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School for Advanced Legal Studies – Faculty of Law

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REDEFINING STATE SOVEREIGNTY:

**The Complexities of Humanitarian Intervention and the
Responsibility to Protect**

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DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

.....

Suzzie Onyeka Ofuani

University of Cape Town

DEDICATION

- To God Almighty for His infinite mercies, favour, grace and strength.
- And to my parents, Professor & Mrs O.A. Ofuani, for their unfailing love and consistent support.

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ABBREVIATIONS

AU:	African Union
CHARTER:	United Nations Charter
ECOMOG:	Economic Community of West African States Monitoring Group
ECOWAS:	Economic Community of West African States
HLP:	High Level Panel
ICISS:	International Commission on Intervention and State Sovereignty
NAM:	Non-Aligned Movement
NATO:	North Atlantic Treaty Organisation
OAU:	Organisation of African Unity
R2P:	Responsibility to protect
UN:	United Nations

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CHAPTER 1

INTRODUCTION

But surely no legal principle not even sovereignty can ever shield crimes against humanity...Armed intervention should always remain the option of last resort, but in the face of mass murder, it is an option that cannot be relinquished.¹

1.1 Background

At the time this statement was made by the former Secretary General of the United Nations, the international community was engulfed in a debate concerning humanitarian intervention and its effect on state sovereignty.² Recent interventions in states such as East Timor, Haiti and Kosovo had sparked off concern regarding the tension between sovereignty and the recognition of human rights norms which has for a long time 'raged' within academic institutions and the international community as a whole.³ In the rhetoric of international politics, attempts to establish the responsibility of states to respect human rights within their jurisdictions are often countered with claims of sovereign equality and the principle of non-intervention.⁴

The concept of sovereignty has provided the fundamental framework for order for over three centuries and has greatly influenced the development of international law.⁵ However, because of the tendency of most states to participate or acquiesce in human rights violations within their territories, there have been attempts by 'norm entrepreneurs' to change the balance from an emphasis on absolute sovereignty to limited sovereignty, which entails responsibility.⁶ The most notable of these attempts was made by the International Commission on State Sovereignty (hereinafter the

¹ *We the Peoples: The Role of the United Nations in the Twenty-First Century* Report of the Secretary General (March 2000) UN Doc A/54/2000 at para 219. Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf>. [Accessed 4 February 2009].

² Gareth Evans 'The Responsibility to Protect: Rethinking Humanitarian Intervention' 2004. Available at [http://www.crisisgroup.org/home/index.cfm?id=2561\\$1=1](http://www.crisisgroup.org/home/index.cfm?id=2561$1=1) [Accessed 22 January 2009].

³ Bruce Cronin 'The Tension between Sovereignty and Intervention in the prevention of Genocide' 2007 *Human Rights Review* 293 at 299.

⁴ Panu Minkkinen 'The Ethos of Sovereignty: A Critical Appraisal' 2007 *Human Rights Review* pg 33

⁵ Thomas W McShane 'International law and the New World Order: Redefining Sovereignty.' Available at <http://www.au.af.mil/au/awc/awcgate/army-usawc/strategy2004/04mcshane.pdf> [Accessed 3 August 20].

⁶ Cronin (note 3) at 297.

ICISS) which proposed the Responsibility to Protect (R2P) in its report produced in 2001.⁷

1.2 Objectives of the Thesis

This research examines whether there is sufficient state practice and *opinio juris* to support the position held by most advocates of human rights that as a result of the recognition of human rights norms and international humanitarian law, the right of humanitarian intervention and the responsibility to protect have developed as international law norms which override the claims and rights inherent in the traditional notions of state sovereignty particularly the principles of non-intervention and the prohibition of the use of force in the affairs of other states. That is whether state sovereignty has been redefined from sovereignty as control to become sovereignty as responsibility.⁸

1.3 Statement of the Thesis

The aim of the thesis is not to engage in an argument of whether or not sovereignty is absolute or limited as there is arguably sufficient evidence to show limitations placed on the sovereignty of states by factors such as globalisation, trade, integration and environmental issues.⁹ The thesis is limited to a consideration of the right of humanitarian intervention and the responsibility to protect as binding norms, which may have developed in international law to place limitations on sovereignty.

By an examination of the existing body of humanitarian interventions undertaken since the inception of the United Nations in 1945 particularly with respect to Security Council resolutions and with emphasis on the criticisms generated by the majority of states whenever interventions were embarked upon and justified on grounds of humanitarian intervention, I argue that there is insufficient state practice and *opinio juris* to justify a customary right of humanitarian intervention in

⁷ See generally *The Responsibility to Protect: Report and Supplementary Report of the International Commission on Intervention and State Sovereignty* (2001) International Development Research Centre, Canada.

⁸ *Ibid.*

⁹ Ivan Simonovic 'Relative Sovereignty of the Twenty First Century' (2001/2002) 25 *Hastings International and Comparative Law Review* 371 at 377.

international law.¹⁰ In addition, I argue that there is no binding norm of the responsibility to protect in international law and consequently, the principle of sovereignty as control prevails over sovereignty as responsibility.

1.4 Literature Review

There exists an enormous amount of literature on the concept of sovereignty with varying views regarding its origin and evolution, its scope and nature. While many recognise the existence of change in the meaning of sovereignty there has been great disagreement about how to interpret the significance of the change.¹¹ Out of the authors reviewed and listed in the bibliography, the report by International Commission on Intervention and State Sovereignty (ICISS) represents the best effort to assemble in a more convenient way the vast amount of literature on sovereignty as it attempts to fill up the gaps and bring it up to date.¹²

1.5 Methodology

The research is desk based and studies the primary and secondary sources relevant to the concept of sovereignty, humanitarian intervention and the responsibility to protect. The primary sources include the United Nations Charter, the Statute of the International Court of Justice, cases and Security Council Resolutions. The secondary sources include books, journal articles, official reports and documents of the United Nations and online articles.

1.6 Structure of the Thesis

Chapter 1: Introduction.

This chapter introduces the thesis as a whole and comprises amongst other things the objectives and statement of the thesis.

¹⁰ An in depth explanation for this conclusion would be examined in chapter 3 of this thesis.

¹¹ Thomas J Biersteker and Cynthia Weber 'The Social Construction of State Sovereignty' in Thomas J Biersteker and Cynthia Weber (eds) *State Sovereignty as a Social Construct* (1996) Biersteker pg 14.

¹² See generally the Report and Supplementary Report of the ICISS (note 7). Although the report and the supplementary volume is cited throughout the research, an in depth discussion of the ICISS and its report would be made in Chapter 4 regarding the responsibility to protect doctrine.

Chapter 2: The Concept of Sovereignty: A general overview.

This chapter examines the historical development of the concept of sovereignty with emphasis on the nature of sovereignty before and after World War II. These eras reflect the different attitudes regarding the nature of sovereignty. The pre-World War II era, which comprises the period from the inception of the concept in 1648 to the period after World War I, represents the traditional notions of sovereignty, which emphasises its absolute nature. The post- World War II era represents a period where there are conscious attempts to place limitations on sovereignty through the development of other norms. This chapter also discusses the principles of non-intervention and prohibition of the use of force, which enforce the concept of sovereignty.

Chapter 3: Humanitarian Intervention: The Evolution of a Norm?

This chapter examines the controversies regarding the right of humanitarian intervention. It gives a detailed overview of humanitarian interventions undertaken under the auspices of the United Nations and is divided into pre-1990 and post-1990 humanitarian interventions. These dates are watersheds in the sense that they reflect the attitude of states to sovereignty and human rights norms during and after the Cold War. The legal and moral justifications proffered for humanitarian interventions reflect the earlier attempts made after World War II to modify state sovereignty. Finally, it concludes that there is no customary right of humanitarian intervention.

Chapter 4: Sovereignty as the Responsibility to Protect.

This chapter examines the idea of the responsibility to protect doctrine as proposed by the ICISS. This chapter is restricted to an examination of the responsibility to react. This is important because the responsibility to react retains the substantive issues inherent in the humanitarian intervention debate. This chapter posits the argument that the R2P is not a binding international law norm and as such, sovereignty has not been redefined from control to responsibility.

Chapter 5: Summary and Conclusion.

CHAPTER 2

THE CONCEPT OF SOVEREIGNTY: A GENERAL OVERVIEW

It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs.

—Lassa Oppenheim.¹³

2.1 Introduction

The international society is based on a set of normative structures, which were derived from factual situations with sovereignty being the foremost among them.¹⁴ It is regarded as the ‘primary constitutive rule’ of international law, which regulates the relationship of states.¹⁵ It has for the last several hundred years been a defining principle of interstate relations and a foundation of world order.¹⁶ It is ascribed to a state in terms of territory and population over which institutional authorities exercise absolute control free from all external interference.¹⁷

The concept of sovereignty has many functions in interstate relationships and lays the foundation for other traditional concepts of international law such as territorial integrity, sovereign equality and sovereign immunity.¹⁸ It is deeply rooted in customary international law and is supported by other corollary principles and rules of public international law such as the prohibition of the use of force and non-intervention in domestic affairs.¹⁹ According to Hinsley, “sovereignty will not be found in societies in which there are no states.”²⁰ Consequently, it provides a basis in international law for claims of state actions and its breach is usually invoked as an institution that must be both protected and defended.²¹

¹³ Lassa Oppenheim *International Law A Treaties* Hersch Lauterpacht (ed) 8th ed (1955) pg 108.

¹⁴ Mohammed Ayoob ‘Humanitarian Intervention and State Sovereignty’ (2002) 6 *International Journal of Human Rights* 81 at 82.

¹⁵ Biersteker and Webber (note 11) at 1.

¹⁶ *The Responsibility to Protect: Research, Bibliography, Background Supplementary Volume to the Report of The International Commission on Intervention and State Sovereignty* (2001) pg 7.

¹⁷ J Samuel Barkin and Bruce Cronin ‘The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations’ (1994) 48 (1) *International Organisation* 107 at 111.

¹⁸ John H Jackson ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ 97 *AJIL* (2003) pg 782.

¹⁹ See Article 2 (4) and (7) Charter of the United Nations 1945.

²⁰ F H Hinsley ‘Sovereignty’ cited in Wayne Hudson ‘Fables of Sovereignty’ in Trudy Jacobsen et al *Re-envisioning Sovereignty: The End of Westphalia?* (2008) pg 6 at 24.

²¹ Biersteker and Weber (n 11) at 1.

Sovereignty is a concept that lacks a specific definition. However, it denotes the basic international legal status of a state that it is not subject within its territorial jurisdiction to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law.²² Traditionally, sovereignty means supreme authority, granting a state exclusive jurisdiction and control over all objects and subjects in its territory to the exclusion of all external influence.²³

Traditional notions of sovereignty (which reflect positivist ideas) imply absoluteness, permanence and indivisibility and in the context of international law it is understood to be an attribute of the state as a member of the international community.²⁴ Since the international community is full of overwhelming variations of power, sovereignty is for many (weak) states their only source of protection against powerful states.²⁵ Sovereignty is regarded as more than just a functional principle of international relations as some states perceive it as recognition of their equal worth and dignity.²⁶ For the neorealist, sovereignty is primarily concerned with its 'manifestations' as a practical institution for managing anarchy, which is defined as the absence of formal governmental authority in the international system.²⁷

2.2 Internal and External Sovereignty

The concept of sovereignty is generally defined with the idea of internal and external sovereignty in mind. Constructivists are of the view that sovereignty in both its internal and external faces is a social concept produced through the practices of states.²⁸ Internal sovereignty is predicated on the principle that each state is free to pursue its internal affairs free from outside interference. It essentially means that the

²² Helmut Steinberger 'Sovereignty' *Encyclopedia of Public International Law* (2000) vol.4 Max Planck Institute for Comparative Public Law and International Law pg 512.

²³ David Held 'The Changing Structure of International Law: Sovereignty Transformed?' pg 162. Available at <http://www.polity.co.uk/global/pdf/GTRReader2eHeld.pdf> [Accessed 22 February 2009].

²⁴ Yoram Dinstein 'Sovereignty, the Security Council and the Use of Force' in Michael Bothe et al (ed) *Redefining Sovereignty: The Use of Force after the Cold War* (2005) pg 111.

²⁵ ICISS Supplementary Report (note 16).

²⁶ Ibid.

²⁷ Biersteker and Weber (note 11) at 5.

²⁸ David A Lake 'The New Sovereignty in international Relations' (2003) 5 (3) *International Studies Review* 303 at 306.

government of any state has supremacy over the people, resources and all other authorities within its control and is usually described as empirical sovereignty.²⁹

On the other hand, external sovereignty envisages recognition by other states and implies a relationship of formal equality.³⁰ It implies that each state is independent with no authority above it. It is based on the notion that the territorial integrity of every state is inviolate and is described as juridical sovereignty.³¹ An illustration of the extent of external sovereignty is found in a statement by Judge Huber to the effect that sovereignty in relations between states signifies independence to a portion of the globe and the right to exercise therein, to the exclusion of any other state, the functions of a state.³²

These dimensions of internal and external sovereignty represent the traditional and absolutist nature of sovereignty retained in international practice during the late 1970s.³³ However, Sikkink has observed that ‘neither the doctrine nor practice of internal sovereignty has ever been absolute.’³⁴ She cites as examples the Treaty of Augsburg and the Peace of Westphalia, which limited the discretion of the monarch in controlling the practice and religion of its subjects and the campaign for the abolition of slavery in the 19th century, which made it clear that certain extreme practices would be the basis for international concern and action.³⁵ However, until the Second World War, in the widest range of issues, the treatment of its population remained within the discretion of a state and no important legal doctrine challenged the state’s supreme authority within its borders.³⁶

In the light of this, internal sovereignty as it is traditionally understood (absolute control) is being challenged by the growing human rights norms in the sense that it seeks to redefine what is essentially within the domestic jurisdiction of states. Thus, issues which were within the exclusive domestic jurisdiction of a state

²⁹ Samuel Makinda ‘Sovereignty and International Security: Challenges for the United Nations’ (1996) 2 *Global Governance* 149 at 150.

³⁰ Lake (note 28) at 305.

³¹ Makinda (note 29).

³² *Island of Palmas Case* (1928) 2 RIAA 829.

³³ Lake (note 28).

³⁴ Kathryn Sikkink ‘Human Rights, Principled Issue-Networks’ (1993) 47 (3) *International Organization* 411 at 413.

³⁵ *Ibid.*

³⁶ *Ibid.*

have now become an issue of international concern. These are examined more extensively in the following sections.

2.3 The Nature of Sovereignty

Sovereignty is a social/ legal construct and as such the roots of its legitimacy tends to differ according to time and place.³⁷ As a social construct, the understandings of sovereignty are usually transformed and this affects the way in which states give effect to the concept in their relationships with each other.³⁸ The understanding of sovereignty tends to be redefined during and following the conclusion of major wars or in the aftermath of widespread political upheavals.³⁹

Such understandings are a reflection of the norms and principles that underlay the legitimacy of a state following a particular era.⁴⁰ Thus sovereignty is not 'exogenous' to the system but produced through the practice of states and is thus influenced by other social norms (such as human rights, self-determination, and humanitarian intervention to mention a few).⁴¹ These developments in international norms suggest a shift in the focus of the nature of sovereignty from the absolute Westphalian precepts to limited sovereignty.⁴²

The generality of the concept of sovereignty together with the differences in its meaning and understanding over time makes sovereignty one of the most controversial concepts in international law. Sovereignty which was once relatively uncontested has become a major cause of disagreement within international law particularly with respect to the scope of its application.⁴³ The central argument is that the principle of sovereignty despite the significant ideological and institutional support it still enjoys has been in steady decline at least since the early part of the 20th century.⁴⁴ Former UN Secretary General Boutros-Ghali reflected this change in ideology in a statement to the effect that:

³⁷ Biersteker and Weber (note 11) at 1.

³⁸ Lake (note 28).

³⁹ Barkin and Bruce (note 17) at 114.

⁴⁰ Ibid.

⁴¹ Lake (note 28).

⁴² Makinda (note 29) at 151.

⁴³ Jens Bartelson 'The Concept of Sovereignty Revisited' (2006) 17(2) *EJIL* 463.

⁴⁴ Joseph Camilleri 'Sovereignty Discourse and Practise-Past and Future' in Trudy Jacobsen et al (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) pg 34.

The time of absolute and exclusive sovereignty 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 internal governance and the requirements of an ever more interdependent World.⁴⁵

In the light of recent developments in international law and practice the paramount question is does sovereignty remain absolute in the traditional Westphalian sense or has it been limited by the recognition of other normative concepts such as human rights, humanitarian intervention and the doctrine of the responsibility to protect? Answering these questions requires an overview of how the notion of state sovereignty has developed and transformed over time.⁴⁶

2.4 Historical Development

The concept of sovereignty is not a modern one and the doctrine was not produced by the modern state, as there were no states in this sense until the 19th century.⁴⁷ Throughout the course of history, the meaning of sovereignty has undergone important change and transformation from the location of the source of its legitimacy (in God, in the Monarch or in the people) to the scope of activities claimed under its protection.⁴⁸ This history can be told as one of two broad movements- the first, a century's long evolution towards a Europe continent, then a globe of sovereign states and the second a circumscription of absolute sovereign prerogative in the second half of the 20th Century.⁴⁹

2.4.1. Sovereignty pre-World War II

The concept of sovereignty dates back to the time when there were relations among disparate territorial entities such as those making up the Holy Roman Empire.⁵⁰ It also shows an emergence of increasingly autonomous cities in Northern Italy and in Flanders, which gave rise to an understanding among numerically small urban elites that certain places could be immune from the authority structures that dominated

⁴⁵ Boutros-Ghali *An Agenda for Peace* (1995) cited in Camilleri (ibid) at 44.

⁴⁶ Minkinen (note 4) at 36.

⁴⁷ Hudson (note 20).

⁴⁸ Biersteker and Weber (note 11).

⁴⁹ Sovereignty' *Stanford Encyclopaedia of Philosophy* pg 4. Available at <http://plato.stanford.edu/entries/sovereignty> [Accessed 3 March 2009].

