DECLARATION

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HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT:
QUESTIONS OF ABUSE AND PROPORTIONALITY

I declare that the above thesis is my own work and that all the sources that I have used or
quoted have been indicated and acknowledged by means of complete references.

[Signature]

DATE: 31 OCTOBER 2016
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LIST OF ABBREVIATIONS

ECOMOG  Military Observer Group of the Economic Community of West African States
ECOWAS  Economic Community of West African States
ICISS  International Commission on Intervention and State Sovereignty
ICJ  International Court of Justice
NATO  North Atlantic Treaty Organisation
OAS  Organisation of American States
UDHR  Universal Declaration of Human rights
UNAMIR  United Nations Assistance Mission in Rwanda
UNITAF  United Task Force (Somalia)
UNOSOM  United Nations Operation in Somalia
UNSC  United Nations Security Council
WSO  World Summit Outcome Document 2005
ICCPR  International Covenant on Civil and Political Rights
ICRED  International Convention on the Elimination of All Forms of Discrimination
ICESCR  International Covenant on Economic, Social and Cultural Rights
DIIA  Danish Institute of International Affairs
IICK  Independent International Commission on Kosovo
UNSCOM  United Nations Special Commission (Iraq)
SUMMARY

The aim of this thesis is to discuss the concepts of humanitarian intervention and the responsibility to protect (R2P), and; to investigate how best to apply the concepts in the face of humanitarian crises, in order to address concerns about their implementation. The failure of the Security Council to react to grave human rights abuses committed in the humanitarian crises of the 1990s, including Iraq (1991), Somalia (1992), Rwanda (1994), Bosnia (1993-1995) Haiti (1994-1997), and Kosovo (1999), triggered international debates about: how the international community should react when the fundamental human rights of populations are grossly and systematically violated within the boundaries of sovereign states, and; the need for a reappraisal of armed humanitarian intervention. Central to the debate was whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or take a different course in the interest of human rights. The debate culminated in the establishment of the Canadian International Commission on Intervention and State Sovereignty (ICISS) in 2000, with the mandate to find a balance between respect for sovereignty and intervention, for purposes of protecting human rights.

Much of the scholarly literature on military intervention for human protection purposes deals with the legality and legitimacy of the military dimension of the concepts. The significance of the thesis is that: it focuses the investigation on the potential abuse of the use of force for human protection purposes, when moral arguments are used to justify an intervention that is primarily motivated by the interests of the intervener, and; the propensity to use disproportionate force in the attainment of the stated objective of human protection, by powerful intervening states. The central argument of the thesis is that there are double standards, selectivity, abuses, and indiscriminate and disproportionate use of force in the implementation of R2P by powerful countries, and; that, whether a military intervention is unilateral, or sanctioned by the UN Security Council, there is the potential for abuse, and in addition, disproportionate force may be used. The thesis makes recommendations to address these concerns, in order to ensure the survival of the concept.

KEY WORDS

Humanitarian intervention, non-intervention, state sovereignty, two concepts of sovereignty, sovereignty as responsibility, responsibility to protect, military intervention, international
law, abuse and proportionality, motivations for intervention, altruism, national interest, rights and duties of states, egregious abuse of human rights, anticipatory military intervention.
INTRODUCTION

During the Cold War period (1945-1989), the world was split between two hostile blocks: the Capitalist West and the Communist (Soviet) East. These two power blocks “sought to avoid intervention in internal and international armed conflicts in order to avoid a larger confrontation.”¹ The hostility between these two blocks impeded the ability of the United Nations to implement the provisions in the Charter on securing international peace and security,² primarily because of the use of the veto by the permanent members of the Security Council. The use of the veto made intervention unlikely to take place at all, or if it did take place, it would be unilateral.³ Examples are the US’ intervention in Vietnam and the Soviet Union’s intervention in Afghanistan.⁴ Under Article 27(3), decisions in the Security Council are made by the affirmative vote of nine members of the Council, provided that a permanent member does not cast a negative vote. A permanent member can thus block a vote on a resolution by exercising a negative vote. The decades of adversarial relations between the great powers during the Cold War made it impossible for the United Nations to fulfil its original mission, due to the large number of vetoes cast by the permanent members.⁵ As a consequence, during the Cold War, the only Chapter VII resolution of note adopted by the Security Council was United Nations Resolution 84,⁶ which recommended that Members of the United Nations should furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack upon it by the forces from North Korea; this resolution passed only because of the absence ⁷ of the Soviet Union during the vote.⁸ The end of the Cold War brought to an end the ideological and superpower differences, and raised hopes that a new era of cooperation in the Security Council had dawned. There was the hope that a new opportunity had arisen for the realisation of the objectives of the United Nations Charter of

² Article 24(1) provides: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out this responsibility, the Security Council acts on their behalf.” The Council was unable to discharge this responsibility because of disagreements between the two blocks.
³ Weiss, note 1, p. 38.
⁴ Ibid.
⁶ Resolution 84 (1950) of 7 July 1950, Available at: http://www.refworld.org/docid/3b00fle85c.html [Accessed 8 February 2016]
⁷ Under Article 27(3) the abstention or absence of a permanent member of the Security Council does not count as a veto. Hence the absence of the Soviet Union could not prevent the adoption of the resolution.
maintaining international peace and security, and of securing justice and human rights. With the collapse of the Soviet Union, which was the main “proponent of non-interference in internal affairs, at the end of the Cold-War, a changed attitude towards human rights was evident.”\(^9\) In the words of former UN Secretary-General, Javier Perez de Cuellar:

We are witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents.\(^10\)

With the end of the Cold War, international attitudes towards humanitarian intervention have softened, and the use of force in the face of humanitarian crises has become acceptable to the international community and in international law.\(^11\) Thus, the beginning of the 1990s saw a “flurry of optimism regarding the new found scope of the international community to deal with humanitarian issues.”\(^12\) This era ushered in new ideas about state sovereignty and humanitarian intervention, and “a new kind of international law and spirit, made possible in the changed conditions of a world no longer structured around the old uncertainties of a struggle between communism and capitalism.”\(^13\) Thus, the end of the Cold War made humanitarian intervention a widely accepted diplomatic norm,\(^14\) with the frequent use of human rights’ concerns as grounds for intervention.\(^15\)

As a legacy of the Cold War, however, the Security Council failed to act decisively in the face of humanitarian crises in the 1990s, in Rwanda, Somalia, Bosnia, and Kosovo. The inaction of the Security Council contributed to the perpetration of mass atrocities during these crises. Grave human rights’ abuses were committed during these crises, but the Security Council was paralysed from acting, either by disagreements among the five permanent members, or lack of political will. The inability of the Security Council to react to grave abuses of human rights triggered international debate as to how the international community

\(^13\) Orford, note 11 supra, 2.
should react when the fundamental human rights of populations are grossly and systematically violated within the boundaries of sovereign states. At the heart of the debate was whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or take a different course in the interest of human rights. The debate culminated in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 by the Government of Canada, with the mandate to find a balance between respect for sovereignty, and intervention for purposes of protecting human rights. The ICISS came up with the concept of R2P that articulated the theme that sovereignty entails responsibility, and this responsibility primarily lies on the state to protect its people; but where the state is unwilling or unable to discharge this responsibility, its sovereignty has to yield to the broader international community’s responsibility to protect the vulnerable population.

The ICISS re-characterised sovereignty as responsibility, which implies that: state authorities are responsible for protecting the fundamental rights and welfare of citizens; state authorities are responsible internally to the citizens and externally, to the international community, through the UN, and; agents of state are accountable for their acts of commission and omission. The ICISS, while recognising the sacredness of sovereignty, acknowledged that there was international recognition that, in certain circumstances such as extreme violations of human rights, there must be exceptions to the non-intervention principle. Thus, in the contemporary international order, sovereignty is not a shield against armed intervention in the face of egregious human rights violations in a state. A state has a responsibility to protect the human rights of its population, and this duty is an attribute of its sovereignty. Failure to discharge this responsibility can provide a justification for external military intervention by the international community, to protect the victims of gross violations of human rights perpetrated on them by their own governments, if the state authorities are unable or unwilling to halt the abuses. However, in order to pre-empt unilateral humanitarian interventions and the potential for abuses, the Security Council is internationally recognised as the body with the exclusive authority to grant authorisation for military intervention for human protection purposes, and to determine when and how interventions should be carried out.

16 ICISS Report, p. XI
17 ICISS Report, p. XI.
18 2005 World Summit Outcome Document, para. 139.
a) **AIM OF THE THESIS**

The aim of this thesis is to discuss the concepts of humanitarian intervention, and the responsibility to protect (R2P), and; to investigate how best to apply the concepts in the face of humanitarian crises, in order to address concerns about their implementation. To this end, the thesis investigates: why interventions have taken place in some states, and why there has been inaction in others; whether there is a duty to intervene, and if so whose duty it is; whether a state or an organisation has a right to intervene in another state; whether there are situations in which it would be wrong, not to intervene;\(^{19}\) what authority has the power to determine when, and, how interventions should be carried out; whether a state has a duty to protect the human rights of its population; whether this duty is an attribute of its sovereignty, and; whether a breach of this duty can be a justification for external military intervention. Much of the scholarly literature on military intervention for human protection purposes, deals with the legality and legitimacy of the military dimension of the concepts. The significance of this thesis is that, while it deals with the military aspect of the concepts, it takes a different approach, by focusing the investigation on the following questions: what are the reasons for the potential abuse of the concepts, for the advancement of the national, strategic, and geopolitical interests of the interveners, and; what are the reasons for the propensity to use disproportionate force in the attainment of the stated objective of human protection, by powerful states? Thus, the research focuses on the question: whether powerful states that use force to intervene in the domestic affairs of other states on grounds of humanity are motivated by altruism or national or geopolitical interests. Answering this question will address the research problem, which is, why there is the potential for abuse of the concepts, and the indiscriminate use of force, in their implementation.

The central argument of the thesis is that, there are double standards, selectivity, abuses, and indiscriminate and disproportionate use of force in the implementation of R2P by powerful countries, and; that, whether a military intervention is unilateral, or sanctioned by the UN Security Council, there is the potential for abuse, and in addition, disproportionate, and indiscriminate, and unjustifiable force may be used; which pose the greatest threat to the survival of the concept.

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The thesis examines the concept of state sovereignty, and the practice of humanitarian intervention in the nineteenth and early twentieth century, and post-UN Charter interventions; the impact of the internationalisation of human rights, and the United Nations Charter on the development of R2P. The thesis examines the role that the humanitarian crises in the 1990s, played as stimuli, in the emergence of R2P. The thesis further, discusses the work of the International Commission on Intervention and State Sovereignty (ICISS), the formulation of R2P and the core principles of the concept. The study further investigates the motivations of countries that carry out interventions, and the issues of double standards, and selectivity in the implementation of military intervention, for human protection purposes.

Finally, the thesis makes recommendations towards the implementation of the military aspect of the responsibility to protect, in order to make a contribution towards, and the avoidance or minimisation of the abuse of the concept, and; to ensure that, where it becomes absolutely necessary to use force, it would be used for the primary objective of relieving human suffering, and that, only the force necessary for the attainment of the objective of the mission, would be applied.

b) DEFINITION OF THE PROBLEM

The use of force for humanitarian purposes or humanitarian intervention has been the subject of various debates by scholars, and has generated controversy “both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda.”20 In Rwanda, the UN and Belgium had forces in Rwanda, but the UN mission was not given the authority to stop the killing.21 The NATO intervention in Libya in 2011 under Resolution 197322 has also generated criticism. The resolution authorised “Members States that have notified the Security Council to take all necessary measures to protect civilians and civilian populated areas.”23 The resolution established “a ban on all flights in the airspace” of Libya to protect civilians24, except “flights whose sole purpose was humanitarian”.25 The

23 Ibid. para. 4
24 Ibid. para 6.
25 Ibid. para 7.
resolution’s provision to use “all necessary measures” gave broad authorisation to NATO, which was interpreted by the organization to advance its pre-set goal of regime change.

However, not every intervention has generated condemnation. In Africa regional organisations have intervened in neighbouring countries, in the face of UN Security Council’s inaction. The first example was the Economic Community of West African States’ (ECOWAS) intervention in Liberia in 1990, through ECOMOG, the Ceasefire Monitoring Group of the organisation. ECOMOG intervened again in Sierra Leone in 1998. Even though “there was no legal basis for the ECOWAS intervention under the UN Charter, it was supported by the United Nations and the whole of the international community”. These interventions were without UN Security Council authorisation, yet the UN did not criticise ECOWAS, but the UN commended the organisation in Resolution 788 for its part in restoring “peace, security and stability in Liberia”. In the personal opinion of Ben Kioko, the Legal Advisor to the AU:

It would appear that the UN Security Council has never complained about its powers being usurped because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at the time.

Kioko’s observation implies that in a situation where the UN Security Council fails to act, and where the intervention is for a popular cause, the UN would not complain about the usurpation of its powers, but rather praise the interveners.

30 Ibid.
31 Ibid.
32 Ibid.
35 Sarkin, note 29 supra, at 375.
The interventions by ECOWAS have been described as “the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council”.

However the countries had sound grounds for the interventions outside the post-1945 international order. The genocide in Rwanda in 1994 exposed the horror of inaction. The slaughter of the innocent in Rwanda and the indifference of the international community and the United Nations “failure …to prevent, and subsequently to stop the genocide” moved African countries to take steps to ensure that such mass killings would not happen again. As Allain observes:

Since the end of the 1990s, the African continent has been marginalised in ways it had not been during the height of the Cold War. This remains true in the area of international peace and security, where African states have come to realise that they cannot depend on the Members States of the UN Security Council to ensure stability on the continent. As a result, African leaders have decided to depart radically from the normative framework established by the United Nations in 1945.

This observation implies that the ECOWAS interventions were not condemned because, firstly, the international community failed to act, and secondly, the genuine purpose was to protect suffering populations, and not in furtherance of geopolitical goals. In this connection, African states had to take action outside the established international order to alleviate human suffering. It can be argued that since no ulterior motives were at play, the force used was limited to the attainment of the objectives of the interventions.

During the 1990s a debate raged between advocates of “humanitarian intervention”, i.e. the “right to intervene” in a country’s domestic affairs to protect its citizens from serious human rights abuses without the consent of the country concerned, or United Nations Security Council authorisation, on the one hand and on the other hand, the defenders of state

39 Allain, note 36 supra, p. 263
40 Ibid. p. 259.
sovereignty, who insisted that matters within the territory of a state were the prerogative of that state.\textsuperscript{41}

Humanitarian intervention in its current form emerged in the 1990s. As the ICISS Report observes, the problems of the 21\textsuperscript{st} century present the international community with new types of challenges, different from challenges that faced the world before the establishment of the UN in 1945.\textsuperscript{42} The issue of humanitarian intervention has become a clear example of issues that require urgent concerted action.\textsuperscript{43}

The roots of humanitarian intervention go back to the debates on natural law in the 16\textsuperscript{th} century.\textsuperscript{44} The Protestant Reformation that began in the 1520s played a large role in creating interest in the status of tyrants.\textsuperscript{45} The Reformation created in princes the awareness that the persecution of foreign religious dissidents was tyrannical.\textsuperscript{46} The period of the Reformation also witnessed the emergence of new centralised states.\textsuperscript{47} This development required the development of a new doctrine of law to reshape the existing concept of a law of nations, which regulated the relations between “individuals and public authorities within the commonwealth of Christendom, into the notion of a law for sovereign states.”\textsuperscript{48} In the discourse on sovereignty and inter-state relations, scholars influenced by the writings of Aquinas argued that princes had a duty to “protect not only their own, but also other princes’ subjects.”\textsuperscript{49}

Both Catholics and Protestants supported the idea that there was a right and a duty to protect victims of tyranny from their rulers.\textsuperscript{50} For example, in the first part of the 16\textsuperscript{th} century, the Spanish theologian and lawyer Vitoria asserted that defending peoples in neighbouring countries from “tyrannical and oppressive laws against the innocent” was legitimate and therefore war could legitimately be waged against rulers guilty of “tyranny and

\begin{itemize}
\item \textsuperscript{41} G. Evans, \textit{The Responsibility To Protect; Ending Mass Atrocity Crimes Once and For All}, (2008), The Brookings Institution, p.3.
\item \textsuperscript{42}ICISS Report, p. 3.
\item \textsuperscript{43}Ibid.
\item \textsuperscript{45} B. Simms, & D. J. B. Trim, \textit{Humanitarian Intervention: A History}, Cambridge University Press, 2011, p. 31
\item \textsuperscript{47}Simms & Trim, note 45 supra, p. 31.
\item \textsuperscript{48}Mattingly, note 46 supra, p. 284-5.
\item \textsuperscript{49}Simms & Trim, note 45 supra, pp. 21-32.
\item \textsuperscript{50}Ibid. p. 32.
\end{itemize}
oppression”.\textsuperscript{51} The right to defend peoples against tyranny and oppression became accepted in the 16\textsuperscript{th} century, as espoused in the \textit{Vindiciae contra tyrannos}.\textsuperscript{52} The \textit{Vindiciae} argued that tyranny was not only a crime but the culmination of all crimes, and a prince who stood idly by and watched the slaughter of the innocent was worse than the tyrant himself. \textsuperscript{53}

In the 19\textsuperscript{th} and early 20\textsuperscript{th} century, some states claimed to have intervened in other states to protect the local populations”.\textsuperscript{54} Fonteyne cites as examples, the United States interventions in Cuba at the end of the 19\textsuperscript{th} century, and the protests of European Major Powers against Morocco’s treatment of political prisoners in the early twentieth century.\textsuperscript{55} He however observes that these cases lacked either a \textit{clear} humanitarian motive or the \textit{highly coercive character} of an armed intervention.\textsuperscript{56} The first example of humanitarian intervention was in 1829 when France, Great Britain, and Russia, in terms of the Treaty of London, intervened militarily in Greece which was then under the Ottoman Empire, in order to put an end to bloodshed.\textsuperscript{57} Another example of state practice took place in 1860, when France undertook an armed intervention in Syria to protect Christians in the Ottoman Empire from massacre by the local Muslim population.\textsuperscript{58}

By the end of the 19\textsuperscript{th} century, the right of humanitarian intervention had gained wide acceptance,\textsuperscript{59} and most international lawyers agreed on the right to intervene on humanitarian grounds.\textsuperscript{60} Thus international law authorities in their writings envisaged that force may be used against states that subjected their citizens to gross human rights abuses.\textsuperscript{61} It is necessary to find a new consensus and “forge unity” by finding a way to reconcile the prohibition on the use of force and the right of states to freedom from interference in their domestic affairs

\textsuperscript{52} VCT (Garnett, 1994) (cited by Simms & Trim, note 27 supra, p. 32).
\textsuperscript{53} Ibid. (quoted by Simms & Trim, note 26 supra, p. 34.
\textsuperscript{55} Ibid. p. 215.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid. p. 207.
\textsuperscript{58} Ibid.
\textsuperscript{59} A. Mandelstam, \textit{International Protection of Minorities} (1923) 367 at 391.
on the one hand, and the obligation of states to protect fundamental human rights on the other hand.\textsuperscript{62}

\textbf{i) State Sovereignty}

One of the fundamental principles of international law is that the territorial sovereignty of the state is inviolable.\textsuperscript{63} It is a fundamental norm, yet, it has been violated consistently form its beginnings,\textsuperscript{64} and powerful countries have always interfered in the internal affairs of weak countries. The foundation of the principle of state sovereignty was laid in the Treaties of Westphalia that established the supremacy of the sovereign authority of the state.\textsuperscript{65} In the classic Westphalian system of international order, the main characteristic of sovereignty is the state’s unquestioned authority over the people and property within its boundaries.\textsuperscript{66} State sovereignty means that the government of the state is competent to act without restraint within its borders, and no external force can interfere with its supremacy.\textsuperscript{67} The concept of sovereignty denotes that all states are equal, and are permitted by international law to choose the kind of governance, economic system, and foreign policy they prefer, without interference from other sovereign states.\textsuperscript{68} Non-interference in the domestic affairs of one state by another is the cornerstone of the concept of state sovereignty that underpins the system of relations among states.\textsuperscript{69} While its supporters extol sovereignty because of the principle of non-intervention, which protects weak countries from interference in their internal affairs by powerful countries, it has the potential to contribute to gross violations of human rights by state authorities, because of the protection, that the principle of non-intervention provides.

The Montevideo Convention on the Rights and Duties of States\textsuperscript{70} codified the basic elements of state sovereignty. Under the convention, a state must have the following attributes: (a) a

\textsuperscript{62}ICISS Report, p. VII.
\textsuperscript{65}T.G. Weiss, and D. Hubert, The Responsibility to Protect, Research, Bibliography, Background, Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty (Ottawa International Development Research Centre, 2001), pp. 5-13. (Hereinafter ICISS Supplementary Volume)
\textsuperscript{67}Shaw, supra note 63 supra, at 276-277
\textsuperscript{68}ICISS Supplementary Volume, p.16.
\textsuperscript{69}Ibid. p. 6.
\textsuperscript{70}The 1933 Montevideo Convention on the Rights and Duties of States. The convention was signed on 26
defined territory; (b) a permanent population; (c) a government; and (d) the capacity to enter into relations with other states.\textsuperscript{71} All states are juridically equal,\textsuperscript{72} and no state has the right to intervene in the internal or external affairs of another state.\textsuperscript{73} The equality of states enshrined in the concept of state sovereignty protects weaker states from more powerful states.\textsuperscript{74} It is a “…final defence against the rules of an unjust world”.\textsuperscript{75} It is no wonder then, that the strongest supporters of non-intervention are weaker third world states, fearful of severe infringement on their territorial sovereignty by powerful states.\textsuperscript{76}

The United Nations Charter adopted this basic model. The organisation is based on the principle of the sovereign equality of all member states.\textsuperscript{77} The UN Charter expressly “Prohibits the threat or use of force and calls on all Members to respect the sovereignty and territorial integrity of other states”.\textsuperscript{78} The exceptions are actions taken by the UN Security Council under Chapter VII of the Charter, where there is a “threat to the peace, a breach of the peace or an act of aggression,”\textsuperscript{79} and actions pursuant to individual or collective self-defence under Article 51. The Charter also prohibits the organisation from interfering in the domestic affairs of member states by providing that: “Nothing contained in the present Charter shall authorise the United Nations to intervene in the matters that are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter.”\textsuperscript{80}

The principle of non-interference has been reinforced by United Nations resolutions and declarations. The 1965 Declaration on the Inadmissibility of Intervention\textsuperscript{81} prohibits all forms of intervention directly or indirectly, for whatever reason, in the domestic or external affairs of other states.\textsuperscript{82} The declaration prohibits States from the threat or use of force to violate the

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\textsuperscript{71}Ibid. Article 1. There has to be a functioning government with exclusive authority over affairs in the territory of the state. 
\textsuperscript{72}Ibid. Article 4 
\textsuperscript{73}Ibid. Article 8 
\textsuperscript{74}ICISS Supplementary Volume, supra, p. 6. 
\textsuperscript{75}Former President of the OAU, Algerian president Bouteflika in his 1999 address to the UN General Assembly. 
\textsuperscript{76}Abiew, supra note 61, p. 65. 
\textsuperscript{77}United Nations Charter 1945, Article 2(1) 
\textsuperscript{78}Ibid. Article 2(4) 
\textsuperscript{79}Ibid. Article 39 
\textsuperscript{80}Ibid. Article 2(7) 
\textsuperscript{81}Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Resolution 2131, (A/RES/36/103) adopted on 21 December 1965. 
\textsuperscript{82}Ibid. para. 1.
The 1970 Declaration on Principles of International Law duplicates verbatim Article 2(4) of the UN Charter and the 1965 declaration. The International Court of Justice has endorsed this principle with the observation that, “Between independent States, respect for territorial sovereignty is an essential foundation of international relations;” and “the principle on which the whole of international law rests.” In the Corfu Channel Case, the ICJ observed that:

The alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

By this statement, the Court made it clear that coercive intervention is unlawful and has no place in international law, because if it was permitted, it would lead to abuse by powerful countries. The conclusion that can be drawn from the foregoing is that, with the inception of the UN Charter, with the exception of UNSC action under Chapter VII and action in individual or collective self-defence under Article 51 of the Charter, humanitarian intervention though not explicitly banned by the Charter, has been considered illegal.

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83Ibid. para.2 (II) (a).
84Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Resolution 2625 (XXV), (A/RES/25/2625) adopted on 24 October 1970. – ‘The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter’, repeats almost verbatim paragraph 1 of GA Resolution 2131, note 22 supra.
85Corfu Channel Case, (Merits) ICJ Reports 1949, p. 35.
86Nicaragua v United States of America, (Merits) ICJ Reports, Judgment of 27 June 1986, para. 263. The United Congress was of the view that the Nicaraguan Government had taken “significant steps towards establishing a totalitarian Communist dictatorship”, and therefore the US had the right to intervene in the internal affairs of the country. The ICJ found that, : “However the regime in Nicaragua be defined, adherence to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of state sovereignty, on which the whole international law rests” para. 263.
87Corfu Channel Case, note 85 supra, p. 35.
88Ibid.
89UN Charter Article 2(4).
However, the principle of non-intervention based on state sovereignty is no longer accepted unquestionably.\textsuperscript{91} State sovereignty has been at the core of the international order, and because of its importance, it has come under close scrutiny.\textsuperscript{92} There is a debate between supporters of rigid non-intervention and those who support a flexible rule that permits intervention where the circumstances require action.\textsuperscript{93} The debate is between supporters of intervention based on human rights grounds and “anxious defenders” of state sovereignty, in which each side has “dug themselves deeper and deeper into opposing trenches”.\textsuperscript{94}

In spite of the foregoing, state sovereignty remains fundamental in the conduct of inter-state relations.\textsuperscript{95} The equality offered by the concept of state sovereignty protects weaker states from the powerful.\textsuperscript{96} What is required is a balance between application of the concept and the human rights of populations suffering mass atrocities. To defend state sovereignty does not necessarily imply the tolerance of the inhumane treatment of populations by their own governments. To defend state sovereignty does not necessarily imply the tolerance of the inhumane treatment of populations by their own governments. Rather, the concern is that, if sovereignty is disregarded and the right of intervention allowed without constraints, there is the likelihood that the principle will be abused by powerful states to advance their national interests and geopolitical objectives.

c) NATURE AND SCOPE OF INQUIRY

The main focus of the study is the military intervention aspect of the doctrine of responsibility to protect, the doctrine that is considered as the new approach to protecting people from mass atrocities.\textsuperscript{97} The study will conduct a critical investigation of the reasons for non-intervention in Darfur (2003 ff.) and Rwanda (1994), and military interventions in Libya (2011), Somalia (1992), Kosovo (1999), Bosnia (1995), Northern Iraq (1991) and Haiti (1994) to determine in each case whether:

(i) There was a humanitarian crisis that warranted military intervention;

\textsuperscript{92} Abiew, note 61 supra p. 36.
\textsuperscript{93} Fonteyne, note 54 supra, at 215.
\textsuperscript{94} Evans and Salnourn, note 66 supra, at 101.
\textsuperscript{95} ICISS Supplementary Volume, p. 17.
\textsuperscript{96} Ibid.
(ii) there was abuse of the concepts of humanitarian intervention or responsibility to protect;
(iii) Disproportionate force was applied in the attainment of the objective of the mission.

In the process the study will examine the evolution of the doctrines of “humanitarian intervention” and the “responsibility to protect”, the differences between the two, and the legality and legitimacy of the doctrines.

The central argument of the study is that whether an intervention is legal or not, whether it is unilateral or collective, sanctioned by the UN Security Council or not, there is the potential for abuse, and in addition, in any case, disproportionate, and indiscriminate, and unjustifiable force may be used, which would cause more harm than the intervention was meant to avert. The study further argues that there are double standards with regard to military intervention under the responsibility to protect doctrine, in the sense that interventions may take place only in the territories of less powerful countries.

The study will critically investigate whether altruism or national interests motivate states that intervene in others. It will critically examine whether there have been cases of abuse and disproportionate use of force in the above-mentioned interventions; and why there have been interventions in some states and inaction in others. The study argues the interventions have been motivated by national interests, not altruism and should be understood in the wider geopolitical context. 98

There is no universally accepted definition or enumeration of forms of intervention that are forbidden by international law. 99 Unfortunately, observes Thomas, “there is no satisfactory agreement among jurists as to the meaning and content of intervention in international law”. 100 The term is used in the sense of “dictatorial interference” by a state in the internal or external affairs of another state, which usually involves the threat or use of force. 101 Response by one state to a request from the legal government of another state, voluntarily and freely

made for assistance would not amount to intervention. Therefore, interference in the domestic affairs of one state by another, which does not involve coercion, would not amount to intervention. In the *Nicaraguan Case*, the ICJ referred to “the element of coercion, which defines, and indeed forms the very essence of, prohibited intervention.” As Oppenheim puts it, “the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention.”

The study seeks to examine the case for flexibility; that in certain circumstances, in the interest of humanity, and subject to United Nations Security Council authorisation, intervention is permissible to protect people who are suffering egregious human rights abuses at the hands of their own government, or when the government is unable or unwilling to act to protect them. For example, if the international community had acted, many lives would have been saved during the 1994 genocide in Rwanda.

The study will make recommendationstowards addressing issues as to: when to intervene, who should intervene, and how the intervention should be conducted, in order to avoid providing a pretext for more powerful states to advance their geopolitical interests at the expense of weaker states.

**d) HUMANITARIAN INTERVENTION AND RESPONSIBILITY TO PROTECT: A BRIEF HISTORICAL AND CONTEXTUAL BACKGROUND**

**i) The scope to be addressed**

The subjects of this inquiry are the doctrines of military humanitarian intervention and the responsibility to protect. However, the main focus of the study would be an investigation of the coercive intervention aspect of the responsibility to protect. In the process, the study will discuss the evolution from humanitarian intervention to the responsibility to protect.

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102 A. Thomas, and A. Thomas, “When consent is given by a state to foreign action of an interventionary character, in reality there is no intervention.”, *The Dominican Republic Crisis 1965*, at 22 (IXth Hammarskjold Forum 1967).

103 *Nicaraguan Case*, note 86 supra, para. 205, p. 108.


105 ICISS Report, pp. XI-XII.

ii) Humanitarian Intervention

During the 13th century, the writings of St. Thomas Aquinas on just war implied that tyranny was an abhorrent crime that could be legitimately opposed by every means including military action, if necessary. Simms and Trim state that, in the 16th century, his conviction “that there was a right, or obligation, to oppose tyranny, became part of princely practice and were developed in early treatises of what was eventually to become ‘international law’”. There was a discourse, during the 16th century among law scholars, statesmen and philosophers that tyranny and atrocity were illegitimate and therefore any action taken to end them was legitimate. Simms and Trim observe that partly in line with this discourse, “princes threatened or used force against regimes that egregiously ill-treated foreign civilian populations”. St. Aquinas, in his writings, stated that on the basis of religious solidarity, a sovereign was entitled to intervene in the internal affairs of another, when the latter inflicts serious human rights abuses on his people. Humanitarian intervention has its roots in Aquinas’ just war theory, which by implication justified coercive intervention to prevent or halt egregious human suffering.

It is necessary at this stage to provide a definition of humanitarian intervention. At the core of humanitarian intervention is the use of military force for humanitarian purposes. Given the controversy surrounding the concept, there is no universally acceptable definition of the principle, “so there is little use in defining the doctrine of humanitarian intervention” Another author has observed that “A usable general definition of ‘humanitarian intervention’ would be extremely difficult to formulate and virtually impossible to apply vigorously.”

This thesis defines humanitarian intervention as, the use of armed force by one state or group of states, to intervene in the internal affairs of another state, without the consent of the latter, to protect the nationals of that state, from atrocious human rights abuses, perpetrated against them by their own government. It can be inferred from the various definitions that the

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107 Simms and Trim, note 45 supra, p. 31
108 Ibid.
109 Ibid. p. 29.
110 Ibid.
111 Fonteyne, note 54 supra, p. 214.
112 Evans, note 41 supra, p. 56.
primary purpose of intervention is to protect people who are unable to defend themselves from human rights abuses, by their own government, and to avert or halt human suffering. To this end the force used in such interventions must be the minimum necessary for the attainment of the objective of the alleviating human suffering.

Weiss defines humanitarian intervention as the use of force, against the wishes of the government of the target state, with humanitarian justifications. It has been defined by Scheid as, military intervention into the territory of the target state by outside forces with the goal of protecting or rescuing defenceless people from “ongoing or imminent, grave, and massive human rights violations…” Fonteyne defines it as “dictatorial interference by a State [or group of States] in the affairs of another State for the purpose of maintaining or altering the actual conditions of things.”

Another scholar has defined it as:

the theory of intervention on the ground of humanity […] recognizes the right of one State to exercise international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity”.

It has also been defined:

as coercive action by States involving the use of armed force in another State without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”.

Oppenheimer considers humanitarian intervention to be intervention in a foreign state to prevent it from committing egregious abuse of the fundamental rights of its own citizens in a way which ‘which shocks the conscience of mankind”.

Fernando Teson has defined the doctrine as:

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115 Weiss, note 1 supra, p. 6.
117Fonteyne, note 54 supra, p. 204.
118Abiew, note 61 supra, at p. 31.
119Humanitarian Intervention, Legal and Political Aspects, Danish Institute of International Affairs, 1999, p. 11.
120Oppenheim, note 104 supra, p. 312.
the proportionate trans-boundary help, including forcible help, provided by
governments to individuals in another state who are being denied basic rights and
who themselves would be rationally willing to revolt against their oppressive
government".  

Holzgrefe defines it as:

…the threat or use of force across state borders by a state or group of states aimed
at preventing or ending widespread violations of fundamental human rights of
individuals other than its own citizens without the permission of the state within
whose territory force is applied.  

Another scholar depicts it as:

the threat or use of force by a state, group of states, or international organization
primarily for the purpose of protecting the nationals of the target state from
widespread deprivations of internationally recognised human rights.  

Stowell has defined humanitarian intervention as the reliance upon force for the purpose of
protecting the inhabitants of another state from treatment that is “so arbitrary and persistently
abusive as to exceed the limits of that authority within which the sovereign is presumed to act
with reason and justice".  

Rougier, has defined it as:

the theory of intervention on the ground of humanity…that recognises the right of
one state to exercise an international control by military force over the acts of
another in regard to its internal sovereignty when contrary to laws of humanity."  

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123 S.D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*
Gen. Dr. Int’l Publ. 468 (1919) quoted by Farooq Hassan, *Realpolitik in International law: After Tanzanian-
Ugandan Conflict “Humanitarian Intervention” Re-examined*, 17 Williamette L. Rev. 859 (1981)
All these writers justify humanitarian intervention and are in agreement that in defence of a population suffering severe human rights abuse, force may be used across national boundaries legitimately to halt human suffering.

The origins of humanitarian intervention can be traced to ancient times and the religious wars of the 16th and 17th centuries. However, its institution is a creation of the 19th century, because, as has been observed by Fonteyne, “Earlier instances of humanitarian intervention are too closely tied with a feeling of religious solidarity to allow them to be classified as genuinely humanitarian”. Secondly, Green is also of the view that earlier practice of humanitarian intervention had its basis on a feeling of religious solidarity, Christian beliefs and the religious concept of the dignity of man. The secular grounds for humanitarian intervention emerged from the principle of providing assistance to people resisting the yoke of tyranny.

a. Views of some Proponents and Opponents of Humanitarian Intervention and a Discussion of their views

There were several proponents of the doctrine of humanitarian intervention. One of the leading advocates was Hugo Grotius.

Writing in 1625, he states:

There is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries by their ruler. Certainly it is undoubted that ever since civil societies were formed, the ruler of each claimed some especial right over his own subjects…But …if a tyrant …practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case…it would not follow that others may not take up arms for them.

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126 Fonteyne, note 54 supra, pp. 205-206.
127 Ibid.
128 Ibid.
130 Ibid.
Grotius lends his support to the view that it is legitimate to provide assistance to a population resisting tyranny. He believed that while rulers had the unimpeded right to rule over their subjects, if the ruler severely abused his subjects, other states had the right to prevent or halt the abuses. Thus while he recognizes state sovereignty, his position is that it is not absolute. His view has the following implications: (i) that force may be used across national boundaries by one state against another; (ii) the objective is to prevent or halt egregious human rights abuse; (iii) no imperative for the occupation of the country against which force is applied, and; (iv) no requirement for the overthrow of the government of the state.

De Vattel another advocate of humanitarian intervention observes that:

The sovereign is the one to whom the Nation has entrusted the empire and care of government; it has endowed him with his rights; it alone is directly interested in the manner in which the leader it has chosen for itself uses his power. No foreign power, accordingly, is entitled to take notice of the administration of that sovereign, to stand up in judgment of his conduct and to force him to alter it in any way. If he buries his subjects under taxes, if he treats them harshly, it is the Nation’s business; no one else is called upon to admonish him, to force him to apply wiser and more equitable principles. If the prince, attacking the fundamental laws, gives his people a legitimate reason to resist tyranny, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested assistance. ¹³²

De Vattel appears to contradict himself by first asserting the right of the ruler to decide how he uses the power entrusted to him. In this vein, he observes that no foreign power has the right to judge the conduct of the ruler or intervene, even if the ruler subjects the population to odious human right abuses. He then asserts the right of intervention by foreign powers to assist the people who are resisting tyranny. As Mosler puts it, he appears not to have been able to resolve “the problem of the friction between Sovereignty and the Law of Nations”.¹³³ His view epitomises the debate about the dichotomy between sovereign independence and non-intervention on the one hand and humanitarianism on the other hand.¹³⁴ Like Grotius, he is an advocate of intervention to assist those resisting tyranny, but does not advocate the

¹³⁴ Fonteyne, note 54 supra, p. 215.
overthrow of the government or occupation of the territory of the state as objectives of intervention.

Brochard states:

Where a state under exceptional circumstances disregards certain rights of its own citizens over whom presumably it has absolute sovereignty, the other states of the family of nations are authorised by international law to intervene on grounds of humanity. When these human rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in the last resort, by the most appropriate organ of the international community.\footnote{E. M., Brochard, \textit{The Diplomatic Protection of Citizens Abroad} (New York: The Banks Law Publishing Co., 1922) at 14.}

Brochard shares the views of Grotius and Vattel to the extent that the state has absolute sovereignty over matters within its territory; however, if the state seriously abuses the human rights of its population, foreign powers may intervene in that state on grounds of humanity. The point of divergence between his views and those of the other two writers is that he advocates the removal of the state government and the occupation of the territory of the state. His view defeats the purpose of humanitarian intervention which is to prevent or halt severe human rights abuses. His view, if applied, would be a recipe for the abuse of the concept of humanitarian intervention, and would invariably involve disproportionate and indiscriminate use of force, for that would be the only way to overthrow a government and occupy the territory of the state.

Stowell expresses a similar view, justifying humanitarian intervention as:

\[\ldots\text{ an instance of intervention for the purpose of vindicating the law of nations against outrage.}\] For it is a basic principle of every human society and the law
which governs it that no member may persist in conduct which is considered to violate the universally recognised principles of decency and humanity.\textsuperscript{136}

Stowell considers the vindication of the law of nations as the primary purpose of humanitarian intervention. The implication of his views is that force may be used to intervene in a country to defend universally recognised principle of human rights, when these rights are violated in a severe manner.

There are doubts expressed by various writers about the existence of the right to intervene for humanitarian purposes as a generally acceptable principle of customary international law.\textsuperscript{137}

Kant was of the view that the norm of non-intervention should be expanded.\textsuperscript{138} He states that: “No state shall forcibly interfere in the constitution and government of another state.”\textsuperscript{139} The implication of his view is that humanitarian intervention is prohibited. Thus even if a sovereign treats his subjects in a bad manner, no foreign power may intervene as long as the conduct of that sovereign does not impact adversely on that foreign power. To intervene in another state to halt the ill-treatment of its citizens would amount to undermining the concept of the independence and sovereignty of states. It is submitted that there are times when sovereignty has to give way in the interest of humanity. However, when it becomes absolutely necessary to intervene in the interest of humanity in a sovereign state, the intervention should be carried out in accordance with clear guidelines, in order to avoid abuse and disproportionate application of force.

Mimiani and Carnazzi-Amari, both Italian writers advocated rigid non-intervention: Carnazza-Amari quotes Mimiani as follows:

The actions and crimes of a people within the limits of its territory do not infringe upon anyone else’s rights and do not give a basis for a legitimate intervention. Truely, what positive right of the other peoples does one infringe upon? Have you ever heard that the law requires that one be only confronted with good example…?\textsuperscript{140}

\textsuperscript{136} Stowell, note 124 supra, pp. 51-52.
\textsuperscript{137} Fonteyne, note 54 supra p. 205.
\textsuperscript{138} Ibid. p. 215.
\textsuperscript{140} Carnazza-Amari, Traite De Droit International En Temps De Paix 557 (Montanari-Revest transl. 1880).
In his own words, Carnazza-Amari states:

Neither can anyone justify intervention in the case where local government does not respect the most elementary laws of humanity.\(^{141}\)

The views of Mimiani and Carnazzi-Amari are almost identical to that of Kant, discussed above.\(^{142}\) Their position is that if human rights abuses take place exclusively within the territory of a state, then no other state has the legitimate right to intervene to halt it since it does not infringe on any state’s rights. Their views demonstrate that they do not find anything unusual with human rights abuses. Such views are untenable, because the defenceless ought to be protected and defended, subject to clearly set parameters.

Pradier-Fodere the French scholar is in agreement with this position. He states, concerning atrocious treatment of nationals by the state:

This [humanitarian] intervention is illegal because it constitutes an infringement upon the independence of States, because the powers that are not directly immediately affected by these inhuman acts are not entitled to intervene. If the inhuman acts are committed against nationals of the country where they are committed, the powers are totally disinterested. The acts of inhumanity, however condensible they may be, as long as they do not affect nor threaten the rights of other States, do not provide the latter with a basis for lawful intervention, as no State can stand in judgement of the conduct of others. As long as they do not infringe upon the rights of the powers or of their subjects, they remain the sole business of the nationals of the country where they are committed.\(^{143}\)

Pradier-Fodere believes that human rights abuses, no matter how egregious and condensible, are permissible if they are perpetrated against the nationals of the state which is committing these abuses. As long as the abuses do not affect the rights of other states or their nationals, no foreign power has the right to intervene to halt the abuses. In a nutshell, it is nobody’s business to intervene to defend or protect the population of a country where the

\(^{141}\) Ibid.

\(^{142}\) Kant, note 139

government is severely ill-treating them. This is an inflexible view and does not take into account “universally recognized principles of decency and humanity”.  

Wolff articulated the principle of non-intervention, stating:

Since by nature no nation has a right to any act which pertains to the exercise of the sovereignty of another nation;…if a state ruler should burden his subjects too heavily or treat them too harshly, the ruler of another state may not resist that by force…for no ruler of a state has the right to interfere in the government of another, and the government of one state is not subject to the decision of the ruler of another state.

Wolff shares the inflexible view on intervention, suggesting that the international community should turn a blind eye in the face of blatant abuse of human rights. In his view sovereignty is absolute, and no state has the right to subject the conduct of another state to judgement. His view would condone genocide, and crimes against humanity, and is therefore absolutely untenable.

The South American inflexible position on non-intervention is espoused by Pereira. He states:

Internal oppression, however odious and violent it may be, does not affect, either directly or indirectly, external relations and does not endanger the existence of other States. Accordingly, it cannot be used as a legal basis for use of force and violent means.

This view, like those of Kant, Wolff, Pradier-Fodere, Mimiani, and Carnazzi-Amari, represents the “…values of nationalism, sovereign independence and non-intervention.” A state may do anything it wants, inflict any amount of harm on its population within its territory or rule tyrannically, and no outside power may intervene on behalf of the suffering people, because the existence of other states is not endangered. This position leaves no room for compromise. It can promote genocide, ethnic cleansing, war crimes and crimes against

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144 Stowell, note 124 supra, pp. 51-52.
147 Fonteyne, note 54 supra, p. 215.
humanity. Such a position epitomises the “era where the absolute personal jurisdiction of thePrince over his subjects was still largely regarded as a central attribute of sovereignty”\(^\text{148}\). However, this position may be unacceptable under the post-1945 international order.

Despite these divergences, by the end of the 19\(^{th}\) century, the right of humanitarian intervention had gained wide acceptance as a right of a state\(^\text{149}\). Abiew argues that the writings of authorities “suggested that force may be used against rulers who abused the rights of their nationals.”\(^\text{150}\) Brownlie writes that “by the end of the 19\(^{th}\) century, the majority of publicists admitted that a right of humanitarian intervention existed.”\(^\text{151}\) However, he goes on to state that the doctrine was “inherently vague” and “open to abuse by powerful states”.\(^\text{152}\) Fonteyne observes that:

> [...] while divergences certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention, as well as to the manner in which such operations were to conducted, the principle itself was widely, if not unanimously, accepted as an integral part of customary international law.”\(^\text{153}\)

Fonteyne quotes the International Law Association as stating that “the doctrine of humanitarian intervention appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate.”\(^\text{154}\) The International Law Association observes that state practice justified humanitarian intervention. Fonteyne’s expressed views support this position.

The continued validity of the legal principles which led to the evolution of the doctrine of humanitarian intervention has been questioned in the light of the prohibition of the use of force under the UN Charter.\(^\text{155}\) Despite the prohibition on the use of force, there have been instances when powerful states have flouted international law to use force against weaker

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\(^{148}\)Ibid.p. 207.

\(^{149}\)Ibid.p. 235.

\(^{150}\)Abiew, note 61 supra at 36.


\(^{152}\)Ibid. p. 338

\(^{153}\)Fonteyne, note 54 supra, at 235.


\(^{155}\)Abiew, note 61 supra, at 62.
On 20 December 1989, the US launched ‘Operation Just Cause’, a full-scale military invasion of Panama, with 24,000 troops armed with high-tech weaponry in order to bring its president, Manuel Noriega, to justice for drug trafficking.\(^\text{157}\) As one analyst has observed, the operation was carried out unilaterally, sanctioned neither by the UN nor the Organisation of American States, (OAS).\(^\text{158}\) This invasion had nothing to do with humanitarianism. It was rather a war on drugs, launched in flagrant disregard of the prohibition of the use of force by the UN Charter Article 2 (4).\(^\text{159}\)

The force applied was absolutely indiscriminate and disproportionate, resulting in the deaths of between 1,000-4,000 Panamanians.\(^\text{160}\) Ramsey Clark has observed that:

> It was a physical assault of stunning violence. It was a time for testing new equipment with no concern for human lives. It was a time for measuring the worth of technology against the life of a child. The stealth fighter in Panama! And now we hear, well, they didn’t mean to hurt anybody.\(^\text{161}\)

Ramsey Clark’s observation raises issues of abuse of humanitarian intervention and the indiscriminate and disproportionate use of force in its implementation, even though the stated purpose of this intervention was not humanitarian but to bring Noriega to justice for drug trafficking.\(^\text{162}\) This is one reason why weak developing countries are apprehensive of the use of the concept as a pretext for waging war on them.\(^\text{163}\) Whether the purpose of the United States’ intervention was to provide humanitarian assistance or in the name of uprooting drug trafficking, there was no justification for the killing of the innocent.

During the 1990s, as a result of serious humanitarian crises, the UN Security Council expanded the notion of “threat to international peace and security” to cover humanitarian concerns.\(^\text{164}\) Following this, the Security Council authorized Chapter VII interventions in

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\(^2\) Ibid.


\(^4\) Ibid.

\(^5\) The US invasion of Panama, note 156, supra, p. 1.


\(^7\) The US Invasion of Panama, note156 supra, p.1.


\(^9\) A. J. Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq, *Ethics & International Affairs*, Summer 2005, at 31, 34.
several countries, including Liberia, Sierra Leone, Haiti, Somalia and Iraq. For example in 1991, Operation Desert Storm, an action taken with the authorisation of the UN Security Council, was launched by the United States and allied forces to evict the occupying forces of Iraq from Kuwait. Subsequent to the allied victory, a humanitarian crisis erupted in Kurdistan, in the northern part of Iraq, where many Kurds perished as a result of military action by the forces of Saddam Hussein. The UN Security Council for the first time linked human suffering to a threat to international peace and security.165 Though the Security Council did not explicitly give authorisation for intervention, under Resolution 688 (1991)166, a United States-led coalition launched ‘Operation Provide Comfort,’ justifying the intervention on grounds of ‘the overwhelming humanitarian need’.167

Another example of UN Security Council authorised intervention linking human suffering to a threat to international peace was ‘Operation Restore Hope’ in Somalia. Following the overthrow of President SiadBarre, there was a power vacuum and inter-clan fighting, which resulted in the death of more than 350,000 from famine.168 In response to the humanitarian crisis, the UN Security Council passed Resolution 794 (1992), declaring that “…the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security”.169

Support for humanitarian intervention can be also be found UN Secretary-General Boutros Ghali’s, Agenda for Peace report,170 which introduced a novel method of resolving conflicts, namely, “peace-enforcement,” to be warranted under Article 40 of the Charter.171 This method of conflict resolution resembled humanitarian intervention, in the sense that peace-enforcement units would be empowered to enforce ceasefire agreements by coercive means.

168 Krieg, note 44 supra, p. 72.
171 Ibid. para. 44.
in affected countries.\textsuperscript{172} He thereby dilutes the absolute concept of state sovereignty. He states:

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality; it is the task of leaders of States today to understand this and to find a balance between the needs of good governance and the requirements of an ever more interdependent world.\textsuperscript{173}

Deng’s view on state sovereignty also lends support to the concept of humanitarian intervention. He states in reference to suffering populations:

But issues could not be left entirely to the states to manage, because in an age of concern with human rights and humanitarian issues, no state could say: ‘This is an internal issue and it does not matter how I manage my situation, it’s none of your concern.’ The world is watching closely, and if necessary, would get involved.\textsuperscript{174}

Thus, even though the validity of humanitarian intervention under the UN Charter is not universally accepted as an exception to the prohibition of force in Article 2(4), it is increasingly becoming accepted as such by the tacit endorsement of the UN.

e) THE RESPONSIBILITY TO PROTECT

In the 1990s, the international community was faced with humanitarian crises in several countries, including Iraq (1991), Somalia (1992), Rwanda (1994), Bosnia (1993-1995) Haiti (1994-1997) and Kosovo (1999). In the face of these crises, particularly the genocide in Rwanda during which over 800,000 Tutsis and some Hutus were killed in just a hundred days, and the Srebrenica massacre where 7000 Bosnian Muslims perished, the international community, failed to respond effectively.\textsuperscript{175} The attitude of the international community as Kofi Annan put it in his 1998 speech to the DitchleyFoundation, was, “so long as the conflict rages within the borders of a single State, the old orthodoxy would require us to let it

\begin{thebibliography}{99}
\bibitem{173}\textit{Agenda for Peace}, note 169, para. 17.
\bibitem{174}F. Deng, Idealism and Realism: Negotiating Sovereignty in Divided Nations, \textit{The 2010 Dag Hammarskjold Lecture}, Uppsala University, 10 September 2010, p. 13.
\end{thebibliography}
rage.”\footnote{176} The international community failed to respond at all, in some instances as Rwanda in 1994, while in others, the response was poorly executed, or was too little or too late as Somalia in 1993 and Bosnia in 1995.\footnote{177} This was largely due to the controversy surrounding external military intervention to protect populations from mass abuse of human rights.\footnote{178} The 1999 NATO intervention in Kosovo which was conducted without United Nations Security Council authorization brought the controversy to a climax.\footnote{179} There was serious disagreement among members of the Security Council, centring on the disregard for the existing international order which is based on the inviolability of state sovereignty, issues of legal justification and the manner in which the intervention was carried out.\footnote{180}

A debate during the 1990s involved how to reconcile the tension between two fundamental principles which underpin the UN Charter, namely: on the one hand, the supreme sovereign authority of the state which entitles the state to make decisions within its territory without interference by other states, and the freedom from the threat or use of force against it; and on the other hand, the obligation of member states of the UN to protect human rights and fundamental freedoms, as stipulated in the Preamble to the Charter.\footnote{181} The tension between these two principles was exacerbated by the assertion of powerful states to a claim of the right to intervene militarily in the domestic affairs of another state to protect populations suffering grave human rights abuses, with or without the consent of the state or United Nations authorisation. The legality of such a claim to this right was naturally questioned by generally weaker states vulnerable to military interventions, as a breach of the concept of state sovereignty.

The dilemma was how to reconcile the prohibition on intervention by a state or group of states in the territorial sovereignty of another state on the one hand, and on the other hand, the imperative to bring to an end the inhumane treatment or human suffering inflicted by a government on its own nationals.\footnote{182} The tensions created by these two positions caused paralysis\footnote{183} in responses by the international community to humanitarian crises, which led to

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\begin{itemize}
  \item \footnote{177} Evans and Sahnoun, note 66 supra p. 100.
  \item \footnote{178} ICISS Report, p. VII
  \item \footnote{179} Ibid.
  \item \footnote{180} Ibid.
  \item \footnote{181} Ibid.
  \item \footnote{182} Ibid. p. 18.
  \item \footnote{183} Evans, note 41 supra, p. 3.
\end{itemize}
the challenge issued by the Secretary-General of the UN, Kofi Annan in his address to the 54th session of the UN General Assembly in 1999. The main characteristic of traditional state sovereignty is the state’s unquestionable authority over people within its boundaries. However, in his address, Annan alluded to the fact that the traditional state-centred concept of sovereignty has to give way to a people-centred concept of sovereignty. He observes that:

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

Annan acknowledges that sovereignty remains fundamental in the conduct of international relations. He however, challenges the international community to find a balance between the concept and the human rights of populations suffering mass atrocities. In the interest of humanity, human rights should take precedence over state sovereignty, if necessary, to prevent or halt gross and systematic violations of human rights. He argues that there was the need for a redefinition of the traditional meaning of sovereignty. He articulated this redefinition as the two concepts of sovereignty, namely, “the peoples’ sovereignty and the sovereign’s sovereignty.” He states that:

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

The idea of people’s sovereignty or popular sovereignty considers the basis of sovereignty as respect for the popular will and government based on international standards of democracy and human rights. The advocates of popular sovereignty hold the view that the

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184 Evans and Sahnoun, note 66 supra, p. 100.
187 Ibid.
188 ICISS Supplementary Volume, p. 11.
“sovereignty of a state does not stand higher than the human rights of its inhabitants”. The idea of popular sovereignty led to the formulation of the doctrine of sovereignty as responsibility by Francis M Deng, the Representative of the UN Secretary-General on Internally Displaced Persons, which stipulates:

Sovereignty as responsibility meant that the state has to take care of its citizens, and if - it needed support - call on the sub-regional, regional or continental organizations, or ultimately the international community. But if it did not do that, and its peoples were suffering and dying, the world would not watch and do nothing. They would find a way of getting involved.

The doctrine of sovereignty as responsibility, meant that sovereignty carries with it a responsibility on the part of governments to protect their citizens. As articulated by Deng, state sovereignty involves accountability: first to the population in the state, and secondly, to the international community, to ensure adherence to observance of human rights. Therefore when a state inflicts egregious human rights abuses on its people, its sovereignty falls into abeyance and other states may intervene to protect the people. Sovereignty is no longer considered to be sacrosanct.

As argued by Ramesh Thakur, the unqualified concept of state sovereignty which gave a state immunity from accountability for the brutal treatment of its population, “has gone with the wind,” and “states bent on criminal behaviour should know that frontiers are not the absolute defence.” As has been posited by Ramesh Thakur, “to respect sovereignty at all times is to risk being complicit in human tragedies sometimes.” Thakur articulates one of the basic principles of the responsibility to protect, namely, that where a population is suffering gross human rights abuses, and the state concerned is unable or unwilling to halt or avert it, the principle of non-intervention yields to the international

189 Ibid.
190 Deng, note 174 supra, p. 13.
192 ICISS Supplementary Volume, p. 21.
193 Ibid.
community’s residual responsibility to protect. His statement also endorses Deng’s view that where the people in a state are suffering and dying, the world would not watch and do nothing. To do so would be to condone human tragedies.

The international community’s response to massive internal violence in Rwanda, Somalia and the Balkans during 1990s was inconsistent, “erratic, incomplete or counter-productive.” For example, in Rwanda, United Nations Assistance Mission in Rwanda, (UNAMIR) for months witnessed mounting tensions between the Hutus and Tutsis. The commander of the UN mission, General Dallaire, sent notices to the UN of impending genocide by the Hutus against the Tutsis, but the international community failed to respond to these warnings. Instead, the UN reduced the strength of the military force deployed to protect civilians to only 270 soldiers. The commander, General Dallaire, could do nothing but stand by while thousands of people were massacred. The number of UN forces may not have been sufficient initially, but as the ICISS Report observes, “credible strategies were available to prevent, or at least greatly mitigate the slaughter which followed.” However, the Security Council failed to act. That, according to the ICISS Report, was “a failure of international will – of civic courage – at the highest level”. As a result, many Africans arrived at the conclusion that despite all “the rhetoric about universal human rights, some human lives end up mattering a great deal less to the international community than others.”

It is understandable in this context, why the ECOWAS’ interventions in Liberia and Sierra Leone without UN Security Council authorization were not condemned.

Another example is Somalia. There, the United Nations Operation in Somalia II, (UNOSOM II) was established in March 1993 to take over from the United Task Force (UNITAF) - a multinational force led by the United States - authorized by the Security

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198ICISS Report, p. XI.
201Krieg, note 44 supra, p.107.
202Ibid.
204Ibid.
206Ibid.
207Ibid.
208Ibid.
209Allain, note 36 supra, p. 238.
Council to use “all necessary means” to establish a secure environment for humanitarian relief operations in Somalia.\textsuperscript{210} The mandate was to take appropriate action, including the use of force if necessary, to establish a secure environment for humanitarian assistance.\textsuperscript{211} In June 1993, 24 UNOSOM II soldiers from Pakistan were killed in an attack in Mogadishu.\textsuperscript{212} In the same year, 18 United States’ soldiers lost their lives in an operation in Mogadishu.\textsuperscript{213} Early 1994, the United States withdrew from the mission, followed by France, Sweden and Belgium\textsuperscript{214} The Security Council revised UNOSOM II’s mandate in 1994 to exclude the use of coercive methods, stressing reconciliation and reconstruction.\textsuperscript{215} UNOSOM II was withdrawn in early March 1995.\textsuperscript{216} The ICISS Report attributes the failure of the UN mission in Somalia to “…flawed planning, poor execution, and an excessive dependence on military force.”\textsuperscript{217} Yet another example was the Bosnia case and the failure of the UN to prevent the massacre of thousands of civilians who had sought shelter in UN “safe areas” in Srebrenica on July 11 1995, which, “raises the principle that intervention amounts to a promise to people in need: a promise cruelly betrayed”.\textsuperscript{218}

After the tragedies in Rwanda and the Balkans in the 1990s, a serious debate began in the international community between advocates of the “right to intervene” on the one hand and proponents of the concept of national sovereignty, who were opposed to coercive intervention, on the other hand.\textsuperscript{219} The debate was about how to react effectively in the face of gross and systematic violations of the human rights of populations.\textsuperscript{220} The question was whether states have unconditional sovereignty over their affairs or whether the international community has the right to intervene in a country for humanitarian purposes.\textsuperscript{221} In his Millennium Report of 2000, then Secretary-General Kofi Annan, recalling the failure of the Security Council to act decisively in Rwanda and the former Yugoslavia, put forward a challenge to Member States of the UN, to take steps in defence of our “common

\begin{thebibliography}{999}
\bibitem{210}Department of Public Information, United Nations, 21 March 1997, p. 1.
\bibitem{211}Ibid.
\bibitem{212}Ibid.
\bibitem{213}Ibid.
\bibitem{214}Ibid.
\bibitem{215}Ibid.
\bibitem{216}Ibid.
\bibitem{217}ICISS Report, supra, para. 1.3, p. 1.
\bibitem{218}Ibid.
\bibitem{219}Evans, Keynote Address, note 200 supra, p. 706.
\bibitem{220}Outreach Programme on Rwanda Genocide and the United Nations: Background Information on the Responsibility to Protect, p. 1, Published by the UN Department of Information, March 2014; available at un.org/en/preventgenocide/Rwanda/pdf/Backgrounder. [Accessed 12 March 2016].
\bibitem{221}Ibid.
\end{thebibliography}
humanity”.  

It was imperative to find a compromise acceptable to these opposed positions. In response to Kofi Annan’s challenge in his 2000 Millennium General Assembly address, the Government of Canada, together with a group of major foundations, announced the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in September 2000.  

The mandate of the Commission was to “build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty, more specifically, it was to try to develop a global political consensus on how to move from polemics – and often paralysis – towards action within the international system, particularly through the United Nations.” In other words, the responsibility of the ICISS was to create a balance between respect for the concept of state sovereignty and the concept of humanitarian intervention. The Commission came up with a new description of humanitarian intervention by placing emphasis on the responsibility of states to protect the powerless instead of the traditional “right to intervene,” which is the core of humanitarian intervention.  

The debate was not about a right, but about a responsibility. “The expression ‘humanitarian intervention’ did not help to carry the debate forward, so too do we believe that the language of past debates arguing for or against ‘a right to intervene’ by one state on the territory of another state is outdated and unhelpful.” “We prefer to talk not about a “right to intervene” but of a responsibility to protect.” The Commission concluded that the change in terminology would bring compromise into the debate because it meant that the interest of people should precede those of interveners. This turned the “right to intervene” language on its head by viewing intervention from the perspective of people who were victims of atrocities not on the rights of the great and powerful to throw their weight around. 

The Commission came up with the doctrine of responsibility to protect, a new approach to protecting people from mass atrocities, as the compromise between these two extreme  

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222 K. Annan, Secretary-Generals’ Millennium Address, note 195 supra.
223 ICISS Report, p. VII
225 Ibid. para.2.4, p11.
226 Ibid.
227 Ibid.
228 Ibid.
229 Ibid. Ch. 2.
230 Evans, note 41 supra pp. 39-40.
The Commission did not advocate the abrogation of the concept of state sovereignty, but rather, influenced by Deng’s formulation of sovereignty as a responsibility, it argued that sovereignty implied that: (i) the state is responsible for protecting its citizens and ensuring their welfare; (ii) the state is responsible to its citizens internally and to the international community through the UN; and (iii) the state and its agents are accountable for their actions. The ICISS postulated that the primary responsibility for the protection of its population rested with the state itself, since the state concerned is in a better position to deal with problems in the state. However, a residual responsibility lies on the international community, which is activated when the state is unable or unwilling to meet this responsibility, or is complicit in the perpetration of atrocities.

The core of the responsibility to protect is to provide protection to the vulnerable and defenceless populations. Where a population is suffering serious harm as a consequence of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it, because it is complicit in it, the principle of non-intervention yields to the international responsibility to protect. The state in question cannot, as a consequence claim the protection granted by Article II of the Charter.

i) **Legal foundations of the responsibility to protect**

The ICISS acknowledged that the doctrine of responsibility to protect had a legal foundation, firstly, in the concept of state sovereignty itself, which places a responsibility on the state not only to respect other state’s sovereignty, but in addition, to respect the human rights of its citizens. Secondly, the UN Charter commits the UN to “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” Furthermore, the Universal Declaration of Human Rights embodies the moral code and legal basis of human rights. This is buttressed by the

231 Massingham, note 97, p. 809.
233 ICISS Report, para. 2.15.
234 Ibid. para. 2.31, p. 17.
235 Ibid.
236 Ibid. p. XI
237 Ibid.
238 Ibid. para. 1.15
239 UN Charter, Article 1.3
240 Universal Declaration of Human Rights, (UDHR) 1948.
Covenants on Civil and Political Rights,\textsuperscript{242} as well as the Covenant on Economic, Social and Cultural Rights,\textsuperscript{243} which affirm human rights as a fundamental principle of international relations.\textsuperscript{244} Thirdly, ICISS observed that while it could not claim that the doctrine of responsibility to protect has emerged as a new principle of customary international law, growing practice of states and UN Security Council precedent suggested an emerging guiding principle, which could properly be termed “the responsibility to protect.”\textsuperscript{245}

\textbf{ii) Core Principles of the responsibility to protect}

The Commission found that the responsibility to protect extended beyond the use of military force which is the core of humanitarian intervention, and that the concept has three elements\textsuperscript{246}, namely:

(i) The responsibility to prevent;
(ii) The responsibility to react; and
(iii) The responsibility to rebuild.

The responsibility to prevent, the Commission noted, is the most important, because military intervention is a demonstration of the failure of preventive measures. The responsibility to prevent is to address the root causes and direct causes of internal conflict.\textsuperscript{247} The responsibility to react is to respond to situations of compelling need with appropriate measures which may include coercive measures like economic sanctions, international prosecution, and only in extreme cases, military intervention.\textsuperscript{248} In the words of the Commission, “less intrusive and coercive measures should always be considered before more coercive and intrusive ones are applied.”\textsuperscript{249} The responsibility to rebuild is to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconciliation, addressing the causes of harm the intervention was designed to halt or avert.\textsuperscript{250}

\textsuperscript{242}\textit{International Covenant on Civil and Political Rights}, adopted by the UN General Assembly of the UN on 19 December 1966.\textsuperscript{243}\textit{International Covenant on Economic, Social and Cultural Rights}, adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966. Came into force on 3 January 1976 in accordance with Article 27.\textsuperscript{244}Ibid.\textsuperscript{245}ICISS Report, p. 15.\textsuperscript{246}Ibid. p. XI\textsuperscript{247}Ibid.\textsuperscript{248}Ibid.\textsuperscript{249}Ibid. p.29.\textsuperscript{250}Ibid. p. XI.
f) FOCUS ON USE OF COERCIVE MILITARY FORCE IN THE IMPLEMENTATION OF THE DOCTRINE OF RESPONSIBILITY TO PROTECT: A JUSTIFICATION

The study focuses on the coercive military dimension of R2P as formulated by ICISS, as it is the most controversial aspect of R2P because it legitimizes the use of force for human protection purposes and also because the ICISS Report accorded it great importance. The thesis discusses the situations when military action for human protection purposes is warranted and the tough thresholds established by the ICISS that must be met if military action is to be defensible. While the ICISS Report indicated that military force should be part of the strategies for implementing R2P, it overemphasised military force as “the centrepiece of R2P by focusing so much attention on the proposed guidelines for the use of force.” The importance accorded to the military dimension of R2P in the ICISS Report itself is demonstrated by a clear bias in favour of the military option over other options such as economic and political sanctions. A study of the ICISS report shows that under the heading “The responsibility to react,” the military option is accorded more detailed treatment, from pages 31 to 37 inclusive, i.e. seven pages, while other options such as economic and political sanctions are dealt with only from pages 29 to 31, i.e. about two and a quarter pages, thereby demonstrating the importance the Commission attached to this aspect of R2P. The centrality of the military dimension is reflected in the ICISS report as follows: “By far the most controversial form of …intervention is military, and a great part of our report necessarily focuses on that.”

To buttress this fact, the report provides detailed criteria for military intervention under six headings, namely: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. Besides, the responsibility to rebuild, to provide full assistance with recovery, reconstruction and reconciliation is required, “particularly after a military

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251 Bellamy, note 164, p. 38.
252 ICISS Report, p. 29
255 ICISS Report, pp. 29-37
256 Ibid.
257 Ibid. p. 8.
258 Ibid. p. 32.
intervention,” which presupposes that the responsibility to rebuild arises only as a consequence of military action, thus reinforcing the importance of the military dimension. In the words of the ICISS Report, “responsibility to protect” implies above all else a responsibility to react to situations of compelling need for human protection. Thus, even though the Commission avoided the phrase “humanitarian intervention,” and also placed emphasis on prevention of crises and rebuilding the affected state in the aftermath of crisis, the Commission’s report focused on the question of military intervention in response to humanitarian crises and mass atrocities. While Gareth Evans notes that “it is an absolute travesty of the RtoP principle to say that it is about military force and nothing else,” he shares the view that the military dimension of R2P is the most important aspect, with the assertion that “the question of military action remains the central one to the debate.” He asserts further that “…military intervention is not merely defensible; it is a compelling obligation.” In the view of Weiss, the central element of R2P is non-consensual intervention, rendering other elements of the concept secondary. He criticises the 2005 World Summit Document refinement of the ICISS report concerning the use of force, “as a step backward, as ‘R2P lite’” – because humanitarian intervention has to be approved by the Security Council.” The foregoing justify the focus on the military dimension of R2P.

i) Criteria for military intervention

The Commission acknowledged that military intervention is an extraordinary measure. Therefore, for military intervention to have legitimacy, it may be resorted to only where there is: (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; (ii) large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing,

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259 Ibid, p. XI.
260 Ibid. p. 29.
261 Ibid. p. 9.
264 Ibid.
268 ICISS Report, p. XII.
269 Ibid. p. XII
forced expulsion, acts of terror or rape.\textsuperscript{270} In addition, the Commission laid down precautionary principles where there are compelling reasons to resort to military force. First, there should be the right intention. The primary purpose of military intervention must be to avert human suffering\textsuperscript{271}. Second, military intervention must be the last resort after the exhaustion of non-military options.\textsuperscript{272} Third, the force applied in military intervention should be the minimum necessary to attain the objective of human protection.\textsuperscript{273} Finally, there must be reasonable prospect of success in averting or halting human suffering.\textsuperscript{274} Above all, any such action can legally be undertaken only with the authorization of the UN Security Council which should be obtained prior to military action.\textsuperscript{275}

The Commission also set out operational principles\textsuperscript{276} to regulate military intervention, namely:

(i) Clear objectives; unambiguous mandate with resources to match;
(ii) Common military approach
(iii) Incrementalism and gradualism in the application of force
(iv) Rules of engagement to reflect the principle of proportionality and adherence to international humanitarian law.

The UN 60\textsuperscript{th} Anniversary World Summit from 14-16 September 2005, which was attended by heads of state and governments of UN Member States, formally accepted the responsibility of each State to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, crimes that may trigger the responsibility to protect.\textsuperscript{277} The summit, according to Evans, was preceded by “months of wrangling in New York about nearly every one of Annan’s sixty or so recommendations”.\textsuperscript{278} John Bolton, the United States Ambassador to the UN, in particular expressed opposition to UN reorganisation measures, which the United States’ Government thought would restrict US authority to use force and the new legal obligations these measures placed on member states to intervene

\begin{footnotes}
\item[\textsuperscript{270}] Ibid.
\item[\textsuperscript{271}] ICISS Report, p. XII
\item[\textsuperscript{272}] Ibid.
\item[\textsuperscript{273}] Ibid.
\item[\textsuperscript{274}] Ibid
\item[\textsuperscript{275}] Ibid.
\item[\textsuperscript{276}] Ibid p. XIII
\item[\textsuperscript{277}] Outreach Programme on Rwanda, note 220 supra, p. 1.
\item[\textsuperscript{278}] Evans, note 41 supra, p. 47.
\end{footnotes}
where genocide, ethnic cleansing, or war crimes were being committed.\textsuperscript{279} He argued that the Security Council was already empowered to intervene in countries like Sudan (Darfur), and maintained that the UN Charter “has never been interpreted as creating a legal obligation for Security Council members to support enforcement action.”\textsuperscript{280} Jeffery Sachs, University of Columbia Economist and Annan’s adviser on the World Summit, observed that the US was attempting at the last minute to “gut” the summit document “with arguments that change by the day”.\textsuperscript{281} As a consequence, the summit, as Evans observes, was a disappointment, “with very little of substance agreed on anything”.\textsuperscript{282}

The only unanimous agreement in the World Summit Outcome Document was on paragraphs 138 and 139.\textsuperscript{283}

Paragraph 138. Each individual State has the responsibility to protect its population 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.

Paragraph 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapter VI and VII 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 governments are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

\textsuperscript{280}Ibid.
\textsuperscript{281}Ibid.
\textsuperscript{282}Evans, note 41 supra p. 47.
\textsuperscript{283}Ibid.
The agreement on the language of paragraphs 138 and 139 is a cause for celebration for supporters of the responsibility to protect, firstly, because of the explicit emphasis on the responsibility of states to protect their own people. Secondly, paragraphs 138 and 139 place emphasis on prevention and the need for countries to help each other to build preventive capacities. Like the ICISS report, the WSO Document placed emphasis on reactive measures of less coercive nature than military action. It was only when all peaceful, diplomatic and humanitarian means have failed that military force under Chapter VII may be resorted to. More important, the Outcome Document endorsed the recommendations of the ICISS by insisting on the central role of the UN Security Council before the use of force for protecting populations at risk.

An important link between the ICISS report and the WSO Document was the work of the UN Secretary-General’s High-Level Panel on Threats, Challenges, and Change. The panel was tasked to “assess current threats to international peace and to security, to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the UN so that it can provide collective security for all in the twenty first century.” In its report, the panel endorsed the notion that the international community has a responsibility to protect populations in the face of genocide, mass killings, ethnic cleansing and other egregious violations of human rights, which states have been unable or unwilling to prevent or halt. The report further endorsed the ICISS criteria for the use of force outlined above.

ii) Use of force - Observations

The main reason the doctrine of humanitarian intervention has generated fierce controversy is that proponents claim “a right to intervene” or non-consensual use of force by one state in the
territory of another state, ostensibly, to protect a suffering population in the latter. Opponents of the doctrine, however, consider it as an assault on the concept of state sovereignty. The victims of international military interventions are likely to be developing countries, not Western countries. Historically, humanitarian interventions have been carried out by powerful states in the territories of weaker countries.

