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**Global responsibility: humanitarian intervention as a
justified mechanism to end post-conflict widespread and
systemic sexual violence**

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Introduction

Sexual violence and conflict go hand in hand. In ancient warfare, sexual violence was a common procedure, perceived as an inevitable consequence of war. Soldiers needed to ‘release’ after heavy fighting; sexual distraction would reward, motivate and relax them. In other words, sexual violence was seen as ‘collateral damage’ and was therefore never prosecuted as a crime. This practice started to change after the Second World War. In fact, at the moment the existence of sexual violence was internationally acknowledged, women’s rights gained recognition and several forms of sexual violence were classified. Finally, sexual violence was labeled as a ‘weapon of war’.¹

However, international sexual crimes – just like acts of domestic sexual violence – are difficult to prosecute due to shame and stigma, evidence issues, and the large scale on which sexual crimes are being committed. To illustrate, numbers of people raped during wartime reach heights of an estimated 20,000 in Yugoslavia, over 50,000 in Sierra Leone, and approximately 500,000 in Rwanda.² More recently, the numbers of people raped during the conflict in the Eastern DRC have led to controversy, as a research conducted by the American Journal of Public Health claims that in Congo every hour 48 women are raped.³ Rape statistics and the significance of an exact number are frequently questioned due to the large number of sexual crimes that remains unreported. In any event, the number is probably increasing as you read this.

In practice, every conflict remains accompanied by sexual violence and no substantive counter action has been undertaken as a response to counteract these horrid acts of inhumane behavior. Therefore impunity remains a major concern.⁴ Moreover, the occurrence of sexual violence seems to have increased during the aftermath of war. ‘Post-conflict’ does not imply the end of violence as most post-war societies suffer from a high number of human rights violations. More specifically, massive sexual violence increasingly seems to take place outside conflict zones;

¹ The UN Resolution 1820 on Women and peace and security (2008) describes rape as ‘a tactic of war’. Similar terminology has been used frequently in the media.

² These data are estimations derived from The Economist, ‘Violence against Women: War’s Overlooked Victims’, 13 January, 2011. Under the tabel ‘customary evil’. Retrieved from <http://www.economist.com/node/17900482> on 21 November, 2011. See also Human Rights Watch, ‘Shattered lives, sexual violence during the Rwandan Genocide and its Aftermath’, September 1996. See www.hrw.org.

³ Amber Peterman, Tia Palermo and Caryn Bredenkamp, ‘Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo’, *American Journal of Public Health*, June 2011, Vol. 101, No. 6, pp. 1060-1067.

⁴ It has been reported, amongst others, from; Europe and Japanese-held territories during World War I and II, Bangladesh, Vietnam, Sudan, Sierra Leone, the Democratic Republic of Congo, Algeria, Liberia, Colombia, Guatemala, East-Timor, Rwanda and former Yugoslavia and many more. See Anne Marie L.M. de Brouwer, ‘*Supranational Criminal Prosecution of Sexual Violence: the ICC and the practice of the ICTY and ICTR*’. School of Human Rights Research Series, Vol. 20, Intersentia, 2005, p. 3.

women and children in vulnerable states that are either balancing on the edge of falling into war or have just come out of war tend to experience a high level of sexual violence. For instance, according to Amnesty International, in Sierra Leone more women and girls have fallen victim to sexual violence after the conflict than during the civil war.⁵ This thesis focuses on widespread and systematic sexual violence in 'post-conflict' situations in particular. Influenced by the rise of human rights and an increasing attention for women's rights, the issue of sexual violence appears to be included in the transitional justice process. However, when it comes to sexual violence this transition is a myth! Even though the armed conflict may be 'over', widespread and systematic sexual violence continues. What is worse, states fail to respond.

The Uppsala Conflict Data Program has developed a Conflict Termination dataset, which provides a list of variables that indicate the termination of a conflict: victory, peace agreement, ceasefire agreement and other outcome.⁶ This leads me to question the following: if a certain group of people within the state is excluded from the termination process and the violence against them continues, can we really speak of 'post-conflict' violence?

In order, for an evident situation to be recognized as an armed conflict (and for international humanitarian law to apply), in modern law, two variables are used: first, the intensity of the violence, and second, the level of organization of the parties. If one of these requirements is not fulfilled, the conflict is considered to be but a mere disturbance.⁷ Internal disturbances are situations in which 'there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence.'⁸ Most likely, massive sexual violence fails to meet the requirements of an 'armed conflict'. However, from my point of view, it is out of place to categorize sexual violence as a 'mere disturbance' in case of sexual violence, since it is considered a grave international crime. Sexual violence in the aftermath of war falls through the cracks; it often exceeds the level of 'low-intensity' violence but, at the same time, fails to meet the requirement for classification as an 'armed conflict'.

While perhaps in legal terms, the 'post-violence phase' is no longer part of the armed conflict, reality proves otherwise. To illustrate, after the formal termination of the conflict, the violence

⁵ Amnesty International documented this phenomenon of post-conflict sexual violence as well in Northern Ireland, the former Yugoslavia and the DRC.

⁶ See: <http://www.pcr.uu.se/research/ucdp/datasets>. Accessed on 10 January, 2011.

⁷ Sylvain Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, 2009, Vol. 91, No. 873, p. 76.

⁸ *Ibid* p. 77.

and fighting continues, we cannot speak of a transition. Accordingly, the distinction between the conflict and the post-conflict phase is a mythical one and has been questioned frequently. Brian Orend has written quite extensively on *jus post bellum* and argues that many issues around post war justice are too focused on the word ‘post’.⁹ He writes: “the precise diagnose of ‘post’ is, truly, difficult – but by no means should this difficulty be thought to be a good reason to give up entirely on the task of providing belligerents with guidance during the termination phase”. According to Orend, during the termination phase of a conflict, the war has not ended; termination is just a different part of the process. Carsten Stahn supports and amplifies Orend’s viewpoint and states that the classical dichotomy of war and peace has lost its significance due to change of warfare and the place of war within law.¹⁰ Moreover, the amount of sexual violence that is committed during armed conflict (and remains unpunished) influences the occurrence of this dreadful type of violence in peacetime and vice versa. The subordinate position of women in peacetime is tightly connected to the status of women during an armed conflict.¹¹

In conclusion, irrespective of whether technically speaking it is peace or wartime, women are excluded from the transitional justice phase when sexual violence occurs on a large scale.¹² The rights of women are systematically violated and the state does not undertake any action. Therefore, the global community is entitled to interfere, even through a military intervention. However, advocating pro humanitarian intervention is a difficult legal, moral and political challenge.

The objective of this dissertation is to examine the possibility of a humanitarian intervention in case of widespread and systemic sexual violence outside armed conflict. In other words, if sexual violence takes place on a large scale, and the state fails to protect its women and girls, is a humanitarian intervention justified? The doctrine of humanitarian intervention was first introduced by Hugo Grotius (1583-1645), who stated that a war could be justified when waged to assist people who were suffering under great tyranny.¹³ For the purpose of this dissertation I comply with the definition as provided by J.L. Holzgrefe: “humanitarian intervention is the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending

⁹ Brian Orend, ‘Jus Post Bellum: A Just War Theory Perspective’, in Carsten Stahn (ed.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, T-m-c Asser press, 2008, p. 34.

¹⁰ Carsten Stahn, ‘*Jus ad bellum, jus in bello... jus post bellum?* – Rethinking the Conception of law of Armed Force’, *EJIL*, 2006, Vol. 17, No. 5, p. 926.

¹¹ LaShawn R. Jefferson, ‘*In War as in Peace: Sexual Violence and Women’s Status*’ in Human Rights Watch (HRW), *World Report 2004*.

¹² Nevertheless, throughout this dissertation I will refer to ‘post-conflict’ sexual violence.

¹³ Hugo Grotius, ‘*The Rights of War and Peace*’, Richard Tuck (ed.), Liberty Fund, 2005.

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”.¹⁴

The main question that this thesis seeks to address is as follows: “does the global community hold a responsibility to stop widespread and systemic sexual violence through the mechanism of humanitarian intervention?” I approach the research question from a legal normative perspective and analyse deep-rooted legal norms as sovereignty and human rights. However, as international law is a highly political field, addressing a political narrative it is crucial to explore the boundaries of humanitarian intervention.

One fundamental obstacle when arguing in favour of humanitarian intervention is the principle of non-intervention in international law. The conflict between sovereignty and human rights shall be addressed in the first chapter.

Chapter two draws upon the fundamental legal norms that are discussed in the first chapter, and further elaborates on the validity of humanitarian intervention. The main question that will be addressed is what space does international law offer for a humanitarian intervention? The argumentation is based on a theory developed by Jean Cohen who argues that sovereignty and human rights are both normative principles that have to be respected. The subsequent issue that is dealt with concerns the question of whether question post-conflict sexual violence is a crime that justifies intervention. Does sexual violence fit in the normative framework as set out by Jean Cohen? In order to strengthen my point, I shall further elaborate on exclusion of women and relate widespread and systematic sexual violence to the field of international criminal law. The legal qualification of a crime in international criminal law is indicative to determine whether a humanitarian intervention would be justified.

The final chapter analyses state responsibility of both the state in which sexual violence is committed and the community as a whole. Questions at the core of this chapter include: how much protection can be expected from a ‘weakened post conflict state’? Under which circumstances can and should the global community respect and invoke the principle of the responsibility to protect, and which mechanisms are available and suitable? In other words, do human rights hold a legal claim on the global community? Finally, I shall explore the space that

¹⁴J.L. Holzgrefe, ‘The Humanitarian Intervention Debate’ in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal and Political Dilemma’s*. 2003, p. 18. This definition was drafted in cooperation with Alan Buchanan.

political science affords to humanitarian intervention and how this relates to the legal concept of humanitarian intervention.

1. Conflicting Concepts: Sovereignty and Human Rights

The Second World War led to a reflection and reconceptualization of international law as this had failed to prevent or stop the systematic killings of millions of Jews and other target groups. Gross human rights violations had taken place while the international community stood by. Horrendous atrocities were committed and it was agreed that this should never happen again.¹⁵ Consequently, shortly after the war, two important documents entered the international law arena: the Charter of the United Nations (UN Charter) in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948. The fundamental difference between these documents is that the Charter applies to states, whereas the Declaration is concerned with the rights of individuals. It is precisely because of this difference in focus that these documents, or the implementation thereof, can clash.

Enforcing international human rights law through humanitarian intervention clashes with the principle of sovereign equality which, according to the UN Charter, is a fundamental value in international law. Accordingly, it is illegal for a state to interfere in the internal affairs of another state. Over the course of centuries, sovereignty evolved to become a leading principle in international law, codified in article 2(1) of the UN Charter. However, nowadays sovereignty is also negatively associated with violence and armed conflict as it seems to give states a licence to act freely.

Ironically enough, applying the sovereignty principle to the Second World War would not have made much of a difference. Namely, on the one hand, the principle of sovereignty affirms that Nazi-Germany breached international law by invading surrounding countries and enforcing their brutal regime upon them. However, on the other hand, the right to sovereignty has a correlative duty: non-intervention. It implies the illegality of entering a country which itself has enacted a policy that violates human rights. This chapter addresses and reflects upon the antagonism between sovereignty and human rights through an in-depth analysis of both concepts.

1.1 *The impact of sovereignty*

Sovereign equality is one of the founding principles of international law. Emmerich de Vattel famously stated that “a dwarf is as much a man as a giant; a small republic is no less a sovereign

¹⁵ The Nuremberg and Tokyo Trials were established so perpetrators could be held individually liable and crimes against humanity would never again go unpunished.

state than the most powerful kingdom”.¹⁶ In other words, all states are equal and weaker states have to be protected against stronger states. Sovereignty was first formally recognized and connected to the territorial state with the signing of the Peace of Westphalia in 1648.¹⁷ It contained two main principles that constitute a normative core in contemporary international law: first, the government of each country is unequivocally sovereign within its territorial jurisdiction (internal sovereignty), and second, states shall not interfere in each other’s domestic affairs (external sovereignty).¹⁸ It is independent from other countries and holds legal personality in international law.¹⁹ Within the state, the sovereign holds the absolute power. Hence, full sovereignty implies both internal and external sovereignty. In order to examine the legality and legitimacy of a humanitarian intervention, we need to determine how absolute external sovereignty is. If external sovereignty is perceived as an intrinsic right of the state, foreign intervention is never a legitimate option.

Sovereignty is a multidimensional concept, it occurs in several principles, including law and politics. Both disciplines will be briefly examined. 21st Century sovereignty is entrenched in multiple sources of international law: treaties, general principles of law and international customary law. Sovereign equality is a core element in international law. It serves as a foundation for other international rules, for example the principle of non-intervention (article 2 (4) UN Charter), self-determination and self-defence (art 51 UN Charter). Article 2 (1) of the UN Charter, the ‘mother of treaties’, states that ‘the Organization is based on the principle of the sovereign equality of all its Members’.²⁰ The Friendly Relations Declaration further explains the Charter and lists various aspects of the principle of sovereign equality. It proclaims that “states are judicially equal”, that “each state enjoys the rights inherent in full sovereignty”, and that states hold “the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter”.²¹

¹⁶ Emmerich de Vattel, *Law of Nations*, Preliminaries, Section XVIII, 1759.

¹⁷ The peace of Westphalia of 1648 ended the wars of religion between the protestant and catholic states and gave rise to a recognize era of nation state dominance.

¹⁸ Seyom Brown, *International Relations in a Changing Global System: Toward a Theory of the World Polity*, Westview, 1996, p. 74.

¹⁹ Timothy Endicott, ‘The Logic of Freedom and Power’, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University press, 2010, p. 252. Endicott states that sovereignty and human rights are not in conflict. A state can just never be completely independent. A state would be constrained if it cannot enter into contracts. Therefore it can never be completely independent. Endicott seems to accept that sovereignty can be lost.

²⁰ By virtue of Article 103 of the Charter of the United Nations, an obligation under the Charter is prevalent over an obligation arising out of any other international agreement.

²¹ Declaration on Principles of International Law Friendly Relations and Co-operation amongst States in Accordance with the Charter of the United Nations, 1970.

However, the Charter itself provides an exception to the non-intervention principle in art 39 of the UN Charter.²² ‘It states that: “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”. This article implies that in certain situations the law provides a possibility to ‘escape’ the sovereignty principle. Despite the fact that article 39 is ambiguous as it neither gives any limitations nor lists specific situations in which the Security Council is entitled to undertake action, it does show that sovereignty is not absolute.

Not only law, but also political science provides an insight in the scope of external sovereignty. There are two opposing theories within political theory; realism and liberalism. Traditionally, sovereignty has been dominated by the realist paradigm, which argues that states continuously strive for power, and that sovereignty regulates that power.²³ For the realist, the state has the supreme inalienable authority, as it is the only body with control over its own territory. A realist would agree that without a strict interpretation of the non-intervention principle, the concept of state sovereignty would be an empty shell. This refers to a concentration of power within the state regulating the country, and it implies exclusive jurisdiction and the monopoly on the use of force within state borders. In the realist view, the existence of a sovereign power guarantees peace, stability and security. Political theorists such as Jean Bodin and Thomas Hobbes stressed the urgent need for internal order and envisioned sovereignty as absolute, unconditional and extending to all matters within the territory.²⁴ Bodin notoriously stated that sovereignty is the “Republic’s absolute and perpetual power”.²⁵ Hence, absolutists envision sovereignty as an all-embracing right, which cannot be restricted by any other power.