⁵⁰ ICISS Supplementary Report (note 16) at 6.

elsewhere.⁵¹ Since the late middle ages, the term sovereignty became a political slogan used by territorial princes in their quest to emancipate themselves from or resist the claims to universal temporal jurisdiction made by the pope or emperor.⁵² It replaced the medieval mixture of overlapping personal jurisdiction with an exclusive territorial jurisdiction and eliminated rivalling powers of nobility and estates.⁵³ It established a relationship of immediate obedience between the ruler and individual subjects.⁵⁴

However, the present foundations of international law regarding sovereignty date back to the 1648 Peace of Westphalia, which established what was considered a new legal order for European States.⁵⁵ The Westphalian international legal regime is best remembered for codifying state sovereignty and making the territorial state the foundation of the modern international system.⁵⁶ The emergence of a society of states first in Europe and later across the globe went hand in hand with a new conception of international law which can be referred to as the classic regime of sovereignty (from 1648 to the early 20th century).⁵⁷

Under the Westphalian system, sovereignty was perceived to reside with political leaders and government and not with the civil society.⁵⁸ This represents the traditional notions of sovereignty whereby the state is supreme and not subject to any force or authority from within or outside its borders. This notion has occasionally served as a defence and excuse for the imposition of dictatorial rule particularly in developing countries as a means of avoiding international scrutiny of their domestic human rights situations.⁵⁹

The history and state practice of the concept of sovereignty was also evidenced and influenced by the works of scholars writing at the time. These scholars contributed to the literature concerning the scope and extent of sovereignty and the holders of sovereignty. These have influenced the differing views of sovereignty existing in today's world. For example, when Jean Bodin and Thomas Hobbes first

⁵¹Steinberger (note 22) at 503.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Makinda (note 29).

⁵⁶ Ibid.

⁵⁷ Held (note 23).

⁵⁸ Makinda (note 29).

⁵⁹ Ibid at 151.

elaborated the notion of sovereignty in the 16th and 17th centuries, they were concerned with establishing the legitimacy of a single hierarchy of domestic authority.⁶⁰

These writers popularised the idea of sovereignty that originated from the Peace Treaties of Westphalia. They envisioned sovereignty as absolute, extending to all matters within the territory unconditionally.⁶¹ To Bodin the only limit to the sovereign's absolute power was that the leader was subject to God and natural law.⁶² The term *absolute* meant the totality of legislative power and the lack of a higher earthly authority and this had a considerable impact on the rise of the state system in early modern Europe.⁶³ For Hobbes, the concept of sovereignty envisaged a situation wherein 'the people established sovereign authority through a covenant in which they transferred all of their rights to the "*Leviathan*", who represented the abstract notion of the state.⁶⁴ The will of the Leviathan reigned supreme and represented the will of those who had alienated their rights to it.⁶⁵

The writings of Machiavelli also influenced the development of the concept of sovereignty. In his renaissance discourse, the government, territory and population remained the property of the prince.⁶⁶ The prince was not bound by natural law, canon law or any other norm or authorities that obligated members of Christendom.⁶⁷ He was supreme within the state's territory and responsible for the well-being of this singular, unitary body.⁶⁸ To these writers, the form of sovereign that exercised sovereign powers could legitimately vary between monarchy and aristocracy but what was important was that sovereignty was absolute and never resided in the people.⁶⁹

However, these absolutist notions of sovereignty were criticised and modified later by writers in the 18th century. These writers include John Locke and Rousseau. John Locke redefined sovereignty as popular sovereignty and was in line with the

⁶⁰ Stephen D Krasner 'Sovereignty' 2001 pg 21. Available at www.foreignpolicy.com [Accessed 22 February 2009].

⁶¹ Jean Bodin *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* Julian H Franklyn (ed) (1992) pg 1 Cambridge University Press, Cambridge.

⁶² *Ibid* at 4.

⁶³ Ruth Lapidot 'Sovereignty in Transition' 2001 *Journal of International Affairs* 325 at 326.

⁶⁴ Thomas Hobbes *Leviathan* (Ed) Richard Tuck (1991) pg 121 Cambridge University Press, Cambridge.

⁶⁵ *Ibid* at 130.

⁶⁶ Niccolo Machiavelli *The Prince and Discourses* (1950) cited in Hudson (note 20) at 26.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ Stanford Encyclopaedia (note 49) at 8.

principles of liberal democracy and respect for human rights.⁷⁰ This concept of popular sovereignty was reasserted in the work of Rousseau, who based sovereignty of the people on natural rights.⁷¹ According to him, the exercise of sovereignty must be linked to the will of the people, which means that political leaders must seek legitimacy through democratic processes.⁷²

The proponents of popular sovereignty envisage that sovereignty ultimately originates from the people and it is a power to be exercised by, for and on behalf of the people of a state.⁷³ This then means that sovereignty would be respected only if the people of a state have the opportunities to exercise their political, economic and cultural rights.⁷⁴

This idea of popular sovereignty has laid the foundation for other norms such as self-determination, democracy, humanitarian intervention and the responsibility to protect thus reflecting the growing limitations of the traditional conceptions of absolute sovereignty. According to Makinda, if sovereignty were universally reinterpreted as popular sovereignty, the international community would then have a reason to intervene in states where human rights were violated by a military regime or an unelected government.⁷⁵

However, for many years following the treaty of Westphalia, the traditional notions of sovereignty remained absolute in international practice. States resisted any attempts to limit or even question the absolutism of their sovereign power.⁷⁶ This was evident in the 1919 Treaty of Versailles, which established a commission to investigate and identify persons, including the Kaiser of Germany Wilhelm II, as liable for war crimes, recommending the creation of an international Tribunal.⁷⁷ The victorious states opposed such an option regarding the trial of a Head of State as unprecedented in international and national law and contrary to the basic concept of

⁷⁰ Makinda (note 29) at 151

⁷¹ Hudson (note 20) at 29.

⁷² Jean –Jacques Rousseau *The Social Contract* in Nigel Warburton *Philosophy: The Classics* (1998) pg 100 Routledge, London. See also Hudson (note 20) at 29.

⁷³ *Our Global Neighbourhood*, The Report of the Commission on Global Governance cited in Makinda (note 29) at 151.

⁷⁴ Makinda (note 29) at 151.

⁷⁵ *Ibid* at 175.

⁷⁶ Vesselin Popovski 'Essay: Sovereignty as Duty to Protect Human Rights.' Available at <http://www.un.org/pubs/chronicle/2004/issue4/0404p16.html> [Accessed 31 March 2009].

⁷⁷ *Ibid*.

national sovereignty.⁷⁸ This was the first notable attempt to crack the Westphalian notion of sovereignty.⁷⁹

2.4.2. *Sovereignty post-World War II*

This era shows a growing number of factors ranging from globalization to environmental factors which place certain limitations on the concept of State sovereignty.⁸⁰ These factors and the growth of non-governmental organisations to help govern interstate relations and policies ranging from trade and security have undermined the scope of sovereignty.⁸¹ In addition, as states came to subscribe to and participate in external relations in the form of treaties, these imposed certain limitations on their will to be independent.⁸² This era also gave birth to the growth of certain principles such as genocide, international criminal law and self-determination, which influenced the way in which sovereignty, came to be constructed by states.

2.4.2.1. *Sovereignty and Human Rights Norms*

The experience of the Second World War and above all the holocaust is considered the beginning of a new era concerning the perception of absolute sovereignty which had dominated political theory and practice since the peace of Westphalia in 1648.⁸³ The horrors of the Nazi genocide and the lessons from the Nuremberg and Tokyo trials led states to create a series of agreements to protect the human rights of their citizens.⁸⁴ These trials to a large extent succeeded in merging international law with certain basic moral principles and gave a clear notice to the nations of the world that henceforth, 'claims of absolute sovereignty must yield to the international community's claim on peace and justice.'⁸⁵

The end of the World War also gave birth to the United Nations (hereinafter the UN) and the United Nations' Charter (hereinafter referred to as Charter) became

⁷⁸ Ibid.

⁷⁹ Jackson N Maogoto 'Westphalian Sovereignty in the Shadow of international Justice? A Fresh Coat of paint for a tainted Concept' in Trudy Jacobsen et al (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) pg 213.

⁸⁰ Eric Brahm 'Sovereignty' 2004. Available at <http://www.beyondintractability.org/essay/sovereignty> [Accessed 3 March 2009].

⁸¹ Ibid.

⁸² Cronin (note 3) at 294.

⁸³ James Traub 'Absolute Fiction: The Perversion of Sovereignty' 2009 *World Affairs* 73 at 74.

⁸⁴ Brahm (note 80).

⁸⁵ Maogoto (note 79) at 215.

the governing legal and institutional framework for States under international law.⁸⁶ The Charter on one hand incorporated the concept of human rights in its preamble and on the other hand incorporated the traditional concept of sovereignty.⁸⁷ The inclusion of human rights in the Charter inspired the adoption of numerous human rights treaties which created binding obligations on State parties to respect the human rights of citizens within their territory.⁸⁸

The recognition and development of human rights norms in particular placed certain limitations on what used to be within the exclusive domestic jurisdiction of a state.⁸⁹ As parts of its obligations, a state was required to provide security for its populations and ensure that situations within its borders do not threaten international peace and security.⁹⁰ Consequently, the line between domestic policies and international concerns became vague and the autonomy of a state in law making was subjected to limitations by international law in respect of certain international interests.⁹¹

The most notable human rights treaty in this regard is the 1948 United Nations Convention on the Prevention and Punishment of Genocide which created a legal framework for states to override the rights of sovereignty whenever genocide was committed.⁹² By Article 1 of the Convention, state parties recognised that genocide is 'a crime under international law which they undertake to prevent and punish'. Thus, they are not merely entitled to prevent genocide but also obliged to do so.⁹³ (This acts as the basis for the R2P doctrine, which redefines sovereignty from absolute control to responsibility).⁹⁴

However, in practice, the ability of the international community to oppose genocide is hampered by the principle of sovereignty and non-intervention, as governments of weaker states are very hesitant to allow great powers the authority to intervene in another state's internal affairs.⁹⁵ This has however to a large extent been

⁸⁶ Barkin and Cronin (note 17) at 123.

⁸⁷ Maogoto (note 79) at 218.

⁸⁸ ICISS Supplementary Report (note 16) pg 8.

⁸⁹ Cronin (note 3) at 294.

⁹⁰ Ibid.

⁹¹ Maogoto (note 79) at 218.

⁹² Cronin (note 3) at 295.

⁹³ Ibid.

⁹⁴ See generally Article 8 Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277.

⁹⁵ Cronin (note 3) at 293.

addressed by the Security Council which has on occasions created international criminal tribunals (ICTY, ICTR and Special Court for Sierra Leone) to prosecute those accused of perpetrating acts of genocide and other crimes against humanity.⁹⁶ These tribunals represent the most direct challenge of state sovereignty by rejecting the claims of states when relying on the defences of sovereign immunity and the act of state doctrine.⁹⁷

2.4.2.2 *Sovereignty and Self-Determination*

The concept of self-determination, which became recognised after World War II as a right of peoples in international law, is another normative factor that has contributed to challenging the once absolute notion of sovereignty particularly with respect to territorial integrity.⁹⁸ Self-determination, which has its roots in popular sovereignty, stresses the link between sovereign authority and a defined population.⁹⁹ The right of peoples to self-determination is recognised in the Charter, by Article 1 (3) and subsequently supported by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 1966.

The right to self-determination has both an internal and external aspect. The external aspect gives a right to peoples to establish a state or to choose the state to which they wish to belong and internally the free choice of government namely democracy.¹⁰⁰ The right to self-determination as a principle of international law relating to sovereignty although not consistently practiced and respected in individual cases was supported by the policies of decolonisation.¹⁰¹ During the colonial times, self-determination affected traditional notions of sovereignty in the sense that peoples were entitled to secede from colonial territories even without the consent of the original state.¹⁰² This led to the creation of a number of sovereign states in Africa and Asia.¹⁰³

On the other hand, in postcolonial times, the right to self-determination did not authorise the dismemberment of the territorial integrity of an existing state, if that

⁹⁶ Ibid at 298.

⁹⁷ Ibid at 299.

⁹⁸ Held (note 23) at 162.

⁹⁹ Barkin and Cronin (note 17) at 112.

¹⁰⁰ Lapidoth (note 63) at 336.

¹⁰¹ Steinberger (note 22) at 516.

¹⁰² ICISS Supplementary Report (note 16) at 8.

¹⁰³ Ibid.

state possessed a government representing the whole people without discrimination and respected the fundamental human rights of its people.¹⁰⁴ However, the exercise of the right to self-determination during this period witnessed the break down of sovereign states such as the Soviet Union, Yugoslavia and Ethiopia.¹⁰⁵

For many years, the provisions of self-determination as enshrined in the Charter was interpreted as asserting the right of existing states to determine their internal affairs free from outside intervention.¹⁰⁶ However, given the changing understanding of sovereignty, it could now be interpreted to assert the right of a people to have control over its own future thus enhancing the idea of popular sovereignty.¹⁰⁷

It was therefore the role of the state to act in the interest of itself and its population, rather than to act towards some long-term internationalist ideal in a manner that might rebound to the detriment of the immediate national interest.¹⁰⁸ Thus, as a result, where the state as represented by the government suppressed the peoples, they could arguably seek outside assistance in order to achieve self-determination. This is implied in the General Assembly Resolution on Aggression.¹⁰⁹ However, this view is unsettled since states refrain from doing so because it is contrary to the provisions of article 2(4) and 2 (7) of the Charter.

As mentioned earlier, the Charter by Article 2(1) inherited and reflected the traditional conceptions of sovereign equality. This was because at the time the Charter entered into force, international law centred primarily on State sovereignty and the independence of states especially with respect to matters of domestic concern was of most significance.¹¹⁰ This era marked a decolonisation era and the newly independent states sought to guard their sovereignty and equality jealously.¹¹¹ For

¹⁰⁴ Steinberger (note 22) at 516.

¹⁰⁵ ICISS Supplementary Report (note 16) at 9.

¹⁰⁶ Makinda (note 29) at 160.

¹⁰⁷ Ibid.

¹⁰⁸ Barkin and Cronin (note 17) at 123.

¹⁰⁹ See Article 7 of the Resolution on the Definition of Aggression (1974) G.A Resolution 3314 (XXIX) 14 December 1974.

¹¹⁰ Jonathan I Charney 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 32 *Vanderbilt Journal of Transnational Law* 1231 at 1240.

¹¹¹ ICISS Supplementary Report (note 16) at 6.

these states, the institution of sovereignty provided the basis for a political and legal restraint on the imposition of values and policies by more powerful states.¹¹²

In lieu of this, in as much as states freely participated in human rights treaties, their constitutional authority largely remained intact as they would not allow any of these treaties to infringe upon their sovereignty.¹¹³ In addition, the principle of state sovereignty was buttressed in the Charter by Article 2(4) and (7) concerning the prohibition on the use of force and non-intervention in the domestic affairs of states respectively.

2.5 The Principle of Non-Intervention¹¹⁴

Before 1648, the principle of non-intervention, which has become a central element of modern sovereignty, had not been given recognition as a principle of international law.¹¹⁵ Interventions for the protection of religious were considered justified in the medieval age but from the time of the Peace of Westphalia, the admissibility of religious interventions were terminated.¹¹⁶ The principle of non-intervention implies that states are precluded from interfering in the domestic affairs of other sovereign states and this is an established principle of customary international law.¹¹⁷ It has been suggested that ‘states jealously treasure the principle of non-intervention, and it is the chief envy of aspiring states because it is the legal insurance of their sovereign existence.’¹¹⁸

The principle of non-intervention is reflected in the Charter by Article 2(7) and provides *inter alia* that ‘nothing contained in the present Charter shall authorise the United Nations to intervene in the matters which are essentially within the domestic jurisdiction of any state....’ It is suggested that while this injunction against intervention is directed at the UN, it must logically also pertain to states comprising

¹¹² Cronin (note 3) at 294.

¹¹³ Stanford Encyclopaedia pg 9

¹¹⁴ ICISS Supplementary Report (note 16) at 15. Intervention can be defined as the ‘various forms of non-consensual action that are often thought to directly challenge the principle of state sovereignty.

¹¹⁵ Steinberger (note 22) at 504.

¹¹⁶ *Ibid* at 505.

¹¹⁷ ICISS Supplementary Report (note 16) at 15.

¹¹⁸ Dino Kritsiotis ‘Reappraising Policy Objections to Humanitarian Intervention’ (1997-1998) 19 *Michigan Journal of International Law* 1005 at 1009.

it.¹¹⁹ The principle of non-intervention is also reflected in numerous General Assembly declarations. For instance, the General Assembly in Resolution 2131(XX) 1965 declared that ‘no state has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any state....’¹²⁰

In the *Nicaragua case*,¹²¹ the International Court of Justice stated that:

The principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference ...the court considers that it is part and parcel of customary international law and has moreover been presented as a corollary of the principle of sovereign equality of states.¹²²

The court went on to state that acts which constituted a breach of the principle of non-intervention would also, if they directly or indirectly involved the use of force, constitute a breach of the prohibition of the use of force in international law.¹²³

Therefore, the aspect of the principle of non-intervention that prohibits acts of forcible interventions overlaps with Article 2(4) of the Charter, prohibiting the threat or use of force in international affairs.¹²⁴

During the past years however, the concept of intervention has been given qualitative and new meanings.¹²⁵ Interventions have increasingly been defined in terms of the purposes or goals that are radically different from the traditional objectives that intervention was expected to achieve.¹²⁶ It became projected as being undertaken by, or on behalf of the international community undertaken to achieve humanitarian objectives ‘which are intrinsically far too valuable to be held hostage to the traditional notions of sovereignty’.¹²⁷

¹¹⁹ Kelly K Pease and David P Forsythe ‘Human Rights, Humanitarian Intervention and World Politics’ (1993) 15 *Human Rights Quarterly* 290 at 292.

¹²⁰ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (1965) G.A Resolution 2131 (XX) 21 December 1965.

¹²¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Reports 14.

¹²² *Ibid* pg 96 at para 202.

¹²³ *Ibid* pg 99 at para 209.

¹²⁴ Pease and Forsythe (note 119) at 297.

¹²⁵ Ayoob (note 14) at 83.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* at 84.

2.6. The Prohibition of the Use of Force by States

The threat or use of force against the territorial integrity or political independence of a state is prohibited by Article 2 (4) of the UN Charter as well as a corresponding general rule of customary international law.¹²⁸ The law prohibiting the use of force by states in their international affairs is one of the fundamental obligations of states in international law, a breach of which would incur state responsibility.¹²⁹ Since the end of World War 2, international law has prohibited states from threatening or using force except in self-defence or pursuant to Security Council authorisation thereby reducing the use of force to the barest minimum.¹³⁰ Article 2(4) of the Charter stipulates 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 provision of Article 2(4) is widely regarded as one of the central building blocks of the UN and it stipulates a general prohibition of the unilateral use of force.¹³¹ The prohibition of the use of force by states in their relationship with each other complements the obligations of states under Articles 2(3) and 33 of the Charter instructing states to settle their disputes by peaceful means.¹³² The provision of Article 2(4) of the Charter is recognised as customary international law and has obtained the status of *jus cogens*, which applies to all states.¹³³

In order to give credence to the prohibition on the use of force, many General Assembly Resolutions over time reaffirm this prohibition. These include the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States 1965, Declaration on Principles of International Law 1970 and the Definition of Aggression 1974. Article 2(4) prevents acts of aggression, defined as ‘the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter.’¹³⁴

¹²⁸ Steinberger (note 22) at 513-14.

