

**RESPONSIBILITY TO PROTECT UNDER INTERNATIONAL LAW: A CASE FOR
ENTRENCHMENT IN TREATY LAW**

BY

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DECLARATION

I, **Joan Pauline Kore**, declare that this thesis is my original work and has not been submitted for the award of a degree in any other university.

Signed: _____

Date: _____

Researcher: Joan Pauline Kore

APPROVAL

This thesis entitled “**International Law: A Case for Entrenchment in Treaty Law**” has been done under my supervision and has been submitted to the University of Nairobi, School of Law for examination with my approval as the candidate’s supervisor.

Signed: _____

Date: _____

Supervisor: Jane Francis Nyangoma

DEDICATION

I dedicate this paper to my Father, Tom Ooko Kore, my hero and my confidant. Thank you for being the most amazing Father a daughter could ever ask for. Rosellyne and I love you dearly.

ACKNOWLEDGEMENT

To my Lord Jesus Christ, my God and King. All this has been through your grace, favour, and guidance. Glory be unto your name.

To my supervisor, JF Nyangoma. Thank you for your patience, dedication, critique, and time. You have been good to me all the way and I will remain eternally grateful. May the Lord bless you and your family.

To my parents, my heroes, Mum and Dad, thank you for your love, support, encouragement, and prayers. Thank you for making me strive to be the best I can be. You have made so many sacrifices for me; I do not know how to repay you. It is because of you that I am where I am today. I could never ask for more. I love you.

To my sister, best friend, and cheerleader, Rosellyne Kore Kababu. My third hero. Your unwavering support and encouragement pushed me through this process. I am so proud to be your little sister.

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To my little one, my nugget, my Hadassah. Your coming has made me be more determined to be a success. I hope I will be a good mother to you, as I have a good mother.

To everyone else that in one way or another supported me through this process, I am most grateful and may the Lord bless you exceedingly and abundantly more than you dared asked for or imagined.

J.P.Kore

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ABBREVIATIONS

AU	The African Union
CIPEV	The Commission of Inquiry into Post-Election Violence (
DDR	Disarmament, Demobilization, and Reintegration
ECOWAS	The Economic Community of West African States and the African Union Centre for Corporate Governance.
EU	European Union
FRY	Federal Republic of Yugoslavia,
LSE	London School of Economics
ICC	International Criminal Court Statute
ICCPR	The International Covenant on Civil and Political Rights
ICISS	The International Commission on Intervention and State Sovereignty
ICTR	The International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced People
ILC	International Law Commission's
IR	International Relations
IMF	International Monetary Fund
IMT	International Military Tribunal

IREC	Independent Review Commission on the 2007 Elections
IS	Islamic State
ISIS	Islamic State in Iraq and the Levant
KPC	Kosovo Protection Corps
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organization
NCIC	National Cohesion and Intergration Commission
OAU	Organisation of African Unity
ODM	Orange Democratic Party
PSU	Public Safety Unity
PNU	Party of National Unity
R2P	Responsibility to Protect
SRB	State Research Bureau
WWII	Second World War
UN	United Nations
UNSMIS	UN Supervision Mission In Syria
UNHCR	The United Nations High Commissioner for Refugees

LIST OF STATUTES AND TREATIES

Convention on the Prevention and Punishment of the Crime of Genocide

Charter of the United Nations (1945)

Montevideo Convention on Rights and Duties of States (1933).

Rome Statute of the International Criminal Court

Statute of the International Court of Justice

Treaty of Westphalia

ABSTRACT

The concept of Responsibility to Protect can be attributed to the international community's failure in the 1990's to respond to the genocide in Rwanda and later to prevent the atrocities in Kosovo. As a result, the international community was forced not only to look at how to prevent mass atrocities within states, but also how the international community should respond to internal state conflicts. However, since its conception, the concept has not been applied consistently, as it has been considered by some to be a violation of state sovereignty. This paper will look at the concept of state sovereignty and its historical development over the centuries. It will then critically examine the concept of Responsibility to Protect, and the successful and failed application in Kenya and Syria respectively. The paper will then call for the establishment of the concept in Treaty Law.

INTRODUCTION

1. **Background**

Defining the concept of state sovereignty is difficult, due to its wide range of meanings, varied applicability and the general lack of understanding to what it actually entails.¹ The Oxford dictionary defines sovereign as:

‘...one who has supremacy or rank above, or authority over, other; a superior; a ruler, a governor, lord or master;’ ‘the recognised supreme ruler of a people or country;’ ‘of power, authority’²

Alain de Benoist defined the term sovereignty in two ways: the first definition applies to supreme public power, which has the right and, in theory, the capacity to impose its authority in the last instance.³ The second definition refers to the holder of legitimate power, who is recognized to have authority.⁴ The first definition applies to national sovereignty expressed in the independence of an entity to act on popular will, whereas the second definition is associated with the power and legitimacy.⁵ Krasner⁶ identified four categories of meanings associated with sovereignty. The first definition outlines domestic sovereignty.⁷ Domestic sovereignty is defined as the absolute authority of the sovereign to determine the affairs of a given jurisdiction.⁸ Interdependence sovereignty, essentially associated with globalization, is the ability of the state to effectively regulate what goes in and out of its borders.⁹ International legal sovereignty refers to the recognition conferred to a state by members of the international community, necessary for a state to enjoy the full benefits associated with statehood.¹⁰ This type of sovereignty allows for diplomatic privileges, juridical equality, membership in international organizations, and the right to enter treaties and secure sovereign loans.¹¹ Lastly, Westphalian sovereignty, as described by Krasner, refers to immunity from

¹ Kelleh, F. (n.d.). The Changing Paradigm of State Sovereignty in The International System.

² Sovereignty [Def. 1]. (n.d.).Oxford Dictionary Online. In Oxford Dictionary. Retrieved August 10 2014, from <http://www.oxforddictionaries.com/>

³ De Benoist, Alain, Translated by Julia Kostova, “What is Sovereignty? from “Qu’est-ce que la souveraineté?” *Éléments*, no. 96 (1999): 99

⁴ De Benoist, supra note 3

⁵ Kellah, supra note 1

⁶ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*. (Princeton: Princeton University Press, 1999),11-24

⁷ Krasner, supra note 6

⁸ Krasner, supra note 6

⁹ Krasner, supra note 6

¹⁰ Krasner, supra note 6

¹¹ Krasner, supra note 6

external interference in the domestic affairs of the state.¹² In this regard, Westphalian and the international legal sovereignty relate to the rights of a state against outsiders and involve issues of authority and legitimacy, but exclude control.¹³ On the other hand, domestic sovereignty involves both the recognition of authority structures inside the state and the state's control over its affairs.¹⁴ Interdependence in sovereignty is solely concerned with a state's control over its borders.¹⁵

The history of state sovereignty has been characterized by a constant state of change.¹⁶ The integral principles of sovereignty, such as non-intervention, territorial integrity, and absolute power within the confines of a state, have been re-evaluated time and time again in light of new challenges to ensure that they remain relevant to the needs of any given time.¹⁷

Debates about the legitimacy of military action by outside actors to address issues within the jurisdiction of a sovereign state have been an integral part of evolution of the international system.¹⁸ In the nineteenth century, states predominantly in Europe intervened in the internal affairs of others either to rescue their own citizens from potential harm or to protect religious and national minorities vulnerable to persecution.¹⁹ This political practice came to be known as 'humanitarian intervention'.²⁰ However, enshrining this practice in international law was strongly opposed.²¹ During the formation of the UN Charter, the overwhelming objective of statesmen and lawyers was to limit the legitimate pretexts for engaging in war to cases of self-defence or collective security.²² The UN Charter therefore remains silent on the question of whether states can use military force to address a humanitarian crisis occurring within the sovereign jurisdiction of another.²³ In the latter part of the 20th century, a series of developments contributed to a more permissive context for intervention by outside actors when humanitarian crises shocked the international conscience.²⁴ These include the rise of international human rights instruments; the increased vulnerability of civilians in the context

¹² Krasner, supra note 6

¹³ Kellah, supra note 1

¹⁴ Kellah, supra note 1

¹⁵ Kellah, supra note 1

¹⁶ Kellah, supra note 1

¹⁷ Kellah, supra note 1

¹⁸ Welsh, supra note 18

¹⁹ Welsh, supra note 18

²⁰ Welsh, supra note 18

²¹ Welsh, Supra Note 18

²² Welsh, Supra Note 18

²³ Welsh, Supra Note 18

²⁴ Welsh, Supra Note 18

of civil conflict; the global and instantaneous access to information which can serve to heighten popular awareness of human suffering; and the greater willingness of the UN Security Council to define instances where such atrocities are occurring as ‘threats to international peace and security’.²⁵ Following the genocide in Rwanda and the war in the Balkans in the 1990s, the international community began a new debate on the legitimacy of intervention for humanitarian grounds.²⁶

In his Millennium Report of 2000²⁷, former Secretary General Kofi Annan put forward a challenge to Member States:

"If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?"²⁸

His objective was to avoid the twin failures in Rwanda and Kosovo, and to find a new consensus within the international community over the legitimacy of action to protect civilians from mass atrocities.²⁹ In 2001, the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS), took up Annan’s challenge and set out to determine when coercive action against another state for humanitarian purposes could be legitimate.³⁰ ICISS’s main contribution to the debate was primarily conceptual: the language moved from a ‘right of intervention’, which focused on coercive measures of interveners, to a ‘responsibility to protect’, which focused more on the individuals subject to harm’.³¹ In its report, the Commission also found that sovereignty not only gave the State the right to control its affairs, it also conferred on the State primary responsibility for protecting its citizenry within its borders.³² In cases where a State fails to protect its people – either

²⁵Welsh, Supra Note 18

²⁶Welsh, Supra Note 18

²⁷ ‘We the People’s’ The Role of the United Nations in the 21st Century. New York: Published by the United Nations, Department of Public Information. www.un.org

²⁸Ibid

²⁹Welsh, Supra Note 18

³⁰Welsh, Supra Note 18

³¹International Commission on Intervention and State Sovereignty, The Responsibility to Protect . (2009). Ottawa, Canada.

³²An Introduction to the Responsibility to Protect, supra note 31

through lack of ability or lack of willingness – the responsibility shifts to the international community to protect the citizens of the State.³³

The Commission argued that contemporary sovereignty is no longer merely about undisputed control over territory, but rather a conditional right dependant upon a state's respect for a minimum standard of human rights.³⁴ For the Commission, intervention is permissible – and an integral part of sovereignty, if it is aimed at protecting civilians from mass violations of their human rights.³⁵

The concept of Responsibility to protect therefore stipulates that:³⁶

1. The State carries the primary responsibility for the protection of populations from genocide, war crimes, crimes against humanity and ethnic cleansing.
2. The international community has a responsibility to assist States in fulfilling this responsibility.
3. The international community should use appropriate diplomatic, humanitarian and other peaceful means to protect populations from these crimes. If a State fails to protect its populations or is in fact the perpetrator of crimes, the international community must be prepared to take stronger measures, including the collective use of force through the UN Security Council.³⁷

Following the wave of violence in Kenya brought about by the December 2007, the international community reacted swiftly in applying the concept of Responsibility to Protect. The international community did this through a African Union mandated mediation team which was tasked to reach a power sharing agreement between the two opposing parties. has successfully been applied in Kenya, following the wave of violence which was triggered by a disputed presidential election in December 2007.³⁸ The rapid and coordinated reaction by the international community to reach a political solution entailed an African Union mandated mediation team commissioned to reach a power sharing agreement.³⁹ The success of this mission has been hailed as a model of diplomatic action under Responsibility to protect. This

³³ An Introduction to the Responsibility to Protect, supra note 31

³⁴ Welsh, Supra Note 18

³⁵ Welsh, Supra Note 18

³⁶ An Introduction to the Responsibility to Protect, supra note 31

³⁷ An Introduction to the Responsibility to Protect, supra note 31

³⁸ A Toolkit on the Responsibility to Protect. (n.d.). International Coalition for the Responsibility to Protect.

³⁹ A Toolkit on the Responsibility to Protect, supra note 38

~~success has been praised as a model of diplomatic action under Responsibility to Protect.~~⁴⁰

Another successful implementation of Responsibility to Protect is during the civil war in Guinea.⁴¹ On 28 September 2009, government forces ~~opened fire at peaceful protestors in a stadium at Conakry which resulted to 1400 civilians wounded, 140 civilian deaths and allegations of widespread sexual violence and rape, interrupted a peaceful political protest in a stadium in Conakry and opened fire on civilians, resulting in over 150 civilian deaths, at least 1400 wounded, and reports of widespread sexual violence and rape.~~⁴² ~~The violence of that day led to allegations of crimes against humanity, and assertions that the ruling military government had assembled private militias around ethnic lines prior to the attacks. The violence that day amounted to crimes against humanity, and concerns that independent members of the ruling military government had assembled private militias around ethnic lines prior to the attack emerged.~~⁴³ ~~This led to a mediation effort and the imposition of sanctions, led by the Economic Community of West African States (ECOWAS) and the African Union, initiated a mediation effort and imposed economic sanctions; which quickly led to the formation of a unity government. measures which quickly led to the formation of a unity government.~~⁴⁴ ECOWAS has since been praised for ~~its quick response to the situation and resolving a matter that could have escalated to a deadly, long-standing conflict, facilitating a rapid political solution to what could have escalated to a deadly, long-standing conflict.~~⁴⁵

~~In Sri Lanka, during the final days of the civil war, violence dramatically intensified thus trapping hundreds of thousands of civilians without access to basic necessities or humanitarian aid. Between 2008 and 2009, during the final stages of the Sri Lankan civil war, violence escalated dramatically, with clashes trapping hundreds of thousands of civilians without access to basic necessities or humanitarian aid.~~⁴⁶ The government failed to uphold its obligations under Responsibility to Protect and was ultimately responsible for a large number of civilian deaths, even though it claimed its actions were aimed at stopping acts of terrorism.⁴⁷ During this time, the United Nations was criticized for its limited efforts to hold the government accountable to likely war crimes and crimes against humanity.⁴⁸ The ~~unfortunate~~

⁴⁰ A Toolkit on the Responsibility to Protect, supra note 38

⁴¹ A Toolkit on the Responsibility to Protect, supra note 38

⁴² A Toolkit on the Responsibility to Protect, supra note 38

⁴³ A Toolkit on the Responsibility to Protect, supra note 38

⁴⁴ A Toolkit on the Responsibility to Protect, supra note 38

⁴⁵ A Toolkit on the Responsibility to Protect, supra note 38

⁴⁶ A Toolkit on the Responsibility to Protect, supra note 38

⁴⁷ A Toolkit on the Responsibility to Protect, supra note 38

⁴⁸ A Toolkit on the Responsibility to Protect, supra note 38

~~in the country was later cited as a grave failure of the UN to effectively respond to early warning signs, events in Sri Lanka was later marked as a grave failure of the UN to adequately respond to early warnings and to the evolving situation.~~⁴⁹ The civil war in Syria is also considered as a failure of Responsibility to Protect.⁵⁰ As atrocities continue, the international community has reacted with economic, diplomatic, and political measures. ~~However, the UN's failure to come up with a more robust action and China and Russia's repeated use veto, have generated criticism from states, UN officials and the civil society; but the UN Security Council's failure to agree on a more robust action and the repeated use of veto by Russia and China, have generated significant criticism from states, UN officials and the civil society.~~⁵¹

2. Problem Statement

The Responsibility to Protect in essence, is a concept established to prevent and stop genocide, war crimes, ethnic cleansing, and crimes against humanity.⁵² The concept is not a law, but rather a political commitment to guide states, sub-regional, regional and international arrangements in protecting populations from these crimes and violations.⁵³ The concept tries to find an answer to the question on how mass atrocities can be prevented, how effective reaction can be deployed to end mass atrocities, and how states and communities should rebuild if an intervention has been executed.⁵⁴

Responsibility to Protect seeks to avoid and address cases of mass atrocities within the confines of nation states. But to date, the principle has not been applied consistently. Questions therefore arise as to why the concept has not been applied consistently and effectively in the diverse countries experiencing severe internal conflict.. In the practical examples noted above, the international community reacted swiftly and effectively in Kenya and Guinea using diplomatic measures, mediation, and sanctions. However this was not the same in Syria and Sri Lanka, where the UN and the international community has been criticised for not reacting as fast or effectively to prevent or stop grave human rights

⁴⁹ A Toolkit on the Responsibility to Protect, supra note 38

⁵⁰ A Toolkit on the Responsibility to Protect, supra note 38

⁵¹ A Toolkit on the Responsibility to Protect, supra note 38

⁵² A Toolkit on the Responsibility to Protect, supra note 38

⁵³ A Toolkit on the Responsibility to Protect, supra note 38

⁵⁴ Trijsburg, S. (2009, January 1). Prospects for Future Effectiveness of the Responsibility to Protect: R2P in reality, how to end mass atrocities once and for all?

violations. This study seeks to interrogate the reasons for the inconsistent application of the Principle of Responsibility to Protect

For its optimal and consistent application, the concept should firmly be embedded and entrenched in international law.

3. Research Objectives

Broad objective

- i. The broad objective of this study is to make proposals for the incorporation of the concept of Responsibility to Protect in treaty law to enable consistent application and for its operationalization in deserving cases.

Specific objectives

- i. To discuss the concept of state sovereignty, especially its progressive development in historical perspective.
- ii. To critically examine the concept of Responsibility to Protect

4. Research Questions

- i. Why has the concept of Responsibility to Protect been applied successfully in some cases of internal conflict and why has its application been opposed in other instances?
- ii. How should the concept of Responsibility to Protect be entrenched in treaty law to ensure its effective and consistent application in deserving internal conflict situations?

5. Hypothesis

Responsibility to Protect is a concept created to specifically protect civilians from genocide, war crimes, crimes against humanity and ethnic cleansing. However, to date, the concept has not been applied consistently, and many people have been affected by genocide, war crimes, crimes against humanity and ethnic cleansing. Until the concept is fully embraced by the international community and until it is entrenched sufficiently within international law, then its application in internal conflict situations will continue to be erratic. There will also be no guarantee that the international community will respond as desired.

6. Rationale

A critical examination of Responsibility to Protect vis-a-vis state sovereignty is important because state sovereignty has been used as an argument not to intervene during times of crises. Take for instance Syria; the country has been embroiled in civil war since March 2011.⁵⁵ To date, according to the Syrian Observatory for Human Rights, more than 100,000 people have been killed since the start of the Syrian conflict.⁵⁶ Resolutions have been brought before the UN Security Council to intervene in the crises but China and Russia have used their Veto power to block any form of intervention. One of the factors for the veto votes include China's traditional policy of non-interference as entrenched in the UN Charter in dealing with matters of international peace and security through the Security Council.⁵⁷ In an article in Xinhua, a state-owned media outlet in China, entitled "China, Russia uphold peaceful approach by vetoing Syria resolution", states:

"The draft resolution, tabled by France, Britain, Germany and Portugal, was seen as a tool to interfere in Syria's internal affairs, as it only advocated sanctions or threat of sanctions against Syria and made no reference to any measures encouraging a peaceful settlement through dialogues among all the parties concerned. Non-interference is one of the fundamental principles enshrined in the UN Charter and also included in the Five Principles of Peaceful Co-existence. Intervention in a sovereign country's internal affairs is detrimental to the peaceful settlement of its problems."⁵⁸

Russia does concur with China that any form of intervention would be an erosion of Syria's sovereignty and would go against the principle of non-interference.

⁵⁵Syria Profile. (n.d.). Retrieved July 10, 2014, from British Broadcasting Corporation: <http://www.bbc.co.uk/news/world-middle-east-14703995>

⁵⁶Syrian war death toll pegged at over 100,000. (n.d.). Retrieved July 10, 2014, from CBC News World: <http://www.cbc.ca/news/world/syrian-war-death-toll-pegged-at-over-100-000-1.1369770>

⁵⁷Cinq-Mars, E. (n.d.). UN Security Council Fails to Uphold its Responsibility to Protect Syria. Retrieved July 10, 2014, from International Coalition for Responsibility to Protect: <http://icrtopblog.org/2011/10/07/un-security-council-fails-to-uphold-its-responsibility-to-protect-in-syria/>

⁵⁸Guanqun, W. (n.d.). China, Russia uphold peaceful approach by vetoing Syria draft resolution. Retrieved July 10, 2014, from Xinhua English News: http://news.xinhuanet.com/english2010/indepth/2011-10/05/c_131175590.htm

Therefore, mass atrocity crimes have continued in Syria because preference of non-interference and state sovereignty have trumped the responsibility of the international community, acting through the UN Security Council, to protect civilians.⁵⁹

However, if you compare this with the situation in Kenya, where the concept was applied effectively with no arguments of state sovereignty being put into play. The main focus of the international community was to stop the crisis and to stop human suffering. The international community therefore implemented diplomatic measures, which eventually brought back peace and stability in the country.

This study is therefore important because it calls for the establishment of the concept in treaty law. This will ensure the consistent application of the concept.

Literature Review

The International Commission on Intervention and State Sovereignty report (ICISS)⁶⁰ is the primary document that outlines the principle of Responsibility to Protect. The document attempted to develop a global political consensus on how to move from action to inaction within the international system and particularly through the United Nations by building consensus around three central ‘responsibilities’ international actors have toward alleviating egregious human suffering – the responsibilities to prevent, to react and to rebuild – collectively known as the Responsibility to Protect.

The report’s message is simple – state sovereignty implies responsibility and the primary responsibility for the protection of people first lies with the state itself. According to the report, when a state signs the U.N. Charter, it accepts certain responsibilities, most importantly a conception of sovereignty as a responsibility. Where states are unwilling or unable to protect its citizens from grave harm, the principle of non-interference as established in the UN Charter yields to the Responsibility to Protect.⁶¹ According to the report, state sovereignty remains important, but it requires that the international community judge and evaluate this sovereignty in light of modern human rights norms.

⁵⁹Cinq-Mars, E. (n.d.). UN Security Council Fails to Uphold its Responsibility to Protect Syria. Retrieved July 10, 2014, from International Coalition for Responsibility to Protect: <http://icrtopblog.org/2011/10/07/un-security-council-fails-to-uphold-its-responsibility-to-protect-in-syria/>

⁶⁰ An Introduction to the Responsibility to Protect, supra note 31

⁶¹ An Introduction to the Responsibility to Protect, supra note 31

With this regard, the report focuses on what should be done to protect people in dire need and the responsibilities of various actors to afford such protection. It outlines the actions to be taken and responsibilities under the ‘*Elements of Responsibility to Protect*’ section. The document therefore provides a detailed report on the concept of Responsibility to Protect, its elements, and the new definition of sovereignty. It does not however interrogate the concept in relation to its perceived erosion of state sovereignty. Neither does it advocate for its implementation in treaty law. This research will examine these issues.

Gareth Evans, in his book “*The Responsibility to Protect Ending Mass Atrocity Crimes Once and for All.*”⁶² advocates for the worldwide adoption and application of the concept of Responsibility to Protect. Evans was the Co-Chair of the ICISS (2000-01), which initiated the Responsibility to Protect concept. He looks at the scope and application of the Principle and urges the international community to strategically operationalize the principle in all its facets and to build political will to act. Evans begins by taking a chronological account of the development of Responsibility to Protect and assesses the prospects of its implementation. According to Evans, when the ICISS report was first published in the immediate aftermath of tragedy of September 11, international policy and academic focus was elsewhere and ‘the report seemed likely to disappear without a trace’.⁶³ Evans expresses his frustration in the international community’s slow response to mass atrocities. To him, the aim of the international community is to prod policy-makers into doing the "right thing" when faced with such crises—or, at the very least, to make it more difficult for them to stand aside. Throughout the book, Evans demonstrates that Responsibility to Protect is a multifaceted political and diplomatic agenda, with a variety of military and non-military tools which can support states and the international community in developing the capacity to protect their own citizens – thus preventing the commission of mass atrocities – but also the responsibility to rebuild societies after any intervention or conflict.

Evans book outlines and discusses the elements of Responsibility to Protect. These are Responsibility to Build, Responsibility to React and Responsibility to Rebuild. Evans book is beneficial to this research because it is more detailed than the ICISS report. He goes more

⁶² Evans, G. (2008). *The Responsibility to Protect Ending Mass Atrocity Crimes Once and For All*. Washington: Brookings Institution Press.

⁶³ Evans, *supra note 62*

in depth by defining and explaining what the elements are, the tools or strategies that fall under each element, and giving ideas and proposals for conflict resolution, violence prevention and the strengthening of human rights. His book however does not advocate for the entrenchment of Responsibility to Protect in treaty law.

Bellamy, in his article, "*The Responsibility to Protect and the Problem Of Military Intervention*"⁶⁴, addresses misconceptions of military intervention. Bellamy states that there is a common belief among governments that Responsibility to Protect is a more sophisticated way of conceptualizing and thus legitimizing humanitarian intervention. He states that since 2005, it has been widely suggested that Responsibility to Protect legalizes non-consensual intervention potentially without the sanction of the UN Security Council. In this regard, governments continue to suspect that Responsibility to Protect is simply a 'Trojan horse'⁶⁵ for the legitimization of unilateral intervention. Bellamy's article is beneficial to this research because his principle aim of writing it is to clarify what Responsibility to Protect says about military intervention and what it can contribute in practice. To do this, he first seeks to clarify the meaning of the concept by identifying the principle roots in two related but quite different contexts; the notion of sovereignty as a responsibility and the debate about unilateral humanitarian intervention sparked by, the North Atlantic Treaty Organization (NATO) 1999 intervention in Kosovo. He states that the tensions between these two distinct roots go some way towards explaining the confusion about the relationship between Responsibility to Protect and military intervention. He states that the first step of translating Responsibility to Protect from words into deeds is by clearly understanding what the principle does and does not say about the use of non-consensual military intervention for humanitarian purposes. He emphasizes what policy says with regards to military intervention; that the UN Security Council has to authorize such use of military force and that Responsibility to Protect does not set out criteria for the use of force beyond the four threshold crimes of genocide, war crimes, ethnic cleansing and crimes against humanity. The Council should also assume responsibility in cases where the host state is manifestly failing to protect its citizens. He argues that continuing confusion about military intervention and Responsibility to Protect helps neither the principle itself or those charged with making difficult decisions about how best to prevent

⁶⁴ Bellamy, A. J. (2008), *The Responsibility to Protect and the problem of military intervention*. *International Affairs*, 84: 615–639. doi: 10.1111/j.1468-2346.2008.00729.x

⁶⁵ a rhetorical vehicle for increased self-interested invasions by powerful international actors

genocide and mass atrocities and protect potential victims. Bellamy's article however does not explain how the concept can be entrenched in treaty law.

Nagan and Haddad's article, "*Sovereignty in Theory and Practice*"⁶⁶, chronicles the theory and practice of sovereignty from the perspective of leading thinkers, philosophers, and International treaty law. They begin by looking at the historical context by examining sovereignty theories and definitions from philosophers such as Jean Bodin, Thomas Hobbes, and John Austin. The authors then proceed to examine the definition of sovereignty in international law after the First and Second World War and the eventual limitations placed on sovereignty during the Nuremberg Tribunal. They then look at the formation of the United Nations and the United Nations Charter which placed limits on its member's sovereignty while at the same time asserting sovereignty through membership to the organisation.

The article is beneficial to this paper because it gives a detailed historical overview of sovereignty and details its development. The authors do not however touch on the new definition of sovereignty as defined in the ICISS document, which is sovereignty as a responsibility.

In her article, "*Cosmopolitan Sovereignty*"⁶⁷, Holli Thomas argues that globalisation and the progressive acceptance of human rights norms has produced a critical need for the principle of sovereignty to be rethought and redefined. The author argues that sovereignty should be redefined in a manner that links state power and a legitimate right to rule to the protection and provision of human rights and human capabilities for all citizens. The author argues that sovereignty should be shared with local, regional, and global authorities which would result in a kind of 'cosmopolitan sovereignty' where every individual is protected and provided for through a network of overlapping institutions of legitimate governance.

The article is beneficial because the author supports the new definition of sovereignty, that is, sovereignty as a responsibility, and argues that sovereignty should be viewed as dependant and conditional upon states protecting the well-being, dignity and human rights of its citizenry. She however fails to advocate for the entrenchment of the new definition of the definition in treaty law.

⁶⁶ Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 San Diego Int'l L.J. 429 (2012), available at <http://scholarship.law.ufl.edu/facultypub/293>

⁶⁷ Thomas, H. (2004, October). *Cosmopolitan Sovereignty*. Institute for Citizenship and Globalisation Deakin University. Adelaide, Australia.

In his article, *“With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Law-making”*⁶⁸, Payandeh notes that Responsibility to Protect is usually regarded as a legal norm or as an emerging norm of customary international law although proponents of this approach have failed to provide much evidence of the existence of its legality or as an emerging norm of customary international law. She rejects this understanding of responsibility to protect. She instead argues that Responsibility to Protect cannot be understood as an emerging international legal norm, and any such characterisation is misleading. She notes that not all aspects of the concept are fit to be translated into legal rights and obligations. The concept is construed as a comprehensive framework for the prevention and containment of massive human rights violations and as such cannot in its entirety become a legal norm. She also notes that from a legal perspective, it is not clear how the term responsibility fits into jurisprudential categories. In technical legal terms, a responsibility cannot be equated with a duty. Duty and responsibility must generally be understood as two distinct legal concepts. According to her, single elements of the concept possibly could be translated into single rights and duties. This however does not make the concept as such a suitable candidate for a legal norm.

Customary international law, as codified in Article 38(1)(b) of the Statute of the International Court of Justice, requires a repeated conduct of states that amounts to state practice and a corresponding belief that this conduct is required by law, (*opino juris*). Notwithstanding the general difficulty of identifying these elements, it is particularly problematic to recognise them in the context of responsibility to protect. An attempt can be made to identify the emergence of a customary norm by looking at the statements of states or to their assent or acquiescence to the endorsement of the concept within the U.N. framework. Verbal utterances as well as resolutions of international organisations and statements of states within international organisations can be considered as evidence of state practice and *opino juris*. However, taking into account the ambiguity of the concept, it is difficult to determine to which part or version of the responsibility to protect a specific statement alludes.

