in cases of drone strikes.

Building on the Draft Articles, under the framework of this thesis consent is restricted to both threats and commission of mass atrocity crimes. In other words, if consent is issued to assist the inviting government in perpetrating mass atrocity crimes, it would be rendered unlawful. As will be revealed later in the analysis of the Yemeni crisis, if the actual purpose to issue consent—that is to further augment the host government's commission of crimes—conflicts with the 'purpose' expressed in the public statements, the consent would also be rendered invalid.

Taking a step further, in support of O'Connell, Deeks (2013) argues that the acting (intervening) state is under the duty to inquire whether the acts consented by the host state are in accordance with international law or not and that if this duty is not properly exercised, it will render the consent to be an 'unreconciled consent' (p. 35). In line with Deek's (2013) contention, this thesis argues that since the essence of R2P is concerned with 'responsible protection', the responsibility of invited interveners under Pillar II and III also encompasses the responsibility to enquire whether the consent issued by the host state is in accordance with the restriction mentioned—threats or actual commission of mass atrocity crimes. Thus, under this framework, the invited interveners are responsible to enquire prior to intervention. If the acts consented were proven to assist the inviting government in commission of mass atrocity crimes, the invited interveners are responsible to reject the invitation. Failure thereof would result in contravention of either Pillar II or III. Thus, upon establishing the external validity, the following section

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short of an armed conflict is unlawful in international law thus presence of consent does not render it such act as lawful (Byrne, 2016, p. 120).

addresses the internal validity of the 'right authority' criterion that is contingent on the assessment of governmental legitimacy.

2.2. 'RIGHT AUTHORITY' UNDER IvI WITHIN THE R2P FRAMEWORK

2.2.1. Right Authority under the R2P framework

The ICISS report proposed six criteria on the use of force and amongst them an entire chapter is dedicated to the 'right authority' criterion owing to its contentious standing. As a starting point, the Commission aptly asks: 'Whose right is it to determine, in any particular case, whether a military intervention for human protection purposes should go ahead?' (ICISS, 2001a, p. 47). In response, it asserts that the UNSC has the 'primary' responsibility to authorize use of force pursuant to Chapter VII of the UN Charter. To circumvent the veto issue, a 'code of conduct' was proposed through the exercise of a voluntary restraint on their veto power unless their vital national interests are involved (ICISS, 2001a, p. 51). However, it goes further by arguing that the UNSC does not have the 'sole or exclusive responsibility' since the authority is transferred to the UNGA in the event of a political impasse at the UNSC. This was proposed in accordance with the UNGA's responsibility in maintaining international peace and security as established under Articles 10 and 11 of the UN Charter. Additionally, by virtue of Chapter VIII, enforcement action could also be taken under regional arrangements upon the UNSC authorization and on the condition that they are 'acting within its defining boundaries' (ICISS, 2001a, p. 53).

Pursuant to this, the then UNSG Kofi Annan also upheld the proposal on veto restraint in the 2004 UNSG High-Level Panel report wherein he exhorted the P5 members to confine its use of veto to 'matters where vital interests are genuinely at stake' in addition to pledging 'themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses' (UNGA, 2004, p. 68). Notwithstanding Annan's attempt to circumvent the UNSC inaction, the unanimous adoption of Paragraphs 138 and 139 of WSOD by the UNGA has not only jettisoned the proposed code of conduct but also restricted the right to use force only to the UNSC without any possible referral to the

UNGA in the event of political deadlock. Given that WSOD has been unanimously adopted by the UNGA, the current R2P framework rests on the premise that use of force could only be authorized by the UNSC in accordance with Chapter VII of the UN Charter.

Thus, the exclusion of UNGA referral and 'code of conduct' have resulted in a continued UNSC inaction as evidenced by the cases in Syria, Palestine and Myanmar. Notwithstanding the official reports revealing that mass atrocity crimes have been committed either by the incumbent or opposing government, the veto issue has hindered the international community from upholding their Pillar III responsibility. In this regard, given that host-state consent offsets prohibition on use of force and non-intervention, a feasible option to overcome UNSC deadlock may be found in IvI. As such, invited interveners may assume the role of the UNSC to use force when facing with mass atrocity crimes. Building on the 'right authority' criterion as per the ICISS report, if we were to extend it to the IvI framework, the question would thus rests on 'which government is legitimate to invite for external intervention?'. To answer this question, it is pertinent to first assess the 'legitimacy of government' according to the traditional tests of 'recognition' and 'effective territorial control', followed by newly formulated tests of 'protection legitimacy' as proposed by Kenny and Butler (2018) and 'effective protection of civilians' by Lieblich (2013). In light of these tests, since the responsibility to assess the legitimacy of government falls on the invited interveners, this thesis proposes a new test that is labelled as 'effective population protection legitimacy' (EPPL). In contrast with the preceding tests, the newly proposed test comprises of two assessments: (i) legitimacy of consent and (ii) legitimacy of protection wherein the latter sets the criteria provided in the 2004 Report of the UNSG as the threshold prior to intervention.

2.2.2. Assessment of the legitimacy of the government

The discussion on the legitimacy of the government rests on two schools of thought: (i) 'constitutive' model supported by positivists that is also known as theory of recognition and (ii) 'declaratory' model deriving from the fulfilment of 'legal requirements of statehood' (Mon, 2003, p. 744). In support of this, Jennings and Watts assert that the determination of the 'rightful' representative of states to issue valid consent is based on

the tripartite test of ‘legitimacy, effectiveness and recognition’ (as cited in Allo, 2009, p. 215). In the meanwhile, Talmon argues that notwithstanding the established yardsticks to determine legitimacy, the structure of international law is only able to provide abstract criteria of a legitimate government but seems to fall through in ascertaining ‘who’ the government is in civil war cases (Talmon, 2013, p. 15). Thus, the issue of ‘legitimate government’ turns to the assessment of the host state’s control, which is primarily dependent on either *de facto* recognition or *de jure* effective control exerted by the state (p. 107), as dissected in the following subsections.

2.2.2.1. Recognition Test

The issue of recognition rests on two entities, that is the recognition of states and governments. The effect of recognition for the former is on the state’s legal character on international platform whereas the latter modifies the standing or legitimacy of the incumbent authority within a state (Shaw, 2005, p. 330). As such, it is reasonable to expect that the international community would determine and recognize the legitimate governing authority of a state as soon as the state is clothed with a legal personality in the international domain. In view of this distinction, the ensuing discussion on recognition does not concern the recognition of a state but with the legitimacy of the government which represents and acts on behalf of the state.

Pursuant to this, Mon (2003) asserts that under the theory of recognition, the government acquires legal existence upon its recognition by other states. Talmon (1998) maintains that recognition by other states may denote two things: willingness of recognizing states to establish official relations and manifestation of opinion on the legal status of the state (pp. 23-24). In this regard, he further notes that although the recognition by states does not serve as an objective authority to determine government legitimacy, it substantiates the ‘subjective (relative) statement’ of the status. To put it simply, the recognition of a government merely reflects the ‘perception’ of recognizing states on the legitimate governing authority that is in their opinion adheres to the criteria as established in international law (Talmon, 1998, p. 30). Building on this, Wet (2016) posits that ‘a *de jure* recognized government’ is thus dependent on four requirements: ‘the authority

whose representatives are accepted in international organizations, accredits ambassadors, can legally enter into treaties and can legally dispose of the states' assets and natural resources' (p. 982).

However, this approach is not without any impediment; since the legitimacy test requires 'subjective evaluations' of the actors, their human rights records and (western) democratic credentials, it is thus susceptible to abuse and may be more problematic in theory than the more 'objective' effective control test' (Nenadic, 2014). In view of this criticism, scholars in support of recognition test contend that the issue of government legitimacy could be resolved via the recognition by international community as represented in the UN as opposed to recognition by an individual state. This is because the UN reflects the opinion of the majority that is more impartial compared to the latter (Mon, 2003; Doswald-Beck, 1986). In the meanwhile, IDI (2009) notes that the issue of government recognition arises when the said state undergoes a change of government following a 'coup d'état, a revolution or any break of continuity' (p. 399). Based on state practice, given that the recognizing states fail to explicitly recognize the 'new government', Talmon (1998) contends that implicit recognition can be deduced from the official relations between the two states. It is noteworthy that the recognition accorded may be unilaterally withdrawn by the recognizing state considering that the prerogative act of recognition remains within its arbitrary discretion. This aspect is evinced by the Syrian case where states have shifted their recognition from Syrian National Council to Syrian Opposition Coalition as legitimate government of Syria (Talmon, 2013). In view of these impediments, scholars proposed another test based on an objective assessment of situation labelled under 'effective territorial control'.

2.2.2.2. Effective Control Test

According to Crawford (2012), the objective assessment of the government's control over its territory is essential in determining the '*de facto*' status of a government. In contrast with the legitimacy test, this requirement rests on a set of facts and not of a political conjecture, thus affording relative objectivity (Lieblich, 2013; Nenadic, 2014). The requirement of effective control is argued to be fundamental in terms of its 'legal

representation' at the international platform and its determination of a 'government' as a separate entity—where rights, obligations and responsibilities are attached to state representation (Lieblich, 2013). Zamani (2017) further asserts that lack of effective control implies that 'a government which does not possess a minimum degree of effectiveness is not in a position to invite foreign troops for assistance' (p.670) or in simpler terms it suggests that loss of territorial control equates to loss of consent power. This understanding is tied to the 'state representation' notion wherein a government that has control over territory is entitled to speak for the state and vice versa.

However, this test is disputed due to the ambiguity involved in the 'degree of control' threshold that is required to qualify a government as having effective control (Allo, 2009). It is said to have undergone a considerable change in modern state practice wherein it is now dependent on the 'controlling' aspect of the 'machinery of state' entailing at a minimum the control of state's capital (Talmon, 2013, p. 222). In an attempt to resolve the ambiguity, Nolte (2010) argues that effective control is met when the authority maintains 'control over a sufficiently representative part of the state territory', thereby excluding 'phony governments, puppet regimes, [and] and governments in exile' (para. 18). According to Wippman (1996), the question of effective control arises when the incumbent government starts to lose control over substantial part of the territory to the opposition groups. Based on his analysis of previous cases, the issue of territorial control may fall under four distinct cases of (i) incumbent government exercising control over substantial part; (ii) equal division of territory between government and opposition; (iii) government reduced to a mere warring faction and (iv) failed state (p. 214).

With reference to the first set of circumstances, Wippman (1996) asserts that notwithstanding the undisputable authority given to incumbent governments to issue invitation, he challenges the effectiveness of the government in view of the fact that its lack of capability to resolve the internal opposition through its own law enforcement implies that it is not the appropriate government to represent the state thereby rendering any external intervention to be an 'impermissible interference with internal political processes' (p. 214). This view is also supported by Doswald-Beck (1998) as he argues that if an incumbent government requires external assistance to repress an internal uprising, in effect it proves that the government lacks effective control thereby depriving

its right to speak for the state (p. 196). However, their arguments are not tenable in light of the legal authorities and state practice in favour of the principle of government preference in IvI, which will be further discussed in the following section. With regards to cases where there is a brief disruption in the incumbent government's effective territorial control, the state practice during the Cold War era appears to tolerate it provided that the interventions are 'swift and small in scale' (Wippman, 1996, p. 217; Wet, 2017) and this approach appears to also find an equal footing in the modern practice as evinced by the 1990 ECOWAS intervention in Liberia and the 2007 African Union Mission in Somalia (Wet, 2016).

The second type deals with equal division of effective control where both *de jure* government and opposition groups appear to have substantial control not only over territory but also its population (Wippman, 1996). In view of this category, it is linked to the 'negative equality' principle, which will be discussed in the following section. It suggests that military intervention conducted in this category would be rendered unlawful as it violates the right to self-determination of people without any external influence. Pursuant to the third type, it is argued that this is a case where the *de jure* government has lost a substantial part of its territory therefore reducing its status to a warring faction (Wippman, 1996). In addition, Doswald-Beck (1986) contends that if the conflict erupts into a civil war, it reasonably suggests that effective control of the territory is impugned (p. 196). The case referred to by Wippman (1996) is with reference to the request for ECOWAS military assistance by President Doe's defunct government despite the fact that another dominant faction had more control over the Liberian territory. In light of the effective control test, the second and third categories denote that the incumbent government loses the privilege to issue consent as soon as there is loss of territorial control (Zamani, 2017).

Lastly, on the fourth category of failed state or as Wippman (1996) puts it as a 'collapse of internal authority' (p. 231), it is said to occur when there is no legitimate government to represent the state at the international platform. Lieblich (2013) makes a point to differentiate between 'failed state' with 'civil war' cases as the latter entails at a minimum effective control of territory by the opposition forces. Therefore, it is proposed that the issue of intervention in cases of failed-state is either resolved by the UN with reference

to forward-looking intervention treaties (Lieblich, 2013) or that the responsibility to restore order may be taken by regional organizations thus doing away with the condition of state consent (Wippman, 1996).