An example is Libya. Due to widespread and systematic attacks on the Libyan civilian population by the Government of Libya, the Security Council unanimously passed Resolution 1970, on 26 February 2011, which condemned “the gross and systematic violation of human rights” in Libya, and demanded an end to the violence. The resolution recalled the “Libyan authorities’ responsibility to protect its population” and imposed international sanctions. On 17 March 2011, the Security Council passed resolution 1973, demanding an end to attacks against civilians, and authorised Member States to “take all necessary measures” to protect civilians under threat of attack in Libya. A few days after the resolution was adopted, NATO planes began massive strikes on Libyan forces. The intensity of force used in military interventions should be the minimum necessary to attain the objective of the mission. Massive airstrikes conducted by NATO in Libya from high altitude killed ordinary people indiscriminately and destroyed infrastructure. This amounted to abuse of the concept and a disproportionate use of force, contrary to the recommendation of the ICISS. If the motive of NATO was solely to protect civilians, and provide humanitarian assistance, and not the attainment of its objective of removing Gaddafi from power, it would have assisted Libya to rebuild and would not have left the country in chaos.

Another example is Cote d’Ivoire. Following post-election violence perpetrated by the supporters of ex-President Laurent Gbagbo and President Ouatarra on civilians in Cote d’

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293ICISS Report, para. 1.5, pp. 1-2.
294Ibid.
296Ibid.
297Outreach Programme on Rwanda, note 219 supra, p. 2
298Ibid.
299Ibid.
300Ibid.
301ICISS Report, p. XII.
d’Ivoire during late 2010 to early 2011, the Security Council passed Resolution 1975, condemning the gross human rights abuses. Referring to the “primary responsibility of each State to protect civilians”, the resolution called for ex-President Gbagbo to cede power to President Ouatarra, who had won the elections and authorised the UN Operations in Cote d’Ivoire (UNOCI), to use “all necessary means to protect life and property”. UNICI commenced operations on 4 April 2011 which dislodged President Gbabgo from power. He was transferred to the International Criminal Court to face charges of “crimes against humanity, as an ‘indirect perpetrator’ of murder, rape, persecution and other inhumane acts”.

On the other hand, when gross human rights abuses occur in powerful countries, no intervention takes place. Gareth Evans refers to China’s:

[…] ugly record in the past decade of violently suppressing dissent in Tibet and Xinjiang and domestic protest elsewhere, and the crackdowns of early 2008 in Tibet and elsewhere, in the context of sensitivities unleashed by the Olympic torch relay…and the Kremlin’s insouciant response to international criticism under President Putin, and the numerous abuses that have occurred in the course of the Russian suppressing of the Chechen independence movement since the mid-1990’s including the massacre of scores of civilians in Grozny in February 2000 and thousands of enforced disappearances from 1999 until at least 2005.

It is inconceivable that coercive military can be contemplated against China, Russia or the United States, or any state that the protection of any of the five Permanent Security Council members, or any militarily powerful country. Application of the principle that military action can only be justified if there is a reasonable chance of success would necessarily exclude military action against any of the five permanent members, because the reality is

303 Outreach Programme on Rwanda, note 220 supra, p. 2.
304 Ibid.
305 Ibid.
306 Ibid.
307 Evans, note 41 supra, p. 73.
308 Ibid. p. 61.
309 ICISS Report, para. 4.42.
that “…there will always be some countries too militarily powerful for military action against them…” to succeed.\textsuperscript{310}

It is not surprising then, that the fiercest defenders of non-intervention are weaker states, mainly third world countries, fearful of severe restrictions on their sovereignty by stronger states.\textsuperscript{311} Countries such as Yemen, Syria and the Central African Republic, have literally been served notice that they are potential candidates for intervention,\textsuperscript{312} and have reason to be apprehensive. Concerning Yemen, Security Council Resolution 2014 of 21 October 2011 explicitly referred to the Yemeni Government’s “primary responsibility to protect its population”. With Syria, the Secretary-General’s Special Adviser on the Prevention of genocide, AdamaDieng, has recommended that because the:

\begin{quote}
Syrian Government is manifestly failing to protect its populations, the international community must act on the commitments made by all Heads of State and Government at the 2005 World Summit to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, including their incitement.\textsuperscript{313}
\end{quote}

Dieng reminds the international community of the obligations undertaken in terms of the World Summit Document paragraphs 139 to take collective measures, in accordance with the Charter, including Chapter VII measures in the face of gross human rights abuses. By this statement, he recommends intervention in Syria.

Another ground for opposition to the doctrine is that the motives for such interventions are not always altruistic, but may be grounded in the geopolitical interests of powerful states.\textsuperscript{314} Altruism, according to the Oxford Advanced Learners Dictionary (7th ed.), “is the fact of caring about the needs of others and happiness of other people more than your own”. In the context of humanitarian intervention, the motivation should be “other oriented”.\textsuperscript{315} The NATO intervention in Libya demonstrates otherwise. The purpose of Security Council Resolution 1973 which authorised military intervention, was to prevent the mass killing of

\begin{footnotesize}
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\item \textsuperscript{310}Ibid. p. 63.
\item \textsuperscript{311}Abiew, note 61 supra, p. 65.
\item \textsuperscript{312}Outreach Programme on Rwanda, note 220, supra, p. 3.
\item \textsuperscript{313}Statement by the Special Adviser of the Secretary-General on the prevention of Genocide, AdamaDieng, on the situation in Syria, UN News Centre, 20 December 2012.
\item \textsuperscript{314}Kuperman, Genocide in Rwanda, note 106 supra, p. VIII.
\item \textsuperscript{315}Krieg, note 44 supra, p. 48.
\end{itemize}
\end{footnotesize}
civilians, and not for the interveners to take sides in the on-going civil war, or effect regime change, or target Gaddafi. However, Gaddafi was targeted, “eventually enabling the rebels to capture and summarily execute Gaddafi and seize power in October 2011,” thus fulfilling NATO’s pre-set goal of regime change.

Yet another example of intervention not motivated by altruism was the United States intervention in Haiti in 1994. Following the 30 September 1991 coup in that country which overthrew President Aristide, the military regime that replaced him persecuted the population leading to an exodus of Haitians into the United States. International pressure and economic sanctions failed to dislodge the military junta from power, or resolve the political crisis. This led the Security Council to pass Resolution 940 (1994) on 31 July 1994 authorising:

[…]Member States to form a multinational force under unified command and control and in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti.

The United States led the intervention because the crisis was in its immediate vicinity. In his address to the nation on 15 September 1994, President Clinton referred to the security interests of the United States, which included, “…promoting democracy on our hemisphere…” Thus, despite the fact that there was a humanitarian crisis in Haiti, “regime restoration was an explicit motivation for the Clinton administration to intervene in Haiti.”

Another reason for criticism of the humanitarian intervention is the selectivity in its application, which is related to the issue of motivation. For example, the situation in Syria is
quite similar to the Libyan situation which precipitated the NATO intervention. Ulstein reports that:

At the end of 2011, the revolt in Syria already displayed similar features to the Libyan uprising at the time the Security Council decided to intervene militarily to protect civilians there and by September 2012 the intensity of the conflict had reached the legal threshold for a non-international armed conflict.

The international community, despite the similarity, has failed to intervene. The reason may be lack of national interest, which reveals that the international community is “far away from a pure humanitarian ethic unmixed with other political considerations”.

The doctrine of responsibility to protect was formulated by the ICISS to be a compromise between the proponents of the “right to intervene” and the advocates of unadulterated national sovereignty. The main aspect of the doctrine of responsibility to protect which generates concerns is the use of military force - the core of humanitarian intervention. The Commission sought to allay these concerns by proposing precautionary principles and guidelines to regulate the use of military force for human protection purposes. These principles were, firstly, that, the primary purpose of intervention must be to halt or avert human suffering. Secondly, military intervention must be the last resort after exhaustion of peaceful means to resolve the crisis. Thirdly, the force used in the course of an intervention must be limited to that necessary for the attainment of the objective of the mission. Finally, there must be reasonable prospect of success of the mission to halt or avert human suffering and not cause more harm than the result of inaction.

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327 ICISS Report, para. 1.7, p. 2.
328 Ibid. Evans, note 41 supra, p. 56.
329 ICISS Report, p. XII.
330 Ibid.
331 Ibid.
332 Ibid.
333 Ibid.
These principles and guidelines were set out by the Commission, to legitimise the developing doctrine and to ensure its widespread acceptance.\textsuperscript{334} The principles and guidelines were designed to distinguish the doctrine of responsibility to protect from the doctrine of humanitarian intervention as far as the use of force is concerned.\textsuperscript{335} Thus, the use of military force in the implementation of the responsibility to protect is just one of the measures for the protection of victims of serious human rights abuse. Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.\textsuperscript{336} Other means include political, economic, and judicial measures.\textsuperscript{337}

While humanitarian intervention advocated the right to intervene, thus viewing intervention from the perspective of the intervener, responsibility to protect emphasises the right to protection of the powerless and imposes on the international community a residual obligation to provide that protection where the state affected fails to do so.\textsuperscript{338} In terms of the doctrine, force may only be used with UN authorisation.

Much as the Commission’s efforts to make the doctrine more acceptable ought to be applauded, it is submitted that where the element of use of force for human protection is concerned, the question of double standards and the possibility of abuse will remain. It is unlikely that coercive military action would ever be taken against powerful states, like the USA, Russia or China, in the hypothetical scenario of egregious human rights abuses being perpetrated in the territories of these states. The Commission’s precautionary principle of “reasonable prospects of success”\textsuperscript{339} of military intervention to achieve the goal of human protection affirms this. “In the case of any proposed action against a Permanent Five member, or any other major power, this particular criterion would always be a showstopper whatever other factors …were in play”\textsuperscript{340}. The Commission admitted as much, that:

\begin{quote}
The application of this precautionary principle would on purely utilitarian grounds be likely to preclude military action against any of the five permanent members of the Security Council even if all the conditions described were met. It is difficult to\end{quote}

\textsuperscript{334}Ibid. para. 4.2. p. 29.
\textsuperscript{335} Ibid. p. XII
\textsuperscript{336} \textit{ICISS Report}, p. XII
\textsuperscript{337}Ibid. para. 4.5.
\textsuperscript{338}Ibid. p. XI
\textsuperscript{339}Ibid. p. XII
\textsuperscript{340}Evans, note 41 supra, p. 62.
imagine a major conflict being avoided, or success being achieved, if such action were mounted against any of them. The same is true of other major powers who are not members of the Security Council.\textsuperscript{341}

This is a clear admission that the use of force in the implementation of the doctrine of responsibility to protect will only apply to weak countries. The Commission attempts to go round this potential for double standards, by actually confirming it with the explanation that:

The reality that interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in every case.\textsuperscript{342}

This thesis attempts to make a case that to the extent that the use of force remains an option in both concepts, the distinction between traditional humanitarian intervention and the responsibility to protect is blurred, and only weak countries may be targets of interventions. The potential for abuse of the concepts and the use of indiscriminate force cannot be discounted, because it is not clear whether powerful states that intervene in other countries are accountable for their actions. To powerful states, interventions introduce a new order in which the pretext to protect human rights takes precedence over state sovereignty, while to the less powerful, interventions herald a new world order in which powerful states use the pretext of protecting human rights to achieve geopolitical goals, by whatever means.

Furthermore, there is no guarantee that powerful countries would not abuse the doctrine for ulterior motives, even where all the grounds of legitimacy are present and the operation is legally sanctioned by the UN Security Council. Even where humanitarian intervention has been undertaken with UN Security Council authorisation, there has been abuse of the mandate and disproportionate force has been applied in pursuit of pre-set goals. An example is the 2011 NATO intervention in Libya, during which the organisation exceeded the mandate under UN Resolution 1973 to aggressively pursue its pre-set geopolitical objective of regime change, through the disproportionate and indiscriminate use of force. The main goal of UN Resolution 1973 was to protect civilians. However:

\textsuperscript{341}ICISS Report, para. 4.42.
\textsuperscript{342}Ibid.
Evidence reveals that NATO’s primary aim was to overthrow Qaddafi’s regime, even at the expense of increasing harm to Libyans. NATO attacked Libyan forces indiscriminately, including some in retreat and others in Qaddafi’s hometown of Sirte, where they posed no threat to civilians. Moreover, NATO continued to aid the rebels even when they repeatedly rejected government cease-fire offers that could have ended the violence and spared civilians. Such military assistance included weapons, training, and covert deployment of hundreds of troops from Qatar, eventually enabling the rebels to capture and summarily execute Qaddafi and seize power in October 2011.343

The lessons from NATO’s use of force in Libya are that: (i) there is the need for considerable caution when contemplating if and how to undertake humanitarian intervention, and; (ii) interveners are unable to resist the tendency to effect regime change, which increases the danger to civilians.344 Therefore, when military intervention becomes absolutely necessary, in order to avoid abuse and the potential disproportionate use of force, the precautionary principles345 set down by the ICISS must be adhered to strictly.

g) SIGNIFICANCE OF THE THESIS

The core of humanitarian intervention is the claim to the right to intervene militarily by one state or group of states in the internal affairs of another state, ostensibly, to protect suffering citizens of the latter. It involves the non-consensual use of coercive force. This is in conflict with the doctrine of state sovereignty, which grants a state the right to take decisions in its own territory without interference from any outside authority. The UN Charter Article II346 prohibits interference in a state’s internal affairs by other states. At the same time, the UN Charter, the Declaration of Human Rights347 and the two 1966348 covenants impose on states obligations to respect the human rights of their citizens. The ICISS Report sought to reconcile these differences by the formulation of the doctrine of responsibility to protect. However, the debate has not gone away mainly because of the inconsistencies in the responses of the

343Kuperman, note 27 supra, p. 1.
344ibid. p. 2.
345ICISS Report, p. XII.
346UN Charter Article 2 (4)
347Universal Declaration of Human Rights (UDHR)1948
348The International Covenant on Civil and Political Rights & The International Covenant on Economic and Social and Cultural Rights.
international community to humanitarian crises, and questions about the legality and legitimacy of the doctrine.

Much of the scholarly literature on the doctrine of responsibility to protect deals with the legality and legitimacy of the doctrine. The significance of the thesis is that it takes a different approach by focusing on the military intervention aspect of the responsibility to protect (R2P): specifically, the thesis investigates the potential for abuse of the doctrine for the advancement of national and strategic interests, and the propensity to use disproportionate force in the attainment of the stated objective of human protection, by powerful states. Abuse “refers to cases where moral arguments are used to justify a war that is not primarily motivated by the moral concerns espoused, but by short term interests of those instigating violence”. The thesis investigates: the motivations for military interventions; why there are interventions in some countries and inaction in others; whether some lives matter more than others; whether the motives are altruistic, economic, or geopolitical; whether powerful countries are accountable for their actions pursuant to the responsibility to protect and to whom, especially where the UN is bypassed, and; issues of abuse and proportionality in the use of force pursuant to interventions. To this end, the thesis will review past interventions in Libya, Somalia, Northern Iraq, Haiti, Bosnia and Kosovo, and; the reasons for inaction in Rwanda and Darfur.

The thesis argues that the intensity and amount of military force applied in the exercise of R2P should be the minimum necessary to achieve the purpose of the operation, namely the protection of victims of human rights abuse. To achieve this, there should be clear guidelines and rules of engagement for the operation, otherwise the integrity of the armed intervention can be compromised, because in the absence of clear guidelines and other conditions, the mandate for the intervention may be extended to attain pre-set geopolitical objectives.

The thesis will recommend that, to eliminate or minimise the potential for abuse and disproportionate use of force, military intervention under the responsibility to protect should be conducted not only with UN authorisation, but also under the direct command of the UN, in a form similar to peace-enforcement operations proposed by UN Secretary-General Boutros-Ghali in 1992. This can be achieved effectively, when the UN establishes its own

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350 Report of the UN Secretary-General, pursuant to the Statement adopted by the Summit Meeting of the
standing army, to be deployed in times of humanitarian crises; thereby, obviating the monopoly on interventions held by powerful states, who are not subjects of interventions themselves.

**h) METHODOLOGY**

This is legal research based on a literature study. It will therefore rely heavily on existing literature, including the UN Charter, The Responsibility to Protect, Report of the International Commission on Intervention and Sovereignty (ICISS) 2001, the Supplementary Volume to ICISS Report, declarations and other international conventions, textbooks, articles in journals, the internet, comments in reputable newspapers, and general observations by eminent scholars.

The thesis will conduct a case analysis of interventions in Iraq in 2003, Libya in 2011 Somalia in 1992-1993, Kosovo in 1999, Haiti in 1994, and Bosnia in 1995, to determine whether there were issues of abuses, and evaluate the amount of force applied during the interventions, and; to establish the motivations for interventions and the reasons for inaction in other situations.

**i) LITERATURE REVIEW**

The term “humanitarian intervention” is an oxymoron. It combines benevolence with the use of force. As a doctrine, it has defied a generally acceptable definition because of its controversial nature. It has generated controversy because at the core of the doctrine is a claim of right to intervene in the affairs of a state by another state or group of states without the consent of the affected state, and the likelihood that it can be used as a pretext to launch wars for ulterior motives.

Bazyler argues that as a result of its controversial nature, “…there is little use in defining the doctrine of humanitarian intervention”. Another author has observed that: “A usable general definition of ‘humanitarian intervention’ would be extremely difficult to formulate.

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352 Roberts, note 167, pp. 429-449.
and virtually impossible to apply vigorously”. However, several writers have attempted to provide various definitions. It has been defined as an armed intervention into the territory of a state by external forces for humanitarian purposes, with the objective of protecting or rescuing vulnerable people from mass atrocities. Ryter has defined it as “…coercive action by states involving the use of armed force in another state without the consent of its government, with or without the authorization from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”. Another author has observed that humanitarian intervention involves: “…the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of fundamental human rights of persons other than the nationals of the intervening state and without the permission of the state within which force is applied”. It has also been described as the use of military forces for the purpose of halting or impeding a humanitarian disaster. This view of humanitarian intervention is shared by various writers, including Abiew, Teson, Fonteyne, and Oppenheim.

What can be deduced from these definitions is that force may be used by one state or group of states in the territory of another state without its consent to protect the nationals of that state from gross human rights abuse perpetrated by the state. The intervening state does not do so to protect its own nationals, but the nationals of another state. Thus “…humanitarian intervention is widely understood as an armed intervention for the purpose of saving lives of strangers”. This paints humanitarian intervention as intervention carried out with altruistic or philanthropic motives. However this does not answer the question why there are interventions in some countries but inaction in other countries where equally odious human rights abuses have taken place.

354Franck and Rodley, op cit. note 114, p. 277.
355Scheid, note 116 supra, 3.
359Abiew, note 61 supra, p. 31
360Teson, note 121, supra, p. 5.
361Fonteyne, note 54 supra, p. 204.
362Oppenheim, note 104 supra, p. 305.
363Krieg, note 44 supra, p. 8.
The right to intervene inherent in the doctrine of humanitarian intervention has generated opposition from advocates of inflexible adherence to the doctrine of state sovereignty. Bellamy argues that the right to intervene in other state is a “limited right” when it becomes necessary “to save strangers in dire need.” However, state sovereignty, in classical Westphalian terms means that, a state has supreme authority to make decisions within its territory without interference from external forces. The United Nations Charter was based on the equality of all states; therefore, state sovereignty is central to the UN system. The UN Charter recognises sovereignty as a prerequisite for ensuring stability and peace in international relations. The Charter rejects the use of force, and prohibits the United Nations itself from interfering in the internal affairs of states. The exceptions to the use of force under the Charter are United Nations Security Council actions under Chapter VII, and actions taken by states in self-defence under Article 51.

The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States also clearly states that “…no state has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.”

The United Nations Charter adopted the Westphalian notion of sovereignty, which makes it sacrosanct. Thus, it has been observed by Vincent that: “If a State has a right to sovereignty, this implies that other states have a duty to respect that right by among other things, refraining from intervention in its domestic affairs …The principle of non-intervention in international relations might be said, then, to be one of protecting the principle of sovereignty”. Intervention involves the use of force; therefore any form of intervention is prohibited under international law.

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366 Krieg, note 44 supra, p. 10.
367 Shaw, note 63 supra, p. 684.
368 UN Charter Article 2 (4).
369 Ibid. Article 2 (7)
370 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States
371 Ibid
However, non-intervention in the classical Westphalian notion of state sovereignty is no longer accepted without debate, as being sacred. It can be argued that the UN Charter itself provides grounds for humanitarian intervention in the interest of humanity because it imposes a duty on member states to protect fundamental human rights. The UN Charter states that one of the purposes of the UN is “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. The Preamble to the Charter also reaffirms the faith of the founding fathers in fundamental human rights, in the dignity and worth of the human person, and in equal rights of men and women, and of nations large and small. It would be impossible for the UN to solve international problems as envisaged by the Charter without harming the sovereignty of the state.

It is argued by Wheeler and Bellamy that under the United Nations Charter, human rights are as important as peace and security. Riesman argues that Articles 1 (3) and Articles 55 and 56 of the UN Charter are sufficient for the UN Security Council to circumvent the prohibition of force under Article 2 (4), and legitimately authorise intervention in cases of massive human rights abuse, murder, or genocide. Shaw argues that customary international law through state practice might provide a basis for humanitarian intervention. Hieronymi argues that “…unlimited sovereignty, not restrained by respect of law and human dignity and freedom, leads to …domestically widespread oppression”.

The Genocide Convention also provides that any Contracting Party “may call upon the competent organs of the United Nations to take action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide…” Under this article, the Security Council may authorise the use of force to halt or prevent human rights abuse that amount to genocide.

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373 UN Charter Article 1 (3).
374 UN Charter Article 1 (3).
375 Krieg, note 44 supra, p. 12
378 Shaw, note 63 supra, p.74.
379 Genocide Convention 1948, Article VIII.
It has also been argued that globalisation has eroded the strict notion of state sovereignty by its impact on the international state system. Globalization has been defined as “…the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa”\textsuperscript{380} Krieg argues that “Together with the global social and economic interconnectivity arising towards the end of the 20\textsuperscript{th} century, also politics experienced a shift from state-centric towards geocentric global politics. State sovereignty and autonomy have been compromised by international regimes that increasingly shape the policy making of nation states and thereby impact the lives of individuals homogenously across national borders”. To deal with matters of an international nature, it is necessary for the state to collaborate with other states. The sovereign state had to sacrifice part of its sovereignty in the interest of global cooperation.\textsuperscript{381} In the words of Krieg,\textsuperscript{382} “The nation state of the Wesphalian world order with its full and uncompromised sovereignty and autonomy ceased to exist.”

In spite of these arguments, even though state sovereignty has been diminished by various factors, it remains fundamental in the conduct of international relations, providing protection for weak countries from powerful countries.

Krieg observes that the inflexible adherence to the doctrine of state sovereignty is one of the reasons the UN failed to effectively address the 1990s crises in Rwanda and Kosovo.\textsuperscript{383} In his report to the 54\textsuperscript{th} session of the UN General Assembly in 1999, the then Secretary-General Kofi Annan made reference to the “prospects for human security and intervention in the next century.”\textsuperscript{384} Recalling the Security Council’s inaction relating to the crises in Rwanda and Kosovo, he urged the international community to come up with a new concept that will allow states to take action “in defence of our common humanity.”\textsuperscript{385}

His challenge led to the establishment of the International Commission on Intervention and State Sovereignty (ICISS) with the task of resolving the dichotomy between state sovereignty and the concept of humanitarian intervention. The ICISS interpreted Article 2 (1) of the

\textsuperscript{382} Krieg, note 44 supra p. 5.
\textsuperscript{383} Ibid. p. 17.
\textsuperscript{384} ICISS Report, note 1 supra, para. 1.6, p. 2.
\textsuperscript{385} Ibid.
Charter to redefine sovereignty as a responsibility in both internal functions and external duties.\(^{386}\) This meant that states have a responsibility to protect their nationals from mass murder, rape, and starvation, but where they are unable or unwilling to do so, a residual responsibility shifts to the broader international community,\(^{387}\) and the “principle of non-intervention yields to the international responsibility to protect.”\(^{388}\) Evans and Sahnoun\(^{389}\) have stated that states are entitled to a right to sovereignty. As a corollary, they have a duty to cater for the wellbeing of their nationals, the duty to “protect communities from mass killings, women from systematic rape, and children from starvation…”\(^{390}\) Consequently failed states have to be reminded by the international community that they have a responsibility to uphold human rights and freedoms. If they fail to discharge these duties, collective action should be taken to assist the state to fulfil its duties.\(^{391}\)

Unlike the doctrine of humanitarian intervention which has at its core the use of force, the doctrine of responsibility to protect the use of force is a last resort. The doctrine envisages that peaceful means should be exhausted before military action. This new doctrine was meant to be more acceptable to the international community and to assuage the fears of less powerful states about non-consensual interventions by more powerful countries, which characterised humanitarian intervention. Nevertheless, like the doctrine of humanitarian intervention, the doctrine of responsibility to protect can be manipulated by powerful countries to serve their interests. Practical incidents, like the NATO intervention in Libya, have met opposition particularly from Third World countries. The NATO intervention in Libya demonstrates how even an intervention authorised by the UN Security Council can be abused without accountability by powerful countries.

Heather M Morgan\(^{392}\) argues that, in the post-World War II era, excuses for the defence of human rights have been used for unilateral interventions unrelated to self-defence and since the end of the Cold War there have been claims that a “new customary rule of international law permitting the use of force for humanitarian aims is developing.”\(^{393}\) Morgan observes that

\(^{386}\)Ibid. para.2.14 p. 13.  
\(^{387}\)Ibid. p. VIII  
\(^{388}\)Ibid. p XI.  
\(^{389}\)Evans and Sahnoun, note 66 supra, pp. 99-110.  
\(^{390}\)Ibid.  
\(^{391}\)Hieronymi, note 378 supra, p. 239.  
\(^{393}\)Ibid. p. 143.
even collective humanitarian intervention authorised the UN Security Council is viewed by the 3rd World with unease and scepticism because of its unrepresentative composition.\(^{394}\)

The problem with the doctrine of responsibility to protect is the inconsistency in its application.\(^{395}\) This arises from the fact that the application of the doctrine is motivated by various factors which are not altruistic. Max Boot argues that motivations include the advancement of national interests.\(^{396}\) On the other hand it is argued that national interests should not influence action under responsibility to protect.\(^{397}\) Max Boot argues further that the likelihood of success also influence a state’s decision to intervene.\(^{398}\) A state will not consider intervening in a country like Russia or the United States, because these are powerful countries. Conversely, for a “less capable” country, the decision to intervene is easy to make.\(^{399}\) Thus the humanitarian motive is not the only one driving the intervening state or organization even where an intervention is authorized by the Security Council. Therefore, complete disinterestedness or the absence of narrow self-interest at all is unrealistic because it cannot be expected that an intervening state will do so without expecting any benefits accruing to its national or strategic goals. Consequently, however altruistic an intervening state’s motive may be, the financial cost and potential cost in the lives of military personnel make it politically imperative that the intervening state should be able to claim some degree of self-interest in the intervention.\(^{400}\) Aside from the cost in finances and in lives, other motives of an intervening state may be to avoid refugee outflows into its territory or to avoid a haven for drug producers or terrorists, developing in the state’s neighbourhood.\(^{401}\) Thus as pointed out by Michael Walzer absolute disinterestedness is highly unlikely.\(^{402}\) Robert Murray shares this view, asserting that a pragmatic approach to R2P allows states to carefully decide where an intervention will take place “under what conditions and just how beneficial such intervention might be to their own interests.”\(^{403}\) Evans and Sahnoun however are of the

\(^{394}\) Ibid. p. 144.
\(^{395}\) ICISS Report, paras. 1.10 - 23.
\(^{398}\) Max Boot, note 396 supra.
\(^{399}\) Ibid.
\(^{400}\) ICISS Report, p. 36.
\(^{401}\) Ibid.
\(^{403}\) R. W. Murray, ‘Humanitarianism, Responsibility or Rationality?Evaluating Intervention as State Strategy’. In
view that intervention for altruistic motives is possible, because in an interdependent world “with crises as capable as they now are of generating major problems elsewhere…it is in every country’s interest to resolve such problems, quite apart from the humanitarian imperative.” It is submitted that while total disinterestedness is ideal, a state will not intervene in another on human protection grounds alone without taking into account its own self-interest, such as considerations of risk to its military personnel, the financial costs involved and strategic benefits. In other words it is unrealistic to expect that an intervention will be motivated solely by compassion for humanity. However even if compassion for humanity is not the sole driving force for intervention, it should take precedence over self-interestedness. As Parekh puts it, the intervention should be disinterested in the sense that the humanitarian aspect should not become secondary to an otherwise self-interested intervention. It is reasonable that an intervening state expects to benefit from the operation, but as long as the overriding objective is to protect victims of human rights, it satisfies the right intention criterion.

j) CONCLUSIONS AND THE STRUCTURE OF THE STUDY

A conclusion can be drawn that the subjects of intervention would primarily be less powerful countries in the 3rd World. It is therefore not surprising that the strongest opposition to intervention comes from the developing world. States that intervene in the affairs of other states do not do so primarily for altruistic motives. Practical examples in Libya and Iraq have demonstrated that geopolitical reasons influence the decision to intervene. It is necessary to devise a mechanism to diminish abuse of the doctrine of responsibility to protect, otherwise opposition to the doctrine will reduce its relevance.

Chapter 1 is the introduction, which sets out the objectives of the study, explains the research problem and provides an overview of the doctrines of state sovereignty and humanitarian intervention, as well as the development of the doctrine of responsibility to protect. It also explains the nature, scope and focus of the study. Chapter 2 discusses the historical development of state sovereignty and humanitarian intervention. It focuses on the tension between the two concepts. The chapter discusses state practice of state sovereignty and


humanitarian intervention in the 19th century and early 20th century. Chapter 3 critically investigates the right of humanitarian intervention in the post-Cold War era. It focuses on the internationalisation of human rights and the effect of the UN Charter on humanitarian intervention. Chapter 4 covers the development of the responsibility to protect doctrine. It covers the establishment of the International Commission on Intervention and State Sovereignty (ICISS), and discusses the legal foundations of the doctrine and its core principles and elements. The Conclusion contains the findings, recommendations, and the contribution of the thesis.
CHAPTER OUTLINE

Introduction

a) Aim of the thesis
b) Definition of the problem
c) Nature and scope of inquiry
d) Humanitarian intervention and responsibility to protect: A brief historical and contextual background
e) The responsibility to protect
f) Focus on use of coercive military force in the implementation of the doctrine of responsibility to protect: A justification
g) Significance of the thesis
h) Methodology
i) Literature review
j) Conclusions and structure of the thesis

Chapter 1

1. HISTORICAL DEVELOPMENT OF STATE SOVEREIGNTY AND HUMANITARIAN INTERVENTION

1.1. Introduction
1.2. State Sovereignty
1.3. History and Evolution
1.4. Westphalian Sovereignty
1.5. Post-1945 Understanding of Sovereignty
1.6. Humanitarian Intervention
1.7. State practice of State Sovereignty and Humanitarian Intervention in the Nineteenth and Early Twentieth Century
1.8. Conclusion

Chapter 2

2. THE RIGHT OF HUMANITARIAN INTERVENTION IN THE POST UNITED NATIONS CHARTER ERA (1945 – 1989)
2.1. Introduction
2.2. Principles of State Sovereignty and Non-Intervention
2.3. The Internationalization of Human Rights
2.4. The Effect of the United Nations Charter on Humanitarian Intervention
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Chapter 3

3. THE DEVELOPMENT OF THE DOCTRINE OF RESPONSIBILITY TO PROTECT
3.1. Introduction
3.2. International Humanitarian Crises and International Action in the 1990s.
3.3. The Establishment of the International Commission on Intervention and State Sovereignty
3.4. The Legal Foundations of the Responsibility to Protect
3.5. The Basic Principles of the Responsibility to protect
3.6. The Elements of Responsibility to Protect
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Chapter 4

4. CONCLUSIONS AND RECOMMENDATIONS
4.1. Introduction
4.2. Findings of the thesis
4.3. Discussion of the findings
4.4. Recommendations
4.5. Contribution
CHAPTER 1

1. HISTORICAL DEVELOPMENT OF STATE SOVEREIGNTY AND HUMANITARIAN INTERVENTION

1.1. Introduction

The purpose of this chapter is to discuss the foundations and the historical evolution of the doctrines of state sovereignty and humanitarian intervention, from Medieval Times to the Treaty of Westphalia, and modern sovereignty, as understood in the post United Nations Charter period. In order to appreciate the practice of the doctrines of state sovereignty and humanitarian intervention in the contemporary context, a discussion of the theoretical and historical background is imperative. Firstly, the chapter provides an extensive overview of the history and evolution of the doctrine of state sovereignty. It explains the various sources of the doctrine: the theories of Aristotle, Jean Bodin, Hobbes, and the works of other writers such as Grotius, Pufendorf, Gentili, and de Vattel. The chapter provides an explanation of the political and legal contexts of the theories and writings, and discusses the modern concept of sovereignty derived from the Treaties of Westphalia. It provides a discussion of the attributes of a state, as codified by the Montevideo Convention 1933, and the adoption and conception of the doctrine of state sovereignty in the post-United Nations era. The chapter discusses the controversies about the doctrine of state sovereignty: the notion that it is obsolete, yet indispensable, in interstate relations. A discussion of the controversial relationship of sovereignty with the protection of human rights and the historical limitations on sovereignty is also provided in the chapter.

Secondly, the chapter provides a broad overview of the origins and evolution of the doctrine of humanitarian intervention; its roots in the Just War theory and Christian theology. It discusses the exposition of the Just War theory by St. Thomas Aquinas, and how the Just War theory with its religious origins became secularised and universalised by writers such as Grotius, de Vitoria, Suarez, Wolff, Pufendorf, and Gentili into the modern concept of humanitarian intervention. The chapter provides a discussion of the criteria for war laid down by the Just War theory and other scholars, and critically examines the controversy and disagreement on the definition and practice of the doctrine. The chapter discusses state practice of the doctrines of sovereignty and humanitarian intervention through an analysis of specific interventions in Greece (1827-1830), Syria (1860-1861), Bosnia, Herzegovina and
Bulgaria (1876-1878), and Macedonia (1903-1908, 1912-1913), in order to establish whether these interventions justified the claim that, by the end of the 19th century, a right of humanitarian intervention had been established as a principle of customary international law.

Thirdly, the chapter investigates whether the right of humanitarian intervention which existed in the 19th century could serve as precedent for the practice of humanitarian intervention in the contemporary international order. The chapter makes a case that even if a right of humanitarian intervention existed by the end of the nineteenth century, it existed in a historical and political context very different from the current international order with its prohibition on the use of force, and can therefore not be used as a precedent for humanitarian intervention.

The importance of the chapter is that by examining past violations of state sovereignty in the name of protecting the human rights of populations, it seeks to establish that powerful states have historically used humanitarian intervention as a pretext for the advancement of other interests, and therefore, instances of abuse in the contemporary international order are not recent developments, but have precedents in medieval times. A study of the history of sovereignty and humanitarian intervention will assist the thesis in making suitable recommendations and suggestions to ensure that the doctrine of state sovereignty, which is the foundation of interstate relations, would be preserved in order to provide protection for the weak against the powerful, in order to avoid anarchy in the international order. At the same time, guidelines may be suggested to regulate the implementation of future humanitarian interventions, in order to avoid the abuse of the doctrine and indiscriminate use of force by powerful states.

1.2. State Sovereignty

This section of the chapter deals with the history and evolution of the doctrine of state sovereignty. The concept of state sovereignty is a key concept of international law, considered to be essential for the maintenance of international peace and security, and one of the most well established principles in the international order. The concept connotes the

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idea that, internally, a state has exclusive jurisdiction over matters within its territory, free from intervention by outside actors. Externally, sovereignty confers independence on a state, and makes it equal to its peers. The concept has been given different meanings, and its application has undergone changes in different historical and political contexts, from the times of absolute sovereignty in the theories of Aristotle, Bodin, and Hobbes, etc., when the concept involved the concentration of power in one person or a small group of people, to the contemporary Westphalian system, which involves a state’s right to statehood, territorial jurisdiction, and legal personality. A corollary of sovereignty is the principle of non-intervention which imposes a duty on states to respect the independence of other states and to refrain from interfering in their internal affairs. While sovereignty, as explained above confers exclusive internal jurisdiction on a state, such an interpretation is controversial in the contemporary international order, because a strict application of the concept would mean that a state could do whatever it wanted within its territory, including gross abuse of the human rights of the citizens, free from outside interference. Thus, a state could commit genocide or ethnic cleansing within its territory, and the rest of the world would be restrained in deference to sovereignty, from acting.

In practice, this would impact issues such as human rights, environmental and economic matters, which were previously internal matters for a state, but are now considered to be matters of international concern. The need to protect human rights in particular, led to the development of the doctrine of humanitarian intervention. The doctrine acknowledges the state’s territorial integrity. However, if a state abuses the human rights of its citizens in a gross manner, then sovereignty has to give way to the duty of the international community to intervene in that state in order to protect the citizens. Thus much as sovereignty may be considered as a bulwark of protection for weak countries against powerful countries, because it requires equality and respect for the territorial integrity of states, humanitarian intervention dictates that respect for state sovereignty should be balanced with the need to address matters of international concern, such as the protection of human rights. Absolute sovereignty has as a consequence been eroded in the face of the internationalisation of matters such as human

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rights. Despite its limitations however, sovereignty has remained resilient and adaptable, and continues to underpin the contemporary international order.

Originally, sovereign authority was considered to be absolute, perpetual, and undivided, and in terms of which the private interest of the ruler or ruling class superseded the common interest. However, at the centre of the earliest conception of sovereignty by political theorists of early modern Europe, such as, Hobbes and Bodin, was the acknowledgement of the interdependence of authority and responsibility, and; that sovereignty entailed responsibilities. The section discusses the definition of sovereignty, internal and external sovereignty, and the theories on absolute sovereignty espoused by philosophers like Bodin, Hobbes, Pufendorf, Gentili, and de Vattel, etc. The theories are discussed in detail to explain the historical and political contexts in which sovereignty developed. An objective of the section is to establish that the doctrine of sovereignty as it is known currently, has its origins in the absolute notion of sovereignty, envisaged by some of these philosophers, and; to demonstrate that, this notion of sovereignty is impracticable, in the current international order, in the light of concerns for human rights, and democratic system of governance.

The role of the Treaties of Westphalia in the establishment of the concept of sovereign statehood and the independence and equality of states is discussed in the section. The Montevideo Convention which codified the concept of statehood, the equality of states, and the principle of non-intervention in the domestic affairs of states, is also discussed. State sovereignty in the post-United Nations Charter era is also dealt with in the section. A discussion of the prohibition on the use of force and the corollary of non-intervention enshrined in the United Nations Charter is provided. Acceptance of the concept of state sovereignty and the equality of states has not eliminated unilateral interventions by powerful countries in the domestic affairs of weaker states in the post UN Charter era. The section discusses the necessary limitations placed on state sovereignty due to the interdependence of states, the internalisation of human rights, and the requirements of international law. The section argues that the need to protect human rights dictates that, in some circumstances, sovereignty and its corollary of non-intervention may have to give way to international

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intervention in the internal affairs of affected states. The purpose is to establish that in such cases, interventions should occur under clear internationally accepted guidelines, in order to avoid abuse by intervening states. The section concludes that, despite its limitations, sovereignty remains an indispensable principle of international law which underpins international relations and protects weaker states from interference in their domestic affairs by more powerful states.

1.2.1. Definition

Sovereignty does not have a universally accepted definition. Oppenheim observes that:

[...]there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an undisputable fact that this conception, from the moment when it was introduced into political science until the present day, had never had a meaning which was universally agreed upon.\(^8\)

Henkin also is of the view that sovereignty “means many things, some essential, some insignificant; some agreed, some controversial; some are not warranted and should not be accepted”\(^9\) and goes on to suggest that the concept is obsolete, and therefore, “for legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic of an earlier era”.\(^10\) Sovereignty, however, is an important principle in international law which cannot be dispensed with, and as asserted by Perrez:

[...]international law is based on the principle of sovereignty, that sovereignty is the most important if not the only structural principle of international law that shapes the content of nearly all rules of international law, that the international legal order is merely an expression of the uniform principle of external sovereignty, that sovereignty is the criterion for membership of the international society, and that sovereignty in sum is the ‘cornerstone of international law’ and the controlling principle of world order.\(^11\)

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10 Ibid. p. 10.
Several writers have provided some definitions of the term. Weiss defines it as “the independent and unfettered power of a state in its jurisdiction.”\(^\text{12}\) To Scheid, sovereignty entails the idea that “states are politically equal, independent, and self-governing (autonomous) entities.”\(^\text{13}\) Bodley has defined it as follows: “Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all persons from time to time therein.”\(^\text{14}\) To Shaw, sovereignty means that the government of the state is competent to act without restraint within its borders, and no external force can interfere with its supremacy.\(^\text{15}\) Referring to Westphalia and the system of sovereign states established by the Treaties of Westphalia concluded in 1648, Krasner defines sovereignty as “an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.”\(^\text{16}\) “Westphalian sovereignty is violated when external actors influence or determine domestic authority structures.”\(^\text{17}\) Brownlie observes that sovereignty consists of jurisdictions of states over territories and the duty to refrain from intervening in the exclusive jurisdiction of other states.\(^\text{18}\) Richard Bilder has defined it as simply “a state’s right to do as it wishes, particularly within its own territory, free of external constraint or interference”.\(^\text{19}\) Bilder goes on to provide a list of scholarly definitions:\(^\text{20}\)

- The American Heritage Dictionary defines sovereignty as “supremacy of authority or rule as exercised by a sovereign or sovereign state” or, alternatively, as “complete independence and self-government.”\(^\text{21}\)
- Max Huber, as Arbitrator in the 1926 Island of Palmas case, wrote that: “Sovereignty in the relations between states signifies independence.

\(^{15}\) Shaw, note 1 supra, p. 276.
\(^{17}\) Ibid.
\(^{20}\) Ibid.
\(^{21}\) The American Heritage Dictionary of the English Language, 1725 (3rd ed. 1992)
Independence in regard to a portion of the globe is the right to exercise there, to the exclusion of any other states, the function of a state.”  

- Judge Alvarez, in his individual opinion in the Corfu Channel case, wrote that: “By sovereignty, we understand the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.”  

- Helmut Steinberger, in the Encyclopaedia of Public International Law, says that: “Sovereignty …denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or territorial jurisdiction of a foreign state or to foreign law other than public international law.”  

- Professor Lou Henkin, in How Nations Behave, writes that the principle holds that “…except as limited by international law or treaty, each state is master of its own territory.”  

- And at a recent ASIL meeting, Professor Tom Franck suggested, interestingly and much more broadly, that a going definition of sovereignty is the loci of the formation of rights and duties generally recognized as establishing and implementing entitlements, distributions and obligations.”  

This thesis defines sovereignty as a state’s freedom to determine, and control affairs within its territory, in accordance with its own laws, without the dictates of any external power, subject to the requirements of international law. Defined this way, sovereignty is meant to ensure the sovereign equality of states, and thereby provides protection for weak countries from interference in their domestic affairs by powerful states.

1.2.2. Internal and External Sovereignty

There seems to be general agreement from the several definitions provided by various the scholars that, firstly, sovereignty is an essential attribute of a state. Secondly, the essence of

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22 Island of Palmas Case, (US v Neth), 2 R. Int’l.Arb.Awards 821, 838 (1928) (Huber, Arb.).
23 Corfu Channel Case, (UK v Alb.) 1949, p. 43.
sovereignty is the power of the state to control affairs within its territory, without limitations, to the exclusion of outside powers. Thirdly, sovereignty has an external dimension besides the internal aspect. Sovereignty therefore consists of the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.\textsuperscript{27} However, it has been argued that absolute sovereignty is essentially an internal attribute of a state. The argument is that the application of the principle of sovereignty on the international plane, however, is “controversial and problematic.”\textsuperscript{28} This is because even though a state may lay claim to absolute sovereignty regarding its internal affairs, it is bound by international law by virtue of membership of the international community.\textsuperscript{29} This position has been aptly expressed as follows:

The 20\textsuperscript{th} century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organisation. It is also inappropriate. Sovereignty as supreme legal power and authority is inapplicable to the position of states within the international community: no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterized by their equality and independence and, in fact, their interdependence. Although states are often referred to as ‘sovereign’ states, that is descriptive of their internal constitutional position rather than of their legal status on the international plane.

Despite the deficiencies in international law which at present make it an imperfect legal order - deficiencies which are gradually being overcome - the very notion of international law as a body of rules of conduct binding upon states irrespective of their internal law, implies the idea of their subjection to international law.\textsuperscript{30}

This thesis argues that, sovereignty is an internal as well as an external attribute of states. Internal sovereignty confers on the state the authority to conduct affairs within its territory

\textsuperscript{28}Bilder, note 19 supra, p. 11.
\textsuperscript{29}Oppenheim’s International Law, Vol. 1: Peace, (Jennings, R. and Watts, A. eds., 9\textsuperscript{th} ed. 1992, p. 25.
\textsuperscript{30}Ibid.
free from external interference. Externally, sovereignty confers upon the state legal independence from other states, a legal personality, which in turn makes the state equal to its peers, and places a duty on other states not to interfere in the domestic affairs of the state. Sovereignty is not absolute, internally or externally, in the light of globalisation and the interdependence of states. There are limits on internal sovereignty, just as there are on external sovereignty. Chapter VII Article 39 of the UN Charter empowers the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression and to make recommendations, or decide what measures to be taken to restore or maintain international peace and security, which may include measures not involving the use of armed force under Article 41, or action by air, sea, or land forces as may be necessary, under Article 42. Thus, at the international level, limitations are placed on the exercise of sovereign authority by a state, by virtue of its membership of the international community. Similarly, there are limitations on internal sovereignty. Thus, even though Article 2(7) of the UN Charter guarantees to states protection from external interference “in matters which are essentially within the domestic jurisdiction of any state”, this protection will not avail a state when international law is breached in matters such as the protection of human rights. Agents of the state responsible for perpetrating gross human rights abuses on its citizens within the state can be held accountable. Absolute sovereignty is therefore an illusion and impracticable under the contemporary legal order. This is to be expected, in the light of the interdependence of states. This exposition that sovereignty is an internal as well as an external attribute of a state finds agreement in the views of other writers. Ayoob, for example, argues that sovereignty is not only an internal attribute of states, but rather, “it is constituted by external recognition by peers (states) and by internal acquiescence.”31 Shaw seems to be in agreement with Ayoob, that sovereignty is not only an internal attribute of states with the observation that sovereignty “expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person.”32 Abiew shares this view. He observes that internally sovereignty means the exercise of supreme authority by a state within its territory while externally, it means equality of states.33

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32 Shaw, note 1, p. 276.
1.3. History and Evolution

The concept of absolute sovereignty, according to Merriam, has its beginnings in Aristotle’s *Politics* and the classic body of Roman Law. In *Politics*, there is a recognition by Aristotle that there must be a supreme power existing in the state, and that this power may be in the hands of one, or a few, or of many. “Sovereignty,” as one writer has observed, “in its historical origins is a political concept which later became transformed” to provide a juristic base to the political power of the State. According to Louis Goodman, the doctrine of sovereignty was invented to give legitimacy to secular authority, with the decline of the Roman Empire, which at the time was the only body with “the revered qualities required to exercise authority over Europeans.” Brierly has argued that the doctrine of sovereignty as known currently has its origins from the Reformation period onwards.

1.3.1. Theories on absolute Sovereignty

1.3.1.1. Jean Bodin (1530-1596)

The formulation of the theory of sovereignty as the right of a state to have supreme control of affairs in its territory is attributed to the French philosopher Jean Bodin. He is rightly regarded as the ‘father’ of the modern theory of sovereignty because he produced “the first systemic discussion of the nature” of the concept. “Bodin…developed what is commonly regarded as the first statement of modern theory of sovereignty: that there must be within every political community or state a determinate sovereign authority whose powers are decisive and whose powers are recognized as the rightful or legitimate basis of authority.” Bodin lived at a time when France was in transition through civil war, from the feudal state into a centralised state. He framed the theory of sovereignty upon which the

39 Merriam, note 34, p. 7.
41 Merriam, note 34, p. 7.
French Monarchy rested.\textsuperscript{42} He defined the concept as follows: “Sovereignty is supreme power over citizens and subjects, unrestrained by the laws.”\textsuperscript{43} Bodin believed that sovereign authority must be absolute, perpetual, and undivided, and in terms of which the private interest of the ruler or ruling class superseded the common interest.\textsuperscript{44} Bodin’s definition envisages authority which is supreme and perpetual in the sense that it has no limit as to time.\textsuperscript{45} Therefore, any person who exercises power for a limited period was not truly sovereign. By ‘perpetual’, Bodin did not mean eternal. Rather, sovereignty signified the life time of the person exercising it.\textsuperscript{46} “The life tenure of supreme power therefore, constitutes sovereignty in an individual.”\textsuperscript{47} Sovereignty may therefore be validly transferred from one individual to another, so long as it is absolute and without conditions.\textsuperscript{48} Bodin wrote his masterpiece \textit{Les Six Livres de la Republique},\textsuperscript{49} published in 1576, to demonstrate loyalty to the French King Henri III.\textsuperscript{50} In Bodin’s view, the sovereign prince cannot share his power without losing his status as sovereign. He writes:

\begin{quote}
It is also by the common opinion of the lawyers manifest, that those royal rights cannot by the sovereign be yielded up, distracted, or any otherwise alienated; or by any tract of time be prescribed against...and if it chance a sovereign prince to communicate with his subject, he shall make him of his servant, his companion in the empire: in which doing he shall lose his sovereignty, and be no more a sovereign: for that he only is a sovereign, which has none his superior or companion with himself in the same kingdom.\textsuperscript{51}
\end{quote}

Sovereignty is indivisible. There cannot be two centres of power in a state. If a sovereign shares power with anyone, he ceases to be sovereign. The sovereign was accountable to no

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\textsuperscript{42}Ibid.
\textsuperscript{44}Andrew, “Jean Bodin on Sovereignty”, note 6 supra, pp. 75-84 at 76-77.
\textsuperscript{45} A.W. Dunning, Jean Bodin on Sovereignty, \textit{Political Science Quarterly}, Vol. 11 No. 1 (Mar., 1896), pp. 82-104, at 84.
\textsuperscript{46}Merriam, note 34, p. 7
\textsuperscript{47}Ibid. p. 93
\textsuperscript{48}Ibid.
\textsuperscript{51}Six Books, note 49 supra, p. 155.
\end{flushright}
one, but ‘to the immortal God alone.’\textsuperscript{52} The sovereign prince, he writes, ‘next under God, is not bound unto any.’\textsuperscript{53} With regard to laws, Bodin believed that, it was the sovereign’s prerogative to make law. He writes: ‘So we see the principal point of sovereign majesty, and absolute power, to consist principally in giving laws unto subjects in general, without their consent’\textsuperscript{54} and ‘a king or sovereign prince cannot be subject to his own laws.’\textsuperscript{55}

Bodin’s conception of sovereignty justified absolute monarchy and envisaged a situation where absolute power is vested in an individual, not bound by law, who had untrammelled power and control over subjects within his territory. The sovereign with such immense power could wage war on other states without restraint and could claim intervention in other states as a right, on the basis of religious solidarity or in advancement of his interests. This could have influenced the acceptance in the 19\textsuperscript{th} century of the principle of a right of humanitarian intervention. Bodin’s conception of absolute sovereignty would be unworkable in the current international order since it would amount to dictatorship. The assertion that the sovereign prince or king is accountable to the immortal God alone will not find acceptance in the 21\textsuperscript{st} century. Under the contemporary international order, sovereignty is vested in the state, and sovereign power is exercised in the interest of the citizens. A state that exercises sovereign power to the detriment of its citizens, by seriously abusing their human rights, stands to lose legitimacy, and may invite intervention by outside powers.

Bodin’s views on sovereignty were shaped by the social and political environment of his time, which convinced him of the need for a supreme centre of authority to hold the state together to prevent disintegration. His conception of absolute sovereignty should therefore be understood in this context. During the 16\textsuperscript{th} century when Bodin wrote his \textit{Six Livres}, the ‘social fabric and political stability of France were in a state of crisis.’\textsuperscript{56} Despite his position on absolute sovereignty, Bodin concedes that there are limits on sovereignty. In addition to being accountable to God, he writes that the sovereign prince must defer to the law of nations:

\begin{footnotes}
\item[52]Ibid. p. 86.
\item[53]Ibid. p. 99.
\item[54]Ibid. p. 98.
\item[55]Ibid. p. 92.
\item[56]Beaulac, note 50, p. 21.
\end{footnotes}
For if we shall say, that he only had absolute power, which is subject unto no law; there should then be no sovereign prince in the world, seeing that all princes of the earth are subject unto the laws of God, of nature, and of nations.\textsuperscript{57}

By making the exercise of sovereign power subject to the laws of God, of nature and of nations, he acknowledged that sovereign power should not be exercised arbitrarily, but should take into account the welfare of citizens and the human rights conferred upon them by natural law, by virtue of their being human. In other words, sovereigns had the responsibility to protect the human rights of their citizens. This is in accordance with current practice of state sovereignty, that sovereignty has limits, and sovereign power has to be exercised in compliance with international law. His view contributed to the foundation of the modern concept of state sovereignty.

1.3.1.2. Thomas Hobbes (1588-1697)

Another writer on sovereignty was Thomas Hobbes, (1588-1697), the English author of \textit{Leviathan}.\textsuperscript{58} Like Bodin, he believed that there should be in a state, a repository of absolute, indivisible and final sovereignty signifying authority beyond which there is no appeal.\textsuperscript{59} Both writers believed that sovereigns are only limited by themselves.\textsuperscript{60} He identified with royalty “in a time of civil dissension”\textsuperscript{61} in his country. He believed that in order to contain civil dissent, there should be an identifiable repository of sovereign power which should be absolute and unquestionable. According to Hobbes, men originally lived in a state of nature, each equal to the other, with competing interests, in insecurity; in circumstances in which each felt threatened by the other and each person sought to dominate the other, “in that condition which is called war: and such a war as is of every man against every man”.\textsuperscript{62} Hobbes began his justification of absolute sovereignty and the need for an unquestionable source of authority by portraying a situation in which men lived in solitude in a state of nature. Each depended on himself, on his own strength for protection and survival; fearful of constant threats of danger from other men. Such conditions engendered uncertainty. Each man was concerned only with how to survive from day to day. In conditions of uncertainty,

\textsuperscript{57}Six Books, note 49, p. 90.
\textsuperscript{60}ibid.
\textsuperscript{61}Dunning, note 45 supra, p. 87.
\textsuperscript{62}Hobbes, note 58 supra, Chapter XIII, pp. 76-77.
when a man did not know what a day would bring, there was no room for the expression of human endeavour: no learning, no commerce, no agriculture, no culture, no society, no medical practice, no law, and no human development whatsoever. In a nutshell, this was a dangerous and an unhappy existence, characterised by perpetual fear of violent death, solitude, poverty, brutality, and brevity of life.63

Hobbes theorised that men can live in security, peace, and development only in a society. However, he asserts that “men have no pleasure in keeping company where there is no power able to overawe them all.”64 Therefore, to have a society, there must be a common power. Where there is a common power, there is law and justice. He believed, then, that this common power should be an unquestionable source of authority.65 In the absence of a common power, each man is the enemy of every other man: there is no law, and therefore, there is no distinction between what is just and what is unjust. No one owns anything. If two men want the same thing, they become enemies. The strongest is a law unto himself, and he takes by force what he wants. The only solution, according to Hobbes, was to establish a commonwealth which will defend them from the invasion of foreigners and the injuries of one another, by conferring all their power upon one man or assembly of men, and by reducing all their wills unto one will.66 The person or assembly of men unto whom these rights and powers are conferred is called sovereign, and is said to have sovereign power.67

From this institution of a Commonwealth are derived all the rights and faculties of him, or them, on whom the sovereign power is conferred by the consent of the people assembled.68

Hobbes’ definition of sovereignty derives from this arrangement. Thus, sovereignty originated from the formation of a body politic or commonwealth by the voluntary transfer by men of all their rights and powers to one person or assembly of persons. The transfer of rights and powers by the people to one individual or assembly of persons is the essence of sovereignty. The sovereign becomes the representative of the people, and anything he does is considered to be the deed of the people who gave him the powers and rights, including those

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63Ibid. p. 78.
64Ibid. p 77.
65Dunning, note 45 supra, p. 86.
67Ibid. p. 106.
68Ibid. Chapter VXIII, p. 107.
who did not participate in the covenant to transfer their powers and rights. By instituting a
covenant the people have bound themselves by covenant “to own the actions and
judgements”\textsuperscript{69} of the sovereign. To circumvent popular sovereignty, he asserts that by
transferring all power to the sovereign, the people become his subjects and cannot without his
leave “cast off the monarchy and return to the confusion of a disunited multitude.”\textsuperscript{70}

Both Bodin and Hobbes wrote about domestic sovereignty which involved the acceptance of
a given authority structure.\textsuperscript{71} They both wrote at a time of religious wars in Europe that were
undermining the stability of their countries and their primary concern was to establish stable
authority acceptable as legitimate by all citizens. Thus, both preferred the concentration of
power in the hands of one person or a group of people. Krasner argues that “the vision of
Bodin and Hobbes has never been implemented…Authority has taken many different forms
including monarchies, republics, democracies, unified systems and federal systems…High
levels of centralization have not been associated with order and stability that Bodin and
Hobbes were trying to guarantee.”\textsuperscript{72} This view is not shared by all scholars. Perrez argues
that in the 18\textsuperscript{th} and early 19th century, Bodin’s conception of sovereignty as absolute and
perpetual power of the state was recognised as the unlimited independence of the
state.\textsuperscript{73} Bodin’s ideas about sovereignty influenced Wheaton to observe that “each state
possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its
territory…No state, can by its laws, directly affect, bind, or regulate property beyond its own
territory, or control persons that do not reside within it, whether they be native-born subjects
or not.”\textsuperscript{74}

Krasner’s argument overlooks the main purpose of Bodin’s and Hobbes’ theories, which was
to identify the repository of supreme authority in a state, to preserve order, and to prevent the
disintegration of the state and the right of the state to decide issues within its territory. Their
theories form the foundation upon which modern state sovereignty was built. Sovereign
power, whether concentrated or diffused is a necessary attribute of a state. In contemporary
times, the state, represented by the government, is the repository of sovereign authority. The

\begin{footnotes}
\item \textsuperscript{69}Ibid. p. 107.
\item \textsuperscript{70}Ibid.
\item \textsuperscript{72}Ibid.
\item \textsuperscript{73}Perrez, note 11 supra, p. 40.
\item \textsuperscript{74} H. Wheaton, \textit{Elements of International Law}, Sec. 78 (8\textsuperscript{th} ed. 1866).
\end{footnotes}
state has the monopoly of the use of force, the power to make laws and enforce them and the
power to exercise control over the inhabitants and property within the territory of the state. The
contemporary international order has only adapted classical sovereignty to suit modern
times, just like the adaptation of any other legal or political principle. The core tenets of
sovereignty as envisaged by Bodin and Hobbes have not been entirely dispensed with, but
adapted to contemporary times. It was not within the contemplation of the theorists of the
concept of sovereignty that it would be implemented with its classical connotations, in
contemporary times, in the light of the political and historical context in which they lived.

1.3.1.3. Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1694),
Alberico Gentili (1552-1608), Emmerich de Vattel (1714-1767)

The works of other writers on sovereignty have also influenced international law. Grotius
considered sovereignty as “that power whose acts are not subject to the control of another, so
that they may be made void by the act of any other human will.” In his treatise, *The Law of
Nature and of Nations (De Jure Naturae et Gentium*, 1672), Samuel Pufendorf, states that
sovereignty is the supreme power of the state. No organ in the society can render
sovereign’s acts void: he is responsible to no other power, free from the restraint of all human
law; and this power is one and indivisible. However, Pufendorf acknowledged that
sovereignty did not signify omnipotence or absoluteness, but rather, supremacy and therefore
certain limits may be placed on sovereignty. However sovereignty, though limited, remains
nonetheless truly sovereign. Alberico Gentili in his 1612 edition of *De Jure Belli Libri Tres*,
states that in ancient Rome, the citizens conferred their sovereignty on their emperor, but
“They did so in order that they might be governed like men, not sold as cattle.” De Vattel
wrote that men institute a commonwealth in order to secure their mutual welfare and
security. He wrote that “liberty and independence belong to man by his very nature, and

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75 R. Araujo, Sovereignty, Human Rights and Self-Determination: The Meaning of International Law,
77 S. Pufendorf, De Jure Naturae et Gentium, VII, ch. 6, sec. 1, cited in Merriam, *History of The Theory of
Sovereignty Since Rousseau*, note 28, p.15.
79 *Ibid.*, VII, ch. 4, sec. 4
81 *Ibid.* VII, ch. 6, sec. 11-14
82 A. Gentili, De Jure Belli Libri Tres 371, quoted in R Araujo, Sovereignty, Human Rights, and Self-
83 E. De Vattel, *The Law of Nations or Principles of Natural Law : Applied to the Conduct and to the Affairs of*
…they cannot be taken from him without his consent.”84 He states further that, “States are formed by men, their policies are determined by men, and these men are subject to the natural law under what capacity they act.”85 His argument is that commonwealths that are formed by people, whether monarchies or republics, exercise sovereignty on behalf of their subjects.86 The members of the commonwealth confer their sovereignty on an individual or assembly of persons, but their sovereignty is delegated for “the common good of all the citizens…”87 Therefore according to De Vattel, “the welfare of the people is the supreme law.”88

The views of Pufendorf, Gentili, and de Vattel are in agreement with those of Bodin and Hobbes in relation to the existence of unquestionable sovereign authority in a state. Even an advocate of absolute sovereignty such as Bodin conceived that sovereign power derives from the people, and should therefore be exercised in the interest of the people. This understanding of the manner in which sovereign power should be exercised undoubtedly influenced the development of Westphalian sovereignty.

1.4. Westphalian Sovereignty

The modern concept of sovereignty is primarily concerned with statehood.89 The concept of sovereignty as it is understood currently, was established by the Peace Treaties of Westphalia signed at Munster and Osnabruck in 1648 between European States, which ended the Thirty Years War.90 Weiss has observed that, the current foundations of international law with regard to sovereignty were laid by the Treaties of Westphalia in 1648; and at the centre of this notion of sovereignty was idea that, the interference by one state in the internal affairs of another was not permissible.91 The treaties, according to Louis Goodman, involved the Pope, whose involvement was vital, because with the fall of the Roman Empire, European political leaders had difficulty exercising authority over their own populations; therefore the leaders of Western Europe utilised the prestige of the Pope “to grant leaders of proto-nations-states the authority to exercise power within national borders.”92 By separating the powers of the State

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84 Ibid.
85 Ibid., p. 4
86 Ibid., p. 7.
87 Ibid., p. 20.
88 Ibid., p. 28.
89 Perrez, note 11, p. 39.
91 Weiss, note 12 supra, p. 16.
92 Goodman, note 37 supra, p. 27.
and the Church, the Peace of Westphalia conferred on nation-states “the special god-like features of Church authority.”  

These treaties are considered to have established the modern concept of sovereign statehood. In order to restore peace and order in Europe after thirty years of war, the Treaties of Westphalia established the supremacy of the sovereign authority of the state through a system of independent and equal states. Stephen Krasner has defined “Westphalian” as an “institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.” Krasner asserts that, “Westphalian sovereignty is violated when external actors influence or determine domestic authority structures.” It is clear that Westphalian sovereignty derived from the theories of sovereignty espoused by earlier writers like Bodin and Hobbes. The main difference is that the conception of sovereignty by Bodin and Hobbes involved the concentration of supreme authority in the hands of one person or a few people, while in the case of Westphalian sovereignty, supreme authority resides in the state. However, in terms of the supremacy of the state regarding the control of affairs within its territory to the exclusion of external actors, the ideas converge.

The concept of statehood was codified by the Montevideo Convention. A state must have the following attributes: a permanent population, a defined territory, a functioning government, and the capacity to enter into relations with other states. All states are equal and none has the right to intervene in the domestic affairs of another state. The doctrine of non-intervention in the internal affairs of states is a corollary of the principle of sovereignty. Robert Jackson calls respect for state sovereignty the cornerstone of the “global covenant”, which is the foundation of international order. According to Jackson, “The global covenant is the first attempt in world history to construct a society of states that operates with a doctrine of recognition and non-intervention that bridges different

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93 Ibid.
96 Ibid. p. 20. (Referring to the concept of sovereignty established by the Treaties of Westphalian in 1648).
97 Ibid.
98 The 1933 Montevideo Convention on Rights and Duties of States.
99 Ibid. Article 1.
100 Ibid. Article 4
101 Ibid. Article 8.
civilisations and cultures around the world.” Brownlie observes that “sovereignty and equality of states represent the basic constitutional doctrine of the law of nations.”

Territorial sovereignty underpins relations among states. The state can exercise its authority within its territory free from interference from external actors, and other states must respect its territorial sovereignty. As Asrat puts it, “other States have the correlative duty of respecting this base State authority, which is one of the important elements constituting statehood.” The concept of the state is the bedrock of international law, while the foundation of the state is sovereignty. As Shaw expresses it, “International law is based on the theory of the state. The state in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person.”

The importance of the concept of state sovereignty and its guarantee of the territorial integrity of states cannot be overemphasised. There would be no states without the concept of sovereignty, because there would be no national boundaries. Entire territories would be controlled by powerful states with the ambition to rule over weak states, which would always strive to free themselves, leading to a state of perpetual war and lawlessness. The international order in its current form would cease to exist.

1.5. Post-1945 Understanding of Sovereignty

The importance of the concept of state sovereignty in international relations is demonstrated by the fact that the United Nations was created in 1945 on the basis of the sovereign equality and the inviolability of the territorial integrity of states. The Charter enjoins member states to settle internal disputes by peaceful means, and prohibits the threat or use of force against the territorial integrity or political independence of any state that is inconsistent with the

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104 Brownlie, note 18 supra, p. 15.
107 Ibid.
108 Shaw, note 1, p. 276.
109 Ibid.
111 Ibid. Article 2(3)
purposes of the organization. Similarly, the African Union was established on the sovereign equality of members of the Union, with all the rights encompassed in the concept of sovereignty.\(^{112}\) The Charter of the Organization of American States\(^{114}\) and the Helsinki Accord\(^{115}\) also acknowledge the sovereign equality of members of their organisations, and respect for their territorial integrity. The International Court of Justice has endorsed the principle of non-intervention by declaring respect for territorial sovereignty to be an “essential foundation of international relations”\(^{116}\) and the principle on which the whole of international law rests.\(^{117}\) Prominent United Nations’ declarations also affirm the concept of state sovereignty and the principle of non-intervention. An example is UN General Assembly Resolution 2131, 1965.\(^{118}\) In the Preamble and its opening paragraph, the resolution expresses its deep concern ‘at the gravity of the international situation and the increasing threat to universal peace due to armed intervention and other direct or indirect forms of interference threatening the sovereign personality and the political independence of States.”\(^{119}\) Also in the Preamble, the declaration cites UN Resolution 1514,\(^{120}\) on States “inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory…”\(^{121}\) United Nations General Assembly Resolution 2625\(^{122}\) also endorsed Resolution 2131 on the sovereign equality of states and the prohibition on intervention. In the Preamble, the resolution affirms the principle of sovereign equality of states and the principle of non-intervention. The resolution makes it clear that intervention in the internal or external affairs of a state is a violation of international law. Thus, the concept of state sovereignty and its companion principle of non-intervention are generally recognised as fundamental in the maintenance of peace and security in international relations. Through the UN Charter and UN Declarations, and similar provisions in the Charters of other international organisations, states have accepted prohibitions on intervention in the domestic

\(^{112}\)Ibid. Article 2(4).
\(^{114}\)Charter of the Organization of American States (A-41), Articles 3, 10.
\(^{115}\)Conference on Security and Co-operation in Europe (Final Act), Helsinki 1975, Article 1.
\(^{116}\)Corfu Channel Case, note 17, p. 35.
\(^{117}\)Nicaragua v United States of America, I.CJ Reports, Judgment of 27 June 1986, para 69.
\(^{118}\)General Assembly Resolution 2131 (XX) of 21 December 1965, Declaration on the Inadmissibility of Intervention in the Internal Affairs of States and the protection of their Independence and Sovereignty.\(^{119}\)Ibid. Preamble.
\(^{120}\)1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, GAR 1514)
\(^{121}\)Ibid. Preamble.
\(^{122}\)General Assembly Resolution 2625 (XXV).Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter United Nations.
affairs of sovereign states. The concept of state sovereignty is thus recognised internationally as being at the centre of inter-state relations.

Nevertheless, acceptance of the concept of state sovereignty and the equality of states has not eliminated unilateral interventions by powerful countries in the domestic affairs of weaker countries in the post-1945 era. The greatest challenge to the doctrine of sovereignty, according to Ayoob, is the inclination of powerful countries, international organisations and regional organisations to intervene in the “domestic affairs of juridically sovereign states for ostensibly humanitarian purposes.” It is impossible to prevent interventions by powerful countries in weak countries, on humanitarian or other grounds. Powerful countries may ignore the sovereignty of weak states when it suits them. Probably the only restraint on such states is that each time they disregard international law and intervene in a weak state, they face international condemnation, which reaffirms the general recognition and resilience of the concept of state sovereignty. Whether such international condemnation is sufficient restraint is another matter.

However, interventions cannot always be condemned as being without justification. For example, ECOWAS’ interventions in Liberia (1990) and in Sierra Leone (2000) were necessary to halt organised violence. Even though the interventions were carried out without United Nations Security Council authorisation, there was no international condemnation. Rather, in Resolution 788, the United Nations commended the organisation for its part in bringing peace security and stability to Liberia. Further, where genocide is perpetrated on a large scale like the example in Rwanda, there is justification for outside intervention. If the international community had made a timely intervention in Rwanda in 1994, many lives would have been saved. Apart from a lack of political will of the international community to intervene, another obstacle to intervention in Rwanda was probably due to respect for the concept of state sovereignty and its corollary of non-intervention. Sovereignty should not be used as a shield in the face of gross human rights abuses, such as genocide, ethnic cleansing, or war crimes. Thus, there will always be limitations on sovereignty especially where human rights are concerned. Even an advocate of absolute sovereignty like Bodin acknowledged that

123 Ayoob, note 31, p. 81.
sovereignty has limits by subjecting the sovereign to the laws of God, of nature and of nations.\textsuperscript{125}

There are important and widely accepted limitations on state sovereignty and domestic jurisdiction in international law.\textsuperscript{126} Firstly, even though Article 2(7) reserves to states control over matters essentially within their jurisdiction, this does not prejudice the application of enforcement measures under Chapter VII. Thus for example, Article 2(7) will not provide immunity to a state from its duty to protect human rights, and persons who exercise the sovereign power of a state cannot do so with impunity. An example is Laurent Gbagbo, ex-President of the Ivory Coast, who is on trial at The Hague, for crimes against humanity, for inciting post-election violence in Ivory Coast.

Secondly, Article 1(3) of the UN Charter brings into the international domain matters not only of human rights, but also issues related to social, cultural, economic and humanitarian issues, thereby removing them from the internal jurisdiction of states.\textsuperscript{127} Under Article 1 of the Charter, one of the Purposes of the United Nations is to “maintain international peace and security, and to this end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace…” It is clear then that the UN may take collective action against a state in the interest of peace and security. Thirdly, Article 2(1) provides that “All Members…shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.” Therefore, states are legally bound by obligations in international relations and law, and cannot invoke sovereignty to evade the performance of their obligations. By virtue of membership of the UN and other international organisations, a state accepts restrictions on its sovereignty.\textsuperscript{128}

From the foregoing examples, it is clear that the classical of concept of sovereignty has been eroded to the extent that matters that were once considered to be within the domestic sphere of states, like cultural, economic, social, and humanitarian, have been elevated unto the international plane. A state therefore has to take into account international repercussions of its internal actions. Most importantly, in the light of international concern for the protection of human rights, the concept of state sovereignty will continue to face challenges.

\textsuperscript{126}\textit{ICISS Supplementary Volume}, p. 7.
\textsuperscript{127}Ibid. p 8.
\textsuperscript{128}Ibid.
Interventions since the 1990s in Libya (2011), Iraq (2003), Somalia (1992), Bosnia (1995), Kosovo (1999), Sierra Leone (2000), Liberia (1990), and Haiti (1994), grounded in the protection of suffering populations, have, however, posed serious challenges to the concept of state sovereignty and the principle of non-intervention. In the light of the internationalisation of human rights, and the prevalence of internal strife in many countries, sovereignty and its corollary of non-intervention will continue to face limitations. Absolute sovereignty is undesirable and impracticable in the face of the interdependence of states. This has led to the erosion of the classical understanding of state sovereignty. Interventions cannot be eliminated because the contemporary trend is that a state has the duty to protect the human rights of its people. The trend has led to interventions based on the belief that the rights of people take precedence over the rights of states. The interventions were based on the belief that the rights of people should take precedence over the rights of states. 129 This belief has found expression in the ICISS Report 2001, that states have a duty to protect the population within their territories. On the other hand, the international community failed to intervene in other countries where humanitarian crises existed, such as Darfur in Sudan, where since 2003 a large number of people have been killed or have been internally displaced, or have become refugees in other countries. In Rwanda, in 1994, the inaction of the Security Council led to the slaughter of hundreds of thousands of innocent people. Interventions have raised issues of motives, abuse, and disproportionate use of force, while inaction raised issues of selectivity and motives, and highlighted the tensions between the defence of state sovereignty on the one hand, and the imperative to intervene in the name of protecting human rights on the other hand.