¹²⁹ Martin Dixon *Textbook on International Law* 6ed (2007) pg 310.

¹³⁰ Ryan Goodman ‘Humanitarian Intervention and Pretext for War’ (2006) 100 *AJIL* 107 at 111.

¹³¹ ICISS Supplementary Report (note 16) at 156.

¹³² *Ibid* at 157.

¹³³ Steinberger (note 22) at 514.

¹³⁴ Article 1 Resolution on the Definition of Aggression (note 109).

Notwithstanding the express prohibition on the use of force however, the Charter permits states to use force in self-defence and in enforcement measures authorised by the Security Council in the maintenance of international peace and security.

2.7 Conclusion

Although the era following World War II marked the rise of international human rights' treaties which purportedly limited the absolute nature of sovereignty, 'the idea of limited or conditional sovereignty was just that-an idea.'¹³⁵ In practice, the UN was governed by Article 2(7) of the Charter which protected the state in its existing border.¹³⁶ Anything contained within a state's border including the most heinous violations of human rights was understood to fall into the realm of domestic jurisdiction.¹³⁷ This allowed for gross abuses by governments of their populations, including in extreme instances a state committing ethnic genocide without a substantive response from the international community.¹³⁸

However, with the end of the Cold War, the Security Council began to interpret the Charter more frequently to favour human rights over the protection of state sovereignty. The recognition of human rights in this era redefined the traditional conceptions of sovereignty in the sense that it gradually inspired and shaped the decisions of the Security Council in its definitions of threat to the peace and adoption of enforcement measures.¹³⁹ The Security Council qualified situations involving systemic human rights violations as threats to the peace, thus opening legal prospects for interventions (although subject to controversies).¹⁴⁰

Thus, the norm of non-intervention in the sovereign affairs of states became undermined by agents outside the state with a potential stake in the outcome of internal affairs.¹⁴¹ For example, in 1990, the Western countries acting under a Security Council Resolution intervened in Northern Iraq to protect the Kurds from

¹³⁵ Traub (note 83).

¹³⁶ Barkin and Cronin (note 17) at 126.

¹³⁷ Traub (note 83).

¹³⁸ Barkin and Cronin (note 17) at 126.

¹³⁹ Popovski (note 76).

¹⁴⁰ Ibid.

¹⁴¹ Biersteker and Weber (note 11) at 10.

dictatorial rule.¹⁴² These resolutions by the Security Council were the beginning of humanitarian interventions under the auspices of the United Nations. The rationale behind these interventions was to favour a redefinition of sovereignty from absolute to limited and as such, a state could not claim absolute sovereignty without demonstrating a duty to protect people's rights as it is from their right that it derives its own.¹⁴³

In each case, the rights of citizens were understood to take precedence over the rights of states.¹⁴⁴ This gradually weakened the legitimacy of sovereignty understood as the inviolability of states.¹⁴⁵ Thus, they are constantly relied on as proof of the limited nature of sovereignty. Has sovereignty in the 21st century been defined to allow for a legally binding right of humanitarian intervention or has sovereignty been redefined as the responsibility to protect? Are these norms binding on states to the extent of overriding the Westphalian absolutist nature of sovereignty? These are examined in the following chapters.

¹⁴² Makinda (note 29) at 157.

¹⁴³ Popovski (note 76).

¹⁴⁴ Traub (note 83) at 76.

¹⁴⁵ Barkin and Cronin (note 17) at 126.

CHAPTER 3

HUMANITARIAN INTERVENTION: THE EVOLUTION OF A NORM?

3.1 Introduction

A quality inherent in sovereignty which has constantly undergone severe challenge is the prohibition against intervention in the matters coming within the internal affairs of a state of which it has absolute autonomy. This is mainly attributed to humanitarian interventions undertaken by states and are often cited as evidence of the qualified nature of a state's sovereignty. This has however been prone to serious controversy as, on one hand, there are those (positivists) who claim an international order of states governed by the principles of sovereignty and non-interference and on the other hand, there are those who contend that human dignity is more fundamental than adherence to the norm of sovereignty and non-intervention.¹⁴⁶

The proponents of humanitarian intervention contend that with the development of international protection of human rights and humanitarian law the core of state sovereignty with respect to the exclusive right of a state to govern its own citizens according to its discretion has been undermined.¹⁴⁷ To them, they constitute issues of international security therefore coming within the realm of international law.¹⁴⁸ Therefore, once international law regulates an issue, it ceases to be a matter of exclusive domestic jurisdiction for the states bound by the rule.¹⁴⁹ Those opposing humanitarian intervention however, classify issues of human rights violations as one of domestic jurisdiction coming within the purview of Article 2 (7) of the Charter.¹⁵⁰

In the last few decades, widespread and gross human rights violations such as genocide, war crimes and crimes against humanity have arguably come to be understood as falling outside the purview of a state's sovereign authority.¹⁵¹

¹⁴⁶ Robyn Lui 'State Sovereignty and International Refugee Protection' in Trudy Jacobsen et al (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) 151 at 166.

¹⁴⁷ Lapidoth (note 63) at 335.

¹⁴⁸ Patrick Macklem 'Humanitarian Intervention and the Distribution of Sovereignty in International Law' (2008) *Ethics and International Affairs* 369 at 371.

¹⁴⁹ Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2005) pg 176.

¹⁵⁰ Macklem (note 148).

¹⁵¹ This can be inferred from the provisions of paragraphs 138 and 139 of the *World Summit Outcome Document* (2005). Available at

Humanitarian intervention advocates therefore argue that when a state is in gross violations of such human rights, other states (may) have the liberty to interfere without the consent of the state in breach to address such violations.¹⁵² This however poses a hard test for an international society built on the principles of sovereignty (sovereign equality), non-intervention and the prohibition of the use of force which ensures international stability and order.¹⁵³

The humanitarian interventions undertaken by states since the inception of the United Nations can be classified into pre-1990 and post 1990 interventions.¹⁵⁴ These dates are important because they reflect the attitude of the Security Council during and after the Cold War, and how this has influenced the way sovereignty came to be constructed.¹⁵⁵ From 1945 to the end of the Cold War, the attitude of the Security Council (and the United Nations as a whole) was to regard human rights as being subordinate to state sovereignty within the framework of the Charter.¹⁵⁶ However, with the end of the Cold War, proponents of a qualified sovereignty suggest a change in the attitude of the Security Council, by contending that human rights seem to have attained the same or more significance than the claim of states.¹⁵⁷

This change in attitude is attributed to the tendency and readiness of the Security Council to consider serious violations of human rights in the wake of internal armed conflicts, at least those that produce cross border effects as situations falling under Article 39 of the Charter.¹⁵⁸ Consequently, the Security Council on occasions has passed resolutions recognising such domestic conflicts as threats to international peace and security and authorised states to use force to address the situations.¹⁵⁹ Since these military deployments were unlike the traditional peacekeeping missions that required the consent of the state, they are regarded by

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> [Accessed 31 January 2009]. See also Macklem (note 148) at 372.

¹⁵² Teson (note 149).

¹⁵³ Alex J Bellamy and Nicholas J Wheeler 'Humanitarian Intervention in World Politics' 2008. Available at <http://cadair.aber.ac.uk/dspace/bitstream/2160/1925/1/Wheeler%20Bellamy.pdf> [Accessed 14 July 2009].

¹⁵⁴ ICISS Supplementary Report (note 16) at 18.

¹⁵⁵ Ibid. This classification is also important in characterising humanitarian interventions into unauthorised and authorised interventions.

¹⁵⁶ Michael Ignatieff 'Intervention and State Failure.' Available at <http://dissentmagazine.org/article/?article=641> [Accessed 26 June 2009].

¹⁵⁷ ICISS Supplementary Report (note 16) pg 48.

¹⁵⁸ Ulrich Beyerlin 'Humanitarian Intervention' in *Encyclopedia of Public International Law* (1995) vol 2 Max Planck Institute for Comparative Public Law and International Law 928 at 932.

¹⁵⁹ Makinda (note 29) at 149.

some as setting precedents for humanitarian intervention with the aim of redefining state sovereignty.¹⁶⁰ However, this contention does not appear to be true because an analysis of the facts indicate that these resolutions authorising the use of force were not intended to create a new principle of humanitarian intervention but more likely an extension of the ‘classical collective security’ envisaged by Article 42 of the Charter.¹⁶¹

This chapter seeks to examine the concept of humanitarian intervention. It examines the interventions authorised by the Security Council and their implications on state sovereignty. It examines also state practice to determine if a right of humanitarian intervention (authorised or unauthorised) exists in customary international law to override claims of sovereignty.

3.2. Definition and Origin of Humanitarian Intervention

Although there are varying definitions of humanitarian intervention, it has been defined as:

The justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive to exceed the limits within which the sovereign is presumed to act with reason and justice.¹⁶²

It has also been defined by Holzgrefe to mean:

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 the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.¹⁶³

It has been suggested that a more widely accepted definition of humanitarian intervention is to regard “interventions authorised by the Security Council for humanitarian purposes as *casus foederis* which, as such, properly fall as precedents under Chapter VII of the United Nations Charter because this is where their legal

¹⁶⁰ Ibid.

¹⁶¹ M J Smith ‘Humanitarian Intervention: An Overview of Ethical Issues’ (2006) *Ethics and International Affairs* 63 at 67.

¹⁶² David Vessel ‘The lonely Pragmatist: Humanitarian intervention in an Imperfect World’ (2003/2004) 18 *B.Y.U Journal of Public Law* 1 at 3.

¹⁶³ J L Holzgrefe, ‘The Humanitarian Intervention Debate’ in J L Holzgrefe and Robert O Keohane, (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) 15 at 18.

basis is located.”¹⁶⁴ Although the practice is to regard humanitarian intervention as involving the use of force, it may also include any ‘non-forcible initiative’ of a state which has the aim of altering the situations where another state is suspected of perpetrating substantial abuse of human rights.¹⁶⁵

The concept of humanitarian intervention can be traced to Hugo Grotius, a 17th century scholar who postulated that when a sovereign commits atrocities against its own subjects, this could be sufficient justification for outsiders to take up arms against that sovereign in the defence of all of ‘humankind’.¹⁶⁶ Such intervention is invoked against a state’s abuse of its sovereignty by the brutal and cruel treatment of those within its power and that state was to be regarded as having made itself susceptible to action by any state or group of states prepared to intervene.¹⁶⁷

While not generally accepted as a right during Grotius’ time, humanitarian intervention was reflected in state practice during the 19th and early 20th century.¹⁶⁸ The most notable interventions during this period were the intervention in Greece by England, France and Russia in 1827 to stop Turkish massacre and suppressions of populations associated with insurgents and the 1860- 1861 intervention by France in Syria to protect the Christians living there.¹⁶⁹ In fact, there were at least five other prominent interventions undertaken by the European powers against the Ottoman Empire from 1827 to 1908.¹⁷⁰ It appears that among the 19th century writers, majority accepted the idea that, lawful humanitarian intervention existed in customary international law although there were considerable doctrinal misunderstandings with respect to the legal foundation and the extent of that right.¹⁷¹

However, with the introduction of the United Nations system, the principle of state sovereignty and non-intervention had extreme priority. Sovereignty was considered important in preventing inter-state wars and maintaining the international legal order that had once been destroyed by the two World Wars.¹⁷² The Charter also made some decisive changes in the development of the norm of humanitarian

¹⁶⁴ J P Humphrey cited in Kritsiotis (note 118) at 1005.

¹⁶⁵ Beyerlin (note 158) at 926.

¹⁶⁶ Hedley Bull et al (eds) *Hugo Grotius and International Relations* (1995) pg 247.

¹⁶⁷ ICISS Supplementary Report (note 16) at 17.

¹⁶⁸ Vessel (note 162) at 9.

¹⁶⁹ Beyerlin (note 158) at 927.

¹⁷⁰ ICISS Supplementary Report (note 16) at 17.

¹⁷¹ Beyerlin (note 158) at 927.

¹⁷² Vessel (note 162) at 9.

intervention, as there was no express mention of the right of humanitarian intervention as an exception to the prohibition of the use of force enshrined in Article 2(4).¹⁷³

3.3 Legal and Moral Justification of Humanitarian Intervention

The question which usually arises in the controversy surrounding the right of humanitarian intervention is the source of its authority.¹⁷⁴ It also concerns the normative status of humanitarian intervention as an instrument of international justice, which may under certain circumstances, override claims of sovereignty.¹⁷⁵ Usually any attempt to answer this question raises a number of fundamental questions about international law and morality, and about the legal and moral standing of states in international law.¹⁷⁶ This has led Tom Farer to conclude that in answering the intervention debate, states will have to choose between compliance with formal prohibitions against intervention and the need to respond to pressing moral appeals.¹⁷⁷

In defending the legality of humanitarian intervention, the first port of call for its proponents is to rely on the provisions of the United Nations Charter.¹⁷⁸ In particular, emphasis is placed on the provisions of Articles 1(3), 55 and 56 of the Charter, which commits states to protect fundamental human rights.¹⁷⁹ It is their assertion that the development of international human rights norms and international humanitarian law has modified the traditional concept of sovereignty.¹⁸⁰ This prioritisation of human rights norms by international law is said to be evidenced by the unique status of certain norms as *jus cogens*; such as genocide, crimes against humanity and war crimes.¹⁸¹

¹⁷³ Beyerlin (note 158) at 927.

¹⁷⁴ Smith (note 161) at 66.

¹⁷⁵ Mackem (note 148) at 369.

¹⁷⁶ Teson (note 149) at 5.

¹⁷⁷ Tom J. Farer, "A Paradigm of Legitimate Intervention," in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, edited by Lori Fisler Damrosch (New York: Council on Foreign Relations Press, 1993), p. 341 cited in Smith (note 161) at 66.

¹⁷⁸ Macklem (note 148) at 373.

¹⁷⁹ Bellamy and Wheeler (note 153).

¹⁸⁰ Penelope C Simons 'Humanitarian Intervention: A Review of Literature', Ploughshares Working Paper 01-2 pg 2. Available at <http://www.ploughshares.ca/content/working%20papers/wpo12> [Accessed 22 January 2009].

¹⁸¹ Charney (note 110).

Contemporary international law forbids the violation of such norms of *jus cogens* by a state against its own citizens and these duties are owed *erga omnes* to the international community as a whole.¹⁸² Consequently, this provides the normative framework for humanitarian intervention, as the concept of sovereignty cannot be used by governments to protect themselves from responsibility for gross violations of such rights.¹⁸³

In addition, they suggest that when a liberal interpretation is given to the provisions of Article 2 (4), such (unilateral) intervention will not be a violation of Article 2(4).¹⁸⁴ The reason being that since Article 1(3) of the Charter recognises human rights as one of the purposes of the UN; any force used in order to protect such rights is not, inconsistent with the purposes of the Charter.¹⁸⁵ Instead, such intervention should be seen as upholding the stated goals of the United Nations when it is unable to take action itself.¹⁸⁶ This line of thinking has it that since humanitarian intervention in principle is neither directed against the ‘territorial integrity’ nor against the ‘political independence’ of the target state, Article 2(4) does not prohibit it.¹⁸⁷

Furthermore, reliance is placed on the provisions of Articles 39 and 42 to give legitimacy to humanitarian intervention where authorised by the Security Council.¹⁸⁸ Since the Security Council is regarded as the guardian of state sovereignty and also has the responsibility of maintaining international peace and security, this mandate could require it to protect people against authoritarian regimes even if this means an alteration of ‘Westphalian’ Sovereignty.¹⁸⁹ This is so because where there are gross violations of human rights, which have extensive cross border effects, they can no longer be considered purely domestic issues but become legitimate concerns of the international community.¹⁹⁰

¹⁸² See generally Chapter III ILC Draft articles on Responsibility of States for Internationally Wrongful Acts *Report of the 53rd Session ILC* (2001) GAOR 56th session Supp.10. See also *Barcelona Traction, Light and Power Co. Case (Belgium v Spain)* [1970] ICJ Reports 3 pg 32 at para 33.

¹⁸³ Charney (note 110).

¹⁸⁴ Dixon (note 129) at 119.

¹⁸⁵ *Ibid* at 313.

¹⁸⁶ Vessel (note 162) at 10.

¹⁸⁷ Beyerlin (note 158) at 927.

¹⁸⁸ Bellamy and Wheeler (note 153).

¹⁸⁹ Makinda (note 29) at 154.

¹⁹⁰ Vessel (note 162) at 10.

Therefore, the international community acting under the mandate of the Security Council may intervene militarily in order to address situations of extreme human suffering.¹⁹¹ In support of this contention, a report of the Commission on Global Governance stated inter alia that “When there is human suffering on a large scale, it inevitably provokes demands for United Nations action, notwithstanding the fact that that such action would constitute external interference in the affairs of sovereign States.”¹⁹² This finds justification in the proviso of Article 2(7), to the effect that ‘the principle of domestic jurisdiction shall not prejudice the application of the enforcement measures under Chapter VII.’ This is to serve as the basis or precedent for collective humanitarian intervention.

Furthermore, proponents of humanitarian intervention assert that since international law is constantly evolving in ways that reflect emerging normative ideas, an appeal to the law itself may not be adequate to solve the underlying moral issues raised by humanitarian intervention.¹⁹³ Consequently, they rely on moral norms to justify unilateral interventions undertaken by a state or group of states acting without the authority of the Security Council. This is because humanitarian intervention is usually a response to grave human rights violations and the most basic human rights are universal moral rights (such as right to life), rights that rest on the principles of ‘common morality’ which are binding on all human beings.¹⁹⁴

The reliance on moral norms is influenced by the jurisprudence of natural law scholars writing in the 16th and 17th century before the emergence of modern international law such as Immanuel Kant.¹⁹⁵ According to these views, the ruler (state) has a duty to enforce certain laws beyond their realms (*jus gentium* or law of nations) an example being the protection of the rights of its subjects.¹⁹⁶ The full recognition of the ruler’s (state) sovereignty is conditioned upon the full recognition of human rights of the population within its territory.¹⁹⁷ Consequently, when a state renders itself guilty of cruelties against its nationals in a way that denies their

¹⁹¹ Lui (note 146).