In this regard, it implies that the source of authority to determine legitimacy is based on the effective control of territory that has the effect of diminishing the government's capacity to issue a valid consent (Fox, 2015). As a corollary, the contention flowing from this gives rise to the presumption that notwithstanding its previous status as a 'recognized legitimate government' by other states, as soon as the incumbent government loses effective control, its right to issue a valid consent is also removed. As Doswald-Beck (1986) suggests, this view implies that the *de facto* test prevails over the *de jure* test, but other scholars have challenged this view, taking into account the preceding discussion on 'recognition test' and state practice (p. 196).

In the aftermath of the Cold War, the assessment of legitimacy takes a step further by attaching the requirement of democratic legitimacy wherein the legitimacy is predicated upon the democratic elements in its exercise of governance (Wippman, 1996; Mon, 2003). As noted by Choquette (2016), a logical corollary from this approach renders nondemocratic governments to be incompetent in state governance and illegitimate in the international sphere. In view of this, some scholars have given due importance on this approach to the extent that they view democracy as the 'touchstone of legitimacy' (Bodansky cited in Allo, 2009) and that it is 'a prominent yardstick with which to assess the legitimacy of governments' (Stein cited in Allo, 2009).

In an attempt to provide a guideline as to what constitutes democratic governance, the aspect on 'free and fair electoral process' is regarded as the 'minimum requirement' to achieve democratic legitimacy (Fox, 2015; Wet, 2017). In view of this, state practice seems to reflect on this approach as evinced by cases in Haiti in 1991 and Sierra Leone in 1997. In both cases, despite the fact that the incumbent governments have lost effective control of the territories, the international community still accords recognition to them on the grounds that they were democratically elected (Wet, 2016, p. 985). However, Fox (2015) maintains that this approach takes on a dangerous path in legitimizing

'government in exile' that is lacking in effective territorial control or 'new government' that is perceived to be more democratic than the incumbent government (p. 24).

Notwithstanding the additional criterion, the persistent criticisms arising from 'recognition' and 'effective control' tests have engendered newly formulated tests known as 'effective protection' and 'protection legitimacy' that are predicated on 'protection principle'[7]. This newly emerging requirement is derived from the R2P framework when it was first tabled in 2001 by the ICISS, which was later endorsed by the UNGA in 2005 (Lieblich, 2013). Scholars have argued that the shift on 'sovereignty as responsibility' concept has also simultaneously shifted the approach in legitimizing consensual intervention wherein validity of consent issued by beleaguered state during civil war is now dependent on the government's ability to protect the civilians from mass atrocity crimes (Hathaway et al., 2013; Lieblich, 2013). Therefore, a detailed analysis on this requirement and the relationship between R2P and IvI is covered in the following section.

2.2.3. Legitimacy of Government in the Face of Mass Atrocity Crimes

In the previous chapter, it was established that the four distinct phases on state sovereignty has also resulted in the broadening of criteria that constitutes a state within the Westphalia system. The initial concept of a state in the Westphalian system resting on three main attributes of 'territory, authority and population' has recently included a fourth criterion wherein 'respect for human rights' is prioritized to determine the legitimacy of a government (ICISS, 2001b). This is also in line with the conceptual shift on state

[7] It is well established that the protection principle trumps the 'democratic legitimacy' doctrine (Lieblich, 2013). In the case of Bashar al-Assad government in Syria, notwithstanding Assad's regime that is based on autocratic system of government, the international community has never questioned the legitimacy of Assad's government. However, in the wake of military crackdown during the Arab Spring, the alleged commission of mass atrocity crimes by the Assad government has triggered not only international condemnation but also official statements by hegemonic states; the USA, Canada and European Union member states claiming that Assad's government has 'lost its legitimacy' (UNHRC, 2012). Similarly, in the case of Gadhafi government in Libya, the challenge to its legitimacy arises only when there is substantial evidence proving that Gadhafi's forces have perpetrated mass atrocity crimes against its population (Hague, 2011).

sovereignty where R2P has introduced the ‘protection principle’ as an essential element of sovereignty (Lieblich, 2013, p. 179).

This shift also essentially alters the traditional understanding of governmental legitimacy contingent on ‘recognition’ and ‘effective territorial control’ tests to ‘protection legitimacy’ or ‘effective protection of civilians’ tests as coined by Kenny and Butler (2018) and Lieblich (2013) respectively. In light of these newly formulated tests, the ensuing assessment is centred on the manner in which the government uses power over its population, whether it is used to protect population from mass atrocity crimes or to participate in the commission of mass atrocity crimes. Therefore, notwithstanding the fundamental essence shared by both tests, the following section provides a separate analysis of these tests for better comprehension.

2.2.3.1. ‘Protection Legitimacy’ Test

The reconceptualization of state sovereignty sparked Kenny and Butler (2018) to reformulate the traditional ‘recognition’ and ‘effective control’ tests into one that hinges on ‘protection of human lives’ as the yardstick that determines legitimacy. In light of the R2P framework, they coined the test as ‘protection legitimacy’ where the assessment is made on the government’s exercise of its sovereign authority to either protect its population from mass atrocity crimes or to legitimize its commission of these crimes. Based on this test, the hypothesis is proposed as follows: ‘A state committing or complicit in the commission of mass atrocity crimes loses its *protection legitimacy* vis-a`-vis its population for as long as such crimes continue’ (Kenny & Butler, 2018, p. 158) in which its impact would be on the curtailment of state sovereignty.

Building on this, the diminution of state sovereignty would then remove the right of the perpetrated government to issue invitation for external intervention. If the right were still maintained by the perpetrator, the external military forces will end up assisting the commission of mass atrocity crimes thereby further aggravating the conflict. Thus, the loss of legitimacy would render any invitation extended invalid and the acceptance of this request by invited interveners would be in contravention of the prohibition on the use of

force. Turning to the threshold question, this test requires an assessment on a case-by-case basis and a fact-based evaluation to avoid a potential abuse by opposing forces. Therefore, with reference to Paragraph 138 of WSOD, the four crimes enumerated are the yardstick to determine whether a government has lost its protection legitimacy. If a government is proven to threaten to commit or is actually committing mass atrocity crimes against its population, this test holds that the government is deprived of its protection legitimacy resulting in a loss of state sovereignty.

This test goes further by establishing two essential elements in the assessment of protection legitimacy; (i) factual-based evaluation of threat or commission of mass atrocity crimes and (ii) a consequential declaration by the UNGA that the incumbent government is deprived of protection legitimacy. Similar to the effective control test, the first element necessitates cogent evidence by fact-finding missions for instance reports published by United Nations Human Rights Commission (UNHRC) on crimes against humanity perpetrated by Syrian and North Korean governments to substantiate the allegation that the government is 'in fact' threatening or committing mass atrocity crimes (Kenny & Butler, 2018). With regards to the second component, they propose that in the event where a government is deprived of protection legitimacy based on the 'established fact' that it has committed mass atrocity crimes, the UNGA is authorized to subsequently make declaration of the government's loss of 'protection legitimacy' to substantiate the allegation. According to them, the UNGA is considered the only 'legitimate body' to make the declaration albeit its non-binding status. Since the UNGA's role is to oversee the development of R2P, such proposal would 'constitute a development of the General Assembly's role within the R2P doctrine and mark a substantive contribution to the viability of R2P' (Kenny & Butler, 2018, p. 162). In light of the first element of this test, another test that is predicated upon 'protection principle' and 'effective control' test, which is known as 'effective protection of civilians' test will be explored.

2.2.3.2. ‘Effective Protection of Civilians’ Test

The test of ‘effective protection of civilians coined by Liebliech (2013) rests on the understanding that the criterion of ‘normative effectiveness’[8] is essential for the state’s ‘mere physical capacity to protect civilians during armed conflict’ (Lieblich, 2013, p. 187). Lieblich (2013) asserts that this shift from ‘effective territorial control’ (that is physical control over a certain area) to ‘effective protection’ (where primacy is given to protect human lives) stems from the shift on state sovereignty as established in Chapter 1. This test holds that as a corollary to the effective control over territory, the government automatically assumes responsibility to protect its population within the territory governed by it. As maintained by Hathaway et al. (2013), ‘states are responsible for ensuring observance of international human rights obligations both inside their own geographic boundaries and when they exercise ‘effective control’ over territory or persons’ (p. 545).

However, since the term used in this test is ‘civilians’, this thesis seeks to refine it to ‘effective protection of population’ in order to harmonize it with the language of R2P. In view of the established principles of ‘Protection of Civilians’ (POC) concept, it appears that Lieblich’s test falls under the POC framework as opposed to that of R2P. To substantiate this contention, a brief discussion on the difference between POC and R2P frameworks will be provided. As aptly noted by Williams (2016), the main distinguishing features of these two concepts lie in the ‘context’ and ‘types of crimes’ committed. POC is applicable only when there is an armed conflict irrespective of the types of crimes committed whereas R2P is only applicable when four specific crimes: ‘genocide, war crimes, ethnic cleansing and crimes against humanity’ (UNGA, 2005b) are committed regardless of the existence of an armed conflict. To extend the R2P framework to the concept of IvI, this thesis contends that the test to determine governmental legitimacy should be based on the state’s ability to maintain effective protection of its population, not of civilians in the face of mass atrocity crimes. Thus, ‘effective protection of population’ test is more befitting in the context of this thesis.

[8] It refers to the manner in which control is exerted—that positively affects the recognition of ‘rights and powers’ of government (see, Lieblich, 2013).

Turning to the issue on threshold requirement, the effective protection test is also subjected to the following question: what is the yardstick that would trigger the loss of effective protection thereby depriving the right to issue consent? In response, Lieblich (2013) refers to the set of circumstances proposed in the R2P framework as can be deduced from ICISS report, WSOD and UNSG reports. However, in view of these reports, it is evident that the yardstick established in the ICISS report is more ambiguous and broader as compared to WSOD and the UNSG reports. In the former, the yardstick is derived from the just cause threshold of either 'large scale loss of life' or 'large scale ethnic cleansing' (ICISS, 2001a, p. xii) whereas the latter narrows it down to the four above-mentioned mass atrocity crimes.

In light of this, given the unanimous adoption of WSOD by the UNGA, the commission or threat to commit the four above-mentioned mass atrocity crimes should be taken as the threshold in the determination of a state's effective protection over its population. Thus, if there is sufficient evidence that the incumbent government is threatening to commit or commits the four mass atrocity crimes against its population, the said government loses its effective protection despite the fact that it still maintains effective control over territory. As evinced by the Somalian case in 2011, notwithstanding the UN declaration that famine prevails in Somalia, the rebel group Al Shabaab persisted with blocking food assistance from entering the region under its control. Lieblich (2013) argues that even if the incumbent government is *de jure* a territorial ineffective government, it still retains right to request for external food aid as protection of population supersedes any claims on lack of territorial control (p. 189).

2.2.3.3. 'Effective Population Protection Legitimacy' Test

As previously stated at the beginning of this subsection, in essence both tests are contingent on the requirement of protection of populations deriving from the R2P framework. In an attempt to reconcile between the two, this thesis proposes a refined test, which it labels as 'effective population protection legitimacy', in order to align it further with the R2P framework. In view of the elements of 'effective protection legitimacy test', the first component appears to reflect the 'effective control test', that is the objective

aspect of legitimacy whereas the second seems to originate from the 'recognition test'. Kenny and Butler (2018) might have been inspired from the traditional tests in an attempt to formulate a new test linking protection and legitimacy principles. It appears that the 'effective protection test' fails to take into account the 'international recognition' aspect (as opposed to biased individual recognition) that is necessary for an impartial assessment in cases where there are competing claims of legitimacy. Proceeding from this, the 'effective population protection legitimacy test' (EPPL) is proposed. The following figure demonstrates the refinement of this test.

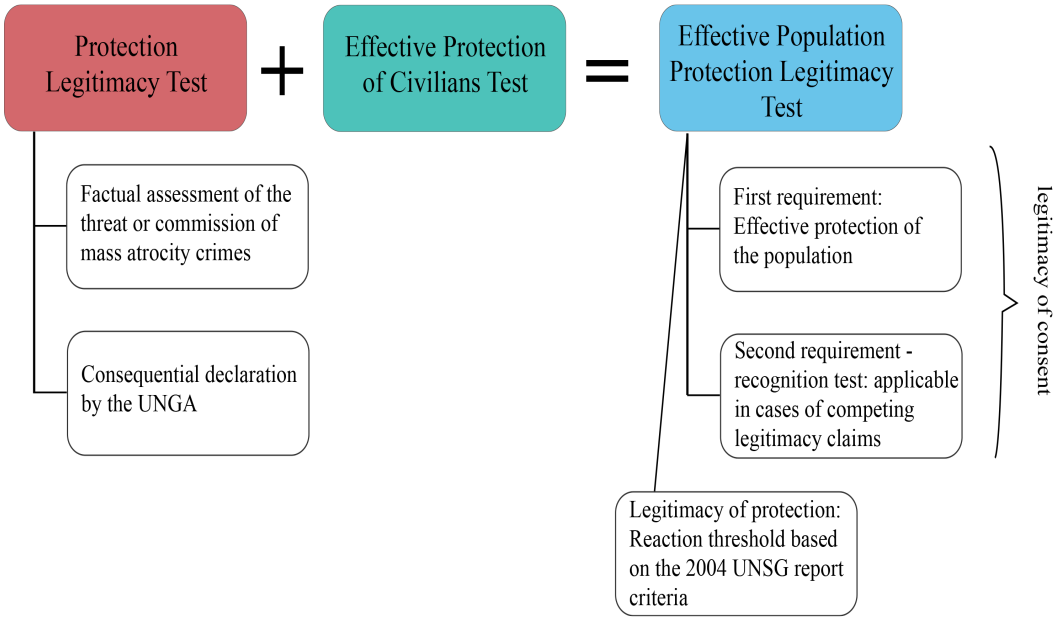

Figure 2. 'Effective Population Protection Legitimacy' (EPPL) test

Accordingly, since the assessment on the legitimacy of the government falls on the responsibility of the invited interveners, it is comprised of two aspects of legitimacy, namely (i) legitimacy of consent and (ii) legitimacy of protection. The legitimacy of consent is dependent on two requirements consisting of (i) 'effective protection of population' and (ii) 'recognition'.