It is clear from recent cases of humanitarian interventions that the norm of non-intervention in the domestic affairs of states has “lost ground”. 130 Sarkin argues that the concept of state sovereignty, though not entirely dispensed with, has been eroded in contemporary times. 131 He observes that despite the classic definition of the concept of state sovereignty, in practice national sovereignty “fluctuates with shifting state obligations”, by the voluntary limitations placed by states on their sovereignty through the assumption of international obligations and

130 ICISS Supplementary Volume, note 99, p. 3.
their membership of international organisations.\textsuperscript{132} Boutros Boutros-Ghali shares the view that sovereignty has been eroded when he states that, “The time of absolute sovereignty has passed; its theory was never matched by reality.”\textsuperscript{133} In other words, absolute freedom from interference in the domestic affairs of states is an illusory goal,\textsuperscript{134} because of the interdependence of states. Intervention to influence the policies of other states is the objective of diplomacy and international agreements, and,\textsuperscript{135} it is impossible to differentiate between what are permissible and impermissible acts of intervention.\textsuperscript{136}

Sovereignty in its origins involved absolutism in the sense that sovereign power was concentrated in the hands of one man or a few people who exercised power as they deemed fit. There were no constraints on the unilateral use of force in intervening in other countries’ domestic affairs, pursuant to national interests. The United Nations Charter placed a prohibition on the use of force except under prescribed circumstances. This has, however, not prevented powerful states from unilaterally intervening in the internal affairs of weaker countries, ostensibly in name of humanitarian intervention. Some of the interventions have been conducted without the authorisation of the United Nations, in total disregard of the concept of state sovereignty.

It is submitted that the absolute concept of sovereignty is impracticable in the contemporary era, because of the internationalisation of human rights, the influences of globalisation and the interdependence of states. State sovereignty need to be respected, but unrestrained sovereignty may present a threat to international peace and stability because every state may consider it a sovereign right to do whatever it wishes, with no regard for international law. In such circumstances, the international order will be reduced to Hobbes’ state of nature. Sovereignty should not mean that a state is above international law. The early writers on sovereignty like Bodin, Hobbes, Grotius, Gentili, Pufendorf and de Vattel, while acknowledging that sovereignty was absolute, recognised that it was not unlimited, but subject to higher norms, in the form of the laws of God, the laws of nature, the laws of nations, and constitutional restrictions. Respect for sovereignty should be reconciled with the

\textsuperscript{132}Ibid., p. 3.
\textsuperscript{135}Ibid. p. 154.
need to protect human rights and the maintenance of international peace and stability. In the face of egregious human rights abuses by a state against its own people, the international community should not be constrained, by deference to sovereignty, from acting to protect victims.

Regardless of the foregoing, sovereignty remains fundamental in the conduct of interstate relations, and therefore, unilateral interventions by powerful states should not be condoned as they constitute an abuse of the concept of humanitarian intervention and a violation of the sovereignty of other states. Ayoob agrees with this position, by observing that “One cannot deny the fact that not merely the UN Charter but also the accumulated norms of international society create a distinct predisposition towards accepting sovereignty claims, unless a very strong case can be made that these claims need to be overridden.”\(^{137}\) The principle of sovereign equality of states is essential for maintaining equilibrium in interstate relations. There is no substitute for the concept of sovereignty. The concept may be considered as obsolete and disregarded by powerful states when it is in their interest to do so. However, as long as they claim sovereignty for themselves, they cannot deny it to other states. It is the only protection weak states have against unrestrained hegemony and aggression of powerful states. In its absence, there will be unmitigated apprehension among weak states of powerful states intervening in their territories at will, under the pretext of humanitarian intervention. Observance of the concept of sovereignty will go a long way to eliminate or reduce abuse and application of disproportionate force in the implementation of humanitarian intervention.

1.6. Humanitarian Intervention

This section traces the Christian origins of the concept from St Augustine to the St Thomas Aquinas and the internationalisation of the concept. The Just War Theory is discussed in detail in the section. The importance of the Just War Theory is that the foundations of the right of humanitarian intervention were laid by the Just War conception of war. The principles of the Just War Theory are reflected in the recommendations of the ‘Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty’ (ICISS), concerning the rules of military intervention, which will be discussed at a later stage in the thesis. This section concludes that the humanitarian interventions during the 19th century were unilateral interventions, not regulated by any supranational authority, but

\(^{137}\)Ayoob, note 31 supra, p. 91
motivated by the national and strategic interest of the intervening states and therefore could not be justified. It empowered powerful states to violate the sovereignty of other states at their discretion, unregulated by any supranational authority or international law. Even if such a right existed by the end of the 19th century, such a right is inapplicable in the post-United Nations Charter era.

In its classical application humanitarian intervention involves military intervention by one state or group of states in the territory of another to avert or halt gross human rights abuses perpetrated by the target state on its own population. The concept is controversial because it usually involves the unilateral violation of the sovereignty of one state by others without the consent of the affected state, and without the authorisation of the United Nations. The controversial nature of the concept is demonstrated by disagreement on its definition by various scholars. The section discusses the views of various writers, for example, Grotius, Suarez, Gentili, Brochard, de Vattel, Wheaton, Westlake, Lauterpacht, Oppenheim, Lawrence and Fonteyne, etc., justifying the concept, with the objective of establishing that humanitarian intervention was recognised by these writers by the end of the 19th century, as a right of states, and was accepted widely, if not unanimously, as an integral part of customary international law, as observed by Fonteyne."138 The section however, aims to reveal that this right did not receive universal recognition, because scholars like Kant, Mimiani, Carnazzi-Amari, Prodier-Fodere, and Wolff did not endorse humanitarian intervention as a right of states.

1.6.1. Definition

Very few topics have generated as much controversy and disagreement with regard to its definition and practice as humanitarian intervention."139 The term has been viewed as an “oxymoron” because it associates “humanitarian” with the use of military force."140 At the centre of the controversy about humanitarian intervention is “that the very meaning of the term is itself controversial.”141 The controversy is partly due to the fact that the term ‘humanitarian intervention’ contains normative assumptions, in the sense that the term is used

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140 ICISS Supplementary Volume, note 99, p. 15.
to convey altruism and apolitical concern for the welfare of humanity. An intervening party that declares its actions as ‘humanitarian’ is explicitly attempting to legitimize these actions as non-partisan, and moral and hence inherently justified, rather than selfish and strategic, and hence inherently contentious. Due to the controversy and confusion about the term “humanitarian intervention” and the very strong opposition expressed by humanitarian organisations and humanitarian workers towards the militarisation of the word ‘humanitarian’ the ICISS made a “deliberate decision not to adopt this terminology, preferring to refer either to ‘intervention,’ or as appropriate ‘military intervention’, for human protection purposes.” The Commission also took note of the fact that the use in this context of an inherently approving word like ‘humanitarian’ tends to prejudge the very question in issue – that is whether the intervention is defensible. As cautioned by Kofi Annan:

...let’s get right away from using the term “humanitarian” to describe military operations...Of course, military intervention may be undertaken for humanitarian motives. I myself believe, and I think it is implicit in the Charter that there are times when the use of force may be legitimate and necessary because there is no other way to save masses of people from extreme violence and slaughter...Such military intervention should not however, in my view, be confused with humanitarian action. Otherwise, we will find ourselves using phrases like “humanitarian bombing”, and people will soon get cynical about the whole idea.

People are already cynical about humanitarian, because it is impossible to establish the motives of powerful states that intervene in others – whether such interventions are driven by altruistic motives or other ulterior motives. Humanitarian aid to people suffering gross human rights abuse should be distinguished from military intervention to halt gross human rights abuse. Military intervention is an act of war, accompanied by pain and suffering. Those who are horrified by the suffering and pain that war brings are uncompromising pacifists, and therefore reject the notion that war could ever be just.

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142 Ibid. p. 12.
143 Ibid.
145 Ibid. p. 9.
For the purpose of this thesis, the term ‘humanitarian intervention’ is applied in connection with the use of military force, with the stated objective of protecting the fundamental human rights of the population or averting human suffering in a target state by one state or a group of states without the consent of the target state. For this purpose, the thesis defines humanitarian intervention as the use of armed force by one state or group of states in the territory of another state, without the consent of the target state or United Nations Security Council approval, for the purpose of ending gross human rights abuses of the nationals of the target state, perpetrated by the government of the target state. Therefore intervention by a state or group of states in another state for the purpose of protecting the nationals of the intervening states residing in the target state, or the use of the military to assist in humanitarian relief operations or peacekeeping operations, or intervention in a state at its request, or intervention to prevent state failure, will not be subjects of this thesis.

There is no universally acceptable definition of the doctrine of humanitarian intervention, so it serves little purpose to define it, given the controversy surrounding it. Humanitarian is sometimes given a broad definition by some scholars to include humanitarian assistance, and different forms of military activity such as peacekeeping and actual use of force to protect suffering populations. The concept has international law, political science, moral and international relations dimensions – therefore “one may come across different definitions and categorisations.” The definition used tends to reflect the field of the person employing it. Adam Roberts describes the term as “a semantic way to justify interfering in the affairs of another country.” The goal of humanitarian intervention is “to protect the citizens of the target state from flagrant violation of their fundamental human rights usually by agents of the state.” Humanitarian intervention has been defined as an intervention in the territory of a sovereign state, for the protection, by a state or group of states of fundamental human rights, in particular the right to life, of nationals and residing in the territory of other states, involving the use or

148 Ibid.
150 Hehir, note 141, p. 11.
152 Ayoob, note 31, p. 81.
threat of force, such protection taking place neither upon the authorisation by the relevant organs of the UN nor upon the invitation of the legitimate government of the target state.\textsuperscript{153}

George Lucas defines humanitarian intervention as the use of armed force for the purpose of halting or impeding a humanitarian catastrophe, or providing relief to a suffering population.\textsuperscript{154} Sean D. Murphy has defined humanitarian intervention “as the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.”\textsuperscript{155} The term has also been defined as an armed intervention in another state, without the agreement of that state, to address “a humanitarian disaster, in particular caused by grave or large-scale violations of fundamental human rights.”\textsuperscript{156} Another writer has defined it as a “dictatorial or coercive interference in the sphere of jurisdiction of a sovereign state motivated or legitimated by humanitarian concerns.”\textsuperscript{157} It has also been defined as a “military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among its inhabitants.”\textsuperscript{158} One author has defined it as:

…an act of intervention in the internal affairs of another country with a view to ending the physical suffering caused by the disintegrations or gross misuse of authority of the state and helping create conditions in which a viable structure of civil authority can emerge.\textsuperscript{159}

The Danish Institute of International Affairs defines it as:

coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council,


\textsuperscript{155} S.D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order (1996), pp. 11-12


for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.\textsuperscript{160}

Verwey has defined it as:

…referring only to coercive action taken by states, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state.\textsuperscript{161}

Despite various definitions of the doctrine of humanitarian intervention, there are many commonalities. Firstly, what comes out of these definitions is that humanitarian intervention involves the use of armed force. Secondly, the force is used by one state or group of state in the territory of another sovereign state. Thirdly, the intervention is without the consent of the target state. Fourthly, the intervention is to avert, halt or prevent, odious human rights abuses of the nationals of the target state, by the government of that state. Fifthly, the intervention is without United Nations Security Council authorisation. All the definitions are based on the assumption that the objective humanitarian intervention is invariably to halt or avert human rights abuses or to bring to an end human suffering. This, however, has not always been the case, because sometimes a humanitarian intervention causes more harm than it was meant to avert. Secondly, the goal of an intervention may be for motives other than humanitarian. The case of Libya is an example of an intervention authorised by the United Nations Security Council which led to regime change and state failure.

One issue that comes out of the definitions, in particular, that given by Parekh, is that the purpose of humanitarian intervention is not only to alleviate human suffering, but also the restoration of civil authority in a state where this has disintegrated.\textsuperscript{162} Ayoob shares this view.

\textsuperscript{160}Humanitarian Intervention: Legal and Political Aspects, Danish Institute of International Affairs, Copenhagen, 1999, p. 11


\textsuperscript{162}Parekh, note 159, p 147.
with the observation that humanitarian interventions have occurred in states where existing institutions of state have collapsed that they are unable to provide security and order within the state.\textsuperscript{163} These states are referred to as failed states. Robert Rotberg has argued that “intervention is a major tool, both for humanitarian reasons and to prevent state failure.”\textsuperscript{164} A failed state has been defined as: “governments that cannot meet a crucial test for the effective assertion of national sovereignty: the ability to pacify their national territories and protect the basic security of the people living within their borders.”\textsuperscript{165} Definitely, where there is state failure, usually there would be anarchy, leading to human rights abuse, not necessarily by the state or its agents, but by other parties like warlords. However, state failure usually comes about due to intervention in that state by external powers. Iraq, Libya and probably, Somalia would fall into this category of state failure arising from interventions. Therefore, even though intervention in a state with the objective of preventing or halting gross human rights abuses may amount to humanitarian intervention as traditionally defined, the fact that the same intervening states would have brought about the failure of these states cannot be overlooked.

1.6.2. History and Evolution

Humanitarian intervention, as a principle, emerged from the “political philosophy and diplomatic practice of the early European states system.”\textsuperscript{166} European sovereigns, through diplomatic contacts became aware of non-Christian rulers who often treated Christian converts in their domains harshly.\textsuperscript{167} These sovereigns considered it legitimate to use intervention and military threats to protect persecuted Christian converts.\textsuperscript{168} According to Henry Wheaton, from the time of the Reformation, European powers frequently used force or diplomatic pressure against each other in defence of religious minorities.\textsuperscript{169} As articulated by Manouchehr Ganji, humanitarian intervention was historically intervention in defence of

\begin{thebibliography}{99}
\bibitem{163} Ayoob, note 31, p.98.
\bibitem{167} Ibid.
\bibitem{168} Ibid.
\end{thebibliography}
persecuted religious minorities. The legitimacy of such interventions was based on the principles of natural law, natural rights, and just war, with the main focus on concern for humanity. Natural rights were considered to be universal, and therefore, if a ruler perpetrated gross human rights abuses on his subjects, intervention was justified in the interest of humanity.

The origins of the doctrine of humanitarian intervention can be traced to the theory of Just War in the Middle Ages. The Just War theory originated from Christian theology. St Augustine is considered to be the first theologian to provide a theory on war and justice. He referred to the Bible and classified some wars as necessary and others as evil. However, another view is that St Augustine did not write about war and therefore, his views have been distorted. He referred to the Biblical prohibition on returning violence with violence by turning the other cheek, but conceded that where one sees that other human beings are victims of violence or are threatened with violence, one has a duty to defend them out of love, but one must love the perpetrator of the violence as well. It was St. Thomas Aquinas who provided the first systematic exposition of the theory in the 13th century in his treatises on just war, government, and tyranny. In his treatise Summa Theologica he provides an outline of the traditional Just War Theory. He discusses the justification for war and what is permissible in war from the Christian viewpoint. St. Aquinas was of the view that tyranny was an abhorrent crime and should be legitimately resisted including by military

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171 Knudsen, note 166, p. 4
172 Ibid.
175 Ibid.
176 Ibid.
179 Augustine, Epistles 138.14, note 178 supra.
182 Ibid.
force, if necessary. He believed that, in the name of religious solidarity, a sovereign was justified in intervening in the internal affairs of another to protect citizens from serious human rights abuses perpetrated by their state. Legal or moral justification for war could thus be based on the Just War Theory. Thus, a state that wanted to go to war had to provide a just cause, if the citizens were not to reject the call to arms. Aquinas had three yardsticks for a just war: war should be declared by a competent authority and; there must be a just cause and a proper intent. He considered proper intent to mean promoting good over evil. Aquinas supported the Crusades which involved the spread of Christianity in the face of Islam which he considered evil. His support for the Crusades has been described as more useful to current jihad than to a secular democracy.

Hehir argues that the reason behind the Just War tradition was to create a standard by which war could be evaluated, not to justify war. The theorists of the tradition considered war as a regrettable event which could be justified in extreme situations, but this did not mean an endorsement of war. Rather, the just war tradition “acknowledged that war always has evil consequences, principally the deaths of non-combatants, but that there are some wrongs that are worse than the wrong of war.” However, if a state may go to war in the face of wrongs that are worse than war, then this was a way to justify war - an endorsement of war under certain circumstances, which was exactly the objective of the Just War Theory. This contradicts Hehir’s position that the Just War Tradition was to create a standard by which war could be evaluated but not to justify war.

It is arguable that the foundations of the right of humanitarian intervention in the 19th century were laid by the Just War conception of war. What it meant was that a state which had the military capability had the right to intervene, upon its own judgement that natural law had been breached by another state. States went to war in solidarity with populations with whom they shared religious affinity. Similarly states could wage war to halt what they considered to be tyranny in another state. A state was therefore the judge of the legality of its own actions. There was no need for legal justification. All that was required was for a state to make the

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183 Trim, note 180 supra, p. 31.
184 Fonteyne, note 138 supra, p. 488.
186 Ibid.
187 Hehir, note 141 supra, p. 23.
188 Ibid.
decision to intervene in another state based upon its own assessment of the conditions in that state and the belief it had in its military might.

1.6.3. Just War Theory Criteria for war

The Just War Theory sets down two categories of criteria: namely, (a) justification for war (jus ad bellum) and (b) the conduct of war (jus in bello). These criteria are discussed as follows:

(a) Jus ad bellum – Justification for war

The principles for the justification of war are: (i) having a just cause for war; (ii) war being a last resort; (iii) declaration of war by the proper authority; (iv) having the right intention; (v) the likelihood of success, and; (v) the objective should be proportional to the means used. These are discussed as follows:

(i) Just cause: This is the primary requirement of jus ad bellum. The reason for going to war should be just. An act of aggression is inherently unjust, unless it is in retaliation for a grave injustice already committed, for example, resistance to aggression. Thus, the victim of aggression has a just cause to go to war to resist the aggression. Therefore, self-defence against an aggressor is a just cause for war. Self-defence includes providing assistance to victims of tyranny, or gross human rights abuses, which are grounds for humanitarian intervention in the contemporary order.

(ii) Last resort: War should be the last resort. Every effort to find a peaceful solution to a crisis must be made before a declaration of war, because of the potential devastation a war can cause. War may result in the mass killing of innocent non-combatants, and wreak havoc on the economy and infrastructure of states, and the consequences of the devastation caused by war may last for a very long time. Therefore, war should not be resorted to lightly. In the same way, all peaceful options should be explored before the

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191 Ibid.
192 Ibid.
use of force in the name of humanitarian intervention. This will avoid or
minimise abuse of the concept.

(iii) Proper authority: Only the proper authority should have the competence to
declare war. This raises the issue of sovereignty. In the contemporary
international legal order the sovereign power to declare war resides in the
state, personified in the government. If the government is not tyrannical
but accountable to the citizens, then it would be reasonable to take the state
to war. However, if the government rules arbitrarily, without
accountability to the citizens, then it would be unreasonable to commit the
state to war. A government that rules arbitrarily should not have the
sovereign power to declare war on behalf of the state. Therefore whether a
government has the legitimate authority to declare war would depend on
the relationship between the government and the citizens.

(iv) Right intention: A state that declares war should do so not in its national
interest but in the interest of justice or for the purpose of correcting a grave
injustice. A war is not just if national interests overshadow the pretext for
going to war. Concern for humanity should not be used as a mask for
pursuing the national or geopolitical interests of a country. Thus, for
example, humanitarian intervention should not be used as a pretext for an
act of aggression to effect regime change in another country. That amounts
to abuse of the concept.

(v) Likelihood of success: There should be reasonable prospects of attaining the
objectives war. This is another important condition for just war. This
principle may affect one state’s decision to intervene or not to intervene in
another, on humanitarian grounds, because the state that seeks to intervene
in another has to weigh the pros and cons and the costs involved. This can
affect the decision whether to intervene on behalf an oppressed people or
to resist aggression. If the cost of intervention would be too high in terms
of finances and lives for the prospective intervening state, then there would
be no motivation to intervene unless intervention serves its national
interests.
(vi) The desired end should be proportional to the means used: This principle overlaps the principle of proportionality in the conduct of war, *jus bello*. War should have an objective, and the means of attaining it should be proportionate to the wrong the war seeks to address. Thus, for example, if one state occupies a piece of another state’s territory through aggression, the amount of force used to repulse the aggression should be proportionate to the aggression. The aggrieved state should, for example, not repel the aggression and then proceed to occupy the aggressor state’s territory, but rather, should apply the force only necessary to recover its territory.

(i) *Jus in bello – Rules for the conduct of war*

The principles for just conduct of war involve discrimination and proportionality.

(i) Discrimination: This deals with who may be legitimate targets in war. It is unjust in war to use force indiscriminately and kill civilians. Interventions which rely solely on aerial bombardment kill indiscriminately, since those who drop the bombs have no idea or do not care where they fall. The Just War Theory prohibits killing of non-combatants in war. Combatants are, however, legitimate targets of force, because by becoming a soldier, the person is deemed to have accepted to be a legitimate target in war.

(ii) Proportionality: This requires that the amount of force used in war should be tempered in order to minimise casualties and destruction. In other words, it is unjust to use a hammer to kill an ant. The principle deals with the amount of force that is morally permissible. The principle is utilitarian because its purpose is to reduce unnecessary suffering. Only the minimum force is necessary to achieve a goal. The use of force through aerial bombardment in humanitarian intervention amounts to disproportionate and indiscriminate use of force, because it kills non-combatants and is an example of the abuse of the concept of humanitarian intervention.
The Just War criteria have largely been incorporated into the responsibility to protect principles for military intervention laid down in the ICISS Report.\textsuperscript{193} They serve as a guide to contemporary humanitarian interventions. The purpose of these requirements is to ensure that the motives for interventions are principally for the stated humanitarian purpose in order to avoid abuse; that force is resorted to as a last option; that force used is limited to that absolutely necessary for the accomplishment of the objectives of the intervention; and that the intervention does not cause more harm than it was meant to avert or halt. The overall purpose is to prevent powerful states from attacking other states in pursuit of their national and strategic interests, with the pretext of protecting human rights or propagating democracy, while in fact the purpose may be to punish a state which pursues an independent policy and refuses to bow to the dictates of powerful states. Scholars including Verwey,\textsuperscript{194} and Ramsbotham\& Woodhouse,\textsuperscript{195} have also set out certain criteria for humanitarian intervention, which replicate the criteria of the Just War tradition, particularly in respect of: right intention, last resort, and the proportionality of force. The Just War tradition justified war in certain circumstances, and provided guidelines for the declaration and conduct of war. These guidelines are relevant to humanitarian interventions in contemporary times, because the potential for abuse and disproportionate use of force is greater. The criteria set down by Just War tradition demonstrate that the potential for abuse and disproportionate use of force in interventions or war was within the contemplation of the theorists. Those guidelines were necessary when the Just War Theory was espoused, and more important in contemporary times as a result of the multiplicity of states with varying national interests, the penchant of powerful states to intervene in the domestic affairs of others states, the tremendous disparity in the military might of states, and the devastation that modern armaments can cause.

1.6.4. Internationalisation of Aquinas’ Just War Theory

Aquinas’s views regarding the right to resist tyranny became part of princely practice only during the 16\textsuperscript{th} century.\textsuperscript{196} The interest in tyrants, according to Trim, was due to the Protestant Reformation in the 1520s.\textsuperscript{197} Prior to the Reformation, princes were reluctant to come to the

\begin{itemize}
\item \textsuperscript{193}ICISS Report, p. XII.
\item \textsuperscript{194}W.D. Verwey, Humanitarian Intervention, in The Current Legal Regulation of the Use of Force, 57 (Antonio Cassese ed., 1986), pp. 74-75.
\item \textsuperscript{196}Trim, note 180 supra, p. 31.
\item \textsuperscript{197}Ibid.
\end{itemize}
aid of heretics. The Reformation split ‘the unity of Christendom,’ and princes became favourably disposed to coming to the defence of religious dissidents in other lands, considering those who persecuted them as tyrannical. This period also saw the creation of the notion of a law for sovereign states. In the course of debates on the issues of sovereignty and interstate relations, the writings of Aquinas were drawn upon to justify the obligation of princes to protect “not only their own, but also other princes subjects.” His thoughts were expanded and universalised by writers such as Francisco de Vitoria (1486-1546), Francisco Suarez (1548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1704), Christian Wolff (1679-1754), and Emmerich de Vattel (1714-1767). These writers secularised St Aquinas’ doctrine “in the doctrine of lawful assistance to a people struggling against tyranny.” The writers justified intervention on the basis of the doctrines of natural law, natural rights and just war out of concern for humanity. These natural rights were regarded as universal, conferred on all, simply for being human and obvious to all through the exercise of moral reasoning, and therefore, if a ruler subjected his subjects to atrocious treatment, foreign intervention or punishment was justified in the name of humanity. 

Grotius initiated the idea of enforcement of international law through punitive military action. He writes:

The fact must also be recognized that kings, and those who possess rights equal to those of kings, have a right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature.

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198 Ibid.
200 Ibid.
201 Ibid.
202 Just War Theory, note 174.
204 Knudsen, note 166, p. 4.
206 Knudsen, note 166, p. 4.
or of nations in regard to any persons whatsoever…Truly it is more honourable to avenge the wrongs of others rather than one’s own…208

He asserted that the international community had a right to punish violations of natural and positive law of nations, regardless of where they were committed or who the victims were.209

This universal licence to punish, according to Grotius, was necessary to uphold natural justice, in the absence of a supranational authority responsible for administering retribution and deterrence.210 Thus, any member of the international community could administer punishment on the violator of natural law for the simple reason that there has been a violation.211 His theory justified war on states as punishment for violation of the law of nature.212

Thus, any member of the international community that is not guilty of violating the law of nature may take punitive action against a violating state. Grotius endorses international punishment or revenge on violators of the law of nature, and therefore, humanitarian intervention could not be its purpose, because the objective of humanitarian intervention is to avert or halt human suffering, and not to exact revenge or retribution. Other writers share this view that the international punishment envisaged by Grotius does not accord with the central purpose of humanitarian intervention as traditionally understood,213 because Grotius focuses on the “punishment of the wrong-doer, rather than with the rescue of the victims, which is the chief focus of humanitarian intervention in the modern sense.”214 However, Meron argues strongly that Grotius’ statement on the right to punish the perpetrators of grave abuses of human rights in another state reflects the current international law principle of ‘universal jurisdiction’ over crimes such as genocide, war crimes and crimes against humanity.215

It is questionable whether Grotius had in mind the principle of universal jurisdiction when he espoused the principle of international punishment. Universal jurisdiction for genocide, war

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209 Ibid.

210 Ibid. p. 478.

211 Ibid. p. 482.

212 Ibid. p. 482.


crimes, and crimes against humanity usually envisages punishment of individuals for committing these crimes after judicial proceedings. Grotius was not calling for the punishment of individuals after a criminal trial, but rather, war on states as punishment for violations of the law of nature. This could involve the indiscriminate use of force and the killing of non-combatants conduct prohibited by the Just War tradition. It could also amount to collective punishment, which current international law would not accept. Besides, in his time, there was no supranational authority to set guidelines as to whether there had been a breach of the law of nature. It was left to the state implementing international punishment to decide whether there had been a breach, when and how to intervene, and the level of punishment considered to be appropriate. This was a recipe for the potential abuse of the concept by powerful states as a pretext for war for ulterior motives, and the use of indiscriminate force towards those ends.

Though he approved of the principle of international punishment for the breach of natural law, he also endorsed humanitarian intervention for the protection of people under oppressive rule. Grotius modelled his concept of humanitarian intervention on the relationship between parent-child. 216 He observes that a sovereign, like a parent, has the responsibility “for the support of his dependents or subjects.”217 Thus, if a sovereign treated his subjects inhumanely, he loses “the rights of independent sovereigns, and can no longer claim the privilege of freedom from foreign intervention under the law of nations.”218 Systematic mistreatment of subjects by the sovereign breaks the relationship between subjects and sovereign, which entitles other states to use force to exercise the suffering people’s natural right of collective self-defence219 to provide “assistance or protection.”220 Writing in 1625, Grotius states: “But…if a tyrant …practices atrocities towards his subjects, which no just man can approve…it would not follow that others may not take up arms for them.”221 This statement of Grotius according to Professor HerschLauterpacht contained “the first

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216 Cridde, 207, p. 482.
218 ibid. pt. VII.
219 Cridde, note 207, p. 483.
220 Grotius, note 214, pt. VII.
authoritative statement of the principle of humanitarian intervention - the principle that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.”

Grotius acknowledged the concept of state sovereignty. Regardless of this, he was of the view that the human rights of vulnerable people should take precedence over sovereignty and the international community had the right to take up arms to defend them from inhumane treatment wherever this took place. This had, as its purpose, humanitarian intervention, a direct opposite of his concept of international punishment for the purpose of exacting revenge. Grotius thereby endorsed action against any state, not for the purpose of retribution, but for the protection of victims of human rights violations. Thus, any member of the international community could take up arms in the interest of oppressed people irrespective of where the oppression occurred or who the victims are, not necessarily as an instrument of punishment. Grotius therefore endorsed intervention on behalf of persecuted citizens of another state.

The first authoritative statement of the principle of humanitarian intervention is attributed to Grotius. However, the principles of the concept predate him, as these ideas appeared earlier in the writings of Suarez and Gentili. Dunning gives an example in the 1579 *Vindiciae contra tyrannos*, which stated that “it is the right and duty of princes to interfere in behalf of neighbouring peoples who are oppressed on account of adherence to the true religion, or by any obvious tyranny.” The *Vindiciae contra tyrannos* states that ‘tyranny is not simply a crime; but the chief and as it were, a summation of all crimes’; therefore, ‘a prince which standethidlely by, to beholdeth the wickedness of a tyrant, and the slaughter of the innocent…is worse than the tyrant him selfe.’ Furthermore, in his writings, Grotius referred to Aristotle, Seneca, and Roman emperors who used force against Persians to protect Christians from persecution. For example, in clear acknowledgement that Seneca was his

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222 H Lauterpacht, “The Grotian Tradition in International Law”, 23 British Yearbook of International Law, 1, 46 (1946).
223 Ibid.
224 Ibid.
225 W Dunning, A History of Political Theories from Luther to Montesquieu, 55 (1905).
226 VCT (Garnett: 1994), 155; VCT (1689), 134.
227 Ibid.
228 Knudsen, note 166 supra, p. 5.
predecessor, Grotius writes on the danger of potential abuse of humanitarian intervention,229 by quoting Seneca thus:

Hence, Seneca thinks that I may make war upon one who is not one of my people but oppresses his own,...a procedure which is often connected with the protection of innocent persons. We know, it is true, from both ancient and modern history, that the desire for what is another’s seeks such pretexts as this for its own ends; but a right does not at once cease to exist in case it is to some extent abused by evil men. Pirates, also, sail the sea; arms are carried also by brigands.230

In quoting Seneca, he acknowledges that the potential for abuse of humanitarian intervention may be used as a pretext by states to further their own interest, but asserts that the need to protect human rights outweighs the potential for abuse of the concept. Late Middle Ages writers like the Spanish Francisco Suarez and the Italian Alberico Gentili also implicitly endorsed humanitarian intervention before Grotius. Suarez stated that:

[…] this ground for war should rarely or never be approved, except in circumstances in which slaughter of innocent people and similar wrongs take place.231

He impliedly endorsed humanitarian intervention by this statement, but restricted it to situations of mass killings and other grievous crimes. He was of the view that its application should be restricted because unrestrained intervention could lead to abuse and undermine territorial jurisdiction of states.232 Thus, he adds:

[…] the assertion made by some writers that sovereign kings have the power of avenging injuries done in any part of the world, is entirely false, and throws into confusion all the orderly distinctions of jurisdiction.233

Suarez expresses his recognition for sovereignty. Combined with his previous statement, he appears to seek a balance between sovereignty and the protection of the innocent. Gentili also believed that there was a justification for war to defend the common interests of humanity. In

229Meron, note 215 supra, p. 111.
230Grotius, note 214 supra, bk. II, ch. XXV, pt. VIII (4). (Quoted in Meron note 299 supra, p. 112.)
232Ibid.
233Ibid. p. 817
his 1588 treatise, *De Jure Belli Libri Tres*, Chapter XXV of book I (“Of an Honourable Reason for Waging War”), discussing the common interests of mankind as reasons for waging war, he states:

> There remains now one question concerning an honourable cause for waging war…which is undertaken for no private reason of our own, but for the common interest and in behalf of others. Look you, if men clearly sin against the laws of nature and of mankind, I believe that any one whatsoever may check such men by force of arms.”

Gentili was of the view that it is honourable to wage war against infringement of the laws of nature and of mankind. These laws deal with human rights, and therefore, a ruler infringes them when he mistreats his subjects. In such a situation, the international community may, in the interest of mankind, come to the aid of the suffering subjects by military force, in order to stop the suffering. He reiterates: “if subjects are treated cruelly and unjustly, the principle of defending them is approved,” and if a sovereign “remote from my nation harasses his own…the duty which I owe to the human race is prior and superior to that which I owe that sovereign.” These statements endorse the principle of humanitarian intervention on behalf of foreigners. Thus, even though Grotius is credited with the concept of humanitarian intervention, there were other scholars like Seneca, Suarez, and Gentili who preceded him in endorsing it.

Brochard observes that: “Where a state under exceptional circumstances disregards certain rights of its own citizens over whom he has absolute sovereignty, other states of the family of nations are authorised by international law to intervene on grounds of humanity.” Brochard implies that even though the state has absolute internal sovereignty, if grave human rights abuses are inflicted on the people, sovereignty has to give way to intervention by foreign forces in defence of the people. Brochard goes as far as recommending that the government of the target should be supplanted by the sovereignty of the intervening forces. Stowell had

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235 Ibid, at 75.
236 Ibid
238 Ibid.
similar views. He observed that when universally recognised principles of human rights are abused in a severe manner by a state, force may be used in defence of people suffering that abuse.  

Emmerich de Vattel and other writers also considered it lawful for foreign powers to intervene to assist a people resisting tyranny. He observes:

If the prince, attacking the fundamental laws, gives his people a legitimate reason to resist tyranny, if tyranny becomes unbearable as to cause the nation to rise, any foreign power is entitled to help an oppressed people that has requested assistance.

De Vattel considered that it was lawful for one state to intervene in another to support a revolt by people under the yoke of tyranny. Another writer in the late 18th century sharing this view was Johann Jakob Moser. He considered intervention to protect individuals from religious persecution as an exception to the general rule of non-intervention, though he stressed that the motive should be humanitarian, not religious. In the 19th century, humanitarian intervention became the subject of the writings of many scholars because it had become accepted as a right in state practice. Henry Wheaton, the American scholar, who leaned in favour of non-intervention, justified a right of intervention on humanitarian grounds as an exception to the rule. He declares: “Non-interference is the general rule, to which cases of justifiable interference form exceptions limited by the necessity of each particular case.”

Inspired by intervention in Greece between 1827-1830, the primary purpose of which the European powers claimed was humanitarian, he endorsed the concept by his statement that:

The interference of the Christian powers of Europe, in favour of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such

241 J.J. Moser, NeustenEuropaischenVolkerveruchs in Friedens-und Kriegs-zeiten, 177-80, [cited by Knudsen, note 169 p. 7].
242 Ibid. cited by Knudsen, note 166 supra, p. 7.
243 Knudsen, note 166 supra, p. 7.
245 Ibid.
interference … where the general interests of humanity are infringed by the excesses of a barbarous and despotic government.246

Wheaton based his support for humanitarian intervention on the intervention in Greece.247 Thus, where a government mistreats its subjects in a barbarous manner, in the name of humanity, intervention in the state is an exception to the general rule of non-intervention. This view is shared by some early 20th century writers. Rougier, a leading French scholar, observed in his endorsement of humanitarian intervention, that such an intervention to be justified must be undertaken in solidarity of mankind.248 John Westlake, the English international lawyer, endorsed humanitarian intervention on grounds of ‘anarchy and misrule.’ He observed that it would be “idle to argue… that the duty of neighbouring states is to look on quietly in the face of misrule.”249 Lawrence joins the list of scholars in the 19th century who endorsed intervention on humanitarian grounds. He argues that:

should the cruelty be so long continued and so revolting that the best instincts of human nature are outraged by it, and should an opportunity arise for bringing it to an end and removing its cause without adding fuel to the fire of the conflict, there is nothing in the law of nations which will brand as a wrongdoer that state that steps forward and undertakes the necessary intervention… There is a great difference between declaring a national act to be legal, and therefore part of the order under which states have consented to live, and allowing it to be morally blameless as an exception to ordinary rules.250

Lawrence thus shares the views of Wheaton, Rougier, and Westlake, among other scholars, that humanitarian intervention is a defensible exception to the rule of non-intervention. It has been observed by Fonteyne that by the end of the 19th century, the right of humanitarian intervention had gained wide acceptance as a right of a state.251 He argues that while there were divergences regarding the circumstances and the manner in which humanitarian intervention should be conducted, “the principle itself was widely, if not unanimously,

247Ibid. p. 103
251Fonteyne, note 138 supra, p. 125.
accepted as an integral part of customary international law.”\textsuperscript{252} In the view of Abiew, the writings of authorities suggested that it was legitimate to use force against states that abused the rights of its nationals.\textsuperscript{253} Brownlie observes that “by the end of the 19\textsuperscript{th} century, majority of publicists admitted that a right of humanitarian intervention existed.”\textsuperscript{254} Fonteyne quotes the International Law Association as stating that the doctrine had become “so clearly established under customary international law that only its limits and not its existence is subject to debate.”\textsuperscript{255} Thus in the 18\textsuperscript{th} and 19\textsuperscript{th} century, many international law scholars recognised the existence of minimum standards of humanity which could justify interventions.\textsuperscript{256} During the early 20\textsuperscript{th} century, a right of humanitarian intervention was defended by scholars such as Oppenheim and Lauterpacht. Oppenheim observed that “should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest world would call on the Powers to exercise intervention.”\textsuperscript{257} Lauterpacht argued that “the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins.”\textsuperscript{258} One writer has argued that:

From the most cursory review of international history of the past two centuries, it is apparent that intervention in foreign States is quite normal. Indeed if international history is thought of as the analysis of the influences of nations upon each other, it is arguable that the very terrain of history is mapped out on the grid of intervention…although this presupposes a wide conception of what intervention might be.\textsuperscript{259} The right of humanitarian intervention espoused by these writers has not received universal acceptance. Kant was a defender of non-intervention.\textsuperscript{260} The Italian writers Mimiani and Carnazzi-Amari were advocates of rigid non-intervention.\textsuperscript{261} The French scholar Pradier-Fodere also considered humanitarian intervention to be unlawful, because it “constitutes an

\textsuperscript{252} Ibid.
\textsuperscript{253} Abiew, note 33 supra, p. 36.
\textsuperscript{256} Knudsen, note 166 supra, p. 7.
\textsuperscript{258} Lauterpacht, note 222, p. 357.
\textsuperscript{259} Lowe, note 136, p. 67.
\textsuperscript{261} 1 Carnazzi-Amari, \textit{Traite De Droit International En Temps De Paix} 557 (Montanari-Revest transl. 1880,}
infringement upon the independence of states.”262 Wolff was another scholar who shared the inflexible notion of non-intervention. In his view, if a state treats its subjects harshly, no other state may intervene, because no state “has a right to interfere in the government of another…”263 In the light of the opposing views of these writers, it is clear that there was no universal acceptance of a right of humanitarian intervention by the end of the nineteenth century.

From the foregoing, it is clear that humanitarian intervention was recognised as a “right” of states by most, but not all writers, on the topic by the end of the 19th century. It is questionable whether the recognition by a majority of writers could justify a right of humanitarian intervention to the extent of making it a principle of customary international law. Even if it was accepted as such, it is difficult to defend the principle, because, for example, there was no agreement on the definition of the concept itself. From the various definitions, it is obvious that different writers had different conceptions of the doctrine of humanitarian intervention itself. While some writers appear to conceive it as an action to halt persecution of religious minorities, others considered it as intervention to end tyranny, or to halt mass slaughter of populations, or to prevent failed states, or to free a weak occupied state from occupation by a powerful state, etc. The question then arises as to what right of intervention these writes espoused.

The right of humanitarian intervention endorsed by majority of these writers were unilateral interventions, and therefore cannot be justified. The right empowered more powerful states to determine when a crisis existed, and to determine the appropriate response, which, invariably, was not based on international law. The interventions were motivated by national and strategic interests. The fact that most writers recognised that a right of humanitarian intervention existed does not provide legal justification for that right. The only basis was the advancement of the interests of the intervening states through unilateral action, clothed in the robes of humanitarianism. These states could only justify their interventions upon the successful outcome, regardless of the lack of any justification in law for their actions. W.V Harcourt writing in the mid-19th century concurs, that, intervention is “a high and summary procedure which sometimes snatch a remedy beyond the reach of law…In the case of


intervention as that of a revolution, its essence is illegality, and its justification is its success."

1.7. State Practice of Sovereignty and Humanitarian Intervention in the Nineteenth and early Twentieth Century

1.7.1. Introduction

This section discusses the practice the concept of humanitarian intervention. State practice during this period was influenced by the widely accepted international law rule of a right of intervention, which was based on the Just War Theory. States were judges of the conditions under which war could be waged without regard to international law. In an era when states were free to use force without limits to advance their national interests, legal justification for interventions was unnecessary. The absolute concept of sovereignty espoused by the earlier philosophers extended into the 19th and early 20th century, and states exercised sovereignty in their own interests. They did not consider themselves to be bound by international law, but by laws they had voluntarily agreed to, and therefore there could be no limitations on a state’s sovereignty without the expressed consent of the state. An objective of the section is to establish that most of the interventions during the period would not fall within the meaning of humanitarian intervention as understood in the contemporary era, because they were motivated by religious solidarity, or solely by national interests. To this end interventions in Greece (1827-1830, Syria (1860-1861), Bosnia, Herzegovina, Bulgaria (1876-1878), and Macedonia (1903-1903, 1912-1913) are discussed.

The purpose of this section is to establish that in the 19th and early 20th century, interventions were carried out by only a few states. The interventions were based on political interests, morality, and religious solidarity, and had no basis in international law. These countries acted unilaterally, without any accountability to a supranational authority as to the legality of the interventions and the manner in which they were carried out. Since legality was of no relevance, the potential for the abuse of humanitarian intervention as pretext for war was ever present. Secondly, with the advent of the United Nations Charter era, unilateral interventions have been prohibited and therefore, a state that intervenes in another has a duty to provide legal justification,

W.V. Harcourt, Letters of Historicus on Some Questions of International Law, London, (1843)
1.7.2. Justification of State Practice

Prior to the 19th century, the law of nations was governed by natural law. Natural law gave sovereigns unlimited rights to be the judges of the justness of their actions, thus giving them a free hand to wage war. The period between 1814 and 1914 witnessed the concept of positive law as opposed to the just war tradition. Positive law held that law consisted of treaties and state practice. In this context, states in principle had the freedom to use force in furtherance of their interests, and international law regarded actions relating “to the use of force and what constituted the national interest to be completely outside the scope of law.” Thus, humanitarian intervention was neither legal nor illegal under international law in the 19th century. States interpreted absolute notion of sovereignty as the right to wage war, and there were no legal rules to bind states to keep the peace. Theorists on sovereignty like Bodin and Hobbes conceived the concept to be absolute, undivided power without limitations. This understanding of sovereignty extended into the 19th and early 20th-century. During this period, states were only bound by laws they had voluntarily agreed to, either by treaty or deriving from custom. States considered sovereignty to be a right to be exercised in their own interests. What existed then was unrestrained sovereignty. The Permanent Court of International Justice endorsed this in the Lotus Case when it stated that:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law…

This statement conveys the idea that there could be no limitations on a state’s sovereignty without the expressed consent of the state. In an era during which states were free to use force to advance national interests with virtually no limit on the use of force, legal justification for

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265 Bellamy, note 205 supra, p. 132.
266 Ibid.
267 Ibid.
268 Ibid.
269 Gill, note 139 supra, p. 63
270 Ibid. p. 65.
271 Perrez, note 11 supra, p. 45.
272 Fassbender, note 5 supra, p. 117.
273 Ibid. p. 119.
274 Ibid. p 11.
275 Lotus Case 1927 PCIJ Reports, Series A, No. 10.
276 Ibid. p. 18.
interventions was not necessary, and therefore, states based interventions on political and ethical grounds to legitimize their actions.277

State practice of the Major Powers, France, Great Britain, and Russia during this period, was influenced by 19th century liberalism, which advocated other methods of settling disputes other than war, while endorsing the use of force to eliminate inhumane practices such as the slave trade and the persecution of Christians in the Ottoman Empire.278 As a consequence of this influence, great powers justified their interventions on humanitarian grounds.279 State practice of humanitarian intervention during the 19th century shows that the influence of liberal opinion made it possible for states willing to intervene in other countries to do so with significant public support and political acceptance.280 Thus even though the legality of an intervention was of little or no significance, an intervention was generally accepted if the intervention was undertaken, not solely to advance or secure national interests, but for a just or popular cause, like defence of persecuted populations.

1.7.3. Interventions in Greece, (1827-1830), Syria (1860-1861), Bosnia, Herzegovina and Bulgaria (1876-1878) and Macedonia (1903-1908, 1912-1913)

The justification of interventions on humanitarian grounds as state practice is a creation of the latter part of the 19th century.281 There were earlier examples of interventions like the Crusades and the 16th and 17th century religious wars which could be considered humanitarian interventions, but they were based on religious solidarity, and therefore cannot be considered as truly humanitarian.282 Other interventions, like the United States intervention in Cuba during the latter part of the 19th century and the protests of the European Major Powers, Great Britain, and France against Morocco’s treatment of political prisoners at the beginning of the 20th century did not have a “clear humanitarian motive or the highly coercive character of an armed intervention.”283 Examples of state practice of humanitarian intervention in the 19th century and early 20th century were those that occurred in Greece (1827-1830), Syria (1860-

277Ibid. p. 66.
278Ibid.
279Gill, note 139 supra, p. 64.
280Ibid. p. 65.
281Fonteyne, note 138 supra, p. 206.
282Ibid.
283Ibid.
1861), Bosnia, Herzegovina, and Bulgaria (1876-1878) and Macedonia (1903-1908, 1912-1913).  

The intervention of France, Great Britain, and Russia in Greece (1827-1830) was among the first historical examples of the use of humanitarian concern as justification for intervention. The Major Powers stated that the intervention was motivated no less by sentiments of humanity, than by interest for tranquillity of Europe.” The intervention arose from the massacres of Christians in Greece within the Ottoman Empire, which culminated in the signing of the Treaty of London by France, Great Britain and Russia. These powers agreed to unilaterally intervene to halt the bloodshed in Greece. They requested for limited autonomy for Greece within the Ottoman Empire and when this was rejected, they intervened militarily on 14 September 1829, leading to the independence of Greece in 1830. This intervention was based on religious solidarity and political expediency. It was to protect a Christian minority, and to bring peace to Europe, and therefore, the motives were not necessarily humanitarian, but based on religious solidarity.

The second intervention which has been classified as humanitarian intervention was the intervention by France in Syria following the Protocol of the Conference of Paris, signed by France, Great Britain, Prussia, Russia, and Turkey, on 3 August 1860. The protocol was the result of the massacre of Christians in Syria by Moslems with the blessing of Turkey. The protocol authorised France to intervene in Syria. It has been argued that since Turkey signed the protocol, it had given its consent to interference in its territory, and therefore the action by France was not an intervention. As Thomas & Thomas have argued; “When consent is given by a state to foreign action of interventionary character, in reality there is no intervention.” However, as observed by Stowell, Turkey consented to the intervention “only through constraint and a desire to avoid worse.” Rougier however is of the view that this was a humanitarian intervention with the observation that: “The Syrian intervention was thus a

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284 Ibid. pp. 207-212.
285 Ibid. p. 208.
287 Fonteyne, note 138 supra, p. 207.
288 Ibid.
289 Ibid. p. 208.
291 Stowell, note 238 supra, p. 66.
humanitarian intervention…” However, like the intervention of Britain, France and Russia in Turkey, the objective was to protect a Christian minority, and therefore to classify it as humanitarian intervention was to present a narrow conception of the doctrine.

Another intervention classified as humanitarian was the declaration of war by Serbia and Montenegro against Turkey on 30 June 1876 in support of persecuted Christians in Bosnia, Herzegovina, and Bulgaria. The declarations of war by Serbia and Montenegro were officially justified as humanitarian intervention, since they were in solidarity with suffering people in neighbouring countries. Yet another example of intervention classified as humanitarian was the declaration of war on Turkey by Bulgaria, Serbia, and Greece in 1913, in response to the government of Turkey’s brutal “Turkification” of Christians in Montenegro. The stated reason for the declarations of war was that the three countries were “unable to tolerate any longer the sufferings of their brethren in Turkey.” The war ended with the signing of the 1913 Treaty of London under which Turkey surrendered part of Macedonia to be divided among the three Balkan Allies. The justification for their intervention was their humanitarian concern for the suffering of the Macedonian people. Like the previous interventions, this intervention was to protect a Christian minority, and not necessarily out of concern for the Macedonian people as a whole.

The interventions discussed above demonstrate that in the 19th and early 20th century, there were only a few states which regularly intervened in other states. These interventions were based on political interests, morality, and religious solidarity, and had no basis in international law. Most of these interventions would not meet the meaning of humanitarian intervention in the post-UN Charter era. The powers which intervened in others acted unilaterally and were neither accountable to a supranational authority, not bound by international law as to the legality of the interventions and the manner in which they were conducted. There were no standards as to what was permissible and what was not. Therefore, the potential for the use of humanitarian intervention as a basis for advancing the political objectives could not be discounted.

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293 Fonteyne, note 138 supra, p. 211
294 ibid.
295 ibid.
297 ibid.
The right of humanitarian intervention which existed in the 19th and early 20th century, which was based on the Just War theory cannot be used as establishing a right of intervention in the post-1945 international order, in the light of the provisions of Article 2(4) on the UN Charter, which prohibits the use of force in inter-state relations. Under the current legal order, the only exceptions to the use of force under the UN Charter are: security measures to maintain and restore international peace and security (Article 42) and action taken by Member states in individual and collective self-defence under Article 51. The wording of Article 2(4) is unequivocal and imperative, and covers the use of force in all forms in inter-state relations. The drafters of the UN Charter wanted to ensure that states will not resort to self-help in resolving interstate disputes, hence the provisions on the prohibition of the use of force contained in Article 2(4) that leaves no room for humanitarian intervention, and the principle of non-intervention in Article 2(7) respectively. To this end there was no provision for states to take either individual or collective action in the interest of human rights and therefore, there is no international law principle that makes humanitarian intervention lawful. Broadly interpreted, Article 2(4) means that, force is to be used only, in the global interest, and; therefore, force may not be used in contravention of the purposes of the United Nations, which include the development of friendly relations among nations. Accordingly, a right of humanitarian intervention, which some scholars assert existed at the end of the 19th century, is of no relevance or application, in the post-1945 international order.

1.8. Conclusion

The doctrine of state sovereignty is a fundamental principle of international law. Sovereignty connotes the notion of independence and equality of states. The current international order is based on the sovereign equality of states. The doctrine confers on a state the right to manage its internal affairs free from the interference of other states and externally, it confers legal personality on a state and imposes a duty on other states to refrain from interfering in the domestic affairs the state. Thus, a state has the freedom to choose the type of political, economic, social, and cultural system it wants as well as its foreign policy. The earliest theorists of the doctrine, like Aristotle, Bodin, and Hobbes postulated sovereignty to be the concentration of supreme power in a state in the hands of one person or a few people. They theorised that sovereign authority must be absolute. The political and historical context in which these philosophers lived influenced their conception of the concept. For example, Bodin and Hobbes wrote at a time of religious wars in Europe that threatened the stability of
their countries and their primary concern was survival of the state. Hence, they considered the concentration of supreme power in the hands of one person or group of people as the best way to save the state from disintegration. However, even the absolute sovereignty defenders acknowledged that sovereignty had limitations and was subject to higher norms. What Bodin Hobbes and other philosophers bequeathed to the contemporary legal order is the principle that there is a repository of power in each state, and every state possesses exclusive sovereignty and jurisdiction within its territory. The Treaties of Westphalia 1648 established the concept of sovereign statehood. The cardinal principle at the centre of sovereign statehood is that all states are equal, and interference in the affairs of one state by another is prohibited, principles which were codified by the Montevideo Convention on the Rights and Duties of States 1933, and adopted by the United Nations Charter. The United Nations Charter went further by prohibiting the use of force in inter-state relations except in prescribed situations. The importance of the concept of state sovereignty is that it serves as a bulwark of protection for weak states against interference by powerful states.

The concept of humanitarian intervention had its foundations on the Just War Theory. The theory recognised that when a sovereign abuses or deprives his citizens of the rights to which they were entitled under natural law, other states had the right to intervene in the interest of the citizens. On this basis, intervening sovereigns were the sole judges of the justness of their actions, and therefore sovereigns had the freedom to wage war. In this context, there was no limit on the use of force, and there was no requirement for legal justification for interventions. Interventions were motivated by political, religious, and moral considerations with no regard to legality. Yet the intervening states justified their interventions on humanitarian grounds and by the end of the 19th century, there was a general recognition by most legal scholars on the subject, that humanitarian intervention was a right of states.

However, the fact that most publicists recognised humanitarian intervention as an exception to the principle of non-intervention did not mean that a right of humanitarian intervention had become a principle of customary international law, because this view was not shared by all the eminent scholars on the subject. Besides, state practice alone cannot make the right of humanitarian intervention a principle of customary international law. The interventions by a few powerful states in other states, for whatever reason, cannot support the assertion that a right of humanitarian intervention had been established. Even if a right of humanitarian intervention existed in the 19th century, it cannot serve as a precedent for intervention in the
current international legal order, because that right belonged to a bygone era. The UN Charter has brought about a new international legal order. The Charter prohibits the use of force in inter-state relations. Under the current international legal order, the only exceptions to the use of force: are security measures to maintain or restore international peace and security with the authority of the United Nations Security Council and actions taken by Member States pursuant to individual and collective self-defence. A right of humanitarian intervention does not exist in the contemporary legal order. A state which intervenes in another state ought to have legal justification for the intervention, either by the sanction of the Security Council, or at the invitation of the country which is the target of the intervention.

The new international order brought by the United Nations Charter has placed the concept of state sovereignty, the principles of equality of states and non-intervention at the core of interstate-relations. This new order also takes into account the importance of human rights, and therefore ensures that in the face of gross human rights abuses, sovereignty cannot be allowed to stand in the way of humanitarian intervention to halt or alleviate human suffering. Otherwise, sovereignty may become irrelevant, obsolete, and a hindrance to the protection of suffering populations. There will always be the problem of how to address issues of abuse of the concept of humanitarian intervention and the limits to be placed on the force to be applied during its implementation. This problem existed in the 18th and early 19th century, and continues under the contemporary international legal order, as the debate on humanitarian intervention demonstrates. As a consequence of the fact some states are more powerful than others, there will always be the tendency for the more powerful states to interfere in the affairs of weaker states, by using humanitarian intervention as a pretext. Such interventions arouse suspicion, especially where the intervention takes place unilaterally. To avoid anarchy, unbridled hegemony, and bullying of weak states by powerful states, only an internationally representative body should have the authority to make decisions regarding the use of force, and the decisions in this regard should be binding on all states. Under the UN Charter only the Security Council is empowered to authorise the use of force. However, this body is unrepresentative and is dominated by very powerful countries. Therefore even when interventions have been authorised by the Security Council, the suspicion will remain, that the interventions serve the interests of one or more of the members of the Security Council. The emergence of a more representative body with the power to authorise the use of force will enhance the legitimacy of interventions. This will go a long way to eliminate the abuse
of humanitarian intervention as a pretext to advance national and strategic interests of powerful states, through the use of indiscriminate force.
CHAPTER 2

2. HUMANITARIAN INTERVENTION UNDER THE UNITED NATIONS CHARTER IN THE POST-COLD WAR ERA.

2.1. Introduction

The chapter investigates the hypothesis that the widespread recognition and promotion of human rights in the post-Cold War era has led to a substantial increase in humanitarian interventions resulting in the erosion of the traditional concept of state sovereignty and its corollary principle of non-intervention during this period. The chapter argues that the concept of humanitarian intervention, (re-conceptualised as ‘Responsibility to Protect’ (R2P), the two subjects that constitute the focus of the thesis, are essentially post-Cold War era phenomena. The chapter further argues that humanitarian intervention is part of R2P, because they both involve the option of forcible military intervention in the face of serious humanitarian crises when necessary. An investigation of the role of international human rights in the change in international attitudes towards humanitarian intervention during the post-Cold War is conducted in the chapter. It is argued that the traditional definition of sovereignty, that says that a state has immunity from accountability for the brutal treatment of its citizens, is outdated, and belongs to the museum of antiquity, in the light of human rights, globalization, and the interdependence of states.

The concept of sovereignty has undergone an evolution from the traditional Westphalian concept of the supremacy of the state to the concept of sovereignty with the people at the centre, or what has been described as popular sovereignty. The state has the primary responsibility to protect its people. If it is unable or unwilling to do so, it creates the conditions for its sovereignty to be subverted by external actors through interventions. Article 2(4) places a general prohibition on the use of force except when it is authorised by the Security Council, or where the force is used in individual or collective self-defence. It is argued, therefore, that when it becomes necessary to conduct humanitarian intervention to protect the victims of human rights abuses, the body to authorize the intervention should be the United Nations Security Council. An intervention without the mandate of the United Nations Security Council is illegal and constitutes a violation of international law.

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Nations Security Council undermines the international order. Besides, the motives of powerful states that intervene in others are not necessarily humanitarian, but are inevitably influenced by geopolitical factors and the national interests of the intervening state. This raises the potential for major military powers to intervene in weaker states to advance parochial interests. However, until the Security Council is able to exercise its function of maintaining international peace and security in the sphere of human rights by taking timely and effective action, the potential for unilateral armed intervention by powerful states cannot be ruled out. The chapter briefly explains issues that hobbled the capacity of the Security Council to implement enforcement measures in relation to human rights during the Cold War.

Further, the chapter discusses the debate on the legality of humanitarian intervention since the beginning of the 1990s with a focus on interventions without the authorisation of the Security Council or without the consent of the target state, otherwise referred to as unilateral humanitarian intervention, because they are essentially illegal under the UN Charter. A cardinal principle of international law is the inviolability of the territory of a sovereign state. The purpose of this principle enshrined in the UN Charter is to protect the territorial integrity and political independence of states. Thus, no country, however powerful, has the right to interfere in the internal affairs of any state through the use of force. Even though humanitarian intervention is not expressly prohibited by the Charter, the prohibition of the use of force under Article 2(4) renders it unlawful, unless it is undertaken with the authorisation of the United Nations Security Council under Chapter VII. However, when serious human rights abuses such as genocide and ethnic cleansing occur in a state, and the Security Council is unable or unwilling to take enforcement measures to protect the suffering people, then the door is opened for other actors to step in to do what the Security Council will not or cannot do, because the world cannot stand by as passive witnesses to atrocities. Unilateral humanitarian intervention takes place in such situations, when in the name of human rights, a state or group of states uses force against the perpetrating state in order to end human suffering within that state. However, the drawback of unilateral humanitarian intervention is that it occurs without United Nations Security Council authorization and

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4 UN Charter Article 2(4).
5 Ibid.
without the consent of the target state, and therefore, it is inherently dangerous because it sets a precedent for other states to follow.

The chapter nevertheless argues that the mandate of the United Nations Security Council is not an absolute prerequisite to justify military interventions, and therefore, when necessary, unilateral military interventions can be a timely response to serious humanitarian crises\(^6\) in the face of Security Council inaction. Thus, a state may intervene in another on ethical grounds because it considers it the right thing to do to stop a humanitarian crisis, or on legal grounds because it is a party to the Genocide Convention 1948, for example.\(^7\) As observed under the UN Charter, the Security Council is the body with the responsibility to authorise the use of force. However in the event of UN Security Council inaction, if other states are compelled to intervene to halt human suffering, it is argued that the intervention, though unlawful under the Charter, would be legitimate on moral or ethical grounds. D’Amato shares this view, stating that the Security Council is hobbled by the veto of the permanent members, and therefore, even without Security Council authorisation, “there are times of severe moral duty where any nation that has the requisite military force should step up and prevent slaughter.”\(^8\)

2.1.1. Structure of the chapter

The chapter has three main parts, structured as follows:

Part I discusses the internationalisation of human rights. The purpose is to investigate the impact of the widespread recognition of human rights on the traditional concept of state sovereignty and the principle of non-intervention. Part I gives a brief history of human rights, explains the nature of ‘human rights,’ and discusses the principle of the universality of human rights. This part also attempts to explain the correlation between international concerns for human rights, the softening of international attitudes towards armed interventions in the internal affairs of states, and the consequential increase in the number of humanitarian interventions. Human rights have become a matter of international concern. Therefore, in the contemporary international order, gross abuse of human rights in a state inflicted on its

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\(^8\) A. D’Amato, There is no Norm of Intervention or Non-Intervention in International Law, *Faculty Working Papers*, Paper 80, (2010). Available at [http://scholarlycommons.northwestern.edu/facultyworkingpapers/80](http://scholarlycommons.northwestern.edu/facultyworkingpapers/80) [Accessed 24 June 2016]
people either by the state, or other events such as internal war, insurgency, repression, or state failure, is a matter of concern to the international community.

Westphalian sovereignty confers on a state supreme authority on a state in dealing with matters within its territory. However, worldwide concerns about human rights in the post-Cold War era challenge this notion. For example, with the advent of the concept of Responsibility to Protect (R2P), external military force may be used to override sovereignty to protect victims of gross human rights abuses. An example can be found in NATO’s intervention in Libya in 2011, authorised by the Security Council to protect civilian victims of mass killing by the forces of the Gaddafi regime. Sovereignty is not absolute in the contemporary international order, because in the post-Cold War era, the widely accepted view is that sovereignty involves a state’s responsibility to provide protection to persons and property, and to provide adequate governance within its territory. Thus, while the Charter acknowledges the sovereignty of states, it at the same time acknowledges the obligation of the international community to protect the human rights of victims of abuse, and to maintain international peace and security. Matters previously considered to be within the domestic jurisdiction of states, like human rights, humanitarian issues, and economic and social issues have been elevated unto the international plane, and are therefore no longer within the domestic sphere of states. Westphalian sovereignty has adapted to changing circumstances brought about by the post-Cold War international order. Consequently, state sovereignty, though recognised by the UN Charter, is neither a licence for states to behave as they please, nor a barrier to necessary action by the international community in the interest of maintaining

9 ICISS Report, note 1, p. XI.
11 ICISS Report, note 1, p. XI.
13 ICISS Supplementary Volume, note 10, p. 8.
14 Article 2(7), UN Charter; Article 2(7) states ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, but this principle shall not prejudice the application of enforcement measures under Chapter VII. Article 39 of Chapter VII empowers the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.
15 ICISS Supplementary Volume, note 10, p. 8.
16 Ibid, p. 7.
international peace and security, including the protection of human rights.\textsuperscript{17} In this light, tension between respect for state sovereignty and the duty of the international community to protect victims of gross human rights abuse is unavoidable.

Part II discusses the redefinition of state sovereignty and non-intervention after the Cold War. The purpose is to juxtapose traditional state sovereignty with the new understanding of sovereignty in the post-Cold War era, especially since the introduction of the new concept of R2P. Westphalian sovereignty enshrined in Article 2(7) of the UN Charter, requires non-intervention in the internal affairs of states.\textsuperscript{18} Traditional state sovereignty vests supreme authority in the state. However, in the post-Cold War era, the people are considered to be the source of authority.\textsuperscript{19} Post-Cold War sovereignty considers the people as the repository of authority and therefore, the state derives its legitimacy from the people. State sovereignty is recognised, but sovereignty is considered as a responsibility and the primary responsibility of the state is to protect its people.\textsuperscript{20} In situations where human rights are gravely abused in a state and the state is unwilling or unable to end or avert it, then sovereignty and non-intervention have to give way on humanitarian grounds.\textsuperscript{21}

Sovereignty has therefore been redefined from a concept based on the supreme authority of the state to a concept based on the individual rights of the people. Therefore, in the period after the Cold War, sovereignty, though not becoming irrelevant, “is the peoples’ sovereignty rather than the sovereign’s sovereignty.”\textsuperscript{22} This part discusses the notion that non-intervention and the inviolability of the territories of the sovereign states are the building blocks of the international order and the collective security system established by the United Nations Charter. Sovereignty is a safeguard for international peace and security, because it imposes a duty on states not to interfere in the internal affairs of other states, and thereby, provides protection for weaker states from powerful states. Nevertheless, sovereignty and non-intervention should not be permitted to impede international action in situations of excessive human rights abuses.

\textsuperscript{17}ICISS Report, p. XI.
\textsuperscript{19}ICISS Supplementary Volume, note 10, p. 10.
\textsuperscript{20}ICISS Report, p. XI
\textsuperscript{21}Ibid.
\textsuperscript{22}K. Annan, “Two Concepts of Sovereignty,” The Economist 352 (September 18, 1999, pp. 49-50.
Part III investigates the reasons for the frequency of humanitarian interventions since the end of the Cold War and the impact on state sovereignty. This part discusses the legality of humanitarian intervention with a focus on unilateral humanitarian intervention, because it occurs without authorisation of United Nations Security Council. Under the Charter, armed intervention can be justified under the following circumstances: (i) in individual or collective self-defence in response to armed attack, as was the case with the NATO’s reason for the invasion of Afghanistan after 9/11;\(^2^3\) (ii) or it has to be authorised by the United Nations Security Council under Chapter VII, as in the case of the NATO intervention in Libya in 2011; (iii) or carried out under Chapter VIII, as a regional organization, and subsequently impliedly authorised by the Security Council as was the case with ECOWAS’ intervention in Liberia in 1990.\(^2^4\) Armed intervention carried out under any of these circumstances in particular an intervention authorized by the United Nations Security Council or “collective humanitarian intervention”\(^2^5\) does not raise the issue of legality in the light of Article 2(7) and Chapter VII.\(^2^6\) On the other hand, unilateral intervention is based solely on the authority and decision of the intervening state or states and has therefore proved to be contentious.\(^2^7\)

For purposes of this chapter, unilateral intervention is defined as the use of force by a state or group of states in the territory of another state, without the United Nations Security Council authorisation or the consent of the target state, with the stated objective of averting or halting gross human rights abuses perpetrated by the government of the target state, or non-state actors, on its people, which the target state is unwilling or unable to avert or halt. Unilateral humanitarian intervention therefore flies in the face of Chapter VII of the Charter, in that it is conducted without the recommendation or authorisation of the United Nations Security Council. It is therefore submitted that unilateral humanitarian intervention raises a presumption of unlawfulness under international law. The prohibition of force under Article 2 (4) does not refer only to the use of force in war, but also any form of armed intervention, including unilateral intervention. Since the decision to use force against another state rests with the intervening state or states, the motives may be geopolitical and not necessarily be

\(^{23}\) J. Quigley, The Afghanistan War and Self-defense, *Valparaiso University Law Review*, Vol. 37, No. 2 (2003), 541-562, at 562. Quigley argues that the attack on Afghanistan was not a lawful response because NATO pursued the wrong target and therefore the attack did not meet the criteria for self-defence.


\(^{26}\) Article 2(7) and Chapter VII.

humanitarian. Besides, since the intervening states determine the objectives and the most effective method to be used to achieve these objectives, the potential for abuse and disproportionate use of force is heightened.

An example is NATO’s bombing of Yugoslavia (Serbia and Montenegro) in 1999. NATO used force against a sovereign state that posed no danger to the organisation, without United Nations Security Council authorisation. The use of force to “save lives usually involves taking lives, including innocent ones.” Images of NATO’s aerial bombardment of the country were witnessed on television. The indiscriminate bombing killed civilians. Human Rights Watch put the death toll from NATO air strikes at 500 civilians. NATO planes were flying too high and too fast to protect civilians on the ground. The air strikes destroyed the infrastructure of the country, including bridges, government buildings, a Serbian television station accused of spreading pro-government propaganda killing 16 civilians, and even the Chinese embassy in Belgrade, none of which posed a military threat. Human Rights Watch reported that NATO’s bombing had violated international humanitarian law and Amnesty International accused NATO of war crimes. NATO’s aerial bombardment did not distinguish between friend and foe. The indiscriminate and disproportionate use of force in this instance demonstrates the dangers inherent in armed unilateral interventions.

The chapter concludes that despite the limitations on the concept and other challenges, state sovereignty remains a cardinal principle of international law, and the foundation of interstate relations, which provides protection to weaker states from unilateral forcible action by powerful states. Any use of force, including humanitarian intervention, constitutes a violation of the prohibition of the use of force, unless it is conducted with United Nations Security Council authorisation or in individual or collective self-defence in response to an armed attack. Respect for sovereignty and non-intervention is therefore fundamental in inter-state relations. However, absolute sovereignty cannot apply in the contemporary international order because of worldwide concerns about human rights. Untrammelled adherence to traditional sovereignty and non-intervention would constitute an impediment to the

29 ‘NATO attack on Yugoslavia begins’, CNN, (March 24 1999).
30 Children reported killed when NATO bomb missed target, CNN (April 28, 1999).
31 Valentino, note 28, p. 64.
32 ibid. p. 65.
34 Valentino, note 28, p. 64.
enforcement of international humanitarian law\textsuperscript{35} and international human rights law. Therefore, if a state subjects the citizens to gross human rights abuses, or it unable or unwilling to avert or halt such abuses, it is morally legitimate for other states to violate its sovereignty in order to protect the victims of abuse.

To pre-empt powerful states from taking unilateral action in defence of victims of human rights abuse, the permanent members of the United Nations Security Council should exercise their prerogative of the veto in a manner consistent with the Purposes and Principles of the United Nations, in order to avoid the paralyses that characterized the Council during the Cold War. Under Article 24 of the Charter, Member States of the UN have conferred on the Security Council the primary responsibility for the maintenance of international peace and security, and have agreed that when the Security Council discharges this responsibility it acts on their behalf. Therefore, the exercise of the veto should be done in the interest of the international community, and not in the national interests of the permanent members of the Council. In particular, the Security Council should implement the enforcement mechanism provided under the Charter relating to the maintenance of international peace and security, and reaction to gross abuses of human rights effectively, in order to avoid giving a pretext to powerful states to take unilateral forcible action.

2.1.2. The Security Council during the Cold War

This section discusses the rivalry between the West and East blocks during the Cold War and its impact on the Security Council’s capacity to implement enforcement measures in relation to international human rights. During the Cold War period 1945-1989, the world was split between two hostile blocks, the Capitalist West and the Communist (Soviet) East. These two power blocks “sought to avoid intervention in internal and international armed conflicts in order to avoid a larger confrontation.”\textsuperscript{36} The hostility between these two blocks impeded the ability of the United Nations to implement the provisions in the Charter on securing international peace and security,\textsuperscript{37} primarily because of the use of the veto by the permanent members of the Security Council. The use of the veto made intervention unlikely to take


\textsuperscript{36} Weiss, note 18, p. 38.

\textsuperscript{37} Article 24(1) provides: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out this responsibility, the Security Council acts on their behalf.” The Council was unable to discharge this responsibility because of disagreements between the two blocks.
place at all, or if it did take place, it would be unilateral.\textsuperscript{38} Examples are the US’ intervention in Vietnam and the Soviet Union’s intervention in Afghanistan.\textsuperscript{39} Under Article 27(3) decisions in the Security Council are made by the affirmative vote of nine members of the Council, provided that a permanent member does not cast a negative vote. A permanent member can thus block a vote on a resolution by exercising a negative vote. The decades of adversarial relations between the great powers during the Cold War made it impossible for the United Nations to fulfil its original mission due to the large number of vetoes cast by the permanent members.\textsuperscript{40} As a consequence, during the Cold War the only Chapter VII resolution of note adopted by the Security Council was United Nations Resolution 84 which recommended that Members of the United Nations should furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack upon it by the forces from North Korea: This resolution passed only because of the absence of the Soviet Union during the vote.\textsuperscript{42} The end of the Cold War brought to an end the ideological and superpower differences and raised hopes that a new era of cooperation in the Security Council had dawned. There was the hope that a new opportunity had arisen for the realisation of the objectives of the United Nations Charter of maintaining international peace and security, and of securing justice and human rights. With the collapse of the Soviet Union, which was the main “proponent of non-interference in internal affairs, at the end of the Cold-War, a changed attitude towards human rights was evident.”\textsuperscript{44} In the words of UN Secretary-General Javier Perez de Cuellar:

We are witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents.\textsuperscript{45}

\textsuperscript{38} Weiss, note 18, p. 38.
\textsuperscript{39} Ibid.
\textsuperscript{40} B. Boutros-Ghali, put the number of vetoes cast during the period 1946 and the end of the Cold War in 1990, at 279: Report of the UN Secretary General: “Agenda for Peace”, A/47/277-s/24111, 17 June 1992, paragraph 14, p. 43.
\textsuperscript{41} Resolution 84 (1950) of 7 July 1950, Available at: http://www.refworld.org/docid/3b00fle85c.html [Accessed 8 February 2016]
\textsuperscript{42} Under Article 27(3) the abstention or absence of a permanent member of the Security Council does not count as a veto. Hence the absence of the Soviet Union could not prevent the adoption of the resolution.
With the end of the Cold War, international attitudes towards humanitarian intervention have softened, and the use of force in the face of humanitarian crises has become acceptable to the international community and in international law.\textsuperscript{46} Thus, the beginning of the 1990s saw a “flurry of optimism regarding the new found scope of the international community to deal with humanitarian issues.”\textsuperscript{47} This era ushered in new ideas about state sovereignty and humanitarian intervention, and “a new kind of international law and spirit, made possible in the changed conditions of a world no longer structured around the old uncertainties of a struggle between communism and capitalism.”\textsuperscript{48} The end of the Cold War made humanitarian intervention a widely accepted diplomatic norm,\textsuperscript{49} with the frequent use of human rights concerns as grounds for intervention.\textsuperscript{50} An example is the Security Council authorised intervention in Libya under Resolution 1973 (2011), to protect the population from mass killing perpetrated by the Libyan government.\textsuperscript{51} A new practice of humanitarian intervention emerged during this period with emphasis on the need to override state sovereignty to rescue victims of atrocious human rights abuses in a state “unable or unwilling to protect or succour them.”\textsuperscript{52} A willingness to intervene militarily in circumstances that “shock the conscience of mankind”\textsuperscript{53} was ushered in during the 1990s, and a ‘new moral order’ emerged in which individual human rights trumped state sovereignty.\textsuperscript{54}

The post-Cold War period has witnessed unprecedented worldwide concerns about human rights, resulting in the softening of international attitudes towards the trans-boundary use of force in the protection of populations from gross human rights abuses. The first test was the reaction of the international community to Iraq’s invasion and occupation of Kuwait.\textsuperscript{55} The Security Council had until Iraq’s invasion and occupation of Kuwait, not made use of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} J. Davidson, Humanitarian Intervention as Liberal Imperialism: A Force for Good?, \textit{POLIS Journal} Vol. 7 Summer (2012), p. 129.
\item \textsuperscript{48} Orford, note 46 supra, 2.
\item \textsuperscript{49} Kochler, note 35 supra, p. 38.
\item \textsuperscript{52} Weiss, note 18 supra, p. 2.
\item International Coalition for the Responsibility to Protect, 2011 (ICRtoP), (2011) \textit{An Introduction to the Responsibility to Protect}: Available at \url{http://responsibilitytoprotect.org/index.php/about-rtop} [Accessed 22 April 2016]
\item \textsuperscript{55} B. Boutros-Ghali, \textit{Agenda for Peace}, note 40 supra, para. 42, p. 55.
\end{itemize}
\end{footnotesize}
most coercive measures – action by military force foreseen in Article 42, but “In the situation between Iraq and Kuwait, the Council chose to authorise Member States to take measures on its behalf.” 56 The United Nations Security Council adopted Resolution 678, which authorised Member States co-operating with the Government of Kuwait to use ‘all necessary means’ to restore international peace and order. Thus, the end of the Cold War liberated the United Nations “to play the security role its founders intended.” 57 Subsequently, humanitarian intervention has been a common occurrence in the post-Cold War era, and there have been instances of humanitarian intervention almost on an annual basis during this period. Examples of post-Cold War humanitarian interventions include ECOWAS’ intervention in Liberia in 1990 58; United Nations Security Council sanctioned humanitarian interventions in Kurdistan (Northern Iraq) in 1991 59; in Somalia in 1992 60; in Haiti in 1994 61; NATO’s intervention in Bosnia in 1995; NATO’s intervention in Kosovo in 1999; NATO’s intervention in Afghanistan in 2001; United States’ invasion of Iraq in 2003; France’s intervention in the Ivory Coast in 2010; NATO’s intervention in Libya in 2011; and France’s intervention in Mali in 2013.