¹⁹² Makinda (note 29) at 149.

¹⁹³ Tom J. Farer, ‘A Paradigm of Legitimate Intervention’ in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, Lori Fisler Damrosch (ed) cited in Smith (note 161) at 66.

¹⁹⁴ Terry Nardin ‘The Moral Basis of Humanitarian Intervention’ (2002) 16 *Ethics and International Affairs* 57 at 65.

¹⁹⁵ *Ibid* at 58.

¹⁹⁶ *Ibid* at 57.

¹⁹⁷ Lui (note 146).

fundamental human rights and ‘shocks the conscience of mankind’ humanitarian intervention is permissible.¹⁹⁸

In the words of Teson, ‘only just states deserve to be fully protected by the shield of sovereignty.’¹⁹⁹ A just state is entitled to respect by other states which are morally barred from interfering with its government.²⁰⁰ It envisages that the same principles that justify non-intervention (sovereignty) also justify exceptions to the principle.²⁰¹ Therefore, if a state is in serious violation of the moral rights of those it governs, others may defend those rights by using force.²⁰² The non-intervention principle is not a shield behind which an unjust state can hide while it violates the moral rights of its subjects.²⁰³

These arguments find support in the idea of popular sovereignty postulated by John Locke and Rousseau writing in the 18th century. Based on this school of thought, it is the individual and not the state that lies at the centre of international law.²⁰⁴ Sovereignty does not reside in the ‘abstraction’ called the state but with the people of the state itself.²⁰⁵ Consequently, when a state engages in substantial human right abuses, it betrays the purpose for which it exists and forfeits not only its domestic legitimacy, but also its international legitimacy as well.²⁰⁶

Therefore, since sovereignty lies in the people, there is a moral duty incumbent on states to intervene to protect the population from genocide and other crimes against humanity.²⁰⁷ This appears to be the basis for the North Atlantic Treaty Organisation (NATO) intervention in Kosovo in 1999 as the Secretary General of NATO while justifying its unilateral intervention relied on the existence of a ‘moral duty’ to protect the population rather than on a legal obligation to do so.²⁰⁸

However, while agreeing with the esteemed position of the individual in the society, the idea of popular sovereignty has however not attained consensus in

¹⁹⁸ Oppenheim (note 13) at 312.

¹⁹⁹ Fernando R Teson *A Philosophy of international Law* (1998) pg 40.

²⁰⁰ Nardin (note 194) at 67.

²⁰¹ Teson (note 199).

²⁰² Nardin (note 194) at 67.

²⁰³ *Ibid.*

²⁰⁴ Simons (note 180).

²⁰⁵ Makinda (note 29) at 151.

²⁰⁶ Teson (note 146) at 16.

²⁰⁷ Bellamy and Wheeler (note 153)

²⁰⁸ *Dr Javier Solana Secretary General of NATO Press Statement Media Release*, (23 March 1999). Available at <http://www.nato.int/docu/pr/1999/p99-040e.htm> [Accessed 14 July 2009].

international law and practice. If it has been so accepted, there will be humanitarian interventions undertaken in places such as Sudan, Tibet and other places where there are gross human rights violations and these would have been sufficient basis for states to intervene in Rwanda without the necessity of Security Council authorisation. In addition, it appears that the moral justification proffered by scholars in support of unilateral intervention based on notions of morality have no bearing under current international law.²⁰⁹

By the end of the 19th century, the natural law argument favouring humanitarian intervention had eroded as the view that international law is positive law based on the will of states emerged.²¹⁰ For example, William Hall has argued that if there is any basis for humanitarian intervention, it must rest not on principles of international morality but on agreement among states to recognise such principles as law.²¹¹ More importantly, natural law does not appear as one of the sources of international law under the Statute of the International Court of Justice.²¹²

3.4 Arguments against Humanitarian Intervention

Although the foregoing arguments in support of humanitarian intervention are persuasive in justifying the proposition that the norms associated with the Westphalian notions of sovereignty are overridden by the development of certain normative principles, the universal validity of these arguments are questioned.²¹³ For example, the suggestion that a liberal interpretation of Article 2(4) will provide a legal foundation for humanitarian intervention finds no basis in the accepted rules of treaty interpretation.²¹⁴ An examination of the *travaux préparatoires* and a textual interpretation of Article 2 (4) of the Charter shows that its provisions were meant to be a 'watertight' prohibition against the use of force and any customary right to unilateral intervention which may have existed were extinguished by the Charter.²¹⁵

²⁰⁹Nardin (note 194) at 57.

²¹⁰ *Ibid* at 62.

²¹¹ William Edward Hall, *A Treatise on International law* (1909) 6th ed. (Oxford University Press) cited in Nardin (note 194) at 63.

²¹² See generally Article 38 Statute of the International Court of Justice 1946.

²¹³ Brian D Leparard *Rethinking Humanitarian Intervention* (2002) pg 119.

²¹⁴ Charney (note 110) at 1234.

²¹⁵ *Ibid* at 1234.

Moreover, it is neither realistic nor politically possible for the intervening state(s) to allow the abusive government to remain in power after the intervention.²¹⁶ Evidence has shown that most humanitarian intervention usually results in the eventual assault of state sovereignty by overthrowing the existing regime and occupation of the territory by the intervening forces.²¹⁷ This is contrary to a proper understanding of the phrase ‘territorial integrity’ and ‘political independence’ which were added to the text merely to reinforce the prohibition contained in this provision for the benefit of smaller states and not in order to restrict its absolute scope as suggested by humanitarian intervention advocates.²¹⁸

In addition, many commentators, particularly civilian humanitarian groups dislike the association of anything humanitarian with the use of military force, perceiving humanitarian intervention as an oxymoron.²¹⁹ The reason for the criticism is not necessarily a lack of feeling for human rights but mainly the fear that any erosion of the principle of sovereignty only increases the vulnerability of weaker states to more powerful states.²²⁰ This is because with respect to these normative factors, there is no consensus among international actors.²²¹

On one hand, the Western world holds that the principle of non-intervention cannot be invoked by a state against a humanitarian initiative by another state if human rights are at stake to which both states as parties to the two United Nations human rights covenants are bound to respect.²²² On the other hand, several Asian, Islamic and other developing countries “continue to challenge the universality of human rights norms, stating that human rights more often than not reflect western ethical and moral standards” and that they continue to belong to the internal affairs of a state of which no other state may interfere.²²³

Another argument against humanitarian intervention is that its inclusion or tolerance in international law as evidence of a normative factor which has altered the

²¹⁶ Cronin (note 3) at 297.

²¹⁷ Ibid.

²¹⁸ Beyerlin (note 158) at 927.

²¹⁹ ICISS Supplementary Report (note 16) at 15.

²²⁰ Michael Reisman ‘Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention’ (2000) 11 *EJIL* pg 6.

²²¹ Smith (note 161) at 66.

²²² Beyerlin (note 158) at 929.

²²³ Simon Duke ‘The State and Human Rights: Sovereignty Versus Humanitarian Intervention (1994) cited in Simons (note 180).

traditional notion of sovereignty would only increase the prospect for the abusive use of force.²²⁴ It would become an instrument for interference by strong states in the affairs of the weak with humanitarian concerns serving as justifications for such interventions.²²⁵ As established by past practice most states are not be inclined to undertake humanitarian intervention unless their national interests are directly or indirectly involved.²²⁶

As it is, there can be no such thing as humanitarian intervention as states are always in pursuit of their own strategic interests and goals and not on altruistic ones.²²⁷ Anything resembling a humanitarian intervention only occurs on occasions when human rights concerns coincide with political power objectives.²²⁸ This was evident in the invasion of Iraq by the United States and its allies in 2003.

When the element of selectivity is added to the way and manner in which humanitarian interventions are undertaken, and the fact that the same criteria is not applied uniformly in each case where interventions have been embarked on, the norm of humanitarian intervention loses credibility in the eyes of many.²²⁹ This is because the legitimacy of a principle is undermined by the erratic or worse, evidently selective application of that principle.²³⁰ This was implicit in the delay of the international community or states to act promptly to prevent the death of thousands of Tutsis in Rwanda while they acted promptly in Bosnia. This inconsistency may be attributed to the fact that humanitarian intervention is 'hijacked by the national interests and ethnocentrism' of powerful states in obvious disregard for the principles of sovereign equality.²³¹

Consequently, most states continue to hold on to sovereignty in its most absolute form denying any claim to its erosion. This is evident in the words of President Bouteflika of Algeria who while reacting to humanitarian intervention stated, that "sovereignty is our last defence in an unequal world."²³² This statement

²²⁴ Kritsiotis (note 118) at 1020.

²²⁵ Ayoob (note 14) at 92.

²²⁶ Ibid at 85.

²²⁷ Ibid.

²²⁸ Vessel (note 162) at 5.

²²⁹ Ayoob (note 14) at 86.

²³⁰ ICISS Supplementary Report (note 16) at 150.

²³¹ Joelle Tanguy 'Redefining Sovereignty and Intervention' 2003 *Ethics and International Affairs* 141 at 143.

²³² Ibid.

has been interpreted to mean a strong reminder that the principles of sovereignty and non-intervention were actually designed as ‘dams against the historical floods of imperial interventions by more powerful states and the threat of these is perceived as real.’²³³

Although these criticisms (selectivity and potential abuse) do not come within the purview of Article 38 of the Statute of the ICJ as sources of international law, they are relevant in assessing state practice.²³⁴

3.5 Overview of Humanitarian Interventions under the Auspices of the United Nations

Over the past decade, there have been a number of interventions in the affairs of other states on humanitarian grounds and the Security Council (impliedly) through its resolutions has contributed to the literature concerning humanitarian interventions. As stated earlier, the humanitarian interventions undertaken under the auspices of the United Nations can be classified into pre-1990 and post 1990 interventions reflecting the attitude of the Security Council during and after the Cold War.²³⁵

A brief analysis of these interventions will illustrate the status of humanitarian intervention in contemporary international law. In particular, the reasons given by states as basis for the interventions embarked by them are significant in their construction of the nature of sovereignty and the standing of humanitarian intervention in international law.

3.5.1 Pre-1990 Humanitarian Intervention

The pre-1990 interventions encompass a number of interventions undertaken from the period of the birth of the United Nations in 1945 to the end of the Cold War in 1990. During this period (which marked the Cold War era), armed humanitarian intervention was not a legitimate practice because states placed more significance on sovereignty and order than on the enforcement of human rights norms.²³⁶ Although there were a considerable number of interventions undertaken on humanitarian grounds during this period, the most widely cited examples of humanitarian

²³³ Ibid.

²³⁴ Kritsiotis (note 118) at 1016.

²³⁵ ICISS Report (note 7) at 18.

²³⁶ Bellamy and Wheeler (note 153).

intervention are the interventions in East Pakistan, Cambodia and Uganda unilaterally undertaken by India, Vietnam and Tanzania respectively.²³⁷

The deadlock in the Security Council and the existence of the veto during the period of the Cold War made interventions under the auspices of the United Nations impossible or if undertaken without Security Council mandate as unauthorised intervention.²³⁸ Consequently, the intervening states of India, Tanzania and Vietnam justified their interventions on grounds of self-defence rather than on the right of humanitarian intervention.²³⁹ In addition, the fact that there were other known cases where entire ethnic or political groups were being massacred by their own states (for example the Biafrans in Nigeria in 1968) without any third state coming to their assistance showed the reluctance of states not engaged in such internal situations to bind themselves to such a principle.²⁴⁰

Basically, evidence of state practice from 1945 to 1990 is inconclusive as it is insufficient to sustain either a right of humanitarian intervention in customary international law or an equivocal rejection of the concept.²⁴¹ Sovereignty in practice remained absolute and any intervention was perceived as a violation of that sovereignty no matter what the circumstances were.

3.5.2 *Post-1990 Humanitarian Interventions*

This period witnessed a number of controversial humanitarian interventions undertaken by states during the period of 1991 to 1999.²⁴² The pattern established was for most states or regional bodies to rely on Security Council resolutions for humanitarian intervention or for the United Nations to undertake such operations itself.²⁴³ The reliance on the Security Council was because at the end of the Cold War, the political climate changed dramatically and the Council was more unified in passing resolutions authorising the use of force in the territories of states to address humanitarian situations.²⁴⁴

²³⁷Smith (note 161) at 78.

²³⁸ICISS supplementary Report (note 16) at 18.

²³⁹Ibid pg 47.

²⁴⁰Beyerlin (note 158) at 928.

²⁴¹ICISS Supplementary Report (note 16) at 68.

²⁴²These interventions include intervention in Iraq, Somalia, Rwanda, Bosnia, Haiti, Sierra Leone, Liberia, East Timor, and Kosovo.

²⁴³Lepard (note 213) at 3.

²⁴⁴ICISS Supplementary Report (note 16) at 18.

The Council adopted series of resolutions which expanded the definition of threat to international peace and security under Article 39 of the Charter which allowed it to authorise military interventions to respond to grave human rights violations even where such crisis were purely domestic in nature.²⁴⁵ The Security Council acknowledged that gross violations of human rights in the territory of one state may have the effect of generating cross border effects affecting other states.²⁴⁶

The Security Council passed resolutions in relation to Iraq, Somalia, Bosnia, Sierra Leone, East Timor and Kosovo, that made some link between human rights and international peace and security under its Chapter VII mandate.²⁴⁷ Consequently, (some) states began to rely on such Chapter VII mandates of the Security Council as opening legal prospects for intervention and setting precedents for humanitarian interventions.²⁴⁸ To them, the rationale behind these resolutions was to favour a redefinition of sovereignty from being absolute to limited.²⁴⁹

On the contrary, an analysis of the authorised interventions undertaken shows that the Security Council had on no occasion sought to erode the traditional conceptions of sovereignty nor did it seek to set precedents for humanitarian interventions.²⁵⁰ At all times, the Security Council acted within the framework of Article 2(7) of the Charter and was only willing to take action when these humanitarian catastrophes had extensive cross border effects.²⁵¹ For example, it is arguable that Resolution 688 which authorised the use of force in Iraq was not in reaction to the way and manner in which the government of Iraq treated its population but to address the cross border effects this had on other states or better still in reaction to the annexation of Kuwait by Iraq.²⁵²

This can be inferred from the fact that the relief action did not recognise a right of Kurdish self-determination as the Council proclaimed its respect for the Iraqi

²⁴⁵ See para 1 Security Council Resolution 688 (1991) SCOR 668 2982nd Meeting 5 April 1991. See also Simons (note 180).

²⁴⁶ Ibid.

²⁴⁷ See for example UN Security Council Resolutions 688 (1991), 794 (1992), 814 (1993), 1199 (1998), 1203 (1998) 1264 (1999). See also Edward Newman 'Humanitarian intervention, Legality and Legitimacy' (2002) 16 *International Journal of Human Rights* 102 at 105.

²⁴⁸ Popovski (note 76).

²⁴⁹ Ibid.

²⁵⁰ Smith (note 161) at 68.

²⁵¹ See Security Council Resolutions 688, 814, 1132 (note 247).

²⁵² See Resolution 688 (note 245) See also Smith (note 161) at 67.

territorial integrity at all times.²⁵³ On the part of the General Assembly, members ‘expressed the need for the consent of the state inhabited by severely affected populations.’²⁵⁴ They stated *inter alia* that:

The sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.²⁵⁵

In the case of Somalia, Sierra Leone and East Timor, the most notable factors are that the interventions were undertaken with the consent of the government or because there was no functioning government.²⁵⁶ In East Timor, although the Security Council had authorised an Australian led UN force to take all necessary measure to restore peace and security, neither the United Nations nor Australia was willing to intervene without the consent of the Indonesian government.²⁵⁷ Thus, the East Timor intervention is best described as a peacekeeping operation rather than a precedent for humanitarian intervention because of the element of consent by the Indonesian government.²⁵⁸

In the case of Somalia, both China and India were cautious of the United Nations in either taking or supporting action that would infringe upon the domestic jurisdiction and sovereignty of any state.²⁵⁹ It appears therefore that members of the Security Council sanctioned any intervention only after acknowledging that since the governmental authority had collapsed and there was no functioning state whose authority is challenged, such intervention could proceed without threatening the principles of state sovereignty.²⁶⁰

Although the intervention in Sierra Leone by the ECOMOG forces was unilateral, it appears that the international community tolerated it because ECOMOG justified its intervention on grounds of regional stability and that its intervention was

²⁵³ *Ibid.*

²⁵⁴ ICISS Supplementary Report (note 16) at 19.

²⁵⁵ Principle 3 Annex to the General Assembly Resolution for Strengthening of the Coordination on humanitarian emergency assistance of the United Nations UN Doc A/Res/46/182, 78th Plenary meeting 19 December 1991.

²⁵⁶ Bellamy and Wheeler (note 153).

²⁵⁷ Vessel (note 162) at 35.

²⁵⁸ Traub (note 83) at 76.

²⁵⁹ Vessel (note 162) at 24.

²⁶⁰ *Ibid* at 23.

at the request of the legitimate government of Sierra Leone.²⁶¹ If added to the fact that Sierra Leone was considered in most quarters to be a failed state, such external intervention does not derogate from state sovereignty for none exists.²⁶² This also appears to be the case for the intervention by ECOWAS in Liberia.

The NATO intervention in Kosovo (1999) was the most controversial intervention to occur under the auspices of the United Nations in the 1990s. It was the most controversial in the sense that it was the first time since the Cold War that a group of states acting without explicit Security Council authority defended a breach of sovereignty on humanitarian grounds.²⁶³ It is obvious that the NATO members faced a legal and moral dilemma between international law prohibiting the use of force and sanctity of sovereignty and the goal of stopping widespread grave violations of international human rights.²⁶⁴

Although the international community acknowledged the need to stop the 'horrendous' crimes against humanity and the massive expulsions in Kosovo, the intervention was criticised primarily because it risked destabilising the international order prohibiting states from intervening in the internal affairs of other states.²⁶⁵ Russia, China, India and other members of the United Nations emphasised the traditional indisputable norms of sovereignty and territorial integrity over the concept of human rights, which was to be within the domestic jurisdiction of the Federal Republic of Yugoslavia.²⁶⁶ In all the intervention was criticised as a violation of the Yugoslav sovereignty.

3.6 Implications on the Formation of Customary International Law

It is a settled fact among international law scholars that the right of humanitarian intervention is not recognised in the UN Charter and neither are there any multilateral treaties to which states are parties, which sanction humanitarian intervention. The question which then arises is whether a right to humanitarian intervention exists under customary international law? This question becomes

²⁶¹ Ibid at 30.

²⁶² Ayoob (note 14) at 82.

²⁶³ Newman (note 247) at 105.