Pursuant to the first requirement, it is argued that there are two situations triggering the application of 'effective protection':

(i) ‘Inability’ of the incumbent government to effectively protect its population due to lack of capacity to do so. This ‘inability’ thereby generates an entitlement for external assistance in order to maintain effective protection over its population.
(ii) ‘Unwillingness’ to effectively protect population due to the incumbent government’s role in the commission of mass atrocity crimes. As a corollary, it will then lose the right to issue invitation for external military assistance and this right will be shifted to the opposing government subject to an affirmation by the UNGA.

By adopting this test, it is maintained that the government satisfying the first requirement therefore retains its legitimacy and its right to issue a valid invitation for external intervention. Following this, it appears that Doswald-Beck’s (1986) and Wippman’s (1996) assertion wherein states requiring assistance do not have effective control is not relevant under this new test. Since this thesis provides states a feasible option to protect their population from mass atrocity crimes in the event that they are ‘unable’ to do so, it therefore does not imply loss of effective protection.

With regards to the threshold, the loss is not only triggered upon actual commission of mass atrocity crimes but also encompasses ‘threat’ or ‘incitement’ to commit, as established in the R2P framework. Additionally, as argued by Wippman (1996), the question of effective control arises when the incumbent government starts to lose control over substantial part of the territory to the opposition groups. Proceeding from this, it is asked: is the loss of effective protection contingent upon the amount of the population affected? Is the loss triggered when mass atrocity crimes are committed over the entire population or only within a certain part or group of the population? To answer these, this thesis suggests that irrespective of the amount of the population affected, if the four mass atrocity crimes are committed, it would lead to loss of effective protection. As a corollary, the legitimate authority loses the prerogative to issue consent for military intervention. However, in the event that there are competing claims of legitimacy, ‘recognition protection’ requirement would be able to resolve this ambiguity. In line with Kenny and Butler’s (2018) proposal, an official UNGA declaration would suffice to prove which government still maintains its effective protection and therefore has the right to issue invitation.

Taking a step further, an additional aspect of legitimacy that needs to be assessed by the invited interveners prior to intervention is propounded. This legitimacy is referred to as 'legitimacy of protection' wherein the invited interveners are required to make an objective assessment of the situation prior to using force under both Pillar II and Pillar III. In this regard, the UNSG's 2004 criteria is suggested to be set as the 'protection threshold' in view of its endorsement under the roof of the UN. Given that the analysis for both 'protection threshold' and 'parameters on the use of force' are premised upon the UNSG's 2004 criteria, these will be extensively examined it in the final subsection of this chapter. Pursuant to the assessment, similar to the IvI framework, two specific issues, (i) incumbent government principle and (ii) counter-intervention require a detailed analysis to ensure an effective application of the EPPL test.

2.2.4. Specific Issues

2.2.4.1. Incumbent Government Preference Principle

The assessment of the 'legitimate authority' representing the state also brings forward a *prima facie* presumption of intervention in favour of incumbent governments until and unless there is concrete evidence that proves otherwise (Lauterpacht cited in Lieblich, 2013). This principle is rooted in the basic proposition of international law that 'the entity that speaks for the state is the recognized and established government' therefore having the authority to issue a valid consent (Lieblich, 2013, p. 439). Lauterpacht supports this view asserting that military intervention to quell an internal resurrection in favour of incumbent governments is 'perfectly legitimate' (as cited in Shaw, 2005, p. 1042). On the other hand, IvI on the side of opposition groups has been regarded as unlawful as the right to request for military assistance is a manifestation of the incumbent government's sovereign authority (Allo, 2009; Mon, 2003).

This rebuttable presumption is firmly established in the leading cases of Nicaragua and FRD whereby the courts have prohibited military assistance on behalf of rebel forces especially if the objective is to effectuate a regime change (Fox, 2015; Gray 2008; Nicaragua v. US, 1986). In the Nicaragua case, the International Court of Justice (ICJ)

further justifies this presumption on the ground that the principle of non-intervention would absolutely be undermined if the invitation were also extended to the opposition (Nicaragua v. US, 1986). In support of this principle, the recent cases of United Kingdom (UK) intervention in Sierra Leone and France intervention in Côte D'Ivoire demonstrate that this principle plays a determinative role in the intervening state's decision to carry out military assistance (Gray, 2008; Lieblich, 2013).

However, as argued by Gray (2008) and Wet (2017), if the population has expressed its intention to overthrow the incumbent regime, it would be illogical for this presumption to still stand particularly in civil war situations where there is loss of not only territorial effective control but also of population which in turn would lead to contravention of self-determination norm. In addition, it also appears that state practice does not abide by this as several reported interventions were also carried out on behalf of rebel forces (Lieblich, 2013).

Applying this principle, it is assumed that invited interveners have the responsibility to first ensure that the inviting government is the incumbent government of the state. If it is established that the intervention is in favour of the incumbent government, the second step is to ensure that it still retains its legitimacy pursuant to the EPPL test. Taking a step further, it is maintained that intervention in favour of opposition to protect the population from mass atrocity crimes is unlawful unless it is affirmed by the UNGA that the opposing government is the legitimate government representing the beleaguered state.

2.2.4.2. Counter-intervention

The principle of counter-intervention is formulated to 'offset a prior illegal intervention' (Allo, 2009, p. 233) and this view is also supported by Jennings and Watts (1997) wherein it is predicated on the argument that 'if there is outside interference in favour of one party to the struggle, other States may assist the other party' (p. 438). Moreover, Lieblich (2013) notes that the idea of counter-intervention does not contravene the principle of non-intervention given that the 'political independence' of the state has been undermined by the prior intervention (p. 297). As maintained by Fox (2015), this rule rests on two

grounds. Firstly, external military assistance ‘effectively internationalizes the conflict’ (p. 11) thereby rendering negative equality doctrine to be inapplicable in this conflict. The second justification hinges on the ‘collective self-defence’ argument in which any intervention in favour of armed rebels is regarded as amounting to an armed attack against the state. In the same vein, the obiter dictum in Nicaragua case justifies counter intervention on the ground of ‘collective self-defence’ as it was carried out with the aim of safeguarding the state from external intervention (Nicaragua v. US, 1986; Schacter, 1984). Although Perkins (1986) holds the same view, she argues that this right is viewed as a ‘remedy for another nation’s breach of international law’. Since Article 2 (4) was meant to prohibit ‘unilateral use of force’, as a corollary, the use of force in counter-intervention does not violate the prohibition on the use of force (Perkins, 1986, p. 201). Schacter (1984) argues that this type of intervention is not subject to any sort of legitimization given that it is meant to ‘neutralize’ a prior intervention that is unlawful with the aim of reinstating the right to self-determination back to the ‘internal actors’ of the targeted state (p. 1642).

However, an issue arises with regards to the ‘right authority’ that is entitled to claim for counter-intervention. On the one hand, Fox (2015) and Gray (2008) argue that this right solely belongs to the incumbent government in response to an ‘armed attack’ by a third state in favour of opposition whereas Schacter (1984) opines that since counter-intervention is justified to maintain independence of the state from outside influence, the assistance rendered can either be in favour of government or rebel forces provided that it is resorted to in the wake of unlawful intervention by third states. Nonetheless, this right is subjected to an essential qualification; principle of proportionality (Nicaragua v. US, 1986) wherein if the amount of force used in counter intervention exceeds the force used in prior intervention, this act would then be deemed unlawful. To illustrate this, Allo (2010) notes that the ‘sending of trainers and military advisors’ is disproportionate to the ‘shipment of arms and financial support’ (p. 236). As such, the ‘lawfulness’ of counter intervention rests on the determination of which authority first resorts to external military assistance. Given that this determination is not as straightforward (depending on covert or overt external assistance) as one would expect, state practice suggests that most states

try to justify their external interventions on the basis of counter-intervention in an attempt to avoid from being sanctioned for violating Article 2 (4) and 2 (7) of UN Charter.

Turning to state practice, it appears that France has often justified its intervention in African states on the pretext of counter-intervention. For instance, in the case of Tunisia in 1980, France justified its military assistance on the ground of countering Libya's intervention that was in support of armed rebels (Gray, 2008, p. 98). Likewise, the 1974 intervention in Cyprus by Turkey was justified on the ground of counter-intervention but was unanimously turned down by the UN (Gray, 2008, p. 94). Further, the US intervention in Grenada in 1983 was meant to counter a prior intervention from Syria, which in turn resulted in negative reactions from the international community (Doswald Beck, 1986; Gray, 2008). As noted by Lieblich (2013), notwithstanding the prevailing view that counter-intervention doctrine is used to justify the incumbent government's request for military assistance, it seems that state practice proves otherwise as the case of Afghanistan's invasion in 1979 where the opposition groups (Egypt and Saudi Arabia) justified counter-intervention in response to the Union of Soviet Socialist Republics (USSR)'s prior illegal invasion and in Angolan civil war in 1975 where the USSR in support of armed rebels counter-intervened to a prior South African intervention (Shaw, 2005, p. 1150).

Pursuant to this principle, the incumbent government has the right to 'counter-intervene' if the prior intervention on behalf of the opposition were carried out to commit mass atrocity crimes. However, if the situation is reversed, the opposition may be granted the right to counter-intervene for the purpose of protecting the population from mass atrocity crimes but subject to an approval by the UNGA.

2.3. SCOPE OF APPLICATION

2.3.1. Negative Equality Principle

As a general rule, forcible intervention is prohibited in international law with the possible exception of consensual intervention in favour of an incumbent government.

Notwithstanding this, IvI is subject to the prohibition of states from providing military assistance during the subsistence of a civil war (UN, 1949; Gray, 2008). The issue surrounding the scope of application was brought to the fore considering that the permissibility of IvI in civil war would be in contravention to the right to self-determination—that rightfully belongs to the peoples of every state as enshrined in Article 1(2) and 55 of the UN Charter (Doswald-Beck, 1986). Any infringement of this right would adversely affect 'the inalienable right of every state to choose its political, economic, social and cultural systems' (Gray, 2008, p. 81).

In this regard, Erika (2016) contends that if military assistance during a civil war contravenes the right to self-determination, as a corollary, it simultaneously violates the principle of the prohibition of the use of force (p. 309). Furthermore, Moore (1983) argues that 'the principal rule is that intervention in internal conflict on behalf of any faction is illegal. This rule is supported by the UN Charter's principle of self-determination. In genuine civil conflicts the factions are free to try to resolve the issue of self-determination among themselves' (p. 196). To expound it further, Nolte (2010) contends that external intervention in civil conflicts would tamper with the unequivocal aspiration of the people in the manifestation of popular uprisings, which would result in the violation of the principle of self-determination (para. 22). In view of this, Gray (2008) and IDI's 1975 Resolution hold the same position wherein they rule out any permissibility of consensual intervention in civil wars.

Not only that, Byrne (2016) argues that governments which are embroiled in civil war are no longer representing the state in view of their loss of effective control of the territory which in turn renders them merely as 'opposing parties' to a civil war (p. 100). His argument is further augmented by the UNGA's Declaration on Friendly Relations wherein states are evidently prohibited from rendering military assistance in acts of civil strife (UN, 1970) considering that intervention from third states would impede states from voluntarily determining their future.

In view of this, prior to the determination on the validity of consent, the intervening state has to first ensure that the conflict falls below the threshold of a civil war. This determination is crucial since the government requesting for military assistance to repress

'secessionist' groups is not deemed to have violated the principle of self-determination (Doswald-Beck, 1986, p. 203). As per Gray's (2008) line of questioning, there are three fundamental issues that need to be ascertained to resolve the question of classification of conflicts. The first is the issue of 'civil war vs limited control unrest' that is dependent on the determination of effective control test. For the purpose of this thesis, it is proposed that it should be contingent on the EPPL test. Pursuant to this, if it is established that civil war exists, the following issue is whether it is 'purely civil war' or has been tainted with outside intervention (counter-intervention). The third issue is to find out whether force is used by the government to suppress the citizenry's right to self-determination (Gray, 2008).