A contrasting theory is cosmopolitanism, which advocates for a total abandon of the principle of sovereignty. Cosmopolitan theorists perceive sovereignty as a power that is unrestrained by law and therefore conflicts with international enforcement of human rights.²⁶ For example, Michael Ignatieff and Robert Keohane argue that the international protection of human rights overrides

²² Scholars have argued that UN Charter itself violates the sovereignty principle by providing exemptions on the non-intervention principle in articles 39 and 51. In addition, the decision-making procedures in the Security Council appear not to be deviated from the equality principle as the weight of votes differs per country. See Max Planck Encyclopedia of International Law (online).

²³ Kenneth Waltz, *Theory of International Politics*, McGraw Hill, 1979.

²⁴ Thomas Hobbes argues that more than one sovereign in a Commonwealth set up a Supremacy against the Sovereignty; Canons against Lawes; and a Ghostly Authority against the Civil’ in *Leviathan*, 1651, p. 370. See also: Samuel von Pufendorf, *On the duty of Man and Citizen*, 1682, p. 146.

²⁵ Jean Bodin, *Six Books on the Republic*, 1576.

²⁶ Jean Cohen, ‘Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective’, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University press, 2010, p. 263.

the sovereignty principle.²⁷ I follow Thomas Pogge in my understanding of cosmopolitanism, which he describes as a global legal order that references individuals and which is based on the principle of equal worth and dignity of all human beings.²⁸ Realist theorists argue that cosmopolitanism inevitably leads to violence and war as outside authorities are thought to be dangerous.²⁹

Less radical than cosmopolitanism but also opposing realism is the liberal idealistic approach, which distinguishes between levels of matters that fall either within or outside the scope of sovereignty. They argue that internal sovereignty itself limits the absoluteness of sovereignty as political legitimacy is given by the people. With the rise of democracy, 'popular sovereignty' has gained increasing territory in modern politics. It reflects the subjective will of the community, which has agreed, to a social contract to create a sovereign power acting in the name of society.³⁰ If the legitimacy of external sovereignty is conditioned on the state's internal political order, sovereignty is no longer legitimized by domestic law, but by international human rights law.³¹ Kurt Mills emphasizes the distinction between powers and rights and denotes that "human rights are the enemy of power".³² Taking this as a starting point, absolute external sovereignty seems contradictory.

1.2 The value of human rights

Human rights are a special kind of rights. They are natural rights, given to all, by the virtue of being human. Natural rights even exist without codification in positive law. John Locke is a clear example of a natural law theorist; he argued that, in the 'state of nature', men have certain rights ('life, liberty and estate'), which limits the legitimate authority of the state.³³ A contemporary example is libertarian Robert Nozick who famously stated that "individuals have rights... so strong and far-reaching that they raise the question of what, if anything, the state and its officials

²⁷ Danilo Zolo gives a brief but clear overview of three possible arguments that are forwarded by theorists in order to support the legitimacy of humanitarian intervention. See, Danilo Zolo, 'Humanitarian intervention', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University press, 2010. The cosmopolitan argument is the most radical one. Also see Michael Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, 2003. Also see Robert Keohane, 'Political Authority in Humanitarian Intervention' in Holzgrefe and Keohane (eds.), *Humanitarian Intervention, ethical, legal and political dilemmas*, 2003.

²⁸ Thomas Pogge, 'Cosmopolitanism' in Robert E. Goodin, Philip Petit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy*, Wiley Blackwell, Second Edition, 2012.

²⁹ Carl Schmitt is one of the most well-know realists. See for example Danilo Zolo, *Invoking Humanity: War, Law and Global Order*, Continuum, 1992, pp. 38-42. Zolo's arguments are based on Carl Schmitt's 'anti-humanist' thinking.

³⁰ For example, Thomas Hobbes, John Locke and Jean-Jaques Rousseau. Even though this political thinking originates from the Enlightenment period, it remains the core justification for internal sovereignty.

³¹ Anne Peters, 'Humanity as the A and Ω of Sovereignty', *EJIL*, 2009, Vol. 20, No. 3, p. 521.

³² Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty*. MacMillan Press Ltd, 1998, p. 38.

³³ John Locke, *Two Treatises of Government*, 1689.

may do”.³⁴ In other words, natural rights are considered to be beyond the authority of any government or international body to dismiss.

Human rights ground both legal and moral claims. It is the latter that makes them different from any other right. Jack Donnelly states that “human rights do imply a manifesto for political change, but this does not make them less truly rights; it simply underscores that they are human rights, not legal rights”.³⁵ He means that human rights reflect on the rights one ought to have; even an unenforced right is a human right.

Human rights claim to be universal. However, the ‘universality’ of human rights is problematic in the sense that it creates unity amongst human species that are divided and diverse. Anne Orford speaks of a ‘fantasy’; human rights generate an imaginary sense of shared identity amongst all the right-bearers.³⁶ She refers to Freud’s exploration of an ‘oceanic feeling’, and states that human rights initiate feelings of limitlessness and wholeness.³⁷ However, as described earlier, human rights have to share the stage with other normative principles such as sovereignty. Moreover, the scope and justification of human rights are not universally agreed upon. For the purposes of this dissertation it is sufficient to assume the existence of human rights. It is not my intention to further elaborate in detail on the philosophical foundations and justifications of human rights. The bottom-line is that human rights are often considered the most important of all rights and are therefore highly valued.³⁸ In daily life, people usually speak of human rights when emphasizing the gravity of abuse or injustice.

Nowadays, there is a substantial body of international human rights law. They are integrated into international customary law, general principles of law and a range of international human rights treaties. The ‘juridical revolution’ of human rights started with the establishment of the United Nations and its Charter.³⁹ Art 55 of the Charter imposes a duty on all its member states to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, gender or religion”. Shortly afterwards, the Universal Declaration of Human Rights came into existence in 1948. Since then, numerous human rights treaties have been ratified, both internationally and regionally. Ratification of a treaty diminishes

³⁴ Robert Nozick, *Anarchy, State and Utopia*, Basic Books, 1974, p. ix.

³⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, 1989, p. 15.

³⁶ Anne Orford, *Reading Humanitarian Intervention*. Cambridge University Press, 2001, p. 212.

³⁷ Sigmund Freud, ‘Civilization and its Discontents’ in James Strachey (ed.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Volume XXI, 1961, p. 64.

³⁸ Donnelly, *supra* n. 36, p. 13.

³⁹ Michael Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, 2003, p. 5.

state sovereignty and decreases national power.⁴⁰ The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966 are core treaties that are widely implemented on a national level. In Europe, America and Africa, regional treaties have come to exist. What is interesting about these, is that they are connected to enforcement mechanisms where nowadays providing individuals with *locus standi*. To clarify, European citizens have access to the European Court of Human Rights and American citizens are able to issue complaints at the InterAmerican Court of Human Rights.⁴¹ In Africa, a similar tendency is on the rise. In 1986, the African Charter on Human and People's Rights came into effect. The African Court on Human and Peoples' Rights (African Court) was established by the Protocol to the African Charter on Human and Peoples' Rights, which was adopted by Member States of the then Organization of African Unity (OAU) in 1998. For our purposes, article 34(6) is particularly interesting.⁴² It holds that individuals are only able to access the Court when their state has made a declaration pursuant to article 34(6). However, as one commentator remarks, "one need not be extensively versed in African politics to gauge the likelihood of African states making an extra effort to provide their citizens and civil society groups with avenues through which to hold them accountable".⁴³

1.3 The evolution of human rights

Despite the increased attention for human rights and its codification in international law, sovereignty continued to prevail over human rights during the decades after 1945. Since humanitarian justifications were previously abused for the purposes of warfare, the non-intervention principle remained the norm. During the Middle Ages, intervention was justified by religious reasons. The reason for the Crusades to start a war was to enable people to benefit from Christianity, thereby improving their lives. Later, during periods of colonization, conquest was justified by the 'spread of civilization'.⁴⁴ More recent, Hitler invaded Czechoslovakia on

⁴⁰ See: Jack Donnelly, 'Human rights, human crisis and humanitarian intervention', *International Journal*, 1993, Vol. 48, No. 4, pp. 607-640.

⁴¹ Complainants can only be nationals to a member of the Council of Europe or the Organization of American States.

⁴² This is also emphasized by Max du Plessis in 'The African Union' in John Dugard, *International Law: a South African Perspective*, 2012, p. 561.

⁴³ J. Harrington, 'The South African Court on Human and Peoples' Rights' in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006*, Cambridge University Press, p. 305.

⁴⁴ Tzvetan Todorov, 'Right to Intervene or Duty to Assist?' in Nicholas Owen (ed.), *Human Rights Human Wrongs*. Oxford University Press, 2003, p. 30.

ostensibly humanitarian grounds in 1939, as German troops entered Czech territory to ‘protect the oppressed minority’.⁴⁵

Later, during the Cold War, despite the existence of the UN Charter and the UDHR, there was no space for human rights – they held a subordinate position. The division between east and west, and the ideological conflict that went together with that predominated international relations. A total outbreak was avoided by holding on to the sovereignty concept and the principle of non-intervention.⁴⁶ Generally, in times of war, human rights do not have priority and every party violates human rights. Ignatieff illustrates it aptly by stating that:

“It is unsurprising that human rights should have occupied a marginalized place in the institutional order of the Cold War. No group of nations had any interest in encouraging domestic scrutiny for their human rights performance. The Americans had Jim Crow to hide. The Russians dirty secret was the Gulag. The ruling elites of newly emerging nations of Africa and Asia exploited the new language of non-interference to prevent external scrutiny of their domestic records”.⁴⁷

After the Cold War, international relations changed drastically. The collapse of the Soviet Union increased the sense of global unity and democratization. Capitalism strengthened, multinational companies became more powerful and world trade increased.⁴⁸ The effects of globalization on human rights are disputed.⁴⁹ But under influence of globalization, the human rights discourse certainly gained more momentum. These developments lead to the rise of human rights organizations such as Amnesty International and Human Rights Watch who in their turn had a major impact on the status of human rights.⁵⁰

Post-Cold War, a new type of warfare emerged often categorized as ‘new wars’.⁵¹ A high number of civilian casualties and brutal methods of war such as sexual violence as a ‘weapon of warfare’ characterize contemporary warfare. Suddenly, due to global media, the internet and the previous

⁴⁵ Michael Ignatieff, ‘Human Rights, Sovereignty and Intervention’, in Nicholas Owen (eds.), *Human Rights Human Wrongs*, Oxford University Press, 2003, p. 52.

⁴⁶ Michael Newman, *Humanitarian Intervention: Confronting the Contradictions*, Hurst, 2009, p. 38.

⁴⁷ Ignatieff, *supra* n. 45, p. 54.

⁴⁸ David L. Cingranelli & David L. Richards, ‘Respect for Human Rights after the End of the Cold War’, *Journal of Peace*, Vol. 36, No. 5, p. 515.

⁴⁹ For example, Susan George states that besides an economic definition, we need a political definition as well. George sees globalization as a product of neo-liberalism that is only beneficial to a small percentage of the human population and defines it as ‘survival of the fittest’: globalization is a process that allows the world market economy to take the best and leave the rest. Susan George, *Whose Crisis, Whose Future*, Polity Press, 2010.

⁵⁰ Ignatieff, *supra* n. 45, p. 55.

⁵¹ Mary Kaldor, *New and Old Wars*, Stanford University Press, 1998.

mentioned rise of human rights organizations, human suffering reached into our homes. Despite it demonstrates a lack of respect towards human rights, it also created awareness of human rights issues. The world realized that these 'new wars' require a different interpretation of international law and human rights law became more important. Ignatieff states that "the Charter was drafted in an interregnum when the Holocaust and the Red Terror existed in a kind of suspended animation, not yet the defining crimes they were to become in the 1970's and 1980's".⁵² In other words, when the UN Charter was drafted, they had no idea of the brutalities that were going to take place. If they would have known what was still to come, they would have dedicated more space to human rights.

The Helsinki Act, addressing both sovereign equality and human rights, had already been signed and ratified in 1970 to improve relations between the Communist bloc and the West. Post-Cold War it had begun to mean something. The Act intensified the contradiction between human rights and sovereignty as human rights started to play a bigger role. In the early nineties, the human rights discourse received significant attention and became a priority on the international agenda. To illustrate, between 1990 and 1994, the Security Council passed twice as many resolutions as it had done in 45 years of existence.⁵³ Human rights principles were implemented in national legislation, the United States promoted human rights abroad and the United Nations for the first time actively reacted against human rights violations.⁵⁴

1.4 Responsibility for human rights

The concept of human rights is tightly bound with human solidarity. As human rights violations continue to take place all around the globe, the question rises: "is human solidarity a myth"? Political scientists have offered different answers to this question. A rough division can be made between theorists of human solidarity that have rejected the impact of state borders to decide moral responsibility and those who hold on to a statist paradigm that believes states should not act as moral agents. From my point of view, the concept of human rights in itself argues against the statist paradigm. The international and universal character of human rights implies an international type of responsibility in case a states fails to protect the human rights of its people. Hence, the value of human rights can be derived from the level of protection that is offered

⁵² Ignatieff, *supra* n. 45, p. 53.

⁵³ Thomas G. Weiss, 'The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era', *Security Dialogue*, 2004, Vol. 35, No. 2, p. 136.

⁵⁴ The intervention in Kosovo is the clearest example.

which depends on the extent of human solidarity. This raises a question: how can a state sincerely value international human rights when it fails to act when witnessing ‘human wrongs’?

As Rickard Rorty puts it: “what we mean by ‘human solidarity’ is to say that there is something within each of us – our essential humanity – which resonates to the presence of this same thing in other human beings”.⁵⁵ It lays at the core of humanity that what we want for ourselves, we also want for others. But, if human suffering takes place on the other side of the world, and the state violates human rights itself or fails to prevent human rights violations, should we still care? Without taking into account the political motivations of the intervening state, I shall briefly touch upon the level of solidarity that, from a moral perspective, may be expected from other states. The question here is not ‘do they care?’ but ‘should they care?’ The political aspect of agency shall be discussed in chapter three.

Nicholas Wheeler endeavours to examine the views of anti-statist theorists and distinguishes foundationalist from non-foundationalist theories. The latter rejects humanity as an intrinsic nature and rather focuses on the ‘we’ feeling that manifests itself within societies and communities. Similarly, Richard Rorty sees human solidarity as socially constructed, because it all depends on who is included and who is perceived as an outsider. Rorty argues that people tend to relate more to people within their social circle as they are one of ‘us’ whereas people further away are more likely to be regarded as ‘others’.⁵⁶ Wheeler correctly points out that the tension in this theory concerns the enlargement of the ‘we’ feeling and the possibility of community building towards human kind as a whole.⁵⁷ According to Rorty, there is friction between universalism and communities which prevents the existence of a ‘cosmopolitan self’. However, he does acknowledge that human solidarity is likely to increase in case of realization that similarities between people outweigh the differences. Wheeler sympathizes with Rorty who states that “the prospect for the global ‘human rights culture’ depends upon how far ‘we’ come to feel the suffering and pain of others by imagining ourselves in the ‘shoes of the despised and oppressed’ and coming to realize what it is like to be in her situation – to be far from home among strangers”.⁵⁸ This reasoning seems to point more towards a foundationalist theory which argues that there is indeed a shared sense of humanity.