On the other hand, humanitarian interventions were few during the Cold War. Armed interventions (examples of which are given below) during this period could have qualified as humanitarian, but instead the intervening states justified their actions on the basis of self-defence. Even though undertaken to halt gross human rights abuses, and humanitarian claims would have been appropriate, 62 the intervening states “took good care not to invoke the doctrine of humanitarian intervention and preferred to ground the lawfulness of their actions on sounder arguments.” 63 “Although they bowed in the direction of humanitarianism, the interventionist leaders involved in these episodes justified their actions on conventional grounds of self-defence.” 64 For example on 25 March, 1971, the Pakistani army embarked on

56 Ibid.
62 CISS Supplementary Volume, p. 67.
military suppression of East Pakistani nationalists who were demanding regional autonomy.\(^{65}\)

Out of concern for the atrocities inflicted on East Pakistan Bengali Hindus and Bengali nationalists, India sought the intervention of the international community to take urgent and constructive steps to prevail on the Government of Pakistan to put an end to what amounted to pre-planned carnage and systematic genocide.\(^{66}\) The killings have been described as “crimes against humanity” since the violence was perpetrated against Bengalis and non-Bengalis.\(^{67}\) Inaction of the United Nations and the international community compelled India to intervene to end the carnage.\(^{68}\) India’s intervention has been described as one of the clearest examples of humanitarian intervention in history.\(^{69}\) However, India did not appeal to the concept of humanitarian intervention, but rather sought justification in self-defence under Article 51, as a response to a Pakistan armed attack.\(^{70}\) Similarly, Tanzania intervened in Uganda in 1979 to oust Idi Amin’s regime, which had perpetrated mass killings of the population.\(^{71}\) Despite grave human rights abuses and the mass slaughter of Ugandans by the Amin crime, “at no time did Tanzania advance the claim that its military action was humanitarian.”\(^{72}\) Rather, Tanzania defended its action on grounds of self-defence, not for humanitarian reasons.\(^{73}\) In another example, in 1978 Vietnam invaded Cambodia and ousted the Khmer Rouge government which was perpetrating systematic mass torture and murder of civilians.\(^{74}\) However, Vietnam did not invoke humanitarian intervention, but declared that the reason for the intervention was self-defence in response to border clashes between the two states.\(^{75}\)

There is no doubt that the interventions of India, Tanzania and Vietnam in East Pakistan, Uganda, and Cambodia respectively were motivated by humanitarian concerns among others.


\(^{71}\) N. Ronzitti, note 63, p. 590.

\(^{72}\)*ICISSSupplementary Volume*, p. 62.

\(^{73}\) UN Document, S/PV.2108, January 11, 1979, p. 2. Also, Ronzitti, note 63 supra, p. 103.

\(^{74}\)*ICISS Supplementary Volume*, p. 58

\(^{75}\) Ibid.
Yet, none of these states appealed to humanitarian intervention. One reason is possibly because of the dubious legitimacy of the interventions. Another explanation is that in the pre-Cold War era international attitude towards the use of force to protect victims of gross human rights abuses was inflexible, and there was no international endorsement, express or tacit, of humanitarian intervention. If these interventions had occurred in the post-Cold War era, it is most likely that the intervening states would have rightly appealed to humanitarian intervention.

2.1.3. Change in international attitudes towards humanitarian intervention

In the post-Cold War era there has been a change in the attitude of the international community towards the use of force to protect victims of excessive human rights abuses. Even when armed interventions take place outside the framework of the United Nations Charter, the UN Security Council has given post-intervention approval to the operation. For example, the Economic Community of West African States (ECOWAS) intervened in Liberia in 1990, through ECOMOG, the Ceasefire Monitoring Group of the organisation, and intervened again in Sierra Leone in 1998 in the face of UN Security Council’s inaction. The interventions by ECOWAS have been described as “the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council.” Even though “there was no legal basis for the ECOWAS intervention under the UN Charter, it was supported by the United Nations and the whole of the international community.” The Security Council commended the organisation in Resolution 788 for its part in restoring “peace, security and stability in Liberia”. Another example is NATO’s intervention in Kosovo in 1999. It has been suggested that in the light of the international support for NATO’s intervention in Kosovo in 1999, it was ‘a potential harbinger of future legality.’

77. Sarkin, note 24 supra, p 375.
the UN Security Council fails to act, and where the intervention is for a popular cause, the UN would not complain about the usurpation of its powers, but rather praise the interveners.\textsuperscript{82} Under Article 24(1) of the UN Charter, the primary responsibility for the maintenance of international peace and security rest with the UN Security Council. In the face of UN Security Council inaction, there is justification under Article 1(1) of the UN Charter for member states of the UN to take action. Article 1(1) imposes a duty on member states of the UN to maintain international peace and security. In a situation where the Security Council is unable or unwilling to discharge its responsibility, the prohibition on the use of force enshrined in Article 2(4) is suspended.\textsuperscript{83}

\section*{2.2. Part I - The Universalisation or Internationalization of Human Rights}

The main purpose of this section is to discuss the universality of human rights. The objective is to emphasise the importance of human rights in the subsequent discussions on sovereignty, non-intervention, and humanitarian intervention. The importance of human rights is that they have normally been used as grounds for the violation of the sovereignty of states through humanitarian intervention. The focus will be on the Universal Declaration of Human Rights 1948, (UDHR), proclaimed on 10 December 1948 as a “common standard of achievements for all peoples and all nations,”\textsuperscript{84} and described as the “foundational human rights document of our time.”\textsuperscript{85} The UDHR set out, for the first time, fundamental human rights to be universally protected.\textsuperscript{86} This part also discusses the nature of human rights, and gives a brief history of human rights. The aim is to investigate the widely held belief that human rights are universal, as the name of UDHR infers.\textsuperscript{87}

Part I also explores the role that the worldwide recognition and protection of human rights have played in the increase in humanitarian interventions and the consequential redefinition of state sovereignty since the end of the Cold War. The United Nations Charter was the first major document relating to the internationalisation of human rights.\textsuperscript{88} The Charter committed the United Nations to promoting universal respect for, and observance of, human rights and

\begin{footnotes}
\item[Sarkin, note 24, p. 375.]
\item[UDHR Preamble.]
\item[General Assembly Resolution 217 A(III) Universal Declaration of Human Rights.]
\item[Perry, note 85, p. 805.]
\end{footnotes}
fundamental freedoms for all without distinction as to race, sex, language, or religion.\textsuperscript{89} UDHR reinforced the principle introduced by the United Nations Charter, that human rights cannot be located exclusively within the sovereignty of states.\textsuperscript{90} Gross human rights violations within one state may have adverse external effects, especially where a large number of victims in the perpetrating state move across international borders, creating a refugee or humanitarian crisis in other states.\textsuperscript{91} Besides, human rights violations could lead to civil war, which may pose a threat to international peace and security, prompting other states to intervene in the perpetrating state.\textsuperscript{92} Therefore, the international community has legitimate concerns about the manner in which a state treats its own nationals.\textsuperscript{93} Abuse by a state of the human rights of its nationals is no longer the exclusive business of the state, because of worldwide recognition that respect for human rights transcends international frontiers.

Other human rights documents that have followed in the wake of UDHR, such as the International Covenant on Civil and Political Rights (ICCPR 1966), the International Convention on the Elimination of All Forms of Racial Discrimination (ICRED 1965), and the International Covenant on Economic, Social and Cultural Rights (1966), etc. were constructed on the foundation of the UDHR.\textsuperscript{94} The UDHR is the first international legal instrument that “imposed an unitary and universal conception regarding the human rights and fundamental freedoms, and ipso facto, of the ‘Dignitashumana’ (dignity of the human person).”\textsuperscript{95} Even though the UDHR is a declaration and not a legally binding document, its principles have influenced international attitudes towards human rights. International concerns for human rights have had a correlation with the softening of international attitudes towards humanitarian intervention. International concerns for human rights have been influenced by the principles enshrined in the UDHR.

\textsuperscript{89}Article 55(c), UN Charter.
\textsuperscript{90}ICISS Supplementary Volume, p. 8.
\textsuperscript{92}Ibid
\textsuperscript{93}Ibid.
\textsuperscript{94}Ibid.
2.2.1. The nature of human rights

The purpose of this section is to explain the concept of human rights in relation to sovereignty, with the aim of establishing that human rights are an entitlement of all human beings, simply for being human beings, and they are therefore not dependent on the magnanimity of the state or sovereign. Human rights are widely considered to be the fundamental rights of a person necessary for a life with human dignity. They are the cornerstone underpinning the rule of law and state sovereignty and are necessary to ensure that every person can live with dignity without discrimination based on gender, race, religious, or other status. These rights, referred to by important human rights documents, imply the dignity inherent in a human being. The Oxford Advanced Learner’s Dictionary defines dignity as “the fact of being given honour and respect by people.” The UDHR recognises in its preamble the “inherent dignity and the equal and inalienable rights of all members of the human family.” Article 1 states: “All human beings are born free and in dignity and rights…and should act towards one another in a spirit of brotherhood.” The International Covenant on Civil and Political Rights (ICCPR) recognises in its preamble the “inherent dignity and inalienable rights of members of the human family,” and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also recognizes the inherent dignity and equal and inalienable rights of all members of the human family.

In the light of the worldwide recognition of human rights, the Westphalian concept of sovereignty has already been breached by the necessity of humanitarian intervention where a state subjects its population to gross human rights abuses.

Every human being has dignity and human rights, not because of his/her race, ethnicity, nationality, cultural or religious background, but solely because he/she is a human being. The idea that human beings have rights as humans is a staple of contemporary world

99 UDHR, Preamble.
100 Ibid. Article 1.
101 ICCPR, Preamble.
102 ICESCR, Preamble.
politics.” Human rights are inalienable rights: “one cannot stop being a human being, no matter how badly one behaves or how barbarously one is treated.” Even though a state may by legislation deny its people human rights, these rights continue to attach to the people, because human rights are inherent in a human being and cannot be destroyed. Thus, notions of law and justice, the right not to be deprived of one’s life or property unlawfully, freedom from oppressive governance, and the right to participate in the affairs of one’s society exist in every human society. For example relating to Africa, Viljoen has observed that “there is little doubt that ‘human rights existed in traditional pre-colonial Africa…and there clearly were established ways and means of marshalling custom and wise leadership that led to effective and legitimate dispute resolution.” For example, in the culture of the Ashanti of Ghana, my ethnic group, there is a saying that literally states: “listen to it twice,” which literally translated means, listen to both sides of a story before you judge. This ensures that a person is entitled to a fair trial, and therefore, no one may be deprived of life, property, or freedom without being heard by an assembly of elders. Another example can be found in Botswana where I lived for over twenty five years. There, the culture is that a traditional ruler does not take a decision unless the people have had their say at a kgotla (meeting of the people), thereby ensuring the participation of the people in the affairs of the community. Therefore, it is argued that notions of fairness, justice, and the desire for freedom from arbitrary or oppressive rule are innate in human beings. Consequently, the authority of a government in every society should depend on the consent of the population, and government has a duty to protect the human rights of its populations, and not to subject them to oppressive or arbitrary rule.

2.2.2. A brief history of human rights

The purpose of this section is to discuss the origins of international human rights. A detailed discussion of the origins of international human rights is beyond the scope of the thesis. The purpose is to provide a basic introduction of international human rights in a historical context. The section firstly discusses human rights instruments that preceded the United Nations and the UDHR with aim of establishing the concerns for human rights has existed for a long time in human history. Sarkin argues that:

106 Ibid.
While it is commonly held that international protections against human rights violations were activated in the post-World War II era, they actually were accessible much earlier. Without having to resort to natural law or other schools of thought that see such protection as having been available from ancient times, it can be shown that a system to protect individuals had been available from at least the nineteenth century. While it could be argued that individuals were unable to access this system to protect their rights at the time, there were indeed measures protecting minorities, protecting people against slavery...long before the 1940s.\textsuperscript{108}

As Sarkin argues recognition of human rights existed in ancient times before the advent of the United Nations and subsequent human rights instruments. Prior to the United Nations, measures existed such as those protecting minorities and people from slavery. Indeed, efforts at providing human rights protection preceded the establishment of the United Nations in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948, as discussed below.

\textbf{2.2.3. Other human rights instruments that preceded the United Nations}

As observed earlier, international recognition of human rights did not only emerge in the 20\textsuperscript{th} century following the formation of the United Nations and the adoption of the UDHR\textsuperscript{109}. Rather, the recognition of international human rights has gradually evolved over centuries. Thus, other instruments, in the area of international human rights preceded UDHR, which demonstrates the importance that human beings have over a long period of time attached to human rights. In 1929 the International Law Institute (New York) developed and published the “International Declaration of Human Rights.”\textsuperscript{110} Article 1 of the Declaration declared that

\begin{quote}
it is the obligation of every state to recognize the equal right of every individual to life, liberty, property, and to grant to those on its territory full protection of this right, without distinction of nationality, sex, race, language or religion.\textsuperscript{111}
\end{quote}

\textsuperscript{109} Ibid.
\textsuperscript{110} Dura, EIRP Proceedings, note 95.
It is clear from the foregoing that it has been a long held belief that human rights are the entitlement of every human being without discrimination. Even though this Declaration does not have its roots in ancient times as argued by Sarkin, the awareness of the importance and inalienability of human rights existed before the formation of the UN and the UDHR. The rights provided in Article 1 of the Declaration have been duplicated in the UDHR, the Convention on Civil and Political Rights, and other human rights instruments, and this affirms the universal nature of human rights and the inherent dignity of all members of the human family as the Preamble of the UDHR postulates. Another human rights instrument preceding the UDHR was the 1939 League of Human Rights. Article 1 of this instrument provided that:

…human rights apply without distinction of sex, race, nation, religion or opinion. These inalienable and imprescriptible rights are attached to the human person; they should be respected at all times, in all places and guaranteed against all forms of political and social oppression. The international protection of human rights should be universally organized or secured, so that no state can refuse the exercise of these rights of a single human being living on its territory."

This provision affirms the universal and inalienable nature of human rights. It recognises that human rights attach to a human being by virtue of being human, regardless of nationality, race, or religion, and no state has the right to deny any person these rights. It advocates efforts at securing international and universal protection of human rights. This is a precursor of R2P, in that it imposes a duty, by implication, on a state to protect the human rights of its people. A further antecedent of the UDHR can be found in Jacques Maritain’s “Declaration on Human Rights and Natural Law” in 1942. He stated that “the value of the person, his/her liberty, his/her rights depend on the order of sacred things, bearing the imprint of the Father of (human) beings…” Maritain implied that human rights are given to all human beings by God and by extension by natural law. What Maritain means by this statement is that human rights are innate in human beings and therefore inalienable. The statement also emphasises the universal nature of human rights and the imperative for all human beings to enjoy them without discrimination. The other human rights antecedent of UDHR was the

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112 Ibid.
113 Agli& Cassin, note 111, p. 333.
114 Dura, EIRP Proceedings note 95.
work of Professor Rene Cassin, the French representative of the Drafting Committee of the UN Commission on Human Rights. In 1947 he presented to the UN General Assembly of the UN the “Project of International Declaration of Human Rights.” He stated in Article 20 of his Project that “the individual freedom of conscience, faith and thought is a sacred and absolute right.” All these instruments conveyed a message of the importance which the international community attaches to human rights. Even though there was no enforcement mechanism for ensuring the protection of these rights, these instruments are relevant because of their emphasis on the need to safeguard international respect for human rights. They affirm the commitment of the international community in the contemporary era to promote and protect human rights, which has led to the new concept of R2P.

2.2.4. The origins of current international human rights

The roots of current international human rights can be found in the discourse on concepts such as liberty over the centuries by philosophers such as John Locke (1632-1704), Jean-Jacques Rousseau (1712-1778) and Immanuel Kant (1724-1804). These philosophers of the 18th century and 19th century connected human rights to natural rights, and placed emphasis on ‘natural rights’- rights that should be enjoyed by all human being, and developed a body of basic rights to be accorded to mankind. Their writings “served as a departure for the thinking up to that time, in which, to put it crudely, the people were there for those in power, rather than the other way round.” The writings of these philosophers ran counter to the understanding of where sovereign power rested in a society during their time. Whereas at that time power rested in the ruler who exercised it without taking into account the interest of the people, these philosophers held the view that on the contrary, the power of the ruler was based on the consent of the people, and therefore power vested in the people. This was a precursor to “popular sovereignty,” the notion that sovereignty rested with the governed and not the ruler.

116 Dura note 95.
117 Ibid.
118Ag and Cassin, note 111 supra, p. 362.
121Ibid. p. 6.
122 Van Genugten, note 87, p. 206.
In the discussion of human rights, reference can be made to the *Magna Carta Libratum* (Great Charter for the Liberties) of 1215.\(^{123}\) Abuses by King John led to a revolt by rebellious barons who forced him to affix his seal to the *Magna Carta*, in recognition of the rights of noblemen and common men.\(^{124}\) The *Magna Carta* made a substantial contribution to current international human rights, because it contained a number of rights which are now reflected broadly in international human rights, including the rights of equality before the law, (the *Magna Carta* established that no one, including the king was above the law), a right to property, and religious freedom.\(^ {125}\) Similar rights can be found in the UDHR, namely: all are equal before the law (Article 7); everyone has the right to own property (Article 17) and; everyone has the right to freedom of thought, conscience, and religion (Article 18). The most pertinent provisions of *Magna Carta* relating to human rights were Articles 39 and 40, which stated:

Article 39: No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by lawful judgment of his equals or by the law of the land.

Article 40: To no one will we sell, to no one deny or delay right or justice.\(^ {126}\)

The rights provided in the *Magna Carta* meant that as the king was not above the law, his authority derived from the consent of the people and therefore, he was obliged to respect the rights of the governed. Consequently, he had no power to deprive a subject of his property or any other entitlement, except after a fair hearing. The *Magna Carta* rights can be found in the bill of rights in modern constitutions, and has inspired and influenced action by other peoples in defence of liberty. Thus, the United States Declaration of Independence and the Bill of Rights contained various rights including liberty and equality to be enjoyed by all citizens.\(^ {127}\) During the American Revolution, the colonies believed that they were entitled to the same rights as Englishmen, namely, the rights guaranteed in *Magna Carta*.\(^ {128}\)

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\(^{123}\) *Magna Carta Constitution Society*: available at [www.constitution.org/eng/magnacar.html](http://www.constitution.org/eng/magnacar.html) [Accessed 20 April 2016]

\(^{124}\) Ibid.

\(^{125}\) Ibid.


\(^{127}\) Smith, note 119 supra, p. 6.

\(^{128}\) U.S. National Archives and Records Administration. Available at;
Amendment to the US Constitution, that “no one shall...be deprived of life, liberty, or property, without due process of law,” originated from the *Magna Carta* guarantee of proceedings according to “the law of the land.”

Similarly, the French Declaration of the Right of Man was influenced by the *Magna Carta*. These rights initially recognised in only a few states with advanced political systems are now universally recognised and promoted as rights to which every human being is entitled without discrimination.

International recognition and promotion of human rights took centre stage of international discourse after the creation of the United Nations and, in particular following the adoption of the UDHR in 1948. Human rights have not always had the worldwide recognition and protection they have in the contemporary international order, for:

> Until World War II, most legal scholars and governments affirmed the general proposition, albeit not in so many words, that international law did not impede the natural right of each equal sovereign to be monstrous to his or her subjects.  

Prior to World War II, human rights were of no concern to the international community, and the international community had no interest in the manner in which a state treated its nationals within its sovereign territory. The general attitude was that what a state did to its people in its territory was its own business. The attitude of the sovereign was that he or she had the right to treat the people in any atrocious manner. The UN Charter and the UDHR changed international attitudes to human rights. As articulated by Riesman:

> The basic proposition of the contemporary international human rights law is that a government may no longer do anything simply because it is effective and promises to achieve its purpose or enhance its power vis-à-vis its own population as long as it is doing it only to its citizens and in its own territory.

Human rights, under the contemporary international order brought by the UN Charter and the UDHR, have become a matter of concern to the international community. Therefore,


Ibid.

Ibid.


excessive abuse of the human rights of a people by their own government in its territory cannot be accepted as that government’s own business and may lead to external armed intervention if peaceful efforts fail. Thus, human rights have become internationalised and a state has to answer to the international community for the manner it treats its population.\textsuperscript{133} A state’s awareness that the gross abuses of the human rights of its population may lead to external military intervention will encourage the state to refrain from abusing these rights.

Worldwide recognition and promotion of international human rights in the contemporary order has led to a softening of international attitudes towards military action for the protection of victims of excessive human rights abuses. Human rights are in the contemporary era a matter of international concern, and are considered to have precedence over sovereignty.

The brief historical background of human rights demonstrates that humanity’s concern for human rights has developed over the years and preceded the advent of the United Nations Charter and the UDHR, as Sarkin has observed.\textsuperscript{134} Human rights have become a central matter of international concern since the creation of the United Nations Charter in 1945 and in particular since the adoption of the UDHR in 1948. Prior to the UDHR, human rights were considered as a matter within the internal affairs of states and not of international concern.\textsuperscript{135} For example, the Commission on Human Rights stated in 1947 that it “recognizes that it has no power to take any action in regard to complaints concerning human rights.”\textsuperscript{136} However, since 1948, under the influence of the UDHR and other human rights instruments, such as the International Convention Civil and Political Rights (ICCPR 1996), human rights are not the exclusive business of the state. Whereas in the past sovereignty vested in the government or the state, in the contemporary era, the people are at the centre of the concept of sovereignty and the state has a responsibility to protect the human rights of its nationals. If it fails in this duty, the international community has a responsibility to come to the assistance of the victims of abuses. Sovereignty is therefore no longer a shield for a state to violate the human rights of its nationals with impunity.

\textsuperscript{133} Forsythe, note 69, p. 5.
\textsuperscript{134} Sarkin, note 108 supra, p. 1.
\textsuperscript{135} R. Cohen, note 44 supra, p. 8.
2.2.5. The UDHR and the universalisation of human rights

The objective of this section is to investigate whether human rights can be universal in the light of the diverse political, social, cultural and religious diversities of different countries. The section discusses the UDHR and the role, if any, it has played in the universalisation of human rights. The basic proposition concerning the universality of human rights is reflected in the UN Charter “and the need to protect the basic rights of all peoples by some universally acceptable parameter”\textsuperscript{137} influenced the drafters of the Charter in 1945. The Charter expressed the determination of the Peoples of the United Nations:

\begin{quote}
to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small. 
\end{quote}

The UN Charter expressed in general terms the rights that all members of the human family were entitled to, without specifying these rights in detail. The (UDHR) went further and set out in detail these rights. The purpose of the UDHR was to emphasise the importance of human rights following Nazi atrocities during World War II.\textsuperscript{139} Article 1 articulates the “morality of human rights,” consisting of various rights recognised by the vast majority of countries of the world as human rights.\textsuperscript{140} Each of the human rights in the UDHR specifies an imperative of what is forbidden or required, which imperative serves as the normative ground for human rights.\textsuperscript{141} Examples of the most important rights to which human beings are entitled are: equality in dignity and rights;\textsuperscript{142} the right to life, liberty, and security of the person;\textsuperscript{143} the right not be subjected to torture or cruel, inhuman, or degrading punishment and; the right to a fair trial,\textsuperscript{144} etc. These rights are universal, and every human being is entitled to their enjoyment without discrimination. The UN Charter has elevated human rights unto the international plane, and not within the exclusive jurisdiction of states.\textsuperscript{145}

\textsuperscript{138} UN Charter, Preamble.
\textsuperscript{140} Perry, note 85, p. 775.
\textsuperscript{141}Ibid. p. 776.
\textsuperscript{142} Article 1 UDHR.
\textsuperscript{143} Ibid. Article 2
\textsuperscript{144} Ibid. Article 8.
\textsuperscript{145}ICISS Supplementary Volume, p. 8.
Security Council has broadened the interpretation of threats to international peace and security to include domestic abuse of human rights. Therefore, excessive abuse of human rights by a state may lead to the application of enforcement measures under Chapter VII of the Charter.

The Declaration is not a legally binding instrument. It was rather a “common standard of achievement”, which every nation should strive to attain. However, over the years, the UDHR has “increasingly been regarded within UN circles and elsewhere as a statement of rules and principles having the status of international law.” The Declaration was “drafted by representatives with different legal and cultural backgrounds from all regions of the world”. It was adopted when the United Nations consisted of only 58 Member States, with eight nations abstaining from the vote. The fact that no negative vote was cast and the incorporation of the principles of the Declaration into the constitutions of many countries in the world affirms the universality of the rights provided in the Declaration.

The UDHR has been described as the foundation of contemporary international human rights standards and the ‘mother’ of all human rights instruments. Other international and regional human rights instruments such as International Covenant on Civil and Political Rights, (ICCPR 1966), International Covenant on Economic, Social and Cultural Rights (ICESCR 1966), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples’ Rights (1981), that have followed in its wake make reference to the UDHR in their preambles. The UDHR is thus an authoritative statement of the meaning of human rights for the purposes of international relations because it effectively codifies the

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146 Ibid. p. 9.
147 Article 39, UN Charter.
148 UDHR, Preamble.
150 UDHR, Preamble, note 98.
153 Siciliano, note 137 supra, p. 115.
154 van Genugten, note 87 supra, p. 207.
highest standards of human rights. Furthermore, treaties and conventions outlawing racial discrimination, discrimination against women, torture and providing for the protection of the child were adopted based on the foundation of the UDHR thereby demonstrating the extensive influence of the UDHR on international human rights.

Further demonstration of the influence of the UDHR can be found in the recommendations of the 1993 Vienna World Conference on Human Rights, in which representatives of 171 States participated. The high number of states participating in the Conference (about 90% of UN membership) affirms the interest and concern of the international community in human rights and the universalisation of human rights. The Conference adopted by consensus the Vienna Declaration and Program of Action of the World Conference on Human Rights, presenting to the international community a common plan for the strengthening of human rights around the world. The Conference “reaffirmed the principles that had evolved during the past 45 years and further strengthened the foundation for additional progress in the area of human rights.” The Vienna Declaration also made recommendations for strengthening and harmonising the monitoring capacity of the United Nations system and called for the establishment of a High Commissioner for Human Rights by the General Assembly which created the post on 20 December 1993. In his final address to the conference, Ibrahima Fall stated that:

In adopting the Vienna Declaration the Member States of the United Nations have solemnly pledged to respect human rights and fundamental freedoms and to undertake individually and collectively actions and programmes to make the enjoyment of human rights a reality for the human being.

The statement expresses the commitment of the international community to the promotion of human rights and fundamental freedoms and underlines the universality of human rights. Member state of the UN thereby made a commitment to take steps to ensure the protection of human rights within their territories. The 2005 World Summit Outcome also underlined the

157 Ibid
158 Ibid.
159 Ibid.
influence of the UDHR on the universalisation of human rights. More than 150 heads of state and government - “presidents, prime ministers, and princes” - attended the summit which was convened to commemorate the sixtieth anniversary of the United Nations. On human rights, the Summit Document stated:

We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter and the Universal Declaration of Human Rights and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.

This statement affirms the commitment that Member States of the UN have made under Article 1(3) of the UN Charter to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, in addition to commitments under the UDHR. The World Summit Outcome Document further reaffirmed the universality of human rights in the following words:

We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have a duty to promote and protect human rights and fundamental freedoms.

The statement recognises that there are many differences among the Member States of the UN arising from political, economic and cultural backgrounds. However human rights are universal and therefore, these differences should not be permitted to stand in the way of promoting and protecting them. There should be no room for the abuse of human rights based on cultural political or religious differences. Human rights are the birthright of every

161 2005 World Summit Outcome Document A/60/L.1
163 World Summit Outcome 2005, paragraph 120.
164 Ibid, paragraph 121.
human being and they are considered to be universal rights, because “all members of the species Homo sapiens are … holders of human rights.” Universalisation of human rights means that individuals, whether in the international system or inside States themselves, are rights holders independent of States. Therefore, enjoyment of human rights by the citizens of a state should not depend on the benevolence or magnanimity of the state, since it is a legal entitlement. Despite diverse historical, cultural and religious, political and economic backgrounds, all human beings desire to be treated with dignity and to enjoy basic human rights. In the words of Habermas:

Notwithstanding their European origins….In Asia, Africa, and South America, human rights now constitute the only language in which opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their humanity.

Put in another way, human rights are universal and inherent in all human beings. International recognition and the determination of the international community to strive to promote respect for human rights serve as a medium of protection for victims of violence, persecution and tyranny, by placing offending states under international scrutiny. In resistance to human rights abuses, victims of violence, persecution, and repression everywhere can raise their voices, which will resonate on the international plane, to motivate the international community to react in their defence. There are rights that all human beings are entitled to regardless of where they live. The universal recognition of these rights enables the international community to judge the manner in which states treat their citizens. The recognition of the principle of universality of human rights means that the conduct of states relating to the human rights of its people can be subjected to international scrutiny. It also means that if a state grossly abuses the human rights of its people, it provides legal or legitimate grounds for external armed intervention to protect the victims of abuse. The imperative to take action to protect people from human rights abuses has been brought about by the acceptance of the importance of human rights enshrined in the UDHR

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165 Donnelly, Universal Human Rights, note 104 supra, p. 10.
166 Siciliano, note 137, p. 121.
168 UDHR Preamble.
2.2.6. The influence of the UDHR on Constitutionalism

This section discusses the reflection of the rights provided by the UDHR in the constitutions of many countries of the world, and the substantial influence of the UDHR has had on constitutionalism. The UDHR has universalised human rights “through the protection of a constitutional ideology, accepted by a few countries, into a standard of constitutionalism for all countries.” In Africa in particular, the UDHR has been liberally referenced and frequently quoted in independence era constitutions. Examples are: Benin, 1990, Preamble; Botswana, 1966 (Rev. 2005), Chapter II; Burkina Faso, 1991 (Rev 2012) Title I; Cameroon, 1972 (Rev. 2008), Gambia, 1996 (Rev 2004) Chapter IV and; Ghana, 1992 (Rev. 1996).

A constitution has been defined as “the most important legal document for a nation that subscribes to the rule of law”, which defines the relationship between the citizens and their government. It has also been defined as an instrument to articulate and protect universal human rights norms. Constitutionalism does not lend itself to a definitive meaning but may be defined by its characteristics. It has been defined by:

[…] its common elements as constituted through many variations in different constitutions. It declares the sovereignty of the people and derives its authority from the will of the people. It prescribes a blueprint for representative government responsible and accountable to the people through universal suffrage at periodic elections. Government authority is to be exercised only in accordance with law established pursuant to constitutional processes and consistent with constitutional prescriptions and limitations. Government is for the people, but is limited by a bill of individual rights. It is in this last respect that the Universal Declaration has had

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the greatest influence – being drawn upon, emulated or directly incorporated into the national constitutions as a bill of rights limiting government power.174

Constitutionalism seeks to guarantee human rights in countries governed on the basis of constitutions. A constitution imposes limitations on government, and protects the citizens from abusive and arbitrary government action. The government derives its authority from the people and the authority is to be exercised in accordance with prescribed laws and procedures. To ensure that human rights are observed, the constitution normally limits the power of government by constitutional provisions in the form of a bill of rights or fundamental freedoms. This creates awareness in the people of their rights and enables civil society to serve as a watchdog of the conduct of the government in respect of human rights.

Even though the UDHR has had a profound influence on the constitutions of many countries, it has been argued that constitutional provisions reflecting UDHR may not necessarily guarantee the enjoyment of these rights by the people which raises the question of the significance of the influence of the UDHR on constitutionalism. One school of the thought represented by Dick Howard is that constitutional provisions may operate as mere window dressing rather than providing actual human rights protection.175 Howard argues that in some instances constitutions have been reduced to “worthless scraps of paper” or “convenient screens” that shield dictators.176 In other words, the constitution of a state may provide a bill of rights. To the outside world the impression is that human rights are respected and protected in that state, whilst, in practice, human rights of the people are not protected or respected. For example, even though many African countries’ constitutions contain a bill of rights, Sarkin cites Amnesty International that, human rights violations continue to be a persistent problem in Africa, and some states do not tolerate dissent while others restrict freedom of expression.177 The constitutional provisions in such a situation are calculated to mask the manner in which the state treats its people, and serves as a convenient screen for the abuse of human rights. Authoritarian rulers provide a bill of rights in the constitutions of their

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174 P. Danchin, note 169.
countries, with the goal of deceiving national and international audiences. These “governments might accept the validity of human rights norms but still continue to torture prisoners, or detain people without trial and so on.” The countries that perpetrate odious human rights abuses “offer robust rights protection in their constitutions.” For example, even though Afghanistan has the lowest literacy rate in the world, its constitution provides a right to education, and North Korea’s constitution guarantees freedom of expression. Constitutional provisions may not necessarily provide protection for human rights. However, the existence of a bill of rights in the constitution makes the people aware of the rights that they are entitled to, and of any excessive breach of these rights. This makes the government more open to pressure from the nationals who are “sympathetic to international human rights.” Thus, for example, in a state where democratic elections take place, it could lead to the abusive government being voted out of power. Furthermore, the existence of a bill of rights in the constitution of a state exposes it to international scrutiny as to whether these rights are observed, and this may encourage the state to refrain from abusing the human rights of the people.

The other school of thought is that these arrangements “have facilitated improvements in rights practices on the ground.” Rosenthal argues that regimes are unlikely to abuse human rights that are guaranteed in a constitution. Elster shares this view with the observation that guarantees of human rights in a constitution can pressurise a government to accede to demands for the protection of those rights. In the words of James Madison, “political truths declared in that solemn manner…become incorporated with the national sentiment, and counteract the impulses of interest and passion.”

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182 Donnelly, note 155, p. 230.
183 Elkins et. al. note 139, p. 63.
in a constitution become ingrained in the minds and consciousness of the people, and the
government cannot abuse these rights as it pleases. Sartori argues that constitutional
provisions on human rights serve as standards by which the public and the international
community can judge the conduct of the government.\(^\text{187}\)

It is submitted that constitutional provisions on human rights engender awareness in the
population of their human rights. This ensures that government will not abuse the human
rights of the population. There may be exceptions as already observed, in the case of
Afghanistan and North Korea, but a bill of rights in a constitution creates a legitimate
expectation both nationally and internationally that human rights will be observed. In
countries such as South Africa, Ghana, Botswana, Namibia, etc.\(^\text{188}\) government respects
the human rights of its people, failing which it risks being voted out of power. The people have
the right to challenge in the courts the infringement of their rights and freedoms. In a state
where the government rules in accordance with constitutional processes, constitutional
prescriptions, and limitations, human rights of the people are respected. A factor that may
trigger external armed intervention or humanitarian intervention in a state is the gross abuse
of the human rights of the citizens. Thus, a state that respects the human rights of its citizens
does not open itself to external armed intervention in the name of human rights.

### 2.2.7. Questions about the universality of human rights

The purpose of this section is to discuss the question whether human rights are or should be
universal in the light of the differences in the political, cultural, and religious background of
the various countries of the world. If human rights are not universal, then there should be no
justification for armed intervention in the name of human rights. The UDHR conveys the
notion of universality in its name\(^\text{189}\) with the assumption that human rights are universal.
However, even though the UDHR was “drafted by representatives with different legal and
cultural backgrounds from all regions of the world”,\(^\text{190}\) it was adopted when the United
Nations consisted of only 58 Member States, with eight nations abstaining from the
vote.\(^\text{191}\) Currently, there are 193 members, South Sudan being the latest.\(^\text{192}\) The 135 nations

\(^{187}\)Sartori, note 178 supra, pp. 853-64,

\(^{188}\)Ibid.

\(^{189}\)Genugten, note 87 supra, p. 208.

\(^{190}\)Ibid

that became members of the UN after the adoption of the declaration have different historical, cultural, and religious backgrounds, which ought to be taken into account in the discussion on the universality of UDHR. These states did not participate in the discussion and adoption of the Declaration. It is probable that in the light of their backgrounds, and being the majority, they could have influenced the contents of the Declaration in terms of the universality of the rights contained therein. However, it can be argued that as human rights are innate in a human being, they are universal regardless of their backgrounds, and therefore, even though the contributions that these states would have made cannot be determined with certainty, it can be assumed that if they had participated in the discussions, they would have gone along with the original members who voted to adopt the Declaration. As observed by Donnelly, countries that later achieved their independence and became members of the UN were at least “enthusiastic in their embrace of the Declaration as those who voted for it in 1948.”

Each culture has its own values and practices. What one culture considers as normal and acceptable may be bizarre and abhorrent in another. So, for example, the right to freedom of religion may be a legal right in one system, e.g. Canada, but not in another. Gay rights are regarded as human rights in the West, but in most African cultures, e.g. Ghana, Uganda, Kenya, Nigeria and Cameroon etc., homosexuality is considered to be an abhorrent practice and, therefore outlawed. “Islamic governments from Afghanistan to Sudan have claimed cultural and religious immunity from human rights standards.” Restrictions on the activities of women in the Islamic world are justified on the grounds of morality. For example, women are not allowed to drive cars in Saudi Arabia. Capital punishment, which is considered to be inhumane, has been abolished in some countries like South Africa and Namibia, but the death penalty is still exists in Nigeria and Egypt.

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193 2005 World Summit Outcome, paragraph 121.
195 Perry, note 85 at 777.
198 Ibid.
200 Ibid.
U.S.A, such as Alabama, Arizona, California, Florida, Texas, Utah, Wyoming etc., the death penalty is on the statute books, and sentences are routinely carried out. In West Africa, specifically in Liberia, Mali, Benin and Niger, pre-trial detainees are kept for long periods in prison arbitrarily “under terrible conditions,” while the prohibition on torture and inhuman treatment is guaranteed in other countries. These examples show that human rights are not necessarily universal, to the extent that even though innate in a human being, the enjoyment of these rights is not uniform in every country, because what is a human right in one country may not be a human right in another. Furthermore, human rights may be considered to be values of the West by the peoples who were victims of the dehumanisation of colonialism, for if the ‘civilised’ colonisers were aware of rights and freedoms, it is difficult for the colonised peoples to understand why they were denied these rights. Thus, to the colonised peoples, the notions of rights and freedoms may be viewed as complicit with the legacy of oppression, and essentially the values of the oppressor, and can therefore not be universal.

It is clear then that what is a human right in one country may not be considered as a human right in another, and therefore, it can be argued that human rights are not universal. As observed by Tharoor:

The growing consensus in the West that human rights are universal has been fiercely opposed by critics in other parts of the world. At the very least, the idea may well pose as many questions as it answers. Beyond the more general, philosophical question of whether anything in our pluri-cultural, multipolar world is truly universal, the issue of whether human rights is an essentially Western concept – ignoring the very different cultural, economic, and political realities of the other parts of the world - cannot be ignored.

It is therefore argued that, with the diverse differences in cultural and religious practices, many states which became members of the UN after 1948, would probably, not have

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accepted all the human rights provisions in the UDHR, as being applicable in their territories. Since the conception of human rights differs from state to state in the light of their different backgrounds, the question is raised about the legality or legitimacy of the use of force by one country or group of states in another, in the name of abuse of human rights in the latter. It is argued that even though unilateral humanitarian intervention is unlawful under international law, it is legitimate on moral grounds in situations of egregious abuses of human rights. Every human being is endowed with certain natural rights inherent in his/her status as a human being. Therefore, in this sense, human rights are universal. The desire to be treated with dignity is innate in the human psyche regardless of nationality, religion, culture, or history, and given a choice, no human being will choose to be tortured, deprived of his/her life, liberty or property without due process. Thus, if a state grossly abuses the human rights of its citizens, it provides legitimate grounds for the sovereignty of the state to be overridden in the name of human rights. Human rights are no longer considered to be solely the business of a state or within the exclusive preserve of a state, because the international community has an interest in the manner in which a state treats its people. Human rights are therefore universal rights, and cannot be abused with impunity by any state.

2.3. Part II - State sovereignty and non-intervention in the United Nations System

Part II provides a brief background of sovereignty and the principle of non-intervention in the context of the change in the understanding of sovereignty since the end of the Cold War. Traditional sovereignty conferred on a state the right to organise its internal affairs as it pleased free from intervention by external powers. Thus, how a state treated its national was its own business. However, since the end of the Cold War, the new understanding of sovereignty is that the basis of governmental power is the people or put another way, the government derives its power from the people. Sovereignty is therefore the peoples’ sovereignty, and not the sovereign’s sovereignty. Thus, the government owes a duty to the people to protect them, and not to deny them their human rights or fundamental freedoms. This part discusses the redefinition of state sovereignty and the principle of non-intervention after the Cold War.
Westphalian sovereignty means that a state has the freedom to determine its own destiny and its relations within the community of states. The basic principle that one state has no right to interfere in the domestic affairs of another is the result of the equality and sovereignty of states, enshrined in Article 2(7) of the UN Charter. However, the concept of sovereignty as envisaged by Article 2(7) has been redefined by world events since 1990. The redefinition has come about as a consequence of a combination of factors, most important of which is that power has shifted from the state to the people with the result that the people are the source of power and legitimacy and authority. Other factors that have contributed to the redefinition of sovereignty include globalisation and concerns about human rights, especially by powerful states. In this light, the actions of the state are restricted particularly regarding human rights, and the recognition of the sovereignty the state by the international community is conditional upon the observance of obligations regarding compliance with human rights. The consequence of concerns for human rights have led to the adoption of the doctrine of “Responsibility to Protect” (R2P), which defines sovereignty in terms of a state’s responsibility to protect and not to terrorise its people. This new doctrine endorses the use of force by the international community to override the sovereignty of a state to protect people suffering serious harm, as a result of repression or internal war and where the state is unable or unwilling to halt or avert their suffering. The concept of sovereignty and its corollary principle of non-intervention have therefore been compromised by the willingness of the international community to use force in defence of victims of excessive human rights abuse.

The basic elements of the modern concept of statehood and state sovereignty derived from the Westphalian model, which dates back to the Treaty of Westphalia or the ‘Peace of Westphalia’ in 1648. The Peace of Westphalia put in place the framework for the emergence of independent, territorially defined states, with one specific authority in that

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206 ICISS Supplementary Volume, p. 10.


208 ICISS Report 2001, p. XI

209 Ibid.

210 A Hehir, note 27, p. 45.
territory, and a prohibition on outside interference.\textsuperscript{211} The main legacy of Westphalia is the establishment of this dual aspect of sovereignty, namely, internal sovereignty consisting of the supremacy of a specific authority within a state, and external sovereignty consisting of the recognition of the state’s independence and non-interference in its affairs by other states.\textsuperscript{212} With the signing of the Peace of Westphalia in 1648, “non-interference in the international affairs of the most repressive governments was the golden rule of international diplomacy.”\textsuperscript{213} The Peace of Westphalia established the rules regulating relations between states and made international security dependent on the principles of the “integrity and inviolability of territorial borders.”\textsuperscript{214} Thus, under the Westphalian system, sovereignty centred on the state, and the inviolability of its territory at the expense of the protection of human rights. The state had the legal right to conduct affairs within its territory as it deemed fit. Supreme authority rested with the state. It had the power to treat its population in any manner it chose to, and no external actors could question its authority or intervene on behalf of the people. As articulated by Sarkin:

Traditional notions of sovereignty cabin the domestic affairs of a state within the purview of that state, regardless of its misconduct – no matter how atrocious – towards its people.\textsuperscript{215}

“Nations states inherited the pedigree of sovereignty and unassailable position above the law that has since been frozen in the structure of international relations.”\textsuperscript{216} In other words, states have claimed entitlement to traditional Westphalian sovereignty, which underpins international relations between states, and confers on a state the competence and independence to decide matters within its domestic jurisdiction free from external dictates and interference, even if it subjects its people to egregious human rights abuses.

The traditional notion of sovereignty, the Westphalian legacy, which is reflected in the contemporary international order meant that:

\textsuperscript{211} Ibid.
\textsuperscript{213} M. Gilbert, The Terrible 20\textsuperscript{th} Century, \textit{The Globe and Mail}, (Jan 31, 2007).
If a state has a right to sovereignty, this implies that other states have a duty to respect that right by, among other things, refraining from intervention in its domestic affairs…The function of the principle of non-intervention in international relations might be said, then, to be one of protecting the principle of sovereignty.217

The statement implies that sovereignty involves reciprocal respect among states. Thus recognition of the sovereignty of a state places a corresponding duty on other states to respect that sovereignty. Respect for the state’s sovereignty means that its territorial integrity is inviolable in the sense other states have a duty to refrain from interfering in its domestic affairs. It might be said then that the principle of non-intervention serves the primary function of protecting the concept of sovereignty. Under Westphalian sovereignty states had a right to govern themselves however they chose, free from outside interference or intervention.218 This is what is commonly referred to as “traditional” meaning of sovereignty. 219 Sovereignty, the concept of “the independent and unfettered power of a state in its jurisdiction lies at the heart of customary international law and the UN Charter.”220 Sovereignty means the competence, independence, and legal equality of states221. It encompasses all matters in which a state under international law has the right to decide and act without external interference, and constitutes the foundation of interstate relations and the contemporary world order.222 In other words, sovereignty is a prerequisite for the maintenance of international peace and security. Thus, under the Westphalian model, sovereignty was protected by the principle of non-intervention in the sense that every state had the right to conduct its internal affairs and foreign policy freely without interference or dictates of external actors. Therefore, the manner in which a sovereign state conducted its affairs within its territory was its own business, and no other state had a right to interfere in its internal affairs.

However, the notion that the Peace of Westphalia gave nation states sovereignty and “unassailable position above the law” may not be entirely correct. While it is true that the current international order recognises the importance of sovereignty in the maintenance of

219 Ibid.
221 Ibid.
222 Ibid.
international peace and security, sovereignty does not confer on states “unassailable position above the law” in the light of worldwide recognition of human rights and the interdependence of states. In the contemporary international order, sovereignty is not absolute, and no state is above the law, for the manner in which a state treats its nationals is of concern to other states. Therefore if a state subjects its nationals to excessive human rights abuses, its sovereignty may be overridden by external armed intervention to halt the abuses.  

The Treaty of Westphalia introduced the concept of statehood and the concept of state sovereignty. It established that a state or a sovereign enjoyed exclusive authority within a defined territory and states could decide their own domestic policies including how they treated their nationals, without outside interference. The attributes of a state were codified by the Montevideo Convention of 1933 as consisting of the following:  

(a) a defined territory;  
(b) a permanent population; (c) ability to exercise exclusive authority over its territorial boundaries; and (d) the capacity to enter into relations with other states. All states are juridically equal, and no state has the right to intervene in the internal or external affairs of another state. The United Nations Charter adopted this model. Thus, Article 2 of the Charter affirms that “the organization is based on the principle of the sovereign equality of all its Members.” The United Nations was created at the end of World War II to “save succeeding generations from the scourge of war,” and to ensure that the horrors of the war will not be repeated. Accordingly, the Charter “was worded through the perspective of a rear-view mirror, with the intention of preventing catastrophes of the likes brought about during the two world wars.” Motivated by this objective, the Charter stated that one of its primary purposes was “…to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.” Thus, the main purpose of the Charter was to lay a foundation for an international order based on the one hand on the “century old rejection of the

223 ICISS Report, note 1, p. XI.  
224 1933 Montevideo Convention on the Rights and Duties of States.  
225 Ibid. Article 1.  
226 Ibid. Article 4  
227 Ibid. Article 8  
228 UN Charter Article 2(1).  
229 Ibid. Preamble  
230 Axworthy, note 213 supra, p. 5.  
231 UN Charter Preamble.
use of force and on the other hand…on the sacrosanct notion of state sovereignty deriving from the Peace of Westphalia.”

Sovereignty is therefore recognised by the Charter as necessary for the preservation of international peace and stability in international relations. The equality of states enshrined in the concept of state sovereignty and its corollary principle of non-intervention, has been described as a “…final defence against the rules of an unjust world,” because it serves as a shield to protect weaker states from the pressure of more powerful states, in the sense that respect for the sovereignty of a state imposes a duty on other states to refrain from interfering in the affairs of the state. Thus, other countries, no matter how powerful, have no right to interference in the affairs of other countries. However, even though in theory sovereignty and the principle of non-intervention place a duty on states to respect the territorial integrity of other states, the concept of sovereignty has routinely been violated by powerful countries, and therefore, in practice, respect for sovereignty has not guaranteed that powerful states will not intervene in the domestic affairs of weaker states. Examples of intervention by powerful states in weaker states include the invasion and occupation of Iraq by the United States and its allies in 2003, and NATO’s attack on Yugoslavia in 1995 leading to its dismemberment. It is a trend that is likely to be repeated, because powerful countries can and will intervene in any country without restraint when it suits them. An illustration can be found in the address of the President of the United States before the United Nations General Assembly, in which he warned “I lead the strongest military that the world has ever known, and will never hesitate to protect my country or our allies, unilaterally and by force if necessary.” This assertion flies in the face of respect for international law, and “is not about the assertion of US power, so much as the expression of US exceptionalism.” Put bluntly, this means that the United States can do anything it pleases. This position undermines the integrity of the United Nations Security Council and international law, and would encourage other powerful countries to do likewise. It does not provide weaker states with the assurance that sovereignty is a shield to

\[233\] Ibid.
\[234\] A. Boueteflika, Algerian President and former Chairman of the OAU, in his 1999 address to the UN General Assembly.
\[236\] Ibid. p. 15.
protect them from unlawful armed intervention, and poses a great threat to international peace and security.

Intervention involves the use of force. Intervention is prohibited by international law if “it is ‘dictatorial,’ i.e. if it is accompanied by the threat or use of force or other forms of coercion.” The United Nations Charter expresses objection to intervention through Article 2(4), which affirms clearly that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

Article 2(4) explicitly expresses the inviolability of the sovereignty of all member States and “outlaws war as an instrument of policy.” The drafters of the Charter should not have placed a blanket prohibition on the use of force at a time when the world had just emerged from the Holocaust. There are situations where it is absolutely necessary to use force in defence of victims of genocide, for example. International action during the Rwanda genocide would have saved tens of thousands of innocent lives. The widespread recognition of human rights has created a permissive attitude towards humanitarian intervention, and it has become more difficult for states to get away with mass murder. Weiss is of the view that defectors from agreed norms, and commitments relating to human rights “should be identified and incentives and disincentives (including the use of force to bring the noncompliant back into line) should be available to punish them.” In other words, if a state abuses the human rights of its nationals in total disregard of international human rights standards, force should be used to halt the abuses.

On the other hand, it may be argued that the prohibition of force was enshrined in the Charter with deliberation, because the drafters foresaw that the use of force without restraint

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would encourage powerful states to use force against weaker states who are their equals in international law. For example, a powerful state can use the pretext of protecting human rights, and apply force in the territory of a weaker state in advancement of its national or strategic interests. Conversely, a state may not intervene militarily in a powerful country, even on humanitarian grounds, because the latter will vigorously resist and repel the intervention at unacceptable cost to the intervening state. Thus, powerful states such as Russia and China will be immune from armed intervention, no matter what they do to their peoples.  

244 The Security Council is often unable to take any intervention action against that abuse the human rights of its people, unless the state is “distinctly small and powerless.”

245 Therefore, the prohibition of the use of force was meant, primarily, to protect international peace and security, and secondly, to provide protection for weaker states against interventions in their territories by more powerful states.

The Charter permits only one exception to the use of force (apart from UN Security Council authorised interventions), and that is, the use of lawful force by a state in response to unlawful force under Article 51. Article 51 permits a state to use force in self-defence in response to an armed attack. Article 51 is a safeguard when the collective security mechanism fails, and “provides a means of defence requiring no Security Council approval.”

246 However, the prohibition of the use of force is so absolute that even the exercise of the lawful right of self-defence under Article 51 is to be under the supervision of the Security Council. Where a state has taken action in self-defence, measures taken must be discontinued as soon as the Security Council takes measures necessary to maintain international peace and security. This is because the Security Council is the only organ of the United Nations with the authority to determine what constitutes an aggressive action and the appropriate action in response.

247 The blanket ban on the use of force demonstrates the rigid stance of the Charter on the principles of sovereignty and non-intervention, and the importance it attaches to the protection of the sovereignty of states. On the other hand this may encourage some states conscious of the protection given by sovereignty and non-

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248 Ibid. p. 49.
intervention to abuse the human rights of their nationals. The Charter goes further in its affirmation of the principle of non-intervention in Article 2(7), stating that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.

The article prohibits the United Nations itself from intervening in matters essentially within the domestic jurisdiction of any state except in the application of enforcement measures under Article VII.\textsuperscript{249} In Article 2(7), the United Nations “compromises its own decision making power and values with the inviolability of the integrity of its Member States.”\textsuperscript{250} There is nothing wrong with Article 2(7), because it leaves room for occasions where the UN may intervene in the affairs of a state, where there are threats to international peace and security. Therefore, the prohibition on the UN is not absolute. However, it is argued that apart from interfering in a state where there are threats to international peace and security, and in relation to the other domestic matters that it has elevated unto the international plane,\textsuperscript{251} the UN should have no business meddling in the domestic affairs of any state. The principle of non-intervention is considered to be the cornerstone of the concept of state sovereignty that underpins the system of relations among states.\textsuperscript{252} Article 2(7) demonstrates the degree of reverence that the Charter has for sovereignty and the inviolability of the territories of its Member States, and the article was therefore “introduced to protect the jurisdictional autonomy of states as members of the UN.”\textsuperscript{253}

The principle of non-interference in the affairs of sovereign states has been reinforced by United Nations resolutions and declarations. The 1965 Declaration on the Inadmissibility of Intervention\textsuperscript{254} prohibits all forms of intervention directly or indirectly, for whatever reason, in the domestic or external affairs of other states.\textsuperscript{255} The declaration prohibits States from the

\textsuperscript{249}UN Charter Article 2(7).
\textsuperscript{250}Krieg, note 231 supra, p. 11.
\textsuperscript{251}ICISS Supplementary Volume, p. 8
\textsuperscript{252}ibid.p. 6.
\textsuperscript{254}Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Resolution 2131, (A/RES/36/103) adopted on 21 December 1965.
\textsuperscript{255}ibid. para. 1.
threat or use of force to violate the territories of other States.\textsuperscript{256} Article 1 of the 1970 Declaration on Principles of International Law,\textsuperscript{257} General Assembly Resolution 2625/1970 (the Friendly Relations Resolution) also affirms that “All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences in economic, social, political or other nature.” The International Court of Justice has endorsed this principle with the observation that, ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations’\textsuperscript{258}, and “the principle on which the whole of international law rests.”\textsuperscript{259} In the Corfu Channel Case, the Court observed that\textsuperscript{260}:

The alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.\textsuperscript{261}

As the statement of the International Court of Justice indicates, coercive interventions are unlawful and have no place in international law, because the interventions involve strong states intervening in weaker states that are their equal counterparts with the pretext of protecting human rights. Prior to 1945, powerful states asserted a right of humanitarian intervention\textsuperscript{262} that entitled them to intervene in other states with the pretext of protecting human rights. The International Court of Justice by this statement repudiates the right of

\textsuperscript{256}Ibid. para.2 (II) (a).
\textsuperscript{257}Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Resolution 2625 (XXV), (A/RES/25/2625) adopted on 24 October 1970. – ‘The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter’, repeats almost verbatim paragraph 1 of GA Resolution 2131, note 192.
\textsuperscript{258}Corfu Channel Case, (Merits) ICJ Reports 1949, p. 35.
\textsuperscript{259}Nicaragua v United States of America, (Merits) ICJ Reports, Judgment of 27 June 1986, para. 263.
\textsuperscript{260}Corfu Channel, note 257 supra, p. 35.
\textsuperscript{261}Ibid. p. 35.
intervention. The right of intervention belonged to a bygone era, and is not applicable in the contemporary era in the light of the prohibition of the use of force under Article 2(4) of the UN Charter. As observed earlier, Article 2(4) was meant to provide protection for weaker states against their more powerful counterparts. The drafters of the UN Charter were conscious of the fact that the use of force without restraint will undermine peace and stability in international relations. Roth shares the view that the current international order’s efficacy rests on its ability to reconcile “the long-term policy interests of its participants, strong and weak by means of the principle of sovereign equality,”263 which recognises the principle of non-intervention. Expressing agreement, Krieg argues that under the contemporary international system, “which is still bound to a state system of the Westphalian era, the sovereignty of states is at least de jure sacred.”264 On the other hand, Sarkin argues that, while sovereignty “has not been discarded entirely, it has in recent years eroded.”265

The proposition of the unassailability of sovereignty is questionable. It rests solely on the premise that interventions are in breach of the concept of sovereign equality of states and the principle of non-intervention in the domestic affairs of states enshrined in the Charter of the United Nations Article 2(7). This line of argument posits, therefore, that interventions must be discouraged if the United Nations Charter is not to be undermined, because they serve as precedents for other states to follow, resulting in anarchy in the international order. Indeed, Roth has argued that the right to non-intervention must be accorded to even states ruled by “ruthless governments because “what appears ‘disproportionate’ to someone else’s cause, however just, frequently appears exigent in the service of one’s own.”266 In other words, what appears unjust and disproportionate in someone’s judgement may be just and necessary for the attainment of another’s political objectives, and what one country considers to be excessive abuse of human rights may not be seen in the same light by the perpetrating state. However, even Roth concedes that the duty to refrain from coercive intervention must be limited by the existence of clearly universal standards, and this duty can legitimately be “overcome in some class of unambiguously catastrophic cases,”267 though he adds a caveat that caution should be exercised to ensure that the “exceptions should not be allowed to

264 Krieg, note 231, p. 11.
266 Roth, note 262 supra, p. 120.
267 Ibid. p. 107.
swallow the rule.” That is, in situations where there is no doubt about the catastrophic scale of human rights abuses, the duty to refrain from armed intervention falls away, but the principle of non-intervention is not to be discarded altogether because of these exceptional cases.

On the other hand, it has been argued that sovereignty can and must be justified, since sovereignty is “not merely limited by human rights, but should be seen to exist only in function of humanity.” Where there is conflict between human rights and sovereignty, it should be resolved in favour of humanity. Sovereignty has therefore been humanized, which implies the state’s responsibility for the protection of basic human rights, the state’s accountability, and a reassessment of humanitarian intervention which requires that, under very strict conditions, the Security Council has a duty to authorise “proportionate humanitarian action to prevent or combat genocide or massive and widespread crimes against humanity.”

It is argued that the principle of non-intervention can be an impediment to necessary, and prompt action in defence of victims of atrocities. Broadly speaking, armed intervention can be a noble undertaking because the ostensible motive is to alleviate or halt the suffering of defenceless people. Thus, if the principle of non-intervention is rigidly adhered to without exception as provided by Article 2(7) of the Charter, then no alternatives remain for the international community to protect victims of gross human rights abuses when peaceful methods fail. It is the responsibility of the Security Council to take measures to maintain international peace and security, including the protection of the human rights of vulnerable people under Chapter VII. However, if the Council fails or is unable to react to excessive human rights abuses in a state, including mass killings, ethnic cleansing, or war crimes in accordance with its mandate under Chapter VII, then self-help or unilateral interventions by more powerful states become justified, because the world cannot stand by while mass slaughter of people on ethnic, religious, or racial grounds takes place. Sovereignty is neither de jure or de facto sacred when it comes to protecting victims of excessive human rights abuses. Armstrong shares this view with the observation that:

268 Ibid. p. 130.
270 Ibid.
271 Ibid.
272 Ibid.
The argument that the freedom of a dictator to murder, oppress and steal from his fellow citizens is his legal right under a strict application of the principle of non-intervention is no less a part of the normative framework of ‘old’ international law than the right to imperial conquest or the mission to ‘civilise’.\textsuperscript{273}

Just as colonialism, the rule of European states over many African and Asian states without their consent cannot be justified, so can there be no justification for a tyrant’s right to terrorise his fellow citizens. Both are not justifiable and cannot be permitted in the contemporary international order. Therefore, if the Security Council fails or is unable to react to excessive human rights abuses pursuant to the discharge of its responsibilities under Chapter VII, any state or organisation with the capability may have the moral justification to intervene in affected state with the expectation that the action will receive post-intervention endorsement of the Security Council. An example is the ECOWAS intervention in Liberia in 1990. Sovereignty and non-intervention should not be preserved at the expense of human lives.

2.4. Post-Cold War challenges to state sovereignty and the principle of non-intervention

This section discusses events in international politics that have redefined the concept of state sovereignty with the inevitable impact on the principle of non-intervention. During the Cold War, international frontiers were regarded as inviolable and sacrosanct with the concept of non-interference in internal affairs, often overriding collective efforts to assist victims of gross human rights abuses in their own countries.\textsuperscript{274} The traditional concept of sovereignty, with its notion of monopoly of power by the nation state and the exclusion of external actors, is facing challenges in the contemporary globalised and borderless world,\textsuperscript{275} in which, in the words of Kofi Annan, threats are “problems without passports.”\textsuperscript{276} No longer can a state claim to have a monopoly over matters that take place within its territory, especially where human rights are concerned.\textsuperscript{277} In an interdependent world, what happens in one country has ramifications beyond its borders.\textsuperscript{278} The absolute rights that sovereigns have traditionally

\textsuperscript{273}Armstrong & Lambert, (2010), note 50, 286.
\textsuperscript{274}Cohen, note 44, p. 11.
\textsuperscript{275}Axworthy, note 213, p.3.
\textsuperscript{276}K. Annan, Problems Without Passports, \textit{Foreign Policy}, (September 1, 2002).
\textsuperscript{277}ICISS Supplementary Volume, (2001), p. 8.
\textsuperscript{278}Trachtman, note 91, p. 857.
enjoyed are being challenged by the “demands of human rights and notions of sovereign responsibilities.” 279 In the face of these challenges, if a state subjects its inhabitants to gross human rights abuses, the Westphalian concept of sovereignty will not prevent external actors from taking action to protect the victims of abuse. 280

The challenges to state sovereignty have taken various forms, namely:

i.  Broadening ‘threat to international peace and security’

This subsection discusses the challenge posed to traditional sovereignty by the expansion of the meaning of what constitutes a ‘threat to international peace and security.’ 281 The focus of the UN Charter in the maintenance of international peace and security was originally on the external use of force by one state against another in committing an act of aggression. 282 Thus, an act of aggression is considered to be a threat to international peace and security, and therefore, when it occurs the Security Council is empowered to take enforcement action to override the sovereignty of the offending state to halt or reverse the aggression. The United Nations Security Council has the discretion to determine which events constitute a threat to international peace and security, and the practice of the Council demonstrates that gross abuse of human rights within a state is considered as a threat to international peace and security. It has been argued that the Security Council can classify any event as a threat to international peace and security subject not to any constraints of law, but only to the political vetoes of its permanent members. 283 Notwithstanding the reasons, however, the Security Council may determine both what constitutes threats to international peace and security, and the actions to be taken to remedy such situations. 284

Examples of Security Council practice broadening the scope of what constitutes threats to international peace and security are: (i) In 1990, the Security Council determined that the repression of the Iraqi civilian population, especially the Kurds in Northern Iraq by the forces of Saddam Hussein posed a threat to international peace and security; 285 (ii) In 1997, the

279Glanville, note 217, p. 2.
280ICISS Report, p. XI.
281ICISS Supplementary Volume, p. 9.
282Article 39, UN Charter.
Council determined that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constituted a threat to international peace and security;\(^{286}\) (iii) In 1994, the Security Council determined that the systematic violations of civil liberty and the desperate plight of refugees in Haiti constituted a threat to peace and security in the region;\(^{287}\) (iv) Similarly in 1994, the Security Council determined that the systematic and widespread killings of the civilian population in Rwanda constituted a threat to peace and security in the region. In all these cases, the Security authorised enforcement measures under Chapter VII on the basis of human suffering and the gross abuse of human rights in those countries, thereby broadening the meaning of what constitutes a threat to peace and security to include gross human rights abuses. Consequently, the sovereignty of a country may be overridden, not only in the case of aggression by the state, but also where egregious human rights occur in the state.

Previously, wars, including the World War I and World War II, were waged by states across borders.\(^{288}\) At the end of the Cold War, however, the international community was faced with a new kind of conflict.\(^{289}\) While in the past wars were waged between armies, and casualties were predominantly soldiers, the post-Cold War era witnessed “many developing nations degenerating into situations of civil conflict.”\(^{290}\) These conflicts were in the form of internal wars “fought locally (in neighborhoods, villages, and other sub-national units).”\(^{291}\) The “focus of these wars no longer coincide with state borders; …non-state actors are playing an increasing role…instead of combatants being the main victims, civilians are increasingly paying the lion’s share of the costs.”\(^{292}\) A requirement of sovereignty is that a State must have the capacity to control its domestic as well as international affairs.\(^{293}\) However, in a situation of internal conflict, there is often no functioning government. Law and order break down, resulting in anarchy, leading to the gross abuse of the human rights of the local population. These conflicts, though internal, have ramifications for neighbouring countries, because the political dimensions of internal disorder and suffering often result in wider international

\(^{286}\) Security Council Resolution 794 (1997)
\(^{287}\) Security Council Resolution 940 (1994)
\(^{288}\) Weiss, note 18, p. 71.
\(^{289}\) Weis, note 18, pp. 69 -70.
\(^{290}\) Ibid.
\(^{291}\) Ibid.
\(^{292}\) Ibid.
\(^{293}\) Montevideo Convention on the Rights and Duties of States, 1933, Article 1.
disorder. Intrastate violence can result in international destabilisation from the spill over effects of conflict. For example, civil wars and factional fighting in Syria, Libya, and Yemen are generating record levels of population displacement, internally and across international frontiers, as illustrated by the current refugee crisis in Europe. As Kofi Annan, former Secretary-General of the UN, put it:

Wars since 1990 have been mainly internal. They have been brutal, claiming more than 5 million lives. They have violated, not so much borders, as people…In the wake of these conflicts, a new understanding of security is evolving. Once synonymous with the defence of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence.

Therefore, since the end of the Cold War, the definition of ‘threat to international peace and security’ under Chapter VII has been given a broad interpretation to override the principle of non-intervention. Thus human rights abuses and the repression of populations are considered as factors that threaten international peace and security. For example, UN Resolution 688, referring to the responsibilities of the Security Council under the Charter for the maintenance of international peace and security, recalling Article 2(7), expressed grave concern about the “repression of the Iraqi population…which has led to a massive flow of refugees towards and across international frontiers…which threaten international peace and security in the region…,” and condemned the repression of the Iraqi civilian population including those in Kurdish areas. Francis Deng, the then Representative of the Secretary-General on Internally Displaced Persons, was of the view that where human rights and humanitarian matters are involved, “…no state can say: ‘This is an internal matter and it does not matter how I manage my situation, it’s none of your concern.’ The world is watching...

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295 Axworthy, note 213, p. 4.
298 ICISS Supplementary Volume, p. 9.
closely, and if necessary, would get involved.”

Thus, during the 1990s, the Security Council stretched the application of threats to international peace and security to “facilitate interventions in situations where the threat to international peace and security was minimal.”

For example, in 1994, the Security Council under Resolution 940, ordered intervention in Haiti to restore the democratically elected President.

The expansion of what constitutes threats to international peace and security has been questioned. The Danish Institute of International Affairs (DIIA) argues that:

> It was hardly the intention of the framers of the Charter that internal conflicts and human rights violations should be regarded as a threat to international peace. There is no evidence that they might have envisaged a competence for the Security Council under Chapter VII to take action to cope with situations of humanitarian emergency within a state resulting from civil war or systematic repression.

This argument is not plausible, because as already observed, the abuse of human rights of its citizens by a state or civil strife is not solely the business of the state. For example, civil war can lead to massive flight of refugees across international frontiers, which may be burdensome to the receive receiving. This may compel this state to take remedial military action against the affected state, leading to a threat to international peace. Therefore, the Security Council under Chapter VII is empowered to take action in states ravaged by civil war, or where there is systematic repression.

**ii. The redefinition of Sovereignty**

The purpose of this sub-section is to discuss the challenge posed to state sovereignty and the principle of non-intervention by the redefinition of traditional sovereignty. The United Nations Charter commits the organisation to two conflicting ideals. On the one hand, the UN commits itself to promote universal respect for and observance of human rights for all, without distinction as to race, sex, language or religion. On the other hand, the organisation and its Members undertake to sanctify state sovereignty by making it inviolable with a

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301 Hehir, note 27 supra, pp. 90-91.

302 Ibid.

303 UN Charter, Article 55(c).
prohibition on intervention in the domestic affairs of states and a prohibition on the use of force. Thus, the Charter affirms both the primacy of human rights and the essentiality of state sovereignty. The Charter’s provisions are therefore contradictory and ambiguous, and provide no guidance as to how to reconcile these two ideals, namely, the importance of human rights and the reverence for state sovereignty. In response to the argument that the Charter is ill-suited as a guide in a world of ethnic wars and intra-state violence, Kofi Annan, then Secretary-General of the UN, stated:

[…] I believe that they are wrong. The Charter is a living document whose high principles still define the aspirations of peoples everywhere…Nothing in the Charter precludes a recognition that there are rights beyond borders…It is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era; an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of people everywhere to attain their fundamental freedoms.

Annan suggests that human rights transcend borders, and therefore, the time has come for a people-centred notion of sovereignty to take precedence over traditional state-centred notion of sovereignty, in the interest of promoting human rights and fundamental freedoms. Human security, which includes the guarantee of fundamental human rights, must be given the same importance as the traditional notions of security based on the defence of borders in the light of threats confronting individuals. Human security involves freedom from “pervasive threats to people’s safety and lives,” hence humanitarian intervention enters when mass murder or displacement takes place. Accordingly, there have been calls for a redefinition of sovereignty in the light of international concerns about human rights. Kochler is of the view that:

The concept of ‘national sovereignty’ must be redefined in the light of a general system of norms that is based on the universal validity of human rights. As norms

\[^{304}\text{Ibid. Article 2(7).}\]
\[^{305}\text{Ibid. Article 2(4).}\]
\[^{306}\text{J. Tanguy, Redefining Sovereignty and Intervention, }\textit{Ethics and International Affairs, Vol. 17, No. 1, 2003, p. 141}.\]
\[^{307}\text{Ibid.}\]
\[^{309}\text{L. Axworthy, (2012), note 213, p. 8.}\]
\[^{310}\text{Weiss, note 18 supra, p. 26.}\]
of *jus cogens*, human rights are at the roots of national legal systems as well as the international legal order, and thus transcend the confines of traditional state-centred international law.\(^{311}\)

Human rights are universal, and transcend national boundaries. The respect for human rights should take precedence over state sovereignty. In other words, while a state has the right to conduct its domestic affairs free from outside interference, this should be conditional on the protection of the human rights of its population, because the legitimate expression of the will of a sovereign people that entrusts power to state (government) entails the protection of their rights.\(^{312}\) Therefore, sovereignty should be redefined as people-centred instead of the traditional state-centred sovereignty. Human rights are peremptory norms of international law from which no derogation is permitted, and should therefore take precedence over the reverence for sovereignty. Kofi Annan has articulated this redefinition as the two concepts of sovereignty, namely, ‘the peoples’ sovereignty and the sovereign’s sovereignty.”\(^{313}\) He states:

State sovereignty, in its basic sense, is being redefined – not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty-by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not those who abuse them.\(^{314}\)

To buttress this view, in *Agenda for Peace*, Boutros Boutros-Ghali affirmed the new notion of sovereignty. In his words:

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand

\(^{311}\)Kochler, note 35, p. 4.
\(^{313}\)Annan, note 22 supra, pp. 49 - 50.
\(^{314}\)Ibid.
this and to find a balance between the needs of good governance and the requirements of an ever more interdependent world.315

Annan and Boutros-Ghali affirmed that the worldwide recognition of human rights means that the time of absolute and state-centred sovereignty has passed. States derive their authority from their people, and therefore the responsibility of the state is to serve the interests of the people. Sovereignty should accordingly be viewed as the people’s sovereignty or popular sovereignty. The ‘peoples’ sovereignty’ or ‘popular sovereignty’ espoused by Annan considers the basis of sovereignty as respect for the popular will and governance based on standards of democracy and human rights. Popular sovereignty has been defined as “a doctrine in political theory that government is created by and subject to the will of the people.”316 It has also been defined as a political term “that simply means that the ‘people are the rulers.’”317 Popular sovereignty, therefore, means that the human rights of the inhabitants of a state stand higher than the sovereignty of the state.318 The concept of absolute sovereignty espoused by early philosophers, like Hobbes, in which the concept was devoted to the interests of the sovereign, is no longer applicable.319 The same applies to Westphalian sovereignty, which vested absolute power in the nation-state.320 In the contemporary international order, government derives its authority from the will of the people, and it is accountable to the people through periodic elections. Popular sovereignty is articulated in the Universal Declaration of Human Rights as follows:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.321

In an interview in 1997, Kofi Annan further emphasised the challenge to the traditional concept of state sovereignty and the principle of non-intervention thus:

315 B. Boutros-Ghali, note 40, para. 17.
320 Chopra and Weiss, note 215 supra, p. 104
321 Article 23(3).
I agree that the era of absolute sovereignty, as asserted in the past, cannot be sustained in contemporary conditions. In the years since the founding of the United Nations, we have lived in an interdependent world, a world in which no state has complete control over its destiny. State sovereignty retains its validity as a defining principle of international society and a governing rule in international relations, but the concept has evolved. No longer an absolute barrier to the outside world, it must, in extreme circumstances, give way to the overriding moral imperative to alleviate human suffering, including systematic violations of human rights…

In the words of Annan, sovereignty remains a fundamental principle in international relations. Nevertheless, when gross human rights are perpetrated by a state, its sovereignty should be overridden to provide assistance to vulnerable victims. In other words, where human rights are concerned, states can no longer claim to have negative rights, i.e., the right not to be interfered with.