²⁶⁴ Charney (note 110) at 1231.

²⁶⁵ *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia* (note 208). See also Charney (note 110) at 1232.

²⁶⁶ Ibid.

necessary, as proponents of humanitarian intervention have gone beyond the Charter to argue that international law under certain circumstances authorises unilateral intervention because customary international law possesses transformative capacity.²⁶⁷ Does an analysis of state practice show any customary right of humanitarian intervention?

By Article 38 (1) (b) of the Statute of the International Court of Justice, ‘international custom as evidence of a general practice accepted as law’ is a source of international law. Such customary law is derived from a consistent and general state practice and *opinio juris*.²⁶⁸ When examining state practice, it is important to take into consideration the duration, consistency, repetition and generality of the practice of states with respect to a norm.²⁶⁹ In the case of *opinio juris*, it is a subjective element which is necessary to distinguish between the actions of states which are motivated by ‘courtesy’ or other (moral/political) reasons and actions of states undertaken on the belief that the action is found in a rule of international law or ‘legally obligatory.’²⁷⁰ This was reiterated by the ICJ in the *Nicaragua case* where it was stated inter alia that in order to deduce the existence of customary rules, it is sufficient that the conduct of the states should in general be consistent with such rules and that instances of state conduct inconsistent with a given rule should be generally treated as breaches of that rule and not as an indication of the recognition of a new rule.²⁷¹

The armed actions that individual states, regional organisations and ad hoc coalitions have taken in the name of preserving human security comprise the body of state practice in issue.²⁷² In the case of the pre 1990 interventions, apart from the scanty state practice in favour of humanitarian intervention, *opinio juris* was lacking as the states justified their interventions on the right to self-defence and other grounds. The post 1990 interventions also reveal similar practice. Although the Security Council was more actively involved, it at no time expressed the desire to create a binding legal right of humanitarian intervention. Instead, it showed a

²⁶⁷ Macklem (note 148) at 373.

²⁶⁸ See *North Sea Continental Cases (Federal Republic of Germany v Netherlands /Denmark)* [1969] ICJ Reports 3 pg 43-45 para 75-78.

²⁶⁹ Malcolm Shaw *International Law* 5ed (2003) pg 72.

²⁷⁰ *Ibid* at 80.

²⁷¹ *Nicaragua case* (note 121) pg 98 at para 186.

²⁷² Vessel (note 162) at 14.

continued respect for the norms enshrined in state sovereignty. With respect to the unauthorised intervention that took place during this period, they witnessed great criticism by other states and non-governmental humanitarian organisations.

In addition, the fact that the states never sought to rely on a legal right to humanitarian intervention also proves a lack of *opinio juris*. It is suggested that, *opinio juris* functions as a check on the behaviour of powerful states so that the most influential and active states cannot abuse state practice as a caveat to establish customary international law by their actions alone.²⁷³ In addition, the words of the ICJ are significant with respect to any claim of the erosion of state sovereignty when it states that:

If a state (or group of states) acts in a way that is *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.²⁷⁴

The lack of international consensus after the NATO intervention shows that there was no state practice at the time and weakens any case for citing it as a precedent for humanitarian intervention. With respect to state practice and *opinio juris*, it is significant that both Russia and China, members of the Security Council criticised it and that most member states who participated in the intervention maintained that it was a singular incident and not intended to set a precedent modifying the use of force regime and by implication state sovereignty.²⁷⁵

On the other hand, the fact that a Security Council resolution proposed by Russia, to formally condemn the NATO action was rejected by other members of the Security Council, and the fact that the Secretary General of the United Nations failed to condemn the intervention, implies acquiescence by the United Nations which is persuasive in the formation of customary law.²⁷⁶

²⁷³ Ibid at 13.

²⁷⁴ *Nicaragua case* (note 121).

²⁷⁵ Simons (note 180).

²⁷⁶ Charney (note 110) at 1246

3.7 Conclusion

From the foregoing, it is apparent that the attitude of the Security Council (and the international community as a whole) was to permit collective humanitarian intervention only to the extent that it did not threaten the rights and privileges traditionally associated with state sovereignty.²⁷⁷ At no time did the Council authorise forcible intervention against a ‘fully-functioning’ state and intervention without the authority of the Security Council was always criticised.²⁷⁸

While the principle of sovereignty had not barred past interventions, sovereignty in its absolute nature has acted quite effectively as a normative requirement by forcing potential or actual interveners to justify their actions before their sovereign and legal equals.²⁷⁹ The United Nations at all times refused to endorse a general doctrine of humanitarian intervention proceeding instead on a case-by-case basis.²⁸⁰ An analysis of the Security Council resolutions authorising interventions illustrate the consistency of the Council in defining issues constituting a threat to international peace and security, but reveals an inconsistency in its post Cold War attempts to redefine state sovereignty.²⁸¹

On the other hand, it is apparent that a customary international law supporting a right of unilateral humanitarian intervention does not exist.²⁸² For example in 1999 when Kofi Annan referred to a developing norm in favour of humanitarian intervention, there was a general rejection by states.²⁸³ This means that the normative scene is still cloudy, and the extent to which the international society has moved beyond traditional norms of sovereignty is doubtful.²⁸⁴

²⁷⁷ Vessel (note 162) at 25.

²⁷⁸ Bellamy and Wheeler (note 183).

²⁷⁹ Ayoob (note 14) at 92.

²⁸⁰ Smith (note 161) at 68.

²⁸¹ Makinda (note 29) pg 161.

²⁸² Vessel (note 162) at 15.

²⁸³ Newman (note 247) at 105.

²⁸⁴ M J Smith (note 161) at 68.

CHAPTER 4

SOVEREIGNTY AS RESPONSIBILITY TO PROTECT

*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?*²⁸⁵

4.1 Introduction

The above question was posed to the international community by former UN Secretary General, Kofi Annan, in his millennium report to the General Assembly, following the controversial intervention by NATO in Kosovo.²⁸⁶ After the NATO intervention, the international community was caught up in a lot of political, legal and moral debate concerning the use of force to stop humanitarian crisis in the territories of other sovereign states.²⁸⁷ At the time of the millennium summit, most states had expressed the view that the concept of humanitarian intervention was a grave challenge to the ‘supreme’ principle of sovereignty in international law and there was no legal justification whatsoever for humanitarian intervention.²⁸⁸ Just like all other humanitarian interventions before it, these controversies did not settle once and for all the nature and limits of state sovereignty.²⁸⁹

However, in response to this challenge posed by Kofi Annan, the Canadian government in September 2000 financed the establishment of the International Commission on Intervention and State Sovereignty (hereinafter referred to as the ICISS).²⁹⁰ The task of the ICISS was ‘to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty.’²⁹¹ It considered ‘when if ever it is appropriate for states to take coercive military actions against another state, how it should be exercised and under

²⁸⁵ *We the Peoples: The Role of the United Nations in the Twenty-First Century* Report of the Secretary General (note 1) at para 217.

²⁸⁶ Alex J Bellamy ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’ (2006) 20 (2) *Ethics and International Affairs* 143.

²⁸⁷ Evans ‘The Responsibility to Protect: Rethinking Humanitarian Intervention’ (note 2).

²⁸⁸ Ian Williams ‘Righting the Wrongs of Past Interventions: A Review of the International Commission on Intervention and State Sovereignty’ (2002) 6(3) *International Journal of Human Rights* 103.

²⁸⁹ Evans ‘The Responsibility to Protect: Rethinking Humanitarian Intervention’ (note 2).

²⁹⁰ ICISS Report (note 7) pg 2 at para 1.7.

²⁹¹ *Ibid.*

whose authority.’²⁹² The membership of the ICISS was intended to reflect as much as possible the perspectives of both developed and developing countries in attaining consensus regarding the debate on humanitarian intervention.²⁹³

Eventually, the ICISS produced a report which developed the concept of ‘*The Responsibility to Protect*’ (hereinafter referred to as R2P) to solve the legal and policy dilemmas of humanitarian intervention.²⁹⁴ In its report, the ICISS proposed a redefinition of sovereignty by perceiving it as responsibility rather than control.²⁹⁵ The idea of sovereignty as responsibility had earlier been proposed in 1996 by Francis Deng and his associates.²⁹⁶ They argued that, “when nations fail to conduct their internal affairs in ways that meet up with internationally recognised standards, other nations not only have a right but also a duty to intervene.”²⁹⁷

According to the ICISS, ‘the debate about intervention for human protection purposes should focus not on the right to intervene but on the responsibility to protect.’²⁹⁸ This implies evaluating the issues from the point of view of those who need support (that is the oppressed population) rather than those considering undertaking the intervention.²⁹⁹ The R2P as proposed by the ICISS has itself become an issue of international interest and controversy and has been described as reflective of the ‘assertive manifestations of post-Westphalian thinking and of political liberalism and human solidarity’.³⁰⁰ Sovereignty as responsibility entails that states are only entitled to full sovereignty as long as they abide by the norms established by the international community.³⁰¹

This chapter examines the R2P, its evolution and retrogression. In particular, it examines whether the R2P has emerged as a principle guiding humanitarian intervention thereby overriding the rights associated with Westphalian sovereignty.

²⁹² Evans ‘The Responsibility to Protect: Rethinking Humanitarian Intervention’ (note 2). See also Gareth Evans ‘From Humanitarian Intervention to the Responsibility to Protect’ (2006/2007) 24 *Wisconsin International Law Journal* pg 703.

²⁹³ ICISS Report (note 7) pg 2 at para 1.7.

²⁹⁴ Carsten Stahn ‘Responsibility to protect: Political Rhetoric or Emerging Legal Norm’ (2007) 101 *AJIL* 99 at 102.

²⁹⁵ *Ibid.*

²⁹⁶ Amitai Etzioni ‘Sovereignty as Responsibility’ 2005. Available at <http://www.sciencedirect.com> [Accessed 31 March 2009].

²⁹⁷ Francis Deng et al *Sovereignty as Responsibility: Conflict Management in Africa* cited in Etzioni *ibid.*

²⁹⁸ ICISS Report (note 7) pg 17 at para 2.29.

²⁹⁹ *Ibid.*

³⁰⁰ Newman (note 247).

³⁰¹ Etzioni (note 296).

4.2 What is the Responsibility to Protect?

The responsibility to protect (R2P) is often referred to as an emerging doctrine primarily designed to provide an international framework for protecting civilians facing gross human rights atrocities.³⁰² The R2P reflects the idea that:

Sovereign states have the responsibility to protect their own citizens from avoidable catastrophe, from mass murder, rape and starvation-but when they are unable or unwilling to do so, the responsibility must be borne by the broader community of states.³⁰³

In practice this means that if a state fails in its responsibility to protect its citizens, the international community must then assume this responsibility on its behalf.³⁰⁴ Thus, sovereignty becomes an internationally shared responsibility and national sovereignty becomes a 'privilege' dependent on the fulfilment of responsibilities.³⁰⁵ It also envisages that:

Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure and the state is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.³⁰⁶

This implies that the interest of the population may sometimes 'trump' sovereignty as it is enshrined in Article 2(7) of the Charter with its emphasis on non-intervention in the domestic affairs of member states.³⁰⁷ The R2P is thus significant in the way it affects sovereignty because matters affecting the welfare of its population are no longer exclusively subject to the discretion of the domestic ruler but perceived as issues concerning the international community as a whole.³⁰⁸

According to the ICISS as indicated by past practice, sovereignty implies a dual responsibility; 'externally to respect the sovereignty of other states and internally to respect the dignity and basic rights of all people within its territory.'³⁰⁹ In this

³⁰² Adele Brown 'Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?' *Research Paper 08/55 17 June 2008*. Available at http://www.wiscnetwork.org/papers/WISC_2008-436.doc [Accessed 22 January 2009].

³⁰³ ICISS Report (note 7) pg viii.

³⁰⁴ Simonovic (note 9) at 373.

³⁰⁵ Etzoni (note 296).

³⁰⁶ ICISS Report (note 7) pg xi.

³⁰⁷ Thomas G Weiss 'R2p After 9/11 and the World Summit' (2006/2007) 24 *Wisconsin International Law Journal* 741 at 743.

³⁰⁸ Stahn (note 294) at 101.

³⁰⁹ ICISS Report (note 7) pg 8 at Para 1.35.

regard, it argues for a modern perceptive of state sovereignty evolving in the context of changing norms which transforms the world from a territorial and state- centric sovereignty where those in power control sovereignty to popular sovereignty in the context of democratic principles.³¹⁰ This argument for popular sovereignty had earlier been proposed by former UN Secretary General Kofi Annan. According to him,

State sovereignty in its most basic form is being redefined.... [S]tates are now widely understood to be instruments at the service of their people 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.³¹¹

Thus, sovereignty is to be understood as upholding human rights precepts in addition to territorial control and inviolability.³¹²

According to the ICISS, the case for thinking of sovereignty as responsibility is increasingly acknowledged in state practice and is particularly strengthened by the importance placed on international human rights norms and the increasing impact in international discourse of the concept of human security.³¹³ The UN Charter is cited as an example of an international obligation voluntarily accepted by states as binding.³¹⁴ The ICISS argues that on signing the Charter, it grants membership of the UN to the state and accepts it as a responsible member of the international community and alternatively, the signatory state accepts the responsibilities of membership flowing from that signature.³¹⁵ Although the ICISS makes a convincing proposition, in practice states have ignored these responsibilities because they are in fact not a prerequisite for state sovereignty.³¹⁶

By balancing the rights of a state with its responsibilities to the international community who must intervene when the state fails to fulfil its responsibilities to its citizens, the R2P (sovereignty as responsibility) poses a challenge to the Westphalian notion of independent sovereign states.³¹⁷ This is so because the R2P doctrine shares

³¹⁰ Newman (note 247) at 106. See also Simonovic (note 9).

³¹¹ Kofi Annan 'Two Concepts of Sovereignty' 1999 *The Economist*. Available at <http://www.un.org/News/ocsg/sg/stories/kaecon.html> [Accessed 3 March 2009].

³¹² Newman (note 247) at 108.

³¹³ ICISS Report (note 7) pg 13 at Para 2.15.

³¹⁴ *Ibid* at para 2.14.

³¹⁵ *Ibid*.

³¹⁶ Newman (note 247) at 118.

³¹⁷ Etzoni (note 296).

with humanitarian intervention the same belief that sovereignty is not absolute in an interdependent world.³¹⁸ However, despite the fact that the R2P outlines criteria for external intervention in the internal affairs of a state, its advocates argue that the doctrine is in effect pro-sovereignty.³¹⁹ It is considered ‘a linking concept that bridges the divide between intervention and sovereignty’.³²⁰

Thus far, from undermining state sovereignty as the fundamental organising principle of international law, the R2P (its advocates argue) seeks to address the failure inherent in sovereignty as control.³²¹ In the words of the ICISS, ‘there is no transfer or dilution of state sovereignty but there is a necessary re-characterisation from sovereignty as control to sovereignty as responsibility.’³²² This re-characterisation is considered important because a large gap has been developing between international behaviour as expressed in the ‘state-centred’ UN Charter signed in 1946 and evolving state practice since then which now emphasises certain limits on sovereignty.³²³ However, this opposition between sovereignty as control and responsibility is neither clear nor coherent within the report of the ICISS.³²⁴

Although the R2P doctrine is not yet legally binding on states, it has been argued that it serves as an international endorsement of existing international legal obligations.³²⁵ According to the ICISS, the legal foundation of the R2P is found in fundamental natural law principles, the human rights provisions inherent in the UN Charter, the Universal Declaration on Human Rights and particularly the Genocide Convention of 1948.³²⁶ The Genocide convention remains one of the relatively few instances prior to the adoption of the R2P doctrine, which reflects an attempt by the international community to place certain limits on state sovereignty.³²⁷

However, regarding reliance on the Genocide Convention as a foundational basis for the R2P doctrine, the emphasis of the Convention was on the prevention and

³¹⁸ Louise Arbour ‘The responsibility to protect as a duty of care in international law and practice’ 2008 *Review of International Studies* 445 at 448.

³¹⁹ Adrian Kuah ‘War in Iraq: Implications for Sovereignty’ 2003. Available at <http://www.idss.edu.sg/publications/perspective/IDSS162003.pdf> [Accessed 3 August 2009].

³²⁰ ICISS Report (note 7) pg 17 at Para 2.29.

³²¹ Kuah (note 319).

³²² ICISS Report (note 7) pg 13 at para 2.14.

³²³ *Ibid* pg 15 at Para .2.24.

³²⁴ Carol Focarelli ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’ (2008) 13 (191) *Journal of Conflict and Security Law* 1 at 2.

³²⁵ Brown (note 302).

³²⁶ ICISS Report (note 7) pg 16 at para 2.26.

³²⁷ Brown (note 302).

punishment of genocide.³²⁸ This obligation to prevent and punish genocide under the convention, which is also reflected in the outcome document of the 2005 World Summit, does not however bestow on states the right of humanitarian intervention.³²⁹ It has however been argued that the prevention of genocide may require a state or international organisation as the case maybe to breach the sovereignty of another state before it has actually committed any violation.³³⁰

According to the ICISS, the R2P embraces three specific responsibilities: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.³³¹ These responsibilities fall by default on the state concerned but when it is unable or fails to discharge any of these responsibilities, they fall on the international community.³³² In broad terms, none of these elements of the R2P either singularly or as a whole is an entirely new concept in international law.³³³ The responsibilities to prevent (regarded as the most important aspect of the R2P) and rebuild represent conflict prevention and state building, and there is consensus among states that they are desirable goals.³³⁴ By far the most controversial is the responsibility to react. It embraces the same tenets as humanitarian intervention and argues that the international community in discharging its responsibility to protect may under certain circumstances use military force to protect human rights without the consent of the sovereign authority.³³⁵

4.3 The Responsibility to React

Although given a new name, the substantive issues of the responsibility to react remain the same as those of humanitarian intervention.³³⁶ As one writer notes, although the language of the responsibility to react may be less confrontational and the moral basis may have changed to accord with 21st century sensitivities, the possibility that there is a responsibility to react by armed force to protect civilians in

³²⁸ See generally Article 1 Genocide Convention (note 94).

³²⁹ Cronin (note 3) at 296.

³³⁰ *Ibid.*

³³¹ ICISS Report (note 7) pg xi.

³³² *Ibid.*

³³³ Brown (note 302).

³³⁴ *Ibid.*

³³⁵ Newman (note 247) at 108.