⁵⁵ Richard Rorty, *Contingency, Irony and Solidarity*, Cambridge University Press, 1989, p. 189.

⁵⁶ Richard Rorty, ‘Sentimentality and Human Rights’ in Stephen Shute and Susan L. Hurley (eds.), *On Human Rights*, Basic Books, 1993, p. 126.

⁵⁷ Nicholas J. Wheeler, ‘Agency, Humanitarianism and Intervention’, *International Political Science Review*, 1997, Vol. 18, p. 17.

⁵⁸ Rorty, *supra* n. 56, p. 127, 133

Foundationalists believe in a core sense of humanitarianism that makes us want for others as we want for ourselves. Bhikhu Parekh expresses himself clearly when stating that “in being a citizen I do not cease to be a human being; to the very contrary my citizenship expresses and articulates my humanity. My citizenship can therefore not absolve me from my moral obligations to other human beings wherever they may happen to live”.⁵⁹ Michael Waltzer holds a similar point of view and argues that historical and social circumstances do not play a role in humanitarianism. He writes: “we are capable of giving expression to a universalist moral code because the struggles and suffering of others resonate with our own particular histories, values and experiences”.⁶⁰ In other words, we all hold a core sense of humanity that is unaffected by distance, culture and history. Humanitarian intervention then becomes a moral necessity.

1.5 Conclusion

Human rights law has become an established field in international law. As human rights have gained prominence on the international agenda, international humanitarian law and human rights law have become increasingly intertwined. Thus, individual values have to find a place in a complex legal field that is dominated by states and regulated by fundamental values such as sovereign equality and non-intervention.

Both human rights and sovereignty have to be taken seriously. Sovereignty prevents the re-occurrence of colonialism, while a total abandonment of the sovereignty principle leads to imperialism. The African Charter is illustrative in this matter as it explicitly emphasizes territorial sovereignty due to a history of mass colonization. In that sense, sovereignty is a ‘weapon of the weaker states’. However, a strict interpretation of sovereignty does not fit into contemporary international law and politics. Sovereign equality stands little chance of affecting behavior if it tries to exclude human rights, as they have gained an important status in contemporary international law and are legally binding. Moreover, it actually decreases the value of the principle as it becomes opportunistic and ambiguous.⁶¹ If the context changes, sovereignty has to be reconstructed accordingly to avoid becoming a useless norm. Scholars have proposed different interpretations of a ‘new sovereignty’, I briefly touched upon a few of them. What is important for the purpose of this thesis is that the realist perspective on sovereignty as absolute appears to be outdated due to individualization, globalization and cosmopolitanism. Instead, the state should

⁵⁹ Bhikhu Parekh, ‘Beyond Humanitarian Intervention’, in H. Cullen, D. Kritsiotis and N. Wheeler, (eds.), *Politics and Law of Former Yugoslavia*, European Union Research Unit, University of Hull, 1993, p. 19.

⁶⁰ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, University of North Dame Press, 1994, p. 8.

⁶¹ Mills, *supra* n. 32.

be able to protect human rights and use sovereignty as an instrument to achieve this goal. The language of international law is often used in an opportunistic manner that increases the sense of antagonism.⁶²

Ignatieff states: “what do we do? If human rights are universal, violations are our business.”⁶³ He also points out that sovereignty and human rights will and should remain antagonists, which is the power of the concepts.⁶⁴ It is finding the balance that leads to complexities. Analysis of both concepts has shown that sovereignty allows space for humanitarian intervention. The second chapter will provide a theoretical framework to support this statement.

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⁶² W. Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’, *AJIL*, 1990, Vol. 84, p. 847.

⁶³ Ignatieff, *supra* n. 39, p. 40.

⁶⁴ Ignatieff, *supra* n. 45, p. 58.

2. Validity of Humanitarian Intervention

The previous chapter illustrated the friction between sovereignty and human rights by providing an in depth look into both concepts. This chapter continues to build on the conflict between the two normative concepts and seeks to find a legitimate base to justify humanitarian intervention. To explore the dichotomy between law and ethics, both seemingly incompatible norms have to be further scrutinized with the purpose of providing a theoretical framework to support the validity of a humanitarian intervention. For this purpose, I propose Jean Cohen's theoretical proposition in favour of humanitarian intervention. The application of her theory leads to the conclusion that humanitarian intervention has a significant place in international law and cannot be precluded due to a lack of legality.

2.1 Lack of legal basis for humanitarian intervention

As mentioned before, the non-intervention principle as described in article 2 (4) of the UN Charter is a fundamental principle in international law. However, in two situations the use of force is lawful; in case of self-defence (article 51 UN Charter) and when authorized by the Security Council (article 39 UN Charter). As only the latter option is relevant in relation to humanitarian intervention. The Security Council is only allowed to take measures when the international peace and security is threatened.⁶⁵ However, the legal right to undertake action when the international peace and security is threatened does not imply a right to humanitarian intervention per se as it is not explicitly mentioned as a specific measure.⁶⁶ Only in certain circumstances can humanitarian intervention as exercised by the United Nations be necessary and proportional and therefore justified under international law.⁶⁷

However, a 'constitutional approach' towards the UN Charter does offer an opportunity to support a right to humanitarian intervention.⁶⁸ In the *Admissions* case, the ICJ attributed a

⁶⁵ The wording 'international peace and security' implies that the Security Council only is allowed to intervene in international conflicts.

⁶⁶ David Lefkowitz explains it as follows: 'It does not follow from an agent having the right to X that the agent is morally or legally permitted to X in whatever way he chooses. Other rights or values may limit the means by which the agent can exercise his right to X. In 'On moral arguments against a legal right to unilateral humanitarian intervention', *Public Affairs Quarterly*, 2006, Vol. 20, No. 2, p. 117.

⁶⁷ Unilateral humanitarian intervention (not authorized by the United Nations) on the other hand seems to lack a legal fundament (legal realist have found ways to interpret international law in a way that it does provide a legal base for unilateral humanitarian intervention). Potential agents of humanitarian intervention will be discussed in chapter three.

⁶⁸ Bartram S. Brown, 'Humanitarian Intervention at Crossroads', *William and Mary Law Review*, 2000, Vol. 41, Issue 5, p. 1707.

constitutional character to the UN Charter.⁶⁹ Judge Alvarez asserted: “the preparatory work on the constitution of the United Nations Organization is of but little value. Moreover, the fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements, which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life”.⁷⁰ Surely, Alvarez’ point is progressive but he touched upon a very valid point. The UN Charter was drafted in 1948. Throughout time, international relations changed. International law should be interpreted according to contemporary international politics and it should be able to transcend the initial purposes of the drafters of the Charter.⁷¹

In addition, a legal basis for humanitarian intervention can also be sought in customary law. A custom requires adherence to a sense of moral obligation and acceptance by a significant number of states. Hence, since the mechanism of humanitarian intervention has not been executed with frequency, and as states disagree on the status of humanitarian intervention, it is disputed whether it qualifies as a custom. Nevertheless, looking at the traditional concept of customary law through a modern lens might procure a legal basis for humanitarian intervention after all. Frederic Kirgis argues that the exact trade-off between state practice and *opinio juris* depends on the significance of the activity in question and the reasonableness of the rule involved.⁷² In order to balance the absence of a constant uniform use of the rule, a strong sense of *opinio juris* and great moral weight of the matter must be demonstrated. For instance, genocide constitutes a heavy moral weight which could compensate for the lack of uniform usage. In that case, humanitarian intervention would qualify as a custom. The purpose of Kirgis’ theory is to generate a morally ‘right’ outcome. However, a difficult aspect of this approach is that it requires a selection of rights that is more important than others. Specifically this has already resulted in many debates and will be touched upon later in this chapter. Another complexity inherent to this argument concerns the role of morals in legal positivism. Legal positivism is the thesis that the existence and content of law depend on social facts and not on its merits.⁷³ In other words, as opposed to customary law, legal positivism is morally indifferent. Nevertheless, as article 38 1(b) of the Statute of the International Court of Justice (which is part of the UN Charter) defined

⁶⁹ Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, 1950, ICJ, 4, 68, 70.

⁷⁰ Ibid. Judge Alvarez built his view upon the *Missouri v. Holland* case in 1920 (252 U.S. 416). At 433, Justice Holmes states that: ‘when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters’.

⁷¹ Brown, *supra* n. 68.

⁷² Frederic L. Kirgis, Jr., ‘Custom on a Sliding Scale’, *AJIL*, 1987, Vol. 81, No. 146, p. 149.

⁷³ John Austin, ‘*The Province of Jurisprudence Determined*’, 1832, p. 157. Other legal positivists are Hans Kelsen, H.L.A. Hart and Joseph Raz.

customary law as a source of law, it is recognized as an independent source of law. It therefore does have a place within legal positivism.⁷⁴ Similarly, Ronald Dworkin argued that despite the lack of authorization by a higher rule of recognition, customs still have a legal force.⁷⁵

In conclusion, even though the legal source for humanitarian intervention might be blurry, finding a legal basis is not impossible. However, having a legal right does not necessarily mean it is the right thing to do. The issue of moral legitimacy should also be taken into account. Only in case of a 'humanitarian crisis' are morals at stake and is a humanitarian intervention considered legitimate.

The fundamental question is whether the political norm of sovereignty must be upheld and dominate over moral duty to protect human rights or if perhaps those principles can co-exist or even complement each other. Political theorist Jean Cohen argues that human rights and sovereignty form a dualistic concept; she configures a very comprehensive and intelligent new model of a political conception of human rights.⁷⁶ Cohen builds upon a more integrated view of the normative framework and offers a promising perspective on justification for humanitarian intervention.

Cohen's theory must be seen against a background of globalization as this has been influential on both the perception of sovereignty and human rights. Therefore, before further discussing Cohen's vision I will first address the influence of globalization in the next paragraph.

2.2 The influence of globalization

Many contemporary issues transcend borders and are subjected to international law. For example, climate change, terrorism and the protection of human rights have a transnational character requiring a global response and international policy making. The majority of states has committed to numerous human rights treaties. By engaging in international covenants, states forfeit exclusive autonomy over these matters and are ordered by the global community to act in accordance with international law. Moreover, a significant part of state power is transferred to supranational institutions such as the United Nations, the European Union and the G-20. Hence, globalization has replaced the coexistence of states, by the interdependency between states. This construction of international relations seems to leave less space for autonomous states.

⁷⁴ '(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (b) international custom, as evidence of a general practice accepted as law'.

⁷⁵ Ronald Dworkin, *Taking rights seriously*, Harvard University Press, 1978.

⁷⁶ Jean Cohen, 'Rethinking human rights, democracy and sovereignty in the age of globalization', *Political theory*, 2008, Vol. 36, No. 4, pp. 578-606. Jean Cohen is professor of political theory at Columbia University.

Clearly, 'absolute' sovereignty is best exercised when decision making takes place on a national level, as it provides the sovereign state with the exclusive right to make decisions. States partly lose their monopoly over internal affairs due to an increasingly united world.⁷⁷ When states integrate and share common values, and decisions are taken on a global level, the doctrinal foundations of sovereign equality start shaking. Let us not assume that this is necessarily a negative development, but solely establish an alteration of the sovereignty concept. In fact, a 2001 UN Report on challenges of, and perspectives on the globalization of states, it was stated that: "in the international arena, closer cooperation and concerted action among states represent an exercise of state sovereignty. Such concerted action does not necessarily weaken states; rather, it can strengthen them by creating a more stable international environment and by giving them greater scope to expand their exchanges in a variety of fields".⁷⁸

As a reaction to this complex 'globalization-phenomenon', multiple scholars have argued that the principle of sovereignty as defined in the Peace of Westphalia is outdated and that an absolute notion of sovereignty is untenable due to transnational issues, (the individualization of) international law and cosmopolitanism. Indeed, sovereignty has to find its way in this 'new world order' in which human rights have become ever more important. Accordingly, a question arises: what are the effects of globalization on international law and does this imply that the doctrine of sovereign equality has become a meaningless and obsolete notion?⁷⁹ Below, I will outline a number of visions on the impact of globalization on sovereignty and human rights.

Kurt Mills points at the historical and social-economical contexts that shape the concept of state sovereignty.⁸⁰ Society changes continuously and sovereignty should be perceived as a dynamic concept that alters accordingly. Mills refers to three aspects of modernity that influence the contemporary perception on sovereignty, of which two are particularly interesting: a focus on humanity and an emphasis on the individual.⁸¹ Both of them refer to human rights. While he acknowledges the relevance of sovereignty, he also suggests that we question the foundation and 'update' the concept to fit into modern times.

⁷⁷ Mary Kaldor, *Human Security: Reflections on Globalization and Intervention*, Polity Press, 2007.

⁷⁸ United Nations World Public Sector Report, *Globalization and the State*, 2001, p. 30. Retrieved from <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan012761.pdf> on 31 January 2012.

⁷⁹ Bert van Roermund speaks of two problems of sovereignty: redundancy and intercoherence in 'Sovereignty: Unpopular and popular' in Neil Walker (ed), *Sovereignty in transition*, Oxford University Press, 2003, p. 34.

⁸⁰ Mills, *supra* n. 32, p. 16.

⁸¹ Nicholas Onuf, 'Sovereignty: Outline of a Conceptual History', *Alternatives*, 1991, Vol. 16, No. 4, p. 426.

In order to understand 'globalized law', Cohen places sovereignty within a cosmopolitan context and reaches a similar conclusion to Mills.⁸² According to her, there are two options: either abandoning or updating the sovereignty principle. She advocates for the latter. Cohen denotes that sovereignty is compatible with moral principles; it protects moral values and therefore has moral value itself.⁸³ The mere fact that sovereignty is diminished does not mean that it has to be abolished.

Cohen repeatedly emphasizes that both sovereignty and human rights are central normative concepts in a globalized world. She calls this a constitutional pluralist approach, as both norms are needed in order to construct a dualistic international system.⁸⁴ Sovereignty has to be taken seriously. To come to a dualist approach we need to alter the concept and create a new dimension of sovereignty which complements rather than replaces the existing understanding of sovereignty. According to this notion, states can be part of a supranational legal and order while remaining their sovereignty. Internal matters are dealt with on a domestic legal, level whereas rules imposed by supranational organizations and competences 'outrule' the national sovereignty. Moreover, Cohen argues for international institutions to be subjected to legal and procedural reform.⁸⁵

Furthermore, Cohen argues that cosmopolitan law can never replace sovereignty-based public international law. As it is neither sufficiently established nor developed. Cohen considers the majority of current cosmopolitan, or 'global law', as quasi-binding or non-binding rules of 'soft law'. Therefore, erasing the principle of sovereignty would lead to imperial world domination. 'Global law' suffers from ambiguity and leaves space for interpretation, increasing the scope for abuse. From Cohen's point of view, human rights as a constitution behind global politics are presently too weak. Cohen suggests that we reform the concept of sovereignty to match it with the current state of international law.

Unlike Mills and Cohen, Anne-Marie Slaughter argues for a totally new understanding of sovereignty. This 'new sovereignty', accompanying the current globalized world, implies the division of sovereignty amongst government institutions and their international counterparts. Slaughter argues that this conception of sovereignty encourages states to engage with other states,

⁸² Jean Cohen, 'Whose Sovereignty? Empire Versus International Law', *Ethics and International Affairs*, 2004, Vol. 18, No 3, pp. 1-24.

⁸³ Jean Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University press, 2010, p. 261.