The writer also demonstrates that the conceptual change in the understanding of sovereignty cannot, by itself, lead to a change in international law. The concept does however touch upon a number of existing norms or potential norms of international law, and the increasing

⁶⁸ Payandeh, M. (2010). *With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking*. Yale Law School.

political recognition of the concept raises the question whether endorsement of the concept may have a legal impact on these norms. Therefore, the concept has to be viewed within the context of the international legal system of the use of force and collective security as defined in the U.N. Charter. The author's article is beneficial to this research because she recognises that the concept of responsibility to protect cannot be automatically assumed to be an international legal norm. This provides a basis for arguing that the concept should be entrenched in Treaty law. She argues that an analysis of the legal dimension of the Responsibility to Protect should not focus on the legal status of the concept. Instead, it must examine whether and how the concept, and especially the behaviour and statements of the relevant international actors in the context of the development of the concept, may have changed the legal content of the existing norms which form the basis of the international system of collective security. The author does not however address if and whether the concept can be entrenched into treaty law.

In his article, "*Responsibility to Protect: Political Rhetoric Or Emerging Legal Norm*"⁶⁹, Carsten Stahn, contends that Responsibility to Protect is not an emerging legal norm. The article is beneficial to this research because the author notes that none of the four main documents that is, the ICISS document, The High Level Panel report, The Report of the Secretary General, and the Outcome Document of the World Summit, can be regarded as generating binding documents in which the concept has been treated in depth. Therefore the concept cannot be regarded as generating binding international law under the classic sources of international law set for in Article 38 of the Statute of the International Court of Justice.

The author argues that Responsibility to Protect is not a completely original as some of the allegedly emerging ideas have emerged in the past. He demonstrates that sovereignty as a responsibility appeared as early as the time of Hugo Grotius whose conception of law is based on the assumption that the rules governing the organisation and behaviour of states exist ultimately for the benefit of the actual subjects of the rights and duties concerned, individual human beings. Grotius even maintained that it would be just to resort to war to prevent a state from mistreating its own citizens. This argument is also reflected in the work

⁶⁹Stahn, C. (n.d.). Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? The American Journal of International Law Vol. 101, No. 1 (Jan., 2007), 99-120.

of contract theorists such as John Locke who viewed the relationship between states and subjects in terms of trust.

Similarly, in international law, the state has never been exclusively considered a self-referential sovereignty. According to the writer, sovereignty and domestic jurisdiction have traditionally been served as forums for the protection of the well-being and interest of human beings. Since the seventeenth century, attempts have been made to grant individuals and groups international protection from the arbitrary exercise of state authority. Religious groups were even protected by treaty from their own sovereign and this protection was later extended to minorities.

Furthermore, according to Max Huber, in the *Island of Palmas* case, sovereignty never meant that a state could act in its territory regardless of the effect of its acts on another state. After the end of World War II, the adoption of the UN Charter and the rise of key human rights instruments eroded the classic quotation of sovereignty and power. Even though the Charter was oriented toward protecting the sanctity of sovereignty, it contained important references to human rights protection. The preamble, the last sentence of Article 2(7), and Articles 1(3) and 55 made it clear that the Charter was designed to 'protect the sovereignty of peoples' and was 'never meant as a licence for governments to trample on human rights and human dignity.' This reading of the Charter was recognised as legal doctrine as early as 1947.

In the 1980's, the term, 'duty to intervene' was invoked by groups seeking access to victims for the purpose of humanitarian assistance. Humanitarian organisations used the term "duty" (*devoir d'ingérence*) to make the case that nongovernmental organizations should have unrestricted access to victims of humanitarian calamities, even without the consent of the territorial state. This argument was later extended in the 1990's to include military interventions specifically for collapsed states such as Somalia and later in Kosovo.

Taking the authors arguments above, that sovereignty as a responsibility is not a new concept but that it emerged centuries ago, shouldn't the international community consider entrenching sovereignty as a responsibility into treaty law? This paper will advocate for that.

In her article, *Responsibility to Protect: A Framework for Prevention*,⁷⁰ Sheri P. Rosenberg acknowledges that prevention is the most important aspect of the Responsibility to Protect. She argues that the responsibility to prevent mass atrocities is firmly rooted in international law with the duty or obligation that states have to protect individuals within their own country. She gives examples of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural⁷¹

She however notes that since the adoption of the Doctrine at the 2005 World Summit, where the heads of state convened to endorse the concept, academic and policy debate concerning the legal and normative content of the Doctrine continue to neglect its preventative dimension. Her paper therefore focuses on filling the lacunae in policy and scholarship by examining the evolving international human rights law on prevention and the CESC. With this in mind she argues that Responsibility to Protect provides an obligation of due diligence requiring states to take such reasonable measures of prevention as could be expected. Rosenberg notes that despite the fact that there isn't a legal framework or document on Responsibility to Protect, the concept is rooted in international law and therefore States and the international community have a 'legal obligation' to step in and implement preventative measures to mass atrocities.

Following Rosenberg's argument above, even if Responsibility to Protect is rooted in international, she doesn't explain how it is rooted. Furthermore, she doesn't explore the possibility of the concept being entrenched in treaty law through codification. This paper will fill in the gap by advocating for the concepts entrenchment in treaty law.

In his article, *A Responsibility to Prevent? A Norm's Political and Legal Effects*⁷², Frank Huisingh examines the preventative pillar of the responsibility to protect and focuses on its normative development, robustness, normative fit and its chances of becoming a legal norm based on the sources of international law. The article is beneficial to this research because the author notes that the Responsibility to Protect as a norm has never been adopted in a Treaty.

⁷⁰ Rosenberg, S. P. (2009). Responsibility to Protect: A Framework for Prevention Global Responsibility to Protect. *Global Responsibility to Protect*, 442-477.

⁷¹ Evans, *supra note 62*

⁷² Huisingh, Frank, *A Responsibility to Prevent? A Norm's Political and Legal Effects* (April 1, 2013). *Amsterdam Law Forum*, Vol. 5, No. 1, pp. 4-35, 2013

He therefore argues that one has to consider other legally binding sources of international law which support the norm – particularly the Responsibility to Prevent. These sources include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article 1 states that that the crime of genocide itself is prohibited and that states have a duty to actively prevent genocide and punish the perpetrators. In the *Bosnia v. Serbia* case, the ICJ stated that the Article 1 obligation requires states to “employ all means which are reasonably available to them” so as to prevent genocide as far as possible. Other sources include the Rome Statute, which provides that parties to the International Criminal Court Statute, ICC, have a legal duty to investigate crimes against humanity and punish perpetrators, and the International Law Commission’s (ILC) Draft Articles on State Responsibility for Internationally Wrongful Acts.⁷³

Instead of advocating for the entrenchment of the concept into treaty law, the author argues that we should consider other legally binding documents which support the norm. This paper will argue that the concept should be entrenched into a single legal document.

7. Justification

The foregoing review indicates the following:

1. Gaps in literature indicate that there is no particular work that addresses embedding Responsibility to Protect in Treaty law.
2. No studies have been done to check the modalities of entrenching Responsibility to Protect in Treaty law

This research paper will therefore fill the gap by advocating for the entrenchment of the concept in Treaty law.

8. Theoretical Framework

Before being able to interrogate Responsibility to Protect vis-à-vis state sovereignty, an outline of the English school/international relations theory is needed as it forms the foundation of the debate.

English School/International Relations

⁷³ Articles on Responsibility of States for Internationally Wrongful Acts, pt. II, ch. 3, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN . Article Art. 41 Commentary, para. (3), para (2)

The English School of International Relations (IR) theory brought together some of the most eminent IR scholars and practitioners within the United Kingdom during the second half of the twentieth century. A stream of enduring and insightful publications flowed from the network that formed around the London School of Economics (LSE) and the British Committee of International Relations.⁷⁴

As a discipline, international relations is believed to have emerged after World War I.⁷⁵ The early IR theorists, during the interwar periods, called for the need for the balance of power system to be replaced with a system of collective security. This school of thought, later described as 'idealists' received heavy criticism from what was known as realist scholars, because realism is based on the idea of international anarchy and does not recognize any universal principles with which states may guide their actions.⁷⁶

There are two main directions of thought within the English School, which are those of the pluralists' and the solidarists'. The tension between the two approaches is portrayed through ideas of 'world society' which is advocated for by solidarists and international society which is advocated for by pluralists, in terms of normative approach, state sovereignty, human rights, and order and justice.⁷⁷ While both schools of thought agree that the international society of states includes commonly agreed values, rules and institutions, they do differ on the 'normative content of this society'.⁷⁸

Pluralism

The concept of pluralism is based on the idea that international order, and ultimately the well-being of individuals depends on reciprocal recognition and respect for state sovereignty and the norm of non-intervention. States are supposed to respect each other's independence through state sovereignty and the principle of non-intervention.⁷⁹ They also argue that an agreement among states about issues like human rights and redistributive justice is not

⁷⁴Roy E Jones, "The English school of international relations: a case for closure," *Review of International Studies* 7: 1, 1981, 1 – 13.

⁷⁵Burchill, Scott & Linklater, Andrew (2005) "Introduction" *Theories of International Relations*, ed. Scott Burchill [et al.], Palgrave. p.1.

⁷⁶Burchill, Scott & Linklater, Andrew (2005) "Introduction" *Theories of International Relations*, ed. Scott Burchill [et al.], Palgrave. p.1.

⁷⁷Czaputowicz, Jacek (2003) "Studies & analysis: THE ENGLISH SCHOOL OF INTERNATIONAL RELATIONS AND ITS APPROACH TO EUROPEAN INTEGRATION". *The "Polska w Europie" foundation. Vol. 11, no. 2.* p. 21

⁷⁸Bellamy, A. J. (2005). Introduction: International Society and the English School. In A. J. Bellamy (Ed.), *International Society and Its Critiques* (pp. 1-28). New York, NY: Oxford University Press.

⁷⁹Clark, Ian (2009) "Democracy in International Society: Promoting or Exclusion". *Millennium* 37 (3), pp 563-581

possible even as they believe that “moral and political codes” are rooted in specific cultural contexts and cannot be universal.⁸⁰

According to Hedley Bull, the author of ‘k “The Anarchical Society” and the first scholar who identified the debate between pluralism and solidarism within the international politics, pluralists believed that international order can only exist by states respecting each other’s sovereignty and non-intervention. This means that a state is the best judge of what is best for its people. He believed that if change was to occur, it has to come from within the state itself and not through external intervention.⁸¹ According to Bull, order in an international society is apparent through six main features:

- (a) the preservation of the system or society of states itself against the challenges to create a universal empire or challenges by supra-, sub-, and trans-state actors to undermine the position of sovereign states as the principal actors in world politics;
- (b) the maintenance of the independence or external sovereignty of individual states;
- (c) peace in the sense of the absence of war among member states of international society as the normal condition of their relationship, to be breached only in special circumstances and according to principles that are generally accepted;
- (d) limitation of interstate violence; and
- (e) observance of international agreements;
- (f) the stability of what belongs to each state's sovereign jurisdiction⁸²

Bull believed that if these achievements are reached and sustained, they will result in a degree of international order which are upheld by common rules and modern institutions such as the balance of power, international law, diplomacy, war, and the concert of great powers.⁸³ Bull therefore supported the idea of common rules among states which laid the foundation of international order. However, states were not permitted to interfere in each others issues if they do not have an international security and order. Domestic feuds should be just that, domestic feuds. Outside interference was not permitted.⁸⁴

⁸⁰Bellamy, A. J. (2005). Introduction: International Society and the English School. In A. J. Bellamy (Ed.), *International Society and Its Critiques* (pp. 1-28). New York, NY: Oxford University Press.

⁸¹Bull, Hedely (1977). “The Anarchical Society: A study of Order in World Politics” London: Machmillan.

⁸²Bull, Hedely (1977). “The Anarchical Society: A study of Order in World Politics” London: Machmillan. P.16-20

⁸³Bellamy, Alex Jay (2005) “International Society and its Critics”. Oxford University Press Inc., New York. P.41

⁸⁴HagebroMatildeand ChristensenGitteJustice and Order A Solidaristic and Pluralistic discussion in Libya and Syria

Dr. Robert Jackson, the author of the 2000 book “The Global Covenant”, and one of the strongest supporters for pluralism argued for the importance of normative pluralism in a world that is becoming more and more globalised. He referred to this as the second form of pluralism; the pluralism of domestic values as value pluralism. To him, this is the deeper pluralism of world politics that the *societas of states* exists to uphold⁸⁵ Jackson contend that pluralism has been the main approach of international politics since the signing of the Peace of Westphalia which signified the end of the 30-year wars as well as the demise of what he terms as the solidarist middle ages.⁸⁶ From that time, international relations opened up to the new pluralist period of sovereign state politics.⁸⁷ He points out that it is important to recognise and respect diversity of state norms and values so that the world does not return to solidarist imperialism which he feared might happen by looking at the direction international politics was headed to at the time.⁸⁸

Jackson discussed two recognized approaches to the ethics of security namely the realist approach which lays the emphasis on national security and the rationalist approach which emphasizes international security.⁸⁹ Jackson believed that both approaches are mostly pluralist since they focus on the ‘system of states’ or the ‘society of states’, as the main security order of world politics. The author notes that while all states are pluralist, the West in their own relations is solidarist.⁹⁰ Jackson argues that having a cause such as democracy and human right does not justify violation of state sovereignty. To him, western leaders have no right to place themselves above the international society as long as respect for state sovereignty remains the universal standard of international conduct.⁹¹

Solidarism

Solidarists believe that states in the international society have an agreement or solidarity in developing and enforcing international law. International relations involve not only states but individual people who possess human rights in spite of the state of which they are citizens of.

⁸⁵Jackson, Robert (2000) “The Global Covenant: Human Conduct in a World of States” Oxford : Oxford University Press, 2000. P.179

⁸⁶Jackson, *supra note 85*

⁸⁷Christensen, G., & Hagebro, M. (2013). Justice and Order: A Solidaristic and Pluralistic discussion on intervention in Libya and Syria (Doctoral dissertation).

⁸⁸Jackson, *supra note 85*

⁸⁹Jackson, *supra note 85*

⁹⁰Jackson, *supra note 85*

⁹¹Jackson, *supra note 85*

⁹²They argue that humanitarian intervention is a legitimate exception to the norm of non-intervention when needed to halt severe human rights violations. They point to the emergence of international human rights regimes as evidence for their argument that diverse communities are able to reach agreements on moral norms, which must be upheld by members of the society.⁹³

John Vincent, a strong proponent of solidarism, recognised that there has been a growing change and move within international politics towards a solidaristic and cosmopolitan approach. Vincent continues to argue that an emergence of a universally restricted ethical agreement is both possible and desirable. He argues that such an agreement might already be present when it comes to the universal moral outrage at genocide.⁹⁴

Nicholas J Wheeler, the author of a book titled “Saving Strangers: Humanitarian Intervention in International Society” published in 2000, is another strong advocate of solidarism. He outlines how far individual states and the United Nations have recognised humanitarian intervention as legitimate and justifiable excuses for breaking the rules of sovereignty, non-interference and use of force.⁹⁵ Wheeler argues that intervention by force might be the only means of enforcing global humanitarian norms that have evolved since the Holocaust. He does note that this does fundamentally challenge the established principles of non-intervention and use of force.⁹⁶ He contends that justice and order can coexist in a modern international and world society. He does however emphasize that justice should undermine order in cases of obscene humanitarian violations. Wheeler believes that humanitarian intervention is a moral and ethical obligation in cases of what can be viewed as supreme humanitarian emergencies.⁹⁷

Wheeler believes that ideally, the best way of handling humanitarian interventions is by getting authorization from the UN Security Council. In cases where this is not feasible, then

⁹²Wheeler, J. Nicholas (1992) “Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention”, *Millennium* 21: p. 463-487, SAGE

⁹³Bellamy, A. J. (2005). Introduction: International Society and the English School. In A. J. Bellamy (Ed.), *International Society and Its Critics* (pp. 1-28). New York, NY: Oxford University Press.

⁹⁴Williams, John (2005) “Pluralism, Solidarism and the Emergence of World Society in English school Theory”.

International Relations Copyright 2005. SAGE Publications(London, Thousand Oaks, CA and New Delhi), Vol 19(1) p.22

⁹⁵Wheeler, N. J. (2000) “Saving Strangers: Humanitarian Intervention in International Society”, Oxford: Oxford University Press.

⁹⁶Wheeler, *supra note 95*

⁹⁷Wheeler, *supra note 95*

interventions which pass the threshold tests can be used which would justify the perceived violation of state sovereignty.⁹⁸

Responsibility to Protect and the English School of thought

Responsibility to Protect arguably marks a solidarist development as it does by nature suggest a greater role of human rights in interstate relations.⁹⁹ Responsibility to Protect breaks with the pluralist custom of placing order exclusively at the forefront of international relations. The human rights norm is not a rule of coexistence which is found under pluralist ideals of state interaction, but morally suits the solidarist set of standards. Pursuing human rights is not a rule of international society per se, but an expression of pursuing end. Responsibility to Protect moves the focus from the rights of the state to situations protecting the citizenry from human rights violations. This greatly differs from the pluralist approach in which state rights trump human rights which is seen as a potential luxury to add on to when suitable.¹⁰⁰

9. Methodology

The research will involve examining sources which provide details on the definitions and evolution of sovereignty; the definition, development, elements, and tools of the concept of Responsibility to Protect; and the success and failure of Responsibility to Protect in Kenya and Syria respectively.

The research will therefore rely on secondary sources such as Treaties, policy documents, journal articles, thesis papers, and books. These resources will be found through internet searches and library resources.

10. Scope of the Study

In the introductory chapter, we will discuss the research problem, state the objectives of the research, and the research questions. A literature review is then undertaken followed by a justification for the research and a theoretical framework for the research. The chapter is concluded by looking at the methodology followed in conducting the research, the scope of the study, and a look at the chapter breakdown.

⁹⁸Wheeler, *supra note 95*

⁹⁹Jovik Rybo Adam, A Solidarist Assessment Of The Responsibility To Protect Examining the Normative and Theoretical Tenets of the RtoP from an English School Perspective

¹⁰⁰JovikRybo Adam, A Solidarist Assessment Of The Responsibility To Protect Examining the Normative and Theoretical Tenets of the RtoP from an English School Perspective

The first chapter will examine the concept of state sovereignty and its historical development. We will consider definitions by philosophers such as Jean Bodin, Thomas Hobbes and John Austin. We will also consider the definitions of the concept set out in the Treaty of Westphalia, The Montevideo Convention on the Rights and Duties of States, the U.N. Charter and the African Union Charter. The chapter will finally look at 2 cases where the concept where the concept has been abused by the leaders of the country.

The second chapter will examine the development of the Responsibility to Protect. We will look at the definition of the concept, the origin and development of the concept, the three elements of the concept and the tools or strategies that applies to each element. In the third chapter, we will undertake two case studies,. The first one will look at Kenya and how the concept of Responsibility to Protect was successfully applied during the 2007/2008 post-election crises and the impact. It will then look at Syria where the concept has not been applied and the impact that it has not only on the country, but also internationally. The final chapter will conclude the research by giving conclusions and providing recommendations. This will be done by considering the findings in the previous chapters.

11. Chapter Breakdown

Introduction

1. Background
2. Problem Statement
3. Research Objectives
4. Research Questions
5. Hypothesis
6. Rationale
7. Literature Review
8. Justification
9. Theoretical Framework
10. Methodology
11. Scope of Study
12. Chapter Breakdown

Chapter 1: The Concept of State Sovereignty: An Examination of its Progressive Development Historically

- 1.1 Introduction
- 1.2 The Historical Context
- 1.3 The Concept of Sovereignty in International Law

- 1.4 Abuse of Sovereignty: An Overview
- 1.5 Conclusion

Chapter 2: Responsibility to Protect: Essence and Development of the Concept

- 2.1 Introduction
- 2.2 Definition
- 2.3 The Elements of Responsibility to Protect
- 2.4 The Origin and Evolution of concept of Responsibility to Protect
- 2.5 The Elements of Responsibility to Protect
- 2.6 Conclusion

Chapter 3: Operationalization of Responsibility to Protect: Case Studies of Kenya and Syria

- 3.1 Introduction
- 3.2 Responsibility to Protect in Action – Kenya
- 3.3 Failure of Responsibility to Protect - Syria
- 3.4 Conclusion

Conclusions and Recommendations

- 1. Introduction
- 2. Conclusion
- 3. Recommendations

CHAPTER 1

THE CONCEPT OF STATE SOVEREIGNTY: AN EXAMINATION OF ITS HISTORICAL PROGRESSIVE DEVELOPMENT

1.1 INTRODUCTION

It has been noted that there exists perhaps no conception the meaning of which is more controversial than that of sovereignty.¹⁰¹ It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.¹⁰² Thus, although sovereignty is a fundamental principle of international law, the precise meaning of the term has not been clearly defined.¹⁰³

This chapter will look at the progressive historical development of sovereignty. We will start by looking at philosophers from the 13th century to the 18th century. We will then look at the concept of sovereignty as defined in international law. Finally, we will look at three instances in which sovereignty has been abused.

1.2 THE HISTORICAL CONTEXT

The origins of the theory of sovereignty are found in Aristotle's '*Politics, and Roman law*'¹⁰⁴ Aristotle recognizes the fact that there must be a supreme power existing in the state, and that this power may be in the hands of one, or few, or many.¹⁰⁵ Aristotle appears to justify the rule of many by stating that:

“The principle that the multitude ought to be supreme rather than the few best is capable of a satisfactory explanation, and though not free from difficulty, yet seems to contain an element of truth.”¹⁰⁶

The Romans believed that sovereignty was:

¹⁰¹ Lassa Oppenheim, *International Law* 66 (Sir Arnold D. McNair ed., 4th ed. 1928).

¹⁰² Lassa Oppenheim, *International Law* 66 (Sir Arnold D. McNair ed., 4th ed. 1928).

¹⁰³ Ferreira-Snyman, M. (2006). *The Evolution Of State Sovereignty: A Historical Overview*.

¹⁰⁴ C. E. Merriam, J. (2001). *History of the Theory of Sovereignty since Rousseau*. Kitchener, Ontario: Batoche Books. [Merriam]

¹⁰⁵ Ibid

¹⁰⁶ Merriam, supra note 104

“The will of the Prince has the force of law, since the people have transferred to him all their right and power.”¹⁰⁷

During the 12th century, there was renewed interest in Roman law, and the study of the newly discovered works of Aristotle in the 13th century provided the fundamental propositions in the discussion of the theory of sovereignty, to which the struggle between the Church and State had risen.¹⁰⁸ Pope Gregory VII advocated for ultimate papal authority over the emperor.¹⁰⁹ He argued that he could both make and depose kings and deny the emperor the right to appoint his own bishops.¹¹⁰ In retaliation, the emperor argued that the papacy’s temporal authority came from secular rulers.¹¹¹ Under the influence of Augustine, the Church declared that the state (and with it the sovereignty) to be the work of sin and evil.¹¹²

In the 13th century, under the influence of Aristotle, Saint Thomas Aquinas¹¹³ taught that supreme power arose from the act of the people and not from the God-established church.¹¹⁴ The authority of the people came directly from God while that of the emperor came from the people, otherwise known as popular sovereignty¹¹⁵

The modern concept of sovereignty can be credited to French political theorist Jean Bodin.¹¹⁶ His work gave the concept of sovereignty coherence, content and currency.¹¹⁷ He defined sovereignty as:

‘The most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth the greatest power to command.’¹¹⁸

¹⁰⁷ Merriam, supra note 104

¹⁰⁸ Merriam, supra note 104

¹⁰⁹ Bevir, M. (2010). Encyclopedia of Political Theory, Volume 1. SAGE. [Bevir]

¹¹⁰ Ibid

¹¹¹ Bevir, supra note 9

¹¹² Merriam, supra note 104

¹¹³ Merriam, supra note 104

¹¹⁴ Merriam, supra note 104

¹¹⁵ Merriam, supra note 104

¹¹⁶ Winston, Nagan, supra note 66

¹¹⁷ Ibid

¹¹⁸ Bodin Jean, Six Books of a Commonwealth, [London, 1606], trans. R. Knolles, K. MacRae and K. Cambridge, Harvard University Press, London, 1962, p.84.

The definition of citizenship, the classification of forms of state, and the identity of the state depend on sovereignty; it is indeed the essential and vital element of the commonwealth.¹¹⁹

According to Bodin sovereignty entailed the absolute and sole competence of law making within the territorial boundaries of a state and that the state would not tolerate any other law creating agent above it.¹²⁰ He argued that sovereignty is the supreme power within a state and it was wholly free from the restraint of law and was held subject to no conditions or limitations.¹²¹ The sovereign is wholly independent of any higher law giver and is moreover unlimited in time, perpetual.¹²² Furthermore, sovereignty is indivisible in nature; there cannot be two supreme powers.¹²³ It moreover cannot be effaced by the mere lapse of time.¹²⁴ However, sovereignty can be restricted by the laws of God, of nature, (natural law), and of nations.¹²⁵ Bodin's sovereign is therefore not subject to civil or positive law but is however bound by natural and divine law.¹²⁶ In short, the terms 'supreme' or 'absolute' are indisputably limited by natural law, divine law and, arguably to some degree international law.¹²⁷ Bodin's use of the term absolute is therefore qualified, and suggests restraints on sovereignty with the domain of natural and international law.¹²⁸

In the 17th Century, Johannes Althusius, a German constitutional scholar and author of *Politics Systematically Considered*¹²⁹, defined sovereignty as:

“The highest and most general power of administering the affairs which generally concern the safety and welfare of the soul and body of the members of the State.”¹³⁰

Althusius believed that this power was subordinate to the laws of God and nature, thus denying that it was absolute or supreme.¹³¹ Althusius was a strong advocate of popular

¹¹⁹Merriam, supra note 104

¹²⁰Bodin Les Six Livres de République (1577) Book I Ch 8. For an English translation see Jean Bodin On Sovereignty: Four Chapters from the Six Books of the Commonwealth (tr by Julian Franklin (1992)) 1-45. [Bodin]

¹²¹Merriam, supra note 104

¹²²Merriam, supra note 104

¹²³Merriam, supra note 104

¹²⁴Merriam, supra note 104

¹²⁵Bodin, supra note 17

¹²⁶Winston, Nagan, supra note 66

¹²⁷Winston, Nagan, supra note 66

¹²⁸Nandasiri Jasentuliyana Kluwer Law Int'l, Perspectives On International Law 20 (ed., 1995)

¹²⁹¹²⁹Althusius, J. (1609). *Politica methodice digesta*.

¹³⁰Merriam, supra note 104

sovereignty.¹³² He argued that it was entire nations that held sovereignty while the state or the prince only administered that sovereignty.¹³³ Therefore the source of all governmental power is ultimately found in the people, which are the great political creator, the true monarch maker.¹³⁴ He maintained that the people held the greater power and was therefore superior to the administration; however great the power conceded, the party conceding always remains superior to the concessionee.¹³⁵ And like Bodin, he argued that the people are immortal, whereas the rulers are merely mortal, hence the people alone are the fit subject of permanent power.¹³⁶

In his work, *The Law of War and Peace*, 1625¹³⁷, Hugo Grotius defined sovereignty as:

“that power whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will”¹³⁸

Bodin’s notion of sovereignty formed the basis of Grotius’ own definition of the term.¹³⁹ Grotius identifies the state as according to the *actus summae potestatis*¹⁴⁰ (marks of the sovereign) which had also appeared in Bodin’s work as the *marques de la souveraineté*.¹⁴¹ To Grotius, the marks of sovereignty included the supreme right to introduce legislation and to withdraw it, the right to pass judgement and to grant pardon, the right to appoint magistrates and to relieve them of their office, and the right to impose taxes on the people.¹⁴²

Grotius likens sovereignty to a field over which one may enjoy full ownership.¹⁴³ To him, the Roman dictator or the elective king was sovereign though for a limited time only, provided only that the power be irrevocable during the period.¹⁴⁴ Grotius maintained that

¹³¹ Merriam, supra note 104

¹³² *Popular Sovereignty*. (2013, March 20). Retrieved November 16, 2013, from Common Law Review: http://commonlawreview.com/wordpress/?page_id=25

¹³³ *Popular Sovereignty*. (2013, March 20). Retrieved November 16, 2013, from Common Law Review: http://commonlawreview.com/wordpress/?page_id=25

¹³⁴ Merriam, supra note 104.

¹³⁵ Merriam, supra note 104

¹³⁶ Merriam, supra note 104

¹³⁷ Grotius, H. (1625). *The Law of War and Peace (De Jure Belli ac Pacis)*. (1. Translated by A. C. Campbell London, Trans.)

¹³⁸ Grotius, 1625: book 1, chapter 3, para. 7

¹³⁹ Jeffery, R. (2004). *Hugo Grotius in International Thought*. Palgrave Macmillan.