³³⁶ ICISS Report (note 7) pg 12 at para 2.5.

peril remains as hotly contested as its predecessor.³³⁷ According to the ICISS, where preventive measures fail to resolve humanitarian crisis in a state and the state is unable to contain the crisis, the members of the international community may take 'interventionary' measures to address the situation.³³⁸ These measures include political, economic or judicial measures and in extreme cases may include military action.³³⁹

Just like the notion of humanitarian intervention before it, the responsibility to react challenges the principle of non-intervention. The non-intervention rule seeks not only to protect the state and its government but also the peoples and cultures within it.³⁴⁰ The ICISS recognised that intervention might be harmful in the sense that it can destabilise the order of states as internal forces seeking to oppose a state may solicit outside help to achieve their own goals.³⁴¹ Therefore, in order to avoid this unnecessary interference with the internal affairs of a state, the ICISS laid down six criteria for military intervention.³⁴²

According to the ICISS, military intervention for human protection purposes may be justified only where there is large scale loss of life or ethnic cleansing, either actual or apprehended which is the product of deliberate state action, state neglect, inability to act or a failed state situation.³⁴³ In addition, before contemplating the use of force in discharging the responsibility to react, the intervening state(s) or international community as the case may be, must have the right intention: the use of force must be the last resort; should be undertaken by proportional means; have reasonable prospects in the sense that it should not cause more harm and casualties than the harm it seeks to protect; and must be undertaken by the right authority most preferably the Security Council.³⁴⁴

These principles regulating the use of force largely reflect the traditional just war theories postulated by Christian theologians such as Grotius, Thomas Aquinas

³³⁷ Brown (note 302).

³³⁸ ICISS Report (note 7) pg 29 at para 4.1.

³³⁹ Ibid.

³⁴⁰ Ibid pg 31 at para 4.12.

³⁴¹ Ibid.

³⁴² Ibid pg 32 at para 4.16.

³⁴³ Ibid (note 7) pg 32.

³⁴⁴ Ibid pg 32-37. See also William (note 288) at 105.

and Augustine.³⁴⁵ The aim of the high threshold set by the ICISS for warranting military intervention is to prevent the abuse of humanitarian justifications by powerful states seeking to justify actions taken for reasons that have little or nothing to do with humanitarian concern.³⁴⁶

In line with the principle of Westphalian sovereignty and its correlatives of non-intervention and the prohibition of the use of force as enshrined in the Charter, the most important of these criteria is that in all case of military intervention, there should be prior Security Council authorisation.³⁴⁷ The ICISS urges permanent members of the Security Council to commit themselves not to exercise their veto power in such extreme cases of violations of human rights unless their vital national interests are at stake.³⁴⁸

Conversely, in the case of a veto by the Security Council, the ICISS suggests that the General Assembly could consider the matter under the 'Uniting for Peace' procedure or alternatively action could be taken by regional or sub regional organisations under chapter VIII of the Charter subject to subsequent authorisation of from the Security Council.³⁴⁹ As it stands, these provisions were subsequently eliminated by states limiting the use of force as a last resort and only with prior authorisation by the Security Council.³⁵⁰

4.4 International Reception of the Responsibility to Protect

According to the ICISS, although 'there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law', the responsibility to protect is indeed the subject of an 'emerging guiding principle'.³⁵¹ This section examines the practice of states since the development of the R2P doctrine by the ICISS in 2001 to see if in fact it has attained the status of customary law or an international law norm.

³⁴⁵ Noel Dorr 'The Responsibility to Protect-an Emerging Norm?' (2008)19 *Irish Studies in International Affairs* 189 at 190. See also Focarelli (note 324) at 4.

³⁴⁶ A Bellamy (note 286) at 148.

³⁴⁷ ICISS Report (note 7) pg xii and 47.

³⁴⁸ *Ibid* pg 51 at para 6.19-6.21.

³⁴⁹ *Ibid* pg 53-54 at para 6.28-6.35.

³⁵⁰ *World Summit Outcome Document* (note 151) at para 139.

³⁵¹ ICISS Report (note 7) pg 15 at para 2.24.

4.4.1 *The Responsibility to Protect in Africa*

The doctrine of the R2P made some considerable progress in the international community and the most notable is its adoption in the African continent.³⁵² This is so because Africa has hosted some of the world's most violent conflicts and civil wars leading to massive humanitarian crisis.³⁵³ The adoption of the R2P doctrine is reflected in the Constitutive Act of the African Union (AU), which formally replaced the Organisation of the African Unity (OAU) in 2002.³⁵⁴

The AU Constitutive Act (Act) gives the Union 'the right to intervene pursuant to a decision of the Assembly in respect of grave circumstances namely war crimes, genocide and crimes against humanity.'³⁵⁵ Although the Act uses the phrase 'right to intervene' instead of the responsibility to protect, they however have the same implications as they both call for intervention in serious cases of human rights violations and widespread killings such as genocide.³⁵⁶ The inclusion of the R2P doctrine in the Constitutive Act appears to have transformed humanitarian intervention from a moral duty or a norm into a legal obligation.³⁵⁷

Although this inclusion of a right to intervene in the affairs of other states seems to be a contradiction of the long-standing principle of non-interference held among African States, an adoption of treaty interpretation provisions of the Vienna Convention on the Law of Treaties may be used to reconcile this contradiction.³⁵⁸ If the Constitutive Act is interpreted in good faith and in light of its object and purposes, the AU would have the right to intervene in the affairs of African states where there is a conflict which constitutes a major setback to the promotion of peace, security and

³⁵² Thelma Ekiyor 'Implementing the Responsibility to Protect Doctrine in Africa' (2007) FES Briefing paper. Available at http://www.responsibilitytoprotect.org/files/FESBP01-07_Ekiyor_R2P_in_Africa.pdf [Accessed 30 July 2009].

³⁵³ Ibid.

³⁵⁴ See generally the preamble Constitutive Act of the African Union (2002). Available at <http://www.africa-union.org> [Accessed 31 March 2009].

³⁵⁵ Ibid Article 4(h).

³⁵⁶ Ekiyor (note 352).

³⁵⁷ Helene Gandois 'Sovereignty as responsibility to protect or African regional organisation as norm setters' (2005). Available at <http://oxford.academia.edu/documents/0001/2131/GandoisBISApaper2005.pdf> [Accessed 29 July 2009].

³⁵⁸ See generally Articles 31-33 of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

stability.³⁵⁹ This is because the promotion of peace, security and stability is a prerequisite for the implementation of its development and integration agenda.³⁶⁰

However, the significance of the R2P as a norm within the Continent is not clear, as its implementation is proving difficult, as the R2P norm has been rarely invoked within the region.³⁶¹ This shortcoming is primarily because of the practice of the African states to hold on to the strict principle of state sovereignty, which for a long time was a sacred understanding among them under the auspices of the OAU irrespective of its constant violation.³⁶²

The AU has insisted that the R2P should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states.³⁶³ In an African mini-summit on Darfur held by the initiative of Libya and Egypt, the African states reaffirmed a commitment to preserve Sudanese sovereignty and expressly rejected any foreign (UN or Western) intervention whatsoever 'in this pure African issue', insisting that regional solutions should take precedence over international actions.³⁶⁴ The AU is generally concerned that the R2P could be just another tool in the hands of the great powers in order to interfere in affairs of other states particularly the weak states.³⁶⁵

The interpretation of the R2P doctrine by the AU also becomes problematic in the sense that it implies that it is the AU and not the Security Council which may assume the primary responsibility in the face of humanitarian emergencies where the state concerned has failed in its responsibilities.³⁶⁶ This may not be wholly compatible with the initial aims of the ICISS, which placed emphasis on prior Security Council authorisation, and the provisions of the Charter, which gives the

³⁵⁹ See AU Constitutive Act (note 354) at Article 3 (a), (c), (f), and (h).

³⁶⁰ *Ibid* at para 8 of the preamble.

³⁶¹ Ekiyor (note 352). In practice, the two AU interventions in Burundi and Darfur have been conducted with the consent of those states. See also Bellamy (note 286) at 158.

³⁶² One of the core objectives of the AU is to defend the sovereignty, territorial integrity and independence of member states. See Article 3(1) AU Constitutive Act (note 354).

³⁶³ AU Executive Council, 'Common African Position on the Proposed Reform of the United Nations' section B (i) cited in Bellamy (note 286) at 161.

³⁶⁴ Final Communique: African Mini-Summit on Darfur,' Tripoli, Libya, October 17, 2004, p. 2 cited in Bellamy (note 286) at 160.

³⁶⁵ Gandois (note 357) at 8.

³⁶⁶ Bellamy (note 286) at 157.

Security Council the primary responsibility of maintaining international peace and security.³⁶⁷

The amendment of Article 4(h) in 2003 to include ‘serious threats to legitimate order’ as an additional basis for warranting intervention by the Union has been described as a ‘backward step’ in the development of the R2P doctrine within the region.³⁶⁸ This inclusion can be rightly interpreted as reprioritising regime security over human security (that is sovereignty as control over sovereignty as responsibility).³⁶⁹ These complexities have led to questions of the validity of the R2P doctrine.³⁷⁰

4.4.2 *The Responsibility to Protect and the War in Iraq*

The R2P doctrine acquired positive response by most governments at least at the declaratory level.³⁷¹ It was perceived by some states and the ‘civil society’ as a welcome initiative to redefine sovereignty by shifting emphasis from control to responsibility although there were concerns expressed by developing countries that it could be used to further erode their sovereignty.³⁷² However, members of the ICISS sought to alleviate the fears and concerns of these developing countries by pointing to the high threshold, which had to be satisfied before any state could legitimately use force in the territory of a sovereign state.³⁷³ Although the use of these just cause criteria was an innovative attempt by the ICISS to curtail abuse of the R2P doctrine, there is also inherent in these criteria the problem of indeterminacy as there can be no control as to its application.³⁷⁴ This was apparent in the invasion of Iraq in 2003 by the United States and some of its allies.

The invasion of Iraq by the United States and its allies greatly affected the standing of the R2P doctrine as an emerging international law norm in a number of ways. Firstly, it reaffirmed the difficulty in obtaining consensus on what made a good

³⁶⁷ See Article 24 and 53 of the Charter. See also ICISS Report (note 7) pg xii and 47.

³⁶⁸ Evaristus Baimu and Kathryn Sturman ‘Amendment to the African Union’s Right to Intervene: A Shift from Human Security to Regime Security’ (2003) 12 (2) *African Security Review* 42.

³⁶⁹ *Ibid.*

³⁷⁰ Ekiyor (note 352).

³⁷¹ Nicholas J Wheeler ‘A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit’ (2005-2006) 2 (1) *Journal of International Law and International Relations* 95 at 97.

³⁷² Kuah (note 319).

³⁷³ Bellamy (note 286) at 148.

³⁷⁴ *Ibid.*

case for intervention.³⁷⁵ The fact that emerging normative framework guiding humanitarian intervention was set in ambiguous terms, gave a certain amount of legitimacy to the Iraq war.³⁷⁶ Arguably, the justification of regime change given by the US as one of the reasons warranting intervention in Iraq appears to adhere to the criteria of right intention and reasonable prospects.³⁷⁷

The brutality and misrule of the Saddam Hussein administration posed a threat to the human security of the Iraqi people.³⁷⁸ Consequently, it could be argued that since the regime had failed to live up to the responsibilities that sovereignty entailed the intervention was necessary to address this failure.³⁷⁹ However, most states and the international community who saw the intervention as an apparent abuse of the Iraqi sovereignty rejected this justification.³⁸⁰

Secondly, the United States' 'circumvention' of the Security Council and its humanitarian justifications had the mixed effect of diluting the normative aspect of the sovereignty as responsibility doctrine while emphasizing its old realist dimension of sovereignty as right (control).³⁸¹ The fact that the invasion was justified on grounds of affording protection to the Iraqis against the tyranny of Saddam Hussein was devastating to the R2P as it only served to increase the concerns of the smaller developing countries that it would be used to further erode their sovereignty.³⁸² The reaction expressed by states revealed emphasis on traditional conceptions of non-intervention instead of reducing sovereign prerogatives even for a humanitarian purpose.³⁸³

The war in Iraq was an instrumental factor to the extensive debate that occurred in the 2005 UN World Summit with respect to the R2P doctrine. To a large extent, it is also responsible to the 'salience' in Darfur considering the global response to the situation where approximately 300,000 people have been killed and

³⁷⁵Kuah (note 319). See also Wheeler (note 371) at 98.

³⁷⁶Eric A Heinze 'Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice' (2006) 36 (1) *Parameters: US Army War College Quarterly* 20 at 21.

³⁷⁷S Neil Macfarlane et al 'The responsibility to protect: is anyone interested in humanitarian intervention?' (2004) 25(5) *Third World Quarterly* 977.

³⁷⁸Kuah (note 319).

³⁷⁹Ibid.

³⁸⁰The invasion of Iraq by the US was particularly criticised because it was undertaken without the prior authorisation of the Security Council and against the wish of some of its allies particularly France, Germany and Turkey.

³⁸¹Kuah (note 319).

³⁸²Brown (note 302).

³⁸³Weiss (note 307) at 750. See also MacFarlane et al (note 377) at 983.

1.7 million displaced since 2003.³⁸⁴ Although Darfur is a classic example of a government unwilling or unable to protect its citizens, it also shows an international community unwilling or unable to take on the responsibility that the R2P envisages as most states are keen to reaffirm the Westphalian principles of state sovereignty and thus less willing than before to contemplate actions that violate this.³⁸⁵

4.4.3. *The Responsibility to Protect, the High Level Panel Report and the UN Secretary General's Response*

Notwithstanding the concerns and controversies surrounding the R2P norm after the invasion of Iraq in 2003, the doctrine continued to gain international political exposure.³⁸⁶ This development was mainly attributed to other factors such as the humanitarian situation in Darfur, which led non-governmental organisations to turn to the R2P framework as a basis for international action.³⁸⁷ In 2003, Kofi Annan who was Secretary General of the UN at the time commissioned the High Level Panel (HLP), which had the task of examining the challenges to international peace and security.³⁸⁸ The debate concerning the R2P then took a new turn in the HLP report where it was related to the institutional reform of the UN as the HLP saw the R2P doctrine as a means of strengthening the collective security system under the Charter.³⁸⁹

The HLP agreed with the ICISS that there is an emerging norm of international responsibility to protect exercisable by the Security Council in the event of genocide, ethnic cleansing or serious violations of humanitarian law which a state is unable or unwilling to prevent.³⁹⁰ With respect to the issue of sovereignty, the HLP commented that:

Whatever perceptions of sovereignty may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today it clearly carries with it the obligation of a

³⁸⁴ R J Hamilton 'The Responsibility to Protect: From Document to Doctrine-But What of Implementation' (2006) 19 *Harvard Human Rights Journal* 289 at 293.

³⁸⁵ *Ibid.* See also Bellamy and Wheeler (note 153).

³⁸⁶ Brown (note 302).

³⁸⁷ *Ibid.*

³⁸⁸ Bellamy (note 286) at 155.

³⁸⁹ Stahn (note 294) at 105.

³⁹⁰ *Report of the High Level Panel on Threats Challenges and Change, A More Secure World: Our Shared Responsibility* (2004) UN Doc A/59/565 at para 201 & 203. Available at <http://www.un.org/secureworld/report.pdf> [Accessed 16 February 2009].

state to protect the welfare of its own peoples and meet its obligation to the wider community.³⁹¹

For the panel, sovereignty only attaches to a state as a means of ensuring the security of its citizens and where sovereignty is misused by a state's failure to fulfil this responsibility, its sovereignty could be denied.³⁹² In attaching its definition of sovereignty to the Charter, and in positing for the responsibility of a state to protect its people, the HLP was adhering to the R2P doctrine as proposed by the ICISS.³⁹³

In general terms the HLP's recommendations reflected those of the ICISS with respect to the precautionary principles except with the inclusion of 'serious violations of humanitarian law' to the list of actions under the just cause requirements.³⁹⁴ However, the HLP differed from the ICISS by omitting any discussion of what should happen in the face of Security Council inaction or veto.³⁹⁵ This was to enable it obtain consensus from those members of the panel who were most sensitive about eroding state sovereignty by expressly endorsing any unilateral right to intervene.³⁹⁶

These recommendations given by the HLP regarding the R2P doctrine were subsequently reflected in a report published by the former Secretary General of the UN, Kofi Annan, some months before the UN world summit in 2005.³⁹⁷ He emphasised that the international community should 'embrace the emerging doctrine of the R2P as a basis for collective action against genocide, ethnic cleansing and crimes against humanity.'³⁹⁸ Just like the reports of the ICISS and HLP, the Secretary General recognised that the R2P lies primarily with each individual state but where the national authorities are unwilling or unable to, the responsibility shifts to the international community.³⁹⁹ However, he recognised the 'sensitivities involved with this issue' and urged that the international community in exercising its responsibility should use 'diplomatic, humanitarian and other means to protect the civilian

³⁹¹ Ibid at para 29.

³⁹² Anne-Marie Slaughter 'Solidarity and Sovereignty: The Grand Themes of UN Reform' (2005) 99 (3) *AJIL* 619 at 628.

³⁹³ Ibid at 627.

³⁹⁴ See generally *Report of the High Level Panel* (note 390) at para 207.

³⁹⁵ Wheeler (note 371) at 96.

³⁹⁶ Ibid.

³⁹⁷ Brown (note 302).

³⁹⁸ *In Larger Freedom: Towards Development, Security and Human Rights for All* Report of the Secretary General (2005) UN Doc A/59/2005. Available at

<http://www.un.org/largerfreedom/contents.htm> [Accessed 16 February 2009].

³⁹⁹ Ibid.

population' and when this fails, the Security Council may take enforcement action in accordance with the UN Charter.⁴⁰⁰

It is worth noting that although the substance of the Secretary General's report were similar to those of the ICISS and the HLP, the precautionary criteria put in place to guide military intervention were excluded in his comments on the R2P.⁴⁰¹ The R2P doctrine was removed from the section dealing with the use of force and placed in the section dealing with the freedom to live in dignity.⁴⁰² This was to separate the idea of the R2P from an automatic equation to armed force.⁴⁰³ This was attributable to the fact that at the time of the Secretary General's report, there was significant opposition against the R2P doctrine and most notably by permanent members of the Security Council.⁴⁰⁴ The emphasis by the Secretary on the need to implement the R2P through peaceful means thus helped influence the normative context of the doctrine and paved way for the consensus reached at the World summit.⁴⁰⁵

4.4.4. The Responsibility to Protect, the 2005 World Summit and the Outcome Document

The most significant impact on the R2P doctrine was its inclusion into the agenda and outcome document of the 2005 UN world summit. Since the change in the language concerning humanitarian intervention had not generated a substantial consensus as had been expected - (a fact most attributed to the invasion in Iraq in 2003), the members of the ICISS lobbied hard to persuade states to adopt the R2P doctrine at the world summit.⁴⁰⁶ At the world summit, 191 Heads of State and Government sitting as the UN General Assembly deliberated upon the R2P.⁴⁰⁷ However, during negotiations at the summit, there was a mixed reaction amongst the states, which mirrored earlier concerns expressed towards the doctrine as postulated by the ICISS.⁴⁰⁸

During the debate at the world summit, many states opposed the R2P as a vague concept requiring further explanation to show what differentiates it from

⁴⁰⁰ Ibid.