⁸⁴ Ibid p. 270.

⁸⁵ Cohen, *supra* n. 76, p. 596.

connects them, and creates an incentive to collaborate.⁸⁶ She describes a ‘new world order’ which is based on global government networks, enabling the necessary global governance while at the same time preserving the democratic legitimacy of local political communities.

The overall understanding appears to be that in present times sovereignty can no longer be perceived as an absolute concept. This does not mean that it ought to be wiped off the table, but it does point to the need of reform. This leads to the following question: does that leave space for humanitarian intervention?

2.3 *The traditional approach of human rights*

As stated before, human rights are natural rights, characterized by universality. Regardless what race, geographic location or nationality, every human being possesses a set of fundamental natural rights that every state has to respect. Cohen labels this as ‘the traditional perception’ of human rights.⁸⁷ When a government oppresses its own people, it infringes on their human rights and imposes conditions to which they could not possibly consent. Such a government lacks moral legitimacy, and its political sovereignty and right to govern are called into doubt. Of course, not all human rights violations justify humanitarian intervention, as it is an extremely forceful mechanism. What is more, stretching the legitimacy of the use of force makes the principle of humanitarian intervention even more vulnerable. It is therefore essential that clarity is generated on which situations justify an intervention, and imperative to avoid both an ‘inflation and deflation’ of human rights as they lead to a destruction of the concept. An ‘inflation’ of human rights refers to a maximalist account in which case human rights are likely to lose their significance. ‘Deflation’ of human rights points at a minimalist account, and implies the risk of creating a list of human rights that is too restrictive to be useful. Caution has to be maintained to prevent either an overly broad or a too narrow a selection of human rights violations, only violations that are globally recognized as inhuman and dreadful create a moral right – or perhaps even a *duty* – to respond.⁸⁸ In case of crimes against humanity, serious war crimes and (the threat of) genocide, universality transcends geography, culture and history.⁸⁹ In order to protect universal rights, universal action is an appropriate response.

⁸⁶ Anne Marie Slaughter, *A New World Order*, Princeton University Press, 2004. Slaughter proposes different models to govern the ‘new world order’ which all seem to contain some level of idealism: pure sovereignty, democratic sovereignty, sovereign state multilateralism, multilateral polled sovereignty, global governance, liberal internationalism and parliamentary world government.

⁸⁷ Cohen, *supra* n. 76, p. 578.

⁸⁸ I will return to this in the final chapter.

⁸⁹ However, not all war crimes justify a humanitarian intervention.

However, this approach leads to difficulties when it is applied in contemporary politics. Can we expect a state to prioritize an individual need over its own interests? Or, can a state function as a moral agent? A major critique against humanitarian intervention is inherent to ‘Realpolitik’; i.e. politics and diplomacy that derive from practical and material concerns rather than ideological and moral values. Intervening states have frequently been accused of holding double agendas. Opponents of humanitarian intervention fear an exploitation of the concept; they suspect states to justify their actions with ‘a fake humanitarian label’ while the underlying *motive* is of a very different (selfish) kind.⁹⁰ Patricia Owens states that the concept of universality is often abused to transform a state’s enemy into a universal enemy.⁹¹ Intervening states claim moral grounds while in fact the underlying motivations favour themselves. Antagonists of humanitarian intervention fear that universally oriented justifications for humanitarian intervention are in fact dominated by partiality and subjectivity.⁹² In other words, states are only willing to get involved in another state’s domestic affairs, if this allows them to pursue their ulterior motives. Hence, there is no political will to intervene and invest – and burn their fingers – in the name of humanity.⁹³ I will further elaborate on the political borders of humanitarian intervention in the final chapter.

2.4 The political approach of human rights

Different from the traditional approach, Cohen distinguishes a political approach that connects the human rights discourse to sovereignty, recognition and intervention.⁹⁴ According to this stance, human rights function as a justification to infringe the sovereignty principle. Cohen argues that “their function in international relations and international law today is, then, to override, or set limits to the domestic jurisdiction of states (...) and to suspend the correlative non-intervention principle, if and when these rights are violated”.⁹⁵ From a political perspective, human rights are perceived as the ‘gatekeeper’ for membership in the international community.⁹⁶ Hence, if you do not respect human rights, you are not part of the club. This view closely relates

⁹⁰ In the literature, this is referred to as ‘new humanism’. See David Brooks ‘The New Humanism’ in The New York Times, March 7, 2011. Retrieved from http://www.nytimes.com/2011/03/08/opinion/08brooks.html?_r=1 on September 2, 2011.

⁹¹ Patricia Owens, ‘Hannah Arendt, Violence, and the Inescapable fact of Humanity’ in Anthony Lang Jr. and John Williams (eds.), *Hannah Arendt and International Relations: Readings Across the lines*, Palgrave MacMillan, 2005, p. 57. Also see Ryan Goodman, ‘Humanitarian Intervention and Pretexts for War’, *The American Journal of International Law*, 2006, Vol. 100, pp. 107-141.

⁹² See David Chandler, *From Kosovo to Kabul and beyond: Human Rights and International Intervention*, Pluto Press, 2006. On a different note, the issue of consistency is often used as an argument to proof partiality, selectivity and private interests: intervening in one state but not in another state that suffers from similar human rights abuses. However, does that make behavior morally more right or wrong?

⁹³ Richard Falk raises the issue of feasibility; both the costs in human lives and money are high. Does that live up against the benefits?

⁹⁴ Cohen, *supra* n. 76, p. 583.

⁹⁵ *Ibid* p. 582.

⁹⁶ *Ibid*.

to John Rawls' perspective, who distinguishes moral human rights from international human rights.⁹⁷ Only violation of the latter rights justify a coercive and intrusive action.⁹⁸ However, the problem Rawls faces in his theory, is that of defining what he calls a 'proper subset', which implies a distinction between moral and constitutional rights and international human rights.⁹⁹ Not every state act that leads to a human rights violation justifies interference by other states. Namely, only violations that are categorized as defying international human rights can give rise to coercive action by outsiders. Cohen states: "in order to redeem the normative promise of both principles an additional element in the conceptualization of sovereignty has to be adequately theorized, namely, sovereignty as status and inclusion in global governance institutions".¹⁰⁰

2.5 *A new political conception*

Cohen proposes a third distinction, also named a 'a new political conception'. This notion is derived from the political conception but values the sovereignty principle through conceptualizing the 'proper subset'. She views the discourse on human rights in a new way, namely "as a mechanism to prevent and correct injustices that may follow from the international legal ascription and distribution of sovereign equality to states".¹⁰¹ Human rights have to be seen in the light of the contemporary international system; 'hard' international human rights have to be distinguished from 'soft' moral rights. She argues that we set the limits of sovereignty through selecting 'hard' international human rights based on what is needed for members to be included in policy and laws.¹⁰² A sovereign state is a coercive public institution; therefore no one may be excluded and treated as an outsider. However, in case a target group does not have the 'right to have rights', the political relationship between the member and the state is abolished. Similarly, when someone can no longer be seen as a member of the state, and has practically become an 'outsider', then the membership principle is violated. Additionally, there has to be more than a single human rights violation as citizens are only excluded from the state when they are denied the right to have rights. In that case the political relationship between the state and the people is abolished. In Cohen's own words: "while moral rights of victims are of course being violated, it is the political project behind the violations and the political prerogatives of sovereignty that must

⁹⁷ John Rawls, *The Law of Peoples*, Harvard University Press, 1999.

⁹⁸ Ibid p. 68.

⁹⁹ Ibid.

¹⁰⁰ Cohen, *supra* n. 76, p. 579

¹⁰¹ Ibid.

¹⁰² Ibid p. 586.

be addressed by human rights discourses”.¹⁰³ Exactly which human rights violations exceed the sustained internal affairs of a state are to be found in international law.

2.6 *Exclusion of women*

Sexual violence takes place in every society and usually seen as an domestic matter that asks for an internal response. Usually, it does not lead to a distorted relation between a large group of women and the state. As long as the judicial system in a state functions reasonably well and perpetrators are convicted, women are by no means labelled as ‘outsiders’. For example, the rate of sexual violence in South Africa is among the highest in the world but there is no call for an external intervention.¹⁰⁴ Something more is needed for sexual violence to attract international attention it has to be ‘widespread and systematic’, as codified in international criminal law.

First we have to determine what type of sexual violence qualifies as ‘widespread and systematic’. In article 7 (g) of the Rome Statute Sexual violence is categorized as a crime against humanity and summarized as “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”. Additionally, the acts have to be part of a widespread and systematic attack. In the *Akayesu* case, the ICTR provided some clarification on the meaning of those terms.¹⁰⁵ The Court declared: “The term ‘widespread’ requires large-scale action involving a substantial number of victims, whereas the term ‘systematic’ requires a high degree of orchestration and methodical planning”.¹⁰⁶ As there are no exact guidelines determining whether a case of sexual violence meets these requirements, it appears that this must be established based on the characteristics of each specific case.

The second question concerns the issue of whether sexual violence exceeds the level of ‘soft law’ and is part of the ‘proper subset’. Cohen states that the answer to this question is to be found in international law and refers to the Genocide Convention and the International Criminal Court. She states that “if a state engages in mass extermination, ethnic cleansing, massive crimes against humanity (...) it forfeits the right to be representing groups it oppresses in these radical ways”.¹⁰⁷

¹⁰³ Ibid p. 588.

¹⁰⁴ Statistics from Interpol estimating that a woman is raped every 17 seconds in South Africa, and that one in every two women will be raped in their lives in the country. According to Interpol, South Africa has the highest number of declared rapes in the world, with nearly half of the victims younger than 18.

¹⁰⁵ *Prosecutor v. Akayesu*, 1998, ICTR judgment, 96- 4-T.

¹⁰⁶ This implies that violence is taking place within private spheres, which makes it difficult to proof the systematic character of the violence. Moreover, a humanitarian intervention would probably not be the right response as it is the morals and the judiciary system that have to be altered in order to stop the sexual violence.

¹⁰⁷ Cohen, *supra* n. 76, p. 587.

Let us have a brief look into the status of sexual violence in international criminal law, in order to determine whether it can be qualified as 'hard law'.

After centuries of impunity, attitudes towards sexual violence, and its status in international criminal law have changed drastically with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁰⁸ Both the tribunals qualified mass sexual violence as a crime against humanity, a war crime and in specific cases even as genocide. The first case that appeared before the ICTR is important for the understanding of the status of sexual violence in international criminal law, as it qualified widespread and systematic violence as genocide.¹⁰⁹ Kelly Askin summarizes the outcome of the case as follows: firstly, the trial chamber recognized sexual violence as an integral part of genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence, and secondly, the chamber recognized rape and other forms of violence as independent crimes constituting crimes against humanity.¹¹⁰

Besides the *Akayesu* case, many other judgments have convicted perpetrators for commission or omission of sexual violence.¹¹¹ This perception is adopted in the Rome Statute, which is largely based on the jurisprudence that derived from the ICTY and the ICTR. Sexual violence is considered a crime against humanity under Article 5 (g) of Statute of the ICTY, Article 3 (g) of the Statute of the ICTR. The Rome Statute, which established the International Criminal Court, qualifies widespread and sexual violence both as a crime against humanity, but also as torture.¹¹² While both the ICTY and the ICTR adopted similar positions on the meaning of torture as constituting a crime against humanity, the Rome Statute is more flexible. For instance, the ICC statute does not require that torture be used to either obtain a confession from the victim or third party, to punish the person for an act, or to intimidate or coerce the victim or

¹⁰⁸ There were occasional references to the protection of women in some of the earliest documents of the law of armed conflict. For example, Article XLVII of the Lieber Code punished those responsible for the rape of inhabitants of a hostile country

¹⁰⁹ *Supra* n. 105.

¹¹⁰ Kelly Dawn Askin, *War crimes against women: prosecution in international war crimes tribunals*. Martinus Nijhoff Publishers, 1997, p. 107.

¹¹¹ For example, the first case that appeared for the ICTY, the *Tadic* case (Prosecutor v. Tadic, 1997, Case No. IT-94-1-T) was remarkable and progressive in terms of sexual violence; Tadic was found guilty of direct and indirect participation of sexual crimes in former Yugoslavia. Nonetheless, the overall number of successful prosecutions has been paltry compared to the scale of the crimes.

¹¹² See article 7 and 8 of the Rome Statute.

third party based on discrimination. Under the Rome Statute, it is easier to qualify sexual violence as torture, since it recognizes that inflicting severe mental or physical pain is, in itself, a crime.¹¹³

The obvious subsequent question is then: does ignorance towards widespread and systematic sexual violence lead to a violation of the membership principle? From my point of view, women who fall victim to widespread and systematic sexual violence are excluded in the broadest sense of the word. Women are expelled from the justice system, denied by their governments and excluded from society. Denying their fundamental rights to life, safety and dignity has far-reaching implications for women's everyday lives. Besides the physical violence, they are confronted with societal exclusion, which effectively literally places them outside their communities. Additionally, when the state either participates in crimes against humanity (or genocide) or fails to protect the women from widespread and sexual violence, it forfeits the claim to represent a group, as the membership principle is violated and a humanitarian intervention is justified. States that fail to protect their people from such severe crimes cannot 'hide' behind the sovereignty principle.

It is not new to use extreme violence against women as a justification for a humanitarian intervention. Several scholars have reminded us of the fact that women's rights have actually played a role in previous interventions, however non-authorized.¹¹⁴ The United States has enforced a number of humanitarian interventions in order to protect women.¹¹⁵ An example that I would like to elaborate on is the intervention in Afghanistan in 2001. In *casu*, the lawfulness of the use of force was officially based on the claim of self-defence. Actually, the invasion could have been labeled as humanitarian intervention, as it was likely to be justified on humanitarian grounds.¹¹⁶ Afghanistan was considered an outlaw state where severe human rights abuses and crimes against humanity were committed on a daily base, especially against women. Former president Bush emphasized the role of women in the decision to start a war against

¹¹³ See Case Law: *The Prosecutor v. Dragoljub Kunarac et al. ("Foca")*, ICTY, Case No. IT-96-23&23/1, 2001; *The Prosecutor v. Miroslav Kvočka et al.*, ICTY, Case No. IT-98-30/1, 2000; *The prosecutor v. Laurent Semanza*, ICTR, Case No. 97-20-T, 2001.

¹¹⁴ Karin Engle states that the role women play in humanitarian intervention is often underestimated. 'humanitarian intervention has often been used to protect the "private" from the "private", especially to "protect" women. Karen Engle, "Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention", *Harvard Human Rights Journal*, 2007, Vol 20, pp. 189- 226, p. 218 Engle refers to: Catherine MacKinnon, 'Women's September 11th: rethinking the international law of conflict', *Harvard International Law Journal*, Vol. 47, No. 1, 2006.

¹¹⁵ For instance in Cuba, the Philippines and Hawaii. See: Deborah Weismann, 'The Human Rights Dilemma: Rethinking the Humanitarian Project', *Columbia Human Rights Law Review*, 2004, Vol. 35.

¹¹⁶ Richard Falk, 'Appraising the War against Afghanistan'. Social Science Research Council. Retrieved from <http://essays.ssrc.org/sept11/essays/falk.htm> on 15 September, 2011.