In light of this, given the absence of a legal definition of 'civil war', this term is at times used interchangeably with 'internal armed conflict' (Lieblich, 2013). Lieblich (2013) further asserts that the term 'non-international armed conflict' (NIAC) defined in Additional Protocol II should not be referred to in the context of IvI as it also encompasses transnational-armed conflicts, which are not considered intrastate or internal (p. 54). Further, in view of its status within international humanitarian paradigm, it is better to refrain from referring to it so as to avoid confusion (Lieblich, 2013). Notwithstanding the non-reference, the scope of NIAC application serves as an appropriate guideline to determine the existence of armed conflict (Gray, 2008). Therefore, the discussion is primarily based on this term.

The term 'internal armed conflict' has been legally dealt with in the case of Tadic where the ICJ states that it 'exists whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a state'. In view of this definition, Lieblich (2013) further expounds the term 'protracted' entailing two additional elements of 'sustained (along the time continuum) and large-scale (in terms of the friction between parties)' that must be fulfilled to qualify it as an internal armed conflict (p. 55). Apart from the 'protracted' requirement, the opposition group challenging the government must be 'organized' so as to exclude 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature' as laid down in Article 1 (2) of the Additional Protocol II (UN, 1949).

Moreover, Lieblich (2013) asserts that revolutions do not constitute an internal armed conflict as they are consequences of a process which do not entail the existence of one (p. 344) Interestingly enough, in contrast to the definition in Additional Protocol II, the existence of 'internal armed conflict' as proposed in the Tadic case appears to do away with the requirement of opposition groups in having 'control over a part of its territory' thereby suggesting that internal armed conflict may still exist even though the opposition does not have control over territory. For this thesis, since the case study is the Yemeni crisis, this classification is pertinent to determine whether the conflict has reached NIAC, which might render the invitation issued by President Hadi as invalid.

Building on the argument that intervention in favour of government is prohibited in civil war, this approach is formulated into a doctrine as established in the report issued by the International Fact Finding Mission in Georgia. This doctrine is known as 'negative equality' whereby each side is 'equally unable to invite outside assistance' in situations of civil war (EU, 2009; Fox, 2015, p. 827). The contention in support of this doctrine rests on the fact that it is hardly possible to ascertain the 'legitimate government' in a situation where both the incumbent government and opposition groups are amply divided in terms of territorial control and international recognition. It is noteworthy that this doctrine plays a preventive role in ensuring that the civil conflict does not escalate into an international conflict (Fox, 2015, p. 828).

However, as Fox (2015) notes, this principle is criticized on the ground that it tilts towards the more powerful faction (often the incumbent government) thereby limiting any possibility of successful revolutions to prevail in the civil war (p. 829). Although this doctrine finds a near-unanimity amongst scholars, Brownlie argues that it has not reached the status of prohibition (p. 323). Further, given that the doctrine lacks a legal standing in international law, its status is reduced to a mere standpoint in academia (Nolte, 2010). Taking these criticisms into consideration, the following section analyses the exception to this doctrine as proposed by Bannelier and Christakis (2013) to ensure that IvI is effectively implemented.

2.3.2. Exception: Purpose-Based Approach

Notwithstanding the near unanimity on the prohibition of IvI in situations of civil strife, Ruys and Ferro, (2018), as well as Bannelier and Christakis (2013) carve an exception to this principle, that is contingent on 'purpose or objective' of intervention. Accordingly, they differentiate two sets of circumstances as follows: If the IvI is solely conducted to resolve an internal strife on the side of the government, it would thus be rendered unlawful. However, if the purpose of the intervention is to accomplish other objectives, i.e. to tackle terrorism or peacekeeping deployment, the intervention would be rendered as an exception to this doctrine (Ruys & Ferro, 2016, p. 191). It is noteworthy that this approach is not without any complexities since the subjectivities involved in determining the legitimacy of purpose runs the risk of unilateral designation of opposition groups as 'terrorists' by consenting states, as evinced in the recent Syrian conflict (Bannelier & Christakis, 2013).

In this conflict, it appears that in the letters sent to the UNSC, the Syrian government has classified all opposition groups as 'terrorists' in an attempt to suppress divergent views. Thus, to circumvent this issue, scholars suggest the UNSC as the appropriate body to confirm the determination made by the consenting or intervening states. In the 2013 Malian conflict, the UNSC affirmed the determination made by France on the three opposition groups regarded as terrorists. As a result, it can be inferred that the UNSC declaration legitimizes the intervention for the purpose of tackling terrorism despite the fact that the conflict has reached NIAC (Bannelier-Christakis, 2016). However, this proposal is flawed since the UNSC is highly influenced by the five permanent members wielding veto thereby rendering the confirmation as partial. Bearing this in mind, another option is to refer the determination to the UNGA where the views of all member states are equally represented thereby reducing the element of bias. Alternatively, Wippman (1996) proposes to refer it to regional organizations for they have better apprehension of the facts on the ground.

Building on this exception, if the 'purpose' of external intervention is to protect the population from mass atrocity crimes, the intervention would be rendered within the limits of law despite the fact that conflict has reached the threshold of civil war. However,

this determination is subject to an official UNGA declaration affirming it as such. Since the protection of innocent lives is more important than unquestionably adhering to the right of peoples to determine its own government free from external influences, the intervention should be rendered as lawful. Upon establishing the scope for application within the framework of this thesis, the following section deals with the parameters on the use of force deriving from R2P guidelines. It is suggested that the invited interveners are responsible to observe these parameters prior to using force and failure thereof would result in contravention of Pillar II and III responsibilities.

2.4. PARAMETERS ON THE USE OF FORCE BY INVITED INTERVENERS VIS-À-VIS R2P GUIDELINES

The R2P guidelines on the use of force were first proposed in the 2001 ICISS report. Later on, former UNSG Annan revisited the guidelines in the 2004 High Level-Panel Report. In view of the different set of criteria, the following discussion focuses on a comparison between the two sets of guidelines. The six criteria proposed by the ICISS are as follows: (i) right authority (ii) just cause (iii) right intention (iv) last resort (v) proportional means and (vi) reasonable prospects.

Given that the preceding section analysed the 'right authority' criterion, the discussion will proceed with the 'just cause' criterion. Under this criterion, military intervention is justified when there is either (i) 'large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation', or (ii) large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape' (ICISS, 2001a, p. 32). In comparison with the 2004 UNSG report, Annan proposes 'seriousness of threat' criterion, which enquires whether the threatened harm is sufficiently serious to justify the use of force at the outset. It is noteworthy that the 2004 criterion is more restricted as 'cases of natural and environmental disasters' are excluded from the scope (UNGA, 2004). On the other hand, it is more extensive given that 'serious violations of humanitarian law' are also added to the list of genocide and ethnic cleansing (Bellamy, 2006, p.156). Furthermore, according to Bellamy (2006), the criterion is

qualified by a ‘preventive component’ wherein it requires that the threat to be actual or ‘imminently apprehended’ (p. 156).

Turning to the ‘right intention’ criterion, the ICISS notes that the ‘primary purpose of the intervention must be to halt or avert human suffering’, and that it must be determined at the outset. This suggests that intervention could be pursued to achieve many reasons but that the primary purpose should be as mentioned. Similar to the 2001 criterion, Annan reformulates it as ‘proper purpose’ wherein the aim of intervention is to either halt or avert a threat of mass atrocity crimes despite the ancillary purposes involved.

In respect to ‘last resort’, the ICISS imposes a chronological sequencing measure whereby peaceful and non-military measures for both prevention and reaction must be explored first before the use of force is employed. However, the Commission underscores that ‘this does not necessarily mean that every such option must literally have been tried and failed…[but] there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded’ (ICISS, 2001a, p. 36). In a similar vein, the 2004 criterion requires every peaceful measure to be explored, ‘with reasonable grounds for believing that other measures will not succeed’ before military intervention is contemplated (UNGA, 2004, p. 58).

In respect to ‘proportional means’, it entails that ‘the scale, duration and intensity’ are proportional with the aim of intervention. Further, the commission highlights that interveners need to strictly observe ‘all the rules of international humanitarian law’ (ICISS, 2001a, p. 37). However, the 2004 criterion requires that they are not only proportional but ‘minimum necessary’ to overcome the threat (UNGA, 2004, p. 58).

Lastly, for the ‘reasonable prospects’ criterion, the Commission stresses that intervention would be justified not only if there is ‘a reasonable chance of success’ in achieving the aim of intervention but it also has to ensure that the aftermath would be better than the conditions prior to the intervention. However, the Commission does not recommend intervention to be taken against any P5 members or hegemonic states on utilitarian grounds. In contrast, Annan reformulates it as ‘balance of consequences’, which not only

necessitates reasonable chance of success but also requires the situation to be improved if military action is taken.

Pursuant to this, a new set of guidelines to align it with the responsibility of invited interveners prior to using force is proposed. It should be noted that the guidelines are for both Pillar II and III since the use of force could also be resorted to in cases of preventive deployment (Boutellis, 2015). Thus, the proposal is as follows.

On the 'seriousness of threat' criterion, despite the different thresholds provided in the report of the ICISS and the 2004 UNSG report, since Paragraphs 138 to 140 of WSOD are unanimously adopted by the UNGA, the criterion should thus be extracted from this document. Therefore, the intervening states are only allowed to intervene if there is cogent evidence that the state is 'manifestly failing' to protect its population from four mass atrocity crimes either due to its 'inability' or 'unwillingness' to do so. The high threshold adopted is to prevent any abuse on the use of force by invited interveners. Thus, if the facts on the ground merely show that there is clear and serious harm or that there is large-scale loss of life, under this framework, it does not trigger military intervention.

With regards to 'proper purpose' criterion, the invited interveners have the responsibility to ensure that the primary purpose to militarily intervene is to either prevent the outbreak or to halt the commission of mass atrocity crimes. Given that there are cases where the secondary purpose is to reinstate state sovereignty, under this framework, force can still be used as long as the primary purpose is to protect population (Kenny & Butler 2018). However, it should be noted that despite the public statements issued where the primary purpose is to protect the population, the reality on the ground is more often than not is proven otherwise, as will be revealed later in the Yemeni crisis.

The 'last resort' criterion is not relevant in this context as the concept of IvI is grounded on the use of force. However, given that this framework differentiates between force used to 'prevent' and to 'react', preventive deployment should be given priority as opposed to military intervention under Pillar III. Nevertheless, as proposed in Paragraph 139 of WSOD, this requirement should be on a case-by-case basis as it would be ineffective if preventive deployment were to be authorized after mass atrocity crimes have been

committed. Conversely, if there is only the threat of mass atrocity crimes, it would be unconscionable to use extreme force in a timely and decisive manner. Lastly, on the 'balance of consequences' criterion, the invited interveners have to ensure that military intervention carried out would alleviate the conflict, not further exacerbate it.

Taking into account the principles established in IvI, two additional guidelines are proposed in this framework. Firstly, in view of the negative equality doctrine, the invited interveners have to first determine whether the conflict falls below the threshold of civil war. If it is in affirmative, the intervening states may proceed as usual but if the conflict is part of the civil war, the invited interveners hold a higher responsibility to ensure that the primary purpose of intervention is to protect population from mass atrocity crimes and in this situation, secondary purpose is not allowed. Secondly, the 'incumbent government principle' should be taken into account prior to intervention but if the incumbent government itself is perpetrating the mass atrocity crimes, invitation from opposition subject to an approval from the UNGA should supersede this principle.

Therefore, pursuant to the guidelines proposed, the following chapter on Yemeni crisis applies these criteria and tests their feasibility. For better comprehension on the set of the parameters on the use of force under this framework, the following table summarizes the guidelines.

Jus Ad Bellum	
Right Authority	Inaction of the UNSC shifts the responsibility to use force to invited interveners.
Seriousness of Threat	State 'manifestly fails' to protect its population from four mass atrocity crimes due to its 'inability' or 'unwillingness' to do so.
Proper Purpose	Primary purpose: to either prevent the outbreak of mass atrocity crimes or to halt the commission of mass atrocity crimes. Secondary purpose i.e. to reinstate state sovereignty is allowed.
Balance of consequences	Military intervention is to alleviate the conflict, not further exacerbate it.
Last Resort (Preventive over reaction)	Preventive deployment under Pillar II is prioritized over military intervention under Pillar III.

'Negative Equality Doctrine'	Conflict falls below threshold of civil war but is qualified by the purpose of protecting population from mass atrocity crimes.
'Incumbent government principle'	Invitation has to be issued by incumbent government unless it is the perpetrator.

Table 1. Parameters on the use of force for invited interveners under the R2P framework.

CHAPTER 3

THE CASE OF YEMEN

This chapter begins with an overview of the factual background to the crisis in Yemen. It then analyses the letter issued by the incumbent Yemeni government to the Gulf Cooperation Countries (GCC) with a request for external intervention. Pursuant to this, the official statements issued by the Saudi-led coalition are assessed for the purpose of determining whether the language used fits within a case of IvI couched in the language of R2P. Moreover, this chapter provides an assessment of the legitimacy of government predicated upon the 'effective population protection legitimacy' test. Upon establishing the 'right authority' to issue invitation, it applies the *jus ad bellum* guidelines on the use of force as laid down in the previous chapter. This application focuses on the decision prior to the intervention and does not address the subsequent interventions carried out by the Saudi-led coalition that is predicated on the initial invitation.