⁴⁰¹ Brown (note 302).

⁴⁰² Stahn (note 294) at 107.

⁴⁰³ Ibid.

⁴⁰⁴ Brown (note 302).

⁴⁰⁵ Wheeler (note 371) at 96.

⁴⁰⁶ Bellamy (note 286) at 144.

⁴⁰⁷ Wheeler (note 371) at 96.

⁴⁰⁸ Stahn (note 294) at 107.

traditional humanitarian intervention.⁴⁰⁹ According to the Algerian representative, it was extremely difficult to differentiate the R2P particularly the responsibility to react from the idea of humanitarian intervention which the ‘countries from the south had formally rejected in 1999.’⁴¹⁰ Generally, the states belonging to the Non-Aligned Movement (NAM) severely criticised the R2P by excluding it as an emerging norm.⁴¹¹ The Malaysian representative speaking on behalf of the NAM argued that the R2P represented a ‘reincarnation’ of humanitarian intervention for which there was no basis in international law.⁴¹²

These states (NAM) emphasised that the R2P was a contradiction in the sense that on one hand it intended to reduce sovereignty in the name of universal humanitarian considerations and on the other hand it expanded sovereignty in the interventionist sense, thereby limiting the sovereignty of weaker states while reinforcing that of stronger states.⁴¹³ In particular, Venezuela argued that since the R2P was couched in a manner that allowed states the discretion to decide when to act, it would merely serve the interest of powerful states by granting them more freedom to act in the affairs of weak states without necessarily increasing global response to humanitarian emergencies.⁴¹⁴

While majority of African states chose not to give individual opinions at the summit regarding the R2P, only South Africa publicly endorsed the concept with Algeria, Tanzania and Egypt openly opposing it.⁴¹⁵ On the part of the Group of 77, although they offered no joint position on the R2P doctrine, they however suggested that the doctrine be revised to emphasise the principles of territorial integrity and sovereignty.⁴¹⁶ Pointing at the Iraq experience, many of these non-western states expressed concerns that any erosion or change in the traditional concept of sovereignty could only be used by the powerful states to impose their will on weaker

⁴⁰⁹ Focarelli (note 324) at 7.

⁴¹⁰ UN doc. A/59/PV.86 pg 9 cited in Focarelli (ibid).

⁴¹¹ Focarelli (note 324) at 7.

⁴¹² Brown (note 302).

⁴¹³ Focarelli (note 324) at 7.

⁴¹⁴ Statement by Hugo Chavez President of Venezuela at the General debate of the 60th session on the UNGA cited in A Bellamy (note 286) at 147.

⁴¹⁵ Bellamy (note 286) at 162.

⁴¹⁶ Brown (note 302).

developing states.⁴¹⁷ India argued that the Security Council was adequately empowered under the UN Charter to act in cases of humanitarian emergencies.⁴¹⁸

The R2P was also unequivocally rejected by powerful international actors such as China.⁴¹⁹ In addition, the R2P significantly failed to find absolute support from even its supporters who apart from contesting its endorsement by existing international law also emphasised that the responsibility to react with military force was to be undertaken by the Security Council.⁴²⁰ Particularly, the Russian representative stated that although the UN Secretary General had referred to the R2P as a doctrine reflecting an emerging norm, “strictly speaking, the establishment of an international norm presupposes that there is wide support within the international community for such a norm. However, this is not the case here.”⁴²¹

The position of the United States was reflected in a letter from the US Ambassador, John Bolton, to the UN while reacting to section of the R2P in the draft outcome document. He noted that although the international community had a role to play in cases involving genocide and other large-scale atrocities, the UN Charter had never been interpreted as creating a legal obligation for members of the Security Council to support enforcement actions in cases involving serious breaches of international peace.⁴²² While recognising that a state has a responsibility to protect its population, he noted that the responsibility of the international community is not of the same character as the responsibility of the host state.⁴²³

Accordingly, he suggests that the idea of an international responsibility to protect be defined in the form of a moral responsibility.⁴²⁴ On the part of other members of the Security Council (with the exception of China and Russia), although in support of the R2P, they expressed concerns about committing to any criteria and were unwilling to give up the practice of case by case decision making about intervening for humanitarian or other reasons.⁴²⁵ The combined resistance of these

⁴¹⁷ MacFarlane et al (note 377) at 983.

⁴¹⁸ Brown (note 302).

⁴¹⁹ MacFarlane, et al (note 377) at 983.

⁴²⁰ Focarelli (note 324 at 7).

⁴²¹ UN doc. A/59/PV.87, p. 6 cited in Focarelli (ibid).

⁴²² Letter from Ambassador John Bolton on the Responsibility to Protect (2005). Available at www.responsibilitytoprotect.org [Accessed 4 February 2009].

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ MacFarlane et al (note 377) at 983.

states towards the R2P destroyed any attempt to develop any agreed guidelines at the summit.⁴²⁶

However, amidst a highly controversial and difficult negotiation, the Heads of State and Government were able to endorse a qualified R2P in the outcome document of the summit.⁴²⁷ They affirmed that ‘each state had a responsibility to protect its population from genocide, ethnic cleansing, war crimes and crimes against humanity’ and that this responsibility entails the prevention and incitement of such crimes.⁴²⁸ With reference to the responsibility of the international community, their responsibility was limited to encouraging and helping the victim state (in exercising its responsibilities) through the UN by diplomatic, humanitarian and other peaceful means in accordance with the provisions of the Charter.⁴²⁹ Nonetheless, should these peaceful means prove inadequate and national authorities fail to protect their populations from those crimes, they expressed their preparedness to take collective action on a case-by-case basis through the Security Council in accordance with chapter VII of the Charter.⁴³⁰

The agreement reached at the summit is usually regarded as an important development to international law in the sense that it builds upon recent trends in international law and practice with respect to humanitarian intervention.⁴³¹ The inclusion of the R2P in the outcome document is said to undermine any objection that unilateral humanitarian intervention violates state sovereignty.⁴³² The argument has it that if states have no sovereign right to commit or permit gross atrocities against their population, then they cannot object on grounds of sovereignty to any humanitarian intervention undertaken to stop the commission of those atrocities.⁴³³ This is because although the outcome document gave priority to a Security Council authorised action, it did not expressly rule out unilateral humanitarian interventions.⁴³⁴

⁴²⁶Wheeler (note 371) at 100.

⁴²⁷ Jutta Brunnee and Stephen Toope ‘Norms, Institutions and the UN Reform: The Responsibility to Protect’ (2005/2006) 2 *Journal of International Law and International Relations* 121 at 126. See also Dorr (note 345) pg 190.

⁴²⁸ *World Summit Outcome Document* (note 151) at para 138.

⁴²⁹ *Ibid* at para(s) 138 & 139.

⁴³⁰ *Ibid* at para 139.

⁴³¹ Alicia L Bannon ‘The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism’ (2005/2006) 115 *Yale Journal of International Law* 1157 at 1158.

⁴³² *Ibid* at 1162.

⁴³³ *Ibid*.

⁴³⁴ Focarelli (note 324) at 6.

However, this interpretation of the outcome document does not seem to reflect the actual view of majority of governments who expressed concern regarding the effect of the doctrine on state sovereignty and insistence on prior Security Council authorisation of the use of force in order to prevent abuse of the R2P.⁴³⁵ In addition, the wordings of paragraph 139 of the outcome document instead of developing or acknowledging a new norm seems to suggest that the enforcement action in place under the Charter is adequate in dealing with issues of international peace and security.⁴³⁶

According to Alex Bellamy, in order to secure consensus, the advocates of the R2P abandoned many of its central tenets significantly reducing the likelihood of progress in future.⁴³⁷ For example, the document completely excluded the list of the precautionary principles earlier proposed by ICISS and HLP to guide military interventions.⁴³⁸ It fails to address the fundamental question of what should happen if the Security Council fails to authorise the use of force to prevent or end humanitarian crisis.⁴³⁹ Another shortcoming is that apart from limiting the responsibility to respond with military force to international crimes, it also required not merely the threat of commission, but the actual commission of these crimes.⁴⁴⁰ Generally, the outcome document sought to raise the threshold for international action by changing the terms warranting collective action from 'unable or unwilling to act' to use the term 'manifest failure'.⁴⁴¹

4.4.5. The Responsibility to Protect and Practice after the World Summit: Has a Norm Emerged?

Although many point to the inclusion of the R2P doctrine in the outcome document as a positive normative development concerning sovereignty, in reality, the outcome document did nothing to change the political reality.⁴⁴² One would have thought that its adoption showed a readiness of states and the international community as a whole to accept the R2P as a binding international norm. Practice however reveals

⁴³⁵Stahn (note 294) at 101.

⁴³⁶Bannon (note 431) at 1159.

⁴³⁷Bellamy (note 286) at 146.

⁴³⁸Brown (note 302).

⁴³⁹Wheeler (note 371) at 95.

⁴⁴⁰Brunnee and Toope (note 427) at 129-130.

⁴⁴¹Brown (note 302).

⁴⁴²Weiss (note 307) at 757.

otherwise.⁴⁴³ This is not however surprising because unlike the other documents dealing with the R2P, the outcome document no longer refers to it as an ‘emerging norm’.⁴⁴⁴ In addition, paragraph 139 of the outcome document, which reflects the responsibility of the international community, implies a voluntary rather than an obligatory responsibility.⁴⁴⁵ As the states commit themselves to act only on a ‘case-by-case basis’ through the Security Council, this rebuts any presumption of the universality of the R2P.

Given the possibility of the R2P to have a transformative impact on the traditional structure of state sovereignty, it is not surprising that although they agreed to its inclusion in the outcome document, many states have sought to limit the consequence of the R2P.⁴⁴⁶ Evidence shows that the East Asian states and regional organisations despite the R2P still cling firmly to the traditional principles of sovereignty and non-interference in internal affairs.⁴⁴⁷ On the part of the African region, although the R2P remains in substance a significant idea of the AU and some of its sub-regional organisations, there has been a departure from its earlier commitment.⁴⁴⁸ This is obvious in the Darfur situation where if the R2P was fully implemented implies an obligation of Sudan to protect its population and answerable to other states when it fails to discharge that responsibility.⁴⁴⁹ On the contrary, the African states together with the Arab League have insisted that the ‘campaign of terror’ sponsored by the Khartoum government was if not strictly a domestic matter, then one which only Africans had the right to engage in with the consent of the state.⁴⁵⁰

Furthermore, most states remain unconvinced about the legal status of the R2P.⁴⁵¹ This attitude was most notable in the actions of Latin American, African and Arab delegates to the UN Budget Committee in 2008.⁴⁵² These states stated that the

⁴⁴³ Gareth Evans ‘The Responsibility to Protect: An Idea Whose Time Has Come...and Gone?’ (2008) 22 (3) *International Relations* 283 at 288.

⁴⁴⁴ Focarelli (note 324) at 7.

⁴⁴⁵ Stahn (note 294) at 101.

⁴⁴⁶ Brunnee and Toope (note 427) at 128.

⁴⁴⁷ MacFarlane et al (note 377) at 982.

⁴⁴⁸ Evans ‘The Responsibility to Protect: An Idea Whose Time Has Come...and Gone?’ (note 423) at 289.

⁴⁴⁹ Brunnee and Toope (note 427) at 128.

⁴⁵⁰ Traub (note 83) at 79.

⁴⁵¹ Brown (note 302).

⁴⁵² Evans ‘The Responsibility to Protect: An Idea Whose Time Has Come...and Gone?’ (note 443) at 288.

General Assembly at the 2005 world summit had neither established nor adopted the R2P as a general principle of international law as paragraph 139 of the outcome document only charged the General Assembly to continue consideration of the R2P and its implications bearing in mind the principles of the Charter and international law.⁴⁵³ In essence, their argument was that paragraphs 138 and 139 of the outcome document were just about the protection of civilians from specific crimes rather than an endorsement of the concept of the R2P.⁴⁵⁴ In addition, both the governments of the United States and the United Kingdom have chosen to frame the R2P in terms of a political and moral principle.⁴⁵⁵

Since many states are unsure of the legal limits and practical consequences of the R2P, it will only become clearer through state practice which is at present relatively insufficient.⁴⁵⁶ This is because although the R2P has been dealt with in four documents which to an extent reflect *opinio juris* of states, these documents are however not binding and as such the intention of states will have to be confirmed through sufficient state practice to ground its validity in customary international law.⁴⁵⁷

So far the R2P has found its way in few Security Council Resolutions the first being resolution 1674 of April 26, which reaffirmed the provisions of paragraphs 138 and 139 of the outcome document.⁴⁵⁸ However, it should be noted that consensus was reached because the resolution specifically focused on the protection of civilian population in armed conflict and not in terms of humanitarian intervention.⁴⁵⁹ Subsequent resolutions authorising military force in Sudan also made reference to the R2P.⁴⁶⁰ In this regard:

The Security Council while recalling its previous resolution 1674 actually reaffirmed its strong commitment to the sovereignty, unity, independence and territorial integrity of Sudan and expressed its determination to work with the

⁴⁵³ UN General Assembly, Fifth Committee, 28th meeting, 4 March 2008 (GA/AB/3837) (United Nations, 2008) cited in Evans (note 443) at 288.

⁴⁵⁴ Evans (note 443) at 288.

⁴⁵⁵ Brown (note 302).

⁴⁵⁶ Brown (note 302).

⁴⁵⁷ Stahn (note 294) at 100-101.

⁴⁵⁸ Resolution 1674 UN SCOR 5430th Meeting UN Doc S/RES1674 (2006).

⁴⁵⁹ Focarelli (note 324) at 8.

⁴⁶⁰ Brown (note 302).

government of Sudan in full respect of its sovereignty to assist in tackling the various problems in Darfur.⁴⁶¹

As a result of these inconsistencies and ambiguities in the implementation of the R2P, the R2P should thus be regarded as ‘a political catchword that gained quick acceptance’ instead of as a legal norm.⁴⁶² The simple fact that the R2P was included in the outcome document does not prove the existence of a norm that has been genuinely accepted by states as having the capacity to influence state conduct with respect to their conceptions of state sovereignty.⁴⁶³

4.5. Conclusion

From the foregoing, it appears that there is no international law norm of the responsibility to protect which redefines sovereignty from control to responsibility. While new concepts may explain new realities, it does not follow that they are able to create new legal norms.⁴⁶⁴ Although as noted by the ICISS that there has been a growing gap between the practice of international behaviour as articulated in the charter whose language emphasised sovereign equality and independence and actual state practice as evolved since the charter was signed which emphasises limits on sovereignty, states continue to hold on to absolute sovereignty (that is sovereignty as control).⁴⁶⁵

As it stands the R2P does not create a binding norm in favour of humanitarian intervention and consequently is unable to avoid future Kosovos and future Rwandas.⁴⁶⁶ It therefore seems that that sovereignty as right (control) continues to take precedence over sovereignty as responsibility.⁴⁶⁷

⁴⁶¹ Resolution 1769 UN SCOR 5727th Meeting UN DocS/RES/1769 (2007).

⁴⁶² Stahn (note 294) at 101.

⁴⁶³ Brunnee and Toope (note 427) at 132.

⁴⁶⁴ Focarelli (note 324) at 3.

⁴⁶⁵ Evans ‘The Responsibility to Protect: Rethinking Humanitarian Intervention (note 2).

⁴⁶⁶ Gandois (note 357) at 8.

⁴⁶⁷ Kuah (note 319).

CHAPTER 5

SUMMARY AND CONCLUSION

Sovereignty is a concept which has over the last 500 centuries come to dominate our understanding of international life.⁴⁶⁸ It is deeply rooted legally and institutionally in numerous regional and international arrangements.⁴⁶⁹ It has contributed to international justice even if modestly by acting as a normative barrier against the predatory instincts of the more powerful states.⁴⁷⁰ The Westphalian system (that is sovereignty as control) with its implied tenets of non-intervention and the prohibition on the use of force has provided a measure of stability, predictability and order within the anarchic system of states for centuries.⁴⁷¹

However, with the passage of time, especially within the past 50 years, the concept of sovereignty has been seriously challenged.⁴⁷² It is true that state sovereignty has always been limited in one way or the other albeit with its consent or acquiescence. Practice reveals the consistent violation of the principle of non-intervention particularly in the face of gross human rights violations. Consequently, there have been various attempts by international law scholars to redefine the concept of sovereignty in order to bring it in line with practice by placing formal limitations on state sovereignty although the problem remains how to determine what new limits it has today.⁴⁷³

These attempts at redefining sovereignty usually emphasise the need to create a balance between human rights norms and sovereignty.⁴⁷⁴ This is so because international sensibilities regarding human rights and their violations have changed quite radically over the past 50 years and this reality can hardly be ignored.⁴⁷⁵ The most notable attempts to place formal limitations on sovereignty in the face of gross human rights violation has been the development of the norms of humanitarian intervention and the R2P. These norms propose that in certain circumstances, sovereignty as right gives way to sovereignty as responsibility, thereby creating a

⁴⁶⁸ Camilleri (note 44) at 33.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ayoob (note 14) at 92.

⁴⁷¹ Cronin (note 3) at 293.

⁴⁷² Camilleri (note 44) at 33.

⁴⁷³ Focarelli (note 324) at 3.

⁴⁷⁴ Vessel (note 162) at 18.

⁴⁷⁵ Ayoob (note 14) at 94.

necessary precondition for increased legitimisation of interventions even if the principle of non-intervention gets impaired in the process.⁴⁷⁶

However, in order for these norms to have the desired effect of overriding sovereignty as right, they must have attained the status of international law. As noted by the Permanent Court of International Justice, ‘the rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.’⁴⁷⁷ As noted in Chapter Two, humanitarian intervention is regarded as intrusive and is generally criticised as not being part of international law.⁴⁷⁸

With respect to the R2P doctrine, although it has found its way into four documents, a closer examination of these documents shows considerable divergences in opinion and the outcome document which is arguably the most authoritative in terms of its legal value leaves considerable doubt concerning whether and to what extent states intended to create a legal norm.⁴⁷⁹ Moreover, these documents are not legally binding as generating international law under the sources of international law envisaged in Article 38 of the statute of the ICJ.⁴⁸⁰ In addition, as seen from the previous chapter, there is actually no evidence of state practice concerning the R2P, as it has never been put into practice. On balance, most states and observers believe that it remains a political commitment.⁴⁸¹

Although no state doubts that populations should be protected from gross violations of human rights committed by their governments, nor do they totally exclude further and constructive discussions regarding collective interventions in cases of genocide, ethnic cleansing and crimes against humanity, it is the wish of most states that such deliberations must be consistent with the principles of sovereignty and non-intervention.⁴⁸² Without support from states as a whole, an emerging norm can hardly emerge and credibly be binding upon them.⁴⁸³ Therefore,

⁴⁷⁶Ibid at 18.