Afghanistan.¹¹⁷ Clearly this was after the ‘victory’ and there were more factors involved but violations of woman’s rights were certainly influential. In addition, the Institute for the Study of Genocide labelled the poor women’s rights situation as ‘female apartheid’ and repeatedly called for a humanitarian action before the United States intervened.¹¹⁸

2.7 Comparison with universal jurisdiction

The purpose of this final paragraph is twofold: it seeks to demonstrate the possibility of a legitimate intervention through another body of law besides the UN Charter and it endeavours to list specific human rights violations that would justify a humanitarian intervention. My aim in this paragraph is not to provide a legal basis for humanitarian intervention, but to explore the boundaries of a humanitarian intervention through an examination of international criminal law. Eric Heinze argues that the principle of universal jurisdiction can be used as a guidance to determine which avenues are available to end certain human rights violations.¹¹⁹ Surely, humanitarian intervention and universal jurisdiction are not interchangeable normative concepts, however, comparing and connecting the two is interesting in two respects. Firstly, universal jurisdiction and humanitarian intervention derive from a similar thought, and secondly, the list of international crimes that justifies universal jurisdiction, can serve as a guideline to determine a ‘proper subset’ for human rights violations in which a humanitarian intervention is allowed.

Under universal jurisdiction states can claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, which affects the internal sovereignty of the state.¹²⁰ The principle of universal jurisdiction manifests itself through both conventional and customary law.¹²¹ The obligation to ‘prosecute or extradite’ was first recognized in the 1949 Geneva Conventions, and many more conventions followed.¹²² To illustrate, the Convention against Torture contains an explicit duty for states to penalize torture in article 4.¹²³ The subsequent articles require states to establish jurisdiction and oblige to either prosecute or

¹¹⁷ State of the Union Address, 2002. Bush states that: ‘Today women are free’, and ‘America will always stand firm for the non-negotiable demands of human dignity: the rule of law, limits on the power of the state, respect for women, private property, free speech, equal justice and religious tolerance.’

¹¹⁸ Guglielmo Verdirame, ‘Human Rights in the Arab World: A Regional Perspective’, *Human Rights Quarterly*, 2001, Vol. 23, No. 3, p. 733, 750.

¹¹⁹ Eric Heinze, *Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Intervention*, SUNY Press, 2009.

¹²⁰ Layla Nadya Sadat, ‘Redefining Universal Jurisdiction’, *New England Law Review*, 2001, Vol. 35:2, p. 243.

¹²¹ Bruce Broomhall, ‘Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law’, *New England Review*, 2001, Vol. 35, No. 2, p. 401.

¹²² Before, at the Nuremburg and Tokyo trials, the defence argued state sovereignty to avoid prosecution. However, the Court ordered otherwise and determined that the defendants could not hide behind sovereignty to justify their crimes.

¹²³ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985, 23 I.L.M. 1027, U.N. Doc. A/39/51 (1984).

extradite.¹²⁴ The customary status of universal jurisdiction is less clear, but it is generally accepted that states hold universal jurisdiction in cases of the most severe crimes: genocide, crimes against humanity and war crimes.¹²⁵ In these cases, impunity is considered unacceptable, even though it still happens too often. In this vein, Human Rights Watch director Kenneth Roth, starts an article that advocates for universal jurisdiction with “behind much of the savagery of modern history lies impunity”.¹²⁶ Universal jurisdiction functions as a safety net to be able to hold perpetrators accountable when domestic prosecution fails.

Traditionally, domestic jurisdiction is tightly connected to the sovereignty principle. It falls within the exclusive right of the state to prosecute crimes committed on state territory. The notion of universal jurisdiction pushes the limits of traditional sovereignty since it allows other states to interfere in internal affairs. However, this does not necessarily have to lead to friction.

Accordingly, Neil Walker argues: “sovereignty retains a string popular and intellectual currency in constitutional discourse, and it is arguable that the current phase is more appropriately described as one of ‘late sovereignty’ rather than ‘post sovereignty’. The crux of this argument is that the emerging post-Westphalian order, it becomes possible to conceive of autonomy without territorial exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms”.¹²⁷

In other words, a state can still hold supremacy even though it does not have exclusive jurisdiction. The same argument can be made in case of humanitarian intervention, as the two concepts originate from a similar intention. Both ensure that the most severe affronts to human welfare and dignity do not go by unaddressed and attempt to prevent and/or end them. The fact in itself that certain human rights violations are considered so heinous that sovereignty is breached offers legitimate space for humanitarian intervention. Peter Singer states that if extraterritorial punishment of certain crimes, which might exceed the borders of sovereignty, can be justified, a humanitarian intervention in order to stop those crimes can be justified as well.¹²⁸ After all, as stated in the previous chapter, sovereignty is not absolute and exceptions can be made.

¹²⁴ Broomhall, *supra* n. 121, p. 404.

¹²⁵ *Ibid* p. 405.

¹²⁶ Kenneth Roth, ‘The Case for Universal Jurisdiction’, *Foreign Affairs*, Vol. 80, No. 5, 2001, p. 150.

¹²⁷ Neil Walker, ‘*The Idea of Constitutional Pluralism*’, European University Institute, Florence, p. 36. Retrieved on 2 February, 2012 from <http://cadmus.eui.eu/bitstream/handle/1814/179/law02-1.pdf?sequence=1>.

¹²⁸ See: Heinze, *supra* n. 119, p. 86.

Secondly, the rules on universal jurisdiction can offer a guideline to determine in which specific cases a humanitarian intervention is justified. As Lon Fuller emphasizes, it has to be clear when a course of action may be lawfully taken.¹²⁹ As we have analysed before, the UN Charter remains silent on this matter. However, a ‘universal jurisdiction approach’ may offer a starting point.

Heinze writes: “the legal development of universal jurisdiction depends greatly on the shared moral assertion that certain acts should be regarded as serious crimes under international law and ought to be governed by legal principles that aspire the end impunity for such crimes. The debate on humanitarian intervention depends on a similar moral assertion, except the moral underpinnings of humanitarian intervention have not been translated into legal principles”. Whereas UN Charter fails to mention specific violations that constitute lawful use of force, the universal jurisdiction approach offers a fairly clear list of crimes under which the exercise of universal jurisdiction is permitted. Despite universal jurisdiction being derived from customary international law, and calls for universal jurisdiction are found in various sources of international law, there is an understanding of which crimes are subjected to universal jurisdiction. Namely, genocide, war crimes, crimes against humanity and torture are so heinous and severe that they strike at the ‘whole of mankind’.¹³⁰ Widespread and systematic sexual violence qualifies as all three of them. If outside states are allowed to prosecute massive sexual violence when the statute where the crimes were committed or allowed fails to do so, foreign states should also be entitled to intervene in order to prevent or stop the crimes from occurring.

2.7 *Conclusion*

In the case of gross violations of a select category of human rights, humanitarian intervention *has a place within international law*. The international community cannot be forced to look away while the most horrific atrocities are being committed around the globe. And they do not have to. Sovereignty is a dualistic concept; the law provides the sovereign with power and authority, and restrains it at the exact same time. In other words, sovereignty in itself cannot be the sole source of legitimacy as it is not only given, but also bound by law.¹³¹

Sovereignty implies a respect for a certain subset of human rights; a state forfeits the claim to represent a group that is excluded from state membership. When state members are denied the right to have rights, the political connection between the state and the citizen is lost. Accordingly,

¹²⁹ Lon Fuller, *The Morality of Law*, Yale University Press, 1969.

¹³⁰ I will return to this issue in the subsequent chapter.

¹³¹ See Anne Peters ‘The standard view is now that the internal sovereignty of a government depends on its legitimacy, and that its legitimacy is the basis of its sovereignty’. *Supra* n. 30, p. 519.

the violation of these international 'hard' human rights justifies external action. Cohen refers to international law to use as a guidance of selection of 'hard' human rights. She argues that, based on international criminal law, genocide, crimes against humanity and certain war crimes certainly qualify as a justification for humanitarian intervention. Massive and widespread sexual violence qualifies as all three of them.

Even though I advocate for humanitarian intervention, I acknowledge the intensity and potential risk of such a mechanism. However, the global concern for human rights; i.e. its place on the international agenda, and the large number of non-governmental organizations and human rights' movements, imply that there is a genuine concern for human rights. Indeed, humanitarian intervention is a final resort. However, certain specific situations require a serious and far-reaching response in order to achieve alteration. To avoid aggravation of human rights violations and actions with wrong intentions, the use of humanitarian intervention must be subjected to a restrictive and narrow interpretation.

International criminal law can serve as guideline to determine when a humanitarian intervention is justified. Universal jurisdiction and humanitarian interventions serve a similar purpose, as both ensure that the most severe affronts to human welfare and dignity do not go by unaddressed and attempt to prevent and/or end them. Even though universal jurisdiction is a controversial concept, states have agreed on the legitimacy of universal jurisdiction in a number of crimes: genocide, torture and crimes against humanity. It is exactly in these cases that I advocate for a humanitarian intervention as a last resort.

3. State Responsibility

States hold a responsibility to provide a multiple range of services ranging from good governance, rule of law, security, health and education. Hence, when a state systematically fails to protect women from sexual violence, it bears responsibility for that. Whether, on a conceptual level, massive post-conflict sexual violence justifies a humanitarian intervention was discussed in the previous chapter. The answer is 'yes'. States that fail to protect their women from such heinous crimes cannot 'hide' behind the sovereignty principle. Sovereignty implies responsibility. It does not provide states with a license to act however they want. When a state fails to comply with certain basic standards, it is considered 'failing' or 'fragile'.¹³² This chapter addresses to what extent a failed state can be held responsible for its 'inactions'. The purpose of this chapter is the find the 'tipping point', in other words: when does an internal affair alter into an external concern? In order to find this tipping point, two sub-questions need to be answered: (1) what constitutes a violation of an international obligation, and (2) can this be attributed to a 'fragile' state?

3.1 Responsibility

Before I continue, I need to clarify my definition of 'responsibility' as it is an ambiguous term that can be interpreted in different ways. James Crawford and Jeremy Watkins distinguish responsibility as 'answerability' from responsibility as liability.¹³³ The former indicates that a state is obliged to respond to any moral or legal wrongdoing. The latter distinction implies a punitive response (criminal liability) or an obligation of the state to redress and pay compensation (civil liability). This chapter focuses solely on the first dimension of responsibility. It does not address what happens after the sexual violence has taken place, but questions whether a state can be held responsible for failing to undertake action while sexual crimes are repeatedly committed under its jurisdiction.¹³⁴

The principle of state responsibility is a principle of general law that only arises when a state commits an 'international wrongful act' against another state.¹³⁵ In this case of sexual violence the state fails to protect its *own* citizens. This limits the usefulness of the mechanisms of state

¹³² The meaning of a 'failed' or 'fragile' state will be discussed later.

¹³³ James Crawford and Jeremy Watkins, 'International Responsibility' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, 2010, p. 284.

¹³⁴ I will briefly return to the question of state criminal liability at the end of paragraph 3.2.

¹³⁵ Danwood, Mwikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', *Melbourne Journal for International Law*, 2004, Vol. 5, No. 1.

responsibility as described in the Draft articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC Draft Articles).¹³⁶ The problem is that state obligations that arise through treaties or customary law only invite other states to undertake action when a state fails to comply with international norms. State responsibility is a principle of general international law. In fact, traditionally, states are the main subject of international law. Even though individuals have gained increasing legal personality, general international law does not recognise the right of individuals or groups to enforce rules of international law. However, despite the ‘inter-state’ affect of the concept of state responsibility, the ILC Draft articles do offer a guideline to determine whether a state has committed an ‘international wrongful act’ against its own citizens. The challenging question is: how does this create a responsibility for an outside state to act?

3.2 Violation of an international obligation

Article 1 of the ILC Draft Articles defines an internationally wrongful act as a breach of an international obligation that consists in “one or more actions or omissions or a combination of both”. Two conditions need to be fulfilled for an external state responsibility to arise in case of a state’s failure to undertake action in a situation of widespread and systematic sexual violence: the act that was committed or failed to act upon has to be a violation of an international obligation, and the (in) action has to be attributable to the state.¹³⁷ The ‘failing’ state might plea that it has done everything within its power to prevent and address the sexual violence.

First we have to determine whether the state, by failing to respond to widespread and systematic sexual violence, violates an international obligation. Art 12 of the ILC Draft Articles states that “there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”. Article 13 adds that the state has to be bound by the obligation. A state legally binds itself through ratification of a treaty, and is automatically bound by customary law, general principles of law or *jus cogens* (article 38 1 (b) of the ICJ Statute).

Widespread and systematic sexual violence in particular, as well as gender violence, is addressed by a variety of international treaties and human rights covenants. For example, article 3 of the UDHR protects the rights to life, liberty and security. All three of them are violated in case of sexual violence. In addition, article 5 of the UDHR states that “no one shall be subjected to

¹³⁶ Marko Milanovic, ‘State Responsibility for Genocide’, *EJIL*, 2006, Vol. 17, No. 3, p. 562.

¹³⁷ Malcolm D. Evans, *International Law*, Second Edition, Oxford University Press, 2006, p. 451.

torture, or cruel inhuman or degrading treatment or punishment”. Article 7 of the ICCPR entails a similar content.¹³⁸ Finally, one of the most prominent documents on women’s rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which orders in article 7 that “gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention”.¹³⁹ So, if a state is party to one of the many treaties or conventions that protect women’s rights, it violates an international obligation by failing to protect women. However, when trying to construct a legal basis for another state to take over responsibility when a state fails to act, human rights covenants are not a sufficient foundation. It fails to address why widespread and systematic sexual violence is an international concern and not just an internal affair.

The solution to this problem is *jus cogens*, which is a fundamental principle in international law.¹⁴⁰ The doctrine of *jus cogens* presupposes that no derogation is ever permitted, irrespective of the content of their occurrence (peace or war).¹⁴¹ In other words, everyone has to comply with the norm. Violation of a *jus cogens* norm gives rise to an obligation *erga omnes*, which means that a right is owed to all.¹⁴² Human rights obligations are generally undertaken as norms of *jus cogens*. Moreover, the inclusion of human rights in the UN Charter implies a binding nature which is confirmed by additional human rights treaties and various judgement and opinions of the International Court of Justice (ICJ). This follows from the *Barcelona Traction Case*:

“In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the

¹³⁸ It states that: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹³⁹ These rights and freedoms include amongst others: (a) the right to life, (d) the right to liberty and security of person and (g) the highest standard attainable of physical and mental health.

¹⁴⁰ See Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986, ICJ, 14.

¹⁴¹ See Case Concerning East Timor (Portugal v. Australia), 1995, ICJ.

¹⁴² Barcelona Traction, Light & Power Co., (Belgium v. Spain), 1970, ICJ, 3.

principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".¹⁴³

Similarly, in the *Tehran Hostages* case, the ICJ found that Iran had violated fundamental human rights as set out in both the UN Charter and the UDHR, by taking hostage of United States diplomatic and consular staff.¹⁴⁴ As outlined before, the UDHR sets out fundamental principles which are recognized by general principles of law.¹⁴⁵

Protecting human rights is a responsibility of the international community as a whole, it is an obligation *erga omnes*. All states are agents of human rights and can be said to have a legal interest in their protection. However, exactly which human rights obligations give rise to an obligation *erga omnes* depends on the level of damage done. Only *jus cogens* violations give rise to a right to intervene. In order to prove that the prohibition on widespread and systematic sexual violence is indeed a *jus cogens* norm, we need to return to the field of international criminal law. As established before, widespread and systematic sexual violence can - in certain cases - be labelled as genocide, torture or a crime against humanity.¹⁴⁶ Since genocide is generally accepted as a *jus cogens* norm, I shall only focus on the latter two and demonstrate that both torture and crimes against humanity are part of *jus cogens*.¹⁴⁷

Jus cogens is covered in a veil of ambiguity as there are no precise rules for what exactly constitutes a 'peremptory norm'.¹⁴⁸ The concept is defined in art 53 of the Vienna Convention: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".¹⁴⁹ States and scholars have reached consensus on a number of norms that are

¹⁴³ Ibid under 33-34.