Popular sovereignty is associated with the concept of “sovereignty as a responsibility,” explicitly associated with the work of Francis Deng, the then Representative of the UN Secretary-General on Internally Displaced Persons and his collaborator, Roberta Cohen. They faced the challenge of “how to work around the denial of assistance by sovereign authorities and;” the challenge of “how to find a way to navigate around the potential denial of humanitarian assistance by sovereigns.” First raised by Cohen in 1991, the concept of “sovereignty as responsibility” meant that sovereignty carries with it the responsibility on the part of governments to protect its citizens, and stipulates that when states are unable to provide protection to their people from serious harm, they are expected to call for external assistance and accept such assistance. If they refuse and their people continue to suffer, the international community will intervene. The principle was articulated by Deng as follows:

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324 Weiss, note 18 supra, p. 25.
Sovereignty as responsibility meant that the state has to take care of its citizens, and if – it needed support – call on the sub-regional, regional or continental organizations, or ultimately the international community. But if it did not do that, and its peoples were suffering and dying, the world would not watch and do nothing. They would find a way of getting involved.\textsuperscript{328}

State sovereignty involves accountability, firstly, to the population in the state and secondly, to the international community, to ensure adherence to observance of human rights.\textsuperscript{329} Therefore, when a state inflicts egregious human rights abuses on its people, its sovereignty falls into abeyance and other states may intervene to protect the people. Sovereignty is no longer considered to be sacrosanct.\textsuperscript{330} As Ramesh Thakur, a member of the International Commission on Intervention and State Sovereignty (ICISS), put it, the unqualified concept of state sovereignty which gave a state immunity from accountability for the brutal treatment of its population, ‘has gone with the wind.’\textsuperscript{331}

The foregoing challenge to state sovereignty and non-intervention gained wide acceptance in the 1990s.\textsuperscript{332} The end of the Cold War saw the collapse of the Soviet Union and the rivalry between the East and the West. The Council was thus liberated from the paralysis that characterised its operations during the Cold War.\textsuperscript{333} It found a new capacity to discharge its responsibilities of maintaining international peace and security, and in particular, with regard to human rights issues. Concerns for human rights spread worldwide, and this gave rise to the norm of protecting human rights at the expense of state sovereignty and the principle of non-intervention. Thus, the end of the Cold War has seen an increase in the number of humanitarian interventions, both collective and unilateral.\textsuperscript{334} Egregious violations of human rights have provided the grounds for overriding sovereignty through unilateral humanitarian interventions,\textsuperscript{335} Article 2(4) notwithstanding. An example is the NATO bombing campaign against Yugoslavia without United Nations Security Council authorisation in 1999.

\begin{itemize}
\item[\textsuperscript{328}] F. M. Deng, Protecting the Dispossessed, (Washington,DC: Brookings Institution, 1993); p. 13.
\item[\textsuperscript{329}] ICISS Supplementary Volume, p. 11.
\item[\textsuperscript{330}] Chopra, and Weiss, note 215 supra, p. 95.
\item[\textsuperscript{332}] Bellamy, note 239, p. 10.
\item[\textsuperscript{333}] International Coalition for the Responsibility to Protect, 2011, note 53.
\item[\textsuperscript{334}] Armstrong and Lambert, note 50, p. 179.
\item[\textsuperscript{335}] Ibid.
\end{itemize}
Thus international recognition of human rights has eroded traditional sovereignty. Sovereignty is no longer centred on the interest of the state, but rather on the protection of the fundamental human rights of the people. This has led to the formulation of the concept of popular sovereignty which considers the basis of sovereignty as respect for the popular will and governance based on standards of democracy and human rights. Arising out of popular sovereignty is the concept of sovereignty as a responsibility, which postulates that a state has the primary responsibility to protect its citizens from harm. If it is unable to do so, it should request external aid. If it fails or refuses to request external aid, or deliberately rejects such assistance, the international community will not just stand by, but will react to protect the suffering people.

iii. The challenge posed by failed states

This sub-section discusses the challenge to state sovereignty and non-intervention posed by failed states arising from the fact that a failed state is exposed to intervention by external actors in defence of victims of excessive human rights abuses. As asserted by Holsti, “…the major problem of contemporary society of states is no longer aggression, conquest and the obliteration of states. It is rather, the collapse of states…” 336 Failed states pose a challenge to international peace and security, because such states are unable to exercise effective authority over their territories and populations.337 A failed state lacks political capacity to control its domestic affairs, an essential characteristic of a sovereign state. The ability of a state to exercise effective control over events in its territory is necessary for the maintenance of domestic law and order, but a failed state loses the monopoly on the use of force, and is unable to guarantee peace and stability.338 The absence of law and order can lead to anarchy and civil war without regard to humanitarian law. The result of this is the displacement of the population and mass exodus of refugees, which may have adverse implications for other countries.339 Examples of failed states are Somalia, Libya and Afghanistan, where there exist no effective central governments, and non-state actors like warlords rule. These warlords challenge territorial sovereignty because of the lack of effective central government control. State failure which leads to internal disorder poses a threat to international peace and

337ICISS Supplementary Volume, p. 10.
339ICISSSupplementary Volume, note 28, p.10.
security, and may lead to action overriding sovereignty, as happened in Somalia where the Security Council authorised a Chapter VII intervention. The downfall of Siad Barre led to a breakdown of law and order and political chaos. On 3 December 1992, the United Nations Security Council unanimously adopted Resolution 794 (1992), authorising “the use of all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”

Resolution 794 was a good example of the Security Council exercising the exclusive right to authorise the use of force. Egregious violations of human rights in a state arising from state failure may amount to a threat to peace, justifying intervention by the UN Security Council on humanitarian grounds. In such a situation, the principle of “reserved domain” or the prohibition on interference in the domestic affairs of states extended to states under Article 2(7) of the Charter falls into abeyance.

If rulers bent on abusing the human rights of their fellow citizens know that the Security Council will take enforcement action against them, which will serve as a deterrent for them to reconsider their actions. If the Security Council fails to take enforcement measures, then there is the danger that the international community will find alternative means to address excessive abuses of human rights. States will be compelled to intervene more and more often, leading to the development of a rule of customary international law, making humanitarian intervention lawful. In other words, powerful countries will continue to intervene by armed force in other countries regardless of the prohibition in Article 2(4), until the UN Security Council is able to take regular enforcement action under Chapter VII, particularly in averting or halting gross human rights abuses. Therefore, in order to prevent the subversion of state sovereignty and the principle of non-intervention through unilateral interventions by powerful states, it is imperative that the Security Council does not abdicate its role as the guarantor of international peace and security, for if it fails to do so, there is the danger that others could seek to take its place.

340 United Nations Charter, Article 39, Chapter VII.
341 ICISS Report, note 1, p. XI.
344 K.A. Annan, Secretary-General’s Annual Report, note 124.
Therefore the traditional definition of sovereignty that says that a state has immunity from accountability for the brutal treatment of its citizens is outdated, in the light of human rights, globalization, and the interdependence of states. The concept has undergone an evolution from the traditional Westphalian concept of the supremacy of the state to the concept of sovereignty with the people at the centre, or what has been described as popular sovereignty. The state has the primary responsibility to protect its people. If it fails or it is unwilling to do so, it creates the conditions for its sovereignty to be subverted by external actors through interventions. Article 2(4) paces a general prohibition on the use of force except when it is authorized by the Security Council, or where the force is used in individual or collective self-defence. Therefore, when it becomes necessary to conduct humanitarian intervention to protect the victims of human rights abuses, the right authority should be the United Nations Security Council. An intervention without the mandate of the United Nations Security Council undermines the international order, and sets a dangerous precedent for others to follow. However, until the Security Council is able to exercise its function of maintaining international peace and security in the sphere of human rights by taking timely and effective action, the potential for unilateral armed intervention by powerful states cannot be ruled out. For example, if a permanent member of the Security Council vetoes or threatens to veto an intervention, thus leaving the Council deadlocked, it is morally legitimate for a country or coalition to act independently, as NATO did in Kosovo.

2.5. Part III - The effect of the United Nations Charter on humanitarian intervention in the post-Cold War era

The purpose of Part III is to discuss the debate on the legality of humanitarian intervention since the beginning of the 1990s. Humanitarian intervention involves the violation of the sovereignty of one state by another state, or group of states, or an organisation without the consent of the affected state. It is unilateral when it occurs without the authorisation of the Security Council, though with the stated purpose of averting or halting gross human rights abuses in the perpetrating state. This part also discusses the question whether the mandate of the United Nations Security Council is an absolute prerequisite to justify an intervention. The section concludes that interventions conducted without the authorisation of the Security Council are inherently dangerous: firstly, because they set a precedent for other states to follow, thereby undermining the collective security system established by the United Nations.

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345 Menon, note 243, p. 7
Charter; secondly, they are not conducted with internationally recognised standards or operational guidelines and therefore; thirdly, they are accompanied by abuse of raw military power and indiscriminate and disproportionate application of force. Even though powerful states have unilaterally intervened in other states, (examples being the 1999 NATO intervention in Yugoslavia and the intervention by the United States and allies in Iraq in 2003), unilateral military intervention is outlawed by the United Nations Charter Article 2(4), and states that undertake unilateral interventions risk international condemnation.

2.5.1. The dilemma – how to reconcile the primacy of human rights with the reverence for state sovereignty

The purpose of this section is to discuss the tensions created by provisions in the United Nations Charter between the primacy of human rights and the inviolability of the territories of sovereign states. The tensions created by these two ideals caused paralysis in responses by the international community to humanitarian crises. Sovereignty and human rights are seen as fundamentally opposed: the rights of the state against the rights of the individual. This has generated debate about how to reconcile two fundamental principles which underpin the UN Charter, namely: on the one hand, the supreme sovereign authority of the state which entitles the state to make decisions within its territory without interference by other states, and the freedom from the threat or use of force against it and; on the other hand, the obligation of member states of the UN to protect human rights and fundamental freedoms, as stipulated in the Preamble to the Charter. The debate on humanitarian intervention thus revolves around the concept of sovereignty and the principle of non-intervention. The tension between these two principles has been exacerbated by the claim of powerful states to a claim of the right to intervene militarily in the domestic affairs of another state with or without the consent of the state or United Nations authorization. The legality of such a claim to this right is naturally questioned generally by weaker states vulnerable to military interventions, as a breach of the concept of state sovereignty. The dilemma is how to reconcile the prohibition on intervention by a state or group of states in the territorial sovereignty of

346 United Nations Charter, Article 55(c).
347 Ibid. Article 2(7).
348 Evans, note 144, p. 3.
351 Obama, note 236.
another state on the one hand, and on the other hand, the imperative to bring to an end the inhumane treatment or human suffering inflicted by a government on its own nationals.352

The inability of the international community to “reconcile these two compelling interests” has been described as a tragedy by Kofi Annan.353 The dilemma is illustrated by the reaction of the international community to the Rwandan genocide in 1994 and NATO’s intervention in Kosovo in 1999. In the case of Rwanda, there was inaction on the part of the international community in the face of genocide. If there had been action on the part of the international community, “approximately 125,000 lives could have been spared.”354 On the one hand, in the context of the inaction of the international community in Rwanda in 1994, he asked whether the principle of non-intervention and the prohibition on the use of force should be observed strictly in the face of mass killings. In the words of Kofi Annan:

If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold? 355

On the other hand, in the context of NATO’s intervention in Kosovo without Security Council authorisation, he wonders whether permitting self-help by powerful states to intervene in other states unilaterally will not set precedents for other states to follow, thereby undermining the UN collective security system set up after World War II. He asks rhetorically:

Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?356

While sovereignty remains fundamental in the conduct of international relations, there should be no doubt about what course of action that the international community should adopt in the

352ICISS Report, note 1, p. 2.
356Ibid.
face of horrendous mass killings, such as occurred in Rwanda. Therefore, even in the absence of Security Council authorisation, armed intervention should be justifiable on moral and humanitarian grounds if potential victims of such horror are not to suffer irreversible harm. In the worlds of the ICISS, “the Commission believes that the Charter’s strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds.”

2.5.2. Unilateral humanitarian intervention

This section discusses the legality of humanitarian intervention with a focus on unilateral intervention, because such an intervention occurs without United Nations Security Council authorisation, and therefore raises a presumption of illegality. The section distinguishes collective humanitarian intervention from unilateral humanitarian intervention. Humanitarian intervention may be collective or unilateral. It is collective when it involves military action by a state or group of states authorised by the United Nations Security Council. Collective humanitarian interventions are usually viewed with greater approval than unilateral interventions because collective interventions tend to operate from a presumption of neutrality. In other words, because collective interventions have Security Council, it is presumed the no particular country has a special interest relating to it. Unilateral humanitarian intervention, however, involves military action taken in violation of the sovereignty of one state by another state, or group of states, or an organisation with the stated objective of averting or halting gross human rights abuses in the perpetrating state. It occurs without the authorization of the United Nations Security Council, and therefore, the possibility that it is carried out to serve the interests of the intervening states cannot be discounted. Unilateral intervention does not only describe a military intervention by an individual state, but also multilateral intervention by a group of states or even an organisation, without Security Council authorisation. Unilateral military intervention is therefore conducted in total disregard of the monopoly conferred on the United Nations Security Council by the Charter to authorise the use of force in the maintenance of international peace and security. The section also provides a brief discussion on the definition of humanitarian intervention. As has been previously observed, there is no

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357ICISS Report, note 1, p. 16.
359United Nations Charter, Chapter VII.
universally acceptable definition of the doctrine of humanitarian intervention. As Franck and Rodley put it, a usable general definition of ‘humanitarian intervention’ would be extremely difficult to formulate and virtually impossible to apply….360 Adam Roberts has defined it as:

coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants.361

Humanitarian intervention involves the use of force in the territory of one state by another or group of without the consent of the target state. The absence of the consent of the target state distinguishes humanitarian intervention from intervention at the invitation of the affected state.362 Thus the absence of the state in which the intervention takes place is a crucial element.363

Franck and Rodley define humanitarian intervention as the:

Theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control by *military force* over the acts of another in regard to its internal sovereignty when contrary to laws of humanity.364

This definition does not make explicit reference to the absence of the consent of the target state, but assumes that there is a *droit d’ingerence*: “the right to intervene” or the right of “humanitarian intervention.” This was an idea which was popularized by French physician Bernard Kouchner, had resonance in the militarily powerful West, but “commanded only negative traction in the Global South, and simply could not generate the necessary consensus

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364 Ibid.
for action.”\textsuperscript{365} The International Court of Justice in the \textit{Corfu Channel Case}\textsuperscript{366} made it plain that the right of intervention as the manifestation of a policy of force cannot find a place in international law. Further, in the light of Article 2(4) and 2(7) of the UN Charter, no right of humanitarian intervention is vested in any state. To insist on such a right would defeat the purposes of humanitarian intervention, for as the ICISS observes, “…the debate about intervention for human protection purposes should focus not on “the right to intervene” but on the responsibility to protect.”\textsuperscript{367}

Sarkin, however, argues that there is indeed the right of humanitarian intervention and the “right to exercise humanitarian intervention can be found in treaty law, including the Genocide Convention, international customary law and the UN Charter…”\textsuperscript{368} He argues that under the Charter (Article 52), regional organisations have the authority to respond to situations that threaten regional peace and security with the authorisation of the UN Security Council.\textsuperscript{369} Regional structures or other willing partners may intervene in “certain absences of Security Council action” (Article 53).\textsuperscript{370} He cites the example of ECOWAS’ intervention in Liberia in 1990 and in Sierra Leone in 1998, both of which were without UN Security Council authorisation. These set dangerous precedents, yet they received post-action Security Council praise in Resolution 788.\textsuperscript{371} In support of his argument, Sarkin states that in urgent situations, the AU Executive Council is prepared to sanction action with approval being sought “after the fact”, he quotes the Executive Council of the AU:

That since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard.\textsuperscript{372}

\textsuperscript{366} \textit{Corfu Channel Case}, (Merits) ICJ Reports 1949, p. 35.
\textsuperscript{367} ICISS Report, note 1, p. 17.
\textsuperscript{368} Sarkin, note 317, p. 4
\textsuperscript{369} Ibid.
\textsuperscript{370} Ibid.
Adam Roberts, on the other hand, argues that:

It may be useful to think of humanitarian intervention not as right but as an occasional and exceptional necessity. It could even be conceived of as duty, or at least as deriving from the duty to uphold human rights and humanitarian law.

It is submitted that there is no right of humanitarian intervention. There may be situations that require intervention to alleviate human suffering, but should be considered as legitimate on moral grounds. Post-action approval by the Security Council of unilateral armed intervention does not necessarily confer a retrospective right of intervention on the intervening states. Rather, the approval is granted on grounds that, even though the intervention was unlawful, it was legitimate because it was undertaken for a popular cause, namely, saving lives in the face of UN inaction. In the words of Ben Kioko, legal counsel of the AU:

It would appear that the UN Security Council has never complained about its powers being usurped because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at the time. 373

An example was NATO’s intervention in 1999, following UN Security inaction. The Independent International Commission on Kosovo (IICK) concluded in its report that, “the NATO military intervention was illegal but legitimate, 374 on moral grounds. Therefore, the post-intervention approval of armed intervention does not divest it of illegality.

Murphy has given a broad definition of humanitarian intervention to “capture the myriad of conditions that might arise where human rights on a large scale are in jeopardy” arising from the actions of both state and non-state actors, as the: 375

[...] threat or use of force by a state, or group of states, or organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights. 376

373 Allain, note 78, p. 263.
376 Ibid.
Murphy’s definition may be broad, however, what is missing from the definition is that it fails to mention the absence of the consent of the target state. The absence of the target state’s consent distinguishes humanitarian intervention from other interventions, such as intervention at the request of the legitimate government of the affected state. Armed intervention is not considered as the right of the intervening state, but the purpose is in fulfilment of the dictates of the responsibility to protect. 377 Adnan Hehir defines humanitarian intervention as:

Military action taken by a state, group of states or non-state actor, in the territory of another state, without the state’s consent, which is justified, to some extent, by a humanitarian concern for the citizens of the host state.378

This definition makes reference to intervention in the absence of the consent of the target state for the purposes of protecting suffering people, and therefore, differentiates humanitarian intervention from other forms of intervention. The definition does not claim a right of humanitarian intervention, but justifies it on the basis of humanitarian concern for the suffering people of the target state.

From the foregoing, this section provides a composite definition of humanitarian intervention as follows: the use of armed force by one state or group of states in the territory of another state, without the consent of the target state and without United Nations Security Council authorisation for the purpose of ending gross human rights abuses of the nationals of the target state, perpetrated by the government of that target state or non-state actors, which the state is unwilling or unable to aver or halt. This definition distinguishes humanitarian intervention from intervention by a state in another to protect its nationals residing in the target state, or the use of force to assist humanitarian relief or peacekeeping operations, or intervention in a state at the invitation of the legitimate authorities.

2.5.3. Legality versus legitimacy of unilateral humanitarian intervention

This section discusses the debate on the legality of unilateral humanitarian intervention. The purpose is to discuss opposing arguments in favour of and in opposition to the legality of unilateral humanitarian intervention, and to examine the assertion that unilateral humanitarian intervention, though illegal, may be justified as being legitimate on moral grounds. The use
of force authorised by the United Nations Security Council under Chapter VII or Chapter VIII,\textsuperscript{379} and the use of force in individual or collective self-defence under Article 51 do not raise issues of legality, since these are lawful under the Charter. However, the use of force that does not fall under these exceptions amounts to a unilateral intervention, and is therefore in violation of the prohibition of the use of force under Article 2(4), and accordingly raises a presumption of illegality. The section discusses the arguments.

A. Arguments opposing unilateral humanitarian intervention

i. Under the UN Charter, etc.

This section discusses the reasons for the illegality of unilateral humanitarian intervention. The root of the question of legality of humanitarian intervention goes back to the Kellogg-Briand Pact,\textsuperscript{380} a multilateral agreement in which the parties agreed to “condemn recourse to war for the solution of international controversies and renounce it, as an instrument of national policy,”\textsuperscript{381} and to the “settlement or solution of all disputes and conflicts…by pacific means”\textsuperscript{382} with the exception of wars waged in self-defence or pursuant to obligations arising from the League of Nations Covenant.\textsuperscript{383} This principle is reflected in the United Nations Charter in Article 2(4), on the prohibition of the use of force and Article 2(7) on non-interference in the domestic affairs of states. Subsequent resolutions also affirm this principle. Article 2(4) states that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

The drafters of the Charter wanted to ensure that states will not resort to self-help in resolving interstate disputes, hence the prohibition of the use of force contained in Article 2(4) and the principle of non-interference in Article 2(7). To this end, there was no provision for states to take either individual or collective action in the interest of human rights. In the words of

\textsuperscript{379} UN Charter, Chapter VII, Article 53 states: “The Security Council shall, where appropriate, authorize such regional arrangements for enforcement action under its authority.”
\textsuperscript{380} Kellogg-Briand Pact, 1928. Available at: \url{www.yale.edu/lawweb/avalon/imt/kbpact.htm} [Accessed 12 May 2016].
\textsuperscript{381} Ibid. Article I.
\textsuperscript{382} Ibid Article II
\textsuperscript{383} Encyclopaedia Britannica. Available at: \url{www.britannica.com/event/Kellog-Briand-Pact} . [Accessed 12 may 2016]
Higgins, “the Charter could have allowed sanctions for gross human rights violations, but deliberately did not do so.”

Chesterman concurs that the dominant legal opinion on Article 2(4) is that it leaves no room for humanitarian intervention. Therefore, it is submitted that there is no legal basis for a claim of the right of humanitarian intervention by an individual or group of states. Nevertheless, the world cannot just stand by and watch mass suffering, simply because intervention and use of force are prohibited by the UN Charter, in the face of Security Council inaction. Therefore, intervention undertaken to protect victims of excessive human rights abuses, is legitimate on moral grounds even if it is illegal under international law. ECOWAS’ intervention in Liberia and Sierra Leone and NATO’s intervention are examples.

Indeed to pre-empt self-help, Article 24(1) makes it clear that the Members of the United Nations:

confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Besides, Article 2(4) and Article 2(7) of the Charter, UN General Assembly Resolution 2131 considers armed intervention to be synonymous with aggression. The Declaration prohibits intervention directly or indirectly and for whatever reason in the internal and external affairs of other states. Similarly, UN General Assembly Resolution 2625 imposes a duty on states to refrain from the threat or use of force against the political independence of territorial integrity of any state, and to settle international disputes by peaceful means. Under the Charter, the only situations where the use of force is permissible are Security Council action under Chapter VII and Article 51 in individual or collective self-defence. Therefore, there is no international law principle that makes humanitarian intervention lawful. As articulated by Hehir, “On the balance it seems fair to

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386 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Resolution 2131, 1965.
387 Ibid. Preamble.
388 Ibid. para. 1.
390 Ibid. para. 1.
conclude that the dominant view on the legal status of unilateral humanitarian intervention is that it is illegal.”\textsuperscript{391} However, the importance accorded to human rights in the post-Cold War era dictates that in the quest to protect human rights, the international community should not dwell on legality alone to justify interventions. Focusing solely on the legality of humanitarian intervention minimises the moral dimension of humanitarian intervention, which is equally important. For example, according to Rengger, the invasion of Iraq by the United States and its allies in 2003 was criticised solely on grounds of legality. He observes:

what was perhaps oddest, at least to my eye, was that the general discussion both among politicians and in the media …was almost exclusively focused on whether or not the war was ‘legal’. At no point that I am aware of, did anyone seriously discuss the surely related question that even if it was legal, was it morally justified?\textsuperscript{392}

In other words, even if an intervention is illegal or otherwise, this should have no effect on its moral legitimacy. Even when an intervention is illegal, it may be legitimate on purely moral grounds, if the purpose is to alleviate or stop horrendous human suffering as occurred in Rwanda. An example of an illegal but legitimate intervention can be found in NATO’s bombing in Kosovo in 1999.\textsuperscript{393}

ii. Potential for abuse

In addition to being illegal, unilateral humanitarian intervention is criticised on other grounds. The first criticism concerns the potential for abuse of humanitarian intervention for ulterior motives, because the choice whether to intervene or not may include considerations unrelated to humanitarian concerns.\textsuperscript{394} As observed by one writer:

\textsuperscript{391}Hehir, note 27, p. 94.
\textsuperscript{393} Independent International Commission on Kosovo (IICK), (2000), note 328, p. 4.
Perhaps the most compelling argument against a right of humanitarian intervention is that it might be used as a pretext for military intervention actually motivated by other, less noble, objectives.\(^{395}\)

The potential for abuse of humanitarian intervention always exists, since powerful states may use it as a pretext to advance objectives other than humanitarian. However, various factors motivate a state to intervene in another. The state may intervene on grounds of morality, in defence of human rights. Intervention to advance legitimate national interests may also be a motivating factor, “either because acting can mitigate the direct and negative impact of a particular humanitarian disaster on national security or on the economy,”\(^{396}\) or a combination of factors. Humanitarian intervention entails costs in lives and finances to the intervening state and therefore, a state may intervene not only in the interest of human rights, but on the basis of other motives such as it national or geopolitical interests. This explains the selectivity in interventions. For example, NATO intervened in Kosovo, but not in Rwanda. As long as the overriding motive is to alleviate human suffering, it cannot be said that the intervention is motivated by less noble objectives. Legality should not be the only ground for the justification of humanitarian intervention, because this obscures the moral aspect, which is relevant in determining its legitimacy.\(^{397}\)

An argument proffered, which is similar to the foregoing, is that:

> The most common criticism levelled at the right of humanitarian intervention is that its incorporation into the system of the law of nations would enhance the opportunities for the abusive use of force.\(^{398}\)

This argument also raises the issue of abuse of humanitarian intervention. This is a legitimate concern. However, it submitted that in the face of excessive human rights abuses, including genocide, ethnic cleansing, or war crimes, it is preferable to have an armed intervention, even if it illegal which may be legitimised on moral grounds, than inaction.

B. Arguments in support of unilateral humanitarian intervention


\(^{396}\) Weiss, note 18, p. 7.

\(^{397}\) Hehir, note 27, p. 97.

This section discusses the grounds on which humanitarian intervention, though unlawful may be legitimate on moral grounds. Some of the reasons advanced in support of the legitimacy of humanitarian intervention are discussed as follows:

i. Humanitarian intervention as a means to defend suffering masses

It has been argued by Teson that humanitarian intervention is justified, because it involves the use of force in defence of people who are suffering from excessive and unjustified violence at the hands of their own government.\(^{399}\) Lauterpacht approved of unilateral intervention “in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind.”\(^{400}\) The Preamble of the UN Charter, together with Articles 1 and 55, reaffirms the United Nations’ commitment to the promotion of universal respect for, and observance of, human rights and fundamental human freedoms. It has been argued, therefore, that, these provisions create a positive obligation on states to take action in defence of human rights;\(^{401}\) if the Security Council is unable to act in the face of egregious human rights abuses then, in the words of Waldock, other actors should step in, because:

To give up the right of self-help without obtaining any other adequate means of redress would simply have played into the hands of law-breakers.\(^{402}\)

This statement seems to be in support of the right of intervention, discussed previously. Thus in the event of UN Security Council inaction, the other states have a right to step in to do what the Security Council will not or cannot do. To those who support unilateral humanitarian intervention, the legality of unilateral humanitarian intervention should be considered in the light of international human rights norms, which impose obligations on states to respect the human rights of their nationals in accordance with international standards.\(^{403}\) The United Nations Charter, the Universal Declaration of Human Rights 1948, and the International Covenant on Civil and Political Rights 1966 among other international

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403 For example the *Universal Declaration of Human Rights 1948* and the *International Covenant on Civil and Political Rights 1966*
human rights instruments have created obligations on states to respect the human rights of citizens. If a state fails to maintain the minimum international human rights standards, “its sovereignty is temporarily suspended,” and it cannot claim immunity from outside intervention, because “sovereignty cannot completely shield internal violations of human rights that contradict international obligations.” 404 This position appears to suggest that humanitarian intervention in such circumstances is legal. However, this is open to debate. Adam Roberts argues that:

Answers to the question of whether in a particular instance humanitarian intervention is viewed as illegal or illegal are likely to depend on the circumstances of the case and on the perspectives of the states and individuals addressing the matter: in other words they are not likely to be uniform. In principle, it is wrong to expect international law to provide one-word answers in advance to cases in which powerful legal and moral considerations have to be balanced against each other. 405

This argument suggests a subjective evaluation of what is legal or illegal and is therefore inherently dangerous, because it is left to an intervening state to determine the legality of its action. It infers that any state can interfere in another, and claim legality for its action. In such a scenario, it can be argued that any state can choose to disregard international law and claim legality for its actions by its own definition of legality. Exceptions may be made for humanitarian intervention on legitimate moral grounds in the face of clear perpetration of atrocities. However, there should be international agreement on when an intervention is legal under international law, in the light of the UN Charter. It is submitted that sovereignty is contingent on a state’s respect for human rights of the citizens. Therefore, where a state subjects its citizens to gross human rights abuses or it is unwilling or unable to avert or stop the abuse, then unilateral intervention becomes legitimate on moral or ethical grounds in the name of humanity. However if the action is taken outside the framework of the UN Charter, then it is illegal. Post-intervention approval of the Security Council only confers legitimacy, but not legality on the operation. The argument on intervention based on human rights is that unilateral humanitarian intervention is morally defensible in the context of protecting human rights.

In order to be morally defensible, it has to comply with certain criteria, namely:

404 ICISSSupplementary Volume, pp. 8 & 11.
405 Roberts, note 360 supra, pp. 19-20.
right authority, right intention, last resort, reasonable prospects, and proportionate means…Any AHI must be conducted under a unified command authority that acts with careful deliberation and circumspection…The immediate intended action must be the humanitarian one of protection or rescue. The intervention must be a last resort, all other measures having been tried or seen to be clearly hopeless. In retrospect, the intervention must have a reasonably high probability of success. The intervention must be no more destructive than absolutely necessary to achieve its goal: and overall, it must be the case that more good than harm will have been achieved by the intervention (i.e., more harm will have been prevented than caused by the intervention.)

It is submitted that the international community cannot always just be a passive observer, wringing its hands in helplessness in the face of atrocities, such as mass slaughter of the innocent, ethnic cleansing or war crimes, if the UN Security Council is unable to take action in defence of vulnerable people. Therefore, there will be situations when, on moral grounds, armed intervention would be legitimate, even if unlawful, because it is better to save lives at the risk of international opprobrium, than stand idly by while vulnerable people are slaughtered. However, in order to avoid the abuse of the concept, such an intervention the primary motive must be to alleviate human suffering; the use of force should be resorted to after all peaceful means have been exhausted and; only the force necessary to accomplish the objective of the intervention should be used. This will ensure that powerful states do not use humanitarian intervention as pretext for waging war in advancement of their interests.

ii. Effect of frequent violations of Article 2(4)

The purpose of this subsection is to discuss the effect of the frequent violations of Article 2(4) on the prohibition of the use of force as justification for humanitarian intervention. Thomas Franck has argued that Article 2(4) is dead, because the provision has been constantly violated. In his judgment, “The prohibition against the use of force in relations between states has been eroded beyond recognition.” Based on Franck’s argument, the frequent breach of Article 2(4) means that the article is no longer relevant, and therefore,

408 Ibid. p. 835.
there are no restraints on the use of force in interstate relations. Indeed, there has been a litany of violations of Article 2(4) by powerful states. On 16 December 1998, the United States’ military forces launched cruise missiles against Iraq (Operation Desert Fox) in response to Iraq’s failure to comply with UN Security Council resolutions, as well as its interference with UN Special Commission (UNSCOM) inspectors, without Security Council authorisation.\footnote{Operation Desert Fox, \textit{Global Security.org}, available at \url{http://www.globalsecurity.org/militaryops/desert_fox.htm} [Accessed 15 March 2016]} On 20 August 1998, American cruise missiles pounded sites in Afghanistan and Sudan in what the US President Clinton called a “long, ongoing struggle between freedom and fanaticism”, without UN Security Council authorization.\footnote{CNN, Washington, August 20, 1998.} On 20 December 1989, the US launched ‘Operation Just Cause’, a full-scale military invasion of Panama, with 24,000 troops armed with high-tech weaponry, in order to bring its president, Manuel Noriega, to justice for drug trafficking.

It is submitted that the conduct of a few states cannot render nugatory Article 2(4), a \textit{juscogen} or a peremptory principle of international law that admits of no derogation. What it means is that those countries that violate Article 2(4) do so illegally, and repeated violations do not render irrelevant the prohibition of the use of force. Just as a frequent breach of municipal criminal law does not make criminal conduct legal, the frequent violations of Article 2(4) do not render the Article irrelevant. Disregard for Article 2(4) undermines the international order which is necessary for international peace and security. Thomas Franck acknowledges the indispensability of Article 2(4) with the acknowledgement that the demise of Article 2(4) raises a serious question for the nations, with the observation that: “Having violated it, ignored it, run roughshod over it, and explained it away, can they now live without it?”\footnote{Franck, \textit{Who Killed Article 2(4)?} Note 406, pp. 809-810, (1970).}

The vast majority of countries consider Article 2(4) to be at the centre of the United Nations collective security system and the bedrock of peaceful relations among states. The prohibition of the use of force may be violated by powerful countries when it is in their interest, but it remains crucial principle in interstate relations.

iii. Treaty versus the UN Charter

This section investigate whether treaty provisions confers a legality on unilateral intervention conducted by signatories.\footnote{M. S McDougal et. al., \textit{Human Rights and World Public Order}, (1980), p. 241.} The argument has been made by proponents of unilateral...
humanitarian intervention that some treaties permit humanitarian intervention. An example is the Genocide Convention.\textsuperscript{413} The Genocide Convention makes genocide a crime and authorises signatories to “undertake efforts to prevent and punish acts of genocide.”\textsuperscript{414} The International Court of Justice stated that “the principles underlying the Convention are principles which are recognized as binding on States, even without any conventional obligation…such obligations derive, for example, in contemporary international law…”\textsuperscript{415} This has been interpreted to provide legal justification for humanitarian intervention.\textsuperscript{416} Schweisfurth has argued that, in the face of excessive human rights abuses, a state has to weigh the obligations to protect human rights against the obligation to refrain from using force: if in the judgment of the state the obligation to protect human rights outweighs the obligation to refrain from using force, then the state may intervene to halt human rights abuses.\textsuperscript{417} In the face of genocide, there is a moral imperative for external intervention to protect vulnerable people, even at the risk of violating the principle on the prohibition of the use of force.

However, others disagree with this view. Ronzitti, for example, argues that:

\begin{quote}
while it is quite sure that the obligation to refrain from the use of force is embodied in a peremptory norm of international law, it is not at all sure that the duty to promote human rights is set forth in a \textit{jus cogens} rule.\textsuperscript{418}
\end{quote}

In other words, there is no rule of international law that imposes a duty on states to take up arms in defence of human rights. This argument is indefensible, because it means that victims of gross human rights abuses have no protection. While there may be no right of humanitarian intervention, every state has a moral duty to come to the assistance of victims of genocide and war crimes, for example. In the \textit{Barcelona Traction Case} the International Court of Justice recommended that the remedy for a violation of the Convention was not to

\begin{itemize}
\item \textsuperscript{415}Ibid. at 23.
\item \textsuperscript{416}Krykov, note 400, p. 381.
\item \textsuperscript{417}T. Schweisfurth, \textit{Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights}, \textit{German Year Book of International Law}, 1980, p. 163.
\item \textsuperscript{418} N. Ronzitti, note 204 supra, Available at: \url{www.europeanleadershipnetwork.org/medialibrary/2016/04/05/902871/ELN_Narratives_Conference-Ronzitti.pdf} [Accessed 08 May 2016].
\end{itemize}
wage war, but to bring the offenders to court.\textsuperscript{419} However the ICJ has stated in the same \textit{Barcelona Traction Case} that, because of the importance of human rights, “all states can be held to have a legal interest in their protection.”\textsuperscript{420} Therefore in the face of egregious human rights abuses, unilateral humanitarian intervention, even if illegal, may be justified on moral grounds.

\textbf{2.6. Conclusion}

During the Cold War period from 1945-1989, the world was split between two hostile blocks, the Capitalist West and the Communist (Soviet) East. The hostility between these two power blocks impeded the ability of the United Nations to implement the provisions in the Charter on securing international peace and security primarily because of the use of the veto by the permanent members of the Security Council. The end of the Cold War brought to an end the ideological and superpower differences, and revived hopes of a new era of cooperation in the Security Council. Thus, the beginning of the 1990s witnessed optimism regarding the new found scope of the international community to deal with humanitarian issues. This era ushered in new ideas about state sovereignty and humanitarian intervention, and a new kind of international law and spirit, made possible in the changed conditions of a world no longer held hostage by the struggle between communism and capitalism. The end of the Cold War made humanitarian intervention a widely accepted norm, with the frequent use of human rights concerns as grounds for intervention.

\textbf{2.6.1. Universalisation of human rights}

Interest in the protection of human rights preceded the United Nations Charter and the Universal Declaration of Human Rights (UDHR). However, prior to World War II, human rights were of no concern to the international community and the international community had no interest in the manner in which a state treated its nationals within its sovereign territory. The general attitude was that what a state did to its people in its territory was a national concern. The attitude of the sovereign was that it had the right to treat its people in any manner, and no external power had the authority to judge the sovereign or intervene on behalf of the suffering people. The UN Charter and the UDHR changed international attitudes to human rights. The United Nations Charter was the first major document relating

\textsuperscript{419}\textit{Barcelona Traction Case}, (Belgium v Spain), 1970 I.C.J. at 4.

\textsuperscript{420} Ibid.
to the internationalisation of human rights. The Charter committed the United Nations to promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. UDHR set out specific human rights including the right to life, freedom of expression, and freedom from torture and inhumane punishment. The UDHR reinforced the principle introduced by the United Nations Charter, that human rights cannot be located exclusively within the sovereignty of states. Gross human rights violations within one state may have adverse external effects, especially where a large number of victims in the perpetrating state move across international borders, creating a refugee or humanitarian crisis in other states. Besides, human rights violations could lead to civil war, which may pose a threat to international peace and security, prompting other states to intervene in the perpetrating state. Therefore in the post-Cold War era, the international community has legitimate concerns about the manner in which a state treats its own nationals. Abuse by a state of the human rights of its nationals is no longer the exclusive business of the state, because of worldwide recognition that respect for human rights transcends international frontiers.

Human rights are rights that a human being is entitled simply for being a human being. Every human being is endowed with certain natural rights inherent in his/her status as a human being. The desire to be treated with dignity is innate in the human psyche regardless of nationality, religion, culture or history. Given a choice, no human being will choose to be tortured, deprived of his/her life, liberty or property without due process. In this sense, human rights are universal and therefore the universality of human rights is what provides moral grounds for armed intervention to protect victims of gross abuse of their rights. The Universal Declaration of Human Rights has played a great role in the universalisation of human rights. For example, the principles of the Declaration have been incorporated into the constitutions of a large number of countries.

As a consequence, of the role of the UDHR, there is international awareness of the importance of human rights which has in turn changed international attitudes towards the use of force to protect victims of human rights abuse. Even though unilateral humanitarian intervention is unlawful under international law, it is considered to be legitimate on moral grounds in situations of egregious abuses of human rights. Thus, even in situations where armed intervention has taken place outside the framework of the UN Charter, the Security Council has granted post-intervention approval to the operation, as it did in the cases of
The sovereignty of a state that subjects its nationals to gross human rights abuses may be overridden in the name of human rights, because human rights are no longer considered to be solely the business of a state or within the exclusive preserve of a state. The international community has an interest in the manner in which a state treats its people, and therefore, human rights means cannot be abused with impunity by any state.

2.6.2. Sovereignty in the post-Cold War era

The basic elements of the modern concept of statehood and state sovereignty derived from the Westphalian model, which dates back to the Treaty of Westphalia or the ‘Peace of Westphalia’ in 1648. Under Westphalian sovereignty, states had a right to govern themselves however they chose, free from outside interference or intervention. Sovereignty covers all matters in which a state under international law has the right to decide and act without external interference. Thus under the Westphalian model, sovereignty was protected by the principle of non-intervention in the sense that every state had the right to conduct its internal affairs and foreign policy freely without interference or dictates of external actors. Therefore, the manner in which a sovereign state conducted its affairs within its territory was its own business, and no other state had a right to interfere in its internal affairs. The basic principle that one state has no right to interfere in the domestic affairs of another is enshrined in Article 2(7) of the UN Charter. The equality of states enshrined in the concept of state sovereignty and its corollary principle of non-intervention are considered as a shield to protect weaker states from the pressure of more powerful states.

During the Cold War, international frontiers were regarded as inviolable and sacrosanct with the concept of non-interference in internal affairs often overriding collective efforts to assist victims of gross human rights abuses in their own countries. However, the traditional concept of sovereignty with its notion of monopoly of power by the nation state to the exclusion of external actors is faced with challenges in the contemporary globalised world. States can no claim to have a monopoly over matters that take place within their borders, especially where human rights are concerned. As a result of the interdependence of states in the contemporary international order, what happens in one country has ramifications beyond its borders and therefore absolute rights that sovereigns have traditionally enjoyed are being challenged by the international concerns for human rights. Thus, if a state subjects its inhabitants to gross
human rights abuses, the Westphalian concept of sovereignty will not prevent external actors from taking action to protect the victims of abuse.

2.6.3. Redefinition of sovereignty

The concept of sovereignty as envisaged by Article 2(7) has been redefined by world events since 1990. The redefinition has come about as a consequence of a combination of factors. These include globalisation and concerns about human rights, especially by powerful states. The consequence of concerns for human rights have led to the adoption of the doctrine of “Responsibility to Protect” (R2P), which defines sovereignty in terms of a state’s responsibility to protect, and not to terrorise its people. This new doctrine endorses the use of force by the international community to override the sovereignty of a state to protect people suffering serious harm as a result of repression or internal war, and where the state is unable or unwilling to halt or avert their suffering. The concept of sovereignty and its corollary principle of non-intervention have therefore been compromised by the willingness of the international community to use force in defence of victims of excessive human rights abuse.

In the post-Cold War era, the worldwide recognition of human rights means that the time of absolute and state-centred sovereignty has passed. States derive their authority from their people, and therefore the responsibility of the state is to serve the interests of the people. Sovereignty should accordingly be viewed as the people’s sovereignty or popular sovereignty. The peoples’ sovereignty considers the basis of sovereignty as respect for the popular will and governance based on standards of democracy and human rights. Popular sovereignty means that the government is subject to the will of the people and therefore the human rights of the inhabitants of a state stand higher than the sovereignty of the state. Popular sovereignty is associated with the concept of “sovereignty as a responsibility”. This means that sovereignty carries with it the responsibility on the part of governments to protect its citizens. Sovereignty as responsibility stipulates that when states are unable to provide protection to their people from serious harm, they are expected to call for external assistance and accept such assistance. If they refuse and their people continue to suffer, the international community will intervene. While it may be argued that this definition would deny statehood to most of Africa, it has to be acknowledged that the traditional concept of absolute and exclusive sovereignty has undergone an evolution from the traditional Westphalian concept of the supremacy of the state, to the concept of sovereignty with the people at the centre. In
the current international order therefore, sovereignty is no longer a barrier to humanitarian intervention where a state perpetrates egregious human rights abuses on its citizens.

2.6.4. Humanitarian intervention in the post-Cold War era

There is tension created by provisions in the United Nations Charter between the primacy of human rights and the inviolability of the territories of sovereign states. This has generated debate about how to reconcile two fundamental principles which underpin the UN Charter, namely; on the one hand, the supreme sovereign authority of the state which entitles the state to make decisions within its territory without interference by other states, and the freedom from the threat or use of force against it; and on the other hand, the obligation of member states of the UN to protect human rights and fundamental freedoms, as stipulated in the Preamble to the Charter.

Humanitarian intervention involves the use of force in the territory of one state by another or a group of states without the consent of the target state. The absence of the consent of the target state therefor distinguishes humanitarian intervention from intervention at the invitation of the affected state. Humanitarian intervention may be collective or unilateral. It is collective when it involves military action by a state or group of states authorised by the United Nations Security Council. The use of force authorised by the United Nations Security Council under Chapter VII or Chapter VIII, and the use of force in individual or collective self-defence under Article 51 do not raise issues of legality, since these are lawful under the Charter.

Unilateral humanitarian intervention, however, involves military action taken in violation of the sovereignty of one state by another state, group of states or an organisation without the consent of the target state, with the stated objective of averting or halting gross human rights abuses in the perpetrating state. It occurs without the authorisation of the United Nations Security Council. Unilateral intervention does not only describe a military intervention by an individual state, but also multilateral intervention by a group of states or even an organisation, without Security Council authorisation. Unilateral military intervention is therefore conducted in total disregard of the prohibition of the use of force under article 2(4) and Article 2(7) on non-interference in the domestic affairs of the UN Charter. For this reason, unilateral humanitarian intervention is considered to be unlawful under international law. This is one of the grounds for opposition to unilateral intervention. However, the focus
on the legality of unilateral humanitarian intervention should not obscure the moral reasons which motivate intervention, because even though an intervention may be illegal, on moral grounds it may have legitimacy, as NATO’s intervention in Kosovo illustrates.

In addition to being illegal, unilateral humanitarian intervention is opposed because of concerns about the potential for abuse of humanitarian intervention for ulterior motives. It is argued, however, that even though the potential for abuse of humanitarian intervention always exists since powerful states may use it as a pretext to advance objectives other than humanitarian, the fact that various factors motivate a state to intervene in another should not be discounted. The state may intervene on grounds of morality, in defence of human rights, or in advancement of legitimate national interests, or it may be motivated by a combination of factors. Humanitarian intervention entails costs in lives and finances to the intervening state, and therefore, even though a state may intervene in another to protect human rights, a state may not intervene in another in defence of human rights if it does not expect some advantage from the intervention. This explains the selectivity in interventions. For example, NATO intervened in Kosovo, but not in Rwanda. Therefore, as long as the overriding motive is to alleviate human suffering, other motives are irrelevant.

In support of unilateral humanitarian intervention, it is argued that humanitarian intervention is a means to defend suffering masses. The Security Council has the responsibility for the maintenance of international peace and security. In the event of UN Security Council inaction, the international community has a moral duty to step in to do what the Security Council will not or cannot do. The legality of unilateral humanitarian intervention should therefore be considered in the light of international human rights norms, which impose obligations on states to respect the human rights of their nationals in accordance with international standards. For example the United Nations Charter, the Universal Declaration of Human Rights 1948, and the International Covenant on Civil and Political Rights 1966, among other international human rights instruments, have created obligations on states to respect the human rights of citizens. If a state fails to maintain the minimum international human rights standards, its sovereignty may be violated, because sovereignty cannot completely provide immunity for internal violations of human rights that contradict international obligations.

While sovereignty remains fundamental in the conduct of international relations, there should be no doubt about what course of action that the international community should adopt in the
face of horrendous mass killings, such as occurred in Rwanda. Therefore, even in the absence of Security Council authorisation, unilateral armed intervention should be justifiable on moral and humanitarian grounds if potential victims of such horror are not to suffer irreversible harm.
CHAPTER 3

3. THE DEVELOPMENT OF THE RESPONSIBILITY TO PROTECT

3.1. Introduction

The chapter discusses the evolution and development of the concept of the Responsibility to Protect (R2P), for purposes of investigating how best to apply the concept in the face of humanitarian crises, in order to address concerns about its implementation. In the 1990s, the international community was faced with several humanitarian crises in several countries, including Iraq (1991), Somalia (1992), Rwanda (1994), Bosnia (1993-1995), Haiti (1994-1997), and Kosovo (1999). In the face of these crises, particularly the genocide in Rwanda during which over 800,000 Tutsis and a smaller number of Hutus were killed in just a hundred days, and the Srebrenica massacre where 7000 Bosnian Muslims perished, the international community, failed to respond effectively. The attitude of the international community as Kofi Annan put it in his 1998 speech to the Ditchley Foundation, was, “so long as the conflict rages within the borders of a single State, the old orthodoxy would require us to let it rage.” The old orthodoxy espoused the inviolability of state sovereignty and non-intervention. The crises in the 1990s and the inability of the Security Council to react triggered debates as to whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or whether the time had come to take a different course.

At the centre of the debates was how the international community should react when the fundamental human rights of populations are grossly and systematically violated within the boundaries of sovereign states, and this heightened the need for a reappraisal of armed humanitarian intervention. These debates culminated in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 by the Government of Canada, with the mandate “to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty.” The ICISS came up with the

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3 Ibid.
4 The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty,
concept of R2P, which articulated the basic principles that sovereignty implies responsibility and this responsibility primarily lies on the state to protect its people, but where the state is unwilling or unable to discharge this responsibility, its sovereignty has to yield to the broader international community’s residual responsibility to protect the vulnerable population. R2P was unanimously adopted by the 2005 World Summit of more than 170 world leaders as the roadmap for responding to mass atrocity crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity. This was the largest gathering of world leaders at the UN, and the unanimous adoption of R2P demonstrated the importance that the world community attaches to the protection of victims of atrocities. The significance is that the head of states and governments who gathered at the summit made it clear that the perpetration of any of the specific four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity constituted a just cause for the application of R2P. However, the world leaders emphasised the use of peaceful and diplomatic means in resolving humanitarian crises, and recommended the use of force only when the state authorities manifestly failed to protect their population from the four crimes.

The chapter argues that the principle of a state’s responsibility to protect its nationals predates the formulation of the concept of the Responsibility to Protect (R2P) formulated by the ICISS, because, prior to the formulation of R2P, it was recognised by states that they could not treat their nationals in any manner they chose, and therefore, R2P is founded on an existing body of law, and not on new theories, and should be “best understood as a reaffirmation and codification of already existing norms.” Furthermore, the idea that states have a duty to protect the welfare of their citizens has a foundation in human rights law, and is a restatement of already existing responsibility of states and the international community to ensure that human rights are respected within their boundaries. Thus, the

5 Ibid. p. XI
powers of sovereigns have always been limited, and therefore, the Westphalian traditional notion of unfettered supremacy of state sovereignty and the right of non-intervention were debunked even before the formulation of R2P. Sovereignty has never been absolute, and therefore, any claim that the ICISS introduced a new concept calculated to derogate traditional sovereignty is unwarranted, because limits on sovereignty, dictated by respect for the human rights of citizens, were already recognised before the formulation of R2P by the ICISS. As observed by UN Secretary-General Ban Ki-moon, the responsibility of a state to protect its population derives from the nature of state sovereignty itself, and from the “pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the responsibility to protect.”

However, what is novel about the work of the ICISS was that it sought to develop international consensus on the problem of reconciling intervention for human protection purposes and sovereignty. The Commission did this by placing emphasis on the following: the state’s primary responsibility to protect its own people; the international community’s residual responsibility to protect the people when the state is unwilling or unable to discharge this responsibility, and, recommending the use of coercive military force among other measures to react to mass atrocities. The novelty of the Commission’s proposals was that it introduced the principles that the primary responsibility for the protection of its population lies with the state itself; but where the state is unable or unwilling to protect its people, then the international community should not stand idly by, but exercise its responsibility to protect victims of excessive human rights violations, through the use of force, should non-coercive measures prove inadequate; and furthermore, in order to ensure that the conflict that gave rise to the intervention does not reoccur, the interveners had a responsibility to address the root causes of the conflict and also stay long enough to contribute to the reconstruction of the affected state.

To further buttress the argument that the notion that sovereigns have the responsibility to protect their populations is not an entirely new idea, reference is made to human rights espoused in instruments such as the UN Charter 1945, the Universal Declaration of Human Rights.

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13 B. Ki-moon, Implementing the Responsibility to Protect. Report of the Secretary-General, A/63/677, 2009, paragraph 11(a)
14 ICISS Report, p. 2
15 Ibid. p. XI.
Rights 1948, the Genocide Convention 1948, the Geneva Conventions 1949, the International Covenant on Civil and Political Rights (ICCPR) 1966, and the International Covenant on Economic, Social and Political Rights (ICESR) 1966, as well as the writings of early modern European political theorists such as Hugo Grotius, Emmerich de Vattel, John Locke, and Jean Jacques Rousseau to demonstrate that they shared the view that sovereigns had a responsibility to protect the safety of their people despite the fact that they were advocates of absolute sovereignty.\textsuperscript{16} The point is that the idea of sovereignty as a responsibility has historical roots going back to a time when human rights did not have the same prominence they do now, and therefore, in the contemporary international order with the widespread recognition of human rights, the principles espoused by R2P ought to be embraced and should not be seen as a licence for powerful countries to intervene in the affairs of weaker states. The rights contained in the human rights instruments and the ideas of the early modern European philosophers laid the groundwork for the formulation of R2P by the ICISS, and possibly played a role in the unanimous endorsement of R2P by world leaders at the 2005 World Summit.

The chapter gives a brief account of Africa’s notion of sovereign responsibility and the connection with R2P. Failure of the international community to halt the Rwandan genocide persuaded African countries that if future atrocities on the continent were to be avoided, then there was the need for a security mechanism that laid down what was to be done to prevent or halt gross violations of human rights. Thus, Africa’s regime for peace and security was developed from the mid-1990s when Africa was faced with many of the issues later raised in connection with R2P\textsuperscript{17} such as armed conflicts in Liberia, Somalia, Algeria and Lesotho; and regional and sub-regional organisations in Africa, in particular the OAU, ECOWAS, SADC, and the Inter-Governmental Authority on Development had to find ways to resolve these conflicts themselves, which were manifested in military intervention.\textsuperscript{18} An example was the military intervention by ECOWAS in Liberia in 1990, through ECOMOG, the Ceasefire Monitoring Group of the organisation, and again in Sierra Leone in 1998 in the face of UN Security Council’s inaction.\textsuperscript{19} Therefore, before the establishment of the ICISS and the formulation of R2P, Africa had already established the principle that, in the face of egregious

\textsuperscript{17} A. J. Bellamy, \textit{Global Responsibility to Protect, from words to deeds}, Routledge, 2011, p. 13.
\textsuperscript{18} Iyi, note 1, p. 3.
violation of human rights, it was legitimate to intervene in the affected state to protect vulnerable populations by military force in order to redress grave humanitarian crises. Thus, even though R2P may have been considered by others as a tool for powerful countries to meddle in the affairs of weak countries in the name of human rights, Africa appreciated R2P as an endorsement of its existing security mechanism, and this prepared the way for the unanimous endorsement of the concept at the 2005 World Summit.

The chapter further discusses the impact of the conceptualization of “sovereignty as responsibility” by Francis Deng and Roberta Cohen on the evolution of R2P; for although the ICISS developed R2P, the Commission’s recommendations followed a path laid out by Francis Deng and Roberta Cohen. The R2P Report was built on Deng’s earlier work, which declared sovereignty as a responsibility primarily resting on a state with a residual international responsibility to protect where the state is unwilling or unable to discharge that responsibility. The idea of international responsibility to take enforcement action to protect human rights inside the territories of states emerged from their concept that a state has a responsibility to protect internally displaced persons. Their concept of “sovereignty as responsibility” meant that sovereignty carries with it the responsibility on the part of governments to protect its citizens, and stipulates that when states are unable to provide protection to their people from serious harm, they are expected to call for external assistance and accept such assistance. If they refuse and their people continue to suffer, the international community will intervene. Their idea of “sovereignty as responsibility” was the “direct precursor of ICISS’s responsibility to protect.”

The chapter discusses humanitarian crises during the 1990s, which triggered debates about how the international community should react to gross human rights abuses within the boundaries of sovereign states, and the need for a reappraisal of armed humanitarian intervention culminating in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 and the articulation of the concept of

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22 Bellamy, note 17, p. 24.
26 Deng, note 24 supra, p. 20.
27 Weiss, note 21 supra, p. 103.
R2P. The international community’s failure to respond effectively to the humanitarian crises in several countries in the 1990s generated debates as to whether human rights should trump sovereignty in the face of egregious human rights abuses, and this culminated in the establishment of the ICISS, with the mandate to find a balance between sovereignty and human rights. The chapter investigates international action or inaction in the face of humanitarian crises during the 1990s in Northern Iraq (1991), Somalia (1992), Rwanda (1994), Bosnia (1993-1995), Haiti (1994-1997), and Kosovo (1999). The atrocities committed during these crises provided the immediate impetus for the need to develop a mechanism which would ensure the prevention of mass atrocities and the protection of victims; hence, these crises can be said to have played defining roles as stimuli for the formulation of R2P. The chapter argues that these crises played a critical role, and brought the idea of international intervention in conflicts within state borders to the centre of international legal and political discourses. The atrocities committed during these crises galvanised international determination that sovereignty should never again be a barrier to international coercive action to halt gross human rights abuses within the territory of a state. Iyi concurs that the failure of the international community to respond to these humanitarian crises brought the controversial doctrine of humanitarian intervention “on the front burner.” The 1999 NATO intervention in Kosovo which was conducted without United Nations Security Council authorization, brought the controversy to a climax, because it set a dangerous precedent in bypassing the Security Council, and also because the intervention caused more harm than it averted, by killing a large number of civilians and destroying the infrastructure of Serbia. There was serious disagreement among members of the Security Council, centring on the disregard for the existing international order, which is based on the inviolability of state sovereignty, issues of legal justification, and the manner in which the intervention was carried out. The Kosovo intervention and the perpetration of genocide, war crimes, ethnic cleansing, and crimes against humanity within other states’ borders in the 1990s caused former Secretary-General of the United Nations Kofi Annan to pose a challenge to the international community in his Millennium Report, to find a balance between

28 Iyi, note 1 supra, p. 3
29 Weiss, note 21 supra, p. 103.
30 ICISS Report, p. VII.
32 Ibid.
respect for sovereignty and the need to the protect human rights.\textsuperscript{33} In response to this challenge, the Canadian Government established the ICISS with the mandate to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty.\textsuperscript{34} The ICISS formulated the concept of R2P, with the theme that a state’s sovereignty is to be respected, but where a state fails to discharge its primary responsibility to protect its nationals, its sovereignty yields to the international community’s responsibility to protect in furtherance of its mandate to find a balance between respect for sovereignty, and the imperative to protect victims of internal mass atrocities.

The chapter discusses the establishment of the ICISS and the basic principles of R2P articulated in the ICISS Report, that: “State responsibility entails responsibility and the primary responsibility for the protection of its people lies with the state itself; where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”\textsuperscript{35} This is due to the worldwide recognition of human rights and the acknowledgement by the international community that the manner in which a state treats its citizens is not the sole business of the state, but also a matter of concern to the international community. The chapter discusses the idea of state sovereignty as responsibility and the residual responsibility of the wider international community to protect, because intrastate conflicts generated by gross human rights abuse can have regional and international implications, and therefore, the international community also has an interest in the manner a state treats its nationals.

Furthermore, the chapter discusses the three dimensions of R2P, namely: the responsibility to prevent - to address both the root causes and direct causes of internal conflict and other man-made crisis putting populations at risk; the responsibility to react - to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution and in extreme cases military intervention, and; the responsibility to rebuild - to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconsideration, addressing the causes of the

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\textsuperscript{34} ICISS Report, p. 2.

\textsuperscript{35}Ibid. p. XI
\end{small}
harm the intervention was designed to halt.\textsuperscript{36} The responsibility to prevent is an extremely important aspect of R2P, for if conflict can be prevented, then the controversial principle of humanitarian intervention would not arise, and it would not be necessary to rebuild shattered societies at great cost in finances and lives. Therefore, the ICISS Report singles out prevention as the most important dimension of the responsibility to protect.\textsuperscript{37} Similarly, the responsibility to rebuild is important for the reconstruction of societies that have been destroyed by violent conflict. The responsibility to rebuild a state involves not only the rebuilding of the institutions of the state destroyed by conflict and the intervention itself, but also the resolution of the issues that gave rise to the conflict and the intervention, if the conflict is not to ignite again. The responsibility to rebuild arises after a military intervention. Conflict within the state has causes, and the conflict usually leads to deaths and widespread destruction of the state’s infrastructure, economy, and legal system. Interveners should devise a post intervention strategy, because failure to take effective steps to address the causes of the conflict and to participate in the reconstruction of the state can lead to total anarchy and state failure after the intervention, as the example of NATO’s intervention, in Libya demonstrates.

However, the chapter focuses on the responsibility to react and in particular the military dimension that is the most controversial aspect of R2P,\textsuperscript{38} because military intervention entails the violation of the target state’s sovereignty with deadly force which may cause deaths and destruction; thus, it requires detailed discussion with the aim of examining how best this dimension may be implemented. The importance of the military dimension is reflected in the ICISS report as follows: “By far the most controversial form of…intervention is military, and a great part of our report necessarily focuses on that.”\textsuperscript{39} In the words of the ICISS Report, “responsibility to protect” implies above all else a responsibility to react to situations of compelling need for human protection.\textsuperscript{40} This is the main underlying justification advanced by the ICISS for military intervention.\textsuperscript{41} The ICISS report itself demonstrates a clear bias in favour of the military option over other options, such as economic and political sanctions.\textsuperscript{42} The importance of the military aspect of R2P is reinforced by the fact that the responsibility to rebuild, to provide full assistance with recovery, reconstruction, and reconciliation is

\textsuperscript{36(ibid.}
\textsuperscript{37(ibid.}
\textsuperscript{38Bellamy, note 17 supra, p. 38.}
\textsuperscript{39ICISS Report, p. 8.}
\textsuperscript{40(ibid. p. 29.}
\textsuperscript{41C. Burke, An Equitable Framework for Humanitarian Intervention, Hart Publishing, 2013, p. 61.}
required “particularly after a military intervention,” which presupposes that the responsibility to rebuild arises only as a consequence of military action. A study of the ICISS report shows that under the heading “The responsibility to react,” the military option is accorded more detailed treatment from pages 31 to 37 inclusive, i.e. seven pages, while other options such as economic and political sanctions are dealt with only from pages 29 to 31, i.e. about two and a quarter pages, thereby demonstrating the importance the Commission attached to this aspect of R2P. The centrality of the military dimension to the debate on R2P makes it a necessary focus of detailed discussion. As already observed, military intervention involves the violation of the sovereignty of a state, and therefore, much of the misgivings about the concept are about the military aspect, because the targets of military interventions may view R2P as a mechanism devised by powerful states to interfere in their internal affairs. Therefore, it is imperative to focus on how best this aspect may be implemented in order to allay the apprehensions of potential target states.

The chapter discusses the links between the ICISS Report and the formal acceptance of R2P by the international community at the United Nations Sixtieth Anniversary World Summit in September 2005. The chapter examines the report of the High Level Panel on Threats, Challenges and Change, as it relates to R2P, particularly the Panel’s addition of serious breaches of international humanitarian law to the just cause threshold and the rejection of the limits on the use of vetoes by the five permanent of the Security Council proposed in the ICISS Report. The inclusion of breaches humanitarian law is nebulous as to the situations where R2P is applicable, and therefore, as finally adopted by the World Summit, there is the necessity to be specific as to the crimes that may trigger military intervention. The Panel rejected the limits placed on the use of the veto unless the vital national interest of the five permanent members of the Security Council were at stake because it is very unlikely that the veto holders would have agreed to the 2005 World Summit Document with that proposal. Reference is also made to the African Union’s embrace of R2P in the Constitutive Act of the African Union. Furthermore, the chapter discusses the 2005 World Summit Outcome Document with the argument that R2P as currently understood is what the 2005 World

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43 ICISS Report, p. XI.
44 Ibid. pp. 29-37
45 Ibid.
Summit endorsed, and not as originally envisaged in the ICISS Report; and therefore, it is the basis for the roadmap for implementing R2P,\footnote{Bellamy, note 17 supra, p. 35.} because the ICISS Report in its original form did not have international consensus, but the version adopted in the World Summit Document was endorsed by the largest gathering of world leaders at UN, and was therefore representative of the international community’s conception of R2P. To this end, the chapter discusses the World Summit’s refinement of the ICISS proposals on the responsibility to rebuild after a military intervention, limits to the use of the veto by the UN Security Council, criteria to guide decision-making about armed intervention, and the idea of the legitimacy of humanitarian interventions in the absence of Security Council authorisation.\footnote{Ibid. p. 9.} The requirement to rebuild after a military intervention does not seem to have been given much attention, because interveners appear to be interested only in the initial intervention itself without a post-intervention strategy and what happens thereafter. The responsibility to react or intervene goes hand in hand with responsibility to rebuild and address the causes of the conflict, otherwise the intervention would serve no useful purpose, as the current state of Libya illustrates. NATO facilitated the overthrow of Gaddafi’s regime and exited before a stable government replaced the ousted regime, leaving chaos in the wake of the intervention, and thereby causing more harm than the intervention was supposed to avert. Furthermore, authorisation of the Security Council is necessary if an intervention is to have legitimacy, and therefore, the World Summit Document recognised the Security Council as the sole body with the authority to give the mandate for military intervention for human protection purposes. In this context, the chapter discusses paragraphs 138 and 139 of the World Summit Document on R2P, and the three core pillars of the concept put forward by the two paragraphs and articulated UN Secretary-General Ban Ki-moon in his report on *Implementing the Responsibility to Protect* in January 2009, namely: (i) the primary responsibility of each state to protect its own population from the four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity and their incitement; (ii) the international community’s responsibility to undertake peaceful collective action to help states to exercise this responsibility, including concerted long-term capacity-building efforts and short-term preventive diplomacy; and (iii) the international community’s responsibility to be prepared to take collective action in a timely and decisive manner through the UN Security Council, in accordance with the UN Charter, if national authorities are manifestly failing to protect their populations from these crimes. The discussion on the three pillars is important, because,
according to the UN Secretary-General’s report, they constitute the way forward for the implementation of R2P. The three pillars were summarised by the Secretary-General from the World Summit Outcome Document after concluding that they constituted the microcosm of the version of R2P that world leaders endorsed unanimously at the World Summit. He concludes in his report that the pillars provide support for the implementation of R2P. They are of equal importance, and the edifice of R2P will crumble without the support of these pillars.51

3.1.1. Structure of the chapter

The chapter proceeds in three parts. Part I discusses antecedents of sovereign responsibility in a historical context. The purpose is to illustrate that the idea of sovereign responsibility, that sovereignty entails both rights and responsibility, predates the concept of R2P. The concept did not introduce an entirely new principle, and therefore, the responsibility of a state to promote the welfare of its nationals has always been inherent in the notion of sovereignty itself. This part discusses antecedents of sovereign responsibility, starting with the writings of early philosophers of absolute sovereignty such as Hugo Grotius, Emmerich de Vattel, John Locke, and Jean Jacques Rousseau, who held the view that a sovereign owed a duty to obey divine and natural laws which included the responsibility to protect the safety of their people. The part also examines the African contribution to the evolution of R2P as well as the impact of Francis Deng and Roberta Cohen on the formulation of R2P by the ICISS. Part II discusses specific humanitarian crises in the 1990s, which played a defining role in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 and the articulation of the principle of R2P. A discussion of international reaction is provided in relation to each of the humanitarian crises. To this end, this part discusses the humanitarian crises in Northern Iraq, Somalia, Rwanda, Haiti, and former Yugoslavia. Part III discusses the establishment of ICISS, the formulation of the concept of R2P, and the principles and dimensions of R2P set down in the ICISS report with a focus on the military aspect of the implementation of R2P. The R2P as adopted by the 2005 World Summit Document, paragraphs 138-140 in particular, and the three pillars put forward by the document, are discussed. This part concludes by examining why R2P has been applied in some instances but

51High Level Panel, note 46 supra, para. 12.
52Glanville, note 16 supra, p. 1.
not in others and further the manner in which R2P has been implemented in specific instances, in order to determine whether the concept was abused in these instances.

3.2. **Part I - Antecedents of Sovereign Responsibility**

The purpose of this part is to discuss antecedents of sovereign responsibility in order to put it in a historical context to set the stage for the discussion on R2P. The purpose is to illustrate that the idea of sovereign responsibility, which means that sovereignty entails both rights and responsibilities, predates R2P, and it is not an entirely new principle; and therefore, the responsibility of a state has always existed as it is inherent in the notion of sovereignty itself. It discusses the views of early philosophers on absolute sovereignty and provides a brief account of Africa’s contribution to the evolution of R2P as well as the impact of Deng and Cohen’s conceptualisation of “sovereignty as responsibility” on the formulation of R2P by the ICISS. The objective is to establish that the re-conceptualisation of sovereign responsibility by ICISS borrowed heavily from the pioneering work of Deng and Cohen, and further, that the notion of sovereignty as responsibility has its roots further back in history at times when human rights did not enjoy comparable recognition as they do in contemporary times; and therefore, R2P should be embraced in the contemporary era, due the recognition that sovereignty entails both rights and responsibilities, and only states that protect the fundamental human rights of their nationals are “entitled to the full panoply of sovereign rights.”  

Thus, a state that fails to protect the welfare of its citizens forfeits its right to non-intervention, and, exposes its sovereignty to be violated in the name of human rights through external military intervention.

3.2.1. **Writings of philosopher of modern Europe**

This section discusses the writings of early European political theorists on sovereignty who subscribed to absolute sovereignty, and yet acknowledged the limitations on sovereignty imposed by natural and divine laws. They recognised that sovereign power was accompanied by responsibility to protect and promote the welfare of citizens, and therefore, if a sovereign disregarded this responsibility through tyrannical or oppressive rule, it provided a just cause for other sovereigns to intervene in his domain to protect the victims. The ICISS formulated R2P, but it would not be farfetched to claim that the views of these philosophers had some influence on the proposals of the Commission in the light of the similarities between the

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53 Bellamy, note 17, p. 10.
proposals and the views of these theorists; and therefore, a discussion of the writings of these theorists is in order. The writings of philosophers of early modern Europe indicated that sovereignty entailed responsibilities. As Glanville observes:

Central to the theories of absolute sovereignty, therefore, was the interdependence of authority and responsibility. The authority of the sovereign was conceived to be limited by various divine, moral and juridical responsibilities and ideas of mutual obligations between ruler and subject. While sovereigns were not understood to be answerable to the people, they were certainly conceived to be responsible for the people and answerable to God. Moreover, rulers were also understood to be accountable to neighbouring princes for the performance of their sovereign responsibilities.\textsuperscript{54}

Glanville’s statement implies that early European political theorists conceived the notion of sovereignty as involving responsibilities. In theory, the sovereign’s power was absolute, but in practice, the sovereign’s power was limited by divine, moral, natural laws, and mutual obligations between ruler and subject. Subjects submitted to the authority of the ruler, and in turn, the ruler had the obligation to exercise authority with the welfare of the population in mind. The sovereign was not accountable to the people, but he was responsible for the welfare of the people. The sovereign was accountable to neighbouring princes to observe divine, natural, and moral laws, and if he failed in this duty, neighbouring princes could wage war on him to uphold divine and natural laws in his domain. The right to wage war in order to uphold natural law was considered to be the external corollary of the internal supreme power of the sovereign.\textsuperscript{55} Hugo Grotius, for example, justified war on a sovereign if he violated these laws by tyrannical and oppressive rule.\textsuperscript{56} In the mid-18\textsuperscript{th} century, Vattel articulated the right of non-intervention in the domestic affairs of states, but he balanced this with the assertion that states that were tyrannical and oppressive should not benefit from the protection of the principle of non-intervention.\textsuperscript{57} Furthermore, the idea that a sovereign is responsible for the protection of the population is articulated in the theories about “popular sovereignty” espoused by John Locke and Jacques Rousseau and the American and French

\textsuperscript{54} Glanville, note 16 supra, p. 6
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
revolutionaries. The early political theorists secularised St Aquinas’ doctrine “of lawful assistance to a people struggling against tyranny.” The writers justified intervention on the basis of the doctrines of natural law, natural rights, and just war out of concern for humanity. These natural rights were regarded as universal, conferred on all, simply for being human and obvious to all through the exercise of moral reasoning, and therefore, if a ruler was oppressive or tyrannical, foreign intervention was justified in the name of humanity. The views of these writers are reflected in the core principles of R2P that sovereignty entails not only rights, but also responsibilities and further that the welfare of nationals of a state is not the sole business of the state, but of the broad international community, and external intervention is justified to protect the victims of gross abuse of human rights.