⁴⁷⁷ The *SS Lotus Case* (France v Turkey) [1927] PCIJ (Ser. A) No. 10 at 18-19.

⁴⁷⁸Simonovic (note 9) at 373.

⁴⁷⁹ Stahn (note 294) at 101.

⁴⁸⁰ Ibid. See also Brunnee and Toope (note 427) at 133.

⁴⁸¹ Brown (note 302).

⁴⁸² Focarelli (note 324) at 7.

⁴⁸³ Ibid at 2.

without sufficient state practice and *opinio juris*, restrictions upon the independence of states cannot be presumed.⁴⁸⁴

The failure of states to accept these norms as international law is basically because they have the potential of weakening the protections of territorial integrity and political independence guaranteed by traditional conceptions of state sovereignty.⁴⁸⁵ This in turn runs the risk of destabilising international order. According to Barkin and Cronin,

The historical legacy of the development of the state system has left a powerful institutional structure in the form of sovereignty one that will not be easily dislodged, regardless of changed circumstances in the material environment.⁴⁸⁶

Thus while it is true that sovereignty has undergone serious challenge, it is still taken to be the defining characteristic of states and of the international system and places constraints to the extent to which normative issues can be accommodated within international law.⁴⁸⁷ This is because in practice, 'there is almost always a yielding to sovereignty as a right in the endgame of real Realpolitik.'⁴⁸⁸ This is most notable by the fact that weak states continue to see the invocation of sovereignty in its absolute form as one of the few instruments still available to them to help discourage interventions by powerful states in their internal affairs.⁴⁸⁹ Conversely, powerful states particularly the US invoke sovereignty as a lever with which to impede the work of any multilateral institution bent on monitoring their activities or otherwise restricting their freedom of action.⁴⁹⁰

However, as the ICISS rightly noted, the defence of sovereignty as a right or in its absolute form even by its strongest supporters does not include the claim of unlimited power of the state to treat its population as it pleases.⁴⁹¹ Nevertheless, as practice shows, many states still experience serious human right abuses and most

⁴⁸⁴ The *SS Lotus Case* (note 477).

⁴⁸⁵ Vessel (note 162) at 18.

⁴⁸⁶ Barkin and Cronin (note 17) at 109.

⁴⁸⁷ Kuah (note 319)

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Focarelli (note 162) at 7.

⁴⁹⁰ Camilleri (note 44) at 37

⁴⁹¹ ICISS Report (note 7) pg 8 para 1.35.

states acquiesce in the face of this without any weakening of their sovereignty or any lessening of the international recognition of their sovereignty.⁴⁹²

Although public opinion, and the often cited precedents of state practice with regards to the violation of the principle of non-intervention, seems to have extended tolerance of the international community for the erosion of sovereignty, there has been no general acceptance of a right of humanitarian intervention or the R2P as norms which override Westphalian sovereignty.⁴⁹³ At present, the principles of sovereignty as control, non-intervention and the prohibition on the use of force remain privileged above other principles of international law particularly those relating to human rights.⁴⁹⁴

⁴⁹²Newman (note 247) at 118.

⁴⁹³William (note 288) at 110.

⁴⁹⁴Newman (note 247) at 108.

BIBLIOGRAPHY

Primary Sources

Cases

Barcelona Traction, Light and Power Co. Case (Belgium v Spain) [1970] ICJ Reports 3.

Island of Palmas Case (1928) 2 RIAA 829.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) [1986] ICJ Reports 14.

North Sea Continental Cases (Federal Republic of Germany v Netherlands /Denmark) [1969] ICJ Reports 3.

The SS Lotus Case (France v Turkey) [1927] PCIJ (Ser. A) No 10.

Statutes and Treaties

Charter of the United Nations (1945).

Constitutive Act of the African Union (2002). Available at <http://www.africa-union.org> [Accessed 31 March 2009].

Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277.

International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3.

Statute of the International Court of Justice 1946.

Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

Security Council Resolutions

Resolution 670 (1990) SCOR 670 2943rd Meeting on 25 September 1990.

Resolution 688 (1991) SCOR 668 2982nd Meeting 5 April 1991.

Resolution 794 UN SCOR 3145th Meeting UN Doc S/RES/794 (1992).

Resolution 814 UN SCOR 3188th Meeting UN Doc S/RES/814 (1993).

Resolution 1199 UN SCOR 3930th Meeting UN Doc S/RES/1199 (1998).

Resolution 1203 UN SCOR 3937th Meeting UN Doc S/RES/1203 (1998).

Resolution 1264 UN SCOR 4045th Meeting UN Doc S/RES/1264 (1999).

Resolution 1674 UN SCOR 5430th Meeting UN Doc S/RES/1674 (2006).

Resolution 1769 UN SCOR 5727th Meeting UN DocS/RES/1769 (2007).

General Assembly Resolutions

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (1965) G.A Resolution 2131 (XX) 21 December 1965.

Declaration on Principles of International Law Concerning Friendly Relations among States (1970) G.A Resolution 2625 (XXV) 24 October 1970.

Resolution on the Definition of Aggression (1974) G.A Resolution 3314 (XXIX) 14 December 1974.

Resolution for Strengthening of the Coordination on Humanitarian Emergency Assistance of the United Nations UN Doc A/Res/46/182 78th Plenary meeting 19 December 1991.

Secondary Sources

Official Reports and Documents

ICISS *The Responsibility to Protect*: Report of the International Commission on Intervention and State Sovereignty (2001) International Development Research Centre, Canada.

ICISS *The Responsibility to Protect: Research, Bibliography, Background* Supplementary Volume to the Report of The International Commission on Intervention and State Sovereignty (2001) International Development Research Centre, Canada.

ILC Draft articles on Responsibility of States for Internationally Wrongful Acts *Report of the 53rd Session ILC* (2001) GAOR 56th session Supp.10.

Letter from Ambassador John Bolton on the Responsibility to Protect (2005). Available at www.responsibilitytoprotect.org [Accessed 4 February 2009].

NATO *Dr Javier Solana Secretary General of NATO Press Statement Media Release*, (23 March 1999). Available at <http://www.nato.int/docu/pr/1999/p99-040e.htm> [Accessed 14 July 2009].

UN *In Larger Freedom: Towards Development, Security and Human Rights for All* Report of the Secretary General (2005) UN Doc A/59/2005. Available at <http://www.un.org/largerfreedom/contents.htm> [Accessed 16 February 2009].

UN *Report of the High Level Panel on Threats Challenges and Change, A More Secure World: Our Shared Responsibility* (2004) UN Doc A/59/565. Available at <http://www.un.org/secureworld/report.pdf> [Accessed 16 February 2009].

UN *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, UN Press Release SC/6659 (26 March 1999). Available at <http://www.un.org/News/Press/docs/19990326.sc6659.html> [Accessed 17 September 2009].

UN *We the Peoples: The Role of the United Nations in the Twenty-First Century* Report of the Secretary General (March 2000) UN Doc A/54/2000. Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf>. [Accessed 4 February 2009].

UN *World Summit Outcome Document* (2005). Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> [Accessed 31 January 2009].

Books and Articles

Adele Brown 'Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?' *Research Paper 08/55 17 June 2008*. Available at http://www.wiscnetwork.org/papers/WISC_2008-436.doc [Accessed 22 January 2009].

Adrian Kuah 'War in Iraq: Implications for Sovereignty' 2003. Available at <http://www.idss.edu.sg/publications/perspective/IDSS162003.pdf> [Accessed 3 August 2009].

Alex J Bellamy 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20 (2) *Ethics and International Affairs* 143.

Alex J Bellamy and Nicholas J Wheeler 'Humanitarian Intervention in World Politics' 2008. Available at <http://cadair.aber.ac.uk/dspace/bitstream/2160/1925/1/Wheeler%2c%20Bellamy.pdf> [Accessed 14 July 2009].

Alicia L Bannon 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism' (2005/2006) 115 *Yale Journal of International Law* 1157.

Amitai Etzioni 'Sovereignty as Responsibility' 2005. Available at <http://www.sciencedirect.com> [Accessed 31 March 2009].

Anne-Marie Slaughter 'Solidarity and Sovereignty: The Grand Themes of UN Reform' (2005) 99 (3) *AJIL* 619.

Brian D Lepard *Rethinking Humanitarian Intervention* (2002) Pennsylvania State University Press, Pennsylvania.

Bruce Cronin 'The Tension between Sovereignty and Intervention in the prevention of Genocide' 2007 *Human Rights Review* 293.

Carol Focarelli 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 (191) *Journal of Conflict and Security Law* 1.

Carsten Stahn 'Responsibility to protect: Political Rhetoric or Emerging Legal Norm' (2007) 101 *AJIL* 99.

David A Lake 'The New Sovereignty in international Relations' (2003) 5 (3) *International Studies Review* 303.

David Held 'The Changing Structure of International Law: Sovereignty Transformed?' Available at <http://www.polity.co.uk/global/pdf/GTReader2eHeld.pdf> [Accessed 22 February 2009].

- David Vessel 'The lonely Pragmatist: Humanitarian intervention in an Imperfect World' (2003/2004) 18 *B.Y.U Journal of Public Law* 1.
- Dino Kritsiotis 'Reappraising Policy Objections to Humanitarian Intervention' (1997-1998) 19 *Michigan Journal of International Law* 1005.
- Edward Newman 'Humanitarian intervention, Legality and Legitimacy' (2002) 16 *International Journal of Human Rights* 102.
- Eric Brahm 'Sovereignty' 2004. Available at <http://www.beyondintractability.org/essay/sovereignty> [Accessed 3 March 2009].
- Eric A Heinze 'Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice' (2006) 36 (1) *Parameters: US Army War College Quarterly* 20.
- Evaristus Baimu and Kathryn Sturman 'Amendment to the African Union's Right to Intervene: A Shift from Human Security to Regime Security' (2003) 12 (2) *African Security Review* 42.
- Fernando R Teson *A Philosophy of international Law* (1998) Westview Press.
- Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2005) Transnational Publishers Inc, USA.
- Gareth Evans 'From Humanitarian Intervention to the Responsibility to Protect' (2006/2007) 24 *Wisconsin International Law Journal* 703.
- Gareth Evans 'The Responsibility to Protect: An Idea Whose Time Has Come...and Gone?' (2008) 22 (3) *International Relations* 283.
- Gareth Evans 'The Responsibility to Protect: Rethinking Humanitarian Intervention' 2004. Available at [http://www.crisisgroup.org/home/index.cfm?id=2561\\$1=1](http://www.crisisgroup.org/home/index.cfm?id=2561$1=1) [Accessed 22 January 2009].
- Hedley Bull, Benedict Kingsbury and Adam Roberts (eds) *Hugo Grotius and International Relations* (1995) Clarendon Press, Oxford, London.
- Helene Gandois 'Sovereignty as responsibility to protect or African regional organisation as norm setters' (2005). Available at <http://oxford.academia.edu/documents/0001/2131/GandoisBISApaper2005.pdf> [Accessed 29 July 2009].
- Helmut Steinberger 'Sovereignty' *Encyclopedia of Public International Law* (2000) vol 4 Max Planck Institute for Comparative Public Law and International Law, Elsevier.
- Ian Williams 'Righting the Wrongs of Past Interventions: A Review of the International Commission on Intervention and State Sovereignty' (2002) 6(3) *International Journal of Human Rights* 103.
- Ivan Simonovic 'Relative Sovereignty of the Twenty First Century' (2001/2002) 25 *Hastings International and Comparative Law Review* 371.
- J L Holzgrefe, 'The Humanitarian Intervention Debate' in J L Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) Cambridge University Press, Cambridge.
- J Samuel Barkin and Bruce Cronin 'The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations' (1994) 48 (1) *International Organisation* 107.

Jackson Nyamuya Maogoto 'Westphalian Sovereignty in the Shadow of international Justice? A Fresh Coat of paint for a tainted Concept' in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) Ashgate Publishing Limited.

James Traub 'Absolute Fiction: The Perversion of Sovereignty' 2009 *World Affairs* 73.

Jean Bodin *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* Julian H Franklyn(ed) (1992) Cambridge University Press, Cambridge

Jean –Jacques Rousseau 'The Social Contract' in Nigel Warburton *Philosophy: The Classics* (1998) Routledge, London.

Jens Bartelson 'The Concept of Sovereignty Revisited' (2006) 17(2) *EJIL* 463.

Joelle Tanguy 'Redefining Sovereignty and Intervention' (2003) *Ethics and International Affairs* 141.

John H Jackson 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 *AJIL* 782.

Jonathan I Charney 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 32 *Vanderbilt Journal of Transnational Law* 1231.

Joseph Camilleri 'Sovereignty Discourse and Practise-Past and Future' in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) Ashgate Publishing Limited.

Jutta Brunnee and Stephen Toope 'Norms, Institutions and the UN Reform: The Responsibility to Protect' (2005/2006) 2 *Journal of International Law and International Relations* 121.

Kathryn Sikkink 'Human Rights, Principled Issue-Networks' (1993) 47 (3) *International Organization* 411.

Kelly Kate Pease and David P.Forsythe 'Human Rights, Humanitarian Intervention and World Politics' (1993) 15 *Human Rights Quarterly* 290.

Kofi Annan 'Two Concepts of Sovereignty' 1999 *The Economist*. Available at <http://www.un.org/News/oss/sg/stories/kaecon.html> [Accessed 3 March 2009].

Lassa Oppenheim *International Law A Treaties* Hersch Lauterpacht (ed) 8th ed. (1955) Longman, Green and Co.

Louise Arbour 'The responsibility to protect as a duty of care in international law and practice' 2008 *Review of International Studies* 445.

Malcolm N. Shaw *International Law* 5ed (2003) Cambridge University Press, Cambridge.

Martin Dixon *Textbook on International Law* 6ed (2007) Oxford University Press, Oxford.

Michael Ignatieff 'Intervention and State Failure'. Available at <http://dissentmagazine.org/article/?article=641> [Accessed 26 June 2009].

Michael J Smith 'Humanitarian Intervention: An Overview of Ethical Issues' 2006 *Ethics and International Affairs* 63.

- Michael Reisman 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) 11(1) *EJIL* 3.
- Mohammed Ayoob 'Humanitarian Intervention and State Sovereignty' (2002) 6 *International Journal of Human Rights* 81.
- Nicholas J Wheeler 'A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit' (2005-2006) 2 (1) *Journal of International Law and International Relations* 95.
- Noel Dorr 'The Responsibility to Protect-an Emerging Norm?' (2008)19 *Irish Studies in International Affairs* 189.
- Panu Minkkinen 'The Ethos of Sovereignty: A Critical Appraisal' 2007 *Human Rights Review* pg 33.
- Patrick Macklem 'Humanitarian Intervention and the Distribution of Sovereignty in International Law' (2008) *Ethics and International Affairs* 369.
- Penelope C Simons 'Humanitarian Intervention: A Review of Literature', Ploughshares Working Paper 01-2 pg 2. Available at <http://www.ploughshares.ca/content/working%20papers/wpo12> [Accessed 22 January 2009].
- R J Hamilton 'The Responsibility to Protect: From Document to Doctrine-But What of Implementation' (2006) 19 *Harvard Human Rights Journal* 289.
- Robyn Lui 'State Sovereignty and International Refugee Protection' in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) Ashgate Publishing Limited.
- Ruth Lapidoth 'Sovereignty in Transition' 2001 *Journal of International Affairs* 325.
- Ryan Goodman 'Humanitarian Intervention and Pretext for War' (2006) 100 *AJIL* 107.
- S Neil Macfarlane et al 'The responsibility to protect: is anyone interested in humanitarian intervention?' (2004) 25(5) *Third World Quarterly* 977.
- Samuel Makinda 'Sovereignty and International Security: Challenges for the United Nations' (1996) 2 *Global Governance* 149.
- 'Sovereignty' *Stanford Encyclopaedia of Philosophy*. Available at <http://plato.stanford.edu/entries/sovereignty> [Accessed 3 March 2009].
- Stephen D Krasner 'Sovereignty'2001. Available at www.foreignpolicy.com [Accessed 22 February 2009].
- Terry Nardin 'The Moral Basis of Humanitarian Intervention' (2002) 16 *Ethics and International Affairs* 57.
- Thelma Ekiyor 'Implementing the Responsibility to Protect Doctrine in Africa' (2007) FES Briefing paper. Available at http://www.responsibilitytoprotect.org/files/FESBP01-07_Ekiyor_R2P_in_Africa.pdf [Accessed 30 July 2009].
- Thomas G Weiss 'R2p After 9/11 and the World Summit' (2006/2007) 24 *Wisconsin International Law Journal* 741.

Thomas Hobbes *Leviathan* Richard Tuck (ed) (1991) Cambridge University Press, Cambridge.

Thomas J Biersteker and Cynthia Weber 'The Social Construction of State Sovereignty' in Thomas J Biersteker and Cynthia Weber (eds) *State Sovereignty as a Social Construct* (1996) Cambridge University Press, Cambridge.

Thomas W McShane 'International law and the New World Order: Redefining Sovereignty.' Available at <http://www.au.af.mil/au/awc/awcgate/army-usawc/strategy2004/04mcshane.pdf> [Accessed 3 August 2009].

Ulrich Beyerlin 'Humanitarian Intervention' in *Encyclopedia of Public International Law* (1995) vol 2 Max Planck Institute for Comparative Public Law and International Law, Elsevier.

Vesselin Popovski 'Essay: Sovereignty as Duty to Protect Human Rights.' Available at <http://www.un.org/pubs/chronicle/2004/issue4/0404p16.html> [Accessed 31 March 2009].

Wayne Hudson 'Fables of Sovereignty' in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (2008) Ashgate Publishing Limited.

Yoram Dinstein 'Sovereignty, the Security Council and the Use of Force' in Michael Bothe, Mary Ellen O'Connell & Natalino Ronzitti (ed) *Redefining Sovereignty: The Use of Force after the Cold War* (2005) Transnational Publishers USA.