3.1. FACTUAL BACKGROUND TO THE CRISIS IN YEMEN

Republic of Yemen was established in 1990. Prior to its formation, the state was comprised of different areas governed by multiple regimes (Brehony, 2015). It is situated between Somalia and South Africa, constituting two distinct territories yet interconnected region namely Horn of Africa and the Arabia (Boucek, 2010). Its population is estimated at 26 million comprising of 65% Sunni majority whilst the remainder 35% belonging to the Zaydi Shi'ite sect (Popp, 2015).

The Northern part of Yemen was ruled by a Shi'ite group, the Qasimi Imams since the 16th century but its control over the territory eventually waned with the arrival of Ottoman and British Empires (Clausen, 2018). Given its strategic position that is near to Mecca and Medina and its authority over trade routes, these hegemonic powers began their pursuit of taking over Yemen (Brehony, 2015). The competing claims over Yemen has led to an official division of Yemen into North and South Yemen, with the Ottomans exerting control over the Northern capital of Sana'a and the British over the Southern

capital of Aden (Brehony, 2011). After the collapse of both empires, civil war broke out and led to the formation of Yemen Arab Republic (YAR) in the North and People's Democratic Republic of Yemen (PDRY) in the South (Brehony, 2011).

In the wake of the Soviet Union's disintegration, PDRY that was set up on Marxist ideology began to lose power and influence therefore paving way for unification that is now known as Republic of Yemen. Similarly, PDRY's weakening has resulted in YAR members having greater political control prior to unification with the agreement appointing Ali Abdallah Salleh as the president of Yemen in 1990 (Dingli, 2013). It was alleged that Salleh's continued allegiance towards YAR was reflected in his policies where infrastructure development was solely concentrated in Sana'a (controlled by YAR) and his lack of determination to integrate PDRY and YAR military forces. The political and economic exclusion of PDRY in the Yemeni governance further exacerbated the strained relationship between Salleh and PDRY, which eventually culminated into a civil war in 1994 (Williams et al., 2017). Although Salleh's government managed to defeat PDRY's forces, Salleh did not honour his undertaking for unification but instead augmented the suppression of Southern population (Dingli, 2013).

In view of the unjust policies implemented by Salleh's government, the Southern opposition intensified its protest in 2003 sparking a smouldering unrest between these two forces. In an attempt to quell this, Salleh's government initiated a crackdown on Houthi[9] forces resulting in the death of their leader, Husayn al Houthi (Nußberger, 2017). It was alleged that his death had impelled other Southerners to partake in an armed rebellion against Salleh's government with persistent attacks in the Sada'a region (Hathaway et al., 2018). Notwithstanding Salleh's effort to improve relations with the rebel forces, the widespread protests that were taking place during the Arab uprisings in 2011 have sparked a 'Yemeni Revolution'. This became an unprecedented wave of protests in Yemen partaken in not only by the Houthis but extending to the Yemeni population as a whole (Popp, 2015). In the wake of this uprising, the Yemeni population

[9] The Houthis are predominantly Zaiddiyah (a Shi'ite Muslim sect) and are allegedly backed up by Iran, which is a long-time adversary of Saudi Arabia. The group began as a localized peaceful movement challenging the social and political marginalization of the Southerners but soon became radicalized due to the six violent conflicts perpetrated by former President Salleh (Dingli, 2013; Popp, 2015).

took to the streets demanding for an immediate dismissal of former President Ali Saleh and an end to his authoritarian rule over Yemen (ICG, 2012). However, on 18 March 2011, the minor and purportedly peaceful protests turned violent when pro-Salleh military forces killed more than 50 demonstrators under the pretext of suppressing public discontentment (Clausen, 2018).

Pursuant to this, the Gulf Cooperation Council (GCC) proposed an initiative entailing a 'two-phase transitional process' wherein in the first phase Salleh was requested to resign in exchange for immunity from persecution while Vice President Mansur Hadi was temporarily appointed as the head of state (Buys & Garwood-Gowers, 2018, p. 4). Pursuant to this, the UNSC adopted a resolution to condemn the human rights violations perpetrated by Salleh's government and express support for the GCC initiative (UNSC, 2011b). In view of the international pressure, Salleh officially handed over his resignation on 23 November 2011 whereupon elections took place on 21 February 2012 as agreed in the initiative.

Upon Hadi's appointment, the second phase was initiated with the convening of a 'National Dialogue Conference', which was subsequently enforced, with the backing of the UN (Ruys & Ferro, 2016). As agreed in the GCC Initiative, the conference was intended to bring about a negotiation on a feasible plan for a 'peaceful political transition' (Buys & Garwood-Gowers, 2018, p. 4) amongst key political actors of Yemen, particularly the Houthis. At the end of the conference, participants have agreed upon recommendations on pressing issues such as the 'Houthi issue', the political system of Yemen and the governance in southern part of Yemen (Gaston, 2014).

However, it was alleged that the Houthis rejected the 'six-region structure' proposal and resorted to brutal territorial expansion, taking advantage of the 'power vacuum' and the growing 'security void' due to the political instability in Yemen (Alley, 2013; ICG, 2012). Concurrently, the offshoots of Salleh's government aligned with the Houthis to overthrow Hadi's government for further expansion of their influence in Yemen. The Houthi-Saleh alliance fortified their forces to take over the Northern region and becoming the *de facto* government in capital Sana'a (Popp, 2015). Due to the aggravating security and political instability of Yemen, Resolution 2140 was adopted by the UNSC wherein stern measures

for instance asset freezing and travel bans have been imposed against any factions causing instability in Yemen (UNSC, 2014). Notwithstanding the international condemnation, the Houthi forces persisted with their efforts in overthrowing Hadi's government by taking control of Yemeni capital, Sana'a in addition to seizing all the key functions of the government (UNSC, 2015c).[10]

To quell the insurrection, Hadi's government entered into Peace and National Partnership Agreement (PNPA) with the Houthis on 21 September 2014 in which their demands were set out and agreed to be satisfied accordingly (Ruys & Ferro, 2016). On 7 January 2015, a draft constitution was proposed to President Hadi but was categorically rejected by the Houthis on the grounds that it contravenes the agreed terms in PNPA (Nußberger, 2017). The lingering mistrust led the Houthis to resume their efforts by placing Hadi and his top officials under house arrest in addition to dissolving the Parliament and setting up a new 'Presidential Council' upon Hadi's removal as head of state (Buys & Garwood-Gowers, 2018). In response, the UNSC adopted Resolution 2201, strongly deploring the unilateral actions of the Houthis and demands them to inter alia, participate in the UN-brokered negotiations, remove forces from governmental institutions and safely release those who were arbitrarily detained (UNSC, 2015e, para. 7).

Upon his release, Hadi successfully fled to Aden and subsequently proclaimed it as the temporary capital of Yemen. In the meanwhile, he publicly revoked his resignation on 21 February 2014, which in turn prompted Houthi forces to advance towards Aden culminating in a successful seizure of the new Yemeni capital. With no other option left, Hadi eventually escaped to Riyadh and officially invited GCC members[11] for a military intervention in Yemen (UNSC, 2015c). In response to Hadi's invitation, a Saudi-led military coalition provided military assistance to Hadi's forces in Yemen comprising of 'military units, tribal militias, and Islamic militants' (UNSC, 2014). The coalition launched Operation Decisive Storm on 26 March 2015 followed by Operation 'Renewal of Hope' on 22 April 2015 (Buys & Garwood-Gowers, 2018). Pursuant to these

[10] To further consolidate its power, the Houthis 'imposed a blockade on the Yemeni National Security Agency building in Sana'a', 'established security checkpoints and 'exerted control over all government institutions and buildings, including the Central Bank and the Ministry of Oil' (see, UNSC, 2015c, p. 23).
[11] GCC members consisting of Saudi Arabia, United Arab Emirates, Bahrain, Omar, Kuwait and Qatar.

operations, the coalition managed to successfully recapture the city of Aden and the Sunni populated regions in southern Yemen whilst western Yemen still remained under the authority of Houthi-Salleh alliance (Ruys & Ferro, 2016).

In view of the ongoing human rights violations committed against Yemeni population, in April 2015, the former UNSG Ban attempted to resolve this issue by appointing UN Special Envoy Ismail Ahmed to assist both parties in reaching a temporary settlement (UN News, 2015). However, his endeavour was proven futile as they failed to even agree on 'a basic framework for peace' (Hathaway et al., 2018, p. 6). In December 2017, after Saleh announced that he is willing to engage with the Saudi-led coalition, the Houthi-Salleh alliance was disbanded, resulting in Salleh's assassination (Wintour, 2017). In response, the Saudi coalition launched a drone strike killing President of Houthi's Supreme Political Council on 23 April 2018 (UNSC, 2018). The Yemeni crisis that is currently labelled as the 'worst humanitarian crisis in the world' (UN News, 2019) remains unabated until this day. Despite several attempts by the international community to reach a temporary ceasefire, both warring parties are still locked in a violent cycle of military strikes undeterred by the surge in civilian deaths (UNHRC, 2018).

3.2. ANALYSIS OF RESOLUTIONS AND STATEMENTS WITH REFERENCE TO R2P IN YEMEN

The first explicit reference to R2P in relation to the Yemeni crisis by the international community is evinced by the adoption of 'Resolution 2014'. In this resolution, the UNSC emphasizes 'Yemeni Government's primary responsibility to protect its population' (UNSC, 2011b). However, the government referred to in this resolution is Salleh's government that was alleged to have committed human rights violations resulting in imposition of sanctions in November 2014 and arms embargo against Salleh's supporters in April 2015 (UNSC, 2015c). It should be noted that notwithstanding the reference to R2P in this UN resolution, it does not have any bearing for this thesis's framework as the 'inviting government' in question pertains to the succeeding government of Hadi.

Turning to the case of IvI in Yemen, the incumbent government of Hadi requested for military assistance to protect the Yemeni population on the ground that he is unable to do so, as stated in his official letter written to the GCC members[12] dated 24 March 2015 (UNSC, 2015b). On that note, since President Hadi as the democratically elected head of the Yemeni state was the 'requisite official' who issued the invitation, the second aspect of internal validity is thus satisfied. The letter started off with the allegation that the current instability in Yemen is perpetrated by the Houthis in the form of 'ongoing acts of aggression and incessant attacks against the country's sovereignty' (UNSC, 2015b, p. 3). At the same time, Hadi claimed that his government had pursued every action to protect its population from 'criminal attacks' but was rendered futile owing to the categorical rejection by the Houthis. Hadi had also insinuated an involvement of 'external forces' supporting the Houthis to further expand their influence in Yemen. Thereafter, he recalled his state's responsibility to protect the Yemeni population and requested military assistance from allied states to 'protect Yemen and its people from the ongoing Houthi aggression' (UNSC, 2015b, p. 5). In view of Hadi's explicit request for intervention due to inability to protect the Yemeni population, it is thus established that there is no contention on the 'form of consent' as the consent was 'expressly' given by the incumbent government.

In response to this invitation, representatives from Bahrain, Kuwait, Qatar, Saudi Arabia and UAE issued a joint statement to the UN, 'for the protection of Yemen and its people…' (UNSC, 2015b, p. 2). The official justifications provided by the invited interveners was with reference to their responsibility to protect Yemeni population, as formulated in the following: 'We are mindful of our responsibility towards the Yemeni people. We note the contents of President Hadi's letter, which asks for immediate support in every form and for the necessary action to be taken in order to protect Yemen and its people from the aggression of the Houthi militias.... [we] therefore have decided to respond to President Hadi's appeal to protect Yemen and its great people from the aggression of the Houthi militias' (UNSC, 2015b, p. 5). At the same time, the joint statement claims that the Houthis are supported by 'regional forces, which are seeking to

[12] Specific reference to the head of states of Saudi Arabia, United Arab Emirates (UAE), Bahrain, Oman, Kuwait & Qatar (see, UNSC, 2015b).

extend their hegemony over Yemen and use the country as a base from which to influence the region' therefore the threat could destabilize not only Yemen, but also adversely affect regional and global stability (UNSC, 2015b, p. 5). Apart from the military support provided by GCC members, the 'logistical and intelligence support' rendered by the US is purported to 'defend Saudi Arabia's border and to protect Yemen's legitimate government' (UNSC, 2015b), without any mention of protection of the Yemeni population.

Therefore, based on the letter and joint statement issued, it appears that this case reflects a case of IvI within the R2P framework. Notwithstanding the other justifications advanced such as individual and collective self-defence, under this framework the analysis addresses the invocation on IvI and R2P. Pursuant to the joint statement above, IvI was clearly invoked by the intervening states as evinced by their explicit reference to respond to Hadi's invitation for military assistance. To further substantiate, the official statements made by Saudi representatives affirm IvI as a ground for intervention as follows: 'Saudi Arabia has launched military operations in Yemen… in response to a direct request from the legitimate government of Yemen…' (Saudi Embassy, 2015). Similarly, the express reference to protect the Yemeni population evidently proves that R2P is invoked alongside IvI, in other words intervention is carried out to protect the Yemeni population.