¹⁴⁰ Ibid

¹⁴¹ Jeffery, supra note 139

¹⁴² Jeffery, supra note 139

¹⁴³ Merriam, supra note 104

sovereignty is limited by certain actions which might be under the legal control of another.¹⁴⁵ Grotius believed that sovereignty implied de facto control and might only be limited by divine law, natural law, and the law of nations and by the contractual understanding between the ruler and the ruled.¹⁴⁶ Thus, an indefinite number of rights may be removed from the authority of the ruler; his acts may be rendered subject to ratification by a senate or other body.¹⁴⁷ In some cases, a revolution or insurrection by the people may lead to ratification.¹⁴⁸ Grotius therefore deviated from Bodin's absolutist theory by asserting that the marks of sovereignty may be divided among several parties.¹⁴⁹ It is thus capable of division and resides concurrently in the government and in the state.¹⁵⁰

According to Grotius, all sovereign states are equally bound by international law, but they do not possess equal rights and duties.¹⁵¹ Differences that may exist among great powers are derived from political asymmetries and not from a legal basis.¹⁵² Grotius believed that society is characterised by relations between unequal relations of father and son, master and slave, king and subject, God and man.¹⁵³ Moreover, Grotius conceived the state as an association not of atomised individuals but of many fathers, united in one people and one state.¹⁵⁴ From this basis, Grotius considered international relations to be hierarchical as well; in the international arena, even the existence of unequal treaties between states does not automatically render sovereignty obsolete.¹⁵⁵ Grotius notes that an inferior party gains from the imposed patron-client relationship; the inferior party retains its sovereignty, provided that it is under protection, not under domination and under patronage, not under subjection.¹⁵⁶ The

¹⁴⁴ Merriam, *supra* note 104

¹⁴⁵ Schwarz, O. J. (2007, September 12). *Slicing up the cake: divisible sovereignty in the pre and post-Westphalian order*. Retrieved 11 16, 2-13, from turin.sgir.eu/uploads/Schwarzdivsov_and_westphalian_order.pdf [Schwarz & Jütersonke]

¹⁴⁶ *Ibid*

¹⁴⁷ Merriam, *supra* note 104

¹⁴⁸ Merriam, *supra* note 104

¹⁴⁹ Jeffery, *supra* note 39

¹⁵⁰ Schwarz & Jütersonke, *supra* note 145

¹⁵¹ Schwarz & Jütersonke, *supra* note 145

¹⁵² Schwarz & Jütersonke, *supra* note 145

¹⁵³ Schwarz & Jütersonke, *supra* note 145

¹⁵⁴ Grotius, 1625: Book 2, chapter 5, para. 23

¹⁵⁵ Schwarz & Jütersonke, *supra* note 145

¹⁵⁶ Grotius, 1625: Book 1, chapter 3, paras. 21.2, 21.3

inferior party only transfers it sovereignty.¹⁵⁷ In practice, such a transfer may lead to some kind of division of sovereignty because:

“...he who has the position of vantage in a treaty, if he is greatly superior in respect to power, gradually usurps the sovereignty properly so called”¹⁵⁸;

Thus, either those who had been allies become subjects, or there is a division of sovereignty (*partitio fit summi imperii*).¹⁵⁹

Thomas Hobbes, the 17th Century English philosopher, has been considered the first thinker to achieve a clear and unambiguous comprehension of the principle of sovereignty.¹⁶⁰ In his *Leviathan* (1651)¹⁶¹, Hobbes constructed the most complete argument for absolutism yet to be made¹⁶² by coming up with the Social Contract Theory.¹⁶³

Hobbes believed that, prior to the Social Contract, man lived in a State of nature which was one of fear and selfishness of chaos and constant fear.¹⁶⁴ According to Hobbes:

“...life in the State of Nature was ‘solitary’, ‘poor’, ‘nasty’, ‘brutish’, and ‘short...’”¹⁶⁵

Therefore for the purpose of security, self-protection and self-preservation, man entered into a Social Contract.¹⁶⁶ This kind of social contract or covenant involves the renunciation of rights by the citizens or the transfer of rights and the authorization of sovereign

¹⁵⁷Schwarz & Jütersonke, *supra* note 145

¹⁵⁸Grotius, 1625: Book 1, chapter 3, para. 21.10

¹⁵⁹Grotius, 1625: Book 1, chapter 3, para. 21.11

¹⁶⁰*Some Basic Hobbesian concepts*. (n.d.). Retrieved November 16, 2013, from Princeton University Press: <http://press.princeton.edu/chapters/s9038.pdf>

¹⁶¹Hobbes, T. (1651). *Leviathan*.

¹⁶²Elahi, M. (n.d.). *Social Contract Theory by Hobbes, Locke and Rousseau*. Retrieved November 16, 2013, from Academic.edu:

http://www.academia.edu/3138759/Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau [Elani]

¹⁶³Merriam, *supra* note 104

¹⁶⁴Elahi, *supra* note 62

¹⁶⁵Lloyd, Sharon A. and Sreedhar, Susanne, "Hobbes's Moral and Political Philosophy", Retrieved November 16th, 2013, *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2013/entries/hobbes-moral/>>.

¹⁶⁶Elahi, *supra* note 62

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competence.¹⁶⁷ The central issue of the authority is not the covenant or contract but the sovereign's ability to effectively discharge the obligation to protect those who have consented to obedience.¹⁶⁸ In order to discharge its obligation to protect, the sovereign needs an effective government whose authority must be absolute.¹⁶⁹ Hobbes argued that it is crucial for the sovereign to have rights which cannot be tested.¹⁷⁰ Only a government that possesses all of what Hobbes terms as "essential rights of sovereignty" can be reliably effective.¹⁷¹ To impose limitations on the authority of the government would lead to factional disagreement, war, or at least paralysis of the government.¹⁷² Therefore to avoid the prospect of governmental collapse and return to the state of nature, the sovereign should have absolute authority.¹⁷³

Therefore, according to Hobbes:

"[T]he sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws."¹⁷⁴

He further explained:

"It is true that sovereigns are all subject to the laws of nature, because such laws be divine and cannot by any man or commonwealth be abrogated. But to those laws which the sovereign himself—that is, which the commonwealth—makes he is not subject. For to be subject to laws is to be subject to the commonwealth—that is, to the sovereign representative that is, to himself, which is not subjection but freedom from the laws. Which error, because it sets the laws above the sovereign, sets also a judge above him and a power to punish him, which is to make a new sovereign, and again for the same reason a third to punish the second, and so continually without end to the confusion and dissolution of the commonwealth."¹⁷⁵

Hobbes therefore went further than Bodin by suggesting that a sovereign is not bound by anything and had a right over everything.¹⁷⁶ To Hobbes, absolute authority meant the

¹⁶⁷ George Shelton, *Morality And Sovereignty In The Philosophy Of Hobbes* (St. Martin's Press 1992).

¹⁶⁸ Winston, Nagan, *supra* note 66

¹⁶⁹ Winston, Nagan, *supra* note 66

¹⁷⁰ Winston, Nagan, *supra* note 66

¹⁷¹ Lloyd, *supra* note 165

¹⁷² Lloyd, *supra* note 165

¹⁷³ Lloyd, *supra* note 165

¹⁷⁴ Merriam, *supra* note 104

¹⁷⁵ Merriam, *supra* note 104

¹⁷⁶ De Cive (1651) Ch 6 pars 12-15. For an English translation see Thomas Hobbes *De Cive*:

sovereign's powers must neither be divided nor limited.¹⁷⁷ A loss of any governmental powers would thwart effective exercise of the rest.¹⁷⁸ Only a government that possessed all the 'essential rights of sovereignty' can be reliably effective.¹⁷⁹

Baron Samuel von Pufendorf was a German scholar and his work can be found in *The Law of Nature and of Nations*(*De Jure Naturae et Gentium*, 1672).¹⁸⁰ His theory was influenced by both Hobbes and Grotius and he managed to combine both their theories.¹⁸¹ Pufendorf concurs with Hobbes' contract principle but he proposes a two stage process, namely an agreement to form a civil society followed by a further contract between the people and the government.¹⁸² He noted that sovereignty is the supreme power of the state and none of his acts may be rendered void by any other organ in the society.¹⁸³ Furthermore, he is accountable to no one and is free from the restraint of any human law; this power is essentially one and indivisible.¹⁸⁴ He however draws a distinction between sovereign power and absolute power.¹⁸⁵ He argues that absolute power gives one complete freedom to use his rights as he will and there is none more superior.¹⁸⁶ Pufendorf argues that sovereignty understood properly signifies not absoluteness, but merely supremacy.¹⁸⁷ He contends that owing to the unfortunate frailty common to all men, certain restraints should be imposed on the sovereign to ensure that he does not usurp all authority.¹⁸⁸ Pufendorf believed that it is not essential that the sovereign should have all power, but it is sufficient that he has the highest power; that is to say that he must be supreme, but need not be absolute.¹⁸⁹ Pufendorf rejects the Hobbes idea that the sovereign can commit no injustice.¹⁹⁰ He however accepts that in

Dominion: <http://www.thomas-hobbes.com/works/dominion.html> (16 October 2006). Also see Lauterpacht (n 21) 117.

¹⁷⁷Lloyd, supra note 165

¹⁷⁸Lloyd, supra note 165

¹⁷⁹Lloyd, supra note 165

¹⁸⁰Pufendorf, S. v. (1672). *The Law of Nature and of Nations* (De Jure Naturae et Gentium)

¹⁸¹Merriam, supra note 104

¹⁸²Merriam, supra note 104

¹⁸³Merriam, supra note 104

¹⁸⁴Merriam, supra note 104

¹⁸⁵Merriam, supra note 104

¹⁸⁶Merriam, supra note 104

¹⁸⁷Merriam, supra note 104

¹⁸⁸Merriam, supra note 104

¹⁸⁹Merriam, supra note 104

¹⁹⁰Merriam, supra note 104

matters pertaining to the general welfare Hobbes proposition would be true; and this holds even though the sovereign's measures may be contrary to the commonwealth.¹⁹¹

In his book, *The Social Contract*¹⁹², Jean Jacques Rousseau further developed the theory of sovereignty from the basis of natural rights.¹⁹³ He notes that sovereignty arises from the voluntary agreement of independent wills.¹⁹⁴ Each individual surrenders his will and the product of the process is the body politic, which when passive is called the State and when active is termed the sovereign.¹⁹⁵

Rousseau believed that sovereignty was inalienable, indivisible and is incapable of doing wrong.¹⁹⁶ Inalienability meant that the assembly cannot transfer legislative authority to any person or body less than the whole.¹⁹⁷ So to Rousseau, power can be transferred, but not will.¹⁹⁸

The sovereign is indivisible in that the emanations from sovereignty, as the legislative and executive powers, may be divided, but the sovereign or the general will itself is wholly incapable of division.¹⁹⁹

Additionally, the sovereign is infallible and absolute; it is infallible because it is always right and always tends towards the general welfare of the people.²⁰⁰ It is absolute because the sovereign has unlimited control over all that affects the general welfare and the indisputable right to judge what falls under this category.²⁰¹ No rights are reserved to the individual – in

¹⁹¹ Merriam, supra note 104

¹⁹² Rousseau, J. J. (1762). *The Social Contract*.

¹⁹³ Merriam, supra note 104

¹⁹⁴ Merriam, supra note 104

¹⁹⁵ Merriam, supra note 104

¹⁹⁶ Pavlovic, D. (1997). *Rousseau's Theory Of Sovereignty* A Thesis Submitted To The Department Of Political Science In Candidacy For The Degree Of Master Of Arts. Budapest, Hungary.

¹⁹⁷ John B. Noone, J. (August 1970). *The Social Contract and the idea of Sovereignty in Rousseau*. *Journal of Politics*.

¹⁹⁸ Merriam, supra note 104

¹⁹⁹ Merriam, supra note 104

²⁰⁰ Merriam, supra note 104

²⁰¹ Merriam, supra note 104

fact no guarantee of rights from the sovereign to the citizen is conclusive.²⁰² Limits are imposed upon the sovereign to the extent that it shall always act for the general good of the people and not discriminate between various classes of citizens.²⁰³

1.3. THE CONCEPT OF SOVEREIGNTY IN INTERNATIONAL LAW

The Treaty of Westphalia

The most significant diplomatic and juridical event for the idea of sovereignty emerged from the Peace of Westphalia of 1648 which ended the thirty years of war in Central Europe.²⁰⁴

The Peace of Westphalia was concluded in two different treaties; the Treaty of Münster between the Holy Roman Empire and the victor of Catholic France and the Treaty of Osnabrück between the Holy Roman Empire and the victor of Protestant Sweden.²⁰⁵

The Treaty of Westphalia legitimized and standardized territorial practice; they rejected the idea that the Pope or Emperor had universal authority.²⁰⁶ Christendom was now divided into sovereign secular States and the government had absolute authority within the State.²⁰⁷

Governments were established as the exclusive authority and their decisions and arguments were exclusively carried out within their territorial limit.²⁰⁸ Territorial sovereignty therefore ensured that the Government was the only one that had absolute temporal power.²⁰⁹

The treaty marked a shift of paradigms in setting the basis for person oriented law to territorial oriented law.²¹⁰ It rejected the idea that the Pope or Emperor had universal authority²¹¹. Instead local elites, including dukes, princes, kings would now exercise secular sovereign authority over the lands which they claimed authority and control.²¹² The

²⁰² Merriam, supra note 104

²⁰³ Merriam, supra note 104

²⁰⁴ Lloyd, supra note 56

²⁰⁵ Ferreira-Snyman, M. P. (2009, July). The Erosion of State Sovereignty in Public International Law: Towards A World Law? Johannesburg, South Africa. [Ferreira-Snyman]

²⁰⁶ Hassan, D. D. (2006). *The Rise of the Territorial State and The Treaty Of Westphalia*. Retrieved November 17, 2013, from <http://epress.lib.uts.edu.au/research/bitstream/handle/10453/3289/2006006060.pdf?sequence=1> [Hassan]

²⁰⁷ Ibid

²⁰⁸ Hassan, supra note 206

²⁰⁹ Hassan, supra note 206

²¹⁰ Hassan, supra note 206

²¹¹ Hassan, supra note 206

²¹² Winston, Nagan, supra note 66

Westphalia settlement established the concept of, absolute sovereignty²¹³, territorial sovereignty and sovereign equality between states.²¹⁴

As a separate State, the sovereign were no longer bound by church norms which previously regulated the conduct of lay rulers in the medieval period.²¹⁵ In order to function, States needed new rules and institutions in place of old ones.²¹⁶ To regulate the dealings of States with each other, the concept of International law emerged as a substitute for such norms.²¹⁷

The Treaty of Westphalia also recognized the equality of states as a principle of modern international law.²¹⁸ This equality was recognized irrespective of the states Catholic or Protestant faith and of their monarchical or republican form of government.²¹⁹

Finally, the Treaty also established the principle of non-interference; it was now an offence in international law to interfere in the internal affairs of another country.²²⁰

The League of Nations

The First World War and its impact on international relations produced substantive changes concerning the concept of state sovereignty, both in practice and in its conceptual framework.²²¹ The developments during the Industrial age, which changed the nature of war and enhanced globalization, increased the prospect of a conflict becoming a global war.²²² As a result, there was the rethinking and restructuring of relationships between states and citizens by imposing the definitive idea of nation state.²²³ In this context, the need to change the nature of the international relations system and the instruments governing the process led to the concept of creating a permanent supranational institution, later known as the League of Nations,²²⁴ which would require sovereign cooperation.²²⁵ This idea was promoted by then

²¹³Ferreira-Snyman, supra note 205

²¹⁴Hassan, supra note 206

²¹⁵Hassan, supra note 206

²¹⁶Hassan, supra note 206

²¹⁷Hassan, supra note 206

²¹⁸Ferreira-Snyman, supra note 205

²¹⁹Ferreira-Snyman, supra note 205

²²⁰Ferreira-Snyman, supra note 205

²²¹Țuțianu, S. (2013). *Towards Global Justice: Sovereignty in an Interdependent World*. The Hague, Netherlands: ASSER PRESS.

²²²Ibid

²²³Țuțianu, supra note 221

²²⁴Țuțianu, supra note 221

²²⁵Winston, Nagan, supra note 66

U.S President Woodrow Wilson that was concurrently supported by General Smuts of South Africa.²²⁶

Those who hoped that the League would bring about the much needed change such as bringing war criminals to justice, recognizing human rights, were profoundly disappointed.²²⁷ The organization was overwhelmingly statist in its approach, rejected the incorporation of human rights standards in its covenant, and – in the face of particularly lobbying by the United States – made no effective provision for the trial of war criminals, accepting the principle of sovereign immunity for the high officials.²²⁸

Furthermore, the concept of sovereignty dominated negotiations and with it emerged the unanimity rule.²²⁹ This meant that if a single sovereign objected to a League determination on a matter within its competence, then the League would be unable to act.²³⁰ Arguably, the strong version of sovereignty undermined the emerging and difficult idea of subjecting sovereignty to international obligation.²³¹

Some theorists suggest that the paralysis of the League is one of the reasons that may have contributed to the Second World War, (WWII).²³²

The War Tribunals

The Second World War was conducted under the belief that a sovereign may determine whether, and if so, what limits it would honour in the conduct of war. Germany developed the idea that it was involved in what was described as ‘total war’.²³³ They used sovereignty to justify their claim that there were no rules from the law of war that could constrain the prerogatives of the sovereignty.²³⁴ Nazi belief in absolute sovereignty led to the development

²²⁶ Winston, Nagan, supra note 66

²²⁷ Evans, supra note 62

²²⁸ Evans, supra note 62

²²⁹ Winston, Nagan, supra note 66

²³⁰ Winston, Nagan, supra note 66

²³¹ Winston, Nagan, supra note 66

²³² Winston, Nagan, supra note 66

²³³ Winston, Nagan, supra note 66

²³⁴ Winston, Nagan, supra note 66

and justification for death camps in which Jews and other ethnic expendables were exterminated.²³⁵ It should be added that apart from the Nazi atrocities, the growth of the totalitarian states, especially in Europe, led to monumental atrocities by states against their own citizens.²³⁶

The horrific human rights abuses witnessed during WWII brought about disquiet about the notion of the abuse of State Sovereignty.²³⁷ Efforts were therefore made to establish limits to sovereignty which is reflected in the work of the Nuremburg Tribunal.²³⁸ In the Tribunal, defendants used the defense that they were merely following the orders of the sovereign; this was rejected by the Tribunal.²³⁹ The court instead did away with the protective umbrella of State sovereignty used by the defendants.²⁴⁰ It stressed that behind the veil of the sovereign are the finite human agents of decision making.²⁴¹ A court of law could therefore penetrate the veil of the state and sovereign and hold the decision makers accountable.²⁴² Furthermore, the Statute of the International Military Tribunal (IMT)²⁴³ did not allow political leaders to shield behind their function any longer. Article 7 explicitly provided that:

‘...official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment’.²⁴⁴

This application has found its way into later statutes of international criminal courts and tribunals.²⁴⁵ Indeed, the arrest and indictment of the Yugoslav ex-president Slobodan Milosevic and the trial and conviction of former president of Liberia Charles Taylor has demonstrated that the accountability of political leaders is more than a hollow

²³⁵ Winston, Nagan, supra note 66

²³⁶ Winston, Nagan, supra note 66

²³⁷ Winston, Nagan, supra note 66

²³⁸ Winston, Nagan, supra note 66

²³⁹ Winston, Nagan, supra note 66

²⁴⁰ Winston, Nagan, supra note 66

²⁴¹ Winston, Nagan, supra note 66

²⁴² Tomuschat, C. (2006). The Legacy of Nuremberg. *Journal of International Criminal Justice*.

²⁴³ Article 7, Constitution Of The International Military Tribunal

²⁴⁴ *ibid*

²⁴⁵ Tomuschat, supra note 242

assertion.²⁴⁶ The Nuremberg Trials to some extent dismantled the sovereign state.²⁴⁷ As a result of the trial, the state lost its pivotal position within the international legal order.²⁴⁸ States were now placed under the rule of international law.²⁴⁹ It established that the state, more so a government could never be above the law.²⁵⁰ Furthermore, the trials repudiated legal theories of sovereignty that sought to shield defendants from responsibility for mass murder.²⁵¹

The Second World War led to the establishment of the United Nations and its Charter.²⁵² The Charter of the United Nations placed limits on its member's sovereignty and at the same time membership in the UN was an important means of asserting sovereignty.²⁵³ The Charter heavily borrowed the meaning of sovereignty from the Peace of Westphalia which was that sovereignty, above all else, means control of a state's territory, unfettered by external constraints.²⁵⁴ This found its way in the UN Charter. Article 2(4) of the Charter states that:

‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’²⁵⁵

Furthermore Article 2(7) restricts intervention by the United Nations:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.²⁵⁶

Arguably, the UN members were overwhelmingly preoccupied with the problem of states waging war against each other and they took unprecedented steps to limit the freedom of

²⁴⁶ Tomuschat, supra note 242

²⁴⁷ Tomuschat, supra note 242

²⁴⁸ Tomuschat, supra note 242

²⁴⁹ Tomuschat, supra note 242

²⁵⁰ Tomuschat, supra note 242

²⁵¹ Winston, Nagan, supra note 66

²⁵² United Nations, Charter of the United Nations, 24 October 1945

²⁵³ Winston, Nagan, supra note 66

²⁵⁴ Evans, supra note 62

²⁵⁵ Article 2(4), United Nations, Charter of the United Nations, 24 October 1945

²⁵⁶ Article 2(7), United Nations, Charter of the United Nations, 24 October 1945

action in that respect.²⁵⁷ The members showed no particular interest in the question of what constraints might be imposed on how states dealt with their own populations.²⁵⁸

The Recognition of Statehood - Montevideo Convention of the Rights and Duties of States²⁵⁹

The Montevideo Convention of the Rights and Duties of States was signed on December 26 1933 in between the two World Wars²⁶⁰ Article 1 of the Treaty establishes that:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.²⁶¹

A permanent population does not mean that the population has to be static, neither does it mean that the size of the population is a requirement for statehood.²⁶² Similarly, a ‘defined territory’ does not suggest that the boundaries need to be defined precisely.²⁶³ It is only important that a state has a clear core territory in order to be recognised as a state.²⁶⁴ The Convention essentially shows that a territory is defined as a State of sovereignty.²⁶⁵

Another essential requirement is the presence of a government which is in effective control of territory and independent of any other authority.²⁶⁶ Legitimate governments would be those that exercise the power vested in them by people democratically and are able to lawfully coerce its citizens to obey.²⁶⁷ Finally, a state must be able to enter into relations with other

²⁵⁷ Evans, supra note 62

²⁵⁸ Evans, supra note 62

²⁵⁹ Montevideo Convention on Rights and Duties of States (1933). Signed at Montevideo, 26 December 1933, Article (1).

²⁶⁰ Montevideo Convention on Rights and Duties of States (1933). Signed at Montevideo, 26 December 1933, Article (1).

²⁶¹ *ibid*

²⁶² Aynete, A. (n.d.). Unclear Criteria for Statehood and its Implications for Peace and Stability in Africa.

²⁶³ *ibid*

²⁶⁴ Aynete, supra note 262

²⁶⁵ Aynete, supra note 262

²⁶⁶ Ferreira-Snyman, M. P. (2009, July). The Erosion of State Sovereignty in Public International Law: Towards A World Law? Johannesburg, South Africa.

²⁶⁷ Ingvarsdóttir, A. (2009). The Fall of Westphalia? Sovereignty of States Post Globalisation.

states.²⁶⁸ This means that a state has been officially recognised by other states as a sovereign entity.²⁶⁹

Definition of Sovereignty in the African Union

The legacy of colonialism greatly influenced the way many African leaders resolved to safeguard and consolidate their hard earned independence.²⁷⁰

Article 2(1) of the OAU Charter described the purpose of the organisation, and its first two points focus on Pan-African values of unity and cooperation among the states.²⁷¹ The third point in Article 2 was very state-centric, emphasizing that the purpose of the organisation was “to defend their sovereignty, their territorial integrity and independence.”²⁷² Commitment to sovereignty was elaborated in Article 3 of the Charter, in which the principles of non-interference were stated as well as the respect for each states “inalienable right to independent existence.”²⁷³

The purpose of the OAU was to strengthen African cooperation and development with the aim of improving the quality of life for Africans.²⁷⁴ These norms were embedded in the Charter.²⁷⁵ However, the way in which sovereignty was institutionalized prevented them from being achieved.²⁷⁶ The principle of non-intervention borrowed from the Westphalia treaty and the UN Charter, meant civil wars raged and human rights violations were perpetrated while the leaders guilty of these atrocities remained in power.²⁷⁷ This was perpetuated by the organizations self-imposed ban on peacekeeping.²⁷⁸ The OAU believed that it was the UN’s responsibility to act and protect human rights, but the politics of the Cold War prevented the Security Council from acting.²⁷⁹ As such, the OAU and the international community failed to intervene in several African civil wars.²⁸⁰

²⁶⁸Ibid.

²⁶⁹Ingvarsdóttir, supra note 267

²⁷⁰Farmer, L. J. (January 2012). Sovereignty and the African Union. *The Journal of Pan African Studies*, vol 4, No 10.

²⁷¹ibid

²⁷²Farmer, supra note 270

²⁷³Farmer, supra note 270

²⁷⁴Farmer, supra note 270

²⁷⁵Farmer, supra note 270

²⁷⁶Farmer, supra note 270

²⁷⁷Farmer, supra note 270

²⁷⁸Farmer, supra note 270

²⁷⁹Farmer, supra note 270

²⁸⁰Farmer, supra note 270

The OAU faced many impediments, and there were serious thoughts of reforming the organization so that it would be more effective in addressing the issues facing the continent²⁸¹ In 2002, the African Union, AU, was launched in Durban and while it shares some features of the OAU such as the assembly of heads of states and government having final decision making powers, in many ways it is different from its predecessor.²⁸² Unlike its predecessor, the AU adopted the notion that sovereignty is not a privilege that all states deserve, rather it is a responsibility and when a government fails to meet these responsibilities, its right to sovereignty is lost.²⁸³ This is entrenched in Article 4 of its Constitutive Act:

(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity²⁸⁴

The AU also established new institutions such as the Peace and Security Council which is the decision-making organ for the prevention, management and resolution of conflicts.²⁸⁵

Definition of Sovereignty in the ICISS Document

The following definition of sovereignty can be found in the ICISS document:

‘State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself’²⁸⁶

The document brings about a significant shift in the understanding of sovereignty from, ‘sovereignty as control’ to ‘sovereignty as a responsibility’.²⁸⁷ This means that sovereignty should no longer be viewed as a right by the sovereign to perform whatever internal actions it desires against its citizenry.²⁸⁸ Instead, the sovereign should be regarded as a major source of

²⁸¹AFRICA: TRANSITION FROM THE OAU TO THE AU. (2014, March 7). Retrieved from <http://www.dpmf.org/meetings/From-OAU-AU.html>

²⁸²Farmer, supra note 270

²⁸³Farmer, supra note 270

²⁸⁴ Article 4 – Principles, The Constitutive Act: The African Union

²⁸⁵The African Union. (n.d.). Retrieved from Icelandic Human Rights Centre: <http://www.humanrights.is/the-human-rights>

project/humanrightscasesandmaterials/humanrightskonceptsideasandfora/humanrightsfora/theafricanunion/

²⁸⁶ An Introduction to the Responsibility to Protect, supra note 31

²⁸⁷ Breakey, H. (May, 2011). The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Review and Analysis. Institute for Ethics, Governance and Law, Griffith University.