¹⁴⁴ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980, ICJ.

¹⁴⁵ The UDHR does not have a legally binding character. It merely spells out the UN Charter and builds upon the Charter.

¹⁴⁶ Widespread and systematic sexual violence also qualifies as a war crime but that is not important for our purposes since it is the state itself that fails to protect, prevent and punish its women. The violence takes place in a 'post-war' phase.

¹⁴⁷ The ICJ determined in the *Genocide* case that genocide is part of *jus cogens*. See Advisory Opinion Concerning Reservations on the Genocide Convention, 1951, ICJ Reports, p. 15.

¹⁴⁸ Dinah Shelton, 'International Law and Relative Normativity', in Malcolm D. Evans (ed.), *International Law*, Second Edition. Oxford University Press, 2006, p. 147.

¹⁴⁹ Vienna Convention on the Law of Treaties, 1969.

part of *jus cogens*. To illustrate, self-determination, piracy, slavery, genocide and apartheid are generally accepted as *jus cogens* norms.¹⁵⁰

According to Bassiouni, enough legal basis exists to reach the conclusion that both torture and crimes against humanity are part of *jus cogens*.¹⁵¹ Not all international crimes are peremptory norms, as that would undermine the effect of *jus cogens*.¹⁵² Bassiouni compiled a list of criteria to determine a legal basis for an international crime being part of *jus cogens*.¹⁵³ (1) *opinio juris*: states have to hold the opinion that the crime is part of international customary law (2) language in preambles that confirm the higher status of the crime in international law (3) the number of states that have ratified treaties related to the crime and (4) international investigation and prosecution of the crime. On a doctrinal basis, it is the threat to peace and security and the shock that it causes which label a crime as part of *jus cogens*. Considering this list, can we now conclude that crimes against humanity and torture are *jus cogens* norms? Yes, it is. I will explain below that both crimes against humanity and torture are rules of customary law, and meet the requirements as set out by Bassiouni.

In order for a rule to be custom, it has to meet two requirements; *usus* and *opinio juris*.¹⁵⁴ This means that states both have to agree on the existence of an obligation to act according to a moral norm, and demonstrate this through repetitive state practice. The prohibition of crimes against humanity, as well as torture evolved under customary international law.¹⁵⁵ To illustrate, crimes against humanity were first defined in the Nuremberg Charter and Judgment, and its content has subsequently developed through the jurisprudence of the ICTY, ICTR and the ICC.¹⁵⁶

As for torture, article 2 of the UN Convention against Torture requires each State Party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.¹⁵⁷ Article 2 states that “no exceptional circumstances whatsoever,

¹⁵⁰ See Karen Parker and Lyn Beth Neylon, ‘Jus Cogens: Compelling the Law of Human Rights’, *Hastings International & Comparative Law Review*, 1989, 411.

¹⁵¹ M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, 59 *Law & Contemporary Problems*, 1996, Vol. 63, p. 68.

¹⁵² See Ulf Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’, *EJIL*, 2007, Vol. 18, No. 5, pp. 853-871.

¹⁵³ Bassiouni, *supra* n. 151, p. 68.

¹⁵⁴ *Nicaragua* case, *supra* n. 140.

¹⁵⁵ For a background of the development of crimes against humanity see: Robert Cryer (et al.), ‘*An Introduction to International Criminal Law and Procedure*’, Cambridge University press, 2010, pp. 230 – 233.

¹⁵⁶ The term ‘crimes against humanity’ was first introduced in the London Charter, but had already been introduced in the Lieber Code (1863), The Hague Conventions (1899 and 1907) and the Geneva Conventions (1864 and 1929). See M. Cherif Bassiouni, ‘Crimes against Humanity in International Criminal Law’, Martinus Nijhoff Publishers, 1992, p. 71.

¹⁵⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. The prohibition of torture is absolute, non-derogable and holds an international customary status.¹⁵⁸ Moreover, The International Criminal Tribunal for the Former Yugoslavia (ICTY) established in the *Furundžija* case that prohibition against torture is a *jus cogens* norm.¹⁵⁹

On a doctrinal basis, it has to be determined per case whether specific acts shock humankind and pose a threat to peace and security. Without a doubt, both mass-scale sexual violence and failing to respond to these types of crimes shock moral conscience. This thesis does not leave space to engage in a discussion whether they really shock mankind or ought to cause a shock.¹⁶⁰ I assume that, if the world would be aware of the gravity and scope of post-conflict sexual violence, the conscience of humanity would be shocked.

Widespread and systematic sexual violence does also constitute a threat to international peace and security, the Security Council established this in Resolution 1820.¹⁶¹ Here, sexual violence during conflict is explicitly linked with sustainable peace and security. Under 11, SC Resolution 1820 stresses ‘the important role the Peace-building Commission can play by including in its advice and recommendations for post-conflict peace-building strategies, where appropriate, ways to address sexual violence committed during and in the aftermath of armed conflict, and in ensuring consultation and effective representation of women’s civil society in its country-specific configurations, as part of its wider approach to gender issues’. Hence, failing to address sexual violence both during and after the conflict threatens peace and security.

It can be concluded that there is sufficient legal and doctrinal basis to reach the conclusion that widespread and systematic sexual violence both as crimes against humanity and torture is part of *jus cogens*. So far, it seems that failing to respond to widespread and systematic sexual violence is always a violation of an international obligation. However, there is one aspect left that still needs to be addressed. In terms of failure to prevent, is there a difference between commission and omission? In other words, does a failure to act also qualify as an act?

¹⁵⁸ See Committee against Torture, the General Comment No. 2, Implementation of article 2 by State Parties, 23 November 2007. Retrieved from http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf. Accessed on 24 January, 2012.

¹⁵⁹ Prosecutor v. Anto Furundžija, ICTY, Case no IT-95-17/1-T10, Trial Chamber, Judgment, 10 December 1998. Also see: Erika de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its implications for National and Customary Law’, *EJIL*, 2004, Vol. 15, No. 1, pp. 97-121.

¹⁶⁰ See Robin Coupland, ‘Humanity: What is it and how does it influence international law?’, ICRC, 2001, Vol. 83, No. 844, p. 49.

¹⁶¹ SC Resolution 1820, 2008.

On an inter-state level, there is no difference between commission or omission of a crime.¹⁶² For example, in the *Corfu Channel* case, it was pleaded that the Albanian authorities knew, or must have been aware, of the presence of mines in their territorial waters but failed to inform third states.¹⁶³ The Court held that this was a sufficient basis for establishing the responsibility of Albania. A similar situation occurred in the *Tehran Hostage* case where the Court found Iran responsible for inaction because it “failed to take appropriate steps” in circumstances where they were evidently called for.¹⁶⁴ According to Bassiouni, also regarding international crimes, it is irrelevant whether a state acts or fails to act. Conduct of international crimes is the result of state action or state favouring policy. He states that: “thus, essentially, a *jus cogens* crime is characterized explicitly or implicitly by state policy or conduct irrespective of whether it is manifested by commission or omission”.¹⁶⁵ This is also enshrined in the Rome Statute, which is signed and ratified by a majority of states and creates a responsibility to both prevent and punish.¹⁶⁶ The preamble reads: “State Parties are determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. In other words, to respect a right by not engaging in a violation is not sufficient. The obligation to ‘ensure’ a right implies that a state takes affirmative measures to prevent violations. This view has been confirmed in the Genocide case that holds Serbia and Montenegro responsible for failing to prevent genocide that occurred in Srebrenica in 1995.¹⁶⁷ The question whether a state can be held responsible for acts of private individuals is complicated. In line with general international law, the Court did not recognize the notion of state criminal responsibility.¹⁶⁸ However, five judges argued in separate statements and opinions that the mere acknowledgment that a state can commit a crime implies criminal responsibility. This is a highly interesting question that shall be further crystalized in the future. For the purpose of this thesis it is sufficient to extract from this case that a state can actually be held responsible in case it fails to prevent or punish.

The subsequent question is then, in which cases there is a connection between the state and the conduct constituting a violation of international law. What defines a ‘weakened’ state and how much control can be expected from a state that is recovering from an armed conflict? In other words, is the wrongful act attributable?

¹⁶² Crawford, *supra* n. 133 p. 12.

¹⁶³ *Corfu Channel* case (United Kingdom v. Albania), 9 April 1949, ICJ, Rep. 4.

¹⁶⁴ *Tehran Hostage* case, *supra* n. 144.

¹⁶⁵ Bassiouni, *supra* n. 151, p. 68.

¹⁶⁶ Currently, 120 countries are State Parties to the Rome Statute. The United States of America is one of the states that has not ratified the treaty.

¹⁶⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgment 26 February 2007.

¹⁶⁸ The ILC has rejected the category. See James Crawford, ‘*The ILC’s Articles on State Responsibility: Introduction, Text and Commentaries*’, Cambridge University Press, 2002, commentary 276-280.

3.3 *Attributable to a weak state?*

Before I turn to the question whether failing to respond to human rights violations can be attributed to a failing state, I need to address the issue of a wider ground of justification, as can be claimed a the state that allows human rights violations within their territory and jurisdiction. A state might argue that widespread and sexual violence in a post-conflict state should be perceived as an ‘Act of God’. This is a legal term that refers to acts or events which occur outside of human control, for which no one can be held responsible.¹⁶⁹ Taking into account my findings in the previous chapter, sexual violence is an ‘act of violence’, sometimes even an ‘act of genocide’. From my point of view it is highly implausible to argue that no one is to blame for widespread and sexual violence. Even though it takes place under specific post-war circumstances, it remains a crime committed by humans beings against human beings. When widespread and systematic sexual violence was perceived as an international crime during the conflict, similar sexual violence committed in the post-conflict phase cannot suddenly be qualified as an ‘Act of God’.

Article 8 of the ICL Draft Articles is concerned with whether actions or failures to act can be attributed. It is stated that: “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”. The crucial question here is whether a post-conflict state can be expected to be in control. Does a state have the capacity to protect? To what extent can a weakened post-conflict state be held responsible for violence that is committed under its authority? For example, South Africa has an exceptionally progressive Constitution that, unlike other constitutions, explicitly addresses social and economical rights. However, it has been only 18 years since this Constitution has been installed and the country is still in a transitional phase, recovering from Apartheid. It is not surprising that for example the right to housing cannot immediately be realized for all people who are in need of a house. A country takes time to recover from war. During war, a state is not able to protect its women from sexual violence. A peace-agreement does change neither human behavior, nor state capacities, overnight. Perhaps a state cannot be expected to provide full protection shortly after the conflict. This brings us to the following question: what can be expected from a post-conflict state?

In order to say something about the responsibilities of a ‘weakened’ state, we first have to determine which ‘label’ suits a post-conflict country best and what the general implications of

¹⁶⁹ Henry Campbell Black, *Black's Law Dictionary*, 6th edition, Saint Paul, Minnesota: West Publishing Co., 1990.

that classification are. As Donald Potter suggests, it may be helpful to consider state failure as a continuum.¹⁷⁰ He distinguishes strong and weak states from failed and collapsed states according to the effective delivery of crucial political goods.¹⁷¹ Accordingly, a weak or fragile state has lost only a part of its monopoly. The term is generally used to refer to countries that suffer from weak governance, limited administrative capacity, violence, and often a long legacy of violent conflict. A failed state is a state that has lost its power and thereby also the monopoly on violence.¹⁷² A collapsed state is a more extreme version of a failed state and implies a total vacuum of authority.¹⁷³

According to Rotberg, the primary political good that determines the strength of a state is the provision of security.¹⁷⁴ This refers to the development of a safe environment and legitimate and effective security institutions. Clearly, widespread and systematic sexual violence endangers the security of women. However, whether a state is to be judged as either weak, failed or collapsed acquires a more in-depth analysis. Potter developed a model that utilises four indicators to determine the classification of the state: governance, corruption, economic and social well-being.¹⁷⁵

It would be unfair to see a post-conflict state as a failed state as it needs time to recover and get organized again. However, it does seem fair to label it as a weak or fragile state as it is not able to take full responsibility yet but is slowly gaining in strength. Rotberg states: “weak states include a broad range of states that are inherently weak because of geographical, physical or fundamental economic constraints or basically strong, but for the moment weak because of internal antagonisms, bad management, and despotism or external conflicts”.¹⁷⁶

‘Regular’ sexual violence in a fragile state is usually perceived as an ‘inside phenomenon’, and sexual violence is prohibited by practically every national criminal law system.¹⁷⁷ It is understandable that a post-conflict state needs time to recover from war and strengthen its rule of law, police forces and legal system. Besides, a weak state is still a sovereign state. As Stephan

¹⁷⁰ Donald Potter, ‘*State Responsibility, Sovereignty and Failed States*’, School of Government, University of Tasmania, 2004, p.4. Retrieved on 7 January 2012 from:

http://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf

¹⁷¹ Robert I. Rotberg, ‘Failed States, Collapsed States, Weak States: Causes and Indicators’, Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Washington D.C: Brookings Institution, 2003.

¹⁷² Max Weber, *Staatssoziologie*, Johannes Winckelmann (ed.), 2nd ed., Berlin, 1996, pp. 27 ff.

¹⁷³ Potter, *supra* n. 170, p.4.

¹⁷⁴ Rotberg, *supra* n. 171.

¹⁷⁵ Potter, *supra* n. 170, p. 5. Since this thesis solely focuses on widespread and systematic sexual violence, it serves no purpose to further elaborate on the specific characteristics of these indicators.

¹⁷⁶ Rotberg, *supra* n. 171.

¹⁷⁷ Potter, *supra* n. 170, p. 12.

Krasner remarks: “a state with very limited effective domestic control could still have complete international legal sovereignty”.¹⁷⁸ However, when sexual violence exceeds the borders of domestic law, affects a large group of people and becomes an international crime, external response becomes a valid option.

3.4 *Human Security*

A post-conflict society is in transition and deserves time and space to rebuild and develop the state. Human development is a broad multi-faced concept, which includes human security. On the one hand, development and security go hand-in-hand. On the other hand, the process of development often puts societies in a fragile position, which negatively affects human security.¹⁷⁹

Originally, the concept of human security was connected to sovereignty and territory.¹⁸⁰ In times of conflict, when state borders and the regime of a state were threatened, security of the people was endangered. This perception of human security changed throughout time. Now, due to globalization, the human security paradigm has expanded and covers multiple factors of security exceeding and actually disconnecting from national security. The contemporary human security concept acknowledges that “a ‘secure state’ untroubled by contested territorial boundaries can still be inhabited by insecure people”.¹⁸¹

This ‘new’ human security was defined in a United Nations Human Development Report in 1994.¹⁸² It entails seven broad categories of security: economic, environmental, personal, community, health, political and food. The UN defines human security as follows: “human security means protecting fundamental freedoms - freedoms that are the essence of life. It means protecting people from critical (...) threats and situations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity”.¹⁸³

Indeed, security has many aspects and ‘development’ is a multilateral process that influences all these categories. It contributes to state security and individual security. On the other hand, however, not all security needs can be met at the same time. Thomas argues that the concept of

¹⁷⁸ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, 1999, p. 12.