Furthermore, the analysis on the 'language' used is essential to ascertain whether it falls under the framework of R2P or not. In view of Resolution 1973 on Libya, despite the assertions of a group of scholars that Libya is a case of R2P (Buys & Garwood-Gowers, 2018; Mahdavi, 2012), upon a closer analysis the language used in the Resolution appears to fall under the PoC framework (Garwood-Gowers, 2013, p. 606; Gözen Ercan; 2019, p. 330). Referring to the preamble of Resolution 1973, the UNSC reiterates the Libyan government's responsibility to 'protect the Libyan population' but shifted the language to that of PoC in the following words : '…reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians' (UNSC, 2011a, p. 1). To further substantiate, the language used by the UNSC to authorize the use of force appears to be in line with the PoC framework as formulated in the following: '… to protect civilians and civilian populated areas under threat of attack in

the Libyan Arab Jamahiriya, including Benghazi…' (UNSC, 2011a, p. 1). In contrast, although the language adopted in the letters issued by Hadi and Saudi-led coalition does not specifically refer to 'Yemeni population', the phrase 'Yemeni people' implies that the responsibility to protect extends over its population as a whole and is not only confined to the protection of civilians, hence falls under the framework of R2P.

3.3. TESTING THE LEGITIMACY OF THE YEMENI GOVERNMENT

In light of the factual background, it appears that the *de jure* recognition of Hadi's government as Yemen's legitimate government remains uncontested. This is evinced by the fact that Hadi was democratically elected[13] in accordance with Article 106(a) of the Yemeni constitution[14] as the President of Yemen (Byrne, 2016). Further, it is well established that Hadi received international recognition from the international community except for a categorical rejection by Iran wherein the legitimacy of his government was put into question (Byrne, 2016; Koen & Hanson, 2018). To substantiate this, France and the US have publicly reaffirmed their support for Hadi as the 'legitimate government' and expressed their approval to the intervention carried out by the Saudi-led coalition (Ruys & Ferro, 2016). At the same time, UK reaffirmed its 'firm political support for the Saudi action in Yemen, noting that it was right to do everything possible to deter Houthi aggression' (UK Government Prime Minister's Office, 2015). Hadi's legitimacy is further augmented by Resolution 2216 wherein the UNSC clearly affirms its '… support for the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi' while 'condemning in the strongest terms the ongoing unilateral actions taken by the Houthis' (UNSC, 2015f). Similarly, notwithstanding the reservation expressed by former UNSG Ban Ki-moon on the external intervention, he declared his support for Hadi as the 'legitimate government' in the following: 'while supporting the legitimacy of the

[13] Despite Hadi's uncontested win in the election, the Houthis categorically rejected the outcome arguing that their exclusion from participating in the government transition process implies that Hadi's appointment does not represent the will of the entirety of the Yemeni population (ICG, 2012). Accordingly, some scholars disputed the 'democratic' nature of this election as Hadi was the sole candidate running for President (Buys & Garwood, 2018; Spencer, 2015).

[14] Article 106(a) of Yemeni constitution states that the 'President of the Republic is the President of the state and shall be elected according to the Constitution'.

President of Yemen, Abdo Rabbo Mansour Hadi, called on all Member States to refrain from external interference which seeks to foment conflict and instability and instead to support the political transition' (UN Press Release, 2015).

However, in light of effective territorial control test, given that Hadi was forced to flee Yemen upon his coerced resignation by the Houthis in addition to his loss of control over substantial provinces as well as the state capitals, Sa'dah and Sana'a since September 2014, it is thus evident that he has lost to a great extent the *de facto* control over Yemen shown in Figure 3 (Byrne, 2016). Following from this, it can be inferred that Hadi's substantial loss of territorial control results in the loss of his ability to issue invitation. Nevertheless, several states challenged the alleged *de facto* control of the Houthis over the entire Yemen in view of Hadi's effective control over southern and eastern of Yemen where he still receives support from several tribal authorities and pro-Hadi forces (UNSC, 2015c). Be that as it may, Koen and Hanson (2018) and Ruys and Ferro (2016) assert that the international recognition enjoyed by Hadi demonstrates that he still retains legitimacy despite the loss of effective territorial control in Yemen.

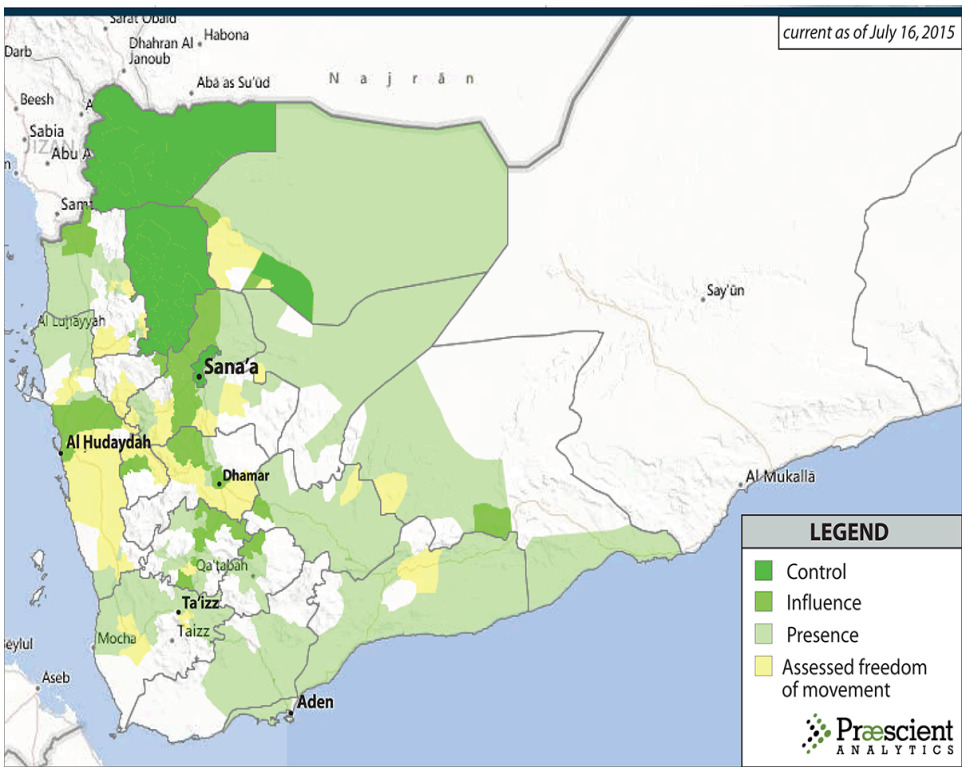

Figure 3. Effective control by the Houthi's government *(*American Enterprise Institute*,* 2015).

Turning to state practice, it appears that the 2014 Ukrainian case stands in stark contrast with the Yemeni case despite the fact that both cases comprise of similar set of facts. In the case of Ukraine, the ousted President Yanukovych who eventually had to flee the country did not receive international recognition on the ground that he has effectively lost *de facto* authority over Ukraine (Tzimas, 2018). Proceeding from this, Yanukovych's request for external assistance from Russia was thus rendered unlawful and illegitimate in the eyes of the international community. To reconcile the 'unreconciled' legitimacy and the inconsistent practice based on traditional tests, Hadi's legitimacy is analysed pursuant to the EPPL test.

Pursuant to the EPPL test, the first requirement is to establish that Hadi still retains or have lost 'effective protection' over the Yemeni population at the time when he issued the invitation. In light of the two situations that could trigger its application, we turn to the assertions made by Hadi in the letter issued to the invited interveners. As maintained by Hadi, given that his government has pursued every possible action to halt the commission of 'heinous, criminal attacks being committed by Houthis' (UNSC, 2015b), this thus suggests that Hadi's government's 'inability' to effectively protect Yemeni population from 'threats of mass atrocity crimes' thereby generates an entitlement to request for external assistance. Similarly, the UNSC has also affirmed 'acts of violence' perpetrated against Yemeni people by the Houthis in their attempt to overthrow Hadi's government and overtake the governmental institutions (UNSC, 2015d). Following from this, if we take Hadi's letter and the UNSC resolution at face value, Hadi's 'inability' to prevent the commission of mass atrocity crimes would entitle him to retain 'effective protection' so that his request for military assistance from GCC members for the main purpose of fulfilling its Pillar I responsibility is tenable within the EPPL framework.

case finds a similar footing to that of the Iraqi government's request for US assistance in halting the alleged commission of 'genocide, crimes against humanity and war crimes' by the Islamic State of Iraq and Syria (ISIS) against the Yazidi population in 2016 (UNHRC, 2016). As maintained by Kenny and Butler (2018), the 'inability' of the Iraqi government to stop ISIS from perpetrating these crimes entitles the incumbent government to retain 'protection legitimacy' and as a corollary still maintains the right to request for external intervention.

However, it should be noted that the 2015 Russian intervention in Syria stands in contrast with the interventions in Yemen and Iraq. In a letter submitted to the UNSC, Russia asserts that the intervention was carried out ‘in response to a request from the President of the Syrian Arab Republic, Bashar al-Assad, to provide military assistance in combating the terrorist group ISIS and other terrorist groups operating in Syria’ (UNGA-SC, 2015a). Notwithstanding this assertion, it appears that at the time of invitation, the incumbent Assad government has essentially lost its ‘effective protection’ due to the well-founded allegations that the government was complicit in the commission of mass atrocity crimes. To substantiate this, prior to Assad’s request for external assistance, there were credible UN reports claiming that the Syrian government was committing ‘crimes against humanity’ against the Syrian population (UNHRC, 2011). In another report, the crimes perpetrated by Assad government against Syrians were specifically set out —comprising ‘use of indiscriminate shelling and aerial bombardment’ and ‘barrel bombs’ which have caused deaths and thousands of casualties (UNGA-SC, 2015b). In light of these acts, the Commission deduced that ‘the Syrian State has manifestly failed to protect its citizens from mass atrocities’ (UNGA-SC, 2015b, p.8).

By virtue of this, it demonstrates that notwithstanding the implication made by Russia that intervention was carried out due to Assad’s ‘inability’ to prevent or halt the commission of mass atrocity crimes by ISIS, the invited interveners have the responsibility to take a step further and verify these claims with the facts on the ground. On that note, since Assad government is assumed to be involved in the commission of mass atrocity crimes prior to its request for intervention, arguably, his government has lost its EPPL at the time of invitation thereby depriving it from issuing a valid consent.

In light of this comparison, this thesis contends that the incumbent government retains effective protection if evidence proves that the requesting government is unable but not unwilling to protect its population from mass atrocity crimes. However, in the event that the requesting government is involved in the commission of mass atrocity crimes as evinced by Assad government, it would deprive the government from effective protection thereby removing its right to issue for external intervention.

Turning to the 'recognition legitimacy' element, if we were to solely refer to public statements made by the international community in 2015, as established above, it is a clear-cut case that Hadi's government also satisfies the second requirement thereby fulfilling the EPPL test. However, according to the 2018 report published by the Panel of Experts on Yemen, the Commission concludes that 'President Hadi no longer has effective command and control over the military and security forces operating on behalf of the legitimate Government of Yemen' (UNSC, 2018). Although their findings carry weight, since the deduction was made after intervention was carried out, this assessment does not take the Commission's determination into account. It could be argued that at the time when invitation was first issued, Hadi's government retained its 'recognition legitimacy' but as the violent conflict persisted and is further exacerbated by the presence of the Saudi coalition requested by Hadi, his authority and legitimacy have eroded in the eyes of the international community thereby removing his right to continue issuing invitation for external intervention. Since this thesis does not address the issue of the extent of invitation, the analysis is limited to the legitimacy of consent at the time of its issuance. Pursuant to this, the responsibility of invited interveners takes a step further in that it also entails legitimacy of protection, which is extensively analysed in the following section focusing on the 'parameters on the use of force'.

3.4. PARAMETERS ON THE USE OF FORCE

The parameters on the use of force as extracted from the UNSG 2004 report are essential to ensure that the Saudi-led coalition abides by *jus ad bellum* framework of R2P prior to its intervention. As previously established, since the coalition assumes the responsibility of the international community to protect the Yemeni population from mass atrocity crimes, it also entails the responsibility to assess the legitimacy of protection under the EPPL test. In view of this, the following discussion is analysed in accordance with the parameters on the use of force as follows: (a) seriousness of threat; (b) proper purpose; (c) last resort; (d) proportionality; (e) balance of consequences and (f) negative equality doctrine.

3.4.1. Seriousness of Threat

As previously established, the pertinent question to address is whether the state is 'manifestly failing' to protect its population from mass atrocity crimes either due to its inability or unwillingness to protect? Pursuant to the letters issued, it appears that the alleged crimes—crimes of aggression and criminal attacks—committed by the Houthis have not reached the threshold of mass atrocity crimes. In light of this, the analysis is not predicated upon the 'actual commission of mass atrocity crimes' but on the 'threats or risks' that may precipitate the commission of these crimes. In order to ascertain whether these acts constitute 'threats of mass atrocity crimes', the 'Framework of Analysis for Atrocity Crimes' (FAAC) that was advanced by former UNSG Ban in 2014 is submitted as the guideline for its determination. Notwithstanding the 14 risk factors set out in the FAAC, it appears that information gleaned from the UNSC Resolution 2201 and the 2018 UNHRC report indicate that only the indicators under Risk Factor 1 are pertinent to the Yemeni crisis.