In essence, the idea that sovereignty involves responsibilities has deep historical roots and the views of the foregoing early European political theorists confirm the historical responsibility of the sovereign to protect his subjects, and the potential for external intervention as a consequence of the sovereign’s failure to discharge this responsibility. Despite their views that sovereignty was supreme, they maintained that a sovereign owed a duty to obey divine and natural laws, which included the responsibility to protect the safety of their people. It is submitted that, during the times of these philosophers, the protection of human rights had not gained widespread acceptance as they have now; yet they conceded that a sovereign’s power should not be exercised at the expense of the rights of the population. Therefore, in the post-UN Charter era, when the recognition and promotion of human rights are duties imposed on member states of the UN, there is the need to strike a balance between the exercise of sovereign power and the protection of human rights. Therefore, where the excessive human rights abuses occur within a state, and the state is unwilling or unable to avert or halt it, there should be a mechanism to protect victims of these abuses. R2P was formulated by the ICISS as the concept to strike a balance between sovereignty and human rights protection in order to

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58 Ibid. p. 7
62 Knudsen, note 60, p. 4.
address the thorny issue of mass atrocities, in advancement of its mandate to provide grounds for the legitimacy of military intervention for human protection purposes.

3.2.2. Africa and the responsibility to protect

This section gives a brief account of Africa’s connection with the principle of sovereignty as responsibility. Before the establishment of the ICISS and the formulation of R2P, Africa had already established the principle that, in the face of egregious violation of human rights, it was legitimate to intervene in the affected state to protect vulnerable populations by military force in order to redress grave humanitarian crises. Thus even though R2P may have been considered as a tool for powerful countries to meddle in the affairs of weak countries in the name of human rights, Africa appreciated R2P as an endorsement of its existing security mechanism, and therefore, a necessary tool to address the issue of mass atrocities. The inability of the OAU to prevent the atrocities in Uganda under Idi Amin’s rule during the 1970s and horror of the Rwanda genocide in 1994 persuaded African states to develop a peace and security architecture in the mid-1990s to prevent mass atrocities, to protect victims after their struggle for independence and self-determination. Having emerged from the oppression of colonialism and its attendant injustices, African states were expected to be at the forefront of the defence and promotion of human rights for their peoples. As a result, as early as the 1990s, African states exhibited a willingness to tolerate interference in the domestic affairs of states to end conflicts, and protect human rights if the intervention was conducted by other African states. In 1992, the Secretary-General of the OAU, Salim Salim, obviously with the idea of sovereign responsibility in mind, stated that “the doctrine of non-interference precludes the possibility of accountability on the part of states” and argued that there was the need to “maintain a balance between national sovereignty and international responsibility.” He went further to express the need to reconsider sovereignty: “We should talk about the need for accountability of governments and of their national and international responsibilities. In the process, we shall be redefining sovereignty.” During the same year, Salim reminded Africans of the values of kinship, and argued that “We in Africa need to use our own cultural and social relationships to interpret the principle of non-intervention in such a way that we are enabled to apply it to our advantage in conflict prevention and

63 Williams, note 20 supra, p. 397.
64 Bellamy, note 10 supra, p. 13.
65 Glanville, note 16 supra, p. 179.
66 S. Salim, quoted in Glanville, note 16 supra, p. 179.
67 Ibid.
In other words, sovereignty entails accountability of the state not only to its nationals, but also to the international community to ensure the protection by the state of its population. We Africans are one people, only separated by artificial borders. Therefore, each African is his brother’s keeper, and therefore, the plight of Africans in one state should be of concern to every African. In 1998, at a summit of the OAU, Nelson Mandela added his voice to the call for sovereign responsibility, declaring that:

Africa has a right and a duty to intervene to root out tyranny” and “we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the continent the right and duty to intervene when behind those sovereign boundaries people are being slaughtered to protect tyranny.69

Mandela’s statement shows that Africa was ahead of the formulation of R2P, and is an affirmation of Africa’s belief that a state has the responsibility to protect its people from mass atrocities. If it fails in this duty, sovereignty should not be a barrier to international action in defence of victims of mass atrocities. Africa’s early embrace of the principle of sovereign responsibility is manifest in the Constitutive Act of the African Union, signed on 11 July 2000 in Lome, Togo. The Act affirms the territorial integrity and independence of its Members States,70 and non-interference by any Member State in the internal Affairs of another.71 However, the Act vests in the organisation the right of the Union to intervene in a Member State…in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity.72 It is striking that these three crimes are among the four in R2P adopted by the 2005 World Summit. While recognising the sovereignty of member states, the Act also emphasises that sovereignty does not carry only rights but also responsibilities regarding the welfare of the populations of member states. This was the “first international treaty to provide such a right of intervention.”73 Furthermore, the African Union’s Common Position on UN reform, ‘The Ezulwini Consensus,’74 while acknowledging the sovereignty, independence, and territorial integrity of states, reiterates “the obligation of states to protect their citizens.”75
the regional level, the Economic Community of African States has arrogated to itself the right of intervention when a member state is unwilling or unable to protect citizens.\textsuperscript{76} Thus if a member state fails to discharge the responsibility to protect by committing or permitting the commission of gross human rights abuses in its territory, its sovereignty has to yield to the collective regional responsibility to intervene to protect the vulnerable population. The shift from “non-interference” to “non-indifference” has been characterised by the African Union as its acceptance of sovereignty as responsibility.\textsuperscript{77} Indeed, it has been asserted, and rightly so, that “in some respects, concepts of sovereignty as responsibility and RtoP emerged from Africa.”\textsuperscript{78} There is justified apprehension by militarily weak countries that R2P was contrived by the powerful countries in West to give them a pretext to intervene in their internal affairs. The fact that almost all military interventions in the name of human rights, for example in Libya, Northern Iraq, Haiti, and Kosovo have all been led by the United States, and its Western allies provide justification for this apprehension. However, Africa’s firm embrace of the concept illustrated by its own security mechanism, tempers the belief that R2P is an entirely Western idea, pitching the West against the rest of the world.

3.2.3. Francis Deng and the idea of “Sovereignty as Responsibility”

In the discussion on the evolution of R2P, the contribution of Francis Deng and his collaborator, Roberta Cohen cannot be discounted,\textsuperscript{79} even though the ICISS developed R2P, the Commission’s recommendations followed a path laid out by Francis Deng and Roberta Cohen.\textsuperscript{80} The R2P Report was built on Deng’s earlier work which declared sovereignty as a responsibility primarily resting on a state with a residual international responsibility to protect where the state is unwilling or unable to discharge that responsibility,\textsuperscript{81} and therefore, it is argued that the ICISS borrowed heavily from the pioneering work of Deng and Cohen, a contribution which deserves acknowledgement. The immediate stimulus for the idea was the appointment of Francis M. Deng by then Secretary-General Boutros Boutros-Ghali as the Secretary-General’s Special Representative on

\textsuperscript{77}Williams, note 20 supra, p. 397.
\textsuperscript{78}Bellamy, note 10 supra, P. 13.
\textsuperscript{79}Weiss, note 21 supra, p. 25.
\textsuperscript{80}Bellamy, note 10 supra, p. 24.
\textsuperscript{81}Deng, note 23 supra, p. 249.
Internally Displaced Persons (IDPs).\textsuperscript{82} Deng and his colleague faced the challenge of “how to work around the denial of assistance by sovereign authorities,” \textsuperscript{83} the challenge of how to persuade state authorities to improve the protection given to IDPs, “and find a way to navigate around the potential denial of humanitarian assistance by sovereigns.”\textsuperscript{84} As Deng expressed it, IDPs are supposed to be under the protection of their own governments, yet their displacement is often brought about by their own governments.\textsuperscript{85} In order to overcome the denial of humanitarian assistance to IDPs, Deng and Cohen came up with the principle of “sovereignty as responsibility.”\textsuperscript{86} The concept of “sovereignty as responsibility” meant that sovereignty entails the responsibility of governments to protect their citizens,\textsuperscript{87} and that when states are unable to provide protection to their people from serious harm, they are expected to call for external assistance and accept such assistance.\textsuperscript{88} If they refuse and their people continue to suffer, the international community will intervene. The principle was articulated by Deng as follows:

Sovereignty as responsibility meant that the state has to take care of its citizens, and if – it needed support – call on the sub-regional, regional or continental organizations, or ultimately the international community. But if it did not do that, and its peoples were suffering and dying, the world would not watch and do nothing. They would find a way of getting involved.\textsuperscript{89}

This statement is explicitly captured in the core principles of R2P formulated by the ICISS, that a state has the primary responsibility to protect its nationals, and where it fails, the duty to protect falls on the international community which illustrates further the major contribution of Deng to the emergence of R2P. Deng and his colleague Cohen had the responsibility of persuading governments to provide protection for internally displaced persons, and their guiding principle was that the primary responsibility for the protection of IDPs rested with the host government.\textsuperscript{90} If the state was unable to discharge this responsibility, it should ask

\textsuperscript{82} Bellamy, note 10 supra, p. 10.
\textsuperscript{83} Bellamy, note 42 supra, p. 619.
\textsuperscript{85} Bellamy, note 10 supra, p. 10.
\textsuperscript{86} Ibid.
\textsuperscript{87} H. Slim, note 25 supra, p. 48.
\textsuperscript{88} Deng, note 84 supra, p. 20.
for and welcome international assistance.\textsuperscript{91} International assistance so provided would facilitate the state’s discharge of its sovereign responsibilities, thereby gaining recognition as a legitimate member of international community.\textsuperscript{92} The idea was that “sovereignty carries with it a responsibility on the part of governments to protect their citizens” and Deng reframed sovereignty as far from a right, and entailed benefits as well as responsibilities of the state towards its citizens and the international community.\textsuperscript{93} Thus, Deng advocated a shift of the meaning of sovereignty from the Westphalian model, under which the sovereign had the right to decide matters within its territory independent of external interference, to an idea of sovereignty entailing both rights and responsibilities. The implication was that failure to discharge this responsibility entailed international consequences, ranging from diplomacy to political pressure, sanctions, and as a last resort, military intervention.\textsuperscript{94} This concept was at variance with the notion of traditional sovereignty that a state could do whatever it wished within its territory without external consequences. The implication of the concept of sovereignty as responsibility was that sovereignty should be conditional on the protection of the human rights of its population by the state. This idea pioneered by Deng and Cohen, though in relation to IDPs undoubtedly had influence on the formulation of R2P by the ICISS. This is demonstrated by the similarities between the idea of “sovereignty as responsibility” and the core principles of R2P, namely: that a state has a responsibility to protect its nationals, and: where it is unable or unwilling to do so the international community has a responsibility to protect vulnerable nationals. In both scenarios, where a state fails to discharge the responsibility to protect its nationals there is the potential of international consequences. The formulation of Deng and his colleagues finally became “a central conceptual underpinning of the responsibility to protect,”\textsuperscript{95} a view shared by W. Burke-White with the observation that Deng’s reframing of the Westphalian sovereignty of exclusive authority to the notion of sovereignty entailing both rights and duties laid the groundwork for R2P.\textsuperscript{96} The foregoing buttress the immensity of the contribution of Deng and his colleagues.

\textsuperscript{91} Deng, note 84 supra, p. 18.
\textsuperscript{92} Deng, S. Kimaro, et al., note supra, 24, p. 1
\textsuperscript{93} Ibid. p. 13
to the awareness of the international community of the imperative to protect victims of mass atrocities, and doubtlessly helped in the broad acceptance of R2P by the 2005 World Summit.

The basis of state responsibility towards their nationals can also be found in the protection of human rights espoused in human rights instruments such as the UN Charter 1945, the Universal Declaration of Human Rights (UDHR) 1984, and other international and regional human rights instruments such as the Genocide Convention 1948, the International Covenant on Civil and Political Rights, (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969, and the African Charter on Human and Peoples’ Rights 1981, that have followed in the wake of the UDHR affirm international concerns about how states treat their nationals. Many of the rights and obligations found in these human rights instruments are similar to those contained in R2P, and therefore, R2P cannot be appreciated and assessed if disconnected from these roots;⁹⁷ for the worldwide recognition of human rights emanating from these international instruments contributed to the unanimous endorsement of R2P at the 2005 World Summit.

3.3. Part II - International Humanitarian Crises in the 1990s

The purpose of Part II is to discuss humanitarian crises during the 1990s which triggered debates about how the international community should react to gross human rights abuses within the boundaries of sovereign states and the need for a reconsideration of the concept of armed humanitarian intervention. The international community had to grapple with how to reconcile respect for sovereignty and the protection of human rights of victims of gross human rights abuses, because the inviolability of state sovereignty had hitherto provided immunity to states that abused the human rights of their nationals because sovereignty served as barrier to external action. In the 1990s, in the face of humanitarian crises in several countries, international community failed to react at all or effectively in defence of victims. The atrocities committed during these crises and the ineffective response of the international community led to debates about whether the international community should stick to the existing notion of difference to sovereignty and non-intervention, or to give preference to human rights over sovereignty. This part investigates international reaction and inaction in the face of humanitarian crises in Northern Iraq, Somalia, Rwanda, Haiti, Bosnia, and

Kosovo, because of the defining roles these crises played in the debates on humanitarian intervention, which culminated in the establishment of ICISS and the formulation of the concept of R2P. The horrendous atrocities committed during these crises directly led to the formulation of R2P, which placed the protection of human rights above respect for sovereignty, and thereby paved the way for the legitimate violation of a state’s sovereignty in the name of human rights.

3.3.1. Northern Iraq 1991-

This section discusses the humanitarian crisis in Northern Iraq which followed the expulsion of Iraqi forces from Kuwait in 1991, when the Kurds in Northern Iraq sought independence from the weakened Saddam Hussein regime. The Kurds had suffered years of oppression and other human right abuses at the hands of the regime. The most atrocious abuse was the al-Anneal campaign in which Saddam’s forces slaughtered an estimated 100,000 Kurdish villagers, most of them with chemical weapons, and reduced hundreds of villages to rubble. The Kurds took advantage of the weakened state of the regime in an attempt to free themselves from years of oppression. It examines international reaction to the crisis and the role the crisis played in the establishment of ICISS and the formulation of R2P. President George Bush had during the war encouraged Iraqi citizens to “take matters into their own hands” and oust Saddam Hussein from power. In response, the defeat of the Iraqi army by coalition forces ignited the independence aspirations of Kurds in Northern Iraq, and the Shia Arabs in the southern marshlands, with the encouragement of the United States. However, the Bush administration, after inciting the rebellion initially, decided not to assist the Kurds, because it considered their struggle as an internal conflict. The uprising by Kurdish forces to overthrow the regime of Saddam Hussein failed and the regime sent the Iraqi army into Kurdish villages to suppress the rebellion, and to teach the Kurds a lesson.

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99 Saddam’s Iraq: Key Events, BBC News Available at: news.bbc.co.uk/2/shared/spl/hi/middle_east/02/Iraq_events/html/chemical_warfare.stm [Accessed 20 August 2016]
leading to a massive flight of refugees towards the border of Turkey.\textsuperscript{104} It is estimated that government soldiers killed as many as 20,000 Kurds, most of them civilians, during the operation to suppress the rebellion.\textsuperscript{105} By 5 April 1991, about 2 million Kurdish refugees had sought refuge in the areas between Iraq, and Turkey and Iran,\textsuperscript{106} at the mercy of advancing Iraqi troops.\textsuperscript{107} The displaced people were exposed to the extreme cold weather, and lack of food and water.\textsuperscript{108} Humanitarian organisations were under these war conditions, unable to gain access to provide aid to the refugees, and as a consequence, between 10,000 and 30,000 Kurdish refugees died of exposure and starvation within a few weeks.\textsuperscript{109} This amounted to a serious humanitarian crisis that justified international military reaction.

**International reaction**

The section discusses international response to the crisis. In the face of excessive human suffering, the UN Security Council adopted Resolution 688, demanding that Iraq allow immediate access to international humanitarian organisations to all those in need of assistance in all parts of Iraq, and appealed to member state of the UN and regional organisations “to contribute to these humanitarian efforts.”\textsuperscript{110} Saddam’s efforts to put down the rebellion led to a massive flight of refugees, and as noted above, an estimated 30,000 died within a few weeks. This was a humanitarian crisis of biblical proportions, and required the efforts of the entire international community to come to the aid of the victims. By authorising intervention in Northern Iraq under Resolution 688, the Security Council for the first time classified state repression as a threat to international peace and security when it caused massive flight of refugees.\textsuperscript{111} Western governments were initially unwilling to intervene, but were galvanised into action by televised images of dying Kurds.\textsuperscript{112} Even though the Security Council did not authorize intervention, President Bush stated on 16 April 1991 that “consistent with” Resolution 688 United States troops would enter Northern Iraq on the basis of overwhelming

\begin{thebibliography}{99}
\bibitem{107} Krieg, note 104 supra, p. 69.
\bibitem{108} Seybolt, note 102 supra, p. 48.
\bibitem{110} UNSC Resolution 688 (1991)
\bibitem{111} Seybolt, note 102 supra, p. 52.
\bibitem{112} Ibid. p. 49.
\end{thebibliography}
humanitarian concern for the refugees. He declared: “Some might argue that this is an intervention into the internal affairs of Iraq. But I think the humanitarian concern, the refugee concern, is so overwhelming that there will be a lot of understanding about this.” Purporting to act under Resolution 688, the United States, France, Turkey, and the United Kingdom launched Operation Provide Comfort, “the first humanitarian intervention in the post-cold war era.” To facilitate the delivery of aid to the refugees, the United States, United Kingdom, and France on 18 April 1991 began relief flights dropping aid supplies to refugees on the Iraq-Turkey border. These countries created “safe havens” in Northern Iraq which would later expand into a “no-fly zone” to protect refugees. The US and its allies provided no legal justification for the no-fly zones, and “many countries and observers have contested the actual legality of the enforcement effort.” Nevertheless, Operation Provide Comfort assisted displaced Kurds and saved the lives of “over 7000 Kurdish refugees.”

There was a real humanitarian crisis in Northern Iraq with the lives and welfare of a large number of people at stake. This intervention appears to have been motivated by altruism to assist the suffering Kurdish refugees. However, it was also motivated by a sense of moral obligation, because the Kurds were encouraged to rebel against Saddam Hussein’s regime by President George Bush himself, and therefore, the US and its allies were making amends for his call to arms. Whatever the motive, this was a situation where grave human rights abuses were being perpetrated by a state against its own population, and the international community could not stand idly by but take action, even if unauthorised, to protect the defenseless victims. Having incited the Kurds to rise up against the regime of Saddam Hussein, the US had a moral obligation to intervene militarily to alleviate their suffering. The moral obligation aside, it was the responsibility of the international community to react robustly in defense of vulnerable people against a state that had not only failed in its primary responsibility to protect the welfare of its own people, but had instead been the perpetrator of atrocities against them. The intervention of the US and its allies in Northern was a precursor of R2P.

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115 Seybolt, note 102 supra, p. 49.
116 ICISS Supplementary Volume, note 102, p. 88.
118 ICISS Supplementary Volume, note 100, p. 88.
119 Seybolt, note 102 p. 49.
agreement, Seybold observes that the intervention “opened the door to subsequent humanitarian interventions.”

### 3.3.2. Somalia

This section examines the events that led to the humanitarian crisis in Somalia following the end of President Said Barre’s rule in January 1991. The end of President Said Barre’s rule in Somalia created a power vacuum, and led to the deterioration of the political situation in the country as a result of clashes among different clans. The section discusses international reaction to the crisis and the impact of the crisis on future humanitarian interventions, because Somalia demonstrated the risks of humanitarian intervention to the interveners, particularly after the death of 18 US soldiers in Mogadishu in October 1993. The political chaos and civil war in Somalia was classified by the Security Council as constituting “a threat to international peace and security”, thereby paving the way for collective action. On 24 April 1992, in response to the Secretary-General’s recommendation, the Security Council adopted resolution 751 which established UNOSOM I. The crisis in Somalia contributed to international consciousness that when intrastate conflict results in massive human suffering, external intervention to end the suffering is justified even without the consent of state authorities, and more so, where no government existed as was the case in Somalia.

By the end of 1991, the warring clans had destroyed agricultural lands and livestock production in the country. The hostilities led to widespread death and destruction, and the mass displacement of the population, raising the need for emergency humanitarian assistance. Humanitarian aid channeled through NGOs was seized by local militias who sold the supplies to civilians. The population was threatened by severe famine, and it is estimated that by early 1992, 300,000 Somalis had perished of starvation, at least one and half million faced the same fate, while almost one million had become refugees in

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120 Ibid. p. 52.
123 Krieg, note 104, p. 72.
124 Ibid.
125 UNOSOM I, note 121.
neighbouring countries.\textsuperscript{126} Scenes of starving and dying Somalis, beamed on television around the world, captured the attention of the international community.\textsuperscript{127} It dawned on the international community that the political chaos, deteriorating security situation, widespread banditry, looting, the extent of physical destruction, and the continuing conflict posed a threat to international peace and security in the Horn of Africa region.\textsuperscript{128} An intrastate conflict does not only impact the state affected, but has implications for international peace and security, because its spillover effects affect neighbouring countries and the broad international community. Therefore, every member of the international community has a responsibility to participate in steps aimed at bringing such crises to a peaceful resolution.

**International reaction**

**UNOSOM I**

This section discusses international reaction to the humanitarian crisis in Somalia. Why? Despite the seriousness of the situation, no government acted to help the Somali people until the then UN Secretary-General Boutros Boutros-Ghali accused political leaders of racism for acting in relation to Bosnia-Herzegovina, but not Somalia.\textsuperscript{129} The challenge prompted the Security Council to classify the political chaos and civil war in Somalia as constituting “a threat to international peace and security”,\textsuperscript{130} paving the way for collective action. On 24 April 1992, in response to the Secretary-General’s recommendation, the Security Council adopted resolution 751 which established UNOSOM I, comprising 50 military observers and a 500-strong infantry to provide United Nations convoys with military escort.\textsuperscript{131} However, in the absence of a government capable of maintaining law and order, and the failure of various factions to cooperate with UNOSOM, the mission experienced increased hijacking of vehicles, looting of convoys and warehouses, and repeated attacks on the personnel and equipment of the United Nations and other relief agencies.\textsuperscript{132} As a result of these reasons and

\textsuperscript{126}Ibid.
\textsuperscript{128}UNOSOM I, note 121.
\textsuperscript{129}Seybolt, note 102, p. 53.
\textsuperscript{131}UNOSOM I, note 121.
\textsuperscript{132}Ibid.
the small number of soldiers in the mission, UNOSOM I was unsuccessful in discharging its peacekeeping mandate. An intervention should have reasonable prospects of success, otherwise there is no justification for commencing it. Potential interveners should ensure that there are available resources to achieve the objective of the mission, or else the intervention may end up exacerbating the problems the intervention was meant to solve: or worse, it may result in a greater conflict than the one the intervention was meant to resolve.

UNITAF

This section discusses the authorisation of the use of force by the Security Council under Chapter VII of the UN Charter, following the failure of UNOSOM I. The use of force should be the last resort where possible, and UNOSOM I having failed because non-coercive measures had proved inadequate, force was the only alternative. In a letter to the Security Council on 24 November 1992, Secretary-General Boutros-Ghali reported on the deteriorating situation in Somalia, with particular reference to the factors impeding UNOSOM I from implementing its mandate. He concluded that there was no alternative but to resort to the enforcement measures under Charter VII of the Charter of the United Nations. He argued that this was necessary, since “no government exists in Somalia that could request and allow such use of force.”

On 3 December 1992, the Security Council unanimously adopted Resolution 794 (1992), authorising the use “of all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.” The resolution led to the establishment of UNITAF (United Task Force), a multinational force led by the United States to use all necessary means to establish a secure environment for humanitarian relief operations. On 4 June 1992, in his Address on Somalia, President George Bush stated: “The people of Somalia, especially the children of Somalia need our help. We’re able to ease their suffering. We must help them live. We must give them hope. America must act.” On 9 December 1992, President Bush ordered the deployment of 28,000 American soldiers in Mogadishu in Operation Restore Hope with the

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133 ICISS Supplementary Volume) note 100 supra, p. 94.
134 UNOSOM I, note 121 supra.
135 Ibid.
136 Roberts, note 113 supra, p. 440.
138 Ibid.
principal goal of establishing a secure environment for urgent humanitarian assistance.\textsuperscript{140} For the first time, the Security Council authorised military intervention strictly for humanitarian purposes under Chapter VII of the UN Charter.\textsuperscript{141} It has been observed that, for the first time, the Security Council had “explicitly authorized a substantial military intervention by member states to protect a population without an invitation from the government of the target state.”\textsuperscript{142} Military intervention for human protection purposes involves the violation of a state’s sovereignty, and therefore, unless the state authorities are the perpetrators of the atrocity, their consent should be sought. However, where no government exists, such consent should not be a condition for intervention, because there is no authority to grant the consent.

Transition from UNITAF to UNISOM II

This section discusses the transition from UNITAF to UNOSOM II,\textsuperscript{143} and the withdrawal of the United States and the rest of UNOSOM II from Somalia. UNITAF was US-led, and consisted predominantly of American soldiers and after the loss they suffered on 3 October 1993, the United States withdrew its soldiers from Somalia, resulting in a domino effect and the withdrawal of the rest of UNOSOM II. UNOSOM II was established by Security Council resolution 814 (1993)\textsuperscript{144} to facilitate a prompt and smooth transition from UNITAF to a UN-led intervention. UNOSOM II was tasked to take necessary action including enforcement measures to establish a secure environment for the delivery of humanitarian assistance. The transition failed to stem the factional fighting in Mogadishu which culminated in the killing of 24 Pakistani soldiers in Mogadishu, on 5 June 1993.\textsuperscript{145} On 3 October 1993, during fighting in Mogadishu between US soldiers and Somali militia, 18 US soldiers were killed and 84 wounded.\textsuperscript{146} On 7 October 1993, the US withdrew its soldiers from Somalia.\textsuperscript{147} The withdrawal of the rest of UNOSOM II mission was completed by 28 March 1995, ending UNOSOM II.\textsuperscript{148} What had started as a humanitarian mission to alleviate the suffering of the

\textsuperscript{140} UNOSOM I, note supra,121.
\textsuperscript{141}Krieg, note 104 supra, p. 72.
\textsuperscript{142}Glanville, note 16 supra, p. 184.
\textsuperscript{143}UN Operations in Somalia, UNOSOM II. Available at: http://www.un.org/Depts/DPKO/Missions/unosom2b.htm [Accessed 07 June 2016]
\textsuperscript{144} S/RES/814 (1993)
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid.
\textsuperscript{148} UNOSOM II, note 143 supra.
Somali people, “ended with a firefight during the Battle of Mogadishu.” Nevertheless, UNITAF and UNISOM II were beneficial to the Somali people because more than 250,000 lives were saved as a result of these missions. Definitively, the human losses suffered by the United States and the United Nations were bound to influence international action or inaction in the face of subsequent humanitarian crises, and in particular, the Rwandan tragedy. These losses were bound to result in the hesitation of the international community in intervening by force to protect suffering populations in other cases. This possibly played a role in the lack of response of the international community and especially the United States, to the Rwandan genocide, as will become evident in the discussion on Rwanda below. An intervening state has to take into account matters such as the risk to its military personnel apart from other national interests. Where a country suffers heavy casualties as the US did in Somalia, it is reasonable that it will hesitate to plunge into future interventions unless its vital national interests are at stake, even if such inaction leads to genocide.

While it may be argued that a state may not intervene on behalf of a suffering people unless it stands to gain an advantage, whether strategic or economic, the example of the United States’ intervention in Somalia demonstrates that this is not always the case. In the case of Somalia, President Bush expressed concern for the suffering people of Somalia. The paramount objective of the intervention was therefore, humanitarian, i.e., to bring relief to suffering Somalis. With regard to Resolution 794 (1992), which authorised the use of force and the establishment of UNITAF, its importance is that it overrode state sovereignty and the principle of non-intervention and established that human suffering within the borders of a sovereign state constitutes a threat to international peace and security; and therefore, external armed intervention was justified. It also established that consent to intervene in a state is not required from the state where there is no functioning central government. The resolution also demonstrated the willingness of the international community to intervene in the domestic affairs of a state in the interest of human rights. Intervention without the consent of the target state was appropriate in this instance, because there was no central government in Somalia. With the advent of R2P, the consent of the government of a target state of intervention may not always be a precondition, if the government is unable or unwilling to halt gross human rights abuses within the state. The events in Somalia contributed to the shaping of positive

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149 Snyder, *Battle of Mogadishu*, note 145 supra.
151 *ICISS Report*, p. XI.
international attitudes towards the emerging concept of R2P. As observed by Scheffer, in the light of the crisis in Somalia, “a new standard of intolerance for human misery and human atrocities has taken hold….Something quite significant has occurred to raise the consciousness of nations to the plight of peoples within sovereign borders.” Over the next few years after Somalia, the Security Council demonstrated its willingness to “authorize interventions in the affairs of sovereign states in response to internal crises,” with examples in Rwanda, and Kosovo. The international community accepted the reality that sovereignty should not be a barrier to international action to avert or halt atrocities committed during intrastate conflicts.

3.3.3. Rwanda

This section provides a discussion of the events that led to the genocide and an investigation of the consequences of the inaction or late action by the international community. The horrendous scale of the genocide laid bare the consequences of inaction. There is no doubt that if the international community had the will to avert the tragedy, and a sizeable well-equipped military force had intervened in a timely manner, the genocide would not have cost so many lives. It brought the realisation to the international community that there was the need for the formulation of a mechanism to avert future mass killings or at least to protect the victims. In 1993, the three-year civil war between the two major ethnic groups in Rwanda, the Hutus represented by the government of President Juvenal Habyarimana and the rebel Tutsi Rwandan Patriotic Front (RPF), was brought to end by the international community with the signing of the power-sharing agreement under the Arusha Accords. On 5 October 1993, the UN Assistance Mission for Rwanda (UNAMIR) was established by Security Council Resolution 872 (1993) to supervise the implementation of the Accords and to ensure the security of the capital Kigali, rather than to engage in peace enforcement. The Accords has been described as “a veritable coup d’etat by the RPF.” Wheeler states that the ‘peace process was doomed from the outset,’ because the Accords were unrealistic and unworkable.

153Glanville, note 16, p. 186.
by giving more power to the rebels and small opposition parties at the expense of the government.\textsuperscript{157} The Arusha Accords did not satisfy the demands of both parties, and as observed by Lewicki, Saunders and Minton, “parties who do not think they got the best agreement possible, or who believe that they lost something in the deal, frequently try to get out of the agreement later or find other ways to recoup their losses.”\textsuperscript{158} In compliance with one of the elements of R2P, namely the responsibility to rebuild, efforts should be made to address the root causes of the conflict, otherwise, the conflict is bound to reignite. It appears that the Arusha Accords did not take this cardinal rule into account, leading to the outbreak of hostilities and the subsequent genocide.

President Habyarimana was under pressure by the international community to implement the power-sharing Arusha Accords. However, to do so would mean the end of his 20-year, one-party rule.\textsuperscript{159} Extremists in the military and government were bitterly opposed to the peace process and dismayed by the Arusha Accords.\textsuperscript{160} Soon after the signing of the Accords, extremists within Habyarimana’s government started to kill Tutsis in an attempt to derail the peace process.\textsuperscript{161} A Hutu elite came to believe that Hutu salvation depended on Tutsi extermination.\textsuperscript{162} On 6 April 1994, President Habyarimana’s private plane was shot down as it returned to Rwanda from a conference in Tanzania, killing him, Burundian President Cyprien Ntaryamira and their entourages.\textsuperscript{163} Those who committed this murder were not identified, but it has been suggested that it was most likely extremists among his supporters who referred to Habyarimana’s signing of the Arusha Accords as “an act of high treason”, who assassinated him.\textsuperscript{164} However, militant Hutus attributed the assassination of the President to Tutsi rebels. Within hours of the plane crash, the Presidential Guard, units of the Rwandan army, and government-backed extremist militia (\textit{Interahamwe}\textsuperscript{165} and \textit{Impuzamugambi})\textsuperscript{166} set up road blocks, and began the organized slaughter of about one

\textsuperscript{157} N. Wheeler, note 103 supra, pp. 212 - 214,
\textsuperscript{161} Ibid.
\textsuperscript{163} Ferroggiaro, note 159.
\textsuperscript{165} ICISS Supplementary Volume, note 100 supra, p. 97.
\textsuperscript{166} Ibid.
million Rwandans, mostly Tutsis, within a period of 100 days,\textsuperscript{167} between 6 April and 19 July 1994. This was a horrendous atrocity and a crime against humanity, and was “executed with a brutality and sadism that defy imagination.”\textsuperscript{168} The Rwandan genocide met the threshold of an acute humanitarian emergency, because “…the survival of populations and entire ethnic groups was seriously compromised…,”\textsuperscript{169} and therefore, the international community should have reacted with force in a timely manner to save the victims.

\textbf{International reaction}

This section discusses consequences of international inaction in the face of the human tragedy that unfolded in Rwanda. If the international community had reacted at the beginning of the genocide, thousands of lives would have been saved. What makes the Rwandan genocide different from other mass atrocities is that the international community could have taken steps to minimise or avert the genocide,\textsuperscript{170} because it had prior knowledge that ethnic killing on a massive scale was about to be perpetrated; yet no action was taken to avert it until it was too late for nearly a million victims who lost their lives. As stated in the report of the International Panel of Eminent Personalities:

No controversy about the genocide is more vexing than whether the world knew it was coming yet failed to take decisive steps to prevent it…There can be not an iota of doubt that the international community knew the following: that something terrible was underway in Rwanda, that serious plans were afoot for even more appalling deeds, that these went far beyond routine thuggery, and that the world nevertheless stood by and did nothing.\textsuperscript{171}

The attitude of the United Nations in particular was inexplicable, because in the age of worldwide access to wireless communication, what was unfolding in Rwanda could not have been a secret. So, the United Nations Security Council and, by extension, the international community could not have claimed ignorance, and therefore if there was the political will to

\textsuperscript{167}Ferroggiaro, note 159 supra.
\textsuperscript{168} Barnett, note 162, p. 1.
\textsuperscript{169} Bellamy, note 61 supra, p. 138.
\textsuperscript{170} Barnett, note 162 supra, pp. 1 & 2.
take timely action, hundreds of thousands of lives would have been saved. Cables sent by Commander of UNAMIR, General Romeo Dallaire, to the UN Secretariat in the months before the genocide had warned of mass ethnic killing, and pleaded for permission to undertake military operations.\textsuperscript{172} Instead, the UN Secretariat ordered the peacekeepers to remain “impartial”.\textsuperscript{173} UNAMIR itself was subjected to attacks, possibly with the objective of driving the Mission out of Rwanda.\textsuperscript{174} This objective was to an extent accomplished because, on 7 April 1992, the Prime Minister of Rwanda, AgatheUwilingiyimana, and 10 Belgian peacekeepers of UNAMIR protecting her were killed, which prompted the Belgian Government to withdraw its battalion from UNAMIR.\textsuperscript{175} In its letter of withdrawal to the Secretary-General, the Government of Belgium stated that UNAMIR was “pointless and powerless in the face of the worsening situation,” because Belgian soldiers faced an “unacceptable risk…making continuation of the Belgian presence impossible.”\textsuperscript{176} When the violence erupted, the Secretary-General, in a report dated 20 April 1994 to the Security Council, recommended the withdrawal of UNAMIR, stating that UNAMIR personnel “cannot be left at risk indefinitely when there is no possibility of their performing the tasks for which they were dispatched.”\textsuperscript{177} On 21 April 1994, in the midst of press reports of some 100,000 dead in Rwanda,\textsuperscript{178} the Security Council voted to reduce UNAMIR military personnel to 270.\textsuperscript{179} Consequently, when the genocide started, the Commander of UNAMIR, General Romeo Dallaire had to stand by passively watching hundreds of thousands of Tutsis being slaughtered.\textsuperscript{180}

Concerns about infringing Rwandan sovereignty was not the reason for the reluctance of the major powers to intervene in Rwanda, and as articulated by then Secretary-General of the UN, Kofi Annan:

\begin{itemize}
\item \textsuperscript{172} Barnett, note 162 supra, p. 2.
\item \textsuperscript{173} ibid.
\item \textsuperscript{174} Hehir, note 160 supra, p. 186.
\item \textsuperscript{175} Rwanda – UNAMIR, note 155 supra.
\item \textsuperscript{177} Rwanda – UNAMIR, note 155 supra.
\item \textsuperscript{178} ibid
\item \textsuperscript{179} ibid.
\item \textsuperscript{180} Barnett, note 162 supra, p. 79.
\end{itemize}
Confronted by gross violations of human rights in Rwanda and elsewhere, the failure to intervene was driven more by the reluctance of Member States to pay the human and other costs of intervention…than by concerns about sovereignty.\(^{181}\)

What defies understanding is that in the face of horrendous killings, American officials shunned the use of the word ‘genocide’ to describe the slaughter for fear that using it would have obliged the United States to act under the terms of the 1948 Genocide Convention.\(^{182}\) The United States opposed the idea of reinforcements, no matter where they were from.\(^{183}\) Even if a belated intervention could have saved a “quarter of the ultimate Tutsi victims, that still means approximately, 125,000 innocent lives could have been spared.”\(^{184}\) As Barnett puts it:

> The fact of willful indifference continues to amaze. The Rwandan genocide is not only about the evil that is possible. It is also about the complacency exhibited by those who have the responsibility to confront that evil.

In other words, the international community abdicated its responsibility to come to the assistance of helpless victims of horrendous mass atrocity. Finally, on 18 June 1994, three months after the eruption of the genocide and after hundreds of thousands have been killed, France announced that it was willing to establish a ‘humanitarian protected zone’ covering about one fifth of Rwandan territory as a safe haven for refugees.\(^{185}\) On 22 June 1994, Security Council by its Resolution 929 (1994) authorised the French initiative, *Operation Turquoise*, “to use all necessary means to achieve the humanitarian objectives.”

Operation Turquoise was launched on 22 June 1994 when 2500 French soldiers and 500 soldiers from African countries entered Rwanda.\(^{186}\) On 22 July 1994, the United States and the United Kingdom launched Operation Support Hope in support of humanitarian relief operations in Rwanda.\(^{187}\) This, however, came too late for the nearly one million dead victims. The United Nations failed in Rwanda. According to the UN Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda:

\(^{181}\) K. Annan, Report of the Secretary-General on the work of the Organization, Supplementary 1 (A/54/1), 31 August 1999, paragraph 67.
\(^{182}\) Ibid.
\(^{183}\) Ibid.
\(^{184}\) Kuperman, note 154 supra, p. VII.
\(^{185}\) Rwanda – UNAMIR, note 155 supra.
\(^{186}\) Krieg, note 104 supra, p. 81.
The failure by the United Nations to prevent and subsequently to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there. There was a persistent lack of political will by Member States to act, or to act with enough assertiveness. This lack of political will affected the response of the Secretariat and decision-making by the Security Council, but was also evident in the recurrent difficulties to get the necessary troops for UNIMIR.\(^{188}\)

The lack of political will on the part of world leaders meant that adequate resources could not be marshalled to facilitate a timely intervention to save lives. The attitude of the international community to the crisis was inexcusable because one would have expected that world leaders would have learnt a lesson from the horrors of the Holocaust, and therefore, taken steps to ensure that killings on a massive scale should not happen again. To put it bluntly, the world abandoned Rwanda. The international community was aware that mass killings were going on in Rwanda; yet the international community watched the genocide unfolding, but did little to halt or alleviate the suffering of the Tutsis and moderate Hutus. If the acclaimed proponents of human rights, such as the United States, had the will to intervene at the outset of the genocide, thousands of lives would have been saved. As for the United States, despite the debacle in Somalia, as the self-proclaimed leader of the free world and the only country with the resources and military might to intervene, it did not have very good reasons to stand by. It is clear that the major western powers had no national interests in Rwanda. Respect for the sovereignty of Rwanda could not have been the restraining factor for the unwillingness of the international community to intervene, because in 1991, the United Nations had under similar circumstances, under Resolution 688, declared that the mass killing of Kurds in Northern Iraq by the forces of Saddam Hussein constituted a threat to international peace of security, thereby paving the way for intervention by the United States and its allies. Further, a year after the Rwandan genocide, following the massacre of Srebrenica, NATO unleashed an air campaign on 11 July 1995 to protect civilians.\(^{189}\) However, in the case of Rwanda, the major powers were reluctant to come to the defence of victims of massacre on a larger scale, and when they did it, came too late for nearly one million victims. The Rwanda genocide in

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\(^{188}\)Ibid.

1994 was the most atrocious event which persuaded governments “that more needed to be done to prevent mass atrocities and protect vulnerable people.”\textsuperscript{190} The critical role that the genocide played in the development of the idea of international intervention in conflicts within state borders finds expression in the ICISS Report, that, “We want no more Rwandas…”\textsuperscript{191} The inaction of the UN in the case of Rwanda has been described as “the worst decision the United Nations ever made.”\textsuperscript{192} However, one positive outcome of the Rwandan genocide is that it strengthened international resolve that such a tragedy should never be allowed to happen again without robust international reaction, and thereby, served as a catalyst to the development of the concept of R2P.\textsuperscript{193} The Rwandan genocide led to the reassessment of the meaning, limits and obligations of sovereignty.\textsuperscript{194} In agreement, Weiss observes that the inaction of the international community in Rwanda was one of the “immediate stimuli” to the 2001 ICISS report, \textit{The Responsibility to Protect}.\textsuperscript{195} The scale of the horror of the Rwanda genocide demonstrated the consequences of inaction by the international community in the face of mass killings, which led to the urgent need to devise a mechanism to avert or to react to future mass atrocities and the ultimate formulation of R2P.

3.3.4. Bosnia

This section discusses briefly the history of Yugoslavia, because the cause of the conflict originated from long standing ethnic tensions and animosities among the groups making up the Federal Republic of Yugoslavia. It discusses international reaction and the contribution of the crisis to the formulation of R2P because like other humanitarian crises preceding the formulation of R2P, it brought awareness to the international community of the need to devise a way to protect victims of mass atrocities, thereby contributing to the emergence of R2P. The Federal Republic of Yugoslavia comprising Serbia, Montenegro, Croatia, Slovenia, Bosnia and Herzegovina was formed after World War II with a population comprising a number of ethnic groups including: Orthodox Christian Serbs, Catholic Croats, Muslim Bosnians and Muslim ethnic Albanians.\textsuperscript{196} Throughout the history of the Balkans, there has

\textsuperscript{190} Bellamy, note 10 supra, p. 13.
\textsuperscript{191}ICISS Report, p. VIII.
\textsuperscript{193}Bellamy, note 10 supra, p. 13.
\textsuperscript{194}ICISS Report, p. vii.
\textsuperscript{195}Weiss, note 21 supra, p. 97.
\textsuperscript{196}Srebrenica: Legacy of Genocide, \textit{United States Holocaust Memorial Museum, Background:} Available at: https://www.ushmm.org/confront-genocide/cases/bosnia-herzegovina/bosnia-background [Accessed 15
always been tension between these groups, but Yugoslavia’s President Josip Broz Tito managed to keep ethnic tensions under control with an iron fist. Following the death of President Tito the ethnic and religious divisions within the federation which Tito’s thirty-five year rule had concealed emerged, and the federation began to unravel. Yugoslavia descended into chaos, and the country spiraled out of control, as the republics and ethnic groups began to proclaim their independence. Conflict in a disintegrating state would mean that civilians would be caught in the crossfire of belligerent forces, leading to large scale human rights abuses of civilians.

On 25 June 1991, the Republics of Croatia and Slovenia declared unilateral independence from the Yugoslavia state. The proclamation of independence by the two republics had a profound effect on events in Bosnia and Herzegovina, a multiethnic republic consisting of about 45 percent Muslim, 32 percent Serbs and 18 percent Croats; and on 15 October 1991, Muslim and Croats representatives in Bosnia’s National Assembly approved a memorandum on the Bosnia sovereignty. On 3 March 1992, Bosnia proclaimed its formal independence after a referendum which was boycotted by Bosnian Serbs who wanted to remain part of Yugoslavia. The birth of these new states was accompanied by violence and as a result by the end of 1992, ethnic violence had resulted in the deaths of 6,000 to 10,000 people, with another 10,000 wounded. The violence also produced an estimated 100,000 refugees and the displacement of about 100,000 Serbs and 250,000 Serbs. Bosnia, the most ethnically heterogeneous of Yugoslavia’s republics, suffered the worst fate. The republic became the focus of the deadliest warfare and introduced the term - ‘ethnic cleansing’, as the militaries of Bosnian Serbs, Bosnian Croats and Muslim Bosnians sought to purge areas

June 2016].

197 Ibid.


200 Srebrenica: Legacy of Genocide, note 196 supra.

201 ICISSSupplementary Volume, note 100 supra, p. 89.

202 Ibid.

203 Rigby, note 198 supra

204 Ibid.

205 ICISSSupplementary Volume, note 100 supra, p. 89.

206 Ibid.

under their control of other ethnicities. These ethnic militaries used “murder, rape, torture, detention camps, forcible transfers, and deportation to reshape the makeup of the various parts of Yugoslavia.” Horrendous war crimes were committed by all sides, but Bosnian Muslims formed the largest number of the victims. The most well-known was the massacre at Srebrenica, a Bosnian city under UN protection. In July 1995, Serb General Ratko Mladic took control of Srebrenica, separated women and children from the men and slaughtered an estimated 8,000 Bosnian Muslim men and boys in the single largest massacre in Europe since World War II. For the part of the population that escaped death in the initial massacre, many were sent to one of 381 concentration or detention camps, in Bosnia, where they were subjected to inhumane living conditions. Women were taken to rape camps where they were raped and tortured for weeks and months until they became pregnant. An estimated rapes 20,000 took place between 1992 and 1995 in Bosnia. These atrocities affirm that there was a humanitarian emergency that required that the international community should have taken timely military action to avert it or halt it.

**International reaction**

Although the war was well documented in the international media, the UN and the major world powers treated the fighting as a conflict between equal warring parties, and therefore, no major steps were taken by the international community to end the killings, because the acknowledgment of the killings as genocide would have triggered the obligations of states party to the Genocide Convention to come to the assistance of the victims, a responsibility which apparently they were not prepared to shoulder. Article I of the 1948 Genocide Convention enjoins parties to prevent and punish genocide. In order to avoid the

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210 Ibid.
212 Power, note 207 supra, p. 247.
213 World Without Genocide, note 211 supra.
214 Ibid.
responsibility of responding to a genocide, the international community referred to the killings as “ethnic cleansing” rather than “genocide.” Indeed, a distinguished genocide legal scholar has argued that there is a distinction between ethnic cleansing, and genocide because the intent of ethnic cleansing “is to drive out a population, while the intent of genocide is to destroy or kill the population.” This was a disingenuous argument put up to justify international inaction in the face of these atrocities, because perpetrators of ethnic cleansing and genocide have the same intent, i.e. the physical removal of a people from a particular geographical area. Ethnically cleansing a place of an ethnic group could equally involve mass murder or eviction of a group from a geographical location. Indeed, the ICISS report supports this argument with the affirmation that ethnic cleansing entails killing, forced expulsion, acts of terror or rape. Thus, ethnic cleansing and genocide aim at the same result. In the fog of war, it cannot be determined with certainty that a particular ethnic group was destroyed or driven out of a geographical area. As a matter of fact, it can be argued that under Article II (c) of the Genocide Convention, ethnic cleansing is an act of genocide. Article II (c) states that an act of genocide includes: “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” In the context of Bosnia, what the Serbs did amounted to genocide, namely, killing Bosnian Muslim men and boys at Srebrenica, sending the survivors to concentration camps where they were subjected to inhumane living conditions, and sending women to rape camps. The international community initially reacted to the violence by delivering humanitarian aid, without active intervention to stop the violence. The United Nations focused on creating ‘safe havens’ or protected areas for displaced people to seek refuge. From 1993 to 1994, the United Nations, in order not to jeopardise the lives of UN personnel and civilians in the UN-supervised safe havens, was careful not to react robustly to Serbian aggression. However, after the Srebrenica massacre, NATO decided in August 1995 to react to Serbian aggression with an aerial bombing campaign which forced the Serbian leadership to agree to binding peace negotiations. The negotiations led to the signing of the Dayton Accords in Paris on 14 December 1995, which


220ICISS Report, p. 33

221Krieg, note 104 supra, p. 84.

222 Ibid.

223 Ibid.

ended the conflict in Bosnia.\textsuperscript{225} NATO’s intervention made the Serbian government amenable to a negotiated settlement of the crisis. This shows that where the international community has the will, the use of force can bring to an end mass atrocities.

The Bosnia and Rwanda genocides and represent two prominent failures of the United Nations to prevent or stop mass killings of innocent people. In both cases, the reason for the delay or failure to act in the face of horrendous tragedies was because of the international community’s reluctance to classify the killings as genocide. The distinction between ethnic cleansing and genocide was calculated to facilitate the avoidance of the moral responsibility to come to the aid of the victims of pogroms. The international community should have treated these acts as genocide and intervened earlier. If this had been done, many innocent lives would have been saved. In such a situation, only the timely use of force could bring relief to the suffering population. The failure of the international community to avert the massacre of Srebrenica, contributed to the debate on whether the sanctity of sovereignty should stand in the way of necessary action to defend suffering masses. The massacres contributed to the development of R2P in the sense that the realisation dawned on the international community that the protection of human rights should take precedence over respect for sovereignty, and therefore, in the face of mass atrocities, there should be the international will to intervene in the affected country in the name of human rights.

\textbf{3.3.5. Haiti}

This section discusses the events that led to the humanitarian crisis in 1994, international reaction to the crisis, and the contribution of the crisis to the emergence of R2P. The crisis led to mass flight of refugees and the killing of a large number of people, thereby creating an emergency humanitarian situation necessitating international reaction. The humanitarian intervention in Haiti was used as a tool not only for the protection of victims of abuses, but also for the promotion of democracy, in the sense that the overriding objective of the intervention was the restoration of a deposed government, and argued hereafter, this was an abuse of the concept of humanitarian intervention. The first democratically elected President of Haiti, Jean-Bertrand Aristide, was overthrown on 30 September 1991 by the military.\textsuperscript{226} The Organisation of American States (OAS) condemned the overthrow, and called for

\textsuperscript{225} A. Hehir, note 160 supra, p. 203.
\textsuperscript{226} ICISS Supplementary Volume, note 100, p. 102.
diplomatic and economic sanctions.\textsuperscript{227} The political persecution of the supporters of the former president led to the flight of an estimated 60,000 to 100,000 Haitians to the Dominican Republic and Florida,\textsuperscript{228} demonstrating that an intrastate conflict can have ramifications for neighbouring countries, and thereby threaten international peace and security. The refusal of the military regime to reinstate the deposed president led the UN Security Council to adopt Resolution 841 (1993), which imposed mandatory economic sanctions in 1993 under Chapter VII. The resolution stated that the incidence of humanitarian crises, including mass displacements of population, and the climate of fear of persecution and economic dislocation increased the number of Haitians seeking refuge in neighbouring states, and constituted unique and exceptional circumstances, the continuation of which threatened international peace and security in the region.\textsuperscript{229} This meant that there was an acute humanitarian emergency and in such a situation there was the need for international action to bring the crisis to an end through the use of force, if necessary, in order to end the mass human suffering.

**International reaction**

The failure of economic sanctions to persuade the military junta to reinstate Aristide resulted in the adoption of UN Security Council Resolution 940 (1994) under Chapter VII, which authorised a multinational force to use:

All necessary means to facilitate the departure from Haiti of the military leadership…the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti…\textsuperscript{230}

Although there was a humanitarian crisis that required the use of all necessary means to bring it to an end, it is argued that the overriding objective of the intervention was the restoration of a deposed regime. The purpose of humanitarian intervention should not be for the reinstatement of a deposed government or restoration of democracy, because by its very definition, military intervention for human protection purposes involves the use of force to protect victims of human rights abuses and alleviate human suffering. Since there was a military government in place in Haiti, the words of Resolution 940(1994) should have


\textsuperscript{228}ICISS Supplementary Volume, note 157, p. 102.

\textsuperscript{229}UNSC Resolution 841(1993).

\textsuperscript{230}UNSC Resolution 940 (1994).
demanded that the regime should stop the abuse of the nationals, failing which, an international force would intervene to protect them. However, the resolution left no ambiguity that its purpose was to facilitate the departure of the military junta, and the restoration of the legitimate authorities of the government of Haiti. This was an abuse of the concept of humanitarian intervention, because it amounted to an endorsement of regime change by the insistence on the departure of one government and the restoration of another. In the Haiti intervention, the Security Council the stretched the meaning of humanitarian intervention too far by including the defence and promotion of democracy, and this was tantamount to an abuse of the concept. An invasion was avoided when the military junta was convinced by an entourage led by former US President Jimmy Carter to return Aristide to power. Aristide reassumed office on 15 October 1994.\textsuperscript{231} The intervention was motivated by the desire to promote democracy and human rights concerns but received positive international reaction,\textsuperscript{232} and “fore-shadowed R2P interventions’ use of military force to quell human rights atrocities.”\textsuperscript{233}

However, it is submitted that it should not be the business of the UN or the international community to send military forces into a country for the reinstatement of a deposed head of state or to promote democracy. It is beyond the scope of this thesis to discuss democracy. Suffice it to say that whatever the concept entails, it is not a one-size fits-all concept, but should take into account the peculiarities of a state’s cultural, social, and political consciousness, and cannot be imposed by external military force. Therefore, military intervention for human protection purposes should not be used as a pretext for the restoration of unpopular regimes; for if the Security Council is to authorise the restoration of deposed regimes each time there is an unconstitutional change of government in a country, then it becomes impossible to draw a line between interventions for purely human protection purposes and interventions for regime change as the example of Haiti illustrates. It is conceded that the ICISS Report observed that the overthrow of a democratic government is a grave matter which may require international action in the form of sanctions and other non-coercive measures, and where there are wider regional security implications, the Security Council would be prepared to authorise the use of force. However, the Commission concluded that military intervention for humanitarian protection purposes should be restricted

\textsuperscript{231}ICISS Supplementary Volume, note 100 supra, p. 104.
\textsuperscript{233}Vlasic, note 98 supra, p. 164.
excluding to situations where large scale loss of civilian life or ethnic cleansing is taking place.\textsuperscript{234} Consequently, military intervention for humanitarian protection purposes should be applied only for the protection of human rights of victims of gross abuses, and therefore, the Haiti intervention amounted to an abuse of the concept of humanitarian intervention.

### 3.3.6. Kosovo

This section discusses the events that caused the humanitarian crisis in Kosovo, NATO’s intervention in 1999, and the impact of the crisis on the establishment of ICISS, because it was the last major and most immediate intervention before the establishment of the ICISS. The following year in his Millennium Address to the UN General Assembly, then Secretary-General, Kofi Annan, challenged the international community to devise a mechanism to protect populations from mass atrocities.\textsuperscript{235} His challenge led to the establishment of the ICISS, which formulated the concept of R2P.

Kosovo was an autonomous province inside Serbia, and had considerable political independence.\textsuperscript{236} In 1989, Serbian President Slobodan Milosevic repealed Kosovo’s autonomy and instituted direct rule from Belgrade.\textsuperscript{237} This led to the declaration of independence by the Kosovo Assembly in July 1990.\textsuperscript{238} Historical, ethnic, and political animosity between Kosovar Albanians and Serbs erupted into violence in 1998 when several Kosovar Albanians\textsuperscript{239} separatists were killed by Serb police. The UN Security Council condemned the excessive use of force by the Serb police and the terrorist activities of the Kosovo Liberation Army (KLA).\textsuperscript{240} Fighting continued, and in September 1998, the Security Council adopted UNSC Resolution 119 (1998), under Chapter VII, “Affirming that the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region…,” and demanded a ceasefire and action to improve the humanitarian situation.\textsuperscript{241} Military intervention for humanitarian protection purposes is justified in situations where large scale loss of civilian life or ethnic cleansing is taking place in order to come to the aid

\textsuperscript{234}ICISS Report, p. 34.
\textsuperscript{235}Ibid. p. VII.
\textsuperscript{236}Hehir, note 160, p. 202.
\textsuperscript{237}ICISS Supplementary Volume, note 100 supra, p. 109.
\textsuperscript{238}Hehir, note 160 supra, p. 202.
\textsuperscript{239}Vlasić, note 98 supra, p.164.
\textsuperscript{240}ICISS Supplementary Volume, note 100 supra, p. 110.
\textsuperscript{241}Ibid.
of suffering masses, as exemplified in the case of Kosovo, particularly in the face of UN Security Council inaction.

**International reaction**

After diplomatic efforts failed to resolve the crisis, NATO intervened militarily with Operation Allied Force on 24 March 1999 without UN Security Council authorisation and over the objections of Russia and China. It has been argued that NATO’s intervention in Kosovo brought the controversy on humanitarian intervention “to its most intense head,” because it was unilateral, and; therefore, set a dangerous precedent; and it was argued that the intervention caused “more carnage than it averted.” Consequently, “the moral, legal operational and political intervention came under sustained and sometimes vitriolic scrutiny.” Indeed, the NATO intervention in Kosovo in 1999 has been described as perhaps the most influential on the formation of R2P, because of the controversy it generated, and also because it was the last major intervention immediately before the formulation of R2P by the ICISS. It is submitted that, unlike the case of the Rwanda genocide, NATO was ready to intervene in Kosovo, even without the authorisation of the Security Council, not only for altruistic motives, but probably mainly because of the proximity of Kosovo to Europe. The motives were, therefore, based on the strategic and security interests of NATO. Relating to R2P, the significance of Kosovo is that it legitimised the use of force for protecting human rights even in the absence of UN Security Council authorisation. NATO’s intervention in Kosovo shows that an intervening state takes action not necessarily on grounds of human compassion, but its strategic and security concerns also play a role. It also reveals the double standards in the application in the implementation of humanitarian intervention, because while NATO was eager to intervene in Kosovo, it was missing in action in the case of Rwanda. If Rwanda was situated in Europe, it is inconceivable that NATO would have remained impassive.

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242 Krieg, note 104 supra, p. 89.
243 ICISS Report, p. VII
244 Ibid.
245 ICISS Supplementary Volume, note 100 supra, p. 114
246 Vlasic, note 98 supra, p. 164.
247 Ibid.
3.4. **Part III - The Establishment of ICISS and the Concept of R2P**

This part discusses the establishment of the ICISS and the basic principles of R2P articulated in the ICISS Report, that: “State responsibility entails responsibility and the primary responsibility for the protection of its people lies with the state itself; where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.” This is because the responsibility to protect is not the sole responsibility of the affected state, but also of the broader international community, and therefore the international community cannot stand idly by in the face of mass atrocities if the affected state is unable or unwilling to protect its own people. This section of the chapter discusses the idea of sovereignty as responsibility and the residual responsibility of the wider international community to protect vulnerable populations if the affected state fails to discharge its responsibility to protect, because the responsibility to protect is not the sole responsibility of the affected state, but also of the broader international community. Furthermore, the chapter discusses the three dimensions of R2P, namely: the responsibility to prevent - to address both the root causes and direct causes of internal conflict and other man-made crisis putting populations at risk; the responsibility to react - to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution and in extreme cases military intervention, and; the responsibility to rebuild - to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconsideration, addressing the causes of the harm the intervention was designed to halt.

The part focuses on the military dimension of R2P, because the centrality of the military dimension is emphasised in the ICISS report itself in the assertion that: “By far the most controversial form of … intervention is military, and a great part of our report necessarily focuses on that.” In the words of the ICISS Report, “responsibility to protect” implies above all else a responsibility to react to situations of compelling need for human protection. Even though the World Summit Document downplayed this aspect, it is submitted that the military intervention dimension appears to be the most critical aspect of the

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249 *ICISS Report*, p. XI

250 Ibid.

251 Ibid. p. 8.

252 Ibid. p. 29.

253 *World Summit Outcome Document 2005*, para. 139.
concept, because ultimately, it remains an option, and therefore, it is this aspect that has been the focus of controversy and misgivings about R2P. The centrality of the military dimension to the debate on R2P makes it a necessary focus of detailed discussion. As noted elsewhere in the thesis, military intervention is a grave matter because it entails the use of force to violate the sovereignty of the affected state. It involves the use of deadly force that may cause death, even among the people the intervention seeks to protect, and may also lead to the destruction of the state’s infrastructure, economy, and political institutions. The gravity of the military dimension requires detailed discussion in order to determine how best to apply it when it becomes necessary to do so.

The crises in the 1990s and the inability of the Security Council to react triggered a debate as to whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or whether the time had come to take a different course. In his speech to the Ditchley Foundation in June 1998, Kofi Annan put it this way:

We all applaud the policeman who intervenes to stop a fight, or the teacher who prevents big boys from bullying a smaller one. And medicine uses the word “intervention” to describe the act of the surgeon, who saves life by “intervening’ to remove malignant growth, or to repair damaged organs. Of course, the most intrusive methods of treatment are not always to be recommended. A wise doctor knows when to let nature take its course. But a doctor who never intervened would have few admirers, and probably fewer patients. So it is in international affairs. Why was the United Nations established, if not to act as a benign policeman or doctor? Our job is to intervene: to prevent conflict where we can, to put a stop to it when it has broken out, or - when neither of those things is possible - at least to contain it and prevent it from spreading...In other words, even national sovereignty can be set aside if it stands in the way of Security Council’s overriding duty to preserve international peace and security.²⁵⁴

The statement implies that, although military intervention has serious implications for sovereignty, there are situations where it becomes absolutely necessary to use force to protect

victims of excessive human rights abuses. In other words, drastic and unpleasant measures are sometimes necessary to stop the gross violations of the human rights of the citizens of a state by their own government. Annan’s view was that, in the face of gross human rights abuse within a state, the United Nations should not shy away from taking the necessary action to protect victims of abuse. Therefore, sovereignty can be overridden in order to take action to protect victims of gross human rights abuses. He implied that the time for radical changes to depart from the old orthodoxy of non-intervention had come, in the face of atrocities perpetrated by a state on its population. He went a step further and, in reference to a government’s responsibility to protect its nationals, argued that “the Charter protects the sovereignty of peoples. It was never meant as a licence for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power.”

By implication, a state’s entitlement to the benefits and rights of sovereignty is tied to its respect for the human rights of the population. Sovereignty entails both rights and responsibilities, including the right of a state to the freedom to govern itself the way it deems fit, free from external interference. However, these rights are subject to the state’s protection and promotion of the welfare of its nationals. If it subjects its nationals to gross violation of their fundamental rights, its sovereignty yields to the international community’s responsibility to protect.

### 3.4.1. Establishment of ICISS

The failure of diplomatic efforts to resolve the Kosovo crisis prompted NATO, claiming that Security Council Resolution 1199 (1998) which affirmed that “the deterioration of the situation in Kosovo…constitutes a threat to international peace and security in the region…” amounted to Security Council authorisation for the use of force, to intervene militarily with Operation Allied Force on 24 March 1999, over the objections of Russia and China and, therefore, without UN Security Council authorisation. Russia and China argued that the resolution did not grant authorization for military intervention. It has been argued that NATO’s intervention in Kosovo brought the controversy on humanitarian intervention “to its most intense head,” because it was conducted without Security Council authorization, and therefore, set a dangerous precedent. However, in Africa, the Rwanda genocide in 1994 was the most atrocious event which persuaded governments “that more needed to be done to

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255 Ibid.
256 Krieg, note 104, p. 89.
257 ICISS Report, p. VII
prevent mass atrocities and protect vulnerable people." Annan, aware of the divisive debate surrounding humanitarian intervention and in reaction to the Kosovo crisis articulated the dilemma confronting the international community, thus:

We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle must prevail when they conflict.

On the one hand, the international community has a duty to promote universal respect for, and observance of, human rights and fundamental freedoms. On the other hand, the Charter prohibits the threat or use of force except with the authorisation of the Security Council, or except in self-defence. The dilemma was how to strike a balance between the principles of non-intervention and the prohibition of the use of force without Security Council authorisation on the one hand, and on the other hand, the imperative to avert or halt mass slaughter of innocent people. In his words:

To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security mandate, one might ask - not in the context of Kosovo - but in the context of Rwanda: If in those dark days and hours leading to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allow the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient security system created after the Second World, and of setting dangerous precedents for future interventions without a clear

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260 United Nations Charter, Article 55(c).
261 Ibid. Article 2(4).
262 Ibid. Article 51.
criterion to decide who might invoke these precedents, and in what circumstances?\textsuperscript{263} 

Put in another way this means that to have legitimacy, humanitarian intervention requires the authorisation of the Security Council. However, if the Security Council fails to act in the face of genocide, it should be legitimate for other actors to act even in the absence of Security authorisation. At the same time, to condone interventions that have not been sanctioned by the Security Council sets a dangerous precedent for other powerful state to follow, which may threaten international peace and security. Annan articulated this dilemma aptly. On the one hand, the UN Charter prohibits the use of force without the authorization of the Security Council. Therefore, in the face of Security Council inaction or authorisation, if any state that takes enforcement action, even in defence of helpless victims of gross human rights abuses, it amounts to a violation of the Charter, and undermines the international order. At the same time the world cannot just stand by passively in the face of mass atrocities, so what should the international community do when the Security Council fails to act? Evans and Sahnoun ask rhetorically, “But what if the Security Council fails to discharge its own responsibility to protect? …Which of the two evils is the worse: the damage to the international order if the Security Council is bypassed, or damage to that order if human beings are slaughtered while the Security Council stands by?”\textsuperscript{264} The answer to this ought to be in favour of action to protect vulnerable populations, even in the absence of Security Council authorisation because, on moral and ethical grounds, the world cannot just stand by while thousands of innocent people are being slaughtered. On the other hand, to permit enforcement measures by individual or group of states without Security authorisation sets a dangerous precedent for other states to follow at their discretion, thereby placing the international order into jeopardy. Annan impliedly challenged the international community to find agreement on when interventions should take place and by whose authorisation. If self-help or unilateral action by powerful states was to be avoided, then the time had come for the United Nations to take a central role in the maintenance of international peace and security. Otherwise, as he argued, if humanity “…cannot find in the United Nations its greatest tribune, there is a danger that it will look elsewhere for peace and justice.”\textsuperscript{265} In other words, the Security Council should actively take enforcement measures to protect human rights; otherwise, unilateral

\textsuperscript{263}K. A. Annan, note 259 supra.


\textsuperscript{265}K. A. Annan, note 259 supra.
humanitarian intervention would be legitimate when egregious human rights abuses occur. Potential interveners should seek the authorisation of the Security Council before taking action. On its part, the Security Council should be prepared to grant timely authorisation when requested, if the Council itself is unable to take enforcement action. Failure to do so may render the Council irrelevant, because it will be bypassed altogether when states or organisations with the will and capabilities decide to intervene in another state for human protection purposes in the face of Security Council inaction.

In his *Millennium Report* to the General Assembly in 2000, Annan, while acknowledging that the principle of sovereignty and non-intervention offered vital protection to small and weak states, challenged the international community to find a balance between respect for sovereignty and the need to protect human rights in the following words:

> If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?²⁶⁶

This statement, while acknowledging that the principle of sovereignty and non-intervention offered vital protection to small and weak states, challenged the international community to find a balance between respect for sovereignty and the need to protect human rights. Annan’s objectives were to ensure that the failures of Rwanda, Kosovo, and Bosnia were not repeated and to further find “a new consensus within the international community over the legitimacy of action to protect civilians from mass atrocities.”²⁶⁷ Military intervention generates apprehension among militarily weak countries because of the potential for powerful countries to use it as a pretext for interfering in their internal affairs. However, in the face of horrendous mass atrocities, Annan was urging the international community to place the protection of human rights above reverence of sovereignty, and to accept the principle that in the face of gross abuse of human rights in a state external military intervention to protect the population is legitimate. This challenge led to the establishment of the International Commission on Intervention and State Sovereignty (ICISS) by the Government of Canada “together with a group of major foundations,”²⁶⁸ with the mandate “to build a broader understanding of the problem of reconciling intervention for human protection purposes and

²⁶⁶Annan, note 33 supra.
²⁶⁸ICISS Report p. VII.
In announcing the establishment of the ICISS, the Government of Canada stated that the ICISS was established “as a response to Secretary-General Kofi Annan’s challenge to the international community to endeavor to build a new international consensus on how to respond in the face of massive violations of human rights and humanitarian law.”

The contribution of former Secretary-General Kofi Annan to the emergence of R2P cannot be downplayed. He was a strong proponent of the concept, and strongly challenged world leaders to rise to their responsibility to devise a mechanism to protect victims of mass atrocities, by placing human rights above sovereignty and the principle of non-intervention. He took human rights seriously, and redefined the balance between states and the people, vesting in the people the source of legitimacy and authority.

He formulated the “two concepts of sovereignty” which defined states as instruments at the service of their people and not vice versa. This formulation “helped launch the debate on the legitimacy of humanitarian intervention,” and therefore, he made a valuable contribution to the evolution of the R2P principle that, where a state perpetrates gross human rights abuses against its own people, the use of force to protect the victims was justified.

3.4.2. The concept of R2P

This section deals with the basic principles of R2P, namely: the idea that sovereignty entails responsibility and the primary responsibility to protect the population of a state rests with the state authorities; and, the residual responsibility to protect which falls on the broader international society where the state affected is unable or unwilling to avert or halt atrocities in the state, because the protection of human rights in a state is not the exclusive responsibility of the state, but also of the international community. The ICISS introduced the concept of R2P as a balance between state sovereignty and the protection of human rights. The importance of the work of the ICISS was its efforts to find international consensus regarding sovereignty, intervention, and human rights, through the formulation of the concept

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269Ibid. p. 2.
271Weiss, note 21 supra, p. 105.
273Weiss, note 21 supra, p. 105.
of “responsibility to protect”275 The R2P was the outcome of the international community’s inability to protect victims of gross human rights abuses in the 1990s, and the growing worldwide awareness of “mass atrocities in various parts of the world.276 The legal foundations of the responsibility to protect as a guiding principle for the international community can be found: firstly, in obligations inherent in the concept of sovereignty itself; secondly, in the responsibility of the UN Security Council under Article 24 of the UN Charter for the maintenance of international peace and security277 and; thirdly, in the developing practice of states, regional organisations and the Security Council itself.278 As has been observed, the US and its allies intervened in Kosovo to protect victims of human rights abuses, and ECOWAS intervened in Liberia for the same reason and in both Kosovo and Liberia. Although the interventions did not have prior Security Council authorisation both received the implied approval of the Council after the fact. As already discussed, historically and under international law state sovereignty involved the responsibility of a state to protect its population and their welfare. Furthermore, under Article 24, members state of the UN have conferred upon the Security Council the primary responsibility of maintaining international peace and security on their behalf, and therefore, it is argued that this responsibility is shared and collective. At the core of the concept are the following principles:279 sovereignty as responsibility which lies primarily with the state, and; the residual responsibility of the international community. As noted, a state has a duty to protect the welfare of its nationals, and this duty is inherent in the concept of sovereignty itself. However, the manner a state treats in its nationals is not the sole business of the state, but is of concern to the international community, and therefore, the international community will intervene if the state fails to discharge this duty to protect its population from excessive human rights abuses.

3.4.3. Sovereignty as responsibility

This section examines the notion of ‘sovereignty as responsibility,’ which implies that the primary responsibility to protect the nationals rests upon the state, because sovereignty entails rights and responsibilities, and a state can claim the benefits of the concept only if it respects and protects the human rights of its nationals. The ICISS re-characterised sovereignty from

275Glanville, note 16 supra, p. 190.
276Thakur, note 273, p. 419.
277ICISS Report, p. XI,
278Ibid.
279Ibid.
sovereignty as control to sovereignty as responsibility,\textsuperscript{280} which implied that: it was the function of state authorities to protect the lives and safety of citizens and to promote their welfare; national authorities are responsible internally to the citizens and externally to the international community through the United Nations, and; agents of the state are accountable for their acts of commission and omission.\textsuperscript{281} This understanding of sovereignty is of central importance to the Commission’s approach to the question of intervention for human protection purposes, and the development of R2P.\textsuperscript{282} In order to achieve international consensus, the Commission emphasised the intrinsic value of sovereignty. In this light, the Commission’s report declared that sovereignty provided protection for weak states against powerful states; for “in a dangerous world marked by overwhelming inequalities of power and resources, sovereignty is for many states their best - and sometimes seemingly - their only line of defence.”\textsuperscript{283} The report went further, stating that sovereignty, for many states and peoples, is “a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape their own destiny.”\textsuperscript{284} Sovereignty implies that all states, big and small, are equal, and each has the right to govern itself in the manner it deems fit free from external dictates. State sovereignty has to be accorded respect in order to allay the fears of weak states that powerful states will use R2P as a pretext to meddle in their internal affairs, because respect for the sovereignty of every state is the only shield for the weak against the bullying of big and powerful countries for the advancement of their national and strategic interests. However, the Commission maintained that state sovereignty did not mean that a state has unlimited power to do what it wants with its people, and the Commission heard no such claim during its worldwide consultations.\textsuperscript{285} As an additional measure to achieve international consensus on its proposals, the Commission shifted the focus of the debate about intervention from “the right to intervene” to “the responsibility to protect,” in order to evaluate the intervention from the point of view of those seeking or needing support and their urgent needs, rather than those who may be considering intervention.\textsuperscript{286} Changing the terms of the debate from “right to intervene” to “responsibility to protect” helps to shift the focus of discussion where it belongs – on the requirements of

\textsuperscript{280}Ibid. p. 13.  
\textsuperscript{281}Ibid.  
\textsuperscript{282}Ibid  
\textsuperscript{283}Ibid. p. 7.  
\textsuperscript{284}Ibid.  
\textsuperscript{285}Ibid. p. 8.  
\textsuperscript{286}Ibid. pp. 16-17.
those who need or seek assistance.\textsuperscript{287} This was appropriate, because whereas “the right of humanitarian intervention” is intrinsically confrontational, ‘the responsibility to protect’ “is more of a linking concept that bridges the divide between intervention and sovereignty.\textsuperscript{288}

The responsibility to protect entails the principle that the state has a responsibility to protect its own nationals form gross human rights abuses, a principle which no state can challenge. Thus, if a state is unable to discharge this responsibility, it should ask for external help. If the state fails to ask for assistance or rejects assistance when offered, then there is justification, in the interest of the victims, for legitimate external military intervention conducted with UN Security mandate. The right of humanitarian intervention on the other hand, occurs without the mandate of the Security Council, and is undertaken from the point of view of the intervener, not necessarily borne out of a responsibility to protect, but rather based upon military might and the capability to intervene, even in situations where the affected state could have brought the humanitarian crisis under control with external help. It is therefore, basically confrontational and it is bound to elicit resistance from the forces of the affected state.