¹⁷⁹ See: Ted Gurr, *Why Men Rebel*, Princeton University Press, 1970.

¹⁸⁰ Nicholas Thomas and William T. Tow, *The Utility of Human Security: Sovereignty and Humanitarian Intervention*, International Peace Research Institute Oslo, 2002, p. 177.

¹⁸¹ Ibid p. 178.

¹⁸² United Nations Development Programme (HDR), *New Dimensions of Human Security*, Oxford University Press, 1994.

¹⁸³ United Nations Report, *Human Security Now*, 2003, p. 4.

human security has become too broad and lost its power. In his opinion, “the implied breath of this application may have devalued the human security aspect by broadening the idea beyond measurable limits”.¹⁸⁴ When ‘human development’ tries to capture both individual and state security at the very same time, an internal tension is created. Measures or actions might contribute to the overall security of a state, but threaten a particular group within the state.

In order to solve this problem we need to identify a fundamental criterion to define a threat. Michael Newman argues that protection is the central notion of humanitarianism and should be a key term within the concept of human security.¹⁸⁵ Amartya Sen holds a similar point of view, according to her human development programmes tend to focus on ‘growth with equity’ whereas human security pays attention to ‘downturns with security’.¹⁸⁶ Moreover, she argues that “even when the much-discussed problems of uneven and unequally shared benefits of growth and expansion have been successfully addressed, a sudden downturn can make the lives of the vulnerable thoroughly and uncommonly deprived. (...) Insecurity is a different problem than unequal expansion”.¹⁸⁷ Thomas considers that challenges of ‘extreme vulnerability and imminent danger’ are prevalent over other security concerns.¹⁸⁸ He lists three factors that indicate the gravity of the security threat which concern the ones whose security is threatened: first, victims of war and internal conflict; second, persons who barely subsist and are vulnerable to become victim of a ‘socio-economic disaster’; and third, victims of natural disasters.

Widespread and systematic sexual violence poses a serious threat against the security of women that cannot be justified by the post-conflict status of a state. Massive sexual violence has far-reaching consequences for a society; besides causing physical harm it diminishes the already vulnerable social position of women and breaks down societal structures.¹⁸⁹ When a state fails to protect its women from widespread and systematic sexual violence, another state has to bear responsibility for the protection of vulnerable human beings.

¹⁸⁴ Thomas, *supra* n. 180, p.181.

¹⁸⁵ Newman, *supra* n. 46, p.188

¹⁸⁶ Amartya Sen in UN Report *supra* n. 183, p.8.

¹⁸⁷ Ibid.

¹⁸⁸ Thomas, *supra* n. 182, p. 182.

¹⁸⁹ Bonn International Center for Conversion, ‘Towards a Typology of Wartime Rape’, pp. 19-21. Retrieved on 20 November 2011 from:
<http://www.bicc.de/uploads/pdf/publications/briefs/brief43/brief43.pdf>

3.5 Conclusion

Sovereignty implies responsibility. A state often plays a crucial and complicit role in permitting discrimination and violence targeting women and girls. Even when a state is considered 'weak', this does not mean that it has lost its sovereignty. Admittedly, 'normal' sexual violence is part of internal affairs and falls under domestic jurisdiction. However, when a state systematically fails to protect its women from mass-scale sexual violence, other states have the right to interfere.

Large-scale and systematic sexual violence qualify as genocide, crimes against humanity and torture, all of which can be classified as peremptory norms when it meets specific requirements as set out by Bassiouni. Violation of a *jus cogens* norm gives rise to an obligation *erga omnes*, which means that a right is owed to all. The *erga omnes* obligation establishes legal standing of a state, and the global community as a whole holds responsibility to protect and safeguard human security.

Certainly, a weakened state takes time to heal from the wounds of an armed conflict and it might not be fair to expect optimal protection of its citizens. However, when severe international crimes are committed without adequate response, action by a third party is justified. In the case of widespread and systematic sexual violence, the security concern transcends issues of human development.

4. Global Responsibility

This final chapter addresses the main question of this dissertation: what does the responsibility to protect entail, can we even speak of a ‘duty to protect’, and which mechanisms are available and proportional for an outside state to interfere?

4.1 *Responsibility to protect*

The 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) states that “state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect”.¹⁹⁰

During the World Summit 2005, world leaders embraced the Responsibility to Protect doctrine (R2P) in articles 138 and 139.¹⁹¹ Article 138 states that:

“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it”.

In addition, article 137 creates space for an intervention:

“In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.^{192 193}

¹⁹⁰ International Commission on Intervention and State Sovereignty (ICISS), ‘The Responsibility to Protect’, December 2001.

¹⁹¹ World Summit 2005.

¹⁹² High Level panel (2004) paragraph 201 spoke of when states are ‘unwilling or unable’ to do so. But at the Summit Meeting these words were replaced with ‘manifest failure’.

¹⁹³ Please note that I do not particularly advocate for either a multilateral or a unilateral intervention.

The Security Council explicitly confirms the R2P doctrine in Resolution 1674 on the protection of civilians in armed conflict.¹⁹⁴ Namely, it “reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. It goes on to express its readiness to “adopt appropriate steps where necessary”.¹⁹⁵ However, bear in mind that the primary responsibility still rests on the state authorities whose citizens are threatened.

It is a common misunderstanding to see R2P as an equivalent of a military intervention.¹⁹⁶ Nevertheless, the R2P doctrine covers a larger variety of possible actions according to the different phases in conflict; the responsibility to prevent, the responsibility to react and the responsibility to rebuild. Humanitarian intervention is only one of the tools available within the ‘reaction’ component of the R2P. Other available mechanisms are political and diplomatic strategies, economic strategies, legal strategies and military strategies. It may be clear that the military strategies are at the final end of the scale as this implies the use of force. When a fragile state acknowledges its failure to protect and gives consent to a humanitarian intervention, this eases the sovereignty concern and the legitimacy issues around humanitarian intervention. However, when the military intervention is non-consensual, it is less clear when the use of force is an appropriate response to a humanitarian emergency.

Scholars have engaged with this question and have developed comparable lists that show large similarities with the Just War theory.¹⁹⁷ The ICISS report provides six criteria for a military intervention, those being right authority, just cause, right intention, last resort, proportionality and reasonable prospects of success.¹⁹⁸ As I have touched upon most of these criteria, I will here concentrate on the one that last one mentioned by the ICISS and has not been addressed yet:

¹⁹⁴ It also explicitly condemns sexual violence during armed conflict. Article 5 ‘reaffirms its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict in violation of applicable international obligations with respect in particular to (i) torture and other prohibited treatment, (ii) gender-based and sexual violence, (iii) violence against children, (iv) the recruitment and use of child soldiers, (v) trafficking in humans, (vi) forced displacement, and (vii) the intentional denial of humanitarian assistance, and demands that all parties put an end to such practices’.

¹⁹⁵ SC Resolution 1674 specifically aims at armed conflict. However, as argued in the previous chapter, crimes against humanity, torture and genocide can take place outside of the ‘traditional’ armed conflict. The Rome Statute does apply to both war- and peace time.

¹⁹⁶ Gareth Evans, ‘The Responsibility to Protect. Ending Mass Atrocity Once and For All’, Brookings Institution Press, 2008, p. 55.

¹⁹⁷ The Just War theory seeks justification for war. *Jus ad bellum*, a just resort to war, involves a set of principles; (1) a just war can only be fought if all non-violent options are exhausted, (2) it has to be proportional and (3) there has to be a reasonable chance of ‘success’. Also, (4) a just war can only be initiated by a legitimate authority. Last but certainly not least, and most relevant in relation to *jus post bellum*, is that (5) there must be a just cause. For example, Gareth Evans elaborated on this question.

¹⁹⁸ ICISS, *supra* n. 190, p. 32.

consequentialism.¹⁹⁹ The consequentialist theory is based on utilitarianism; we are only prepared to risk some factors of human security (human lives) if it is likely that by doing so, the overall level of human security benefits.²⁰⁰

The ultimate goal of a just humanitarian intervention is to improve the status of human rights. Since humanitarian intervention in itself has caused human suffering as well, it is only permissible in case of grave human rights abuses. The consequences of a humanitarian intervention must therefore be balanced against the potential harm. Coercive military action can only be justified when there is a reasonable chance of success. This is probably the most difficult element to predict. Does a humanitarian intervention really contribute to the well being of the people?

The problem with a humanitarian intervention is always the 'unknown' factor. Consequences cannot be predicted and pain, loss and suffering are inevitable. However, that should not prevent the global community from undertaking any action. Thomas Weiss advocates for the 'do-something' approach and refers to the non-intervention in Rwanda to support his point of view.²⁰¹ Prior to the genocide in Rwanda in 1994, the international community did not undertake any action. A massive genocide occurred.²⁰² Weiss wonders whether it would not be "possible to imagine the same outcome but with slightly more robust and more timely international responses in that fateful year that might have deterred or slowed the momentum of the genocide, prevented the flight of millions, and saved *only* a few hundred thousand lives?"²⁰³

The ICISS report describes the moral dilemma aptly by stating that "getting a moral motive to bite means, however, being able to convey a sense of urgency and reality about the threat to human life in a particular situation. Unfortunately, this is always harder to convey at the crucial stage of prevention than it is after some actual horror has occurred".²⁰⁴

Questioning the consequences of a humanitarian intervention is particularly important in case of a 'fragile state'. Gareth Evans argues as follows:

"In particular, a military action for limited human protection purposes cannot be justified if in the process it triggers a larger conflict. It will be the case that some human beings simply cannot

¹⁹⁹ The 'right authority' criterion is interesting and controversial but unfortunately this thesis offers no space to scrutinize the desired characteristics of the intervening state.

²⁰⁰ See for example Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Clarendon Press, 1996.

²⁰¹ Thomas George Weiss, *Humanitarian Intervention: Ideas in Action*, Polity Press, 2007, p. 110.

²⁰² From April to mid July 1994, between 500,000 and 1,000,000 people were killed in Rwanda.

²⁰³ Weiss, *supra* n. 202, p. 110.

²⁰⁴ ICISS, *Responsibility to Protect: Research, Bibliography, Background*. This is a supplement to the 2001 Report *supra* n. 190. See p. 71, under 8.13.

be rescued except at unacceptable costs (...). In such cases, however painful the reality, coercive military action is no longer justified. None of this means that the ‘responsibility to protect norm’ is irrelevant: just that it has to be implemented here by means falling short of full-scale coercive military intervention”.²⁰⁵

In other words, particular situations ask for different responses. I admit that a humanitarian intervention might not always be the most fitting answer to a post-conflict status. As written before, multiple mechanisms are available to offer protection to foreign citizens.

Indeed, in the case of fragile post-conflict states, the ‘costs’ of a humanitarian intervention are higher because the state is actually trying to recover from armed conflict and should be given the chance to do so. However, we may not underestimate the pain, suffering and loss that accompany post-conflict sexual violence. Situations may occur in which the mechanism of a humanitarian intervention is less suitable than other, less forceful, available tools. In case the consequences of the use of force are disproportionately high, other mechanisms should be considered. For example, states can impose financial and diplomatic sanctions or even bring a case for the International Court of Justice.²⁰⁶

4.2 *A duty?*

Even though I have not elaborated extensively on the moral obligation to protect ‘aliens’ from atrocities, I shall briefly touch upon a moral *duty*, which possibly derives from that. Does the moral obligation to take responsibility in the name of humanity imply that in certain cases the global community bears a legal duty? I understand a duty to protect as a duty to aid, which is defined by Henry Shue as the provision for ‘security of those unable to provide their own’ when the institutions designed to provide such protection are unable or unwilling to do so.²⁰⁷

The ICISS Report addresses the morality issue in paragraph 8.12, stating that to mobilize support for intervention, the “responsibility to protect’ must be substantiated by strong moral arguments”.²⁰⁸ In order to find a strong moral argument to support the claim that states have a moral duty to intervene in certain cases, one must look within the field of political theory.

²⁰⁵ Evans, *supra* n. 196, p. 145.

²⁰⁶ A violation of an obligation *erga omnes* gives another state legal standing. Assuming that the Court has jurisdiction.

²⁰⁷ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press, 1996, p. 53.

²⁰⁸ ICISS Report 2001, p. 71.

Shue advocates for the responsibility to protect as a duty. His argument is based on the understanding of human rights as more than just a liberty to enjoy these rights.²⁰⁹ In the ‘Hohfeld-scheme’, human rights are classified as claim-rights.²¹⁰ A claim-right is a right ‘in the strict sense’ that implies an obligation on others to allow or enable someone to claim his or her right. According to Shue, basic rights imply correlative duties to enforce these rights, including undertaking a humanitarian intervention.²¹¹ Kok-Chor Tan similarly argues that the debate around humanitarian intervention is twofold; establishing the legality and the legitimacy of intervention is the first step. The second step is to scrutinize whether the permissibility of a humanitarian intervention implies an obligation to act.²¹² Tan writes: “if rights violations are severe enough to override the sovereignty of the offending state, which is a cornerstone *ideal* in international affairs, the severity of the situation should also impose an obligation on other states to end the violation. If the right of the offending state to non-intervention may be overruled in the name of human rights, so too, it seems to me, may the right of other states to stay disengaged”.²¹³

Shue and Tan definitely hold a valid point of view. However, there are some complications with this approach. First of all, this perspective on humanitarian intervention goes against the consequentialist foundation of humanitarian intervention. A duty-based approach is based on a deontological normative ethics; humanitarian intervention is considered ‘good’ because it would be ‘wrong’ not to intervene.²¹⁴ It does not consider the possible negative consequences of a military intervention. Secondly, it places a risk on the ‘duty-bearer’, which possibly violates the rights of the intervening state. Duty-bearers are right-holders themselves and cannot, therefore, be obligated to sacrifice their own lives for the sake of others. To place such an obligation on the duty-bearer would fail to respect his right to life and, thus, would fail to treat the duty-bearer as a valuable human being. In the same line, Pattison argues that in order to speak of a ‘right’, a state needs to have sufficient financial resources. If not, it violates the rights of its own people.²¹⁵ In this sense, the universality of human rights conflicts with a corresponding duty to protect human rights.

Taking these complications into consideration seems to imply that only when human rights abuses are severe and the outside state has the means to intervene, can they be considered ‘duty-

²⁰⁹ Shue, *supra* n. 207.

²¹⁰ W.N. Hohfeld, *Fundamental Legal Conceptions*, Yale University Press, 1923.

²¹¹ Michael Payne, ‘Henry Shue on Basic Rights’, *Essays in Philosophy*, 2008, Vol. 9, Issue. 2, Article 5.

²¹² Kok-Chor Tan, ‘The Duty to Protect’, *NOMOS*, 2005, Vol. 47, p. 87.

²¹³ *Ibid* p. 90.

²¹⁴ See Aleksandar Jokic, ‘*Humanitarian Intervention: Moral and Philosophical Issues*’. Broadview Press, 2003, p. 79.