Risk Factor 1 concerns situations of instability that could trigger the commission of mass atrocity crimes. In view of the factual background, the ongoing-armed conflict between Hadi's government and Houthi militias since 2004, which eventually resulted in a takeover by the Houthis is classified as NIAC. Pursuant to the assessment made by the ICJ, the Yemeni crisis fits the criteria of NIAC on the following grounds: (a) the opposition group that is in conflict with Hadi's government is an 'organized armed group' as manifested in their *de facto* control of Yemen and its capital city Sa'ada in addition to its authority over Yemeni military (Clausen, 2018) and (b) there is high intensity of hostilities in view of the deployment of armed forces at government institutions and arbitrary detention of President Hadi and his key ministers (ICJ, 2018). In light of Indicator 1.2, the Houthi's defection from the 'Peace and National Partnership Agreement' that is aimed at undermining the political transition process (UNHRC, 2018) has led to security crisis and caused political instability in Yemen. Further, Indicator 1.4 is also pertinent as the abrupt 'transfer of power' through a coup d'état also gave rise to political instability (UN, 2014).

Based on this assessment alone, the serious level of political instability in Yemen caused by the Houthi's takeover may lead to a conclusion that there is likelihood the situation could further escalate into actual commission of mass atrocity crimes. However, given that the threshold is of a 'manifest failure' to protect the Yemeni population, there is not any information proving that the alleged 'criminal attacks' or 'acts of violence' were perpetrated against its people. Further, upon analysing the acts committed by the Houthis including, inter alia, 'arbitrary detention of Hadi's supporters and usage of media to incite violence' (UNSC, 2015c) and 'intimidation, arbitrary detention, ill-treatment and torture of vocal critics, in addition to raids on media outlets in Sana'a.… [and] blocked news websites, censored television channels and banned newspapers from publication' (UNHRC, 2018, pp. 11-12), it is argued that these acts are not considered as imminent threats of mass atrocity crimes that would cause Hadi to 'manifestly fail' to protect the Yemeni population from mass atrocity crimes.

In stark comparison to the Libyan and Iraqi cases, the 'manifest failure' threshold is fulfilled given that the acts perpetrated do not only constitute mass atrocity crimes but were specifically aimed at the populations. In the Libyan case, a UNSC report estimated the death toll to be around 1000 people prior to intervention and another study found that 2675 people were killed in addition to 3920 were injured (Saba & Akbarzadeh, 2017). Moreover, the threat was further augmented by the fact that Gaddafi had employed 'heavy weapons, including warplanes and helicopters, against unarmed protesters' (Paris, 2014, p. 586) and at the same time had publicly threatened Libyan protestors in the following words: '[a]ny Libyan who takes arms against Libya will be executed. Officers have been deployed in all tribes and regions so that they can purify all decisions [sic] from these cockroaches' (ABC, 2011). In a similar vein, he has also exhorted his followers to 'go out and cleanse the city of Benghazi' in his abominable 'no mercy' speech (Pattison, 2010, p. 272). Building on this, some scholars even went as far as to deduce that the degrading language adopted was similar to the Rwandan genocide thereby suggesting that Gaddafi government was preparing to commit genocide against the Libyan population.

Likewise, in the case of Iraq, pursuant to the UNHRC report on 'ISIS crimes against the Yazidis', the Commission has specifically listed down the criminal acts committed by ISIS that had prompted Al-Abadi's government to request for US external assistance in

halting mass atrocity crimes against the Yazidi population. The offences committed included but were not limited to sexual slavery, enslavement, torture and rape wherein it is estimated that 400,000 Yazidis were either 'displaced, captured, or killed' (UNHRC, 2016).

Thus, if we were to compare the seriousness of threat in these three cases, it is a clear-cut case that the acts committed by the Houthis did not even reach the threshold of 'threats of mass atrocity crimes'. Notwithstanding the allegation of 'acts of violence', 'criminal attacks' and 'acts of aggression' that might precipitate preventive deployment under Pillar II, it is maintained that since they are not corroborated by any credible reports as published for Libya and Iraq, the deduction that could be made is in the following: The acts perpetrated by the Houthis were not 'sufficiently clear and serious, to justify prima facie use of force' and that they do not involve mass atrocity crimes that are 'imminently apprehended' (UNGA, 2004). Accordingly, since the threat was not serious enough to render Hadi's government to 'manifestly fail' to protect Yemeni population, Hadi is thus not entitled to request for external intervention.

3.4.2. Proper Purpose

If Hadi's letter would be taken as a prima facie evidence, it would be assumed that he has fulfilled its Pillar I responsibility to the best of his ability, but his government is unable to protect Yemeni population from mass atrocity crimes. The allegation where the Houthis have persisted with acts of aggression may be deemed as threats to commit the mass atrocity crimes thereby the triggering responsibility of the international community either under Pillar II or III but upon further analysis, given that the acts were perpetrated against Yemeni sovereignty as opposed to Yemeni population, it implies that human lives are not at stake, but Hadi's sovereign authority is. As previously established, under this framework, if the primary purpose for military assistance is to reinstate sovereignty, it does not precipitate the involvement of invited interveners to exercise use of force either in the form of preventive deployment or military intervention.

However, if there is cogent evidence proving that the 'acts of aggression' were specifically perpetrated against Yemeni population that may lead to the actual commission of mass atrocity crimes, in such situation Hadi has the right to request for external intervention. Interestingly enough, since the joint statement refers to the protection of the Yemeni people, we may conclude that the intervention was carried out to protect Yemeni population from mass atrocity crimes. However, in view of the data gathered on civilian casualties, it appears that the primary purpose was to reinstate Hadi's sovereignty by defeating Houthi militias even at the expense of committing mass atrocity crimes against the Yemeni population. According to a report published by HRW, the Saudi-led intervention resulted in a sharp increase on the death toll up to 4,000 civilians and 7,000 wounded and in the meanwhile the coalition airstrikes have deliberately targeted public facilities involving 800 civilian casualties (HRW, 2017b). Further, the UNHRC (2018) report has also affirmed that the Saudi-led coalition's intervention has resulted in the highest number of civilian casualties thus suggesting that the sole purpose of intervention was to regain sovereignty as opposed to protecting the Yemeni population from mass atrocity crimes.

In light of this, the claim that the intervention was carried out to achieve ulterior political, economic and religious motives seem to be tenable vis-à-vis credible reports. The political purpose stems from Iran's rising dominance over Yemen in view of the allegation that Iran extends support to the *de facto* authority of Houthi militias. This political rivalry has impelled Saudi Arabia to exert its hegemony over Yemen by intervening on behalf of President Hadi (Matthiesen, 2013). Similarly, Matthiesen (2013) also asserts that the political rivalry is also tied with the sectarian affiliation between Saudi Arabia of Sunni influence and Iran of Shia dominance. Likewise, Cordesman (2015) maintains that Yemen's border with Saudi Arabia has rendered it as a geostrategic location in the region. Thus, Yemen's instability would adversely affect Saudi Arabia's oil exportation that passes through Yemen's port.

Proceeding from this, the assessment of proper purpose entails a detailed analysis beyond the official assertions made by the interveners. This is to prevent the recurrences of Libyan intervention wherein post-analysis reveals that despite NATO's official justification for intervention couched in the language of R2P, credible reports

documented high number of civilian casualties involved as a result of intervention. This led scholars to deduce that the primary purpose of intervention was in actuality to effectuate regime change instead of protecting the Libyan population from mass atrocity crimes (Kuperman, 2013). Pursuant to this, notwithstanding the purpose of intervention to protect the Yemeni population from mass atrocity crimes as asserted in the letter, it appears that all the available evidence indicates otherwise. Upon closer analysis, the Saudi-led intervention couched in the language of R2P is similar to NATO intervention in Libya since the primary purpose was actually to reinstate Hadi's sovereignty instead of for the protection of Yemeni population from mass atrocity crimes.

3.4.3. Last Resort

In view of the 'last resort' guideline proposed, if the alleged acts committed by the Houthi aggression amounted to 'threats of mass atrocity crimes', preventive deployment under Pillar II should be prioritized over military intervention under Pillar III. In view of this, Tzimas (2018) asserts that in view of the peaceful political transition comprising of all key internal actors prior to issuance of invitation, President Hadi should have requested for a UNSC mandate to 'establish peacekeeping and peace-building mission' (p.181). Building on this, the invitation issued by Hadi should have entailed establishing preventive deployment to ensure that the peace plans are abided by the Houthis and at the same time to steer clear of military escalation that could lead to commission of mass atrocity crimes. However, since the Saudi-led interveners have resorted to military intervention under Pillar III despite the fact that the situation does not require a 'timely and decisive response', in this regard, the invited interveners have also failed to satisfy the 'last resort' requirement.

3.4.4. Proportionality

The Saudi-led coalition became embroiled in the Yemeni crisis on 26 March 2015 as a response to Hadi's government to protect Yemen and its people. The initial response was the launching of 'Operation Decisive Storm' wherein Saudi Arabia took the lead whilst

receiving assistance from other Arab countries.[15] It is alleged that the coalition included 'indiscriminate use of airstrikes and attacks using surface-to-surface missile' ('The percolating proxy war in Yemen,' 2017). According to the UNHRC report, this operation went on for less than a month with the objective of undermining the Houthi's stronghold by targeting their 'ballistic missile capabilities, troop concentrations, leadership locations, military camps and arms depots' (UNHRC, 2018) but the reality on the ground was proven otherwise as the air attacks seem to be targeting non-combatants instead ('The percolating proxy war in Yemen', 2017). The first mission began with naval operations with the objective of completely obstructing military vessels from entering territorial waters of Yemen (Fink, 2017). Pursuant to this, an intensive air campaign was carried out, with unceasing shelling of the Houthi targets to effectively weaken their authority (Orkaby, 2015). On 22 April 2015, this operation formally came to a close upon attaining its military objectives (Ruys & Ferro, 2016).

In terms of its legitimacy, the launching of this operation received general approval and acquiescence from the international community, with an exception of Iran and Russia. In a report published by the UK government in July 2015, the approval was expressed as follows: 'Operation has a clear and lawful basis in response to President Hadi's request' (UK Government Foreign and Commonwealth Office, 2015). In a similar vein, Germany, Japan and Turkey also adopted the same position (Buys & Garwood-Gowers, 2018). At the same time, several members merely acquiesced to it. For instance, China states that it is concerned with the humanitarian crisis in Yemen and urge all actors to act accordingly (China Ministry of Foreign Affairs, 2015). However, given that Resolution 2216 does not mention anything about the operation, the UNSC's silence could thus be interpreted as acquiescing to the operation. Opposed to this operation, Iran and Russia strongly condemned it, with Iran describing the operation as 'flagrant defiance of the most basic principles of international law, flouting the purposes and principles of the Charter of the

[15] Sudan, Egypt and Senegal undertook deployment of ground troops whereas other GCC member states pledged up to 30 fighter jets. Further, naval support was given by Egypt in addition to 'intelligence and logistical support' from the US and the UK. At the same time, Somalia allowed its use of territory to assist in the operation (see, Ruys & Ferro, 2016).

United Nations, in particular the obligation to refrain from the threat or use of force in international relations' (UNSC, 2015a).

At the end of the Operation 'Decisive Storm', the coalition initiated Operation 'Renewal of Hope' 'at the request of the legitimate government of Yemen' with the main objective of facilitating political and humanitarian process in addition to protecting 'the Yemeni population from Houthi aggression' (UNSC, 2018, p. 18). Despite the claim that military bombardment ended, there were reports alleging that the coalition resumed its military onslaught—to use force 'as necessary' against the Houthis under the disguise of 'Renewal of Hope' (Buys & Garwood-Gowers, 2018; Nußberger, 2017). In July 2015, with the launching of 'Operation Golden Arrow', the structure of Yemeni conflict changed in favour of Hadi's government, as the weapons used, such as heavy artillery and military tanks were severe enough so as to allow the coalition to regain control of the Houthis' strongholds (Ruys & Ferro, 2016).

The data gathered by the Yemen Data Project indicate that the Saudi-led air campaign was 'severe' as there were roughly 18,000 raids carried out from 1 March 2015 to 30 June 2018 (UNHRC, 2018). On 12 May 2015, the deteriorating humanitarian crisis and pressure from the international community compelled the coalition to agree to a five-day humanitarian ceasefire contingent upon the Houthis honouring the agreement (Black, 2015). The UNHRC (2018) report further asserts that the coalition's air campaigns 'have been and continue to be the leading direct cause of civilian deaths' despite the sharp rise in the death toll of civilians (p. 38). Additionally, the targets of coalition airstrikes are also questionable given that they hit 'residential areas, markets, funerals, weddings, detention facilities, civilian boats and even medical facilities' (UNHRC, 2018, p. 6). In another report published by HRW, it is categorically affirmed that the 'coalition has conducted scores of indiscriminate and disproportionate airstrikes killing thousands of civilians and hitting civilian objects in violation of the laws of war, using munitions sold by the United States, United Kingdom, and others, including widely banned cluster ammunition' (HRW, 2018, p. 1).