3.4.4. The State’s primary responsibility to protect

This section discusses the state’s primary responsibility to protect is people. The Commission emphasized that the primary responsibility to protect its people rested with the state, and it is only when the state is unable or unwilling to fulfill this responsibility that the responsibility of the international community is activated. Even though sovereignty “does still matter”,\textsuperscript{289} it has undergone a major transformation. Sovereignty, according the Commission, “implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”\textsuperscript{290} As the ICISS report states, “the conditions under which sovereignty is exercised have changed dramatically and there are expectations and demands in relation to the way states treat their people.”\textsuperscript{291} Former UN Secretary-General Perez de Cuellar expressed this view in his 1991 report, in which he called for the reassessment of sovereignty and non-intervention, affirming the emergence of “an irresistible shift in public attitudes towards the

\textsuperscript{287}\textit{Ibid.} p. 18.
\textsuperscript{288}\textit{Ibid.} p. 17.
\textsuperscript{289}\textit{Ibid.}
\textsuperscript{290}\textit{Ibid.} p. 8
\textsuperscript{291}\textit{Ibid.} p. 7
belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents.” He acknowledged the importance of state sovereignty, but asserted that sovereignty “cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.” He challenged the traditional notion of sovereignty during the Cold War, and asserted that it cannot be argued that sovereignty:

…in this day and age includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection.

Traditional sovereignty implied that states had the privileges of sovereignty and non-interference regardless of how they treated their populations. However, it is unacceptable in the contemporary international order that a state had the right to suppress the population. In the contemporary world order, the welfare of the population of a state is paramount. As articulated by then Secretary-General Kofi Annan in his groundbreaking article in the Economist magazine:

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

In order words, while under Westphalian sovereignty state sovereignty was supreme, the new understanding of sovereignty is that the interest of the population of a state takes precedence over state sovereignty and the international community has an interest in the manner in which a state treats its own citizens. Therefore, the treatment of the citizens by a state of its citizens

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292 A/46/1 (13 September, 1991, 5
293Ibid.
294Ibid.
296Ibid.
is no longer the exclusive business of that state. Sovereignty now entails both rights and responsibilities, and a state is entitled to enjoy the benefits of sovereignty only if it discharges its responsibility to protect the human rights of its citizens. R2P, thus, re-characterised sovereignty as responsibility, linking it to human protection, and without rejecting the principle of non-intervention, addresses the issue from the perspective of the victims. Breakey shares this view with the observation that:

Sovereignty is no longer to be understood as a right to perform whatever domestic activities the state authority desires…the very reason for sovereignty is at base the protection of the people’s most fundamental rights from egregious acts of violence.

The principle of sovereignty as responsibility and its implication to protect vulnerable people from egregious violations of human rights has a basis under the UN Charter. It has been argued that it has a basis on international law, because, “it epitomizes the humanitarian character and central purpose of international human rights, humanitarian law, refugee law and international criminal law,” and further that there is a responsibility “under international law to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”, and therefore, the principle of sovereignty as responsibility “does challenge states to meet their existing responsibilities.”

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298 Thakur, note 273, p. 418.
300 UN Charter, Articles I & 55. Article 1 aims to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 55 affirms universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
3.4.5. The international responsibility to protect

As already observed, the Commission’s report stated, “State sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself.”\(^{303}\) However, a residual responsibility lies with the broader community of states.\(^ {304}\) Thus, according to the Commission’s report, “Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”\(^ {305}\) Thus, a residual responsibility to protect is conferred on the international community where a state is unable or unwilling to fulfil its responsibility.\(^ {306}\) This is a very important principle, in the sense that a duty is imposed on the international community to take action to avert or halt atrocities, only where the state authorities fail to do so. This will ensure that powerful states will not intervene in weak states at the earliest sign of a humanitarian crisis. State authorities are better placed to assess the potential for a humanitarian crisis and come up with the best way to handle it, unless they are the perpetrators or the crisis overwhelms them. As the Commission’s report states:

The domestic authority is best placed to take action to prevent problems from turning into potential conflicts. When problems arise the domestic authority is best placed to understand them and to deal with them. When solutions are needed, it is the citizens of a particular state who have the greatest interest and the largest stake in the success of those solutions, in ensuring that the domestic authorities are fully accountable for their actions in addressing these problems, and in helping to ensure that past problems are not allowed to recur.\(^ {307}\)

The passage sums up the Commission’s rationale for placing the primary responsibility to protect a state’s nationals on the state. The state authorities are best placed to deal with any internal humanitarian crisis. However, in the event that the state authorities are overwhelmed by a humanitarian crisis, they should ask for international assistance, or accept it when offered. If the state fails to ask for assistance or rejects international assistance in the face of grave violations of human rights, then the international community should not just stand by in

\(^{303}\) ICISS Report, p. XI.
\(^{304}\) Ibid. p. 17
\(^{305}\) Ibid.
\(^{306}\) ICISS Report, p. XI.
\(^{307}\) Ibid. p. 17.
the face of state inaction. However, the discharge of this responsibility by the international community in such situations should be motivated by the imperative to protect the vulnerable victims of human rights abuse, and not viewed as a right of intervention in the interests of the interveners. As Breakey puts it: “In this way R2P aims to displace the controversial ‘right of humanitarian intervention’, and refocuses attention on the needs of the vulnerable, rather than the entitlements of the interveners.” The residual responsibility to protect should not be a pretext for the advancement of the national or strategic agenda of the intervening state or states. The fallback responsibility of the international community is justified, and should be activated only in the face of the inability or unwillingness of state authorities to halt or avert a humanitarian calamity. The responsibility to protect its nationals is essentially that of the state, and therefore, its sovereignty should not be subverted by external intervention in the name of human rights, except in the exceptional situations where the state is manifestly unwilling or unable to protect its people.

3.4.6. The three dimensions of the responsibility to protect

This section discusses the specific responsibilities which the responsibility to protect embraces because these are the responsibilities embodied in the concept formulated by ICISS. The report of the Commission outlined three specific responsibilities embraced by the responsibility to protect, namely: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild. These responsibilities require detailed discussion in order to provide a clear understanding of the concept.

1. The responsibility to prevent

This section deals with the responsibility to prevent which is meant to address both the root causes and direct causes of internal conflicts and other man-made crises putting populations at risk, in order to avert the eruption of events that may lead to human suffering, because if conflicts can be prevented, it obviates the need to resort to the controversial measure of military intervention. The section discusses the three essential conditions that have to be met

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308 Breakey, note 298 supra, pp. 11-39.
309 ICISS Report, p. 17
310 2005 World Summit Outcome Document, note 252, para. 139.
311 ICISS Report, p. XI
for effective prevention of conflict.\textsuperscript{312} (i) early warning and analysis; (ii) root causes prevention efforts; and (iii) direct prevention efforts.

In the view of the Commission, prevention is the most important dimension of R2P and therefore, prevention options should be exhausted before intervention is contemplated.\textsuperscript{313} Thus, the encouragement of sustained efforts to address the root causes of the problems that put populations at risk, and the effective use of direct prevention measures was a key objective of the Commission.\textsuperscript{314} The Commission stated that the exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied. Bellamy shares this view, with the observation that the first response to atrocities is peaceful means, while the use of force should be the option of last resort.\textsuperscript{315} Conflict prevention requires the cooperation and involvement of state authorities of the affected state. Hence, the Commission was of the view that prevention of deadly conflict and other man-made catastrophes, is primarily the responsibility of sovereign states and the communities and institutions within them, as the fair treatment and fair opportunities for all citizens provides a solid basis for conflict prevention.\textsuperscript{316} However, because the failure of prevention can have international ramifications, the support of the international community in the form of development assistance, support for the advancement of good governance, human rights or the rule of law, mediation efforts and other efforts to promote mediation and dialogue or reconciliation may be needed, and in some cases, may be indispensable.\textsuperscript{317} Similar to the primary responsibility to protect its people, which lies on the state, the primary responsibility to prevent atrocities lies on the state. However, as internal conflicts can have international ramifications, the responsibility to prevent is not the sole responsibility of the state, but also of the broader international community. Therefore, the international community has a responsibility to provide all the necessary assistance to the state to enhance its ability to discharge its responsibility to prevent.

\textsuperscript{312}Ibid. pp. 21-23.
\textsuperscript{313}Ibid. p. XI.
\textsuperscript{314}Ibid. p. 20.
\textsuperscript{316}ICISS Report, p. 19
\textsuperscript{317}Ibid.
Improving conflict prevention is urgent and essential, and therefore, sustained efforts to address the root cause of the problems that put populations at risk must be encouraged.\textsuperscript{318} To this end, the ICISS Report mentions three essential conditions that have to be met for effective prevention of conflict:\textsuperscript{319} (i) early warning and analysis, i.e., the capacity to predict violent conflicts, in order to stop conflicts before they erupt; (ii) root causes prevention efforts, i.e. steps that need to be taken to address the root causes of conflicts before they break out, and; (iii) direct prevention efforts in the form of political and diplomatic initiatives needed to prevent internal conflicts.

i.Early warning and analysis

This sub-section discusses the importance of early warning, i.e. the capacity to predict violent conflicts or in the words of the ICISS Report, “the knowledge of the fragility of the situation and the risks associated with it,”\textsuperscript{320} in order to take effective preventive action to obviate the eruption of conflict. Early warning appears to be the most essential condition, because early warning makes it possible for action to be taken in a timely manner in order to ensure success in preventing a crisis from erupting. However, if action is not taken in a timely manner in response to an early warning of an impending humanitarian crisis, action may come too late to save the victims of mass atrocities. As the Commission noted in reference to the UN response to the Rwandan genocide, lack of early warning is an excuse, and the problem is not lack of warning but of timely response\textsuperscript{321} arising from weak analytic capacities which are exacerbated by the problem of securing accurate information to predict violent conflict.\textsuperscript{322} In order to fulfil its purpose, early warning must have three elements, namely: access to information, capabilities to analyse the information, and channels of communication to decision makers responsible for taking preventive measures.\textsuperscript{323} The task of securing accurate information in order to predict violent conflict is usually not conducted by state authorities, but by foreign agencies. Without the cooperation of state authorities, which may not be forthcoming, these foreign agencies cannot obtain accurate or reliable information. Even if accurate information is gathered, it may not be possible upon analysis to determine that

\textsuperscript{318}Ibid. p. 20.
\textsuperscript{319}Ibid. pp. 21-23.
\textsuperscript{320}Ibid. p. 20.
\textsuperscript{321}Ibid. p. 21
\textsuperscript{322}Ibid.
conflict will break out at all or when it will break out; nor can it be guaranteed that officials responsible for taking preventive action will do so in a timely manner. State authorities are more suitably positioned to provide accurate information towards efforts at conflict prevention, and they are reasonably suspicious of foreign agencies that seek to gather information as interference in their domestic affairs. They would, as a result, be unwilling to cooperate, and therefore, these external agencies are unlikely to gather accurate information. In such a situation, even if an analysis is conducted, it would rely on inaccurate information, and any recommendations made thereby will be flawed; and even in the event that suitable recommendations are made, the responses of officials responsible for taking action to avert the conflict may not reflect the urgency of the situation, thereby rendering any recommendation for action valueless.

Preventive analysis that is critical for early action to prevent conflicts seldom takes place, and it if does at all, fails to take key factors into account, misses key warning signs, or misreads the problem, thereby missing the opportunity for early action, or leading to the application of wrong tools. This is not to diminish the critical role of early warning in averting impending conflict because early warning can lead to action to stop conflicts before they start. Therefore, there is an urgent need for the international community to establish a better early-warning system. The international community has responded to the need for mechanisms for conflict prevention, focused particularly on intra-state conflicts. For example, the Organisation of African Unity (OAU) established in 1993 a Mechanism for Conflict Prevention Management, and Settlement. The organisation established the mechanism “against the background of the history of many prolonged and destructive conflicts” in order to “bring to the process of dealing with conflicts in our continent a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur.” To put it another way, the limited success at finding solutions to intrastate conflicts on the continent made the establishment of a preventive mechanism imperative. The Organisation for Security and Cooperation in Europe (OSCE) has also developed internal mechanisms aimed at preventing conflict in Europe. NGOs have also been playing an important role in the context of early warning efforts, and in helping to shape domestic and international public

324Ibid.
325 ICISS Report, p. 20.
326 OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution, (Cairo Declaration), 28-30 June 1993.
327Ibid. paras. 11-12.
328ICISS Report, p. 20.
opinion to support preventive measures.\textsuperscript{329} NGOs on the ground in the affected country add to regional and international efforts by focusing domestic and international attention on issues that may trigger conflict in the state, in order to facilitate steps to address these issues, and thereby contribute to the prevention of intrastate conflicts, making the use of force for human protection purposes unnecessary.

\textbf{ii. Root causes prevention}

This section deals with steps that need to be taken to address the root causes of conflicts before they break out, because if internal economic and political deficiencies are not addressed, efforts aimed at averting conflict will not succeed. With regard to the root causes prevention efforts, the UN Security Council has stressed the urgent need to address the root causes of conflict, such as poverty, political repression, and uneven distribution of national resources.\textsuperscript{330} The Commission recommended that root causes prevention should address political deficiencies, including constitutional power sharing. It should also tackle economic deprivation, strengthen legal protections, and embark upon sectoral reforms to the military and other state security services,\textsuperscript{331} because these are the areas that generate dissatisfaction in a state, leading to conflict. Steps have to be taken to ensure that: minorities are represented in government; that their rights are respected; that every citizen has equal economic opportunities; and that the military and security services are representative of the demographics of the state. If these issues are not addressed conflict in a state cannot be averted and it is bound to reignite even after a military intervention. Conflicts can break out in a state because of the monopoly on political and economic power by one segment of society, political oppression or the domination of the security services of a state by one ethnic group. The unfair allocation of national resources in a state in particular can lead to conflict. For example, resources in a state like oil, cocoa, timber, gold, etc. may be located in the geographical area inhabited by a particular ethnic group. The geographical area of this ethnic group may be denied a fair allocation of these resources in terms of the development, while a relatively poor part of the state is allocated a disproportionate part of national resources because the government is dominated by people from the latter area. Alternatively, people from a resource-rich part of the state may be aggrieved that they do not have a fair share of the national cake. The low-level insurgency in the oil-rich eastern part of Nigeria is a case in

\textsuperscript{329}Ibid.
\textsuperscript{330}Ibid. p. 22.
\textsuperscript{331}Ibid. p. 23.
point. Alternatively people belonging to the ethnic group dominating the government will get preferential treatment in the allocation of government jobs, especially recruitment into the army and other security services, making national elections a ‘do or die’ affair. Thus internal conflicts usually arise because of unfair treatment and unfair opportunities for all citizens in the allocation of national resources. Political repression can also lead to internal conflict. Thus, for example, if the political system is so rigged as to make the democratic change of government impossible, the population has the only option of resorting to arms to effect change. If states avoid these pitfalls, many conflicts leading to needless human suffering will be avoided. Therefore, in order to prevent conflict, pursuant to their responsibility to prevent, state authorities have to respect the human rights of citizens and also ensure a fair distribution of economic opportunities, fair distribution of national resources and promote a system of inclusive government that represents all the sectors of the society.

iii. Direct efforts prevention

The section deals with the direct prevention efforts in the form of political and diplomatic initiatives needed to prevent internal conflicts, because diplomatic and political pressure from the UN Secretary-General, for example, and regional organisation can persuade the affected state authorities to take steps to address the potential root causes of impending conflict. These have the same components like the root causes prevention, but different instruments in achieving them: - political and diplomatic, including the involvement of the UN Secretary-General; economic, including promises of new funding or investment, or the threat of sanctions; legal involving offers of mediation or arbitration, and; military, involving consensual preventive deployment of the military, or the threat to use force. These measures may be in the form of assistance, positive inducements, or in the negative form of threatened “punishments.”332

The difficulty in preventing atrocities is that, firstly, it is not always possible to predict their occurrence, or whether the state concerned will take action to prevent them from occurring.333 Secondly, preventive action may be interpreted as interference in the domestic affairs of the host, and may be resisted, or at the very least, the host state may refuse to cooperate or the host state may prospect of early warning as involving the collection of sensitive information.

332Ibid. p. 23.
333Bellamy, note 17 supra, p. 123.
about the host state.\textsuperscript{334} Thirdly, it is not always easy for the international community to know the causes of atrocities or simmering animosities and whether they will lead to mass killings, and to come up with the most effective preventive and response mechanisms.\textsuperscript{335} The eruption of armed conflict in a state does not necessarily portend the commission of atrocities, which would necessitate preventive action. As expressed by Thakur, armed conflict is not a necessary or sufficient condition of atrocities, because “most (although not all) atrocities occur against the backdrop of armed conflict, but most armed conflicts do not lead to mass atrocities.”\textsuperscript{336} Examples can be found in the current situation in Ukraine, where there is armed conflict between government forces and rebels in the eastern part of the country, but mass atrocities are not taking place. Another example is the conflict between Morocco and the rebels of the Saharawi Arab Republic in Western Sahara. Another problem with taking preventive action is that a crisis can develop quickly, as was the case in the post-election violence in Kenya, and in some situations, even though a state may be identified as a state at risk of impending crisis, the crisis may not occur at all.\textsuperscript{337} Thus, the difficulty with taking preventive action to avert atrocities is exacerbated by uncertainties, because if it is not possible to predict accurately that conflict is about to erupt in a state, then it is impossible to take timely action to avert it.

In addition to the Commission’s proposal on the involvement of the international community in conflict prevention, the basis of the international community’s responsibility to prevent exists in the Charter of the United Nations 1945. Under the Charter, member states have conferred on the Security Council “the primary responsibility for the maintenance of international peace and security”\textsuperscript{338} “in accordance with the Purposes and Principles of the United Nations,”\textsuperscript{339} which include “effective collective measures for the prevention…of threats to peace.”\textsuperscript{340} It is argued that member states share the responsibility for preventing threats to peace; for, as the Charter states, “All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter…”\textsuperscript{341} The Security Council has determined that internal problems of peace and security, gross violations of

\begin{itemize}
\item[334] Ibid.
\item[335]Thakur, note 273 supra, p. 419.
\item[336]Ibid.
\item[337]Bellamy, note 17 supra, p. 123.
\item[338]UN Charter, Art. 24(1).
\item[339]Ibid. Article 24(2)
\item[340]Ibid. Article 1(1).
\item[341]Ibid. Article 2(5).
\end{itemize}
human rights, including genocide, constitute threats to international peace and security.\footnote{\textit{ICISS Supplementary Report}, note 100, p. 9.} Therefore, member states of the UN have a duty to assist the Security Council in the prevention of threats to peace. Besides, resolutions of the General Assembly and the Security Council on the prevention of armed conflict support the responsibility to prevent under the Charter.\footnote{L. Woocher, ‘The Responsibility to Prevent’, in \textit{The Routledge Handbook of the Responsibility to Protect}, W. A. Knight & F. Egerton, eds. Routledge, (2012), p. 22.} For example, the General Assembly Resolution 337 reaffirmed “the primary responsibility of Member States for the prevention of armed conflict.”\footnote{\textit{Prevention of armed conflict}, A/RES/57/337. Available at \texttt{www.un-documents.net/a57r337.htm} [Accessed 9 September 2016]} To reinforce this responsibility, Security Resolution 1366 affirmed that “conflict prevention is one of the primary responsibilities of Members States”, emphasising the “fundamental responsibility of Member States to prevent and end the impunity of genocide, crimes against humanity and war crimes.”\footnote{The Role of the Security Council in the Prevention of Armed Conflicts, S/Res/1366. Available at \texttt{www.refworld.org/docid/} [Accessed 9 September 2016]} The resolution places the primary responsibility for conflict prevention on state authorities, the UN, and the international community.\footnote{Ibid.} This resolution contains many of the elements of the responsibility to prevent which would later be “articulated by the International Commission on Intervention and State Sovereignty.”\footnote{Woocher, note supra 342, p. 24.} Therefore the responsibility of a state to prevent mass atrocities against its own people predated the formulation of R2P by the ICISS, and thus, the ICISS, only affirmed a preexisting state obligation, which a state is obliged to observe.

The importance of conflict prevention is also reflected in the European Presidency statement of priorities to the 65\textsuperscript{th} UN General Assembly, that, ‘…the EU will apply a “narrow but deep approach” to R2P-related policies and will particularly focus on its preventive pillar’.\footnote{EU Presidency Statement of 16 September 2010. Available at \texttt{http://www.eoropa.eu-\_un.org/articles/en/article_10094\_en.htm} Quoted in H. Cuyckens& De Man, note 339, p. 118.} The “narrow but deep” approach was articulated in UN Secretary-General Ban Ki-moon’s January 2009 report on \textit{Implementing the Responsibility to Protect}. The report stated that the scope of R2P should be kept narrow in the sense that it should apply only to the four crimes stated in the 2005 World Summit Outcome Document, namely: genocide, war crimes, crimes against humanity, and ethnic cleansing, and to their prevention, as expanding R2P to include natural disasters and other crimes would undermine international support for R2P. At the same time, the implementation of the concept should be deep in the sense that it is not only
about the coercive measures, but includes other prevention and protection measures in response to mass atrocities.\textsuperscript{349} R2P consists of a continuum of measures, from prevention, to reaction, to rebuildng, and not limited to the use of force. In the face of mass atrocities, and where circumstances permit, non-coercive measures should be applied, and the use of force should be the last resort. The clear statement of the crimes that may trigger the application of R2P, namely, genocide, war crimes, ethnic cleansing, and crimes against humanity, removes any ambiguity as to when military intervention for human protection purposes is applicable.

The importance of conflict prevention cannot be underestimated, for if crises can be prevented, then the contentious issue of armed military intervention will not arise and therefore preventing atrocities is better than reacting to them, or incurring the expenses or building shattered societies. The prevention of atrocities is appealing, because as opposed to intervention, it is less problematic and less costly.\textsuperscript{350} Successful prevention will spare at-risk populations from the scourge of war, displacement, and death.\textsuperscript{351} Hanne Cuyckens concurs that “effective prevention will definitely obviate any need to resort to the other two components of R2P,”\textsuperscript{352} i.e. the responsibility to react and the responsibility to rebuild. Atrocity prevention is challenging and encompasses not only the gathering of information, but also the proper analysis, and the communication to officials who are in a position to take action to prevent atrocities. For example, the Bosnia war and the Rwanda genocide were predicted in advance, but the warnings were issued to “institutions that were not specifically tasked with preventing atrocities.”\textsuperscript{353} Successful prevention of conflicts will help to avoid genocide and other mass atrocities, making rendering it unnecessary for precious resources to be expended on protection measures. Without conflict prevention, conflicts will always break out without warning, and there will be many Rwandas and Srebrenicas. In the words of the ICISS Report, without new energy and momentum being devoted to conflict prevention, “the world will continue to witness the needless slaughter of our fellow human beings, and reckless waste of precious resources on conflict rather than on social and economic development.”\textsuperscript{354} Thus, the importance of conflict prevention cannot be underestimated, because successful conflict prevention efforts would address the causes of conflict, thereby

\begin{thebibliography}{99}
\bibitem{349} Ban Ki-moon, note 13 supra, para. 10 (b-d).
\bibitem{350} ICISS Supplementary Report, note 100 supra, p.27.
\bibitem{351} ibid.
\bibitem{353} Bellamy, note 17, p. 122.
\bibitem{354} ICISS Report, p. 27.
\end{thebibliography}
obviating conflicts. Where there is no conflict, the possibility of mass atrocities is limited, thus making military intervention and the attendant expenditure in rebuilding a shattered state unnecessary, and thereby releasing the resources expended in these pursuits to be applied on the economic and social development of the state.

2. The responsibility to react

This section discusses the second specific responsibility which the responsibility to protect entails, i.e. the responsibility to react or the responsibility to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions, and international prosecution, and in extreme cases, military intervention.355

The use of military force is an extreme and grave measure that entails the infringement of the sovereignty of a state, and therefore, if non-coercive military measures prove adequate in halting gross human rights abuses, then the latter measures are to be preferred. This refers to the international community’s residual responsibility to react where a state is unable or unwilling to halt gross abuses of human rights perpetrated within its territory and the measures that have to be taken to discharge this responsibility. To this end, the section discusses the following measures: measures short of the actual application of military force, and; the situations when military action for human protection purposes is warranted, with a focus on the military dimension, because as previously observed, the military dimension has been the subject of concern to militarily weak countries apprehensive that powerful countries may use the pretext of protecting human rights to interfere in their domestic affairs. Therefore, it is necessary to focus on how best the use of force may be applied in the face of mass atrocities. The responsibility to react imposes a responsibility on the broader international community “to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international persecution, and in extreme cases military intervention.”356 Thus, where possible, non-coercive measures should be applied in the effort to halt gross human rights abuses, and the military option should be the last resort, and only if the former measures prove inadequate.

355Ibid. p. XI.
356ICISS Report, p. XI.
Measures short of military action

This sub-section discusses measures that do not involve the actual application of military force in the resolution of a humanitarian crisis when preventive measures fail, because failure of prevention measures to avert a humanitarian crisis does not necessarily mean that military action should be taken; and therefore, before military action, other non-coercive measures should be attempted because of the gravity of the coercive military measure. The Commission’s Report provides a list of coercive measures short of military intervention that can be applied to put pressure on the affected state, before resorting to the use of military force.\(^\text{357}\) These include political, economic, and military sanctions. Such sanctions operate to persuade the affected state authorities to take or not to take a particular action or actions, by inhibiting the affected state’s capacity to interact with the outside world.\(^\text{358}\) Sanctions impose hardship and suffering on the population they are meant to assist without having much effect on the perpetrators of atrocities, and therefore, the perpetrators have no incentive to stop their actions.\(^\text{359}\) As was noted in the Commission’s Report, the hardships brought upon the population sanctions “tend to be greatly disproportionate to the likely impact of sanctions on the behavior of the principal players” and “…they develop holes and deteriorate further over time…when they are poorly monitored, as has been almost universally the case.”\(^\text{360}\) This may not be sufficient to persuade the affected state to change course, even though the 2005 World Summit Outcome Document which adopted ICISS’s R2P downplays the military aspect or R2P.\(^\text{361}\) Nevertheless, non-coercive measures are worth a trial prior to the application of military force, because the use of force has grave implications for the affected state in terms of deaths of its military personnel and nationals, damage to its infrastructure, and economy; and to the interveners, the cost of intervention may entail fatalities in its military personnel and finances. Therefore, the ICISS proposed non-military measures prior to military force, which include: economic measures, political and diplomatic measures, and non-coercive military measures.

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\(^{357}\)Ibid. p. 29.

\(^{358}\)Ibid.

\(^{359}\)Ibid.

\(^{360}\)Ibid.

i. Economic measures

Under this heading, the section discusses the economic measures that may be applied in reaction to atrocities within a state. These may consist of positive or negative inducements, because the two sets of inducements go together in the form of the proverbial carrot and stick. Positive inducements assure the affected state that it stands to get certain benefits if it halts gross human rights; but on the other hand, if it persists in perpetrating human rights abuses, then unpleasant consequences will follow. Positive incentives include giving better access of trade, access to external markets, development assistance, promises of new funding or investment, or the promise of more favourable trade terms.\(^{362}\) It is debatable whether state authorities or non-state actors within a state bent on committing atrocities can be swayed by such incentives to halt them, because the incentives are realisable in the long term, and therefore, the perpetrators may consider that there are no immediate personal benefits sufficient to make them change their actions. If the perpetrators of the abuses consider that the positive inducements on offer will not impact directly on their personal financial wellbeing, then these inducements will have no effect on their behaviour, and they will not be persuaded to end the atrocities.

Negative inducements may target the foreign assets of a country, or a rebel movement or terrorist organisation or the foreign assets of foreign leaders and their immediate families.\(^{363}\) Restrictions may also be placed on income-generating activities such as oil, and diamonds, and on access to petroleum products and the use of aviation bans.\(^{364}\) It is argued, that while some of these sanctions may affect the principal players, others such as restrictions on access to petroleum or targeting the foreign assets of a country are indiscriminate, and end up punishing the ordinary people. As per the Commission’s Report, these sanctions can “blunt” weapons causing more harm than good, in particular to civilian populations.\(^ {365}\) In any case, it is debatable whether these measures can bring any change to the conduct of the perpetrators, because they can continue to leave opulent lives unaffected by these sanctions and restrictions. The proven ineffectiveness of non-coercive measures as discussed above strengthens the application of the military option, because the use of force is bound to get the

\(^{363}\)Ibid. p. 30.
\(^{364}\)Ibid.2
\(^{365}\)Ibid. p. 29.
attention of the perpetrators, or at the very least, it will defeat them militarily in order to pave the way for assisting the vulnerable population.

ii. Political and diplomatic measures

This topic discusses the measures in the political and diplomatic realm that can be brought to bear on a state where atrocities are taking place in order to persuade the state authorities to end them. Diplomatic and political pressure exerted by a regional organisation or the UN may prove successful in persuading the affected state authorities to end mass atrocities, thereby rendering unnecessary the use of the military option which entails unpleasant consequences for the state. These measures include restrictions on diplomatic representation, such as the expulsion of staff, and restrictions on travel against specific leaders and their families to major international shopping destinations.\footnote{Ibid. p. 30.} It is difficult to understand how such measures can persuade perpetrators of atrocities to mend their ways. State authorities can easily find a way around restrictions on diplomatic representation or expulsion of diplomatic staff by using the diplomatic services of a friendly country, and it is unlikely that restrictions of travel to major shopping centres can affect the perpetrators of atrocities in these days of online shopping. For example, travel restrictions have been placed on President of Robert Mugabe of Zimbabwe for decades for alleged gross abuse of human rights, but they cannot be said to have achieved the desired results. Other measures are suspension of membership or expulsion from international or regional bodies and refusal to admit a country to membership of these bodies.\footnote{Ibid. p. 31} Measures like the aforementioned may not be sufficient to sway perpetrators of mass atrocities without the back-up of the threat or actual use of force. Therefore the affected state authorities should be left in no doubt that non-coercive measures and the use of military force are both options on the table, and if it remains intransigent in the face gentle persuasion by non-coercive measures, the use of force may follow. Such a strategy will be more effective than a stand-alone use of non-coercive measures.

iii. Non-coercive military measures

This section discusses measures of a military nature but which do not involve the threat or the use of force, with the same objective, that military force should be applied as the last resort and only after non-coercive measures have proved inadequate. These entail arms embargoes
on the sale of military equipment and spare parts to the affected state, and cessation of military cooperation and training programmes.\textsuperscript{368} The Commission’s Report concedes that results vary.\textsuperscript{369} It is argued that embargoes on the sale of military hardware and spare parts will not lead to a change in the actions of perpetrators of atrocity, because this equipment can be sourced from the black market, as there are always people, other states, or organisations that will be prepared to breach international embargoes for financial gain. With the proliferation of armaments on the international market and the competition among arms producing countries to sell arms to any interested buyer, be it a state or non-state actor, perpetrators of mass atrocities will not be persuaded to end them due to a shortage of weapons, because there will always be sellers of arms as long as there are willing buyers, and therefore, as a negative inducement, armed embargoes are of minimum value as a means in ending mass atrocities.

It is submitted that non-military measures alone cannot bring relief to victims of atrocities without the back-up of the threat or actual use of force. Besides, if the international community has to wait until all non-military measures have been exhausted before resorting to coercive military force, a large number of people who military intervention is meant to save would already be dead, and therefore, salvation would have come too late. Thus, the use of force for human protection purposes may be a reasonable first option in some humanitarian crises such as the Rwanda genocide, because the genocide took place over a short period of time, and therefore, non-coercive measures would not have had the time to be effective, and would have come too late to save the lives of victims. Consequently, in cases similar to the Rwanda genocide, the use of force as a first option is justified, because it will halt the genocide in its early stages and save hundreds of thousands of lives. Weiss concurs and, while referring to the Balkan wars, makes a plausible case that “earlier military intervention would conceivably have been more humanitarian than attempting less coercive measures prior to military ones, many of the people whom humanitarian intervention is intended to save could be dead or have fled.”\textsuperscript{370} if time is spent on applying all the alternatives to military intervention. Thus, prevention is not the single most important priority as the ICISS Report claims. As Weiss puts it:

\textsuperscript{368}Ibid. p. 30.
\textsuperscript{369}Ibid.
\textsuperscript{370}Weiss, Ideas in Action, note 21, p. 113.
Most of the mumbling and stammering about prevention is a superficially attractive but highly unrealistic way to try and pretend that we can finesse the hard issues of what essentially amounts to humanitarian intervention. The ICISS’s discourse about prevention is a helpful clarification, but it nonetheless obscures the essence of the most urgent part of the spectrum of responsibility, to protect those caught in the crosshairs of war.\footnote{Ibid.}

The primary purpose of the responsibility to protect is to save lives, but not to tarry while lives are lost. This implies the use of force, and therefore, R2P is essentially humanitarian intervention couched in a different expression. Measures calculated to prevent mass atrocities are unrealistic, and cannot achieve their goals, and therefore, the threat or use of force is always likely to be more effective because it will get the attention of those who perpetrate atrocities. What needs to be done is to ensure that military interventions are carried out with the mandate of the UN Security Council, with clearly operational guidelines, in order to ensure that powerful states do not use the pretext of protecting vulnerable people as a pretext to interfere in the domestic affairs of weaker states. To be legitimate and to receive international approval, it is necessary that an intervention should be authorized by the UN Security Council, because unilateral interventions set a dangerous precedent which other states may exploit and thereby undermine the international order.

**Military action**

This section focuses on the coercive military dimension of R2P as formulated by ICISS, as it is the most controversial aspect of R2P\footnote{ICISS Report, p. 31.} because it legitimises the use of force for human protection purposes, and also because the ICISS Report accorded it great importance. The ICISS Report implied that non-coercive measures have not always proved effective, and therefore, this strengthens the case for the military option. This can be deduced from the objective of the Commission, which was to devise a mechanism that would make the use of force for human protection purposes legitimate by creating a balance between respect for sovereignty and respect for human rights. The section discusses the situations when military action for human protection purposes is warranted, and the tough thresholds established by the ICISS that must be met if military action is to be defensible.\footnote{ICISS Report, p. 29} These thresholds or
criteria were designed in a way that will ensure that, if they were observed, it would be difficult for powerful countries to intervene in weak countries on no other grounds but primarily on humanitarian grounds. The criteria also set operational guidelines to ensure that disproportionate force will not be used in the attainment of the objective of the intervention. While the ICISS Report indicated that military force should be part of the strategies for implementing R2P, it overemphasised military force as “the centerpiece of R2P by focusing so much attention on the proposed guidelines for the use of force.” The importance accorded to the military dimension of R2P in the ICISS Report itself is demonstrated by a clear bias in favour of the military option over other options such as economic and political sanctions. A study of the ICISS report shows that, under the heading “The responsibility to react,” the military option is accorded more detailed treatment, from pages 31 to 37 inclusive, i.e. seven pages, while other options such as economic and political sanctions are dealt with only from pages 29 to 31, i.e. about two and a quarter pages, thereby demonstrating the importance the Commission attached to this aspect of R2P. The centrality of the military dimension is reflected in the ICISS report as follows: “By far the most controversial form of … intervention is military, and a great part of our report necessarily focuses on that.” The ICISS took into account the fact that if the military aspect of R2P was not handled with circumspection, the concept would not receive international consensus because of the concerns of militarily weak states that they would be potential targets of armed force by aggressive major military powers. Therefore, the Commission covered in great detail the circumstances under which force may be justified, in particular by making the Security Council the right body to confer legitimacy on an intervention. The manner in which the Commission handled the military dimension of R2P definitely contributed to the unanimous adoption of the concept at the 2005 World Summit.

To buttress this fact, the report provides detailed criteria for military intervention under six headings, namely: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects. Besides, the responsibility to rebuild, to provide full assistance with recovery, reconstruction, and reconciliation is required, “particularly after a military

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375 Bellamy, note 42 supra, p. 621.
376 ICISS Report, pp. 29-37
377 Ibid.
378 Ibid. p. 8.
379 Ibid. p. 32.
intervention,” which presupposes that the responsibility to rebuild arises only as a consequence of military action, thus reinforcing the importance of the military dimension. In the words of the ICISS Report, “responsibility to protect” implies above all else a responsibility to react to situations of compelling need for human protection. Thus, even though the Commission avoided the phrase “humanitarian intervention,” and also placed emphasis on prevention of crises and rebuilding the affected state in the aftermath of crisis, “the commission’s report was still very much focused on the question of military intervention in response to humanitarian crises and mass atrocities.” While Gareth Evans notes that “it is an absolute travesty of the RtoP principle to say that it is about military force and nothing else,” he shares the view that the military dimension of R2P is the most important aspect, with the assertion that “the question of military action remains the central one to the debate.” He asserts further that “…military intervention is not merely defensible; it is a compelling obligation.” In the view of Weiss, the central element of R2P is non-consensual intervention, rendering other elements of the concept secondary. He criticises the 2005 World Summit Document refinement of the ICISS report concerning the use of force “as a step backward, as R2P lite” - because humanitarian intervention has to be approved by the Security Council. The foregoing justify the focus on the military dimension of R2P, because the point is, even if it is argued that humanitarian intervention is not identical to R2P, the common denominator with the two concepts is that the use of force is an option, and therefore, the apprehensions of militarily weak states with humanitarian intervention apply in relation to R2P; and these fears have to be addressed in order to provide justification for the use of force for human protection purposes where necessary.

The ICISS Report proposed that less intrusive and non-coercive measures should always be considered before more coercive and intrusive ones are applied. The primary responsibility for protecting its nationals rests on the state, but when non-coercive measures fail to end
atrocities, and the state is unable or unwilling to discharge the responsibility to protect, it subverts its own sovereignty, and the principle of non-intervention yields to the responsibility of the international community to intervene in the affected state. The international community’s responsibility to intervene in order to protect vulnerable victims in such a situation appears to compromise Article 2(7) of the UN Charter which enshrines the principle of non-intervention. Article 2(7) states:

Nothing contained in present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Nevertheless, the Article makes an exception with regard to measures taken under Chapter VII, which confers authority upon the Security Council when “necessary to maintain or restore international peace and security.” Therefore, any intervention conducted with Security Council mandate will be lawful. When prevention measures fail and hostilities break out in a state, and mass atrocities are taking place in a state, “it is not an option for the world to stand by and do nothing.” The problem is determining the most effective measures to bring an end to such atrocities. The Commission made a deliberate decision not refer to the use of force for the purpose of protecting or assisting people at risk as “humanitarian intervention,” because of its controversial nature, but rather preferred to refer to it either as “intervention” or “military intervention” for human protection purposes. It is argued that the change in terminology does not mask the fact that with both descriptions the use of force is the common denominator. The only difference between the two is that in the case of R2P the use of force is one among other measures in tackling the issue of mass atrocities, and before the use of force, R2P requires that non-coercive measures should be applied, thereby making the use of force a last resort. However, as has been argued, in certain situations it will be unreasonable for the international community to test the efficacy of non-coercive measures before resorting to the use of force, because the latter measure may come too late for the victims of mass atrocities.

390 Ibid. p. XI.
391 UN Charter Chapter VII, Article 42.
392 Evans, Ending Mass Atrocity Crimes, note 95, p. 105.
393 ICISS Report, p. 9.
As has already been noted, non-coercive military measures are not always sufficient to end atrocities, and therefore, the ICISS proposes that when non-military measures fail to resolve a humanitarian crises, then “in extreme cases – but only in extreme cases” military force may be applied. It has been argued that if quiet and public diplomacy “are not founded on a realistic possibility that they will be backed up, if necessary, by other measures, then they will ring hollow and lose credibility.” In other words, non-military measures are not enough to persuade a state perpetrating atrocities against its own people to cease and desist, and therefore, unless there is a credible threat to use force or actual force is applied, atrocities cannot be ended through diplomacy or economic sanctions alone. As observed by Frank Chalk et. al., in the contemporary era, no genocide or crimes against humanity, once underway, was halted through soft-power measures; and thus, for example, “Crimes against humanity in East Pakistan in 1971 and the killing fields of Cambodia in 1978 were stopped by intervening militarily.” This goes to buttress the argument that non-coercive measures alone are not sufficient to stop mass atrocities, and thereby strengthens the case for the military option.

Nevertheless, military intervention for humanitarian purposes, in the view of the Commission is an exceptional and extraordinary measure, and therefore, to be warranted, there must be an extraordinary level of human suffering in the form of large scale loss of life, “actual or apprehended, with genocidal intent or not,” or “large scale ‘ethnic cleansing’, actual or apprehended, whether carried by killing, forced expulsion, acts of terror or rape.” Thus, military intervention, because of its gravity, has to be conducted primarily in response to excessive human suffering, such as mass killings, ethnic cleansing, rape etc., and not in advancement of any other agenda. The expression “actual or apprehended” appears flexible enough to permit preventive or anticipatory use of force; for if there is a reasonable apprehension of imminent genocide, then it would be unreasonable to wait for it to happen before action is taken, but rather, there would be justification for armed intervention at the earliest indication of impending atrocities. This blurs the line between preventive measures and forceful military action as a first option. Indeed, the ICISS Report makes it clear that the

394Ibid.
397ICISS Report, p. XII.
“international community should not be placed in the morally untenable position of being required to wait until genocide begins” before reacting, and therefore, military action can be “legitimate as an anticipatory measure in response to clear evidence of likely large scale killing.”

This statement seems to be at variance with the Commission’s statement in its report that “prevention options should always be exhausted before intervention is contemplated,” because prevention is the most important dimension of R2P. The rationale behind regarding prevention as the most important dimension of R2P is that successful prevention makes the other dimensions of R2P unnecessary, because the absence of conflict usually means there is minimum gross human rights abuses, making the need to intervene to protect victims or to rebuild the affected state, thereafter, irrelevant.

The danger with preventive or anticipatory military action, however, is that on the one hand the danger apprehended may never occur, and it may be used as a pretext to advance the national interest of the intervening state or states. On the other hand, to wait for atrocities to start may cause irreparable harm to victims of atrocities, because “in most cases, by the time mass atrocities are apprehended as imminent, the window for prevention has been closed.”

Evans appears to be a strong advocate of the military aspect of R2P, for as he asserts, if R2P is to take root to ensure that there are no more Rwandas, then the international community has to identify and apply credible principles for intervention in general “and military action in particular.”

The ICISS Report acknowledges the norm of non-intervention, but asserts that there are “exceptional circumstances” in which, for purposes of maintaining a stable international order, it is in the interest of the international community to react, when order has broken down in a state leading to genocide or ethnic cleansing on a large scale. The exceptional circumstances must be cases of extreme violence that “shock the conscience of mankind,” or that threaten international peace and security, thereby requiring coercive military action. The Report then attempts to define what exactly it means by “exceptional circumstances” by establishing the threshold of violence that has to be crossed before coercive military force for

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398 Ibid. p. 33
399 Ibid. p. XI
400 Ibid.
401 Bellamy, note 10 supra, p. 159.
402 G. Evans, When its right to fight, note 386, p. 72.
403 ICISS Report. p. 31.
404 Ibid.
405 Ibid.
human protection purposes can be justified. To this end, the report establishes six criteria that must be satisfied before the decision to use force is made. The purpose of these criteria is to ensure that, when strictly observed before military intervention is initiated, there will be international consensus that the primary objective of the intervention is to protect victims of gross human rights abuses purposes, and not for the advancement of other agendas.

3.4.7. The six criteria for military intervention or precautionary principles

This section discusses the criteria that must be satisfied before the decision to intervene is made. The ICISS Report calls them precautionary principles, because they assist in drawing the line as to when military intervention is justified before the intervention takes place. R2P is a comprehensive concept which frames intervention as a continuum of measures from various types of political, economic, and military sanctions, with military action as a last resort. Thus, under R2P, intervention does not consist only of the use of force, and therefore, it is a requirement that before force is used, non-coercive measures should be applied to give the perpetrators of the atrocities in question the opportunity to halt them. Force is to be used only after non-coercive measures have proved inadequate in stopping the atrocities, because of the grave implications accompanying the use of force, for both the target state and the interveners as, already observed. The Commission took the view that “in extreme and exceptional cases, the responsibility to react may involve the need to resort to military action.”\textsuperscript{407} The Commission was persuaded during consultations with stakeholders that there was strong opposition to infringements on sovereignty.\textsuperscript{408} However while it acknowledges the importance of the principle of non-intervention, it found that there is general acceptance that “there must be limited exceptions to the non-intervention rule for certain kinds of emergencies.”\textsuperscript{409} Plausible as this sounds, this has raised concerns among weaker countries that R2P confers legitimacy on interference in the domestic affairs of weaker states by powerful states.\textsuperscript{410} Nevertheless, since its formulation in 2001, R2P has gained significance as a mechanism for the “prevention of genocide and mass atrocities and about protecting

\textsuperscript{407}ICISS Report, p. 31
\textsuperscript{408}Ibid
\textsuperscript{409}Ibid.
\textsuperscript{410}M. Ayoob, Third World Perspectives on Humanitarian Intervention and International Administration, 10 Global Governance, (2004), p.115.
potential victims.” Despite the fears of militarily weak states about the potential abuse of R2P by powerful countries, R2P has gained international consensus as a mechanism for the protection of victims of egregious human rights, as demonstrated in the unanimous endorsement of the concept by over 170 world leaders at the 2005 World Summit.

The Commission listed the following criteria which have to be satisfied in order to justify the use of force for human protection purposes, namely: just cause, right intention, last resort, proportional means, reasonable prospects, and right authority. Fulfilment of the criteria assists in determining that the primary goal of the intervention is to protect the human rights of victims of abuse.

**Just cause**

This section focuses on the just cause threshold; that is, the kind of harm sufficient to serve as a catalyst for military intervention to override the principle of non-intervention. The Commission took into account the fact that sovereignty is to be respected, and therefore, exceptions to the principle of non-intervention should be limited, and in the light of the gravity of military intervention, “there must be serious and irreparable harm occurring to human beings” before force is used for human protection purposes. The just cause principle seeks to find moral and ethical justification for intervention, and has its foundations in the just war or bellum justus theory which “makes the use of force just and the cause of war legitimate,” especially where it becomes necessary to wage war in defence of victims of tyranny or gross human rights abuses. The phrase ‘just war,’ like ‘humanitarian intervention’ is an oxymoron, and as rightly observed by Tucholsky, “There is no such thing as a just war,” because war always involves violence, death, and human suffering. Nevertheless, under certain circumstances, the use of force may be a necessary option in the international arena. Krieg shares this view, observing that with the exception of pacifism that rejects the use of force entirely, “all models of just war theory have accepted the fact that in certain scenarios the use of force may within limits be justifiable.” Thus, the ICISS was of the view that, in extreme and exceptional cases, the responsibility to protect may involve the

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411 Bellamy, R2P Five Years On, note 10 supra, p. 143.
412 ICISS Report, p. 32.
413 ibid.
414 Krieg, note 104, p. 20.
415 K. Tucholsky, quoted by Krieg, note 104 supra, p. 20.
416 Krieg, note 104 supra, p. 20.
417 ICISS Report, p. 29.
need to resort to military action. The threshold for just cause however is set high, and therefore, military intervention is justified only where there is serious and irreparable harm occurring to human beings or imminently likely to occur, in order to limit exceptions to the principle of non-intervention. The just cause criterion was intended to create expectations of the situations when the international community and in particular the Security Council, should use force in the face of human catastrophes and to limit the arbitrary casting of the veto by the five permanent members of the Security Council for selfish purposes. The Commission identifies two conditions that military intervention for human protection purposes must aim to halt or avert: (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.” The term ‘large scale’ was not defined, because opinions on the phrase will differ, what is large scale is relative and what may be considered large scale in one situation may pale into relative insignificance when compared to another situation. For example, few atrocities compare to the horror of the Rwanda genocide; yet, regardless of the scale, every incident of mass killing is intolerable. Therefore, the Commission’s view was that military action is a legitimate response to clear evidence of likely large scale killing. The view of the Commission justifies anticipatory military intervention for human protection purposes, so that the international community will not have to wait for actual large scale killing to commence before taking action, because the action may come too late for the victims of gross human rights abuses.

The Commission was of the view that the just cause criterion for the decision to intervene would be amply satisfied if either or both of conditions (i) and (ii) are met. These conditions are amplified to include: actions precisely defined in the 1948 Genocide Convention that involve large scale loss of life; crimes against humanity and violations of humanitarian laws as defined in the Geneva Conventions and Additional Protocols; manifestations of ethnic cleansing, including killing of members of a particular group in order to eliminate their

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418Ibid., p. 31.
419Ibid., p. 32.
421ICISS Report, p. 33.
422Ibid.
423Ibid.
presence from a particular area or their removal from a geographic area; situations of state collapse resulting in the exposure of population to mass starvation and/or civil war or; overwhelming natural or environmental catastrophes where the state affected is unwilling or unable to cope or call for assistance leading to loss of life. The objective of the just cause threshold is to ensure that the horror of the Rwandan genocide is never repeated, because it serves as a guide to the international community as to when timely action should be taken in defence of vulnerable people. Thus, the international community should not wait until mass atrocities have already started, but should be able to take action where evidence points to imminent mass killing or ethnic cleansing. Anticipatory military intervention is to ensure that the international community is not placed in the untenable position of coming too late to the rescue of victims of human rights abuses. Anticipatory intervention is, therefore, a preventive measure, aimed at stopping mass atrocities before they start. If this principle had been applied in Rwanda, the genocide would not have started, or at least the number of victims would not have been on such a large scale.

The idea behind R2P was that, in the face of excessive violations of human rights in the form of mass killings or ethnic cleansing, coercive force may be used to protect the victims, and therefore, the expansion of the concept to include natural and environmental catastrophes is controversial because these are not man-made phenomena; and therefore, it is submitted that the affected state should not be held accountable where it fails to call for assistance or rejects such assistance in the face of its inability cope. The reason for rejecting foreign assistance may be due to the fear that powerful states may use the humanitarian crisis as a pretext to interfere in the domestic affairs of the affected state, because it may not always be easy to draw a line between humanitarian assistance and occupation or regime change agendas. Thus, even where a state fails to ask for external assistance or rejects such assistance when offered, measures short of coercive military force would be more appropriate, and therefore, the military force dimension of R2P should not be applicable. It is for this reason that the Commission limited the threshold for just cause to cases of violence that genuinely “shock the conscience of mankind,” such as genocide and ethnic cleansing, as justification for military intervention.

424 Ibid. p. 33.
425 Ibid. p. 31
The Commission excluded from the just cause criteria the following: situations of human rights violations falling short of outright killings and ethnic cleansing, such as systematic racial discrimination, or repression of political opponents; the overthrow of a democratic government, and; the use of force by a state to rescue its own nationals on foreign territory, the latter being already covered by the right of self-defence under Article 51 of the UN Charter. The exclusion of these situations is due to the fact that they do not deserve to be addressed by coercive military force, because other non-coercive measures such as political, economic, or non-coercive military sanctions would be sufficient to address them. For example, the system of apartheid was brought to an end in South Africa mainly through political and economic pressure. The system was abominable and brutalised South African society, but it did not bring about mass killings on the scale of the Rwandan genocide, and therefore, external coercive intervention was not needed. Consequently, in the absence of a deliberate policy of mass killing of a section of the population or ethnically cleansing a minority from a geographical area by a government, military intervention is not justified.

Right Intention

The objective of this section is to discuss the primary purpose of intervention for humanitarian purposes, which, regardless of the intentions or motives of an intervening state, must be to avert or halt human suffering. This is to ensure that military intervention for human protection purposes is not used as a pretext for the advancement of the ulterior motives of the interveners. This view is shared by St. Augustine, who stressed that war can be justified only if it is conducted with the right intent; that is, putting an end to a grave injustice or for the restoration of peace. Therefore, any use of force with a regime change agenda, as occurred with NATO’s 2011 intervention in Libya that has transformed the country into a failed state, is not a legitimate objective. The Commission noted that even though overthrowing a government is not a legitimate objective, “disabling that regime’s capacity to harm its own people may be essential to discharging the mandate of protection.” This is a disingenuous proposition, because the overthrow of a government cannot be prohibited while the incapacitation of that government is tolerated; for disabling the regime facilitates its overthrow, as occurred in Libya during NATO’s intervention. What the Commission is

426 Bellamy, note 61 supra, p. 227.
428 ICISS Report, p. 35.
inferring here is that overthrowing a regime should not be the primary objective of intervention for human protection purposes, and therefore the intervening states should not go in with that objective, but they can achieve that objective by disabling the regime to ensure its overthrow. The Commission’s provides an ambiguous guideline which is likely to be abused. Similarly, the Commission proposed that, while occupation of territory should not be an objective, it may not be able to be avoided, though it proposed that there should be an initial commitment to return occupied territory to its sovereign owner. The Commission made no effort, however, to specify the duration of such unavoidable occupation, which, for all practical purposes, could last for decades. An example is NATO’s occupation of Afghanistan, which though not an R2P situation, is an example of enduring occupation of one country by a powerful force. Military intervention for human protection purposes should be for the protection of human rights, but not in advancement of geopolitical and strategic goals of the interveners, such as regime change or the occupation of the target state and control of its resources or exporting democracy.

To satisfy the fulfilment of the “right intention” criterion, the Commission proposed that military intervention should always take place on a collective or multilateral rather than single-country basis. Other ways to ensure the fulfilment of the right intention criterion depend on whether and to what extent the intervention is actually supported by the people who would benefit from it, and whether and to what extent regional countries are supportive of the intervention. It is submitted that collective or multilateral military intervention, which is an intervention with UN Security Council mandate, is not always enough to satisfy the “right intention” criterion, because the Security Council lacks the capacity to control or monitor the operational aspects of an intervention, after it has authorised it. This is partly because the Security Council does not have its own army and invariably depends on other countries or organisations to fulfil its mandate of maintaining international peace and security, and partly because the authorisation given by the Security Council to an intervening state or organisation can be misinterpreted or abused as illustrated by NATO’s intervention in Libya, where the organisation misinterpreted Security Council Resolution 1973 which authorised intervention to protect civilians, to effect regime change. To avoid this the Security

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429 Ibid. p. 35
430 Ibid. p. 36.
431 Ibid.
Council should lay down strict operational guidelines for an intervention it authorises, in order to eliminate the abuse of its mandate.

To be fair to the Commission, it acknowledged that the humanitarian motive is not the only one driving the intervening states or organisation even where an intervention is authorised by the Security Council. Complete disinterestedness or the absence of narrow self-interest at all is unrealistic, because it cannot be expected that an intervening state will do so without expecting any benefits accruing to its national or strategic goals. Therefore, however altruistic an intervening state’s motive may be, the financial cost and potential cost in lives of military personnel make it politically imperative that the intervening state should be able to claim some degree of self-interest in the intervention.\textsuperscript{432} Aside from the cost in finances and in lives, other motives of an intervening state may be to avoid refugee outflows into its territory, or to avoid a haven for drug producers or terrorists developing in the state’s neighbourhood.\textsuperscript{433} Thus, as pointed out by Michael Walzer, absolute disinterestedness is highly unlikely.\textsuperscript{434} Robert Murray shares this view, asserting that a pragmatic approach to R2P allows states to carefully decide where an intervention will take place “under what conditions and just how beneficial such intervention might be to their own interests.”\textsuperscript{435} Evans and Sahnoun, however, are of the view that intervention for altruistic motives is possible, because in an interdependent world “with crises as capable as they now are of generating major problems elsewhere…it is in every country’s interest to resolve such problems, quite apart from the humanitarian imperative.”\textsuperscript{436} It is submitted that while total disinterestedness is ideal, a state will not intervene in another on human protection grounds alone without taking into account its own self-interest, such as considerations of risk to its military personnel, the financial costs involved and strategic benefits. In other words, it is unrealistic to expect that an intervention will be motivated solely by compassion for humanity. However, even if compassion for humanity is not the sole driving force for intervention, it should take precedence over self-interestedness. As Parekh puts it, the intervention should be disinterested in the sense that the humanitarian aspect should not

\textsuperscript{432} ICSS Report, p. 36.
\textsuperscript{433} Ibid.
\textsuperscript{436} Evans & Sahnoun, note 263 supra, pp. 108-109.
become secondary to an otherwise self-interested intervention.\textsuperscript{437} It is reasonable that an intervening state expects to benefit from the operation, but as long as the overriding objective is to protect victims of human rights, it satisfies the right intention criterion.

**Last resort**

This section discusses the requirement that the military option should be the last resort after preventive or peaceful options have been exhausted, because if non-coercive measures prove adequate, then it obviates the need to resort to the controversial measure of using force in violation of the target state’s sovereignty. Prior to the use of force, every diplomatic and non-military alternative for prevention or peaceful resolution of the humanitarian crisis must have been explored,\textsuperscript{438} and therefore, the use of force can only be justified when non-coercive methods has been fully discharged.\textsuperscript{439} For example, where the conflict is between a state and an insurgent group, deployment of peacekeepers and observers is a better option than a coercive military response.\textsuperscript{440} However, this does not necessarily mean that every non-military option must literally have been tried and failed, because often there will simply not be the time for the process to work itself out.\textsuperscript{441} Exploring every avenue for the prevention or resolution of the humanitarian crisis does not mean putting the option “in place and waiting around for it to fail.”\textsuperscript{442} What it does mean is that there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded.\textsuperscript{443} This proposal is ambiguous, because it provides no guidance as to when or how to determine whether measures other than military force would not have succeeded if they had been attempted. This leaves room for an intervening state or organisation to be the sole judge as to whether other measures other than the use of military force would not have succeeded if they had been attempted prior to an intervention. Despite this possibility, there are situations (such as the Rwanda genocide) where it would be unreasonable to expect that non-coercive measures will succeed in halting atrocities, when time is of the essence in saving thousands of people from being slaughtered.

\textsuperscript{438} ICISS Report, p. 36.
\textsuperscript{439} Ibid.
\textsuperscript{440} Ibid.
\textsuperscript{441} Ibid.
\textsuperscript{442} Evans, note 95 supra, p. 144
\textsuperscript{443} ICISS Report, p. 36.
Thus, there is the possibility that military intervention may be premature, because no time was allowed to explore peaceful solutions to a humanitarian crisis. For example, with regard to the military intervention in Iraq on grounds that Iraq possessed weapons of mass destruction, it has been argued that there was ample time for the inspection process to have been carried through, and that resort to military action was, at the very least, premature. It is clear that whether an intervention is unilateral or collective, if the intervening states or organisations choose to, they do not have to explore prevention or peaceful solutions before resorting to military action, where there are reasonable grounds to believe that in all circumstances, if these measures had been attempted they would not have succeeded. As Sarkin has observed, “the future of RtoP does not look rosy,” because with such uncertainties and ambiguities the concept will continue to generate controversy and opposition from potential targets of interventions by powerful states. Regardless of this argument, where anticipatory military intervention becomes necessary in the face of a reasonable expectation that mass killing is imminent, it is preferable to take preemptive military action to save lives and risk international condemnation than do nothing.

**Proportional means**

The purpose of this section is to discuss the principle that the intensity and duration of the military action taken has to be commensurate with the stated objective and in line with the magnitude of the original provocation. The Commission proposed, for example, that the effect on the political system of the affected country should be limited to what is strictly necessary to achieve the purpose of the intervention, and the interveners should strictly observe international humanitarian law. As has been observed in relation to the Libya intervention, interveners do not always abide by the requirement to ensure that the effect on the political system of the target country should be limited to what is necessary to accomplish the objective of the intervention. Besides, again, as in the Libya case, interveners are likely to use disproportionate and indiscriminate force far beyond the magnitude of the original provocation.

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444 Evans, When it's right to fight, note 385 supra, p. 71.
446 ICISS Report, p 37
447 Ibid.
Reasonable prospects

This section discusses the principle that to justify a military intervention there must be a reasonable chance of success of halting or averting the human suffering that triggered the intervention in the first place.\textsuperscript{448} The intervention should not bring about a greater harm than the intervention was originally calculated to avert, and therefore, an intervention is not justified if it has no chance of success, and is likely to make matters worse by triggering a greater conflict.\textsuperscript{449} Thus, on purely utilitarian grounds, the application of the principle would be likely “to preclude military action against any one of the permanent members of Security Council…”\textsuperscript{450} and for that matter, any other major military power. This implies double standards, because in practice, it means that the use of force for human protection purposes can be applied only to militarily weak countries, and military action can never be taken against militarily powerful countries even if all the conditions required for intervention are met. This is unjust, because, without defending any atrocities perpetrated by any state, it is argued that the only reason why weak states are targets for military interventions is simply because they are weak militarily, and not that they have a monopoly on the perpetration of atrocities. The injustice is exacerbated by the fact that invariably interventions are carried out by the major military powers exempted from the application of the principle. In response to the issue of double standards, Evans argues that, “The reality that interventions may not be plausibly mounted in every justifiable case is no reason for them not to be mounted in any case.”\textsuperscript{451} This does not justify the double standards, but only reiterates the injustice by expressing it in another way that powerful countries are exempted from military intervention, but weak countries are legitimate targets of military intervention. It should therefore not come as surprise that the greatest opponents of humanitarian intervention would be militarily weak countries that see themselves as potential targets of military intervention.

Right authority

The objective of this section is to discuss the appropriate authority with the right to determine whether military intervention for humanitarian purposes should proceed. The controversy about military intervention entails issues such as how and when it should be undertaken, and the right body to grant authorisation. In particular, it is critical to identify the right authority

\begin{itemize}
\item \textsuperscript{448}Ibid. p. 37.
\item \textsuperscript{449}Ibid.
\item \textsuperscript{450}Ibid.
\item \textsuperscript{451}Evans, note 95 supra, p. 146.
\end{itemize}
which can grant the mandate for an intervention, because without identifying such an authority, unilateral interventions cannot be considered illegitimate. In the words of the ICISS Report, military intervention involves not only an intrusion into a sovereign state, but also the use of deadly force on a potentially massive scale; and therefore, identifying the institution with the right to authorize an intervention is a matter of critical importance, because without international consensus on the right authority, the target state of an intervention has the right to resist with its military forces a unilateral and illegal intervention, thereby endangering international peace and security. The Commission sought to eliminate the danger of unilateral humanitarian military interventions conducted on the sole decisions of powerful states in the territories of weak countries ostensibly with the objective of saving lives, while the actual motives may be to defend strategic interests. As expressed by von Schorlemer, “repeatedly, unilateral interventions genuinely or supposedly aimed at saving people’s live in third world countries were opportunistic in nature and stemmed from the intervening countries’ overwhelming power.” A major power is the sole judge as to whether conditions existed in the affected state to warrant an intervention and therefore such an intervention could be arbitrary; and consequently, the identification of the body under whose authority military intervention should be conducted is imperative. Thus, the Commission was of the view that, when it comes to the authorisation of military intervention for human protection purposes, there is no better body than the United Nations Security Council which should be making the hard decisions about overriding state sovereignty, the decisions about the mobilisation of effective resources, including military resources, and the decisions about rescuing populations at risk in order to engender international consensus and confer legitimacy on such operations. The basis of this authority is found in Article 42 of the UN Charter, which confers on the Security Council the discretion to “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.” The Commission found that there was the overwhelming consensus in their consultations around the world about the Security Council as the rightful authority. Therefore, in the view of the Commission, if international consensus was to be attained as to when, where, how, and by whom military intervention is to take place then the Security Council should be at the

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452ICISS Report, p. 47
454ICISS Report, p. 49.
455United Nations Charter, Chapter VII, Article 42.
centre of the consensus. Without agreement on the Security Council as the legitimate body to grant authorisation for military intervention, military intervention is reduced to the level of might is right, thereby granting powerful countries the licence to violate the sovereignty of weak countries at will. The Council is without doubt the most appropriate organ to authorise military intervention for human protection purposes because besides Article 42, another basis for this is Article 24 of the United Nations Charter. The Article states:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Council acts on their behalf.  

In other words, in matters concerning the maintenance of international peace and security including the military intervention for human protection purposes, the Security Council, as the representative of the nations of the world, is the right body to confer legitimacy on any necessary action. Thus, when the Security Council authorises an intervention for the maintenance of international peace and security, in principle it is equivalent to the authorisation by the entire membership of the UN, and therefore, the legality of the intervention should be beyond question. The Commission endorsed this view with the observation, that since the end of the Cold War, an intervention by the Security Council has “almost invariably been universally accepted as conferring international legality on an action.” However, the credibility and suitability of the Security Council in its current form as the right institution to authorise interventions raises questions. The Security Council is unrepresentative in its current composition, dominated by the major military powers of the world with different interests and agendas, exacerbated by the Council’s “inherent institutional double standards with the Permanent Five veto power.” Thus, in matters of military intervention, the political will of some members may be lacking; and therefore, it is unlikely that unanimity or even consensus would be attainable, because some members of the Security Council may use their vetoes to protect a state that is a potential target for military intervention as a consequence of gross abuses of human rights abuses in its territory. Sarkin, while expressing agreement that the Security Council is the appropriate body to

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456 ICISS Report, p. 49.
457 United Nations Charter, Article 24(1)
458 ICISS Report, p. 50.
459 Ibid. p. 49
authorise military intervention, criticises the Security Council as a “highly politicized institution” in which “Its five permanent members wield veto power, frequently to protect their own interests, at the expense of preventing massive human rights violations.” He argues, therefore, that whether or not steps are taken in the face of massive human rights violations depends on Security Council politics, and calls for reform of the Security Council in order to address this anomaly.

Reform of the Security Council is long overdue; for as long as the five permanent members of the Council have the ultimate say as to whether an intervention should take place or not the credibility of the intervention will raise questions. Reforms should involve stripping the five permanent members of the veto, or giving the veto to representatives of continents not already represented on the Council, such as Africa, or granting every member of the Security Council, permanent or temporary, the veto. Another alternative is to give every member country of the UN the veto in matters concerning international peace and security. This will go a long way to levelling the playing field, in the light of the fact that countries that are targets of military intervention make up the temporary members of the Council, and are also the majority in the General Assembly. However, in the light of the fact that only a handful of states have nuclear weapons, levelling the playing field may be an ideal, but not an attainable goal. However, the Commission expressed support for Security Council reform with the observation that, despite misgivings about the Council, the “task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has.” The rest of the world should not relent in seeking these reforms because all the countries of the world are equal. The preamble of the UN Charter “…reaffirm faith in fundamental human rights, in the dignity of the human person, in the equal rights of men and women and of nations large and small…” No, nation, however powerful, has the right to the preservation of its sovereignty at the expense of the sovereignty of smaller countries. The veto should be used only in the interests of the international community, with the purpose of preserving international peace and security, but not in a capricious manner, to advance the national interests of states that wield it.

460 Sarkin, note 443 supra, p. 22.
461 Ibid.
462 ICISS Report, p. 49.
463 Ibid. p. 51
Having established the Security Council’s role in military intervention for human protection purposes, the Commission noted that, before any military intervention can be carried out, Security Council authorisation must be sought by those calling for an intervention and the Security Council should deal promptly with any request for authority to intervene where there is large scale killing or ethnic cleansing. As noted, the decision to intervene or not depends on the five permanent members, and since a decision may be influenced by the interests of these members, prompt authorisation for an intervention even in the face of mass atrocities may not be possible. The consequences of delayed action or inaction by the Security Council in such situations would be unilateral intervention by states or organisations with the capability, because it would be immoral for the world to stand idly by and watch the mass slaughter and ethnic cleansing of civilians. An example is of NATO’s intervention in Kosovo which was carried out unilaterally due to a deadlock in the Security Council arising from the threat of Russia and China to veto any resolution authorising the use of force. Conversely, the likelihood that inaction may trigger unilateral intervention may compel the Security Council to grant prompt authorisation to those who seek to intervene. As Bellamy has observed, by prescribing the situations under which the international community has the responsibility to react, the ICISS was attempting to bring pressure to bear on the members of the Security Council to discharge their responsibility to take quick and decisive action to halt or avert a humanitarian crisis, in order to preempt unilateral military intervention. The Security Council is often paralysed by disagreement among the five permanent members as to situations when force may be used for human protection purposes. A clear prescription of the circumstances under which force may be used ensures that there would be no justification for any of the five permanent members to be an obstacle to necessary action in the face of mass atrocities.

On the issue of the capricious use of the veto by the five permanent members as an obstacle to international action to halt or avert a humanitarian crisis, the Commission placed a limitation on the use of the veto: that a member should not use the veto unless its vital national interest was involved. This appears reasonable; but it still leaves room for abuse because, it is left to any of the five permanent members to decide when its vital national interest is at stake that warrants the use of the veto. Conversely, none of the five permanent members

464Ibid. p. 50.
465ICISS Supplementary Report, note 100 supra, p. 112.
466Bellamy, note 47 supra, p. 146.
467ICISS Report, p. 51
members would carry out a military intervention for human protection purposes, unless its vital national interest is at stake; the result being the exposure of vulnerable populations to gross violations of human rights without any protection. The solution to the capricious use of the veto would be to request the five permanent members to disclose the reasons behind the exercise of their veto to the international community to enable it to make an assessment as to whether the use of the veto in a particular circumstance was justified.\textsuperscript{468} This will engender a degree of accountability in the exercise of the veto, thereby diminishing the use of the veto as an obstacle to action for human protection purposes; for if the veto wielding members of the Council are compelled to disclose the reasons for using their veto, there is the likelihood that the veto would not be used frequently, and also the likelihood of consensus among them where the protection of human rights is concerned will be enhanced.

\textbf{When the Security Council fails to act}

This section discusses other options for the authorisation of military intervention when the Security Council fails to take action to avert or halt a humanitarian crisis, or rejects a request for intervention, or fails to grant such request within a reasonable time. Where the Security Council is unable or unwilling to act, it should grant timely authorisation to other capable actors to take action; for if refuses to grant permission for other actors to intervene or it is slow in granting permission, it would pave the way for unilateral interventions, setting a dangerous precedent for other actors to follow, which would in turn undermine the credibility of the Council as the custodian of the authority to secure international peace and security. The view of the Commission was that even though the Security Council is the primary authority, it should not be the last; and therefore; if the Council fails to act, alternatives to discharging the responsibility to protect cannot be entirely discounted.\textsuperscript{469} Action that bypasses the Security Council undermines the international order, but this has to be weighed against the imperative of protecting the lives of vulnerable people.\textsuperscript{470} As noted, there are situations where the Security Council is paralyzed by the exercise of the veto by a single member from taking military action. In such circumstances, it would be unreasonable to close other options for coming to the assistance of suffering populations. The Commission provides the following possible alternatives:

\textsuperscript{468} Bellamy, note 47 supra, p. 147.
\textsuperscript{469} ICISS Report, p. 53.
\textsuperscript{470} Evans & Sahnoun, note 263 supra, p. 104.
The General Assembly of the UN

One possible alternative according to the Commission would be to solicit support from the General Assembly meeting in an Emergency Special Session under the United for Peace, established to address situations where the Security Council fails to take steps to maintain international peace and security.\textsuperscript{471} Even though the General Assembly has no power to authorize an intervention, the support of an overwhelming majority of member states would confer substantial legitimacy on an intervention.\textsuperscript{472} It is submitted that, if the Security Council, upon which the member states of the UN have conferred the primary responsibility for the maintenance of international peace and security, fails to discharge the responsibility, then the General Assembly constituted by the member states should as a collective have the power to authorize a military intervention. The world, through the General Assembly, would be speaking with a united voice to take action to protect victims of excessive abuse of human rights where the Security Council has abdicated its responsibility, and therefore, the credibility of the military intervention in such a situation should be beyond question.

Regional Organisations

Another alternative is collective intervention by a regional or sub-regional organisation in the region where the humanitarian crisis occurs, since a crisis in one state in the region could have spill-over effects into other neighbouring countries. Article 52 of the UN Charter provides the authority for regional arrangements or agencies to deal with matters relating to international peace and security as are appropriate for regional action, provided that the actions of these regional arrangements or agencies are consistent with the Purposes and Principles of the United Nations.\textsuperscript{473} In the 1990s, Africa faced many armed conflicts including conflicts in Liberia, Somalia, Algeria, and Lesotho; and regional and sub-regional organisations in Africa, in particular the OAU, ECOWAS, SADC, and the Inter-Governmental Authority on Development, had to find ways to resolve these conflicts themselves, which were manifested in military intervention.\textsuperscript{474} An example of intervention by a regional arrangement was ECOWAS’ intervention in Liberia in 1990, through ECOMOG, the Ceasefire Monitoring Group of the organisation, and again in Sierra Leone in 1998 in the

\textsuperscript{471}\textit{ICISS Report}, p. 53.
\textsuperscript{472}\textit{Ibid.}
\textsuperscript{473}\textit{United Nations Charter}, Article 52(1).
\textsuperscript{474}\textit{Iyi}, note 1 supra, p. 3.
face of UN Security Council’s inaction. A regional organization, besides being better placed to deal with a humanitarian crisis because it occurs in its geographical area, is also more likely to be motivated by humanitarian concerns and the will to have a quick resolution of the crisis. A corollary of the authority of regional organisations to conduct military intervention for humanitarian purposes is to seek approval after the event or *ex post facto*, as occurred in the case of ECOWAS’ interventions in Liberia and Sierra Leone, which were carried out without Security Council approval, but was approved by the Council after the fact.