²⁸⁸ ibid

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protection of the people's fundamental rights from the most egregious acts of violence and as such, the sovereign has the inviolable responsibility to fulfill this protection.²⁸⁹ Therefore, sovereignty should be viewed as a dependent and conditional concept upon states protecting the well-being, dignity and human rights of its citizenry.²⁹⁰

1.4 ABUSE OF SOVEREIGNTY: AN OVERVIEW

Uganda

In 1971, Idi Amin seized power from Milton Obote in a military coup.²⁹¹ Once in power, Amin began mass executions against the Acholi, the Lango, and Christian tribes that had been loyal to Obote and therefore were perceived as a threat to his rule.²⁹² During his tenure as president Uganda became a slaughterhouse²⁹³ and he became famously known as the 'Butcher of Uganda'.²⁹⁴ The most conservative estimates by informed observers hold that Amin and his terror squads killed an estimate of 500,000 Ugandans.²⁹⁵ He terrorized the general public through various internal security forces he created, such as the State Research Bureau (SRB) and Public Safety Unity (PSU), whose main purpose was to eliminate those who opposed his regime.²⁹⁶ Many of the victims were guilty of nothing more than catching the eye of the killed – a shopkeeper with coveted goods, a Christian in a Muslim village, a civil servant who questions authority or a judge with foreign friends.²⁹⁷

During this time, many African leaders privately abhorred Amin and believed that he had disgraced Africa.²⁹⁸ They refused to speak or act against Amin for fear of violating OAU's cardinal rule against interference in a member state's internal affairs and its sovereignty.²⁹⁹ They also believed that any effort to condemn Amin would open the door to a process that

²⁸⁹ Breakey, *supra* note 287

²⁹⁰ Thomas, *supra* note 67

²⁹¹ Ullman, R. H. (2014, March 29). *Human Rights and Economic Power: The United States Versus Idi Amin*. Retrieved from <http://www.foreignaffairs.com/articles/29141/richard-h-ullman/human-rights-and-economic-power-the-united-states-versus-idi-ami>

²⁹² *Idi Amin*. (2014, March 29). Retrieved from The History Channel: <http://www.history.com/topics/idi-amin>

²⁹³ Ullman, *supra* note 291

²⁹⁴ *African History*. (2014, March 29). Retrieved from Idi Amin Timeline - Key Events in the Life of Idi Amin: <http://africanhistory.about.com/od/biographies/l/bIdiAminTime.htm>

²⁹⁵ Ullman, *supra* note 291

²⁹⁶ The History Channel, *supra* note 183

²⁹⁷ Ullman, *supra* note 291

²⁹⁸ Ullman, *supra* note 291

²⁹⁹ Ullman, *supra* note 291

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ultimately would rebound against themselves.³⁰⁰ Only two leaders, Julius Nyerere of Tanzania and Kenneth Kaunda of Zambia publicly criticised him.³⁰¹

Idi Amin was deposed as president of Uganda on 13th April 1979 after Uganda exiles, backed by the Tanzanian army seized the capital of Uganda.³⁰²

Cambodia

From 1975 to 1978, Cambodia under Pol Pot faced an unbelievably brutal three-year ‘purification’ reign terror.³⁰³ His intention was to ‘purify’ the Cambodian society of capitalism, Western culture, religion and all foreign influences.³⁰⁴ He wanted to create Cambodia into an isolated and totally self-sufficient Maoist agrarian state.³⁰⁵ Members of the preceding government, public servants, police, military officers, teachers, ethnic Vietnamese, Christian clergy, Muslim leaders, members of the Cham Muslim minority, members of the middle class and the educated were identified and executed.³⁰⁶ An estimated 1.5 – 3 million Cambodians worked or starved to death, died of disease, exposure, or were executed for committing crimes.³⁰⁷

In 1978, Vietnam invaded Cambodia and stopped the Khmer Rouge in its tracks. The scale of horror and human rights violations were well known by the time of Vietnam’s invasion.³⁰⁸ Despite this knowledge, Vietnam was widely criticised for violating Cambodia’s sovereign rights.³⁰⁹ Condemnation was widespread from the United States, United Kingdom

³⁰⁰Ullman, supra note 291

³⁰¹Ullman, supra note 291

³⁰²*African History*. (2014, March 29). Retrieved from Idi Amin Timeline - Key Events in the Life of Idi Amin: <http://africanhistory.about.com/od/biographies/1/IdiAminTime.htm>

³⁰³Evans, supra note 62

³⁰⁴*The Cambodian Killing Fields - 3 years-8 months-20 days*. (n.d.). Retrieved from The Killing Fields Museum: <http://www.killingfieldsmuseum.com/genocide1.html>

³⁰⁵*The Cambodian Killing Fields - 3 years-8 months-20 days*. (n.d.). Retrieved from The Killing Fields Museum: <http://www.killingfieldsmuseum.com/genocide1.html>

³⁰⁶*The Cambodian Killing Fields - 3 years-8 months-20 days*. (n.d.). Retrieved from The Killing Fields Museum: <http://www.killingfieldsmuseum.com/genocide1.html>

³⁰⁷*The Cambodian Killing Fields - 3 years-8 months-20 days*. (n.d.). Retrieved from The Killing Fields Museum: <http://www.killingfieldsmuseum.com/genocide1.html>

³⁰⁸Evans, supra note 62

³⁰⁹Evans, supra note 62

and their NATO allies; every member state of the Association of South East Nations (ASEAN); Australia; most Latin American Countries and many others as well.³¹⁰

Kosovo

Large- scale violence erupted in Kosovo in late 1997/early 1998. At this stage, the international community, in particular the NATO allies and the UN were determined to ensure that no new massacres or ethnic cleansing took place.³¹¹

In March 1998, the Security Council, using its powers in Chapter VII of the Charter, passed Resolution 1160. (Moorman, 2003) The resolution took note of the reports of use of excessive force by Serbian police against civilians in Kosovo.³¹² The Resolution did not expressly state that the crisis in Kosovo was a threat to international peace and security but it did however call upon the Federal Republic of Yugoslavia, (FRY), and the Kosovar Albanians to work towards a political solution.³¹³ It imposed a mandatory arms embargo on both parties and also indicated that the Security Council intended to remain seized of the issues and support the International Criminal Tribunal of Yugoslavia in gathering information and evidence of any possible crimes.³¹⁴ Finally, it emphasized that failure to make constructive progress towards finding a peaceful resolution to the situation will lead to the consideration of additional measures.³¹⁵

Despite the resolution, the situation in Kosovo deteriorated rapidly.³¹⁶ In early spring 1998 fighting intensified and Serbian security forces as well as the Yugoslav army used excessive force indiscriminately against civilians.³¹⁷ This caused numerous civilian casualties, the displacement of hundreds of thousands of people and massive flow of refugees to neighbouring countries.³¹⁸ There were reports of systematic and widespread oppression of human rights and freedoms of Albanians in Kosovo³¹⁹. In June, the UN Secretary General

³¹⁰ Evans, supra note 62

³¹¹ Evans, supra note 62

³¹² Moorman, W. M. (2003). Humanitarian Intervention and International Law in the Case of Kosovo. NEW ENGLAND LAW REVIEW.

³¹³ Moorma, supra note 312

³¹⁴ Moorma, supra note 312

³¹⁵ Moorma, supra note 312

³¹⁶ Kumbaro, Dajena. The Kosovo Crisis In An International Law Perspective: Self-Determination, Territorial Integrity And The Nato Intervention

³¹⁷ ibid

³¹⁸ Kumbaro, supra note 316

³¹⁹ Kumbaro, supra note 316

advised NATO of the necessity for a Security Council mandate for any military intervention in Kosovo.³²⁰ By this time, it had become apparent the Soviet Union oppose such a resolution, if brought before the Security Council.³²¹

In September 1998, the Security Council adopted Resolution 1199 which finally determined that the deterioration of the situation in Kosovo constituted a threat to international peace and security.³²² The Resolution expressed grave concern over the fighting in Kosovo, particularly citing the excessive and indiscriminate use of force by the Serbian security forces and the Yugoslav military.³²³ The Council demanded of the FRY and Kosovo Albanians to cease hostilities and take immediate steps to improve the humanitarian situation and to avert humanitarian catastrophe.³²⁴ The resolution also demanded that both sides enter into discussions with the international community.³²⁵ The FRY was requested to implement a series of measures aimed at achieving a peaceful solution for the crisis.³²⁶ To be specific the Council demanded that the FRY should call back its security forces and cease its actions affecting the civilian population.³²⁷ The FRY was also required to facilitate international monitoring of the situation, facilitate the safe return of the refugees and that it make rapid progress in negotiations towards a rapid solution to the crisis.³²⁸ The Council emphasized that if the measures laid out in the resolution were not carried out, then further action would be considered and additional measures would be enforced to restore peace and security in the region.³²⁹

In the weeks that followed, it became clear that the Council Resolution 1199 was not sufficient in itself to provide for a legal basis for the threat or use of armed force by UN Member States or international organizations. Furthermore, it became abundantly clear that in their attempts to protect sovereignty, the Soviet Union and China would veto any Council resolution that would authorize the use of force.

³²⁰Kumbaro, supra note 316

³²¹Moorma, supra note 312

³²²Moorma, supra note 312

³²³Moorma, supra note 312

³²⁴Moorma, supra note 312

³²⁵Moorma, supra note 312

³²⁶Moorma, supra note 312

³²⁷Moorma, supra note 312

³²⁸Moorma, supra note 312

³²⁹Moorma, supra note 312

The United States and its NATO allies decided to go it alone and commenced a campaign of airstrikes against the former Republic of Yugoslavia.³³⁰ The seventy-eight days of destructive bombing produced a flood of refugees and internal displacements, and a surge of further killings by Serbs.³³¹

The Kosovo intervention by NATO elicited various reactions but the balance of international opinion generally favoured the intervention's justifiability in all the circumstances.³³² Where international opinion remains much less favourable to the NATO action is not on the legitimacy of the intervention, but on the legality of the intervention, which bypassed the authority of the Security Council.³³³

1.5 CONCLUSION

In conclusion, the philosophical theories of sovereignty discussed have a common characteristic in that all have a contractual basis attached to them.³³⁴ In the early period, the general agreement is the presence of an original contract which forms the foundation of sovereign power.³³⁵ The contract might be between government and people or a social contract organizing the people followed by a further agreement between people and the government as with Pufendorf; or again, the single contract in which the sovereign and the state are created simultaneously as with Hobbes and Rousseau.³³⁶ The tendency was to rest the supreme power upon the basis of popular consent.³³⁷ In the later period, especially after Grotius, the State and sovereignty were seen from the point of view of the individual whose natural rights were combined with those of others to form the political right of the ruler.³³⁸ The initial tendency was to derive the power of the sovereign from the people as a whole, the

³³⁰ Evans, *supra* note 62

³³¹ Evans, *supra* note 62

³³² Evans, *supra* note 62

³³³ Evans, *supra* note 62

³³⁴ Merriam, *supra* note 104

³³⁵ Merriam, *supra* note 104

³³⁶ Merriam, *supra* note 104

³³⁷ Merriam, *supra* note 104

³³⁸ Merriam, *supra* note 104

later from the units of which the people was composed.³³⁹ The development of sovereignty was therefore the individualistic-contractualistic.³⁴⁰

Further, a prevailing tendency of the theory was the movement toward the absolutist conception of sovereignty.³⁴¹ Constitutional limitations, the laws of God, of nature and of nations must yield to the Leviathan, the mortal god as developed by Hobbes, while with Rousseau the sovereign will of the people emerged, unhindered by limitations and incapable of contractual restraint.³⁴² Both theories focus on the individual who must surrender all, so far as the interest of the State requires, and of its needs the sovereign is the judge, from whose decision there is no appeal.³⁴³ The individualistic theory of sovereignty, based upon voluntary agreement is arguably one of the strongest arguments constructed during this period since, to the fear of external force; it added the sanction of internal obligation.³⁴⁴

Finally, the significance of the Westphalian principles, which gradually expanded beyond Europe and over time became an accepted worldwide norm, is that for all their undoubted utility as a stabilizing element in international relations, they effectively institutionalised the long – standing indifference of political rulers toward atrocity crimes occurring elsewhere, and also effectively immunized them from any external discipline they might have faced for either perpetrating such crimes against their own people or allowing others to commit them while they stood by.³⁴⁵ Thus sovereignty, meant immunity from outside scrutiny or sanction: what happened within a state's borders and its territorial, however appalling and morally indefensible, was nobody else's business.³⁴⁶

From the discussion in this chapter, it can be submitted that as much as there has been no universally accepted definition of sovereignty, the one definition that has been widely applied by states and international bodies such as the UN is the Westphalian definition. As

³³⁹ Merriam, supra note 104

³⁴⁰ Merriam, supra note 104

³⁴¹ Merriam, supra note 104

³⁴² Merriam, supra note 104

³⁴³ Merriam, supra note 104

³⁴⁴ Merriam, supra note 104

³⁴⁵ Evans, supra note 62

³⁴⁶ Evans, supra note 62

demonstrated in the case studies, the international community stood by and watched millions being slaughtered as they upheld the principles of non-intervention, territorial integrity and absolute power. Intervention by Tanzania in the case of Uganda, Vietnam, in the case of Cambodia and NATO in the case of Kosovo, drew wide criticism and condemnation by the international community.

It can be submitted that when it comes to cases of genocide, war crimes, crimes against humanity, and ethnic cleansing, the definition of sovereignty, as outlined in the ICISS document should be adopted. When it comes to the the four crimes, saving the lives of many and averting human suffering should take priority of a states territorial integrity. Sovereignty should no longer be considered as a form of control, but a form of responsibility by the state and the international community to alleviate human suffering.

In light of this, this study will therefore adopt the definition of sovereignty found in the ICISS document. Sovereignty should be defined as a responsibility to protect citizens from acts of genocide, war crimes, crimes against humanity, and ethnic cleansing.

CHAPTER 2

RESPONSIBILITY TO PROTECT: ESSENCE AND DEVELOPMENT OF THE CONCEPT

2.1 Introduction

The conception of Responsibility to Protect, can be attributed to the international community's failures in the 1990's to respond to the genocide in Rwanda and later to prevent the atrocities in Kosovo.³⁴⁷ As the consequences of these failures became apparent, a shift in debate not only about how to prevent a crisis, but also on how the international community should respond to internal state conflicts that lead to human rights abuses.³⁴⁸ This chapter will examine the essence and development of the concept. It will then look at the three elements of the concept and the tools or strategies available under each measure

2.2 Definition of Responsibility to Protect

According to the ICISS document, the Responsibility to Protect stipulates that:

- i. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself
- ii. Where the 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.³⁴⁹

In essence, Responsibility to Protect, as defined by the ICISS document has two central elements.³⁵⁰ The first involves a shift in the understanding of sovereignty from, 'sovereignty as control' to 'sovereignty as a responsibility'.³⁵¹ This means that sovereignty is no longer to be understood as a right by the sovereign to perform whatever internal actions it desires. Instead, sovereignty should be regarded as a major source of protection of the people's fundamental rights from the most egregious acts of violence, and as such, the sovereign has

³⁴⁷ Burke-White, William W., Adoption of the Responsibility to Protect (July 30, 2011). University of Pennsylvania Law School, Public Law Research Paper No. 11-40

³⁴⁸ *ibid*

³⁴⁹ An Introduction to the Responsibility to Protect, *supra* note 31

³⁵⁰ Breakey, *supra* note 287

³⁵¹ Breakey, *supra* note 287

an inviolable responsibility to fulfil this protection.³⁵² The second element of Responsibility to Protect states that, while the state has primary responsibility for protecting its citizens, if the state should be unwilling or unable to protect, then the responsibility shifts to the international community.³⁵³

The concept of Responsibility to Protect applies to four specific crimes and violations: genocide, crimes against humanity, war crimes and ethnic cleansing.³⁵⁴ The concept does not apply to other threats to human security including health crises, natural disasters, poverty or corruption.³⁵⁵

[This paper will adopt ICISS definition of Responsibility to Protect.](#)

2.3 The Elements of Responsibility to Protect

The Responsibility to Protect has three specific responsibilities or elements.³⁵⁶ The first element is the responsibility to prevent.³⁵⁷ This element addresses both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.³⁵⁸ Root causes can include poverty, repression and failures of distributive justice.³⁵⁹

The second element is the responsibility to react.³⁶⁰ This involves responding to situations of compelling human need with appropriate measures which may include coercive measures such as sanctions and international prosecution, and in extreme cases, military intervention.³⁶¹

Regarding military intervention, the Commission identified guidelines that could be adopted by the Security Council and would prove of real utility to decision makers.³⁶² The first criterion was legality, and here, the Commission's task was not to find alternatives to clear legal authority of the Security Council, but rather making it work better thus reducing the

³⁵² Breakey, supra note 287

³⁵³ Breakey, supra note 287

³⁵⁴ A Toolkit on the Responsibility to Protect, supra note 38

³⁵⁵ A Toolkit on the Responsibility to Protect, supra note 38

³⁵⁶ ICISS Report, supra note 31

³⁵⁷ ICISS Report, supra note 31

³⁵⁸ ICISS Report, supra note 31

³⁵⁹ Breakey, supra note 287

³⁶⁰ ICISS Report, supra note 31

³⁶¹ ICISS Report, supra note 31

³⁶² ICISS Report, supra note 31

chance of it being bypassed altogether.³⁶³ The second criteria was legitimacy which was designed as a set of benchmarks that, while they might not guarantee consensus on a particular case, would make success more likely.³⁶⁴ In short, these benchmarks were, the seriousness of the harm being threatened, the motivation or primary purpose of the proposed military action, whether there were reasonably available peaceful alternatives, the proportionality of the response, and the balance of the consequences – whether more good than harm would be done by the intervention.³⁶⁵ The development of criteria for legitimizing humanitarian intervention does not answer the pressing question of who can authorise intervention³⁶⁶ The ICISS report therefore takes a rather cautious approach and emphasizes the pivotal role of the Security Council under the UN Charter.³⁶⁷ If the Security Council fail to react, the report notes that the General Assembly has residual authorities to act.³⁶⁸ The report notes that:

“General Assembly lacks the power to direct that action be taken, [but that] a decision by the General Assembly in favour of action . . . would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position.”³⁶⁹

Furthermore, the report also mentions the role of regional organisations although it notes that according to the UN Charter, such action can only be taken with authorization of the Security Council.³⁷⁰ These include establishing and enforcing organizational membership criteria related to human rights violations and mass atrocity crimes, developing or using existing early warning mechanisms to call attention to situations in which populations are threatened, and exerting diplomatic pressure through statements of concern and/or the recalling of envoys.³⁷¹

³⁶³ ICISS Report, supra note 31

³⁶⁴ ICISS Report, supra note 31

³⁶⁵ ICISS Report, supra note 31

³⁶⁶ ICISS Report, supra note 31

³⁶⁷ ICISS Report, supra note 31

³⁶⁸ ICISS Report, supra note 31

³⁶⁹ ICISS Report, supra note 31

³⁷⁰ ICISS Report, supra note 31

³⁷¹ ICISS Report, supra note 31

Additionally, the report proposed criteria, including four “precautionary principles”, to be considered before authorizing the use of force.³⁷² The principles are as follows;

“ i) Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned; ii) Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded. iii) Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective. iv) Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction” .³⁷³

The responsibility to rebuild ensures that, post intervention, the states is left in such a condition that it will not swiftly return to hostilities.³⁷⁴ It does this by providing full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.³⁷⁵

2.4 The Origin and Evolution of concept of Responsibility to Protect

The most important contributions to the debate were those made by the cofounder of both Medecins Sans Frontieres and breakaway Medecins du Monde Bernard Kouchner, the former U.K. Prime Minister Tony Blair, former Sudanese diplomat Francis Deng and former UN Secretary General Kofi Annan.³⁷⁶

The French physician did not invent the concept or even the expression, “humanitarian intervention”.³⁷⁷ The term was first used as early as 1840 and has been the subject of

³⁷² ICISS Report, supra note 31

³⁷³ [ICISS Report, supra note 31](#)

³⁷⁴ ICISS Report, supra note 31

³⁷⁵ ICISS Report, supra note 31

³⁷⁶ Evans, supra note 62

³⁷⁷ Evans, supra note 62

continuous discussion in international law literature since the early twentieth century.³⁷⁸ What Kouchner did do was give the term a new lease on life by inventing and popularizing the expression “*droit d’ingerence*,” the “right to intervene”, which had resonance in the new circumstances of the post-cold war world, when both the need and the opportunity to take protective action repeatedly arose.³⁷⁹

In the recurring debates of the 1990s the collective call from those demanding forceful action in the face of catastrophe was invariably, echoing Kouchner, “the right of humanitarian intervention”, the right to intervene. Kouchner and law professor Mario Bettati launched the concept of *droit d’ingerence* in 1987. But it was only a few years later that the expression first came into real prominence, at the time of the U.S – led intervention into Somalia in 1992, when just about all major French newspapers, at Kouchner’s urging uniformly headed their editorials “*Le droit d’ingerence*.”³⁸⁰

In his much quoted speech to the Chicago Economic Club in April 1999³⁸¹, made in the context of defending the NATO airstrikes in Kosovo that were ongoing operation at the time, former British Prime Minister Tony Blair sought to articulate a “doctrine of international community,” designed to address the most pressing foreign policy problem faced at the time which was to identify the circumstances in which the international community should get actively involved in other people’s conflicts and to do so by bringing together a more subtle blend of mutual self-interest and moral purpose in defending shared and cherished morals.³⁸² He characterised the Kosovo conflict as “a just war, based not on any territorial ambition but on values.”³⁸³ The most important contribution of Blair’s speech was to identify five major considerations, which were not absolute tests but the kind of issues that the international community needed to think about in deciding the future when and whether to intervene.³⁸⁴ They were first, “Are we sure of our case?”³⁸⁵ Second, “Have we exhausted all diplomatic

³⁷⁸ Evans, supra note 62

³⁷⁹ Evans, supra note 62

³⁸⁰ Evans, supra note 62

³⁸¹ Tony Blair, ‘Doctrine of the International Community,’ speech delivered at the Chicago Economic Club, April 24, 1999

³⁸² Evans, supra note 62

³⁸³ Evans, supra note 62

³⁸⁴ Evans, supra note 62

³⁸⁵ Evans, supra note 62

options?”³⁸⁶ Third, “Are there military operations we can sensibly and prudently undertake?”³⁸⁷ Fourth, “Are we prepared for the long term?”³⁸⁸ And fifth, “Do we have national interests involved?”³⁸⁹

By trying to identify specific criteria for military intervention, Blair was onto something important.³⁹⁰ The criteria would focus on the complex mix of issues that decision makers needed to take into account.³⁹¹ But looked into more closely the checklist was incomplete and lurched back and forth between conceptual, evidentiary and political considerations.³⁹² Its perspective was national - not international – decision making, reinforcing the perception that for the United Kingdom, the UN mattered less than its most powerful members.³⁹³ Prevention was neglected, the focus being reactive after the event, and entirely military rather than including less extreme coercive options.³⁹⁴ Finally, the description of a “just war” simply as one “based on values” was guaranteed to stir the anxieties of the developing world about the selective in which the west commandeered values to justify its adventures in the past and might do so in the future.³⁹⁵

In 1993, the then UN Secretary General Boutros Boutros-Ghali appointed a former Sudanese diplomat, Francis Deng, as his Special Representative on Internally Displaced People (IDPs) from 1992 to 2004³⁹⁶ The IDP issue, as Deng had to constantly confront it on the ground, was by its definition an internal affair, usually arising wholly in the context of domestic conflicts, and as such, lending itself almost invariably to a reluctance to engage with international officials by the governments concerned.³⁹⁷

³⁸⁶ Evans, supra note 62

³⁸⁷ Evans, supra note 62

³⁸⁸ Evans, supra note 62

³⁸⁹ Evans, supra note 62

³⁹⁰ Evans, supra note 62

³⁹¹ Evans, supra note 62

³⁹² Evans, supra note 62

³⁹³ Evans, supra note 62

³⁹⁴ Evans, supra note 62

³⁹⁵ Evans, supra note 62

³⁹⁶ Bellamy Supra note 64

³⁹⁷ Evans, supra note 62

According to Deng, the essence of being a sovereign country is just not protection from outside interference –rather it’s a matter of states having positive responsibilities for their own citizens’ welfare, and to assist each other.³⁹⁸ Roberta Cohen, Deng’s colleague, further articulated that ‘sovereignty carries with it a responsibility on the part of the government to protect its citizens’.³⁹⁹The two therefore conceptualized the term ‘sovereignty as a responsibility’.⁴⁰⁰ The notion was the first step of recognizing that the primary responsibility for protecting and assisting IDP’s lay with the host government.⁴⁰¹Where a state proved that it was incapable of fulfilling its obligations of protecting IDP’s, it should then invite international assistance which would enable it to discharge its sovereign responsibilities.⁴⁰²

Unfortunately, the principle was not developed much further than this, and – as is the fate of many such ideas – had no obvious impact on policy makers at the time.⁴⁰³

Towards the end of the 1990s, the then UN Secretary General Kofi Annan made a major attempt to resolve the impasse of the sovereignty-intervention debate by arguing that there was not just one kind of sovereignty in play here but two: in these cases national sovereignty needed to be weighed and balanced against individual sovereignty, as recognised in the international human rights instruments.⁴⁰⁴ He outlined his argument in an article published in *The Economist*⁴⁰⁵ just before the opening of the 1999 General Assembly:

State sovereignty, in its most basic sense, is being redefined by the forces of globalisation and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of human rights. When we read

³⁹⁸ Evans, supra note 62

³⁹⁹ Evans, supra note 62

⁴⁰⁰ Evans, supra note 62

⁴⁰¹ Bellamy, supra note 64

⁴⁰² Bellamy, supra note 64

⁴⁰³ Evans, supra note 62

⁴⁰⁴ Evans, supra note 62

⁴⁰⁵ Kofi Annan, “Two Concepts of Sovereignty,” *The Economist*, September 18, 1999, pp.49-50

the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.⁴⁰⁶

The Report of the International Commission on Intervention and State Sovereignty (2001)⁴⁰⁷

In early 2000, the Canadian government responded to Annan's appeal by establishing the International Commission on Intervention and State Sovereignty, (ICISS).⁴⁰⁸ The Commission's purpose was to approach the problem of humanitarian intervention in a comprehensive manner, by coming up with a report that would help the then Secretary General and everyone else find some common ground in this debate.⁴⁰⁹ The ICISS was launched in September 2000 and just over a year later, in December 2001, published a 90 page report and a 400-page supplementary volume of research essays, all under the title *The Responsibility to Protect*.⁴¹⁰

The commission recommendations were premised on the notion that when states are unwilling or unable to protect their citizens from grave harm, the principle of non-interference 'yields to the Responsibility to Protect'.⁴¹¹ The report aimed to escape the irresolvable logic of 'sovereignty versus human rights' by focusing not on what interveners are entitled to do – a right of intervention – but on what is necessary to protect people in dire need and the responsibilities of various actors to afford such protection.⁴¹² By doing this, the Commission invented a new way of talking about "humanitarian intervention".⁴¹³ To the Commission, if any right was involved, it was of the victims of mass atrocity crimes to be protected.⁴¹⁴ The focus was now where it should have always been from the beginning: on the need to protect communities from mass killing and ethnic cleansing, women from systemic rape and children from starvation.⁴¹⁵

⁴⁰⁶ Kofi Annan, "Two Concepts of Sovereignty," *The Economist*, September 18, 1999, pp.49-50

⁴⁰⁷ ICISS Report, *supra* note 31

⁴⁰⁸ Payandeh, *supra* note 68

⁴⁰⁹ Evans, *supra* note 62

⁴¹⁰ Evans, *supra* note 62

⁴¹¹ Bellamy, *supra* 246

⁴¹² Bellamy, *supra* 246

⁴¹³ Evans, *supra* note 62

⁴¹⁴ Evans, *supra* note 62

⁴¹⁵ Evans, *supra* note 62

The Commission also side lined the humanitarian intervention terminology because it had become irretrievably linked to the use of military force, and only military force, as the way of responding to mass atrocities.⁴¹⁶ Unfortunately over the years, the term ‘humanitarian intervention’ overwhelmingly had come to mean the application of non-consensual military force to achieve a humanitarian objective.⁴¹⁷ Therefore, throughout the ICISS report, when military action is being referred to, the terminology used is “military intervention for human protection purpose”.⁴¹⁸

The Commission also insisted upon a new way of defining sovereignty: building squarely on Francis Deng’s formulation the Commission argued that its essence should now be seen not as ‘control’ in the centuries old Westphalian tradition, but, again, as “responsibility”.⁴¹⁹ The starting point was that any state has the primary Responsibility to Protect the individuals within it.⁴²⁰ Where the state is unwilling or unable to meet its responsibility, through either incapacity or ill will, a secondary Responsibility to Protect would fall on the wider international community to step in, by whatever means is appropriate to the particular situation.⁴²¹

The Commission spelt out very clearly what the “Responsibility to Protect” meant in practice both for the sovereign state itself in meeting its primary responsibility and to its own people, and then, if it could not do so, for the responsibility of the wider international community to assist.⁴²² The Commission argued the Responsibility to Protect was about much more than military intervention; it extended to a whole continuum of obligations such as the responsibility to prevent mass atrocity from arising; the responsibility to react to them when they did; and the responsibility to rebuild after any intrusive intervention.⁴²³ These are now known as the responsibility to prevent, the responsibility to react and the responsibility to rebuild.⁴²⁴ Of all these layers of responsibility, the Commission overwhelmingly insisted that

⁴¹⁶ Evans, supra note 62

⁴¹⁷ Evans, supra note 62

⁴¹⁸ Evans, supra note 62

⁴¹⁹ Evans, supra note 62

⁴²⁰ Evans, supra note 62

⁴²¹ Evans, supra note 62

⁴²² Evans, supra note 62

⁴²³ Evans, supra note 62

⁴²⁴ Payandeh, supra note 68

the most important to pursue was the responsibility to prevent, though means such as building state capacity, remedying grievance, and ensuring the rule of law.⁴²⁵

The report addresses the most controversial question which is humanitarian intervention without the authorization of the Security Council.⁴²⁶ The report on one hand acknowledges the lack of global consensus, while on the other hand avoids explicitly terming such interventions as illegal.⁴²⁷ The report notes that there will be damage to the international order if the Security Council is bypassed.⁴²⁸ It however emphasizes the that there will be damage to that order if human beings are slaughtered while the Security Council stands by.⁴²⁹ The report thereby cautions the Security Council that single states or coalitions might take action if it fails to live up to its responsibility.⁴³⁰

Finally, the report recommends that the UN General Assembly endorse the Responsibility to Protect.⁴³¹ The report also recommends that the members of the UN Security Council should come to a consensus on principles for military intervention.⁴³² The permanent members of the Security Council were also advised to restrict the use of their veto power in cases where humanitarian intervention is necessary and their vital state interests are involved.⁴³³

The Report of the High-Level Panel on Threats, Challenges and Change (2004)⁴³⁴

The concept of the Responsibility to Protect, as developed in the ICISS report, was then considered by the High-Level Panel on Threats, Challenges and Change.⁴³⁵ The group was convened by the then Secretary General, Kofi Annan, in order to evaluate the adequacy of existing policies and institutions with regard to current threats to international peace and security.⁴³⁶

⁴²⁵ Evans, supra note 62

⁴²⁶ Payandeh, supra note 68

⁴²⁷ Payandeh, supra note 68

⁴²⁸ Payandeh, supra note 68

⁴²⁹ Payandeh, supra note 68

⁴³⁰ Payandeh, supra note 68

⁴³¹ Payandeh, supra note 68

⁴³² Payandeh, supra note 68

⁴³³ Payandeh, supra note 68

⁴³⁴ Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, 29, 36, 202-203, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel Report].

⁴³⁵ Payandeh, supra note 68

⁴³⁶ Payandeh, supra note 68

The group produced its own report, *A More Secure World: Our Shared Responsibility*.⁴³⁷

The report represented a significant shift in thinking about international law, and while it may in many ways echoed the ICISS Report, it was more remarkable in that it came out of the UN system itself.⁴³⁸

The High-Level Panel highlights the responsibility of the state for the welfare of its people as well as the 'collective' international Responsibility to Protect, when it comes to people suffering from avoidable catastrophe, mass murders, rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvations and exposure to disease.⁴³⁹ This collective responsibility is to be exercised by the Security Council.⁴⁴⁰

The report urges the Security Council to adopt the 'emerging norm'.⁴⁴¹ Similar to the ICISS report, the panel confirms the competence of the Security Council to act Under Chapter VII of the in cases where massive human rights violations occur⁴⁴² thus restricting the powers granted to individual states.⁴⁴³ It urges the permanent five members to refrain from using the veto in cases of genocide and large scale human rights abuses.⁴⁴⁴

The report states that, in the case of intervention, the Security Council should consider five factors: 1. The seriousness of the threat: is the threatened harm sufficiently clear and serious to justify, prima facie, the use of military force?, 2. Proper purpose: is the primary purpose of the proposed action to halt or avert the threat?, 3. Last resort: have non-military options been exhausted?, 4. Proportional means: is the response the minimum necessary?, 5. Balance of consequences: is the response likely to succeed, and are the consequences not likely to outweigh the threat?⁴⁴⁵

⁴³⁷ High-Level Panel Report , supra note 429

⁴³⁸ High-Level Panel Report , supra note 429

⁴³⁹ Payandeh, supra note 68

⁴⁴⁰ Payandeh, supra note 68

⁴⁴¹ Eaton, J. (2011). An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect. Michigan Journal of International Law.