Since there is not any established evidence proving the commission of mass atrocity crimes against the Yemeni population at the time when the invitation was issued, the two

Operations launched by the Saudi-led coalition thus are disproportionate responses taken by invited interveners. Additionally, given the high number of civilian casualties as a result of these operations, the force used contravenes the 'proportionality requirement' as proposed. As previously established, under this framework, if the invited interveners were to assume the UN's responsibility as representatives of the 'international community', they are also responsible to assess whether the situation on the ground necessitates a military intervention to either prevent or react to the commission of mass atrocity crimes. Since they have failed to adopt proportionate measures in meeting the 'alleged' threat in question, the Saudi-led interveners have evidently failed to satisfy this criterion.

3.4.5. Balance of Consequences

In view of the question of reasonable chance of success in carrying out the intervention, the Saudi-led coalition as invited interveners should have known that if they were to pursue 'Operation Decisive Storm' entailing indiscriminate airstrikes in Yemen in addition to the disproportionate deployment of armed forces, the consequence would undoubtedly be worse than inaction. This argument is also tenable in view of the available evidence as established above wherein the collateral damage inflicted as a direct result of coalition's intervention did not only exacerbate the conflict but led to the actual commission of mass atrocity crimes against Yemeni population. This has been affirmed by the UN Human Rights Experts that the Saudi-led coalition has committed acts amounting to war crimes in view of the sharp rise on civilian's death toll (UNHRC, 2018). Further, taking into account the alleged 'acts of violence' that may amount to threats of mass atrocity crimes, since the alleged acts perpetrated by the Houthis did not involve any civilian casualties prior to intervention, a reasonable assessment would have undoubtedly pointed to unsuccessful military action in meeting the slight threat in question. Similarly, in the Libyan crisis, based on Kuperman's (2013) trajectory, the analysis reveals that NATO's intervention has further prolonged the conflict to 36 weeks as opposed to 6 weeks if it were not involved in addition to the assertion that the intervention has further 'multiplied the deaths in Tripoli and Misurata about tenfold' (p. 207). Turning to the question posed by the UNSG for this requirement, this thesis responds in the following: In view of the death toll and trajectory by Kuperman, there is not any reasonable chance of Saudi-led operations to successfully overcome the 'alleged

threat' in question. The consequences of action, in this case the Saudi-led operations are, therefore, absolutely worse than the consequences of inaction. In this regard, the Saudi-led interveners have also failed to satisfy the 'balance of consequences' requirement.

3.4.6. Negative Equality Doctrine

Buys and Garwood-Gowers (2018) argue that since the invitation was issued when Yemen was in a state of civil war, neither Hadi nor the Houthis had the right to request for external intervention. Under this framework, as per the guidelines proposed, this is qualified by the primary purpose. Hence, if primary purpose is to protect the population from mass atrocity crimes therefore Hadi still retains the right to issue intervention.

Nevertheless, if the letter and joint statement were taken at face value, it will lead to an abuse of using R2P as a pretext to reinstate the *de facto* authority of Hadi's government. In the case of Yemen, given that Saudi Arabia is infamous for its substandard human rights record, it is rather preposterous for the international community to believe that the intervention carried out on behalf of Hadi's government was for the primary purpose of protecting the Yemeni population. As argued by Buys and Garwood-Gowers (2018), the perceived legitimacy 'of the military action was bolstered by Saudi Arabia's R2P rhetoric, prompting perceptions that the Operation aimed to avert the greater crime of human suffering' (p. 27).

As previously established, since the request for intervention was actually issued to prevent Iran's hegemonic influence—which was supporting the Houthi rebels in Yemen—it thus indicates that the primary purpose was to reinstate Hadi's sovereignty (Kutsch, 2015). It should be noted that this approach to gain international legitimacy traces back to the interventions carried out by Russia not only in Georgia in 2008 but also in the case of Crimea in 2014. In the Georgian case, prior to its military intervention, Russia explicitly justified its stance on the basis of having a responsibility to protect a certain group of the Georgian population, namely South Ossetians (Kuhrt, 2015). Similarly, in the case of Crimea the intervention was couched in the language of 'R2P' to protect the Russian people (Coicaud, 2015). Proceeding from this, since the Yemeni

conflict has escalated into a civil war rendering it to be bound by the negative equality doctrine, it may be qualified by the primary purpose of protecting the Yemeni population from mass atrocity crimes. However, given that the primary purpose was to reinstate Hadi's sovereignty at the expense of committing mass atrocity crimes against the Yemeni population, the Saudi-led intervention thus contravenes the negative equality doctrine.

Taking a step further, in view of the allegation that the Saudi-led operations were carried out as a counter-intervention to Iran's support for the Houthi rebels, it could also be argued that the intervention does not contravene this doctrine. However, since there is not any cogent evidence that proves military assistance provided to the opposition group or that the regional power is militarily involved in carrying out acts of aggression on behalf of the Houthis, this claim is therefore tenuous and should merely remain a 'speculation' (United States Department of State, 12 February 2015). Accordingly, given that the Saudi-led intervention was carried out during the subsistence of a civil war and it is neither qualified by the primary purpose for the protection of Yemeni population nor as a counter-intervention to the alleged prior intervention by Iran, it thus suggests that the intervention also violates the negative equality doctrine.

Thus, in light of the above analysis, the available information on the Saudi-led intervention points towards a contravention of all *jus ad bellum* guidelines as proposed in the 2004 UNSG report. Accordingly, since the legitimacy of protection under the EPPL test is subjected to the same guidelines, the coalition thus has effectively lost protection legitimacy thereby failing to satisfy the EPPL test as proposed. Given that the responsibility to assess the legitimacy of the government vis-à-vis the EPPL test falls on invited interveners, it is argued that as a corollary the Saudi-led coalition has failed to uphold its responsibility to protect as part of the international community.

It is important to note that the adverse ramifications from the Saudi-led intervention did not only contravene proposed guidelines but also IHL. UNHRC reported that the Saudi-led coalition has intentionally targeted the destruction of 'medical facilities and educational, cultural and religious sites', with at least 32 reported incidents since the launching of the 'Operation Decisive Storm' (UNHRC, 2018, p. 6). To make matters worse, the coalition has also conscripted child soldiers specifically from Darfur into the

armed forces (Kirkpatrick, 2018). In view of this, the Panel of Experts on Yemen affirmed that these acts have violated not only IHL but also IHRL and amounted to war crimes (UNHRC, 2018, p. 13). In an attempt to deliberately use ‘starvation as a method of warfare’, the coalition’s obstruction of humanitarian assistance into Yemen has further exacerbated the conflict rendering it as the ‘worst humanitarian crisis in the world’ (HRW, 2017a; ICJ, 2018; UNHRC, 2019). Since the issue of the consequences of interventions is beyond the scope of this thesis, it is important to note that this is another aspect that requires special focus in relation to the ‘reasonable prospects’ criterion.

CONCLUSION

Building on the key principles of the R2P framework, this thesis aimed to extend these principles to the concept of IvI on the proposition that state consent plays a significant role in reconciling the prohibition on use of force and non-intervention rule with military intervention in the face of mass atrocity crimes. Under the R2P framework, the UNSC is accepted as the sole body of the UN to authorise the use force despite its proneness to political deadlocks due to veto, which often leads to inaction or results in unilateral interventions in contravention of the prohibition of the use of force. Given the catch-22 situation in the R2P framework, the answer can be found in the concept of IvI.

To this end, the first chapter expounded on the concept of 'sovereignty as responsibility', which constitutes the foundation of the R2P framework. In the analysis, it is established that the dual-actor involvement was adopted in both frameworks with priority given to states and that the involvement of secondary actors is only triggered if the state either issues consent under IvI or fails to protect the population under R2P. Additionally, it is argued that state consent provides a way out of the catch-22 situation as the invited interveners can undertake military intervention based on the consent and without the UNSC authorisation when confronted with mass atrocity crimes. This argument is founded on the premise that state consent offsets the prohibition on the use of force and non-intervention principle, and as such, state authorities become able to meet their sovereign responsibility with the assistance of invited interveners.

To further situate IvI within the R2P framework, the responsibility of consenting and intervening states within the three-pillar strategy as stipulated in the 2009 UNSG report is established. It is demonstrated that in relation to Pillar I, states have the responsibility to request for military assistance, which in turn would trigger the shift of responsibility to the international community when the affected state is either unable or unwilling to protect its population. Pursuant to this shift of responsibility, it is maintained that the act of authorizing 'preventive deployment' by invited interveners is in the fulfilment of Pillar II responsibility. However, in the event that the state is manifestly failing to protect its population and that the UNSC refuses to authorize intervention, it is established that the

responsibility of the UNSC is thus shifted to the invited interveners to use force in a 'timely and decisive' manner under Pillar III in the form of military intervention.

Thereafter, Chapter 2 discussed the scope and assessment criteria of IvI, by focusing on the perplexing issue of the legitimacy of the government. It began with a discussion on the assessment of consent where it tackled the pertinent issues of external and internal validity of consent and restriction of a valid consent. Pursuant to the right authority aspect under internal validity of consent, it analysed the four tests formulated to assess governmental legitimacy and proposed a new test that is derived from R2P principles, labelled as 'effective population protection legitimacy' test. This novel test aimed to reconcile between the recently proposed tests as established by Kenny and Butler (2018) and Lieblich (2013) and in doing so, it proposed an additional aspect on the legitimacy of protection to ensure an effective implementation of IvI within the R2P framework. Furthermore, this chapter addressed the specific issue of the 'incumbent government principle' wherein it upheld the principle to the extent that the incumbent government is not involved in the commission of mass atrocity crimes. In relation to the 'negative equality doctrine', a new exception under the purpose-based approach is proposed: an intervention that is carried out with the purpose of protecting the population from mass atrocity crimes would be rendered within the limits of law notwithstanding the fact that conflict has reached 'civil war' threshold.

Pursuant to this, the feasibility of this new framework is analysed in the Yemeni crisis and it is duly established that since Hadi still maintained effective protection, he had the right to invite external intervention. In this regard, Hadi fulfilled his Pillar I responsibility, as manifested in the consent issued to protect Yemeni population from mass atrocity crimes. Turning to the responsibility of invited interveners, the analysis demonstrated that the Saudi-led intervention has failed to satisfy all of the requirements under parameters on the use of force. As a corollary, since this aspect is also tied to the responsibility of the invited interveners to assess the 'legitimacy of protection', it is maintained that the Saudi-led interveners have also failed to uphold their Pillar II and III responsibilities.

The analysis revealed that the framework of the thesis is limited in several aspects. Firstly, it is only applicable up to the stage where invitation is issued and accepted by the

intervener(s) for a single operation. As demonstrated in the Yemeni crisis, this framework is restricted in its scope of application. This test is not applicable in the assessment of the legitimacy of the government as the conflict rages on, especially when a multiplicity of actors is involved and that the international recognition of the government changes throughout the conflict. It is pertinent to note that this framework also fails to take into account the underlying ulterior motives for the Saudi-led interveners particularly in relation to the economic, political and religious motivations. Additionally, this framework does not address the situation when the host state withdraws its consent and the extent of the invitation. In the analysis of Yemeni crisis, given that President Hadi had explicitly consented to the 'Operation Decisive Storm', the question remains as to whether the succeeding operations are legitimate if they were carried out on the basis of initial invitation. Moreover, given that the critical issue on consequences of intervention is not addressed within this thesis, this unexplored aspect of R2P may be given consideration in the evolving discussions on R2P as a future work.

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APPENDIX 1. ETHICS BOARD WAIVER FORM

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Thesis Title / Topic: Intervention by Invitation within the Responsibility to Protect framework

My thesis work related to the title/topic above:

1. Does not perform experimentation on animals or people.
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4. Is not based on observational and descriptive research (survey, measures/scales, data scanning, system-model development).

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Name Surname: Haseenah Huurieyah Wan Rosli
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ADVISER COMMENTS AND APPROVAL

Within the scope of this thesis, no activities/experiments that would require an ethics board decision will be performed. Hence, I approve the waiver of an ethics board decision.

Assoc. Prof. Dr. Mine Pınar GÖZEN ERCAN
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DANIŞMAN GÖRÜŞÜ VE ONAYI

Bu tez etik kurul izni gerektirecek bir çalışma içermemektedir. Bu nedenle etik kurul izninden muaf tutulması uygundur.

Doç. Dr. Mine Pınar GÖZEN ERCAN
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Name Surname: Haseenah Huurieyah WAN ROSLI
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APPROVED.

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Tarih: 23/09/2019

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Yukarıda başlığı gösterilen tez çalışmamın a) Kapak sayfası, b) Giriş, c) Ana bölümler ve d) Sonuç kısımlarından oluşan toplam 95 sayfalık kısmına ilişkin, 23/09/2019 tarihinde tez danışmanım tarafından Turnitin adlı intihal tespit programından aşağıda işaretlenmiş filtrelemeler uygulanarak alınmış olan orijinallik raporuna göre, tezimin benzerlik oranı %17'dir.

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