3. Responsibility to rebuild

The objective of this section is to discuss the third specific responsibility that R2P embraces, namely: the responsibility of intervening states to remain in the affected state long enough to ensure sustainable reconstruction. Failure of the interveners to ensure that the causes that gave rise to the conflict are addressed will lead to the conflict erupting again. Furthermore, a state emerging from conflict would require all necessary assistance in order to stand on its feet again, and it is the responsibility of the interveners to stay long enough to assist in this regard. The responsibility to protect implies in addition to the responsibility to prevent and react, a commitment to follow through and rebuild. The responsibility to rebuild entails the responsibility to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconciliation, and addressing the causes of the harm the intervention was designed to halt or avert. If after a military intervention the affected state’s capacity to discharge its responsibility to protect breaks down, there should be a genuine commitment to help build “a durable peace, and promoting good governance and sustainable development.” Intervening states should not leave the affected state to be saddled with the problems that triggered the military intervention, but should address the root causes of the crisis that the intervention was intended to halt; otherwise, the possibility of

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475 J. Sarkin, note 19 supra, p. 375.
476 ICISS Report, p. 53.
477 Sarkin, note 19, p. 375.
479 ICISS Report, p. 39.
480 Ibid. p. Xi.
481 Ibid.
482 Ibid.
the reoccurrence of violence cannot be discounted. The Commission’s Report recalled the statement of the UN Secretary-General that:

Societies that have emerged from conflict have special needs. To avoid a return to conflict while laying solid foundation for development, emphasis must be placed on critical priorities such as encouraging reconciliation and demonstrating respect for human rights; fostering political inclusiveness and promoting national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons; reintegrating ex-combatants and others into productive society; curtailing the availability of small arms; and mobilizing the domestic and international resources for reconstruction and economic recovery. Each priority is linked to every other, and success will require a concerted effort and coordinated effort on all fronts.\textsuperscript{483}

The passage identifies three areas namely, security, justice, and economic development as the most crucial aspects of the responsibility to rebuild that need to be addressed. On the security aspect, in order to avoid the violence in the aftermath of an intervention, it would be necessary to reintegrate ex-combatants into a national army and into other areas of productive society, and also to undertake the disarmament of ex-combatants and others. On the justice aspect, the passage requires creation of mechanisms to ensure respect for human rights, promotion of national unity, and the repatriation and settlement of refugees and displaced persons. On economic development, the passage emphasises the mobilisation of resources for reconstruction and economic recovery. All of these aspects are interconnected, and the achievement of the tasks involved will require the major commitment of the international community. If preventive measures fail, military force is expected to end the crisis, and this should be followed by commitments towards helping the society overcome its potential susceptibility to subsequent violence.\textsuperscript{484}

The Commission’s Report outlines the measures that have to be taken to achieve the security, justice, and economic aspects of the responsibility to rebuild. On security, the report states that an intervention force should provide basic security and protection for all members of a


population, regardless of origin, as everyone is entitled to basic protection for their lives and property.\textsuperscript{485} The intervention force should also address issues of disarmament, demobilisation and reintegration of ex-combatants into a rebuilt national army. On justice, the report requires the intervening force to establish a functioning judicial system, including the courts and the police, and to bring violators to justice. The intervening force has to address the issue of the legal rights of refugees and ensure the equal distribution of reconstruction assistance. Relating to economic development, the intervening force should encourage economic growth, the recreation of markets and sustainable development.\textsuperscript{486} To attain these goals, an intervening force should make prior arrangements for the rebuilding and reconstruction of the affected state before the intervention, because as has been noted, the responsibility to prevent, to react, and to rebuild are interconnected in the sense that one cannot be attained without the others. The interveners should stay long enough to ensure the rebuilding of state institutions and also to address the root causes of the conflict which necessitated the intervention, in order to prevent the conflict from being ignited again.

3.5. From ICISS to the 2005 World Summit

This section discusses the links between the ICISS Report and the 2005 World Summit, because these links set the stage for the formal endorsement of R2P by the international community at the United Nations Sixtieth Anniversary World Summit in September 2005. To this end, reference is made to the African Union’s embrace of R2P in the Constitutive Act of the African Union\textsuperscript{487} and its role in the adoption of R2P in the World Summit Outcome Document. The section examines the report of the High Level Panel on Threats, Challenges and Change\textsuperscript{488} as it relates to R2P, and the UN Secretary-General’s report \textit{In Larger Freedom: Towards Development, Security and Human Rights for All}.\textsuperscript{489} Furthermore, the section discusses the 2005 World Summit Outcome Document and argues that R2P as proposed in the ICISS Report differs substantially from that endorsed in the 2005 World Summit Outcome Document, because in the World Summit Outcome Document, R2P does not contain the ICISS proposed criteria to guide decision-making about when to intervene;
there is no code of conduct for the use of the veto contained in the ICISS Report; and no alternative is provided for the use of force without the authorisation by the Security Council as contained in the ICISS Report. In this context, the chapter discusses paragraphs 139 and 139 of the World Summit Outcome Document on R2P, and the three core pillars of the concept put forward by the two paragraphs and articulated by UN Secretary-General Ban Ki-moon in his report on Implementing the Responsibility to Protect in January 2009. These links are:

3.5.1. Constitutive Act of the African Union

The R2P concept was apparent in the Constitutive Act of the African Union adopted in 2000, and in force since 2003; thus, African countries were amenable to the proposals in the World Summit Document, thereby contributing to the unanimous endorsement of R2P by the World Summit. While the Act provides for “non-interference by any Member State in the internal affairs of another,” it at the same time reserves “the right of the Union to intervene in a Member State …in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.” Thus, prior to the endorsement and acceptance of R2P by the 2005 World Summit, the Union had already embraced a concept of the responsibility to protect by the recognition that where a member state committed or permitted to be committed on its territory, genocide, war crimes, and crimes against humanity, the principle of non-intervention had to yield to the regional responsibility to protect. Thus, the Union acknowledged that when it comes to grave violations of human rights, the emphasis should not be on “non-interference,” but rather on “non-indifference.” The Union, therefore, recognised that it could not stand by passively in the face of atrocities perpetrated by any member state on its nationals, but it would take robust military action in defence of victims of human rights abuses. The position of the Union made it amenable to the adoption of R2P by the World Summit, and thereby, contributed to the unanimous endorsement of the concept.

Bellamy, note 42 supra, p. 623.
Constitutive Act of the African Union Article 4(g).
Ibid. Article 4(h).
Ibid.
Evans, note 95 supra, p. 44.
3.5.2. UN Secretary-General’s High Level Panel on Threats, Challenges and Changes

Another important link between the ICISS report and the World Summit Outcome Document was the report of the United Nations Secretary-General’s High-Level Panel on Threats, Challenges and Change, entitled A More Secure World: Our Shared Responsibility. The Panel’s report adopted the recommendations of the ICISS, and drew on the ICISS’s core principles of R2P on the state’s responsibility to protect its people and the international community’s residual responsibility to protect where the state fails to discharge this responsibility, thereby contributing to the endorsement of R2P by the World Summit. In relation to R2P the report states:

The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent.\(^\text{495}\)

The significance of the Panel’s recommendation is that it endorsed the ICISS proposal that the UN Security Council is the appropriate body to authorize military intervention as a last resort in the event of genocide, ethnic cleansing, and other mass killings, and that those who challenge the authority of the Security Council run the risk of undermining the international order.\(^\text{496}\) By implication, the Panel shared the view of the ICISS that the task is not to find alternatives to the Security Council as the source of authority, but to make it much better.\(^\text{497}\) The differences between the Panels’ recommendations and that of the ICISS on the just cause criterion relates to the Panel’s addition of “serious violations of humanitarian law” as grounds for military intervention, and the rejection of the limits on the use of vetoes by the five permanent members of the Security Council proposed in the ICISS Report.\(^\text{498}\) Referring to humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, and Kosovo, the Panel’s report shared the view of the ICISS that the focus should not be on “the right to intervene,” but on the “responsibility to protect.”\(^\text{499}\) Furthermore, on the guidelines for the

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\(^{496}\) ICISS Report, p. 48.

\(^{497}\) Ibid. p. 49.

\(^{498}\) Bellamy, note 47 supra, p. 153.

\(^{499}\) ICISS Report, p. 11.
use of force, the Panel recommended five basic criteria of legitimacy, in addition to the UN Security Council being the right body to authorise military intervention. The report spells out “five basic criteria of legitimacy” which are basically identical to the precautionary principles in the ICISS report already discussed.\textsuperscript{500} On the whole, the Panel’s recommendations endorsed the proposals in the ICISS report, thereby enhancing consensus and the unanimous adoption of R2P, and in that way played a crucial role in preparing the stage for the endorsement of R2P by the World Summit.

3.5.3. UN Secretary-General’s Report: In Larger Freedom

Another link was the UN Secretary-General Kofi Annan’s acceptance of the recommendations of the High-Level Panel in his report \textit{In Larger Freedom: Towards Development, Security and Human Rights for All},\textsuperscript{501} in which he stated “…I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it,”\textsuperscript{502} because there is no better alternative mechanism for the protection of victims of mass atrocities. He made a formal appeal to the international community to:

> Embrace the “responsibility to protect” as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population, but that if national authorities are unwilling or unable to protect its citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect civilian populations, and that if such methods appear insufficient the Security Council may out of necessity decide to take action under the Charter, including enforcement action, if so required.\textsuperscript{503}

The Secretary-General’s statement was an elaboration of the ICISS views expressed in its report, relating to the theme that the responsibility to protect its nationals from mass atrocities primarily lies with the state, supplemented by the international community’s responsibility to protect where the state fails; because mass atrocities perpetrated in one state can have


\textsuperscript{502}Ibid. paragraph 135.

\textsuperscript{503}Ibid. Annex, recommendation 7(b)
regional or international implications, and therefore, the protection of the nationals of a state from mass atrocities is not the sole responsibility of the state, but also of the broader international community. In particular, the emphasis “on the importance of non-military responses being explored first …was enormously helpful in setting the scene for the World Summit debate.”\textsuperscript{504} The Secretary-General’s endorsement of R2P provided material for deliberation by the 2005 World Summit, and “in this way aspects of RtoP were adopted at the World Summit and subsequently endorsed by both the General Assembly and the Security Council.”\textsuperscript{505} The endorsement of R2P by the Secretary-General’s Report, which prioritised the use of non-coercive measures in reaction to mass atrocities allayed the apprehensions of world leaders, especially those from weak countries, about the use of force and made them amenable to the adoption of R2P.

\textbf{3.5.4. 2005 World Summit}

The 2005 World Summit of the 60\textsuperscript{th} Session of the UN General Assembly held in New York from 14-16 September 2005 was attended by over 170 heads of state and government,\textsuperscript{506} and therefore, the unanimous endorsement of R2P was a manifestation of worldwide consensus on the concept. The agenda was based on proposals contained in the Secretary-General’s report,\textsuperscript{507} \textit{In Larger Freedom}, aforementioned, which drew on the proposal of the ICISS. The outcome document reflected the international position on a number of crucial issues among which, for the purposes of this thesis, was the acceptance of the collective responsibility to protect civilians against genocide and other crimes against humanity. The outcome document called for timely and decisive collective Security Council action when national authorities manifestly fail to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and established two new bodies.\textsuperscript{508} The assembled world leaders at the World Summit showed their commitment to R2P by unanimously endorsing the wording of Paragraphs 138 and 139 of the Outcome Document which set out the core principles of the concept. These paragraphs, which endorsed the concept of R2P, are quoted below:

\textsuperscript{504}Evans, note 95 supra, p. 46.
\textsuperscript{505}Scheid, note 475, supra p. 17.
\textsuperscript{507}Ibid.
\textsuperscript{508}2005 World Summit Outcome Document, Resolution A/Res/60/1.
Responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity

138. Each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. The 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. 509

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VII 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. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and assisting those which are under stress before crises and conflicts break out. 510

The World Summit Outcome Document endorsed the ICISS proposal that the primary responsibility to protect its nationals lies with the state, and went further by specifying genocide, war crimes, ethnic cleansing, and crimes against humanity and their incitement as the crimes from which a state has a responsibility to protect its nationals. Furthermore, the

509 ibid. para. 138.
510 ibid. para. 139
Document requested world leaders to encourage and help states to discharge this responsibility. The Document made a fundamental departure from the ICISS R2P proposition, which made provision for regional and sub-regional organisations to deal with matters relating to international peace and security under Article 52 of the UN Charter; and action by the General Assembly under the ‘Uniting for Peace’ procedures, where the Security Council fails to act. Thus, the Document conferred on the Security Council the exclusive authority to authorise interventions on a case by case basis when peaceful means prove inadequate, and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. While the Summit Document acknowledged military intervention as an option, it downplayed it, and instead, prioritised the use of peaceful means to protect victims of mass atrocities, stressing that military intervention is justified only when the national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

The assembled Heads of State and Government at the Summit made it clear that the responsibility to protect is not an adversary, but an ally of sovereignty, and arises from the positive notion of sovereignty as responsibility, rather than the narrower idea of humanitarian intervention, in order to make R2P more acceptable to world leaders. In helping states to discharge their protection responsibilities, R2P seeks to strengthen sovereignty, not to weaken it. Thus, the member states of the UN accepted that each state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity and their incitement, and “act in accordance with it.” Under paragraph 138, this responsibility entails the prevention of these crimes. Thus, the emphasis is on prevention rather than on reaction. Members committed themselves to helping states to build the capacity to protect their populations from these crimes. However, member states are prepared to take collective action through the Security Council in accordance with the Charter, including action under Chapter VII, where a state manifestly fails to protect its population from the four crimes, unlike the ICISS’ recommendation which spoke of a state being “unable or unwilling.” Thus, paragraph 139 requires a higher threshold of a state’s failure to protect before enforcement action can be taken against it. Nevertheless, governments that grossly violate the human rights of their population can no longer seek immunity from

intervention behind sovereignty.\textsuperscript{512} However, the emphasis as the ICISS report states was not on the “right to intervene,” but responsibility to protect of every state.\textsuperscript{513} As a corollary, member states have a duty to assist in the prevention of mass atrocities “and to step in to protect populations in peril when needed.”\textsuperscript{514} The outcome document leaves no doubt that the Security Council is the right authority to authorise the use of force for human protection purposes. By implication, intervention without the authority of the Security Council military intervention for human protection purposes is not only unlawful, but it also sets a dangerous precedent for other states to follow, and undermines the established international order.

The outcome document has been criticised, because it did not include some of the controversial recommendations of the ICISS, such as the limitations on the use of the veto,\textsuperscript{515} criteria for the uses of military force, and the possibility of unilateral intervention. Weiss, for example, argues that while the ICISS had left open the possibility of unilateral intervention “the summit’s language could be seen to be step backward, as “R2P lite” – because it requires that humanitarian intervention has to be approved by the Security Council.”\textsuperscript{516} This argument overlooks the fact that intervention without Security Council approval would not have received unanimous assent at the Summit. Doyle concurs that the 2005 World Summit Outcome Document would not have won the unanimous assent of member states without the two paragraphs above,\textsuperscript{517} which assert the role of the Security Council as the sole authority with the right to give the mandate for military intervention. These provisions outlawed unilateral military intervention for human protection purposes, thereby making the unanimous endorsement of R2p, possible at the Summit.

The concept of R2P contained in the Summit Outcome Document is substantially different from the ICISS formulation. In the ICISS report, the crimes under the just war threshold are expressed in general terms as “\textit{large scale loss of life actual or apprehended with genocidal intent or not}” or “\textit{large scale ethnic cleansing actual or apprehended}” without defining “large scale loss of life” or “large scale ethnic cleansing.” These expressions are ambiguous

\textsuperscript{512} Bellamy, note 17 supra, p. 196
\textsuperscript{513} Weiss, note 21 supra, p. 126.
\textsuperscript{514} Ibid.
\textsuperscript{516} Weiss, note 21 supra, p. 127.
\textsuperscript{518}ICISS Report, p. 32.
in the sense that what is “large scale” is relative, and therefore cannot set a proper standard or guidance for reaction in every case. The outcome document was specific on the crimes which would justify international reaction, namely, genocide war crimes, ethnic cleansing, and crimes against humanity. This is a significant improvement, because it limits the ambiguity in the ICISS’s report. The acceptance of R2P by the inclusion of these two paragraphs despite the differences between the language of the outcome document and the ICISS report affirms the success of the ICISS because fundamentally, the basis of the concept was its articulation in the ICISS report. Therefore, although the World Summit Outcome Document watered down the proposals in the ICISS Report, the important contribution made by the Commission to R2P and the protection of populations from mass atrocities should not be underestimated.

3.5.5. Implementing the Responsibility to Protect - The 3 Pillars

This section discusses the three pillars on which, according to UN Secretary-General Ban Ki-moon the edifice of R2P is built, because the three pillars constitute a summary of the concept of R2P; and according to the Secretary-General’s report, they represent the way forward in implementing R2P. On the basis of the agreements in paragraphs 138-139, the Secretary-General concluded in his report, Implementing the Responsibility to Protect, that the responsibility to protect rests on the following three pillars, which are interlinked in the implementation of R2P, and even though there is no sequence in which the three pillars are to be applied, they are of equal importance and none may be dispensed with.

1. Pillar one:

The protection responsibility of the state

The primary responsibility of the state protecting its population from genocide, war crimes, ethnic cleansing, and crimes against humanity and their incitement lies with the state. This responsibility is captured in the opening sentence of paragraph 138 of the Summit Outcome Document, that, “we accept that responsibility and will act in accordance with it.” The Secretary-General emphasised that pillar one is critical to effective and timely prevention strategies, and emanates from the notion of sovereignty and pre-existing legal obligations of

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519 B. Ki-moon, note 13 supra, para. 11.
520 Ibid. para.11(a).
states. The international community has a supplementary role to encourage and assist states in fulfilling this responsibility. To implement pillar one, the report suggests, among other steps, more research into why one society plunges into mass violence while others remain stable. Another way is for states to become parties to international instruments on human rights, international humanitarian law, and refugee law, as well as to the Statute of the International Criminal Court. The focus of pillar one is on the prevention of the four crimes, because in the words of the report, prevention is a key ingredient for a successful strategy for the responsibility to protect, because successful prevention of conflict renders unnecessary the other elements of R2P, i.e. the responsibility to react and the responsibility to rebuild.

2. Pillar two:521

International assistance and capacity building

The international community’s owes a commitment to assist states in fulfilling these obligations. Pillar two can be found in Paragraph 138 of the Summit Outcome Document states this commitment, with the assertion that: “the international community should, as appropriate, encourage and help States to exercise this responsibility.” Paragraph 139 adds: “we also intend to commit ourselves, as necessary and appropriate, to helping States to build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before conflict breaks out.” With these commitments the international community omits itself to encourage States to fulfil their responsibilities (para. 138), assist them in the discharge or their responsibilities, (para. 138), helping them to build capacity to protect (para. 139), and assist states under stress before crises break out (para.139). Encouraging states to meet their responsibility entails persuasion while assisting them to discharge their responsibilities involves “active partnership between the international community and the State.” The language of this pillar represents a shift from the language of the ICISS Report, because the language of pillar two is devoid of confrontation, but rather stresses cooperation among states in assisting each other in discharging the responsibility to protect their populations contributed to the unanimous endorsement of R2P.

521ibid. para.11(b).
522ibid. para 28.
523ibid. para. 49.
3. Pillar three\textsuperscript{524}

Timely and decisive response.

Paragraph 139 of the Summit Outcome document reflects pillar three. The international community under this paragraph commits itself to “use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” This stresses that, in response to a crisis, peaceful and flexible means should be employed to find a solution. However, “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,” then “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.” The report emphasises that international reaction should not be limited to the use of force and furthermore, that international response should take place within institutions of the UN, i.e. the Security Council and the General Assembly.\textsuperscript{525} The report seeks to prioritise the use of peaceful means in the protection of victims of mass atrocities, and stresses that the use of force is just one of the means for achieving this, but not the most important, and should be used as a last resort. Furthermore, it stresses the central role of the Security Council in the authorisation of military intervention.

Implementation of the three pillars does not have to be in a set sequence for moving from one to another.\textsuperscript{526} The pillars are of equal importance, and if the three pillars were unequal in importance, “the edifice of the responsibility to protect could become unstable…”\textsuperscript{527} However, the report places more emphasis on pillar one, prevention, and on pillar two, capacity building. The use of force for human protection purposes is to be resorted to on a “case-by-case basis,” which means that while military force may be used to protect victims of genocide, war crimes, ethnic cleansing, and crimes against humanity in some situations, this may not be so in other cases. As already observed, non-coercive measures alone are not adequate perpetrators of mass atrocities to change course, unless these measures are backed by the threat or the accrual use of force. Ban Ki-moon’s report makes the use of force an

\textsuperscript{524}Ibid.
\textsuperscript{525}Ibid.
\textsuperscript{526}Ibid. para. 12
\textsuperscript{527}Ibid.
option, but the emphasis is predominantly on preventing and rebuilding aspects of R2P. The phrase on a “case-by-case basis” implies that force may be used, depending on the circumstances in each humanitarian crisis. The emphasis on preventive measures, in the view of one writer, obscures what is truly novel about the concept of R2P, “namely generating and exercising the international responsibility to respond to mass atrocities when state authorities fail to protect their populations.”

528 Sarkin shares the view that the use of force as an option should be available when circumstances require, because non-coercive measures alone are unlikely to convince potential perpetrators of atrocities to desist or pressure perpetrators to end them, unless backed by the use of force. As he puts it:

...persuasion is likely to be less successful…Carrots are useful to induce improved behaviour, but the stick can ensure that that the inducement process is more likely to secure positive results. Where it is known that behind the carrot is the stick, the carrot is more likely to have a positive outcome. Thus, a stick in tandem with a carrot is much more likely to be an effective tool and more likely to have a successful outcome. 529

Non-coercive measures alone are not sufficient to end mass atrocities unless backed up by a credible threat or actual use of force. Therefore, although peaceful means for protecting victims of mass atrocities are preferable, the military option should always be an option on the table to be used if non-coercive measures prove inadequate.

3.5.6. Evaluation of the Implementation of R2P

This section evaluates the implementation of R2P in the prevention of mass atrocities and the protection of victims in specific cases, in order to evaluate the best way to implement the concept to investigate why there is intervention in some cases and inaction in others. The section provides brief discussions on Darfur, Kenya, Myanmar, and Libya, because they are post-R2P humanitarian crises.


529 Sarkin, note 443, p. 29.
i.  Darfur: 2003-

The Darfur crisis started in 2003, when the janjaweed militia backed by the government of Sudan responded to a rebellion resulting in the mass killing of about 250,000 people and the displacement of over 2 million.\textsuperscript{530} This crisis, in the light of the core principles of R2P as formulated by the ICISS,\textsuperscript{531} was a clear case that required the application of the concept. The United Kingdom House of Commons International Development Committee shared this view with the statement that “if the responsibility to protect means anything, it ought to mean something in Darfur.”\textsuperscript{532} In spite of the continuing human suffering in Darfur, there has been no international coercive military action to protect the population since 2003, and therefore, it is argued that R2P failed in the situation in Darfur. It has been suggested that the failure was due to the lack of political will,\textsuperscript{533} because the humanitarian crises in Darfur qualify as an R2P situation in the sense that masses of the Sudanese populations have been subject to excessive human rights abuses which demonstrate that the state authorities have proved unable and unwilling to protect the population, or have manifestly failed to do so; yet the crisis is ongoing without international military action to end it, demonstrating the inconsistency in the application of R2P.


The diplomatic intervention in Kenya after the disputed 2007 elections was touted as the best recent example of R2P,\textsuperscript{534} because timely international intervention through diplomatic and political means prevented potential mass killings. The characterisation of the Kenyan scenario as falling under R2P was supported by UN Secretary-General, Ban Ki-moon, with a statement which reminded the government and the political and religious leaders of Kenya of their legal and moral responsibility to protect the lives of the innocent people regardless of their racial, religious, or ethnic origin.\textsuperscript{535} It has been argued that the only time the UN has actually applied R2P “was in the case of Kenya, early in 2008, after the disputed elections.”\textsuperscript{536} Others raised doubts about whether R2P applied to the Kenya

\textsuperscript{530}A. J. Bellamy, \textit{Global Politics}, note 17, p. 52.
\textsuperscript{531}ICISS Report, p. XI
\textsuperscript{533}Bellamy, \textit{Global Politics}, note 17, p. 55.
\textsuperscript{534}Evans, \textit{Ending Mass Atrocity Crimes} note 95, p. 106.
\textsuperscript{535}Bellamy, note 17 supra, p. 54.
situation.\textsuperscript{537} Taking into account the fact that about 1,500 people lost their lives with 300,000 displaced during the crisis,\textsuperscript{538} it is the diplomatic intervention which possibly averted what could have ended in mass killings. Therefore, the use of diplomacy proved useful as a peaceful measure in preventing mass killing in Kenya, which thereby tempers the argument that it is unreasonable for the international community to give peaceful measures a chance to work before resorting to the use of force, for fear that the latter may come too late.

iii. Myanmar: 2008

On 3 May 2008, Burma’s Irrawaddy delta region was devastated by Cyclone Nargis leading to the death of about 138,000 and the displacement of about 1.5 million people.\textsuperscript{539} The continuous denial of access to humanitarian agencies by the Government of Burma and its refusal to accept international humanitarian assistance in the face of the massive humanitarian catastrophe led to a debate in the international community as to whether the humanitarian crisis in Burma amounted to an R2P situation.\textsuperscript{540} France’s Foreign Minister, Bernard Kouchner, argued that Burma’s denial of access to cyclone victims was a situation covered by R2P, because the deliberate mass suffering and death amounted to crimes against humanity, which falls within the ambit of R2P.\textsuperscript{541} France’s claim was rejected by the Association of Southeast Asian Nations (ASEAN), China, UK, and UN officials.\textsuperscript{542} The consensus at the UN was that extending R2P to cover international response to natural disasters would stretch the concept beyond recognition or operational utility and therefore, render the concept meaningless.\textsuperscript{543} Edward Luck, then Special Adviser to the Secretary-General on R2P, argued that “linking R2P to the situation in Burma is a misapplication of the doctrine.”\textsuperscript{544} With the rejection of France’s claim, there appears to be international consensus that R2P does not extend to natural and environmental catastrophes, as proposed by the

\begin{footnotesize}
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\item \textsuperscript{537} J. Ping, Chairperson of the African Union Commission Keynote Address at the \emph{Roundtable High-Level Meeting of Experts on ‘The Responsibility to Protect in Africa’}, Addis Ababa, 23 October 2008. Cited by Bellamy, note 17 supra, p. 55.
\item \textsuperscript{538} Bellamy, note 17 supra, p. 54.
\item \textsuperscript{539} J. Haacke, “Myanmar, The Responsibility to Protect and the Need for Practical Assistance,” \emph{Global Responsibility to Protect}, 1 no. 2 (2009), p. 159.
\item \textsuperscript{540} ICISS Report, p. 33.
\item \textsuperscript{541} Ibid.
\item \textsuperscript{542} Bellamy, note 17, Table 1, p. 149.
\item \textsuperscript{544} International Coalition for the Responsibility to Protect, \emph{The Crisis in Burma}. Available at \url{responsibilitytoprotect.org/index.php/crises/crisis-in-burma}.
\end{itemize}
\end{footnotesize}
Commission. Had France succeeded in using R2P to legitimise its defence of intervention, it would have “confirmed the view that R2P is a ‘Trojan horse’,” 545 because it confers legitimacy on the interference of powerful states in the affairs of weak states in the name of providing humanitarian assistance to victims of natural disasters. R2P should only be applied where there is deliberate commission or intended deliberate commission of genocide, ethnic cleansing, or other atrocities by state authorities or non-state actors, which the state authorities are unable or unwilling to avert or halt. It should not be applied in cases of natural or environmental disasters, even if the state authorities reject international assistance for fear of interference in the target state’s domestic affairs, because to apply R2P in such situations constitute an abuse of the concept, and therefore, will certainly elicit military resistance from the target state, which will require the intervener to apply disproportionate force to overcome, and thereby, threaten regional or international peace and security.

iv. Libya: 2011

The Libyan crisis started in February 2011, when Libyans rose against the rule of Gaddafi, leading to violent repression of demonstrations and threats made against the opposition by the regime. 546 On 11 March 2011 the Security Council adopted Resolution 1973 (2011), which imposed a no-fly zone on Libyan military aviation, “in order to help protect civilians.” 547 The Resolution called on States that have notified the Secretary-General (UN) and the Secretary General of the League of Arab States, to take all necessary measures to enforce compliance with the ban on flights.

This was a collective intervention authorised by the Security Council and, therefore, entirely legal. The purpose was to establish safe havens to protect the Libyan people and foreign nationals residing in Libya exposed to shelling by Libyan forces. 548 It was obvious from the beginning, however, that NATO had other intentions, as evidenced in the statement issued by the US President Obama, French President Sarkozy, and British Prime Minister Cameron, that “our duty and our mandate under UN Security Council Resolution 1973 is to protect civilians, and we are doing that. But it is impossible to imagine a future for Libya with

545 Bellamy, note 17 supra, p. 152.
548 Ibid. para. 12.
Qaddafi, in power.”

It is clear from this statement that part of the objectives was to overthrow Gaddafi, and it cannot be stated with certainty whether the humanitarian motive was not subsumed under their goal of regime change. Indeed, some of NATOS’s actions were questionable, such as the bombing of a private residence leading to the killing of Gaddafi’s son Saif and Gaddafi’s three grandchildren. NATO also rejected diplomatic and peace negotiation offers by Gaddafi and the African Union for the resolution of the conflict. Reinhard Merkel, professor of international law at Hamburg University, poses the question, “Have the interveners limited themselves in their military force to the boundaries set by Resolution 1973? [...] The answer to this question is easy - it is a clear No.” On whether Libya was a good example of R2P, he observes:

The development of a Responsibility to Protect is one of the most positive achievements in the recent history of international law. Libya has made painfully clear that it needs protection from itself, namely from potential abuses of power. Resolution 1973 has not strengthened this developing norm of a universal duty to help in cases of grave and large scale crimes, nor has it provided it with teeth [...], rather it has done severe damage to it.

Put in another way, the Libyan example has shown that even where an intervention occurs under a Security Council mandate, abuses by the interveners to advance strategic interests cannot be averted, because the Security Council has not got the capacity to micromanage the operational aspects of the intervention. NATO exceeded its mandate and facilitated the overthrow of Gaddafi’s regime, because the resolution could not provide precise rules of engagement, and thereby compromised the integrity of the operation and the integrity of R2P itself. It is therefore argued that R2P operationalised through collective or multilateral

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550B. Barber, Libya: ‘This is NATO’s dirty War – The west’s approach to Libya is self-deluding, hypocritical and is proving to be counterproductive.’ The Guardian, 2 May 2011. Available at www.theguardian.com/commentisfree/2011/may/02/nato-gaddafi-libya-air-strikes [Accessed 31 August 2016].


553Ibid. p. 783.

intervention does not necessarily provide the guarantee that the interveners will be guided by the primary legitimate intention of halting or averting human suffering. Despite the foregoing, other scholars have argued that the Libyan intervention demonstrated the international community’s "commitment to working through the Security Council to fashion responses to human protection crises."  

It is argued, however, that NATO’s intervention in Libya was a clear example of how R2P can be abused by powerful countries. NATO interpreted the Security mandate to suit its predetermined objective of regime change. To achieve this NATO used force that was far beyond what was required to attain the objective of Security Council Resolution 1973, to protect civilians from mass atrocity, to the extent of bombing the private homes of Gaddafi, with the aim of killing him and facilitating regime change which was finally achieved. The result has been to render Libya a failed state; yet, because the intervention was conducted by a powerful organisation, no one held the leaders of NATO to account. This approach to the implementation of R2P will ensure that the credibility of military intervention for human protection purposes will always be in question because it demonstrates that even when an intervention has been authorised by the Security Council, there is no guarantee that the concept will not be abused by the interveners in furtherance of their geopolitical goals.

3.6. Conclusion

Traditional Westphalian sovereignty espoused the inviolability of state sovereignty and a state’s right to non-intervention in its internal affairs. Thus, a state had the right to determine how it would govern itself, free from interference by external actors, and therefore, how it treated its population was its own business, and the international community had no right to intervene militarily to stop the gross violations of the fundamental human rights of the population. The attitude of the international community was that intrastate conflicts that gave rise to gross human rights abuses were strictly an internal matter and not the concern of the international community necessitating intervention. Therefore, in the 1990s, in the face of grave humanitarian crises, particularly the genocide in Rwanda and the Srebrenica massacre in Bosnia, the international community failed to take effective action. This triggered debates as to whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or whether the time

had come to take a different course. At the centre of the debates was how the international community should react when the fundamental human rights of populations are grossly and systematically violated within the boundaries of sovereign states. The atrocities committed during these humanitarian crises accentuated the need for a reconsideration of the justification for armed humanitarian intervention, because the international community considered it was immoral and unethical for the world to stand idly by while the mass slaughter of populations took place.

It became widely accepted that sovereignty entails both rights and responsibilities, including the right of a state to the freedom to govern itself the way it deems fit, free from external interference. However, these rights are subject to the state’s responsibility to protect and promote the welfare of its nationals, and therefore, if it subjects its nationals to gross violation of their fundamental rights, its sovereignty yields to the international community’s responsibility to protect the population. Sovereignty therefore implies responsibility, and not a licence for governments to violate the human rights of its population; and therefore, a state’s entitlement to the benefits and rights of sovereignty is tied to its respect for the human rights of the population and if it fails in this regard, it is legitimate for external actors to intervene militarily to protect the population. Military intervention for human for the protection of victims of internal human rights abuses has serious implication for sovereignty; however, there are situations where it becomes absolutely necessary to use force to protect victims of excessive human rights abuses. In other words, drastic and unpleasant measures are sometimes necessary to stop the gross violations of the human rights of the citizens of a state by their own government; and therefore, in the face of gross human rights abuse within a state, the international community should not shy away from taking the necessary action to protect victims of abuse. Thus, sovereignty can be overridden in order to take action to protect victims of gross human rights abuses; and therefore, the time for radical changes to depart from the old orthodoxy of non-intervention had come, in the light of atrocities committed during the humanitarian crises in the 1990s. In order words, while under Westphalian sovereignty state sovereignty was supreme, the new understanding of sovereignty is that the interest of the population of a state takes precedence over state sovereignty, and the international community has an interest in the manner in which a state treats its own citizens; and therefore, the treatment of the citizens by a state of its citizens is no longer the exclusive business of that state.
While acknowledging that the principle of sovereignty and non-intervention offered vital protection to small and weak states, the international community had to find a balance between respect for sovereignty and the need to protect human rights in order to ensure that the failures of Rwanda, Kosovo, and Bosnia were not repeated. Military intervention generates apprehension among militarily weak countries because of the potential for powerful countries to use it as a pretext for interfering in their internal affairs. However, in the face of horrendous mass atrocities, the international community had to place the protection of human rights above reverence of sovereignty, and to accept the principle that, in the face of gross abuse of human rights in a state, external military intervention to protect the population was legitimate.

The debates about how the international community should react to gross abuses of human rights culminated in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) by the Government of Canada in 2000, with the mandate to strike a balance between intervention for human protection purposes and sovereignty, and to endeavor to build a new international consensus on how to respond in the face of massive violations of human rights and humanitarian law. The ICISS formulated the concept of R2P, which articulated the basic principles that sovereignty implies responsibility, and this responsibility primarily lies on the state to protect its people; but where the state is unwilling or unable to discharge this responsibility, its sovereignty has to yield to the broader international community’s residual responsibility to protect the vulnerable population. The Commission set out a continuum of measures for responding to gross violations of human rights under the three dimensions of R2P, namely: the responsibility to prevent - to address both the root causes and direct causes of internal conflict and other man-made crisis putting populations at risk; the responsibility to react - to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution and in extreme cases military intervention, and; and the responsibility to rebuild - to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconsideration, addressing the causes of the harm the intervention was designed to halt. The responsibility to prevent is an extremely important aspect of R2P, for if conflict can be prevented, then the controversial principle of humanitarian intervention would not arise, and it would not be necessary to rebuild shattered societies at great cost in finances and lives. Therefore, the ICISS Report singles out prevention as the most important dimension of the responsibility to protect. Similarly, the
responsibility to rebuild is important for the reconstruction of societies that have been destroyed by violent conflict. The responsibility to rebuild a state involves not only the rebuilding of the institutions of the state destroyed by conflict and the intervention itself, but also the resolution of the issues that gave rise to the conflict and the intervention, if the conflict is not to ignite again. The responsibility to rebuild arises after a military intervention. Interveners should devise a post intervention strategy and not just walk away from the smoking ruins of a state shattered by conflict; because failure to take effective steps to address the causes of the conflict, and to participate in the reconstruction of the state can lead to total anarchy and state failure after the intervention, as the example of NATO’s intervention in Libya demonstrates.

However, the military dimension is the most controversial aspect of R2P, because military intervention entails the violation of the target state’s sovereignty with deadly force, which may cause deaths and destruction. Therefore, the use of force should be the last resort, and should be carried out only with the authorisation of the Security Council. The main motivation should be the protection of victims of gross human rights abuses. Military intervention should be carried out only if there is a prospect of success, and therefore, force should not be used, if it will exacerbate the problems it is meant to solve, and the force used in an intervention should be that, only necessary to achieve the objective of the mission. This aspect of R2P has come under criticism, because of potential for abuses in the implementation of the concept. For example, during NATO’s intervention in Libya, the organisation went in with the predetermined objective of regime change, contrary to the Security mandate to protect civilians, which was a clear example of how R2P can be abused by powerful countries even when authorised by the Security Council.

The 2005 World Summit Outcome Document endorsed in paragraphs 138 and 139 the ICISS proposal, that the primary responsibility to protect its nationals lies with the state, and went further, by specifying genocide, war crimes, ethnic cleansing, and crimes against humanity and their incitement, as the crimes from which a state has a responsibility to protect its nationals. Furthermore, the Document requested world leaders to encourage, and help states to discharge this responsibility, but it vested in the Security Council, the exclusive authority to authorise interventions on a case by case basis, when peaceful means prove inadequate, and national authorities are manifestly failing to protect their population, from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this way the World Summit
Outcome Document tacitly strengthened the powers of the Security Council. While the Summit Document acknowledged military intervention as an option, it downplayed it, and instead, prioritised the use of peaceful means to protect victims of mass atrocities, stressing that, military intervention is justified, only when the national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. On the basis of the agreements in paragraphs 138-139 of the World Summit Outcome Document, the Secretary-General of the Security Council concluded in his report, *Implementing the Responsibility to Protect*, that the responsibility to protect rests on three pillars, which constitute a summary of the concept of R2P, and represent the way forward, in implementing R2P. Pillar one concerns the primary responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and their incitement, which lies with the state; pillar two deals with international community commitment to assist states in fulfilling these obligations, and; pillar three concerns the international community’s commitment, to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Implementation of the three pillars does not have to be in a set sequence, for moving from one to another. The pillars are of equal importance, and none can be dispensed with.

In the end, it is observed, firstly, that sovereignty is no longer a barrier to international military action to protect victims of mass atrocities, and therefore, although Article 2(7) enshrines the principle of non-intervention in the domestic affairs of states, the Security Council has determined, that, violent intrastate conflicts constitute a “threat to international peace and security,” justifying the use of force. Secondly, while total disinterestedness is ideal, a state will not intervene in another, motivated solely, by compassion for humanity. This explains why, there have been interventions in some instances, and inaction in others. Thirdly, because of the requirement that a military intervention should have a reasonable prospect of success, the use of force for human protection purposes, cannot be implemented against militarily powerful states, because this may lead to a greater conflict. Fourthly, an organisation that has been given Security Council mandate to intervene in another state, should adhere strictly to the terms of the mandate, in order to eliminate or, at least, minimise abuse and the disproportionate use of force in pursuance of the objective of the mission.
CHAPTER 4

4. CONCLUSION

4.1. Introduction

This chapter explains how the aims of the thesis have been fulfilled. It weaves together the conclusions from all the chapters, and then, presents broad general conclusions to the thesis. It explains the significance of the thesis, and its contribution to knowledge, relating to military intervention for human protection purposes. The chapter identifies the findings of the thesis, and then, discusses the implications of the findings. It summarises what has been learned, and explains how the lessons learned can be applied, by making recommendations.

The aim of this thesis has been to discuss the concept of humanitarian intervention, and the concept of the responsibility to protect (R2P), and; to investigate how best to apply the concepts in the face of humanitarian crises, in order to address concerns about their implementation. To this end, the thesis investigates: whether a state has a duty to protect the human rights of its population; whether this duty is an attribute of its sovereignty; whether a breach of this duty can be a justification for external military intervention; whether there is a duty to intervene, and if so, whose duty it is; why interventions have taken place in some states, and why there has been inaction in others; whether a state or an organisation has a right to intervene in another state; whether there are situations in which it would be wrong, not to intervene, and; what authority has the power to determine when and how interventions should be carried out.

Much of the scholarly literature on military intervention for human protection purposes, deals with the legality and legitimacy of the military dimension of the concepts. The significance of this thesis is that, while it deals with the legality and legitimacy of the military dimension of the two concepts, it takes a different approach by focusing the investigation on the following questions: what are the reasons for the potential abuse of the concepts, for the advancement of the national, strategic, and geopolitical interests of the interveners, and; what are the reasons for the propensity to use disproportionate force in the attainment of the stated objective of human protection by powerful states? Thus, the research focuses on the question: whether powerful states that use force to intervene in the domestic affairs of other states on grounds of humanity are motivated by altruism or national or geopolitical interests. Answering this question will address the research problem, which is, why there is the
potential for abuse of the concepts and the indiscriminate use of force, in their implementation.

The central argument of the thesis is that there are double standards, selectivity, abuses, and indiscriminate and disproportionate use of force in the implementation of R2P by powerful countries, and; that, whether a military intervention is unilateral, or sanctioned by the UN Security Council, there is the potential for abuse; and in addition, disproportionate, indiscriminate, and unjustifiable force may be used, which pose the greatest threat to the survival of the concept.

This thesis argued that the Westphalian concept of state sovereignty confers on states the right to govern themselves in any manner they choose, free from interference by external actors. The concept connotes the idea that, internally, a state has exclusive jurisdiction over matters within its territory, free from intervention by outside actors. However, sovereignty has undergone an evolution from the traditional Westphalian concept of the supremacy of the state to the concept of sovereignty with the people at the centre, and therefore, in the current international order, where a state perpetrates egregious human rights abuses against its citizens, sovereignty is no longer a barrier to military intervention. The worldwide recognition of human rights and the acknowledgement by the international community that the manner in which a state treats its citizens is no longer the sole business of the state, but also a matter of international concern, has resulted in the softening of international attitudes towards armed intervention in the internal affairs of states.

This thesis argued that the failure of the Security Council to act decisively in the face of humanitarian crises in the 1990s contributed to the perpetration of mass atrocities during these crises. Grave human rights abuses were committed during these crises, but the Security Council was paralysed from acting, either by disagreements among the five permanent members or lack of political will. The inability of the Security Council to react to grave abuses of human rights triggered international debate as to how the international community should react when the fundamental human rights of populations are grossly and systematically violated within the boundaries of sovereign states. At the heart of the debate was whether the international community should continue to adhere unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or take a different course in the interest of human rights. The debate culminated in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 by the
Government of Canada, with the mandate to find a balance between respect for sovereignty and intervention for purposes of protecting human rights. The ICISS came up with the concept of R2P that articulates the theme that sovereignty entails responsibility and this responsibility primarily lies on the state to protect its people, but where the state is unwilling or unable to discharge this responsibility, its sovereignty has to yield to the broader international community’s responsibility to protect the vulnerable population.

This thesis argued that in the light of international norms relating to human rights, sovereignty has been re-characterised as responsibility, which implies that: state authorities are responsible for protecting the fundamental rights and welfare of citizens; state authorities are responsible internally to the citizens and externally, to the international community, through the UN, and; and agents of state are accountable for their acts of commission and omission. The ICISS, while recognising the sacredness of sovereignty acknowledged that there was international recognition, that in certain circumstances, such as extreme violations of human rights, there must be exceptions to the non-intervention principle. Thus, in the event of large scale loss of life or ethnic cleansing, military intervention for human protection purposes is justified. The Security Council is the most appropriate body to take the necessary steps to maintain international peace and security, including the protection and promotion of human rights. In order to avoid the abuse of R2P, the ICISS proposed that the new approach to military intervention for human protection purposes should ensure that: there are clear criteria on whether, when, and how to intervene; the use of force is the last resort; military intervention is carried out with the primary objective of alleviating human suffering; only the force necessary to attain the objective of the intervention is used, and; the interveners would stay in the affected country long enough to participate in the reconstruction of the state.

This thesis argued that the importance of the World Summit of the 60th Session of the UN General Assembly held in New York from 14-16 September 2005, which was attended by over 170 heads of state and government, was that it endorsed the ICISS proposal, that, the primary responsibility to protect its nationals lies with the state, and went further by specifying genocide, war crimes, ethnic cleansing, and crimes against humanity and their incitement as the crimes, from which a state has a responsibility to protect its nationals. Furthermore, the Document requested world leaders to encourage and help states to discharge this responsibility, and vested in the Security Council the exclusive authority to authorise interventions on a case- by-case basis when peaceful means prove inadequate, and national
authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. While the Summit Document acknowledged military intervention as an option, it downplayed it, and instead, prioritised the use of peaceful means to protect victims of mass atrocities, stressing that military intervention is justified only when the national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

4.2. Findings of the thesis

The thesis makes the following findings:

i. A state has a responsibility to protect the human rights of its population, and this duty is an attribute of its sovereignty.¹

ii. Failure to discharge this responsibility can provide a justification for external military intervention.²

iii. A right to intervene does not exist under international law, and; yet, there are situations in which it would be morally wrong not to intervene.³

iv. The international community has a responsibility, under R2P, to intervene to protect the victims of gross violations of human rights perpetrated on them by their own governments, if the state authorities are unable or unwilling to halt the abuses.⁴

v. The Security Council is the body with the exclusive authority to grant authorisation for military intervention for human protection purposes, and; to determine when and how interventions should be carried out.⁵

vi. There is inconsistency and selectivity in the application of military intervention for humanitarian purposes.⁶

vii. The use of force to save lives usually entails taking lives, including innocent ones,⁷ and therefore, whether a military intervention for human protection purposes is

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¹ICISS Report, p. XI
³UN Charter, Article 2(7).
⁴ICISS Report, p. XI.
⁵2005 World Summit Outcome Document, para. 139.
⁶ICISS Report, p. 37.
unilateral, or sanctioned by the UN Security Council, there is the potential for abuse, and in addition, the disproportionate and indiscriminate use of force.  

4.3. Discussion of the findings

i. This thesis has found that a state has a duty to protect the human rights of its population, and that this duty is an attribute of its sovereignty.  

From Chapter 2, we found that sovereignty is the most important, if not the only, principle of international law that defines all the rules of international law, and in sum, is the cornerstone of international law. Sovereignty is defined as the independent and unrestricted power of a state within its internal jurisdiction, and serves as a defence for weak states against powerful countries. Originally, sovereign authority was considered to be absolute, perpetual, and undivided, and in terms of which the private interest of the ruler or ruling class superseded the common interest. However, at the centre of the earliest conception of sovereignty by political theorists of early modern Europe, such as Hobbes and Bodin, was the acknowledgement of the interdependence of authority and responsibility; and that sovereignty entailed responsibilities. 

From Chapter 2, we found that the concept of sovereignty as it is understood currently was established by the Peace Treaties of Westphalia signed at Munster and Osnabruck in 1648 between European States, which ended the Thirty Years War. In the classic Westphalian system of international order, state sovereignty meant that the government of the state was competent to act without restraint within its borders, and the interference by one state in the internal affairs of another was not permissible. 

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9 ICISS Report, note 1 supra, p. XI.  
This thesis defines sovereignty as a state’s freedom to determine and control affairs within its territory in accordance with its own laws, without the dictates of any external power, subject to the requirements of international law. The thesis argues that the principle of non-intervention based on state sovereignty has come under close scrutiny, and is no longer accepted unquestionably in the current international order. Neither the absolute concept of sovereignty, nor the Westphalian notion of sovereignty is practicable in the contemporary era, because of the internationalisation of human rights, the influences of globalisation and the interdependence of states. Strict application of these notions of sovereignty may serve as a protection for tyrannical and oppressive governments, and at the same time, be an impediment to action to protect victims of human rights abuses. In addition, unrestrained sovereignty may present a threat to international peace and stability, because every state may consider it a sovereign right to do whatever it wishes, with no regard for international law. However, even the earliest theorists, who defended absolute sovereignty, acknowledged that sovereignty entailed responsibilities, and that it was not unlimited, but subject to higher norms, in the form of the laws of God, the laws of nature, the laws of nations and constitutional restrictions. Therefore, in the contemporary international order, sovereignty does not imply that a state is above international law, and therefore, a state has a duty to protect its nationals; a duty that is inherent in sovereignty itself.

ii. This thesis has found that failure to discharge the state’s responsibility to protect its nationals can provide a justification for external military intervention.16

From Chapter 3, we found that during the Cold War, there was a split between the Capitalist West and the Communist East, and these two hostile blocks avoided intervention in intrastate conflicts in order to avoid a larger confrontation.17 The end of the Cold War raised a new opportunity for the realisation of the objectives of the UN Charter, of maintaining international peace and security, and of securing justice and human rights; and a changed attitude towards human rights became evident.18 Consequently, the end of the Cold War made humanitarian intervention a widely accepted norm, with the frequent use of human rights concerns as grounds for intervention.19

Humanitarian intervention has been defined as

16Weiss, note 2, p. 15.
17Ibid. p. 38.
coercive action by one state or group of states, involving the use of armed force, in the
territory of another state, without the consent of the affected state, with the aim of averting
mass suffering or death among the population of the target state.20

The thesis defines humanitarian intervention as the use of force by a state or group of states
in the territory of another state, without the consent of the target state, with the stated
objective of averting or halting gross human rights abuses perpetrated by the government of
the target state on the inhabitants of the target state. The thesis argues that the frequency of
humanitarian interventions since the end of the Cold War demonstrates that the principle of
non-intervention in the domestic affairs of states has not been observed rigidly; partly
because of international concerns for human rights, and; partly because of voluntary
limitations placed by states on their own sovereignty, through the assumption of international
obligations, and their membership of international organisations. Sovereignty has therefore
been eroded, and absolute freedom of states from interference in their domestic affairs is an
illusory goal, because of the interdependence of states. Thus, much as sovereignty may be
considered as a bulwark of protection for weak countries against powerful countries, respect
for state sovereignty should be balanced with the need to address matters of international
concern, such as the protection of human rights. If the principle of non-intervention is rigidly
adhered to without exception as provided by Article 2(7) of the Charter, it can be an
impediment to necessary and prompt action in defence of victims of atrocities, because no
alternatives would remain for the international community to protect victims of gross human
rights abuses, when peaceful methods fail. Therefore, the excessive abuse of the human rights
of a people, by their own government in its territory, is no longer accepted as that
government’s own business, and may lead to external armed intervention, if peaceful efforts
fail. Consequently, sovereignty is no longer a barrier to armed intervention to protect victims
of mass atrocities.

The thesis further argues that the United Nations Charter commits the UN to two conflicting
ideals. On the one hand, the UN commits itself to promote universal respect for, and
observance of, human rights for all, without distinction as to race, sex, language, or religion.
On the other hand, the organisation and its members undertake to respect state sovereignty by
making it inviolable, with a prohibition on intervention in the domestic affairs of states, and a

20A. Roberts, “The So-Called ‘Right’ of Humanitarian Intervention”, in Yearbook of International Humanitarian
prohibition on the use of force. Thus, the Charter affirms both the primacy of human rights, and the importance of state sovereignty. The Charter’s provisions are therefore contradictory and ambiguous, and provide no guidance as to how to reconcile these two ideals, namely, the importance of human rights and the reverence for state sovereignty. However, the thesis argues that human rights are peremptory norms of international law from which no derogation is permitted, and therefore, should take precedence over the reverence for sovereignty. Therefore, the time has come for the redefinition of sovereignty from the traditional state-centred notion to a people-centred notion of sovereignty, in the interest of promoting human rights and fundamental freedoms.

iii. This thesis has found that a right to intervene does not exist under international law.\textsuperscript{21}

From Chapter 1 we found that at the core of humanitarian intervention is the right of a state to intervene in another, in the name of human rights.\textsuperscript{22} The doctrine has its roots in St. Thomas Aquinas’ just war theory, which justified coercive intervention to prevent or halt egregious human suffering, and his writings on just war implied that tyranny was an abhorrent crime that could be legitimately opposed by every means including military action, if necessary.\textsuperscript{23} By the end of the 19\textsuperscript{th} century, the right of humanitarian intervention had gained wide acceptance,\textsuperscript{24} and most international lawyers agreed on the right to intervene on humanitarian grounds.\textsuperscript{25}

The thesis argues that the fact that most writers recognised that a right of humanitarian intervention existed does not provide legal justification for that right. The right of humanitarian intervention endorsed by the end of the 19\textsuperscript{th} century by majority of writers, sought to justify unilateral military intervention. The right empowered more powerful states to determine when a crisis existed, and to determine the appropriate response, which invariably was not based on international law. The interventions were motivated by religious solidarity and strategic interests, and not necessarily by humanitarian considerations. The only basis was the advancement of the interests of the intervening states, through unilateral action, clothed in the robes of humanitarianism. These states could only justify their

\textsuperscript{21}UN Charter, Article 2(7).
\textsuperscript{24}A. Mandelstam, International Protection of Minorities (1923) 367 at 391.
interventions upon the successful outcome, regardless of the lack of any justification in law, for their actions.

The thesis argues that there is no legal basis for a claim of the right of humanitarian intervention by an individual or group of states in the current international world order. The drafters of the UN Charter wanted to ensure that states will not resort to self-help in resolving interstate disputes; hence; the provisions on the prohibition of the use of force contained in Article 2(4) that leaves no room for humanitarian intervention, and the principle of non-intervention in Article 2(7) respectively. To this end, there was no provision for states to take either individual or collective action in the interest of human rights, and therefore, there is no international law principle that makes unilateral humanitarian intervention lawful.

The thesis argues, however, that there are situations in which it would be morally wrong not to intervene. For example, if the international community had reacted with an armed intervention at the beginning of the Rwanda genocide, thousands of lives would have been saved. The lack of political will on the part of world leaders meant that adequate resources could not be marshalled to facilitate a timely intervention to save lives. The attitude of the international community to the crisis was inexcusable, because one would have expected that world leaders would have learnt a lesson from the horrors of the Holocaust, and therefore, taken steps to ensure that killings on a massive scale should not happen again. To put it bluntly, the world abandoned Rwanda. The international community was aware that mass killings were going on in Rwanda, yet; the international community watched the genocide unfolding, but did little to halt or alleviate the suffering of the Tutsis and moderate Hutus. The international community abdicated its responsibility to come to the assistance of the helpless victims of horrendous mass atrocities. Although it has been argued that no right to intervene exists in international law, a unilateral intervention by any state or organisation in this particular instance would have been justified on moral grounds. Therefore, the argument can be made that, in some situations, it is wrong for the international community to abstain from intervening in a state to alleviate human suffering.

iv. This thesis has found that the international community has a responsibility, under R2P, to intervene to protect the victims of gross violations of human rights, perpetrated on them by their own governments, if the state authorities are unable or unwilling to halt the abuses.26

26ICISS Report, p. XI.
However, before armed force is used, less intrusive and non-coercive measures should always be considered before more coercive and intrusive ones are applied.\(^{27}\) When non-coercive measures fail to end atrocities, and the state is unable or unwilling to discharge the responsibility to protect, it subverts its own sovereignty, and the principle of non-intervention yields to the responsibility of the international community to intervene in the affected state.\(^{28}\)

From Chapter 4, we found that, during the 1990s, the international community failed to respond effectively, to several humanitarian crises, during which grave violations of human rights were perpetrated.\(^{29}\) The failure of the international community to react triggered debates as to whether the international community should adhere to unconditionally to the principle of non-intervention enshrined in Article 2(7) of the UN Charter, or whether the time had come to take a different course.\(^{30}\) These debates culminated in the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in 2000 by the Government of Canada, with the mandate to reconcile intervention for human protection purposes and sovereignty.\(^{31}\) The ICISS came up with the concept of R2P, which articulated the basic principles, that sovereignty implies responsibility, and this responsibility primarily lies on the state to protect its people; but where the state is unwilling or unable to discharge this responsibility, its sovereignty has to yield to the broader international community’s responsibility to protect the vulnerable population.\(^{32}\) The ICISS re-characterised sovereignty as responsibility, with the implication that it was the function of state authorities to protect the lives and safety of citizens and to promote their welfare; and state agents were accountable for their acts of commission and omission.\(^{33}\) R2P was unanimously adopted by the 2005 World Summit of more than 170 world leaders as the roadmap for responding to mass atrocity crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity.\(^{34}\)

\(^{27}\)ICISS Report, p. XI

\(^{28}\)Ibid. p. XI.


\(^{32}\)Ibid. p. XI.

\(^{33}\)ICISS Report, p. 13.

\(^{34}\)The 2005 World Summit Outcome Document, Resolution A/Res/60/1, para 139. Available at
The thesis argues that the primary responsibility to protect its nationals rest with the state, and it is only when the state is unable or unwilling to fulfil this responsibility that the responsibility of the international community is activated. Thus, this principle imposes a duty on the international community to take action to avert or halt atrocities only where the state authorities fail to do so. State authorities are better placed to evaluate the potential for a humanitarian crisis and come up with the best way to handle it, unless they are the perpetrators or the crisis overwhelms them. In the event that the state authorities are overwhelmed by a humanitarian crisis, they should ask for international assistance, or accept it when offered. If the state fails to ask for assistance or rejects international assistance in the face of grave violations of human rights, then the international community should not just stand by, but step in to bring relief to the victims. Therefore, under the concept of R2P, the international community has a duty to intervene in a state to protect victims of gross human rights violations. However, the discharge of this responsibility by the international community in such situations should be motivated by the imperative to protect the vulnerable victims of human rights abuse, and not be used as a pretext to subvert the sovereignty of the state to advance the interests of the interveners.

The thesis further argues that much as it is reasonable to give non-coercive measures a chance to work before the use of force, if the international community has to wait to give these measures the time to prove whether or not the affected state is unwilling or unable to avert serious harm to its population, it may lead to the closure of the window for taking preventive action, especially if the state authorities of the affected state are the perpetrators of the atrocities. Furthermore, it may lead the international community to delay in taking preventive measures, with the expectation that the conflict from which atrocities have arisen will resolve itself. Therefore, where there is reasonable expectation that atrocities are imminent, the international community should not be placed in the position of having to wait until they are actually carried out, but should take anticipatory military action to avert or impede the harm.

[Accessed 10 September 2016].
v. The thesis has found that the Security Council is the body with the exclusive authority to determine when and how interventions should be carried out, and to grant authorisation for military intervention for human protection purposes.\(^{35}\)

In Chapter 4, we found that the ICISS was of the view that, when it comes to the authorisation of military intervention for human protection purposes, there is no better body than the United Nations Security Council which should be making the hard decisions about overriding state sovereignty, the decisions about the mobilisation of effective resources, including military resources, and the decisions about rescuing populations at risk,\(^{36}\) in order to engender international consensus and confer legitimacy on such operations. The basis of this authority is found in Article 42 of the UN Charter, which confers on the Security Council the discretion to “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.”\(^{37}\) When the Security Council failed to act, the ICISS proposed that the UN General Assembly or regional organisations could take action.\(^{38}\) However, the 2005 World Summit conferred upon the Security Council, the exclusive authority to determine, when, and how, military intervention for humanitarian purposes should be carried out.\(^{39}\)

The thesis argues, however, that the credibility and suitability of the Security Council in its current form as the right institution to authorise interventions raise questions. The Security Council is unrepresentative in its current composition, dominated by the major military powers of the world with different interests and agendas. Thus, in matters of military intervention, the political will of some members may be lacking; and therefore, it is unlikely that unanimity or even consensus would be attainable, because some members of the Security Council may use their vetoes to protect a state that is a potential target for military intervention as a consequence of gross abuses of human rights abuses in its territory.

Therefore, the Security Council has to be reformed, in order to make it a suitable body responsible for authorising interventions. Reforms should involve stripping the five permanent members of the veto, or giving the veto to representatives of continents not already represented on the Council, such as Africa, or granting every member of the Security

\(^{35}\)World Summit Document, note 5 supra, para. 139.  
\(^{36}\)ICISS Report, p. 49.  
\(^{37}\)United Nations Charter, Chapter VII, Article 42.  
\(^{38}\)ICISS Report, p. 53.  
\(^{39}\)World Summit Document, note 5 supra, para. 139.
Council, permanent or temporary, the veto. Another alternative is to give every member
country of the UN the veto in matters concerning international peace and security. This will
go a long way to levelling the playing field, in the light of the fact that countries that are
targets of military intervention make up the temporary members of the Council, and are also
the majority in the General Assembly.

vi. The thesis has found that there is inconsistency in the application of military intervention
for humanitarian purposes.40

In Chapter 4, we found that, to justify a military intervention there must be a reasonable
chance of success of halting or averting the human suffering that triggered the intervention in
the first place.41 The intervention should not bring about a greater harm than the intervention
was originally calculated to avert; and therefore, an intervention is not justified if it has no
chance of success, and is likely to make matters worse by triggering a greater conflict.42
Thus, on purely utilitarian grounds, the application of the principle would be likely to exclude
military action against any one of the permanent members of Security Council,43 and for that
matter, any other major military power.

We also found in Chapter 4 that there must be the right intention behind an intervention,
which implies that the primary purpose of an intervention should be to avert or halt human
suffering; however, absolute disinterestedness of the intervener is highly unlikely.44
Nevertheless, the interveners should be disinterested, in the sense that the humanitarian
aspect should not become secondary to an otherwise self-interested intervention.45

First, the thesis argues, with regard to the issue of a reasonable chance of success, that there is
an implication of double standards, because in practice, it means that the use of force for
human protection purposes can be applied only to militarily weak countries, and military
action can never be taken against militarily powerful countries, even if all the conditions
required for intervention are met. This is unjust, because, without defending atrocities

40Ibid. p. 37
41 Ibid.
42 Ibid.
43 Ibid.
44 R. W, Murray, ‘Humanitarianism, Responsibility or Rationality? Evaluating Intervention as State Strategy’. In
Libya: The Responsibility to Protect and the Future of Humanitarian Intervention, A. Hehir & R. Murray,
18, no. 1, pp. 49-69, 55.
perpetrated by any state, it is argued that the only reason why weak states are targets for military interventions is simply because they are weak militarily, and not that they have a monopoly on the perpetration of atrocities. The apparent injustice is exacerbated by the fact that, invariably, interventions are carried out by the major military powers exempted from the application of the principle. Put in another way, this implies that powerful countries are exempted from military intervention, but weak countries are legitimate targets of military intervention. It should therefore not come as surprise that the greatest opponents of humanitarian intervention would be militarily weak countries that see themselves as potential targets of military intervention.

Second, in relation to the issue that the primary purpose of an intervention should be to alleviate human suffering, it is submitted that while total disinterestedness is ideal, a state will not intervene in another on human protection grounds alone, without taking into account its own self-interest, such as considerations of risk to its military personnel, the financial costs involved, and other strategic benefits. In other words, it is unrealistic to expect that an intervention will be motivated solely by compassion for humanity. However, even if compassion for humanity is not the sole driving force for intervention, it should take precedence over self-interestedness. It is reasonable that an intervening state should benefit from the operation; but as long as the overriding objective is to protect victims of human rights, it satisfies the right intention criterion. This is to ensure that military intervention for humanitarian purposes is not used as a pretext for the advancement of the ulterior motives of the interveners.

vii. The thesis has found that the use of force to save lives usually entails taking lives, including innocent ones; and therefore, whether a military intervention for human protection purposes is unilateral, or sanctioned by the UN Security Council, there is the potential for abuse, and in addition, the disproportionate and indiscriminate use of force. For example, NATO intervened in Kosovo in 1999, without Security Council authorisation. Images of NATO’s aerial bombardment of the country were witnessed on television. The indiscriminate bombing killed civilians, and Human Rights Watch put the death toll from NATO air strikes at 500 civilians. NATO planes were flying too high and too fast to

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46 Valentino, note 7 supra, p. 64.
47 ‘NATO attack on Yugoslavia begins’, CNN, (March 24 1999).
48 Children reported killed when NATO bomb missed target, CNN (April 28, 1999).
49 Valentino, note 29, p. 64.
protect civilians on the ground. With regard to a Security Council-authorised intervention where there was abuse and the disproportionate use of force, Libya is a good example. This was a collective intervention authorised by the Security Council and, therefore, entirely legal. The purpose was to establish safe havens to protect the Libyan people and foreign nationals residing in Libya exposed to shelling by Libyan forces. It was obvious from the beginning, however, that NATO had other intentions to overthrow Gaddafi. NATO even bombed a private residence leading to the killing of Gaddafi’s son, Saif, and Gaddafi’s three grandchildren. It also rejected diplomatic and peace negotiation offers by Gaddafi and the African Union for the resolution of the conflict.

The thesis argues that the amount of force used in an intervention should be that which would minimise death and destruction. Interveners should not use disproportionate and indiscriminate force far beyond the magnitude of the original provocation, for there is no justification for the killing of the innocent, by literally killing an ant with a sledgehammer. The Kosovo and Libya examples have shown that whether an intervention is unilateral or collective, abuses by the interveners to advance strategic interests, and the disproportionate use of force occur. It is argued that NATO’s intervention in Libya and Kosovo were clear examples of how R2P can be abused by powerful countries, and demonstrates that, whether implementation of R2P is through collective or multilateral intervention, there is no guarantee that the interveners will be guided by the primary legitimate intention of halting or averting human suffering. It is argued further that despite the abuses, no one held the political leaders of NATO to account, because the intervention was conducted by a powerful organisation. This lack of accountability will ensure that the credibility of military intervention for human protection purposes will always raise questions.

4.4. Recommendations

In order to minimise or eliminate abuses in the implementation of R2P, this thesis makes the following recommendations:

50bid. p. 65.  
52B. Obama, D. Cameron, N. Sarkozy, Libya’s Pathway to Peace, New York Times, 14 April 2011.  
53B. Barber, Libya: ‘This is NATO’s dirty War – The west’s approach to Libya is self-deluding, hypocritical and is proving to be counterproductive.’ The Guardian, 2 May 2011. Available at www.theguardian.com/commentisfree/2011/may/02/nato-gaddafi-libya-air-strikes [Accessed 22 October 2016].  
a. The Security Council should be the body with the exclusive authority to determine when and how interventions should be carried out, and to grant authorisation for military intervention for human protection purposes. To pre-empt powerful states from taking unilateral action in defence of victims of human rights abuse, the permanent members of the United Nations Security Council should exercise their prerogative of the veto in a manner consistent with the Purposes and Principles of the United Nations. The exercise of the veto should be done in the global interest, and not in the national interests of the permanent members of the Council. In particular, the Security Council should implement the enforcement mechanism provided under Chapter VII of the Charter of the United Nations, relating to the maintenance of international peace and security, including the protection of human rights, effectively, in order to avoid giving a pretext to powerful states to carry out unilateral interventions. Where the Security Council is unable or unwilling to act, it should grant timely authorisation to other capable actors to take action; for if it rejects the request of other actors to intervene, or it is slow in granting permission, it would pave the way for unilateral interventions, setting a dangerous precedent for other actors to follow, which would in turn undermine the credibility of the Council as the custodian of the authority to secure international peace and security. Where an intervention is carried out with the blessing of the Security Council, then it would be in a position to frame the authorising resolution in clear and precise language, laying down clear operational guidelines, in order to eliminate or minimise abuse and the disproportionate use of force in its implementation;

b. The current composition of the Security Council, dominated by the five permanent veto-wielding members, makes it an unsuitable body for discharging the foregoing responsibilities. Therefore, there is the need to reform the United Nations Security Council in order to make it work better in maintaining international peace and security. Reforms should involve stripping the five permanent members of the veto, or giving the veto to representatives of continents not already represented on the Council, such as Africa, or granting every member of the Security Council, permanent or temporary, the veto. Another alternative is to give every member country of the UN the veto in matters concerning international peace and security. Until the Security Council is able to overcome its paralysis, occasioned by disagreements among the five permanent members, concerning matters of international peace and security, the
authorisation of the Security Council should not always be an absolute prerequisite for military intervention for human protection purposes. The Security Council should actively take enforcement measures to protect human rights; otherwise unilateral humanitarian intervention would be legitimate when egregious human rights abuses occur. When an intervention has been sanctioned by the Security Council, or even when an intervention is unilateral, interveners should not take sides in an internal conflict. Protection should be extended to all non-combatants and civilians, and not only to the section of the population that is opposed to the state authorities. NATO took sides during the intervention in the Libya by bombing only the supporters of the regime, while providing air cover for the rebels, thereby facilitating regime change, which undermined the primary objective of the operation;

c. The United Nations should have its own standing army, to be deployed by with the authority of the Security Council, to respond to humanitarian crises. Unlike the current system, in which the Organisation depends on the voluntary contributions of soldiers form member states for UN missions on an ad hoc basis, a standing army would ensure prompt and reliable reaction to humanitarian crises. The army would comprise soldiers from member countries that are willing to make contributions. The leadership of the army would be appointed by consensus in the General Assembly, or by a special committee created by the General Assembly, solely for this purpose, or by the Secretary-General. If the UN has its own army, it will ensure that:

i. Exceptions to the principle of non-intervention would be limited to situations where there is serious and irreparable harm perpetrated against vulnerable populations. Irreparable harm in this context involves the crimes of genocide, ethnic cleansing, war crimes and crimes against humanity. It is only when this threshold has been met, that there will be legal, moral, and ethical justification for military intervention. The certainty, which this threshold brings, implies that, when it has been met, a reformed Security Council will be compelled to act, by the deployment of the UN army, thereby eliminating unilateral intervention by powerful states with their own agendas. Since the army would be under the control of the Security Council, it would be possible to hold the military leadership accountable for any abuses in the implementation of the R2P intervention.
ii. Military intervention for human protection purposes would be carried out with the primary objective of averting or halting human suffering, and military intervention for humanitarian purposes would not be used as a pretext for the advancement of the ulterior motives of the interveners. Thus, military intervention for humanitarian purposes would not be carried out for regime change, or for the reinstatement of deposed regimes, or for the promotion of democracy, but would be solely for the intended purpose of alleviating human suffering.

iii. The amount of force used in an intervention would be that which would minimise death and destruction. Since the intervention would be carried out by a UN army, the military leadership would be expected to abide strictly by the operational guidelines laid down by the Security Council to use only the minimum force necessary to achieve the objectives of the intervention. If disproportionate and indiscriminate force is used, leading to the large scale killing of non-combatants, the military leaders would be held accountable to the UN, and thereby, serve as an incentive for restraint.

iv. The UN army would only use of force as a last resort in the protection of victims of gross human rights violations, and non-coercive measures would be exhausted before the resort to military action. The UN army would not be eager to use force in resolving humanitarian crises, unlike other potential interveners, and when it does, it would be in the form of peace enforcement. Peace enforcement, in this context, would involve the use of force, or the threat of the use of force to ensure that state authorities or the warring factions in an intrastate conflict comply with Security Council resolutions calculated to maintain or restore peace. This could be attained by the use of force, or the threat of the use of it, to separate the belligerents in an internal conflict, and by creating safe havens for civilians. The UN army would not intervene in the target state as an invading or conquering army, and; as an army representing the entire membership of the UN, it would have the cooperation of the state authorities of the affected state.
v. It is acknowledged that even the creation of a UN army would not eliminate the double standards and inconsistencies in the application of the military aspect of R2P, because force cannot be used against powerful countries. What is certain, though, is that the UN army would not be selective in intervening in humanitarian crises, because the primary motivation for an intervention would not be for the advancement of national, strategic or geopolitical interests, but to bring relief to suffering populations, wherever they may be.

4.5. Contribution

The contribution of the thesis can be found in the recommendations, calculated to address the double standards, selectivity, abuses, and the indiscriminate and disproportionate use of force, in the implementation of R2P by powerful countries, which the thesis argues, pose the greatest threat to the survival of the concept. As this thesis argues, the concept is abused by powerful countries that intervene in others, because the interventions are not necessarily motivated by humanitarian considerations, but rather by the advancement of national, strategic or geopolitical interests of the interveners. Compassion for humanity, which is the primary consideration for launching a military intervention for human protection purposes, is often subsumed under other considerations. Thus, the decision to intervene is influenced by parochial considerations, and to this end, interventions have been carried out with the primary goal of achieving regime change or promoting the interveners’ concept of democracy in the target country. Consequently, while interventions have taken place in some countries, other countries with similar circumstances of mass atrocities have been ignored, because the major world powers have no strategic interests in the affected countries. The decision to intervene in a particular country is also influenced by the relative balance of military power between the target state and the intervener, and therefore, the weaker the target country, the more eager the desire to intervene therein. Conversely, it is inconceivable that military intervention will be implemented against a militarily powerful country, even if all the conditions for intervention are met. The injustice inherent in the implementation of R2P is exacerbated by the fact that most interventions are carried out by powerful countries, to whom the implementation of the concept does not apply.

With regard to the indiscriminate and disproportionate use of force, the thesis argues that interventions, instead of providing protection, destroy the infrastructure and economy of the
target country, as the example of Libya has demonstrated. The disconcerting aspect of the implementation of R2P is that the powerful countries that carry out interventions are not held to account for any abuses. Thus, although they purport to be carrying out the responsibility to protect, the irony is that they are not responsible for any abuses in the course of their operations. The apprehension of militarily weak countries about R2P arises from the double standards, selectivity, abuses, and the indiscriminate and disproportionate use of force by powerful countries, in the implementation of the concept. The recommendations are aimed at addressing these concerns in order to ensure the survival of the concept.
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