⁴⁴² Chapter VII, United Nations, Charter of the United Nations, 24 October 1945

⁴⁴³ Eaton, supra note 441

⁴⁴⁴ Payandeh, supra note 68

⁴⁴⁵ Eaton, supra note 441

It should be noted that the High-Level Panel significantly departs from the ICISS report.⁴⁴⁶ The Panel places more emphasis on action taken by the Security Council and does not discuss the possibility of authorisations by the General Assembly or action by states or regional organisations outside the UN framework.⁴⁴⁷ The report develops criteria for the legitimacy of the use of force similar to those suggested by the ICISS.⁴⁴⁸ It however limits the application of these criteria to the use of force authorised by the Security Council.⁴⁴⁹ While the Panel supports the conceptual change in the understanding of sovereignty as a responsibility and the emphasis that the responsibility for the well-being of human beings is shared between the state and the international community, the operational content of the Responsibility to Protect is remarkably more restrictive.⁴⁵⁰

The 2005 World Summit Outcome⁴⁵¹

By 2005, the Responsibility to Protect had only been considered by the Secretary-General and specialised commissions.⁴⁵² This however changed at the September 2005 World Summit, when the heads of state and government convening at the UN General Assembly endorsed the concept.⁴⁵³ The doctrine was written into the 2005 World Summit Outcome document in two paragraphs, 138 and 139.⁴⁵⁴

Paragraph 138 states that:

"[e]ach individual State has the Responsibility to Protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.... The international community should, as appropriate, encourage and help States exercise this responsibility." ⁴⁵⁵

⁴⁴⁶ Payandeh, supra note 68

⁴⁴⁷ Payandeh, supra note 68

⁴⁴⁸ Payandeh, supra note 68

⁴⁴⁹ Payandeh, supra note 68

⁴⁵⁰ Payandeh, supra note 68

⁴⁵¹ 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter World Summit Outcome Document].

⁴⁵² Payandeh, supra note 68

⁴⁵³ Payandeh, supra note 68

⁴⁵⁴ Eaton, supra note 441

⁴⁵⁵ World Summit Outcome Document, supra note 451

Paragraph 139 states:

"[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."⁴⁵⁶

The Summit Outcome also pledges:

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.⁴⁵⁷

This reflects previous statements of the concept, in particular the first two parts of the three-part responsibility attached to the ICISS Report.⁴⁵⁸ These are the responsibility to prevent and the responsibility to react.⁴⁵⁹ The Summit Outcome language of "helping States build capacity to protect their populations . . . and . . . assisting those which are under stress before crises and conflicts break out" somehow overlaps with the ICISS responsibility to prevent, although with less emphasis on coercive diplomatic and economic measures.⁴⁶⁰ The document notes that the responsibility to react will be in a timely and decisive manner, but only when peaceful means have been found to be inadequate and national authorities have manifestly failed to protect their citizens from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁶¹ This is qualified by a case-by-case determination which arguably appears to explicitly reject the prescriptive proposals found in the ICISS report⁴⁶² by neither recognising specific responsibilities of the Security Council, nor mentioning the possibility of

⁴⁵⁶ World Summit Outcome Document, supra note 451

⁴⁵⁷ World Summit Outcome Document, supra note 451

⁴⁵⁸ Eaton, supra 287

⁴⁵⁹ Eaton, supra 287

⁴⁶⁰ Eaton, supra 287

⁴⁶¹ Eaton, supra 287

⁴⁶² Eaton, supra 287

unilateral or collective action with the authorization of the General Assembly or outside the UN framework.⁴⁶³ It should be noted that the Summit Outcome does not address the responsibility to rebuild as outlined in the ICISS report.⁴⁶⁴

One critical compromise that made the Summit Outcome language acceptable was that unlike the ICISS report which recognises the large scale loss of life or large scale ethnic cleansing, genocide, war crimes, ethnic cleansing, and crimes against humanity, the Outcome document limits the scope of the Responsibility to Protect to the international crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity.⁴⁶⁵ The idea of limiting the Responsibility to Protect to the four crimes was a breakthrough in the negotiations, as it limited the scope of the concept by adding a restrictive element.⁴⁶⁶ Moreover, the four-crimes establish the limited applicability of the Responsibility to Protect in international humanitarian law.⁴⁶⁷ Thus, these four crimes present relatively well-defined standards that states will be held to in terms of their protection responsibilities, which should enhance the predictability in its application.⁴⁶⁸

Arguably, the Summit Outcome is a compromising document without a decisive interpretation.⁴⁶⁹ The document strayed too far from the important and positive elements of the ICISS report by abandoning many of the prescriptive elements that would have placed greater pressure on the Security Council to act – for instance by potentially limiting the veto power – while allowing too much vagueness in the concept of Responsibility to Protect that may open the door for abuse of the doctrine to justify interventions based on self-interest rather than concern for local populations.⁴⁷⁰ Furthermore, the Summit Outcome has been extensively criticised for not providing a mechanism to escape the problems that plague collective interventions.⁴⁷¹

⁴⁶³ Payandeh, *supra* note 68

⁴⁶⁴ Eaton, *supra* 287

⁴⁶⁵ Eaton, *supra* 287

⁴⁶⁶ Eaton, *supra* 287

⁴⁶⁷ Eaton, *supra* 287

⁴⁶⁸ Eaton, *supra* 287

⁴⁶⁹ Eaton, *supra* 287

⁴⁷⁰ Eaton, *supra* 287

⁴⁷¹ Eaton, *supra* 287

The Secretary-General's Report on Implementation of Responsibility to Protect⁴⁷²

After the 2005 World Summit approved the concept of Responsibility to Protect, the UN secretariat began the process of incorporating the Summit Outcome into policy.⁴⁷³ The new administration of Ban Ki-moon produced the 2009 report *Implementing the Responsibility to Protect: Report of the Secretary-General*⁴⁷⁴ which detailed the Secretary General's interpretation of the concept.⁴⁷⁵

The Report lays out the policy implications of Responsibility to Protect based on three pillars. The first pillar consists of the responsibility of the state to protect its population from serious crimes.⁴⁷⁶ The second pillar is the commitment of the international community – consisting of states, regional organisations, civil society, and the private sector – to support the state in complying with its obligation under the first pillar.⁴⁷⁷ The third pillar comprises of the timely and decisive response by the international community should a state not live up to its Responsibility to Protect.⁴⁷⁸ With the third pillar, members of the international community are required to resort to peaceful measures and, as a last resort, to coercive action in compliance with the UN Charter.⁴⁷⁹

A significant number of states did not vote to endorse the report, despite the fact that they had endorsed the unanimously passed Summit Outcome.⁴⁸⁰ One reason may be that the Secretary General's Report was more detailed and had more substance than the Summit Outcome document.⁴⁸¹

The report concurred with the Summit Outcome's commitment of taking collective action in a timely and decisive manner through the Security Council on a case-by-case basis.⁴⁸²

However, the Secretary General's report uses the highly discretionary language of the

⁴⁷² The Secretary-General, Report of the Secretary-General, Implementing the Responsibility To Protect, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility To Protect*].

⁴⁷³ Eaton, *supra* 287

⁴⁷⁴ *Implementing the Responsibility To Protect*, *supra* note 472

⁴⁷⁵ Eaton, *supra* 287

⁴⁷⁶ The Secretary-General, Report of the Secretary-General, Implementing the Responsibility to Protect, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*]

⁴⁷⁷ *ibid*

⁴⁷⁸ *Implementing the Responsibility To Protect*, *supra* note 472

⁴⁷⁹ *Implementing the Responsibility To Protect*, *supra* note 472

⁴⁸⁰ Eaton, *supra* 287

⁴⁸¹ Eaton, *supra* 287

⁴⁸² Eaton, *supra* 287

Summit Outcome, most significantly dropping the case-by-case basis language and adding the non-binding commitment to reign in the use of veto.⁴⁸³

The Responsibility to Protect and the 63rd Session of the General Assembly

In the General Assembly's debate on the Responsibility to Protect, ninety-four member states submitted statements.⁴⁸⁴ The debate demonstrated a broad consensus with regard to the concept as it was recognized at the World Summit in 2005.⁴⁸⁵ A significant majority of the General Assembly highlighted the importance of prevention of serious crimes and the responsibility of the international community to support states in the effort to prevent or confine such crimes.⁴⁸⁶ A majority of states welcomed the report of the Secretary General, while some delegates explicitly endorsed the three-pillar approach.⁴⁸⁷

A number of states however voiced serious concerns over the concept.⁴⁸⁸ Some emphasised on the potential abuse of the concept as a pretext for unilateral intervention and equated the Responsibility to Protect with humanitarian intervention.⁴⁸⁹ Several states identified the composition of the Security Council and the veto power of the permanent members as the major obstacles for decisive and effective UN action when it came to implementing the concept.⁴⁹⁰ These states called for reform by looking for ways to limit the use of veto.⁴⁹¹ Many states expressed a preference for the General Assembly over the Security Council with regard to the implementation of the concept.⁴⁹²

The General Assembly eventually adopted Resolution 63/308, which reaffirms the principles and purposes of the UN Charter as well as the commitment to the Responsibility to Protect in the World Summit Outcome Document in its preamble.⁴⁹³

⁴⁸³ Eaton, *supra* 287

⁴⁸⁴ Payandeh, *supra* note 68

⁴⁸⁵ Payandeh, *supra* note 68

⁴⁸⁶ Payandeh, *supra* note 68

⁴⁸⁷ Payandeh, *supra* note 68

⁴⁸⁸ Payandeh, *supra* note 68

⁴⁸⁹ Payandeh, *supra* note 68

⁴⁹⁰ Payandeh, *supra* note 68

⁴⁹¹ Payandeh, *supra* note 68

⁴⁹² Payandeh, *supra* note 68

⁴⁹³ G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

2.5 The Legal Status of the Concept of Responsibility To Protect

Presently, Responsibility to Protect is not recognised as an international legal rule in accordance to formal sources of international law.⁴⁹⁴ The concept is not part of any international treaty.⁴⁹⁵ The ICISS document⁴⁹⁶ and the The World Summit Outcome Document⁴⁹⁷ cannot be recognised as treaty law.⁴⁹⁸ If anything, the ICISS document is seen as a political statement made by highly distinguished people.⁴⁹⁹ Furthermore, the authority of the Outcome Document arises from its adoption by the General Assembly in Resolution 60/1.⁵⁰⁰ However, according to Articles 10 – 14 of the UN Charter, the powers of the Assembly are limited to discussing matters within the scope of the UN Charter and the maintenance of international peace and security, referring legal matters or making recommendations to the Security Council.⁵⁰¹ Moreover, the resolutions made by the General Assembly do not create legal obligations.⁵⁰² Therefore, the adoption of the World Summit Outcome Document by the Assembly does not create legal obligations.⁵⁰³

The concept has not attained the status of customary international law⁵⁰⁴ because it does not fit into the constitutive elements of customary international law.⁵⁰⁵ Customary international law, as codified in Article 38(1)(b) of the ICJ⁵⁰⁶, requires a repeated conduct of states that amounts to state practice and a corresponding belief that this conduct is required by law, *opino juris*.⁵⁰⁷ It is difficult to recognize these elements in the context of Responsibility to Protect.⁵⁰⁸ The emergence of a customary norm can be identified by looking at the statements of states or to their assent or acquiescence to the endorsement of the concept within the UN framework.⁵⁰⁹ Verbal utterances, as well as resolutions of international organisations and statements of states within international organizations can be regarded as evidence of state

⁴⁹⁴ Garwood-Gowers, A. (n.d.). The Responsibility to Protect and the Arab Spring: Libya as the Exception and Syria as the Norm.

⁴⁹⁵ Garwood-Gowers, supra note 494

⁴⁹⁶ ICISS Report, supra note 31

⁴⁹⁷ World Summit Outcome Document, supra note 451

⁴⁹⁸ Garwood-Gowers, supra note 494

⁴⁹⁹ Burke-White, supra note 342

⁵⁰⁰ Burke-White, supra note 342

⁵⁰¹ Articles 10 - 14, United Nations, Charter of the United Nations, 24 October 1945

⁵⁰² Burke-White, supra note 342

⁵⁰³ Burke-White, supra note 342

⁵⁰⁴ Garwood-Gowers, supra note 494

⁵⁰⁵ Payandeh, supra note 68

⁵⁰⁶ Article 38(1)(b), United Nations, Statute of the International Court of Justice

⁵⁰⁷ Payandeh, supra note 68

⁵⁰⁸ Payandeh, supra note 68

⁵⁰⁹ Payandeh, supra note 68

practice and *opino juris*.⁵¹⁰ It is difficult to determine to which part of the version of the responsibility to protect a specific statement alludes.⁵¹¹ Since the concept has gone through numerous changes during its development, it is far from clear what exactly state means when it endorses the concept.⁵¹² The same difficulty applies to the element of repeated practice.⁵¹³ Since the concept encompasses a variety of possible reactions to deteriorating human rights situation in a specific state, it is relatively easy to allege a connection between a reaction of a state or international organization in a specific case and the concept of Responsibility to Protect.⁵¹⁴ For instance, the Security Council's resolutions with regard to Darfur has been qualified as implementing responsibility to protect.⁵¹⁵ However, it is far from clear why the mere mention of the concept in the preamble of the resolution should imply that the Security Council was implementing the concept.⁵¹⁶ There are no indications that the Security Council was obliged to take a specific action due to its previous endorsement of the concept.⁵¹⁷

Most scholars qualify it as a norm, which might become customary international law.⁵¹⁸ Legal scholars such as Jennifer Welsh and Maria Banda contend that Responsibility to Protect is an example of soft law.⁵¹⁹ Burke-White argues that this approach is both analytically unhelpful and risks promoting a political backlash.⁵²⁰ He maintains that soft law is subject to multiple definitions and often inaccurate usage.⁵²¹ Legal scholarship defines soft law as either imprecise legal obligations or non-legally binding obligations.⁵²² Classifying the Outcome Document under the first definition inaccurately suggests that it is legally binding, if imprecise.⁵²³ As noted earlier, neither the ICISS report nor the Outcome Document has the capacity to establish international legal obligations.⁵²⁴ Under the second

⁵¹⁰ Payandeh, supra note 68

⁵¹¹ Payandeh, supra note 68

⁵¹² Payandeh, supra note 68

⁵¹³ Payandeh, supra note 68

⁵¹⁴ Payandeh, supra note 68

⁵¹⁵ Payandeh, supra note 68

⁵¹⁶ In Resolution 1706, the Security Council recalled Resolution 1674 (2006), which reaffirmed the endorsement of the responsibility to protect in the World Summit Outcome Document. S.C. Res. 1706, pmbL., U.N. Doc. S/RES/1706 (Aug. 31, 2006).

⁵¹⁷ Payandeh, supra note 68

⁵¹⁸ Payandeh, supra note 68

⁵¹⁹ Burke-White, supra note 342, Jennifer M. Welsh & Maria Banda, International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities? 2 GLOBAL RESPONSIBILITY TO PROTECT 3, 213 (2010).

⁵²⁰ Burke-White, supra note 342

⁵²¹ Burke-White, supra note 342

⁵²² Burke-White, supra note 342

⁵²³ Burke-White, supra note 686

⁵²⁴ Garwood-Gowers, supra note 494

definition, the Responsibility to Protect is seen as a hortatory norm, rather than a legal rule.⁵²⁵ Despite the accuracy of this definition, the terminology of soft law is both confusing and unhelpful.⁵²⁶ Labelling a non-legally binding norm as ‘law’ creates a mis-perception of a legally binding rule and may lead to some states worried about ‘creeping legalization’, which in turn will lead to its denunciation in an effort to avoid its legal codification.⁵²⁷

The concept of Responsibility to Protect has also been characterized as an emerging principle of customary international law in the ICISS report.⁵²⁸ Similarly, the High Level Panel report qualified the concept as an emerging norm, an assessment shared by the current Secretary General.⁵²⁹ Carsten Stahn argues that characterizing Responsibility to Protect as an emerging norm is misleading, since it is over-optimistic and over pessimistic at the same time.⁵³⁰ Stahn states that some of the features of the concept are actually well embedded in contemporary international law, while others are so innovative that it might be premature to speak of a crystallizing practice.⁵³¹

2.6. The Elements of Responsibility to Protect

Responsibility to Protect has three elements; namely the responsibility to prevent, react, and rebuild.⁵³² This section will examine the preventative measures or tools that can be implemented under Responsibility to Protect.⁵³³

2.6.1 Before the Crisis: The Responsibility to Prevent

According to the ICISS report – Prevention is the single most important dimension of the concept of Responsibility to Protect.⁵³⁴ Experience has constantly taught us that effective prevention is far less costly on blood and treasure than cure.⁵³⁵ Recognition of these realities

⁵²⁵ Garwood-Gowers, supra note 494

⁵²⁶ Garwood-Gowers, supra note 494

⁵²⁷ Garwood-Gowers, supra note 494

⁵²⁸ Payandeh, supra note 68

⁵²⁹ Stahn, C. (n.d.). Responsibility to Protect: Political Rhetoric or Emerging Legal Norm? *The American Journal of International Law Vol. 101, No. 1 (Jan., 2007)*, 99-120.

⁵³⁰ Stahn, supra note 69

⁵³¹ Stahn, supra note 69

⁵³² ICISS Report, supra note 31

⁵³³ ICISS Report, supra note 31

⁵³⁴ ICISS Report, supra note 31

⁵³⁵ Evans, supra note 62

– that prevention is the single most important dimension of the Responsibility to Protect – is at the heart of the 2005 World Summit’s conclusions.⁵³⁶

In his address to the conference on “Responsible Sovereignty: International Cooperation for a Changed World”⁵³⁷, the UN Secretary General Ban Ki-moon heavily focused on prevention, which reflected his belief that the international community needs more options for its involvement beyond the use of military force.⁵³⁸ A major piece of the prevention puzzle is improving how the UN responds to reports of a brewing crisis that could lead to genocide, crimes against humanity, war crimes, and ethnic cleansing.⁵³⁹ Developing this capacity within the UN is viewed as having three main requirements: the timely flow of accurate and relevant information about the preparation or commission of mass atrocities within a country; a strong capacity within the UN to assess that information and understand its implications; and easy access to the Secretary General and the Security Council so that the analysis and recommendations can be acted upon.⁵⁴⁰ Ban Ki-Moon’s report suggests that one way to strengthen the UN’s institutional capacity is to consolidate the analysis and sharing of information in a single office for the Prevention of Genocide and the Responsibility to Protect.⁵⁴¹

Gareth Evans notes that effective prevention, and by extension the prevention of mass atrocity crimes, depends on three major factors. First, it requires detailed knowledge of the countries and regions at risk: essential preconditions would be strong analysis and good early warning.⁵⁴² Second, policy makers have to fully understand the comprehensive ‘toolbox’ of policy instruments potentially available to them, long and short term, for prevention of the outbreak, continuation, or recurrence of conflict.⁵⁴³ Third, conflict prevention requires the availability in responses and the necessary political will to apply to these resources.⁵⁴⁴

⁵³⁶ Evans, *supra* note 62

⁵³⁷ Ki-Moon, B. (n.d.). Address by UN Secretary-General Ban Ki-moon to the conference on ‘Responsible Sovereignty: International Cooperation for a Changed World’. UN doc. SG/SM/11701 of 15 July 2008.

⁵³⁸ Ki-Moon, B. (n.d.). Address by UN Secretary-General Ban Ki-moon to the conference on ‘Responsible Sovereignty: International Cooperation for a Changed World’. UN doc. SG/SM/11701 of 15 July 2008.

⁵³⁹ Welsh, J. (n.d.). Implementing the ‘Responsibility to Protect’ Policy Brief NO. 1/2009. *Oxford Institute For Ethics, Law, And Armed Conflict*. 2009.

⁵⁴⁰ *ibid*

⁵⁴¹ Welsh, *supra* 282

⁵⁴² Evans, *supra* note 62

⁵⁴³ Evans, *supra* note 62

⁵⁴⁴ Evans, *supra* note 62

2.6.1.1 Political and Diplomatic Strategies

Structural and Longer Term Political Measures— achieving good governance in all its manifestations – representative, responsive, accountable, and capable – is at the heart of effective long-term conflict and mass atrocity prevention.⁵⁴⁵ Both individual states themselves and the wider international community have mutually supportive roles to play in developing the legislative, executive and judicial institutions and processes of effective government.⁵⁴⁶ It is important to recognize just how much of the responsibility must fall on the shoulders of the states themselves.⁵⁴⁷

Part of the process of building up preventative structural safeguards is to encouraging states to join and participate actively in international organizations and regimes designed to minimize threats to security, promote confidence and trust and create institutional frameworks for dialogue and cooperation.⁵⁴⁸

Direct Political Measures –the 2005 Human Security Report⁵⁴⁹ calculated that, notwithstanding continuing weaknesses in UN infrastructure, there had been a six fold increase between 1990 and 2002 in the number of diplomatic missions aimed at stopping wars before they started. Its authors claim that this is one of the reasons for the very significant and noticeable decline over that period in the number of wars, genocidal and other mass atrocities, and number of people dying violent deaths as a result of them.⁵⁵⁰

Direct preventative diplomacy is normally considered as a ‘soft’ technique but it does have a firm end.⁵⁵¹ Threats of political sanctions such as diplomatic isolation, suspension of organization membership, travel and asset restrictions on targeted persons, ‘naming and shaming’, or such other actions are part of the diplomatic toolkit can be applied if and only if softer approaches fail.⁵⁵²

⁵⁴⁵ Evans, supra note 62

⁵⁴⁶ Evans, supra note 62

⁵⁴⁷ Evans, supra note 62

⁵⁴⁸ Evans, supra note 62

⁵⁴⁹ Human Security Center, *Human Security Report 2005*, (Oxford University Press, 2005), p.153; available at www.humansecurityreport.info

⁵⁵⁰ Evans, supra note 62

⁵⁵¹ Evans, supra note 62

⁵⁵² Evans, supra note 62

2.6.1.2 Economic and Social Strategies

Structural and Longer-Term Economic Measures – without a doubt, economic development matters.⁵⁵³ Severe economic deprivation – economic decline, low income, high unemployment - arguably is a direct cause of conflict or mass atrocities.⁵⁵⁴ They directly fuel grievances among particular disadvantaged or excluded groups, or indirectly by reducing the relevant opportunity costs of joining a violent rebellion.⁵⁵⁵ As Paul Collier puts the recruitment point:

‘Low income means poverty and low growth means hopelessness. Young men...come pretty cheap in an environment of hopelessness and poverty.’⁵⁵⁶

The 2005 World Summit Outcome document⁵⁵⁷ states that development, peace and security and human rights are interrelated and mutually reinforcing.⁵⁵⁸ Development cannot be achieved without security – as shown by the recent history in Iraq and Afghanistan – and security cannot be confidentially guaranteed without development.⁵⁵⁹ Therefore there is every reason, from a conflict and mass atrocity perspective to make a major effort to dramatically reduce levels of both absolute and relative deprivation within countries that are struggling.⁵⁶⁰ The policy measures available to achieve this are: development assistance and cooperation to address inequities in the distribution of resources or opportunities; encouragement and technical assistance to adopt institutional reforms and internal policies that will increase government efficacy, reduce corruption, generate investment, promote growth and reduce inequality; specific assistance to develop transport and communications infrastructure and improve the management of natural resources; acceptance of trade regimes that will permit greater access to external markets for developing economies and better terms of trade for them; and then encouragement for regional and larger economic integration strategies.⁵⁶¹

⁵⁵³ Evans, supra note 62

⁵⁵⁴ Evans, supra note 62

⁵⁵⁵ Evans, supra note 62

⁵⁵⁶ Evans, supra note 62

⁵⁵⁷ World Summit Outcome Document, supra note 451

⁵⁵⁸ Evans, supra note 62

⁵⁵⁹ Evans, supra note 62

⁵⁶⁰ Evans, supra note 62

⁵⁶¹ Evans, supra note 62

Direct Economic Measures – Aid conditionality entails targeting development assistance so as to achieve particular policy responses from the recipient.⁵⁶² For instance, the holding of proper elections or the cessation of some direct human rights abuse.⁵⁶³ Used this way, aid is not so much a structural measure to address root cause problems, instead it can be viewed as a functional equivalent of broad-based economic sanctions.⁵⁶⁴ Whether this is very useful in changing behaviour is a matter of doubt; so too is it contentious whether the denial of aid to people suffering under a recalcitrant regime is ever likely to do more good than harm.⁵⁶⁵

Direct broad-based sanctions – or at least the threat of economic sanctions as a preventative measure – is equally controversial.⁵⁶⁶ Sanctions include comprehensive or selective trade embargoes, the freezing or dissolution of trade agreements, capital controls, the withdrawal of investment, and the withdrawal of IMF or World Bank support.⁵⁶⁷

Economic incentives are winning more sympathetic interest as a conflict prevention tool.⁵⁶⁸ Positive inducements can take such forms as the promise or delivery of better trade terms, new investment, more favourable taxation treatment, access to technology, and lifting existing negative sanctions.⁵⁶⁹ These have been used over the years in diplomatic negotiations, including strategic issues such as the 1978 Egypt-Israel Camp David accords, the relinquishment by Ukraine and other former Soviet entities of their nuclear arsenals in 1991, and other negotiations with North Korea in the early 1990's.⁵⁷⁰

2.6.1.3 Constitutional and Legal Strategies

Structural and Longer-Term Legal Measures - For many people, a sense of security begins with confidence that they live under fair constitutional structures not inherently hostile to their interests.⁵⁷¹

⁵⁶² Evans, supra note 62

⁵⁶³ Evans, supra note 62

⁵⁶⁴ Evans, supra note 62

⁵⁶⁵ Evans, supra note 62

⁵⁶⁶ Evans, supra note 62

⁵⁶⁷ Evans, supra note 62

⁵⁶⁸ Evans, supra note 62

⁵⁶⁹ Evans, supra note 62

⁵⁷⁰ Evans, supra note 62

⁵⁷¹ Evans, supra note 62

There are ways of addressing group grievances and winning underlying protections of minority rights – and in doing so helping avoid the outbreak of violent conflict – than making fundamental changes to a state’s system of internal governance.⁵⁷² Human rights protections can take many forms: for a start, constitutional or legislative guarantees of freedom of expression, association, religious practice, use of language, and non-discrimination in employment, and the creation of effective human rights commissions and other such institutional mechanisms both inside and outside the court system.⁵⁷³

The promotion of human rights requires a multifaceted approach, including investigating and documenting human rights abuses; funding and assisting in the creation of sustainable local institutions capable of defending human rights and monitoring violations; training and education local human rights advocates; training and educating local police and judicial officials; assisting in setting up appropriate judicial bodies to prosecute violations; and assisting in tracking down suspected human rights abusers.⁵⁷⁴

The High Commissioner for Human Rights, based in Geneva, has become an increasingly strategic player across many of these areas of activity in a large number of volatile locations.⁵⁷⁵ Global NGOs like Human Rights Watch and Amnesty international play a major role in spotlighting abuses in countries and campaigning for redress.⁵⁷⁶

The broader need is to promote, in those many states at risk of conflict, a much more fundamental respect of the rule of law, which means the non-arbitrary exercise of state power, in accordance with the laws that are clear and non-retrospective, the subjection of the institutions of the states themselves to law, and the application of the law to all persons equally: these are the essential ingredients, irrespective of the system of government a country has and the particular policy content of its laws.⁵⁷⁷

No single rule of law is more important than the eradication of corruption.⁵⁷⁸ Corruption has a negative impact on economic growth, undermines the smooth inflow and effectiveness of

⁵⁷² Evans, supra note 62

⁵⁷³ Evans, supra note 62

⁵⁷⁴ Evans, supra note 62

⁵⁷⁵ Evans, supra note 62

⁵⁷⁶ Evans, supra note 62

⁵⁷⁷ Evans, supra note 62

⁵⁷⁸ Evans, supra note 62

foreign aid, and destroys trust in government and public establishments.⁵⁷⁹ Deeply ingrained corruption can eventually push states to the edge of state failure and precipitate conflict.⁵⁸⁰

Direct Legal Measures - Various avenues are available for the direct legal resolution of disputes before they realise the potential to become violent.⁵⁸¹

The International Court of Justice established under the UN Charter is the UN's principle judicial organ (Article 92).⁵⁸² However, member states are only bound to comply with its decision to the extent that they voluntarily submit to its jurisdiction (Article 94) and only a third of UN members have signed a declaration recognising the jurisdiction of the court as compulsory.⁵⁸³ That said, its adjudication of issues between states and its capacity to offer essentially advisory opinions – as with the recent *Bosnia v. Serbia* case – making much clearer the obligations imposed on states by the Genocide Convention to prevent and punish genocide – have from time to time played a significant role in the prevention of conflict and mass atrocity crimes.⁵⁸⁴ The court requires more commitment from states that it has received.⁵⁸⁵

In the current context, a more significant legal weapon has emerged in recent years in the international preventative armory: the threat of international criminal prosecution.⁵⁸⁶ Unlike before, it is now possible to ensure that those who minded to commit mass atrocity crimes know that there is a real prospect of them being tried and punished.⁵⁸⁷ There has been the establishment of specialist tribunals to deal with war crimes committed in specific conflicts particularly for the former Yugoslavia, Rwanda and Sierra Leone.⁵⁸⁸ There has also been the establishment of the International Criminal Court, which created a new jurisdiction over crimes of humanity, genocide and war crimes.⁵⁸⁹ There has also been some significant