²¹⁵ James Pattison, ‘*Humanitarian Intervention & The Responsibility to Protect: Who Should Intervene?*’, Oxford University press, 2010.

holders'. Pattison labels this as the 'General Duty Approach', which refers to an imperfect duty.²¹⁶ Depending on the qualities of potential interveners they can hold an 'unassigned' duty to undertake action. Pattison distinguishes two ways in which this theory works in practice; either the state that holds the most legitimate claim would be the designated intervener or, the duty to intervene could be institutionalized.²¹⁷ He lists a number of advantages of such an approach, amongst which are efficiency, clarity and legitimacy of humanitarian intervention.

It is not my aim to list actors, or define, which features a legitimate actor should possess. My point is that, from a legal perspective, it is problematic to speak of a duty to protect. I follow Anne Orford who states that "the obligation of the state to protect those within its territory or jurisdiction from genocide and other mass atrocities was already reflected in the Genocide Convention, international and regional human rights treaties and the laws of war. Nor does it appear that the declaration of an *international responsibility* to protect has imposed a legal obligation upon states to engage in unilateral or collective intervention in situations of humanitarian crisis".²¹⁸

States hold a duty to respect, protect and ensure human rights. Whether they hold a global duty to interfere when other states fail to do so is a different question. I argue that in this case we can speak of a moral duty to undertake action. The power of the duty depends on multiple factors, amongst others the position of the potential intervener and the international political position a state has taken on certain matters. The global community has expressed a serious concern for women's rights and sexual violence in particular. To illustrate, Security Council Resolution 1325 directly acknowledged that "civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict".²¹⁹ It also laid the groundwork for increasing its own institutional responsibility to prevent rape and gender-based violence. The resolution called "on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse". Although this was not an outright declaration of it being the responsibility of the UN to stop gender violence, between the lines of diplomatically vague language the UN did suggest that gender violence had become an issue of serious concern. In this regards, Security Council Resolution 1820, adopted in June 2008, is also relevant.²²⁰ In this Resolution, the UN acknowledged the use of sexual violence as a military technique – as a 'weapon of war'. More importantly, the UN

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, 2011, p. 24.

²¹⁹ SC Resolution 1325, 2000.

²²⁰ SC Resolution 1890, 2008.

expressed “its readiness, when considering situations on the agenda of the Security Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence”. Indeed, several high ranked perpetrators have already been punished.²²¹

4.3 *‘Political borders’*

Up until now, most attention was given to legitimacy of a humanitarian intervention as an act. This paragraph concerns the legitimacy of the state actors. My aim is not to identify specific actors but to analyse the political agency of states in general. Assuming the existence of a core sense of morality in human kind, the question arises: why do we still see so much suffering in the world? Or more specific: why is there so much inaction? The main answer to this question is politics. States are the agents of human rights, but are they capable of fulfilling this task? In other words, can a state ever be a moral agent?

A fair evaluation of the political view on humanitarian intervention is impossible within the scope of this thesis. Therefore I will just briefly mention the main political factors that have the potential to undermine a humanitarian intervention.²²²

Realists have raised a number of serious arguments against humanitarian intervention to which they refer as ‘Realpolitik’. First of all, realists argue that states have more than one political objective; respect for human rights often has to bend for other interests. In other words, the commitment to human rights is instrumental and pragmatic. As Louis Henkin famously said, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”.²²³ The codification and implementation of a significant number of human rights impose both a legal and moral obligation on the state. However, in reality, when power and moral come together, human rights often get the worst of it. States are not moral agents, they are institutions with multiple interests of which human rights are only a small part.²²⁴

Realism has been sold to the world as a strong argument against moral state actions and as a way to define and abuse power. However, we should not take ‘Realpolitik’ too seriously as a tool of

²²¹ See for example the *Akayesu* case: *Prosecutor v. Akayesu*, ICTR 96-4-T.

²²² Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, 2000. Wheeler asks himself this question and summarizes the difficulties: [1] Realpolitik, [2] Unwillingness to put nationals at risk, [3] Legitimacy issues, [4] Uncertainty of success.

²²³ Louis Henkin, *How Nations Behave. Law and Foreign Policy*. London: Pall Mall for the Council of Foreign Relations, 1968, p. 47.

²²⁴ Noam Chomsky notoriously stated that ‘states are not moral agents, people are, and can impose moral standards on powerful institutions’.

political analysis. In fact, Ferguson argues that “realists will tend to focus on national power and prestige, and limit the use of diplomatic, democratic or ideological weapons which challenge the realist world order. This is not the only way to conduct the political projection and use of power, and is insufficient to even define national goals”.²²⁵

I understand the concern for the abuse of the humanitarian intervention doctrine but that cannot be a reason to wipe the whole concept off the table. Rather, generally speaking, is there such a thing as a ‘single motivation’ to act? It is conceivable that just like individuals, states and the global community often have multiple interests to undertake a certain action. Take for instance millions of refugees fleeing from a civil war into neighboring safer but relatively unstable countries. A humanitarian intervention may have accumulated motives; just as much as the international community wants to put an end to the human rights abuses in the war torn country, it also wants to stop the influx of refugees that cause a huge financial burden on the surrounding states. In this vein, Michael Walzer argues that interventions will always involve a plurality of motives since “states do not send their soldiers into other states, it seems, only in order to save lives”.²²⁶ Furthermore, according to Walzer an intervention can be labeled ‘humanitarian’ when there are some humanitarian benefits even if they are accompanied by less humanitarian reasons.²²⁷ However, this is only a solid point when assuming that states have an interest in global humanity and value human solidarity. Otherwise, humanism is overruled by geopolitical and strategic considerations.

Even though actors might justify humanitarian action based partly on ulterior motives, sometimes it is the only mechanism to enforce human rights that offers real change. Anne Orford states that “many legal scholars seem haunted by the fear that opposing military intervention in Bosnia, Haiti, Kosovo or East Timor means opposing the only realistic possibility of international engagement to end the human rights suffering witnessed in such conflicts. The need to halt the horrors of genocide or to address the effects of civil war and internal armed conflict on civilians has been accepted as sufficient justification for intervention, even if other motives may be involved”.²²⁸

It is not difficult to see why states are reluctant to forcefully intervene in another country. The stakes of a humanitarian intervention are much higher than any other kind of intervention. States

²²⁵ R. James Ferguson, *Political Realism, Ideology and Power: A Discussion and Critique via Machiavelli, Morgenthau and Sun Tzu*, 2004. Retrieved from <http://www.international-relations.com/History/Machiavelli.htm> on 2 February, 2012.

²²⁶ Michael Walzer, *Just and Unjust Wars*. Basic Books, 1977, p. 101.

²²⁷ Ibid pp. 104-108.

²²⁸ Anne Orford *Reading humanitarian intervention*. Cambridge University Press, 2003, p. 6.

are unwilling to put nationals at risk in order to save strangers in distant lands. Besides, the financial expenses of a humanitarian intervention are high. From my point of view, the hesitation of states to intervene is connected to the lack of legitimacy of humanitarian intervention. In order to persuade states to accept the obligation to use of force for human protection, it needs to be clear when a humanitarian intervention is justified.

Realists argue that by denying the right to humanitarian intervention, we avoid abuse by powerful states. I oppose this view and hold the opinion that the ambiguity around humanitarian intervention encourages abuse. I agree with for example Nicholas Wheeler and Eric Heinze who state that even the actions of powerful states will be constrained if the agent is perceived as illegitimate.²²⁹ Heinze quotes Hans Morgenthau: “Legitimate power, which can evoke a moral or legal justification for its exercise, is likely to be more effective than equivalent illegitimate power, which cannot be so justified. That is to say, legitimate power has a better chance to influence the will of its objects than equivalent illegitimate power”.²³⁰ Gareth Evans also addresses the question of legitimacy and comes to a similar conclusion. He states that “the effectiveness of the global security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy: their being made on solid evidentiary grounds, for the right reasons, morally as well as legally”.²³¹

The pluralist objection to humanitarian intervention relates to this argument. It states that in the absence of an international consensus on the rules governing a practice of unilateral intervention, states will act on their own moral principles, thereby weakening an international order built on the rules of sovereignty, non-intervention and non-use of force.²³² Realists now conclude that we need a legal rule to prohibit humanitarian intervention.²³³ However, it is also possible to draft a law that allows humanitarian intervention under defined circumstances. We need a legal exception to the rule of non-intervention.

²²⁹ Heinze, *supra* n. 119, p. 115.

²³⁰ Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, McGraw Hill, 1993, p. 32.

²³¹ Evans, *supra* n. 196, p. 139.

²³² Wheeler, *supra* n. 57, p. 29.

²³³ Andrew Mason and Nicolas Wheeler, ‘Realist Objections to Humanitarian Intervention’, in Barry Holden (ed.), *The Ethical Dimensions of Global Change*, MacMillan, 1996, pp. 101-102.

4.4 Conclusion

The R2P doctrine affirms this worldwide responsibility and states that “where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect”. The R2P doctrine does not challenge the status of state sovereignty but reinforces it. That is to say, the state remains primarily responsible for the safety of its own citizens, and only when the state fails to prevent sexual violence it forfeits its legitimacy and responsibility transferred to the larger community.²³⁴

The R2P doctrine offers multiple mechanisms to defend the population of a foreign country against human rights abuses, a humanitarian intervention can only be used as a last resort. A fundamental and complex question is whether the costs of a military intervention in a post-conflict state lift up against the benefits. This all depends on specific circumstances concerning the general status of human rights and the level of state control. When necessary, a humanitarian intervention is a legitimate option.

A humanitarian intervention is a political affair, which involves state action. The question arises; can states act as moral agents? Realists have argued that they cannot as states are selfish, have double standards and are unwilling to put nationals at risk. They hold a valid point to a certain extent; there are more factors determining state action.

From my point of view, legalizing a humanitarian intervention contributes to the global human rights situation rather than resulting in abuse and selectivity. States are not equal and military interventions are reality. However, they are often justified by article 51 of the UN Charter, invoking a right to self-defense, while the actual motives are rather humanitarian. To illustrate, India entered East Pakistan in 1971 to stop Pakistani atrocities, Vietnam entered Cambodia in 1978 to end the reign of terror by the Khmer Rouge, and Tanzania entered Uganda in 1979 to depose of the Idi Amin dictatorship. Each of these examples was unilateral (non-authorized by the United Nations) and seemed to be motivated by genuine humanitarian concerns.²³⁵ The ambiguity around humanitarian intervention and the individual character of human rights makes states ‘feel’ uncomfortable. They are afraid to lose legitimacy if they fail to comply with human rights norms and tend to hold on to sovereignty as justification for lack of action.

²³⁴ Weiss, *supra* n. 205, p. 111.

²³⁵ Richard Falk, ‘Humanitarian Intervention: Elite and Critical Perspectives’, *Global Dialogue*, 2005, Vol. 7, No. 1-2. Falk speaks of a ‘yellow light of caution’: in certain extreme cases states should be allowed to intervene without prior UN authorization.

Conclusion

The contradiction between sovereignty and human rights lies at the core of the debate around humanitarian intervention. Both norms have a solid basis in law as well as politics. Contrary to what some realist theorists have argued, sovereignty is not an ‘expired’ concept. However, due to individualization, globalization and cosmopolitanism, an *absolute* perception of sovereignty is outdated. Contemporary international law allows space for both sovereignty and human rights. To illustrate, article 2 (1) of the UN Charter guarantees sovereign equality, while at the same time, article 39 of the UN Charter provides an exception to the non-intervention principle and demonstrates that sovereignty is not absolute. Accordingly, and perhaps ironically, reality goes against the realist perspective as human rights are increasingly used as a justification for humanitarian intervention. Nonetheless, despite their universal character, recognition and importance, human rights do not wipe the sovereignty principle completely off the table. More specifically, only a selection of human rights, a ‘proper subset’, can serve as a justification for a humanitarian intervention.

Exactly which human rights violations justify a breach of the sovereignty principle, is a pressing and an apparent complicated question. I propose Jean Cohen’s theory as a fitting solution to this question. Cohen searches for space between a traditional approach and a political approach towards human rights, and advocates for a third distinction. She argues that a state forfeits the claim to represent a group that is excluded from state membership. If state members are denied the right to have rights, and ‘hard law’ is violated, the political connection between the state and the people is lost. Consequently, when mass-scale sexual violence occurs in a state that systematically fails to protect its women, the victims of sexual violence can be labeled as ‘outsiders’ and the membership-principle is violated. Additionally, as Cohen suggests, the status of sexual violence in international criminal law provides us with a guideline to determine in which specific cases a humanitarian intervention is justified.

This guideline is twofold: firstly, the qualification in international criminal law is indicative for selecting human rights violations that justify humanitarian intervention. Widespread and systematic sexual violence is part of ‘hard law’ as it qualifies as the most severe international crimes: genocide, crimes against humanity and torture. Secondly, the concepts of universal jurisdiction and humanitarian interventions follow from a similar thought; both ensure that the most severe affronts to human welfare and dignity do not go by unaddressed and attempt to prevent and/or end them. Certain crimes are considered so heinous that if a state fails to protect

its people from violence and/or when a state fails to prosecute perpetrators, other states can intervene or exercise universal jurisdiction.

Obviously, the nation state holds the the main responsibility for the well being of its people. Admittedly, violence and crime seems inherent to humanity, and practically every society is confronted with sexual violence. The bulk of the sexual crimes that are committed remain an internal affair and are subject to domestic jurisdiction. However, in case sexual violence is 'widespread and systematic', and the state fails to respond, it becomes an external affair. Since widespread and systematic violence holds a status in international criminal law, failing to comply with these norms leads to a breach of an international obligation.

I follow Bassiouni's argument who states that certain international crimes qualify as a *jus cogens* norm, which means that everyone has to comply with the norm. Violation of such a peremptory norm gives rise to an obligation *erga omnes*. Genocide, crimes against humanity and torture all qualify as a *jus cogens* norm, which accordingly creates an obligation for all states to undertake action. Hence, a state is mainly responsible for its own citizens, but if it fails to protect its citizen and prevent sexual violence from occurring, an outside state is entitled to intervene. When taking global responsibility, humanitarian intervention is a legal and legitimate option.

The 'post-conflict' character of the violence and the lower level of protection that can be expected from a weak or fragile state is understandable but does not weigh up against the damage done. Sexual violence is an extremely serious crime that asks for a serious response.

In conclusion, only in a number of select cases justifies a humanitarian intervention. Widespread and systematic sexual violence is one of those cases. Even though it appears to be an 'inside phenomenon', it is of global concern. It shocks mankind, forms a threat against peace and security and classifies as the most dreadful international crimes.

I advocate for clearer rules on humanitarian intervention that allow the use of force in certain cases that serve a humanitarian purpose. Humanitarian interventions are reality, they are not just an ambiguous concept. I acknowledge the fragility of post-conflict societies and the far-reaching consequences of a military intervention. However, in order to make a statement, one sometimes has to exaggerate. Besides, the R2P doctrine provides the global community with a number of mechanisms besides a humanitarian intervention that do not imply the use of force. Perhaps a diplomatic or an economic sanction is more suitable in case of widespread and sexual violence.

The aim of this thesis is not to advocate for a humanitarian intervention per se when widespread and sexual violence occurs in a state that fails to respond to it. In order to do so, case studies need to be done that scrutinize and analyze the roots, causes and nature of the sexual violence. My goal here is to emphasize that sexual violence against women in a post-conflict phase exceeds the limits of 'low-intensity' violence and has to be taken seriously. The global community has repeatedly expressed its concern about women's rights and sexual rights, it is time to turn words into deeds.

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