⁵⁷⁹ Evans, supra note 62

⁵⁸⁰ Evans, supra note 62

⁵⁸¹ Evans, supra note 62

⁵⁸² Article 92, United Nations, Charter of the United Nations, 24 October 1945

⁵⁸³ Evans, supra note 62

⁵⁸⁴ Evans, supra note 62

⁵⁸⁵ Evans, supra note 62

⁵⁸⁶ Evans, supra note 62

⁵⁸⁷ Evans, supra note 62

⁵⁸⁸ Evans, supra note 62

⁵⁸⁹ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>

applications in recent years of ‘universal jurisdiction’, which is available for certain crimes committed under the Geneva Conventions and Protocols, the Convention against Torture, and under customary international law, for genocide and crimes against humanity.⁵⁹⁰ Any state party, if it has legislated to give its courts this jurisdiction, can bring to trial any person accused of such crimes irrespective of any connection of the accused or crime within the state in question.⁵⁹¹ A good example is with the 2001 prosecution and conviction in a Belgian court of Rwandan nuns charged with complicity in the Rwandan genocide.⁵⁹²

One disadvantage of having the threat of international criminal justice as a preventative tool is that not enough convictions have yet accumulated to act as a deterrent to potential perpetrators.⁵⁹³ The specialist tribunals for former Yugoslavia, Rwanda and Sierra Leone by definition have no application for future situations arising outside these countries, and their expense and uneven records makes it now especially likely that any of them will be replicated elsewhere.⁵⁹⁴ Not many countries that have legislated to allow their courts to apply universal jurisdiction, have shown much inclination to do so.⁵⁹⁵ And the International Criminal Court is finding it quite challenging to apply that jurisdiction to ongoing rather than completed conflicts.⁵⁹⁶

2.6.1.4 Security Sector Strategies

Structural and Longer Term Security Measures – this involves providing support through security sector reform by ensuring armed forces, police and intelligence services are competent and democratised.⁵⁹⁷ This is a significant conflict prevention tool, vital to enhancing governance, promoting stability, and ensuring greater public trust in the state.⁵⁹⁸ Undisciplined, poorly structured, or otherwise ineffective security forces can

⁵⁹⁰ Evans, supra note 62

⁵⁹¹ Evans, supra note 62

⁵⁹² Evans, supra note 62

⁵⁹³ Evans, supra note 62

⁵⁹⁴ Evans, supra note 62

⁵⁹⁵ Evans, supra note 62

⁵⁹⁶ Evans, supra note 62

⁵⁹⁷ Evans, supra note 62

⁵⁹⁸ Evans, supra note 62

aggravate tensions and create environments where conflicts can prosper: Congo and Timor Leste are just two examples.⁵⁹⁹

The biggest security sector reform of all is managing a transformation from military to civilian controlled government.⁶⁰⁰ To be successful, this requires not only formal constitutional and political mechanisms that embody that change but new habits of routine regard to civilian financing.⁶⁰¹

Direct Security Measures

The most interesting innovation of recent times, when it comes to more direct and immediate conflict prevention strategies of a military character is preventative deployment.⁶⁰² This involves, where there is emerging threat to conflict but it has not yet broken out, the positioning of troops either within or across borders, with the consent of the government or governments involved, for the primary purpose of deterring the escalation of that situation into armed conflict; associated aims may be to calm communities in the area by monitoring law and order and general conditions and offering other forms of assistance to local authorities.⁶⁰³

Another category of preventative military response involving deployment of troops is non-territorial shows of force.⁶⁰⁴ This involves deploying military resources without an actual intervention on the territory of the targeted state and accordingly the question of consent does not arise.⁶⁰⁵ Such operations may be intended as a show of force to give added weight to diplomatic initiatives, or serve as instruments to monitor or implement non-military enforcement actions such as sanctions and embargoes.⁶⁰⁶ A good illustration of this is probably the positioning of US warships, with substantial detachments of marines, offshore from Monrovia, Liberia in 2003 in an exercise designed - without actually putting any

⁵⁹⁹ Evans, supra note 62

⁶⁰⁰ Evans, supra note 62

⁶⁰¹ Evans, supra note 62

⁶⁰² Evans, supra note 62

⁶⁰³ Evans, supra note 62

⁶⁰⁴ Evans, supra note 62

⁶⁰⁵ Evans, supra note 62

⁶⁰⁶ Evans, supra note 62

American boots on the ground – to concentrate the minds of potential spoilers pending the arrival of a UN peacekeeping mission.⁶⁰⁷

Threatened arms embargoes or withdrawal of military cooperation programs is also an example of military tools of some preventative utility.⁶⁰⁸ Arms embargoes are a familiar tool used by the Security Council and the international community when conflict arises or is threatened, and also have quite a history of informal application by trade unionists and others.⁶⁰⁹ A recent example in April 2008, is the turning away, at least from the South African and Mozambique ports, of a Chinese ship carrying arms intended for delivery to the Mugabe government in Zimbabwe.⁶¹⁰

2.6.2 During the Crisis: The Responsibility to React

When prevention fails, conflict breaks out within a state, and mass atrocity crimes are occurring or imminent – it is not an option for the world to stand by and do nothing.⁶¹¹ The primary responsibility to react, is as expected, that of the state itself where the crisis is erupting.⁶¹² But if the state is unable or unwilling to act perhaps because it is the government itself doing the major damage, the responsibility to take action falls on the wider international community.⁶¹³

The 2005 World Summit Outcome Document⁶¹⁴ makes this clear beyond doubt by identifying the broad option available, in a sequence moving – from less to more intrusive and from less to more coercive.⁶¹⁵ The document notes that the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶¹⁶ As a result, collective action will be taken in a timely and decisive

⁶⁰⁷ Evans, supra note 62

⁶⁰⁸ Evans, supra note 62

⁶⁰⁹ Evans, supra note 62

⁶¹⁰ Evans, supra note 62

⁶¹¹ Evans, supra note 62

⁶¹² Evans, supra note 62

⁶¹³ Evans, supra note 62

⁶¹⁴ World Summit Outcome Document, supra note 451

⁶¹⁵ Evans, supra note 62

⁶¹⁶ Chapter VI and VII, United Nations, Charter of the United Nations, 24 October 1945

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 organisations as appropriate should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶¹⁷

As with the responsibility to prevent, there are four broad sets of tools available – political, economic, legal and security.⁶¹⁸

2.6.2.1 Political and Diplomatic Strategies

Diplomatic Peace-making - the best example of the use of early and effective mobilization of political and diplomatic resources to bring back under control an explosive mass atrocity situation is Kenya in early 2008.⁶¹⁹ The post-election violence, largely inter-ethnic in character, leaving within a matter of days more than 1,000 dead and 600,000 displaced – that could have quickly become, without this intervention, much more catastrophic in scale.⁶²⁰

Another example is the combined effort led by NATO's George Robertson and the EU's Javier Solana, to defuse a potentially disastrous downward spiral of inter-ethnic violence in Macedonia in 2001, which led to the Ohrid Agreement.⁶²¹ Robertson attributes this success to a combination of early intervention, top level engagement, continuity of effort, inter-institutional cooperation, and implementing lessons learnt.⁶²²

At any given time, the UN secretary-general, in the exercise of his 'good offices' role has dozens special representatives, personal representatives, special envoys, or special advisers working on peace and security issues in all parts of the world.⁶²³ In the same way, regional organisations such as the EU and AU are engaged.⁶²⁴ From time to time, nongovernmental organisation like the Carter Center - which over many years has helped broker significant peace agreements and arrangements in locations such as Liberia, Uganda, Haiti, Nepal and

⁶¹⁷ Evans, supra note 62

⁶¹⁸ Evans, supra note 62

⁶¹⁹ Evans, supra note 62

⁶²⁰ Evans, supra note 62

⁶²¹ Canada: Immigration and Refugee Board of Canada, Macedonia: Implementation of the Framework (Ohrid) Agreement, 18 July 2003, MCD41727.E

⁶²² Evans, supra note 62

⁶²³ Evans, supra note 62

⁶²⁴ Evans, supra note 62

Israel-Palestine – , the Community of Sant’Egidio which played a crucial role in bringing the war in Mozambique to an end in 1992, and the Geneva-based Centre for Humanitarian Dialogue.⁶²⁵ The Elders, a group of former senior statesmen and women founded in 2007, chaired by Archbishop Desmond Tutu, and has members such as Kofi Annan, Jimmy Carter, and Gro Harlem Brundtland, can be expected to make a new contribution to this scene.⁶²⁶

Political Sanctions and Incentives – political incentives include diplomatic recognition, membership in an international organisation, military assistance, and measures with a more specifically economic flavour like access to aid cancellation of debt.⁶²⁷

Political sanctions essentially involve withdrawal of diplomatic recognition, expulsion from international organisations, suspension of sporting contacts, ‘naming and shaming’ through condemnation in international forums, and travel bans in the case of influential individuals.⁶²⁸ Arguably, measures like supporting bans, whether directed to Zimbabwe or apartheid South Africa, or various Olympic hosts, have proved notoriously ineffective, some political sanctions have greater political impact than may immediately meet the eye.⁶²⁹ As the ICISS commissioners noted, restrictions of diplomatic representation, including expulsion of staff, has increasingly come to be seen as a relevant and useful measure in efforts to limit illicit transactions – whether for the sale of commodities such as illegally mined diamonds or drugs, or for the purchase of arms and other military-related material or with respect to the movement of funds.⁶³⁰

Targeted travel bans, when applied to specific individuals and their families, do seem to weigh heavily.⁶³¹ Visa bans for major international retail and entertainment destinations have been known to cause serious pain to a number of serially offending national leaders.⁶³² Even more interesting are bans on entry to attend school or university.⁶³³

⁶²⁵ Evans, supra note 62

⁶²⁶ Evans, supra note 62

⁶²⁷ Evans, supra note 62

⁶²⁸ Evans, supra note 62

⁶²⁹ Evans, supra note 62

⁶³⁰ Evans, supra note 62

⁶³¹ Evans, supra note 62

⁶³² Evans, supra note 62

⁶³³ Evans, supra note 62

2.6.2.2 Economic Strategies

Economic Sanctions –Economic sanctions have successfully worked in South Africa.⁶³⁴ This involved the cooperation of governments in denying or limiting credit to the South African governments and banks in denying or limiting credit to the South African government and local companies.⁶³⁵ Arguably, sanctions, more than any other form of external pressure forced South Africa to the negotiating table after the release of Nelson Mandela.⁶³⁶

Sanctions, if sustained for long, can have a major negative effect on the well-being of the country's people by denying access to goods, services, or other externally provided requirements necessary or important to maintenance of a country's economic, social, or political infrastructure, even if – as was the case for Iran in the 1990's – an attempt is made to make an exception for food and medical supplies and other essentials.⁶³⁷

Recently, the term 'smart sanctions' has come into play.⁶³⁸ This can be seen in the work of the Stockholm Process on the Implementation of Targeted Sanctions.⁶³⁹ These are measures that are directed against particular political leaders and members of their regimes whose actions constitute a threat to international peace and security.⁶⁴⁰ Examples extend across the whole political, economic, and military spectrum, ranging from travel bans on key individuals as discussed above, to financial sanctions, to specifically focused trade sanctions, to aviation bans (denying individual targets, or target states, permissions to land in, take off from, or fly over national territory) and arms embargoes.⁶⁴¹ The purpose of such intended sanctions is to avoid the unintended consequences of comprehensive economic sanctions and focus sanctions on the pressure points of the regime, group, or individual to be sanctioned.⁶⁴²

Targeted financial sanctions can be aimed at the foreign assets of a country, rebel movement, or terrorist organisation, particular leaders and their families, or companies associated with

⁶³⁴ Evans, supra note 62

⁶³⁵ Evans, supra note 62

⁶³⁶ Evans, supra note 62

⁶³⁷ Evans, supra note 62

⁶³⁸ Evans, supra note 62

⁶³⁹ Evans, supra note 62

⁶⁴⁰ Evans, supra note 62

⁶⁴¹ Evans, supra note 62

⁶⁴² Evans, supra note 62

any of them.⁶⁴³ An example of such a sanction may involve an asset freeze or a blanket restriction on dealing with companies or banks from a certain country.⁶⁴⁴

Economic Incentives - positive economic incentives include measures such as concessions on trade access, development assistance, beneficial trade agreements, investment offers, or membership in a regional economic organisation.⁶⁴⁵ These incentives have been used quite successfully in connection with major political or strategic goals.⁶⁴⁶

2.6.2.3 Legal Strategies

Criminal Prosecution: Peace versus Justice –in cases where a state is unable or unwilling to arrest, try, and if properly convicted, punish those perpetrating mass atrocity crimes – then the alternative would be to seek justice through some other court or tribunal outside the state, exercising international criminal jurisdiction.⁶⁴⁷

As described in previous paragraphs, there are three classes of such courts: the specialist or ad hoc tribunals dealing with crimes committed in specific conflicts; the International Criminal Court, ICC; and other national courts able and willing to exercise universal jurisdiction.⁶⁴⁸

Historically, most international war crimes tribunals have been ad hoc bodies.⁶⁴⁹ A good example would be The International Military Tribunal set up in Nuremburg in 1945 to try twenty one major figures accused of crimes against peace, violations of the laws of war, and crimes against humanity.⁶⁵⁰ Post 1945 international war crimes tribunals include the International Criminal Tribunal for the former Yugoslavia, (ICTY) and the International Criminal Tribunal for Rwanda, (ICTR).⁶⁵¹

⁶⁴³ Evans, supra note 62

⁶⁴⁴ Evans, supra note 62

⁶⁴⁵ Evans, supra note 62

⁶⁴⁶ Evans, supra note 62

⁶⁴⁷ Evans, supra note 62

⁶⁴⁸ Evans, supra note 62

⁶⁴⁹ Evans, supra note 62

⁶⁵⁰ Evans, supra note 62

⁶⁵¹ Evans, supra note 62

The ICC was established through the 1998 Rome Statute.⁶⁵² The Court breaks with the ad hoc tradition of war crimes tribunals by setting up a permanent court to hear cases of genocide, crimes against humanity and war crimes.⁶⁵³

2.6.2.4 Military Strategies Short of Applying Coercive Force

Peacekeeping for Civilian Protection – Peacekeeping involves what is now called the traditional form, blue-helmeted forces being engaged essentially in the monitoring, supervision, and verification of cease fires and early-stage peace agreements.⁶⁵⁴ Peacekeeping was not contemplated by the UN founders, and not explicitly mentioned in the charter; it developed to the status of a full working doctrine under Secretary General Dag Hammarskjöld.⁶⁵⁵ Operations were multinational in character, authorised by the UN Security Council, under UN command, premised on the consent of all the parties to the conflict, expected to remain completely impartial between them and not mandated or expected to use force except in self-defence if under attack.⁶⁵⁶

Peace enforcement operations on the other hand are not premised on consent of all sides or requiring impartiality.⁶⁵⁷ These were clearly anticipated in Chapter VII of the Charter, which gave the Security Council power to take such action by air, sea or land forces as necessary so as to ensure or restore international peace and security.⁶⁵⁸ It should be noted that interventions of this kind have been rare, the clearest examples being the cold war era operations in Korea in 1950 and, on a much smaller scale, the Congo in 1960.⁶⁵⁹ In the recent years, the practice has been for major peace enforcement operations, where the robust use of force is integral to the mission from the outset.⁶⁶⁰ A good example would be the operation against Iraq in 1991 after its invasion of Kuwait.⁶⁶¹

⁶⁵² UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6

⁶⁵³ Evans, supra note 62

⁶⁵⁴ Evans, supra note 62

⁶⁵⁵ Evans, supra note 62

⁶⁵⁶ Evans, supra note 62

⁶⁵⁷ Evans, supra note 62

⁶⁵⁸ Evans, supra note 62

⁶⁵⁹ Evans, supra note 62

⁶⁶⁰ Evans, supra note 62

⁶⁶¹ Evans, supra note 62

Safe Havens and No-Fly Zones

A safe haven is a specific and limited form of security guarantee, often but not exclusively intended to provide for the safe delivery of humanitarian aid, but in all cases demanding a genuine commitment to protect civilians with force if necessary.⁶⁶² The benefits of creating safe havens are clear.⁶⁶³ They allow a third party to intervene in a conflict where a full peacekeeping mission is politically impossible and nevertheless achieve limited goals of civilian protection.⁶⁶⁴ In cases of potential or actual mass atrocity crimes where speed of deployment is critical, the setting up of safe havens can help to restore peace over a wider area and prevent genocide from taking place.⁶⁶⁵

No-fly zones are the aerial equivalent of safe havens.⁶⁶⁶ They have been used as a form of limited security guarantee, attempting – though with mixed success – to prevent the use of airpower being brought to bear in a conflict.⁶⁶⁷ An example would be in Iraq, where the US and the UK imposed a no-fly zone over northern and southern Iraq from 1991 to 2003 intended to protect Kurdish and marsh Arab populations from reprisals.⁶⁶⁸

For them to be effective, both safe havens and no-fly zones involve a willingness by the protecting power to apply full-scale coercive military force in their defence if that proves necessary.⁶⁶⁹ To that extent, they raise all the issues about when it is right to use such coercive power and in effect to invade in the process the sovereign territory of another state.⁶⁷⁰

2.6.3 After the Crises: The Responsibility to Rebuild

The responsibility to rebuild a society, in the aftermath of war or mass atrocity crimes that have torn it apart, has four interrelated but distinct dimensions.⁶⁷¹ These include achieving security, good governance, justice and reconciliation, and economic and social

⁶⁶² Evans, supra note 62

⁶⁶³ Evans, supra note 62

⁶⁶⁴ Evans, supra note 62

⁶⁶⁵ Evans, supra note 62

⁶⁶⁶ Evans, supra note 62

⁶⁶⁷ Evans, supra note 62

⁶⁶⁸ Evans, supra note 62

⁶⁶⁹ Evans, supra note 62

⁶⁷⁰ Evans, supra note 62

⁶⁷¹ Evans, supra note 62

development.⁶⁷² Physical security may always be the first priority, but it cannot be the only one, and, in particular, recreating or creating a viable justice system and respect for the rule of law, and the governance preconditions for economic development, deserves higher priority.⁶⁷³

2.6.3.1 Achieving Security

Peacekeeping in Support of Nation Building –“Peacekeeping plus” missions focuses on supporting and consolidating peace-making processes, stabilising the country in question through immediate post-conflict transition and paving the way for long-term development, as with missions led wholly, or most of the time by the UN in post conflict countries such as Namibia, El Salvador, Cambodia, Somalia, Mozambique, Haiti, Eastern Slavonia, Sierra Leone, and Timor-Leste.⁶⁷⁴

The peacekeeping missions are required to do a number of tasks in the general context of providing a safe environment necessary for the restoration of good governance, the rule of law, and the conditions for economic growth and development.⁶⁷⁵ Some of it is a continuation of the responsibility-to-react role described earlier, in particular responding militarily, as necessary, to spoilers who may seek to violently disrupt peace, until such time as confident and capable national forces can play that role themselves.⁶⁷⁶ Other tasks may be more akin to ordinary law and order maintenance, a police rather than military function but one that is crucial for stabilizing a war-torn society and, among other things, ensuring that refugees and internally displaced persons, (IDPs), are willing to return home.⁶⁷⁷ This again is a role exercised by peacekeepers until such time as effective national capability has been built or rebuilt.⁶⁷⁸

⁶⁷² Evans, supra note 62

⁶⁷³ Evans, supra note 62

⁶⁷⁴ Evans, supra note 62

⁶⁷⁵ Evans, supra note 62

⁶⁷⁶ Evans, supra note 62

⁶⁷⁷ Evans, supra note 62

⁶⁷⁸ Evans, supra note 62

Other specific tasks that peacekeepers may be called upon to perform or supervise as identified in the ICISS document include mine clearance and the pursuit and apprehension of indicted war criminals.⁶⁷⁹

Worldwide, there remain some 40 to 50 million active landmines currently in the ground in almost every significant conflict area.⁶⁸⁰ In 2006, uncleared land mines killed nearly 1400 people and left many thousands more injured: the number of known mine injury survivors rose to, 473,000, many of whom require lifelong care.⁶⁸¹ Demining operations are clearly essential not only for the immediate safety of people in the areas in question, but also for the return of civilians to areas previously subject to conflict.⁶⁸²

The pursuit and apprehension of indicted war criminals is another task most likely to fall upon international peacekeepers during the peace building phase.⁶⁸³ This task remains sadly incomplete, with enforcement agencies finding local intelligence often difficult to obtain and fearing violent local reactions from one side or another if their diligence should not succeed.⁶⁸⁴

2.6.3.2 Disarmament, Demobilization, and Reintegration (DDR)

This is a crucial part of the post-conflict peacebuilding and stabilization process, designed to interrupt the conflict cycle and facilitate a transition of armed groups into national forces or back to civilian life.⁶⁸⁵ For it to be effective, it requires close and effective cooperation between national authorities and the international missions assisting them.⁶⁸⁶ In Afghanistan for example, successful DDR will involve, by reducing the influence of warlords, a major restructuring of the political landscape, and the halting progress of these programs has been a

⁶⁷⁹ Evans, supra note 62

⁶⁸⁰ International Commission on Intervention and State Sovereignty, ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Center, 2001), p65 - 66

⁶⁸¹ Figures obtained from Geneva International Centre for Humanitarian Demining, 2006 (www.gichd.ch), as quoted in John C. Kostelnick and others, "Cartographic Symbols for Humanitarian Demining" *Cartographic Journal* 45, no.1(2008): 18-31, at p.18

⁶⁸² Evans, supra note 62

⁶⁸³ Evans, supra note 62

⁶⁸⁴ Evans, supra note 62

⁶⁸⁵ Evans, supra note 62

⁶⁸⁶ Evans, supra note 62

factor holding up other political, economic and administrative developments.⁶⁸⁷ The glaring lesson learnt from all experience is that the political will of the principal parties is essential for DDR: while pressure can be applied by international bodies and their resources used to facilitate this process, this is largely ineffectual without clear commitment from the parties in play.⁶⁸⁸

Disarmament, aimed at the collection and destruction of existing weapons and the progressive suppression of the capacity to produce or purchase new ones.⁶⁸⁹ This process is obviously likely to be more effective when based on consent, regardless of whether any external forces involved in the process are deployed under Chapter VI or VII mandates.⁶⁹⁰ However, achieving voluntary disarmament regularly runs into local resistance from combatants, with peacekeeping operations often then proving unable or unwilling to compel them, a recurring problem in eastern Congo among other instances.⁶⁹¹

Demobilisation, even more than disarmament, has to be handled intelligently and sensitively if there is to be counterproductive backlash.⁶⁹² For instance after 2003, the Iraqi army went through demobilisation, which left scores of thousands of former soldiers, many of whom had played no role in the atrocities, without income, future or honour.⁶⁹³ In some cases, like Kosovo, the problem of former combatants has been managed less by demobilisation than reclassification, with the creation of the Kosovo Protection Corps (KPC), perceived as a way station toward the creation of an army for a future independent country and whose command structure was essentially that of the former Kosovo Liberation Army (KLA).⁶⁹⁴

Reintegration is the most costly and the most extensive element of DDR and ultimately the most complex, involving issues ranging from transport arrangements to the resolution of land and property issues and finding employment for the ex-combatants.⁶⁹⁵ A classic example is Mozambique which went through a slow and long-term yet very effective process, with

⁶⁸⁷ Evans, *supra* note 62

⁶⁸⁸ Evans, *supra* note 62

⁶⁸⁹ Evans, *supra* note 62

⁶⁹⁰ Evans, *supra* note 62

⁶⁹¹ Evans, *supra* note 62

⁶⁹² Evans, *supra* note 62

⁶⁹³ Evans, *supra* note 62

⁶⁹⁴ Evans, *supra* note 62

⁶⁹⁵ Evans, *supra* note 62

successful political reintegration – with RENAMO’s transition from insurgent group to opposition party – as well as economically and socially.⁶⁹⁶ While employment creation schemes may not arguably be the most productive use of donor resources, and former insurgent or militia combatants may well be among the least deserving of claimants, there is a strong security imperative in most cases to, at the very least, detach the more dangerous individuals from each other enough to prevent them easily re-associating, re-arming, and re-threatening.⁶⁹⁷

2.7 Conclusion

Since its conception, Responsibility to Protect has generated tremendous attention and hope as a potentially powerful tool to promote and sustain global peace.⁶⁹⁸ It has also played a key role in influencing the international community’s response to the protection of civilians in several country cases.⁶⁹⁹ The international consensus extends to the general idea that it is the shared responsibility of the state as well as of the international community to prevent and contain the four crimes, genocide, crimes against humanity, war crimes and ethnic cleansing.⁷⁰⁰ However, ensuring adequate, timely, and consistent application of the concept remains a serious challenge.⁷⁰¹ This will be demonstrated in the next chapter.

⁶⁹⁶ Evans, *supra* note 62

⁶⁹⁷ Evans, *supra* note 62

⁶⁹⁸ A Toolkit on the Responsibility to Protect, *supra* note 38

⁶⁹⁹ A Toolkit on the Responsibility to Protect, *supra* note 38

⁷⁰⁰ Payandeh, *supra* note 68

⁷⁰¹ Payandeh, *supra* note 68

CHAPTER 3

OPERATIONALISATION OF RESPONSIBILITY TO PROTECT: CASE STUDIES OF KENYA AND SYRIA

3.1 Introduction

Since its official introduction into the international arena in 2001, Responsibility to Protect has been invoked by the civil society, the UN and/or other national, regional and/or sub-regional actors.⁷⁰² However, there have been variations in its application. In some cases, the international community has reacted swiftly and effectively and implemented the concept mostly through diplomatic measures. In other cases, the application of the concept has not been as effective or consistent mostly due to the states that define sovereignty as a concept that respects territorial integrity, non-interference, and non-intervention. In other cases, UN members such as China and Russia have used their veto power to oppose a resolution which they deem as a violation of state sovereignty. In other cases, intervention or non-intervention has been allowed due to the alleged interests of the Security Council's permanent five.

This Chapter will demonstrate the inconsistency of the concepts application, which in turn will build a case for the concepts entrenchment in treaty law.

This Chapter will examine the action and the inaction of the international community and the impact of the actions thereof.

3.2 Responsibility to Protect in Action – Kenya

3.2.1 The Post-Election Violence 2007/2008

From December 2007 to February 2008 Kenya⁷⁰³, once viewed as a relative safe haven of stability in the horn of Africa, experienced ethnic violence, a growing humanitarian crisis, economic disruption, and unresolved questions about its future political direction.⁷⁰⁴ This was triggered by a disputed presidential election held on 27 December 2007.⁷⁰⁵ As a result of the violence, 1,333 Kenyans were killed and over 600,000 internally displaced persons (IDPs), while more than 110,000 private properties were destroyed between ethnic Kikuyus, Luos,

⁷⁰²Crises. (2014, July 28). Retrieved from International Coalition for the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises>

⁷⁰³The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷⁰⁴Langer, J. (n.d.). The Responsibility to Protect: Kenya's Post-Electoral Crisis.

⁷⁰⁵The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

and Kalenjins in the Rift Valley, Mombasa and urban informal settlements.⁷⁰⁶ The perpetrators comprised of individuals, militias, and police with victims often targeted on the basis of assumed connection between their ethnicity and support for either of the two presidential candidates, incumbent Mwai Kibaki of the Party of National Unity, (PNU), and opposition leader Raila Odinga of the Orange Democratic Party, (ODM).⁷⁰⁷ It should be noted that Kenya's elections since gaining independence had been dominated by ethnic affiliation which resulted in exclusion and discrimination of those affiliated with the opposition.⁷⁰⁸

In committing to uphold Responsibility to Protect, the Kenyan government had accepted the Responsibility to Protect its citizens from genocide, war crimes, crimes against humanity, and ethnic cleansing.⁷⁰⁹ The government therefore had the responsibility to ensure that government officials did not incite or facilitate the commission of these crimes; mitigate the rampant hate speech; deter private actors from inciting, aiding, perpetrating crimes; arrest and prosecute perpetrators; and ensure that the police and the military observe international human rights standards and develop the capacity to respond rapidly to the threats of atrocities.⁷¹⁰ However, the government showed that it was unable or unwilling to take the necessary steps to protect its population.⁷¹¹

The severity of the crisis and lack of action by the Kenya government led to a swift response by regional and international actors, as it appeared to rise to the level of crimes against humanity, a level of violence that the Responsibility to Protect is designed to prevent.⁷¹² French Foreign and European Affairs Minister, Bernard Kouchner, appealed to the UN Security Council in January 2008 to react “in the name of the Responsibility to Protect” before Kenya plunged into deadly ethnic violence.⁷¹³ The UN Secretary General, Ban Ki-moon characterized the post-election ethnic crises as an issue concerning the Responsibility

⁷⁰⁶Halakhe, A. B. (2013, December). “R2P in Practice”: Ethnic Violence, Elections and Atrocity Prevention in Kenya. Global Center for the Responsibility to Protect: Occasional Paper Series No.4.

⁷⁰⁷ibid

⁷⁰⁸The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷⁰⁹(13 February 2010). The Responsibility to Protect and Kenya: Past Successes and Current Challenges Policy Brief. Global Center for the Responsibility to Protect.

⁷¹⁰(13 February 2010). The Responsibility to Protect and Kenya: Past Successes and Current Challenges Policy Brief. Global Center for the Responsibility to Protect.

⁷¹¹(13 February 2010). The Responsibility to Protect and Kenya: Past Successes and Current Challenges Policy Brief. Global Center for the Responsibility to Protect.

⁷¹²Langer, supra note 704

⁷¹³The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

to Protect⁷¹⁴ and issued a statement expressing concern for the ongoing violence, calling the population to remain calm and for restraint to be shown by the Kenya security forces.⁷¹⁵ The UN High Commissioner for Human Rights called on the Kenyan government to abide by its international human rights obligations.⁷¹⁶

Internally, soon after the violence began, a discreet attempt to a political agreement between PNU and ODM was initiated with the support of influential members of the Kikuyu business community facilitated by the World Bank representative, Collin Bruce.⁷¹⁷ The initiative was intended to operate between the parties through trusted intermediaries.⁷¹⁸ The go-betweens, chosen for the ability to interact one-on-one with the president, emphasised the need for power sharing with Odinga.⁷¹⁹

Efforts to peacefully resolve the crisis through mediation was launched by the African Union first with a visit from the outgoing Chairman of the African Union, (AU), President John Kufour of Ghana on 30 December 2007, one day after Kibaki's swearing in.⁷²⁰ He met with both Kibaki and Odinga, but failed to establish a mediation process.⁷²¹ His visit was followed by the arrival of Nobel Peace Laureate Archbishop Desmond Tutu, on 2 January, and that of US Assistant Secretary of State for African Affairs, Jendayi Fraser on 5 January.⁷²² Four former heads of state - Tanzania's Benjamin Mkapa, Mozambique's Joaquim Chissano, Botswana's Katumile Masire and Zambia's Kenneth Kaunda – arrived on 8 January for talks with President Kibaki.⁷²³ Despite all mediation attempts, no one was able to broker a successful peace agreement.⁷²⁴

⁷¹⁴Langer, *supra* note 704

⁷¹⁵The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷¹⁶The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷¹⁷(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷¹⁸(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷¹⁹(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷²⁰Halakhe, A. B. (2013, December). "R2P in Practice": Ethnic Violence, Elections and Atrocity Prevention in Kenya. Global Center for the Responsibility to Protect: Occasional Paper Series No.4.

⁷²¹The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷²²The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷²³The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷²⁴The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

On 9 January, President Kufour returned to Kenya at President Kibaki's invitation and authorized a panel of "Eminent African Personalities" to mediate between the two presidential candidates.⁷²⁵ A document outlining 'Principles of Agreement' was to be signed in the parliament on 10 January 2008, the day of Kufuor's departure, in order to establish the basis of a process designed to address the root causes of the violence and the electoral dispute, as well as provide a political settlement.⁷²⁶ But before the document was signed, hardliners in the Kibaki camp convinced the president to disown the document.⁷²⁷

The document which went through ten rounds of negotiations, in the full knowledge and apparent support of the president, detailed a mutual commitment to restore the rule of law and stability rapidly.⁷²⁸ The document recognised that the electoral commission's tallying compilation and declaration of results as problematic and proposed a credible, independent and impartial process which could not be subjected to control by either party, and the parties would be bound by the findings and recommendations.⁷²⁹ The document also included an agreement that the process would be carried out by a panel of eminent Africans, which consisted of former UN Secretary General Kofi Annan, former Tanzanian President Benjamin Mkapa, and former first lady of Mozambique Graca Machel, who would present their findings and recommendations within 30 days.⁷³⁰ In the interim, it provided for a coalition government based on equal representation of both parties in number and portfolio.⁷³¹ The document further stated that government activities would be subject to mutual agreement, and both parties committed to pass the laws required for implementation in parliament.⁷³² The document was to be signed by Kibaki and Odinga witnessed by the AU's Kufuor, UK High Commissioner Adam Wood, U.S. Ambassador Michael Ranneberger and French Ambassador and local EU President Elisabeth Barbier.⁷³³ This document provided two of the essential pillars for the resolution of the crisis: an independent investigation into the electoral dispute with recommendations on the measures and time frame needed to organise a rerun if the first count was found to be invalid; and a powersharing

⁷²⁵Halkhe, *supra* note 720

⁷²⁶(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷²⁷(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷²⁸(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷²⁹(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷³⁰(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷³¹(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷³²(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

⁷³³(n.d.). Kenya in Crisis Crisis Group Africa Report N°137, 21 February 2008.

arrangement between ODM and PNU while reforms and preparations for a rerun were to be carried.⁷³⁴

The panel arrived on 22 January 2008 and immediately restored hope on the possibility of a negotiated settlement.⁷³⁵ After intensive consultations and visits to areas affected by violence, it arranged a Kibaki-Odinga meeting followed by rapid agreement on the format and agenda of negotiations.⁷³⁶ Both parties agreed to address four agenda items in four weeks, namely:(1) taking immediate action to stop the violence and restore fundamental rights and liberties,(2) addressing the humanitarian crisis and promoting reconciliation, healing and restoration of calm, (3) overcoming the political crisis, and (4) addressing long-term issues and the root causes of the conflict, including constitutional, legal and institutional reforms.⁷³⁷

On 28 February 2008, a power sharing agreement was brokered.⁷³⁸ The agreement was built around a power-sharing cabinet with Mwai Kibaki as president and Raila Odinga as prime minister.⁷³⁹ The parties also agreed to have ongoing negotiations on underlying root cause issues – especially land, economic disparity, and the constitution – and the establishment of three formal commissions to review electoral law and practice, investigate postelection violence, and set in place a truth and reconciliation process.⁷⁴⁰ The three commissions were:(1) the Independent Review Commission on the 2007 Elections (IREC), also known as the Krieglger Commission, which was assigned to review the electoral process, (2) the Commission of Inquiry into Post-Election Violence (CIPEV), also known as the Waki Commission, which was tasked to analyze the factors that contributed to the electoral violence and (3) the National Task Force on Police Reform, which was directed to review the conduct of the police.⁷⁴¹

The findings of the three commissions formed the foundation for many of the reforms initiated by the government to prevent a recurrence of the 2007/2008 violence.⁷⁴² Such reforms include the adoption of a new constitution which entered into force in August 2010.

⁷³⁴ (n.d.). Kenya in Crisis Crisis Group Africa Report N° 137, 21 February 2008.

⁷³⁵ (n.d.). Kenya in Crisis Crisis Group Africa Report N° 137, 21 February 2008.

⁷³⁶ (n.d.). Kenya in Crisis Crisis Group Africa Report N° 137, 21 February 2008.

⁷³⁷ Halkhe, supra note 720

⁷³⁸ Langer, supra note 604

⁷³⁹ Evans, supra note 62

⁷⁴⁰ Evans, supra note 62

⁷⁴¹ Halkhe, supra note 720

⁷⁴² Halkhe, supra note 720

⁷⁴³ In advance of the referendum, the government showed its commitment to prevention, Responsibility to prevent, by deploying 10,000 additional police.⁷⁴⁴ Equally significant was the unified position on the referendum that Odinga and Kibaki presented, which in turn helped to allay any doubts about the capacity of the power sharing agreement to survive until the next elections.⁷⁴⁵ The constitution reduced the power of the president and helped create more independence for key institutions including the judiciary and the police.⁷⁴⁶ The constitution also introduced a devolved system of governance structure which moved the country from a centralized and highly personalized form of governance that had previously contributed to inequitable development and a form of politics that was perceived as benefiting particular ethnic groups.⁷⁴⁷

The Waki and Krieglar Commissions both called for reforms of the media's regulatory framework as a means of curbing hate speech; a tool which had been used during the 2007 to incite violence.⁷⁴⁸ As a result, in February 2008 the Kenyan parliament passed the National Cohesion and Integration Act which established laws on ethnic and religious discrimination and created penalties for hate speech.⁷⁴⁹ In September 2009 the government established the National Cohesion and Integration Commission, (NCIC), whose task was to monitor compliance with the act.⁷⁵⁰ The Commission played a critical role in ensuring that hate speech would not play a similar role during the 2013 election by developing guidelines for journalists and media outlets regarding hate speech, conducting awareness training regarding hate speech, warning that perpetrators would be held accountable should they violate the Act, investigating and hearing complaints regarding hate speech, and initiating prosecutions.⁷⁵¹ By working with the NCIC, the government also undertook studies to identify flashpoints for violence and developed strategies to minimise the level of risk.⁷⁵²

⁷⁴³ Halkhe, supra note 720

⁷⁴⁴ The March 2013 Elections in Kenya and the Responsibility to Protect, Policy Brief. Global Center for the Responsibility to Protect. (11 February 2013).

⁷⁴⁵ The March 2013 Elections in Kenya and the Responsibility to Protect, Policy Brief. Global Center for the Responsibility to Protect. (11 February 2013).

⁷⁴⁶ Halkhe, supra note 720

⁷⁴⁷ Halkhe, supra note 720

⁷⁴⁸ Halkhe, supra note 720

⁷⁴⁹ Halkhe, supra note 720

⁷⁵⁰ Halkhe, supra note 720

⁷⁵¹ Halkhe, supra note 720

⁷⁵² The March 2013 Elections in Kenya and the Responsibility to Protect, Policy Brief. Global Center for the Responsibility to Protect. (11 February 2013).

The reform implemented in the police force established the legal and institutional framework for a more independent police force which seeks to serve the Kenyan state rather than politicians.⁷⁵³

3.2.2 Why Was Responsibility to Protect Successful in Kenya?

From the foregoing, Kenya is the best example of the use of the Responsibility to Protect.⁷⁵⁴ The concept was applied by using diplomatic and political strategies by the international community, through the panel of eminent Africans, which brought back under control an explosive mass atrocity situation in the country.⁷⁵⁵

The negotiation and mediation process led by the Eminent African Personalities demonstrated the value of outside engagement when they succeeded in preventing an escalation of post-election violence, an outcome that Annan saw as a successful example of the Responsibility to Protect in Action.⁷⁵⁶ The case also demonstrates that a joint undertaking by the UN and other multilateral and regional organizations can be successful.⁷⁵⁷ Without the joint effort, the parties would not have felt the pressure to come to the table and come up with an agreement which would eventually stop the chaos.⁷⁵⁸ Invoking Responsibility to Protect provided a diplomatic solution.⁷⁵⁹ Through political and diplomatic intervention, it took the panel 40 days to convince both sides that there was no way either side could run the country without the other and that without any agreement the country would be in a political gridlock.⁷⁶⁰ Kofi Annan concluded proudly by saying:

“[w]hen we talk of intervention, people think of the military . . . But under R2P, force is a last resort. Political and diplomatic intervention is the first mechanism. And I think we’ve seen a successful example of its application [in Kenya].”⁷⁶¹

Furthermore, the international community has provided considerable financial, technical, and political support to assist the Kenyan government in carrying out reforms, which were implemented to deter future violence.⁷⁶²

⁷⁵³Halkhe, supra note 720

⁷⁵⁴Evans, supra note 62

⁷⁵⁵Evans, supra note 62

⁷⁵⁶Langer, supra note 704

⁷⁵⁷Langer, supra note 704

⁷⁵⁸Langer, supra note 704

⁷⁵⁹Langer, supra note 704

⁷⁶⁰Langer, supra note 704

⁷⁶¹Langer, supra note 704

The rapid and coordinated response to the Kenya crisis by the international community has been hailed as “a model of diplomatic action under the Responsibility to Protect.”⁷⁶³

3.3 Failure of Responsibility to Protect - Syria

According to the Syrian Observatory for Human Rights, more than 140,000 people, over 7000 of them children, have been killed in Syria’s uprising-turned-civil war.⁷⁶⁴ Yet, the international community, represented by the members of the UN Security Council, has been unable to agree upon any interventionist action to stem the violence.⁷⁶⁵ Additionally, the Syrian Government remains resolute in its rejection of any foreign interference in its domestic affairs and hostile to suggestions by other nations and coalitions of nations that its repressive violence must cease.⁷⁶⁶

Disagreements over Syria have centred on two key issues: first, how to interpret events on the ground, and second, how to respond to the violence.⁷⁶⁷ In the early stages of the conflict, Western countries characterised the situation as a brutal repression of pro-democracy protesters by the Assad regime.⁷⁶⁸ In contrast, Russia and China, saw the violence as a legitimate government response to attacks on state infrastructure by armed opposition groups.⁷⁶⁹ These divergent perspectives have undermined attempts to reach an agreement on appropriate responses.⁷⁷⁰ While Western states and subsequently the Arab League have called for President Assad to step down as president, China and Russia have been unequivocally been opposed to any external pressure aimed at changing the Syrian regime.⁷⁷¹

The uprising in Syria began mid-march 2011 after protestors asking for the release of political prisoners were immediately met by Syrian Security forces.⁷⁷² President Bashar al-Asaad refused to halt the violence and implement meaningful reforms demanded by

⁷⁶² The March 2013 Elections in Kenya and the Responsibility to Protect, Policy Brief. Global Center for the Responsibility to Protect. (11 February 2013).

⁷⁶³ The Crisis in Kenya. (2014, July 29). Retrieved from International Coalition For the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

⁷⁶⁴ Syria's death toll now exceeds 140,000: activist group. (2014, July 30). Retrieved from Reuters: <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>

⁷⁶⁵ Zifcak, S. (2012). ‘The Responsibility to Protect after Libya and Syria. 13 Melbourne Journal of International Law (2012), 1–35.

⁷⁶⁶ *ibid*

⁷⁶⁷ Garwood-Gowers, *supra* note 494

⁷⁶⁸ Garwood-Gowers, *supra* note 494

⁷⁶⁹ Garwood-Gowers, *supra* note 494

⁷⁷⁰ Garwood-Gowers, *supra* note 494

⁷⁷¹ Garwood-Gowers, *supra* note 494

⁷⁷² The Crisis in Syria. (n.d.). Retrieved July 30, 2014, from The International Coalition for the Responsibility to Protect: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>

protestors such as the lifting of emergency law, broader political representation and a freer media.⁷⁷³ Accounts emerged from witnesses, victims, the media, and civil society that government forces had subjected civilians to arbitrary detention, torture, and the deployment and use of heavy artillery.⁷⁷⁴ The Syrians were also subjected to the Shabiha, a heavily armed state-sponsored militia fighting alongside Syrian Security forces.⁷⁷⁵

The UN Security Council met on 27 April 2011 to discuss the deteriorating situation in Syria.⁷⁷⁶ All members of the Security Council expressed deep concern over the worsening situation in Syria.⁷⁷⁷ However, when it came to the actions to be taken to remedy the situation, the different views were made clearly visible.⁷⁷⁸ The United Kingdom, reflecting a broadly Western position, recommended four measures which should be taken immediately.⁷⁷⁹ Firstly, the violence had to stop immediately.⁷⁸⁰ Secondly, the Syrian government had to immediately respond to the legitimate demands of its people for genuine reform.⁷⁸¹ Thirdly, those responsible for the violence should be made accountable for their actions.⁷⁸² And fourthly, the international community should present a united front in condemning the killings and abuses of human rights.⁷⁸³

The Russian representatives however responded by making clear its view that this was essentially a domestic matter for the Syrian authorities to resolve.⁷⁸⁴ They pointed out that the situation was not one that constituted a threat to the international peace and security.⁷⁸⁵ Furthermore, violence had been committed by both the government and the opposition.⁷⁸⁶ Any outside interference should be avoided as it might provoke undesirable and considerable regional instability.⁷⁸⁷ The Indian delegation added that the primary responsibility of the Security Council was to avoid violence in any form and seek a resolution of internal differences through peaceful means.⁷⁸⁸ It should be noted that even at this early stage,

⁷⁷³The Crisis in Syria, supra note 767

⁷⁷⁴The Crisis in Syria, supra note 767

⁷⁷⁵The Crisis in Syria, supra note 767

⁷⁷⁶Zifcak, supra note 765

⁷⁷⁷Zifcak, supra note 765

⁷⁷⁸Zifcak, supra note 765

⁷⁷⁹Zifcak, supra note 765

⁷⁸⁰Zifcak, supra note 765

⁷⁸¹Zifcak, supra note 765

⁷⁸²Zifcak, supra note 765

⁷⁸³Zifcak, supra note 765

⁷⁸⁴Zifcak, supra note 765

⁷⁸⁵Zifcak, supra note 765

⁷⁸⁶Zifcak, supra note 765

⁷⁸⁷Zifcak, supra note 765

⁷⁸⁸Zifcak, supra note 765

reservations concerning the prospect of any intervention by the international community to address the issues in Syria were clearly being expressed.⁷⁸⁹

On April 29, the Human Rights Council met to discuss the situation in Syria.⁷⁹⁰ The Council presented a Resolution S-16/1⁷⁹¹, which strongly condemned the use of lethal violence against peaceful protesters.⁷⁹² It called on the Syrian government to immediately put an end to all human rights abuses including reaffirming the rights to freedom of expression and assembly, lifting censorship restrictions, permitting reporting within Syria, calling for the prohibition on foreign journalists to be lifted, and demanding the immediate release of all political prisoners.⁷⁹³ The Security Council agreed to urgently send a mission to Syria to investigate the alleged human rights abuses and called upon the Syrian government to cooperate with the mission representatives.⁷⁹⁴ The proposed Resolution applied the concept in two ways, firstly, it exerted diplomatic pressure through statements of concern, and secondly, it called for the establishment of a fact finding mission to investigate and report alleged threats against the Syrian population.⁷⁹⁵ Despite the resolution being adopted by a substantial majority of the Security Council, there was a notable opposition and absence.⁷⁹⁶ China, Russia, Pakistan and Malaysia, among others, voted against the resolution.⁷⁹⁷ The abstainers included Nigeria and Saudi Arabia.⁷⁹⁸ Violence continued on the ground and as the killing became more prevalent, the demonstrations grew larger and more widespread.⁷⁹⁹

In late May 2011, France, Germany, Portugal and the United Kingdom introduced a draft resolution to the Security Council.⁸⁰⁰ The draft resolution noted the Syrian government's Responsibility to Protect its citizens and stressed the need for those responsible for the government-sponsored violence to be brought into account, and called for an end to killings, arbitrary detention, disappearances, and torture.⁸⁰¹ The draft resolution demanded that the

⁷⁸⁹Zifcak, supra note 765

⁷⁹⁰Zifcak, supra note 765

⁷⁹¹*The Current Human Rights Situation in the Syrian Arab Republic in the context of Recent Events*, GA Res S-16/1, UN GAOR, 16th spec sess, 2nd mtg, UN Doc A/HRC/RES/S-16/1 (4 May 2011, adopted 29 April 2011).

⁷⁹²Zifcak, supra note 765

⁷⁹³Zifcak, supra note 765

⁷⁹⁴Zifcak, supra note 765

⁷⁹⁵A Toolkit on the Responsibility to Protect, supra note 38

⁷⁹⁶Zifcak, supra note 765

⁷⁹⁷Zifcak, supra note 765

⁷⁹⁸Zifcak, supra note 765

⁷⁹⁹Zifcak, supra note 765

⁸⁰⁰France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, UN SCOR, 66th sess, UN Doc S/2011/612 (4 October 2011).

⁸⁰¹Zifcak, supra note 765

siege in Dar'a cease and that all media and communications restrictions be lifted.⁸⁰² The regime was urged to cooperate with the Human Rights Council's investigative mission.⁸⁰³ This draft resolution applied Responsibility to Protect in the following ways; first, it called for criminal prosecution, second it advocated for freedom of the media, and third it urged the Syrian government to cooperate with the fact finding mission which was lead by the Human Rights Council's investigative mission.⁸⁰⁴ What followed was an intensive discussion among the members of an amended form of the European Resolutin. Russia, China, India, Brazil, and South Africa expressed their concern that a Security Council resolution should not seek to dictate the nature of the reform program that the Syrian government should undertake.⁸⁰⁵ Essentially, they felt that this was an internal matter. They also sought to remove language that would suggest any form of military intervention.⁸⁰⁶ The draft resolution was put on hold.⁸⁰⁷

Developments in Jisr al-Shughour in north-west Syria, where Syrians began to flee the violence across the border to Turkey, while more crossed over the border to Israel.⁸⁰⁸ The argument that the crises in Syria was an internal matter became weaker, and the movement of Syrian refugees across borders became a major source of international concern.⁸⁰⁹

The Secretary General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a statement on Syria.⁸¹⁰ They noted that the scale and ferocity of the violence in the country indicated that crimes against humanity may have been committed.⁸¹¹ The Advisors urged the Syrian government to fulfill its Responsibility to Protect its population and to ensure that its security forces complied with their obligations under international law.⁸¹²

The President of the Security Council issued a presidential statement on Syria expressing its grave concern with respect to the worsening crisis in Syria and noted its regret on the deaths

⁸⁰²Zifcak, supra note 765

⁸⁰³Zifcak, supra note 765

⁸⁰⁴Evans, supra note 62

⁸⁰⁵Zifcak, supra note 765

⁸⁰⁶Zifcak, supra note 765

⁸⁰⁷Zifcak, supra note 765

⁸⁰⁸Zifcak, supra note 765

⁸⁰⁹Zifcak, supra note 765

⁸¹⁰Francis Deng and Edward Luck, 'Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria' (Press Release, 21 July 2011).

⁸¹¹Zifcak, supra note 765

⁸¹²Zifcak, supra note 765

of hundreds of people.⁸¹³ It condemned the widespread violations of human rights that had taken place and called for an immediate ceasefire.⁸¹⁴ Notably however, the statement was seen as a compromise and it affirmed the Security Council's commitment to state sovereignty, independence, and territorial integrity of Syria.⁸¹⁵ It stressed that the only solution to the crisis was through an inclusive and Syrian led political process whose objective was the recognition of the legitimate aspirations of the Syrian people.⁸¹⁶

On 4 October 2011, France, Germany, Portugal, and the UK introduced the final amended European draft resolution for discussion and adoption.⁸¹⁷ The draft strongly condemned the continued grave and systematic human rights violations and the use of force against civilians by the Syrian authorities and demanded for the immediate end to all violence.⁸¹⁸ It recalled the Syrian government's Responsibility to Protect its population and expressed its deep concern with respect to the deteriorating political situation in Syria and the prospect of further violence.⁸¹⁹ In order to satisfy Russia and China, no reference was made on sanctions.⁸²⁰ The resolution however conveyed an intention to impose such sanctions should Syria not comply with resolution's terms within the designated time.⁸²¹ This draft adopted Responsibility to Protect by exerting diplomatic pressure through statements of concern and relaying the Security Council's intent of applying economic sanctions.⁸²²

Despite reaffirming the Security Council's commitment to sovereignty, independence, territorial integrity, and national unity of Syria, the draft met vetoes from China and Syria.⁸²³ In explaining their vetoes, China focused on its traditional talking points regarding non-interference, respect for sovereignty, and its preference for resolving crisis through political dialogue.⁸²⁴ Russia set down four arguments against the resolution.⁸²⁵ First, like China, Russia noted that the resolution did not pay sufficient respect to Syria's national sovereignty,

⁸¹³Zifcak, supra note 765

⁸¹⁴Zifcak, supra note 765

⁸¹⁵Zifcak, supra note 765

⁸¹⁶Zifcak, supra note 765

⁸¹⁷Zifcak, supra note 765

⁸¹⁸France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution, UN SCOR, 66th sess, UN Doc S/2011/612 (4 October 2011).

⁸¹⁹ibid

⁸²⁰Brendan Howe, Boris Kondoch. (2013). *The Legality and Legitimacy of the Use of Force in Northeast Asia Studies in East Asian Security and International Relations*. BRILL

⁸²¹Zifcak, supra note 765

⁸²²Evans, supra note 62

⁸²³Howe, Kondoch, supra note 820

⁸²⁴Howe, Kondoch, supra note 820

⁸²⁵Zifcak, supra note 765

territorial integrity, and to the principle of non-interference into Syria's domestic affairs.⁸²⁶ Secondly, Russia saw the resolution as founded upon the logic of confrontation.⁸²⁷ Instead, the resolution should reflect a clear preference for dialogue amongst the Syrian parties aimed at achieving peace.⁸²⁸ Thirdly, Russia asserted that the violence in Syria was caused by both parties and it concurred with President Assad's previous statements that the Syrian government was faced with a radical opposition of extremists which relied on terrorist tactics to further its cause.⁸²⁹ Fourthly, Russia was very critical of the events that took place during the Libyan intervention and its possible implications for Syria.⁸³⁰ Pressure from Russia is reported to have had a significant influence on China's vote.⁸³¹

In November 2011, the Arab League suspended Syria and imposed tough economic sanctions to isolate Syria from the rest of the membership.⁸³²

The second draft resolution was introduced in early February 2012, which endorsed the Arab League's plan for President Assad to step aside in a 'Syrian-led political transition to a democratic, plural political system'.⁸³³ Once again, the draft reaffirmed the Council's strong commitment to the sovereignty, independence, unity and territorial integrity of Syria and emphasized 'its intention to resolve the current political crisis in Syria peacefully',⁸³⁴ and explicitly ruled out any military action under Article 42 of the UN Charter.⁸³⁵ The resolution condemned the continuing violence and loss of life and demanded that the Syrian authorities withdraw all military and militia forces from the cities and towns and allow full and unhindered access to League of Arab State institutions.⁸³⁶ It also insisted that Syria grant immediate access for international humanitarian assistance.⁸³⁷ The draft also sought to mute

⁸²⁶Zifcak, supra note 765

⁸²⁷Zifcak, supra note 765

⁸²⁸Zifcak, supra note 765

⁸²⁹Zifcak, supra note 765

⁸³⁰Zifcak, supra note 765

⁸³¹Howe, Kondocho, supra note 820

⁸³²Nanda V.P, The Future under International Law of the Responsibility to Protect after Libya and Syria, 21 MICH. ST. INT'L. L. REV 1, 5 (2013)

⁸³³Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/77 (4 February 2012)

⁸³⁴Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/77 (4 February 2012)

⁸³⁵Article 42, United Nations, Charter of the United Nations, 24 October 1945

⁸³⁶Zifcak, supra note 765

⁸³⁷Zifcak, supra note 765

criticism that the Council was taking sides by condemning all violence regardless of the perpetrators.⁸³⁸

However, the draft was met with a double veto from Russia and China.⁸³⁹ Both delegations described the resolution as unbalanced due to the fact that it failed to condemn both the Syrian authorities and armed rebels in equal measure.⁸⁴⁰

Following the second double veto, former UN Secretary General, Kofi Annan, was appointed as a Joint Special Envoy to Syria, (thus applying diplomatic and peaceful measures of Responsibility to Protect)⁸⁴¹, by the UN and the Arab League.⁸⁴² Hopes of an end to the crises were briefly raised when Annan's Six-Point Plan was accepted by the Syrian government and subsequently endorsed by the UN Security Council which authorised the UN supervision mission in Syria, (UNSMIS) to monitor compliance with the plan.⁸⁴³ The mission however was later suspended due to the continuing violence.⁸⁴⁴

With the failure in the implementation of the Six-Point Plan, a third Western-sponsored draft resolution was put to vote in the Security Council.⁸⁴⁵ Similar to previous resolutions, the draft recognised the concept of sovereignty, independence, unity and territorial integrity of Syria.⁸⁴⁶ The draft proposed the extension of UNSMIS for further 45 days, on the basis of the Secretary General's recommendation to reconfigure the Mission to increase support for dialogue with and between parties, and enhance attention to the political track and rights' issues against the Six-Point Plan.⁸⁴⁷ The resolution further stated that failure to comply with Annan's Six Point Plan would lead to the application of Article 41 of the UN Charter.⁸⁴⁸ The resolution condemned the armed violence in all its forms, including those by armed opposition groups, expressed grave concern at the continued escalation of violence, and expressed

⁸³⁸ Howe, Kondoch, *supra* note 820

⁸³⁹ Howe, Kondoch, *supra* note 820

⁸⁴⁰ Zifcak, *supra* note 765

⁸⁴¹ Evans, *supra* note 62

⁸⁴² Garwood-Gowers, *supra* note 494

⁸⁴³ Garwood-Gowers, *supra* note 494

⁸⁴⁴ Garwood-Gowers, *supra* note 494

⁸⁴⁵ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/538 (19 July 2012)

⁸⁴⁶ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/538 (19 July 2012)

⁸⁴⁷ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/538 (19 July 2012)

⁸⁴⁸ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/538 (19 July 2012)

profound regret at the death of many thousands of people in Syria.⁸⁴⁹ It also condemned the continued widespread violations of human rights by both the Syrian authorities and by armed opposition groups and recalled that those responsible will be held accountable.⁸⁵⁰

Once again, Russia and China vetoed the draft, complaining that it failed to adequately address the violence coming from the Syrian opposition groups, did not explicitly rule out military intervention, and would not help resolve the situation on the ground.⁸⁵¹

On 22 February 2014, the Security Council broke its deadlock and unanimously passed Resolution 2139 to ensure that the Syrians had access to humanitarian aid, urged all parties to lift sieges in populated areas, and condemned the use of barrel bombs and terrorist acts by Al Qaeda-linked organisations.⁸⁵² However, the omission of sanctions weakened the significance of the resolution.⁸⁵³

3.3.1 The Impact of the Syrian Civil War

Death Toll

As stated before, the death toll in Syria as of 15 February 2014 has amounted to 140,000.⁸⁵⁴ The pro-opposition Observatory noted that all those cases included in its count were those it could document with either names and identification documents, or pictures and videos.⁸⁵⁵ The fate of tens of thousands remains unknown.⁸⁵⁶ The Observatory claims that it has counted more than 30,000 rebels killed and over 50,000 from pro-Assad forces.⁸⁵⁷ The Observatory also points out that these statistics do not include the fate of more than 180,000 people missing from inside the regimes prisons, nor does it include more than 7,000 detained

⁸⁴⁹ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/538 (19 July 2012)

⁸⁵⁰ France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution UN S/2012/538 (19 July 2012)

⁸⁵¹ Garwood-Gowers, supra note 494

⁸⁵² The Crisis in Syria, supra note 772

⁸⁵³ The Crisis in Syria, supra note 772

⁸⁵⁴ *Syria's death toll now exceeds 140,000: activist group*. (2014, July 30). Retrieved from Reuters: <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>

The United Nations said last month it would stop updating its death count in Syria as dangerous conditions on the ground made estimates impossible to update with accuracy.

⁸⁵⁵ *Syria's death toll now exceeds 140,000: activist group*. (2014, July 30). Retrieved from Reuters: <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>

⁸⁵⁶ *Syria's death toll now exceeds 140,000: activist group*. (2014, July 30). Retrieved from Reuters: <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>

⁸⁵⁷ *Syria's death toll now exceeds 140,000: activist group*. (2014, July 30). Retrieved from Reuters: <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>

by regime forces and armed groups loyal to it, of the hundreds of people kidnapped by rebel groups because they are believed to be regime loyalists.⁸⁵⁸

Refugees and IDPs

As of March 2014, Syria has the highest number of forcibly displaced people.⁸⁵⁹ The United Nations High Commissioner for Refugees, (UNHCR), reports that 9 million Syrians are displaced amounting to half the population.⁸⁶⁰ This includes 6.5 million uprooted from their homes within Syria and another 2.5 million who have fled to neighbouring countries.⁸⁶¹ According to UNHCR, as of February 2014, almost 642,000 people have fled into Turkey, over 584,000 in Jordan, 135,000 in Egypt, 226,000 in Iraq, and 962,000 in Lebanon.⁸⁶² Journeys to safety are sometimes made more treacherous by winter conditions.⁸⁶³ On 24 May 2013, Foreign Affairs stated that refugee populations faced dire conditions in the refugee camps.⁸⁶⁴

Spill-Over Effects

The repercussions of the degeneration of Syria's uprising into civil war has been felt strongly across the region.⁸⁶⁵ The constantly rising number of Syrians fleeing the from the chaos has put an enormous pressure on neighbouring countries , particularly the countries mentioned above -Lebanon, Turkey, Jordan and Iraq, with regard to providing adequate shelter, health services and supplies.⁸⁶⁶

In May 2013, the World Bank announced that the influx of refugees into Jordan was affecting the livelihood, public services, and basic commodities of the local communities and offered its financial support.⁸⁶⁷

⁸⁵⁸ *Syria's death toll now exceeds 140,000: activist group.* (2014, July 30). Retrieved from Reuters: <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>

⁸⁵⁹ The Crisis in Syria, supra note 772

⁸⁶⁰ The Crisis in Syria, supra note 772

⁸⁶¹ The Crisis in Syria, supra note 772

⁸⁶² The Crisis in Syria, supra note 772

⁸⁶³ The Crisis in Syria, supra note 772

⁸⁶⁴ The Crisis in Syria, supra note 772

⁸⁶⁵ Muriel Asseburg, D. (2013, June). Syria's Civil War: Geopolitical Implications and Scenarios. The Civil War in Syria. German Institute for International and Security Affairs. Berlin, Germany. Retrieved from <http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/AsseburgSyriaMediterraneanYearbook2013.pdf>

⁸⁶⁶ *ibid*

⁸⁶⁷ The Crisis in Syria, supra note 772

The influx of refugees into neighbouring countries has also brought about tensions with local populations.⁸⁶⁸ Although Turkey has been more economically equipped to handle the refugees influx,⁸⁶⁹ the presence of overwhelmingly Sunni refugees and rebels in the area bordering Syria has led to the local Arab Alawite population feeling threatened by the rebels and disadvantaged compared to the refugees.⁸⁷⁰

Lebanon has also been significantly burdened by the conflict, a country which UNHCR says hosts 230 registered Syrian refugees for every 1000 Lebanese.⁸⁷¹ The country's hospitals, electricity, transportation systems are strained, and food costs are rising.⁸⁷²

Fighting has spilled over into Lebanon and Iraq fuelling sectarian strife in these already destabilised states.⁸⁷³ Lebanon is facing a reignition of ethnic tensions, with violent clashes occurring between Sunni and Shiite communities and between supporters and opponents of Assad.⁸⁷⁴ Both Iraq and Lebanon have also been involved in the Syrian conflict, with the government and opposition each supporting opposing parties in the conflict, rhetorically, financially, and at least partially with combatants e.g. Lebanese Hezbollah.⁸⁷⁵ There are arguments that both countries will severely be destabilised by Syria's civil war.⁸⁷⁶

For Israel, the major concern is the possible deployment of chemical weapons in Syria or the transfer of these and other heavy weapons to its opponents in Lebanon, specifically Hezbollah.⁸⁷⁷ The Jewish state has increased its military's alert levels in northern Israel and conducted at least three separate air attacks against suspected shipments in Syria, which has increased tensions with the Syrian regime, which has threatened to retaliate against any future Israeli action.⁸⁷⁸

The Islamic State (IS), formerly known as the Islamic State in Iraq and the Levant, (ISIS), stands with al-Qaeda as one of the most dangerous jihadist groups.⁸⁷⁹ The Sunni jihadist group

⁸⁶⁸ Asserburg, supra note 865

⁸⁶⁹ The Crisis in Syria, supra note 772

⁸⁷⁰ Asserburg, supra note 865

⁸⁷¹ The Crisis in Syria, supra note 772

⁸⁷² The Crisis in Syria, supra note 772

⁸⁷³ Asserburg, supra note 865

⁸⁷⁴ The Crisis in Syria, supra note 772

⁸⁷⁵ Asserburg, supra note 865

⁸⁷⁶ Asserburg, supra note 865

⁸⁷⁷ The impact of the Syrian conflict on neighbouring states. (n.d.). Retrieved August 4, 2014, from News 24: <http://www.news24.com/MyNews24/The-impact-of-the-Syrian-conflict-on-neighbouring-states-20130827>

⁸⁷⁸ The impact of the Syrian conflict on neighbouring states. (n.d.). Retrieved August 4, 2014, from News 24: <http://www.news24.com/MyNews24/The-impact-of-the-Syrian-conflict-on-neighbouring-states-20130827>

⁸⁷⁹ Syria Iraq, supra note 775

was formed in April 2013, growing out of al-Qaeda in Iraq and has thrived and mutated during the ongoing civil war in Syria.⁸⁸⁰ It has since been disavowed by al-Qaeda because of its reputation for its brutal rule, but has become one of the main jihadist groups fighting government forces in Syria and Iraq.⁸⁸¹ IS is seen to be working towards an Islamic emirate that straddles Syria and Iraq.⁸⁸²

The group has experienced significant military success.⁸⁸³ In March 2013, it took over Raqqa, a Syrian city and the first provincial capital to fall under rebel control.⁸⁸⁴ Since June, the militant group has expanded from its stronghold in northern Syria across large swathes in western Iraq including Mosul, Iraq's second largest city, and Tikrit.⁸⁸⁵ It is also known to have a strong presence in a number of towns near the Turkish and Syrian borders.⁸⁸⁶

Jordan's officials suspect that the militant group is now targeting their country, after increasing its offensive in Iraq and capturing the nation's city in Rutba, 90 miles east of the Jordanian border.⁸⁸⁷ Furthermore, IS is now being seen as a protector of Sunni identity.⁸⁸⁸ The Sunnis in Jordan who now subscribe to the extremist ideas of the militant group is increasing.⁸⁸⁹ There are approximately 1,200 Jordanian jihadists fighting with IS.⁸⁹⁰

Internationally, about 80% of Western fighters in Syria have joined the jihadist group.⁸⁹¹ IS claims to have fighters from the UK, France, Germany, and other European countries, as well as the US, the Arab world and the Caucasus.⁸⁹² These fighters are being trained as jihadists on how to make and detonate car bombs and suicide vests and later encouraged to return their home country to start new terror cells and launch attacks on home soil.⁸⁹³

⁸⁸⁰ Syria Iraq, *supra* note 775

⁸⁸¹ Syria Iraq, *supra* note 775

⁸⁸² Syria Iraq, *supra* note 775

⁸⁸³ Syria Iraq, *supra* note 775

⁸⁸⁴ Syria Iraq, *supra* note 775

⁸⁸⁵ How has ISIS become one of the richest ever militant groups? (n.d.). Retrieved August 4, 2014, from Cable News Network, CNN: <http://www.cnn.com/2014/06/22/world/meast/mme-isis-money/>

⁸⁸⁶ Syria Iraq: The Islamic State militant group. (n.d.). Retrieved August 4, 2014, from British Broadcasting Corporation: <http://www.bbc.com/news/world-middle-east-24179084>

⁸⁸⁷ Shankar, S. (n.d.). Jordan's Officials Worry ISIS May Target It Next, After Iraq, Amid Growing Support From Locals. Retrieved August 4, 2014, from International Business Times: <http://www.ibtimes.com/jordans-officials-worry-isis-may-target-it-next-after-iraq-amid-growing-support-locals-1614498>

⁸⁸⁸ Shankar, *supra* note 887

⁸⁸⁹ Shankar, *supra* note 887

⁸⁹⁰ Shankar, *supra* note 887

⁸⁹¹ Syria Iraq, *supra* note 775

⁸⁹² Syria Iraq, *supra* note 775

⁸⁹³ Al-Qaeda training British and European 'jihadists' in Syria to set up terror cells at home. (n.d.). Retrieved August 4, 2014, from The Telegraph:

At the time of writing, members of the IS have publicly beheaded 3 people, two Americans and one Briton.

3.3.2 Why has Responsibility to Protect failed in Syria?

The unsuccessful application of the Responsibility to Protect in Syria can be attributed to the Security Council's inability to agree on any effective measures to protect civilians in Syria.⁸⁹⁴ This can be interpreted from a number of perspectives. First in political terms, the fallout from the Libyan intervention undermined the trust between Western and non-Western members of the Security Council.⁸⁹⁵ A brief background on the intervention in Libya. Following the Gaddafi regimes initial crackdown on protestors, the Security Council issued a statement on 22 February 2011 in which it condemned the violence and called the government in Libya to meet its Responsibility to Protect its population.⁸⁹⁶ The Council unanimously adopted Resolution 1970⁸⁹⁷ under chapter VII of the UN Charter. The resolution expressly referred to Responsibility to Protect and acting in accordance with Article 41 of the UN Charter, the resolution imposed an arms embargo and other restrictions on travel and Libyan assets, and referred the situation to the International Criminal Court. The resolution was ignored by the Libyan regime and the violence intensified.⁸⁹⁸ The Arab League and other regional organisations called for the creation of a no-fly zone to protect the civilians. On 17 March 2011, Gaddafi made explicit threats against civilians in Benghazi, thus increasing pressure on the international community to intervene.⁸⁹⁹ On the same day, the Security Council passed Resolution 1973 with 10 affirmative votes and abstentions from China, Russia, Brazil, India and Germany.⁹⁰⁰ The resolution stated that the situation in the Libya continued to constitute a threat to international peace and security.⁹⁰¹ It established a no-fly zone and authorised member states to take necessary measures to protect civilians, and civilian populated areas under threat of attack while expressly excluding a foreign occupation

<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10582945/Al-Qaeda-training-British-and-European-jihadists-in-Syria-to-set-up-terror-cells-at-home.html>

⁸⁹⁴ Garwood-Gowers, supra note 494

⁸⁹⁵ Garwood-Gowers, supra note 494

⁸⁹⁶ Garwood-Gowers, supra note 494

⁸⁹⁷ SC Res 1970, UN SCOR, 66th sess, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) Preamble ('Resolution 1970').

⁸⁹⁸ Garwood-Gowers, supra note 494

⁸⁹⁹ Garwood-Gowers, supra note 494

⁹⁰⁰ SC Res 1973, UN SCOR, 66th sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) Preamble para 12 ('Resolution 1973').

⁹⁰¹ Resolution 1973, UN Doc S/RES/1973 paras 4, 6–12.

force of any form on any part of the Libyan territory.⁹⁰² On March 19, NATO began bombing Libyan Government positions from which attacks upon civilians were likely to be launched.⁹⁰³ Despite the resolution having been adopted, dissent on the ground that Libyan sovereignty had been abused was clearly evident.⁹⁰⁴

Blocking action on Syria can therefore be viewed as Russian and Chinese diplomatic response to the West for what they perceive was NATO's use of Resolution 1973 as a pretext for removing the Gaddafi regime and in turn, violating Libya's sovereignty.⁹⁰⁵ These post-Libya tensions within the Security Council have hampered efforts to generate political consensus on appropriate responses to Syria.⁹⁰⁶

Furthermore, the key principle at the stake of the Security Council negotiations and debates was that of the respect for the sovereignty, territorial integrity, and independence of nations.⁹⁰⁷ This principle is in stark contrast to the interventionist nature of pillar 3,⁹⁰⁸ which comprises of the timely and decisive response by the international community should a state not live up to its responsibility to protect.⁹⁰⁹ The tension between the two may legally be resolved when the Responsibility to Protect interventions are endorsed by the Security Council acting in line with Chapter VII⁹¹⁰ of the UN Charter. At the Security Council however, it can always be expected preservation of sovereignty will weigh more than to ending government atrocities.⁹¹¹ Both Resolution 1970 and Resolution 1973 reflected the desire of the Security Council to balance the two considerations appropriately.⁹¹² Resolution 1970 aimed to intervene in the Libyan crisis only indirectly through the imposition of arms embargo, asset freeze, travel ban, and the referral to the ICC.⁹¹³ This meant that direct intervention and hence intervention with its national sovereignty was avoided.⁹¹⁴ However the actions taken by NATO, through Resolution 1973 was considered as a direct violation of Libya's sovereignty.⁹¹⁵ Therefore, by the time the Council addressed the Syrian Crisis, the

⁹⁰² *Resolution 1973*, UN Doc S/RES/1973 paras 4, 6–12.

⁹⁰³ Zifcak, *supra* note 765

⁹⁰⁴ Zifcak, *supra* note 765

⁹⁰⁵ Garwood-Gowers, *supra* note 494

⁹⁰⁶ Garwood-Gowers, *supra* note 494

⁹⁰⁷ Zifcak, *supra* note 765

⁹⁰⁸ Zifcak, *supra* note 765

⁹⁰⁹ *Implementing the Responsibility To Protect*, *supra* note 368

⁹¹⁰ Chapter VII, United Nations, Charter of the United Nations, 24 October 1945

⁹¹¹ Zifcak, *supra* note 765

⁹¹² Zifcak, *supra* note 765

⁹¹³ Zifcak, *supra* note 765

⁹¹⁴ Zifcak, *supra* note 765

⁹¹⁵ Zifcak, *supra* note 765

sentiment amongst opponents had substantially changed.⁹¹⁶ This was because, according to many, in Libya, NATO had pushed the boundaries of Resolution 1973 far beyond its primary objective, which was to protect the civilian population from attacks by government forces.⁹¹⁷ Therefore, China and Russia, together with influential abstainers such as India were not willing to provide support for any resolution that may once again be illegitimately transformed into Western pressure or the overthrow of the al-Assad regime.⁹¹⁸

Another aspect would be the competing visions over intervention and the international order.⁹¹⁹ The situation in Syria highlights conflicts between the Security Council members over both principle and political strategy.⁹²⁰ Russia and China remain reluctant to move from their traditional foreign policy emphasis on non-intervention and non-use of force.⁹²¹ When interstate conflict occurs, these states prefer to employ peaceful means of conflict resolution such as dialogue and negotiation rather than coercive measures such as sanctions or military force.⁹²² Furthermore, for historical and pragmatic reasons, these countries are sceptical of the West's focus on 'muscular humanitarianism' as a civilian protection strategy.⁹²³ This theme has been present during debates, indicating the fundamental differences of principle and political approach which continue to divide the Western and non-Western powers.⁹²⁴

Finally, the self-interest of nations has played a part in discouraging the Security Council from endorsing any intervention in Syria.⁹²⁵ The closer a Security Council member's ties with the al-Assad regime, the less likely it is that the member will favour an external intervention into the country's domestic affairs.⁹²⁶ Russia has been a key opponent of any form of intervention in Syria.⁹²⁷ Most often, its arguments against Responsibility to Protect have been delivered from an angle of principle.⁹²⁸ However, the country has significant political, economic, and strategic investment in Syria, which should not be taken lightly, and has arguably influenced

⁹¹⁶Zifcak, supra note 765

⁹¹⁷Zifcak, supra note 765

⁹¹⁸Zifcak, supra note 765

⁹¹⁹Garwood-Gowers, supra note 494

⁹²⁰Garwood-Gowers, supra note 494

⁹²¹Garwood-Gowers, supra note 494

⁹²²Garwood-Gowers, supra note 494

⁹²³Garwood-Gowers, supra note 494

⁹²⁴Garwood-Gowers, supra note 494

⁹²⁵Garwood-Gowers, supra note 494

⁹²⁶Garwood-Gowers, supra note 494

⁹²⁷Garwood-Gowers, supra note 494

⁹²⁸Garwood-Gowers, supra note 494

its decisions.⁹²⁹ A regime change in Syria would have serious implications on Russia's influence in the region.⁹³⁰

3.3. Conclusion

From the foregoing, we can see that the Kenyan crisis was resolved peacefully and relatively quickly.⁹³¹ For Syria, the question should not be whether Responsibility to Protect has worked, but whether it ever stood a chance of working in the first place.⁹³² Former UN Secretary General, Kofi Annan, has been involved in both cases, however the context within which he set out to work was entirely different in both cases.⁹³³ In Kenya, both conflicting parties as well as international donors all concurred that no one stood to benefit from a Kenyan descent into civil war, and interests converged around finding a swift political solution to end the crisis.⁹³⁴ For Syria, interests diverge at multiple levels.⁹³⁵ For instance, at the global level and representing the greatest obstacle to a diplomatic consensus is Russia's backing of the Syrian government.⁹³⁶

The lack of action in Syria has morphed into a problem which not only affects the Syrian people, but also affects the international community as a whole. If Responsibility to Protect had been implemented through the draft resolutions, the international community would not be facing further instability within the Middle East, or terrorism threats from trained IS members. It is imperative that the UN finds a way of applying the concept objectively, without the interference of personal interests.

⁹²⁹Garwood-Gowers, supra note 494

⁹³⁰Crossley, supra 677

⁹³¹Crossley, N. (n.d.). Has the Responsibility to Protect Failed in Syria? Retrieved August 4, 2014, from Global Policy: <http://www.globalpolicyjournal.com/blog/21/07/2012/has-responsibility-protect-failed-syria>

⁹³²ibid

⁹³³Crossley, supra note 931

⁹³⁴Crossley, supra note 931

⁹³⁵Crossley, supra note 931

⁹³⁶Crossley, supra note 931

CONCLUSION AND RECOMMENDATIONS

Why Embed Responsibility to Protect in International Treaty Law

Responsibility to Protect was officially launched through the ICISS document in 2001 and was a widely welcomed concept in the international arena. The following conclusions can be drawn from the study.

~~To conclude this research we propose that in order to ensure its consistent and objective application, the concept of Responsibility to Protect should be embedded in treaty law. This effectively sums up the broad objective of the research paper.~~

~~This chapter will outline the conclusions drawn from the research and recommendations on how to anchor the concept of Responsibility to Protect in Treaty law.~~

Conclusion

1. The Legal Status of the Concept of Responsibility to Protect

From the research, we can establish Responsibility to Protect has not been formally codified in international treaty law and neither has it been recognised as customary law.⁹³⁷ Instead, the concept is best viewed as a multifaceted political concept based on existing principles of international law.⁹³⁸ The concept does not change the legal framework governing the use of force, which permits force only in self-defence or when authorised by the Security Council in accordance with chapter VII of the UN Charter.⁹³⁹ Furthermore, the concept does not create any additional legal duties for states or international bodies such as the UN Security Council.⁹⁴⁰ The endorsement of the concept can be seen as a political or moral commitment by states to implement established duties created in treaty law and customary international law.⁹⁴¹ All that is expressed in the various documents is a willingness to consider appropriate responses on an ad hoc basis.⁹⁴² There is legal obligation, either on the Security Council or the broader international community, to take any action –forcible or non-forcible – to protect populations from mass atrocity violence.⁹⁴³

⁹³⁷ Garwood-Gowers, supra 494

⁹³⁸ Garwood-Gowers, supra 494

⁹³⁹ Article 10-14, United Nations, Charter of the United Nations, 24 October 1945

⁹⁴⁰ Garwood-Gowers, supra 494

⁹⁴¹ Garwood-Gowers, supra 494

⁹⁴² Garwood-Gowers, supra 494

⁹⁴³ Garwood-Gowers, supra 494

2. Inconsistent Application of Responsibility to Protect

By looking at the case studies of Kenya and Syria in the previous chapter, we can see that the concept has not been applied consistently. In Kenya, the concept was successfully applied, however for Syria, the concepts application has not been successful.

3. The Security Council vs Regional Organisations

Arguably for Kenya, the regional organisation, the AU, was more involved in averting the crisis. The UN, more so the Security Council, was not directly involved. There were no debates or resolutions passed in the Security Council. The peace process was led by the African Union. Arguably, this may have led to the halt of the conflict in the country. Furthermore, the adoption of a new definition of sovereignty in Article 4 of the AU's Constitutive Act may have played a significant role, in that the Union recognised that it had the right to intervene in the crises in Kenya, where alleged crimes against humanity were taking place.

The same can be said for role played by ECOWAS and the African Union in quelling the civil war in Guinea.⁹⁴⁴ The organizations initiated mediation efforts and imposed economic sanctions, which lead to a quick formation of a unity government.⁹⁴⁵ ECOWAS has been praised for facilitating a rapid political solution, which could have escalated to a long standing civil war.⁹⁴⁶

On the other hand, for Syria, the UN Security Council has played a more active and significant role. Any form of intervention has been a source of contentious debate in within the Council and this in turn has been a source of impediment in resolving the crisis in Syria. The Arab League has been more decisive in dealing with the situation in Syria. As noted in the previous chapter, the League has suspended Syria from the League and imposed tough economic sanctions on the country.⁹⁴⁷ Furthermore, the league endorsed a plan for President Assad to step aside in a Syrian-led political transition to a democratic, plural political system.⁹⁴⁸

⁹⁴⁴ A Toolkit on the Responsibility to Protect, supra note 38

⁹⁴⁵ A Toolkit on the Responsibility to Protect, supra note 38

⁹⁴⁶ A Toolkit on the Responsibility to Protect, supra note 38

⁹⁴⁷ Nanda, supra note 832

⁹⁴⁸ Nanda, supra note 832

Arguably, this may mean that regional organisations are more effective in applying and implementing the concept of Responsibility to Protect.

4. The Issue of Sovereignty

Sovereignty has played a significant part during the Security Council's debates on Syria and has been a main source of contention. The new definition of sovereignty, as outlined in the ICISS document views sovereignty as the responsibility of the state to protect its citizens from genocide, war crimes, crimes against humanity and ethnic cleansing. However, during the debates on Syria, non-Western states did not take this definition into consideration. Instead, these members applied the Westphalian definition of state sovereignty.

5. Strategic Interests

There are claims that Russia has blocked the Security Council's draft resolutions, thus protecting Assad, due to protect its commercial and strategic interests.⁹⁴⁹ Strategically, Syria hosts the sole remaining Russian naval base on the Mediterranean.⁹⁵⁰ The Russians are unwilling to give this up.⁹⁵¹ Although limited, Russia also has commercial interests in Syria.⁹⁵² Contracts to sell arms to Damascus – both those signed and under negotiation – totalling \$5 billion.⁹⁵³ Russia's defence industry is in jeopardy due to having lost \$13 billion due to international sanctions on Iran, and having \$4.5 billion in cancelled contracts to Libya.⁹⁵⁴ Additionally, besides arms exports, Russian companies have major investments in Syria's infrastructure, energy and tourism sectors worth \$19.4 billion.⁹⁵⁵

6. International Distrust

The apparent dishonest use of Responsibility to Protect in the case of Libya has brought about international distrust in the concept of Responsibility to Protect.⁹⁵⁶ Resolution 1973 was meant to protect the Libyan people, however, it was used as an excuse for regime

⁹⁴⁹ Treisman, D. (n.d.). Why Russia protects Syria's Assad. Retrieved September 18, 2014, from Cable News Network, CNN: <http://www.cnn.com/2012/02/02/opinion/treisman-russia-syria/>

⁹⁵⁰ *ibid*

⁹⁵¹ Treisman, *supra* note 949

⁹⁵² Treisman, *supra* note 949

⁹⁵³ Treisman, *supra* note 949

⁹⁵⁴ Treisman, *supra* note 949

⁹⁵⁵ Treisman, *supra* note 949

⁹⁵⁶ Sponeck, D. h.-C. (2012, May 8). Responsibility to Protect (R2P): Concept Implementation, Opportunity and Misuse. The R2P attempt failed in Libya. Centre for Conflict Research of the University of Marburg in Germany.

change.⁹⁵⁷ This political damage caused by gaps in expectation, communication and accountability between those who mandated the Libya operation and those who executed it has contributed to the Security Council's indecisiveness to matters relating to Syria.⁹⁵⁸ There is clear need for a respectful conversation among proponents and sceptics.

From the concluding points above, this study proposes that in order to ensure its consistent and objective application, the concept of Responsibility to Protect should be embedded in treaty law. The effectively sums up the broad objective of the research paper.

Recommendations

This research recommends that Responsibility to Protect be entrenched in treaty law. The treaty should be a multi-lateral treaty – between many states and should be ratified by states indicating that they are bound by the treaty.

To ensure its effective and consistent application, the following points should be addressed when codifying the concept of Responsibility to Protect.

1. When should Responsibility to Protect be implemented?

The concept should be implemented when a state or parties within a state commit crimes against humanity, war crimes, genocide and ethnic cleansing. Not only should the concept become effective when these crimes are taking place, responsibility to react, but it should also become effective when there are hints or signs that it may happen, responsibility to prevent. Finally, the concept should be implemented when the crisis within a state ends or is averted, the responsibility to rebuild. This will ensure that the country will not return to hostilities.

When it comes to responsibility to prevent, the treaty should outline the steps that the international community should take to prevent. As Gareth Evans suggests, this requires an in depth understanding of the countries and regions at risk.⁹⁵⁹ The treaty should call for the establishment and setting up of a monitoring centre body – either within the UN or independent of the UN – which will monitor globally countries or regions that have the potential of facing genocide, war crimes, crimes against humanity, and ethnic cleansing. The monitoring body should then present reports to the UN Security Council and the respective regional organisation, outlining the root causes and direct causes of conflict and present

⁹⁵⁷ Sponeck, supra note 965

⁹⁵⁸ Garwood-Gowers, supra 449

⁹⁵⁹ Evans, supra note 62

recommendations on the relevant preventative tools available on how to prevent the outbreak of conflict. Such tools include, preventative diplomacy, the threat of political and economic sanctions, proposals to support economic development and growth so as to create jobs and increase investment which in turn will reduce poverty, and economic incentives.⁹⁶⁰

When implementing the responsibility to react, as stated in Brazil's official concept note on 'Responsibility While Protecting'⁹⁶¹, the treaty should indicate that the international community should exhaust all peaceful means before resorting to any coercive measures.⁹⁶²

These include diplomatic peacemaking with Kenya being a strong example of how this tool was effectively used, and political sanctions and incentives.⁹⁶³ The use of diplomatic peacemaking should always be the first tool to be used by the international community before resorting to both economic and political sanctions. Other tools such as arms embargoes should also be considered at this point.

If the crisis continues, despite using peaceful means, then the international community should consider implementing coercive measures such as the threat or use of military force, safe havens and no fly zones, and peacekeeping missions.⁹⁶⁴

The treaty should also outline the tools to be used when implementing the responsibility to rebuild. These include disarmament, demobilization and reintegration; security sector reform; peacekeeping missions; providing support on economic development and establishing social programs for peace.⁹⁶⁵

The treaty should also recognise that all internal conflicts have the potential of becoming an international 'problem', particularly through refugees fleeing to neighbouring countries which in turn put a substantial amount of pressure on these countries in terms of shelter, health services, and food. Furthermore, as shown in the case study of Syria, areas of conflict

⁹⁶⁰ Evans, supra note 62

⁹⁶¹ Brazil, Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General, UN GAOR, 66th sess, Agenda Items 44 and 117; UN SCOR, 66th sess, UN Docs A/66/551 and S/2011/701 (11 November 2011) annex ('Responsibility While Protecting: Elements for the Development and Promotion of a Concept') ('RWP Concept Note').

⁹⁶² Brazil, Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General, UN GAOR, 66th sess, Agenda Items 44 and 117; UN SCOR, 66th sess, UN Docs A/66/551 and S/2011/701 (11 November 2011) annex ('Responsibility While Protecting: Elements for the Development and Promotion of a Concept') ('RWP Concept Note').

⁹⁶³ Evans, supra note 62

⁹⁶⁴ Evans, supra note 62

⁹⁶⁵ Evans, supra note 62

can become breeding grounds of terrorist organisations, which is clearly an international problem.

2. How should Responsibility to Protect be implemented?

As indicated in the previous section, the concept should be implemented using the various tools available, or as recommended by the established monitoring centre in cases of responsibility to prevent.

Regarding military intervention, the set of bench marks on legitimacy outlined in the ICISS document should be adopted in the treaty. These benchmarks are the seriousness of the harm being threatened, the primary purpose of the proposed action whether there were reasonably available peaceful alternatives that have been explored or are yet to be explored, the proportionality of the response, and the balance of the consequences – whether more good than harm would be done by the intervention.⁹⁶⁶

The treaty should also clearly state that, the use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent.⁹⁶⁷

3. Who should implement the Responsibility to Protect?

The treaty should indicate that the UN, through its organs, should be the main organisation that implements the concept. This section will outline the roles of the Security Council and the General Assembly

3.1. The Role of the Security Council

The Security Council's role is as follows:

1. Under Article 29⁹⁶⁸ of the UN Charter, the Council shall establish a monitoring centre, whose main function will be monitor globally countries or regions that have the potential of facing genocide, war crimes, crimes against humanity, and ethnic cleansing. Recommendations brought forth by this body should be implemented by the Security Council or assigned to regional organisation or an NGO by the Security Council.

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⁹⁶⁶ ICISS Report, supra note 31

⁹⁶⁷ RWP Concept Note', supra note 961

⁹⁶⁸ Article 29, United Nations, Charter of the United Nations, 24 October 1945

2. Under Article 33⁹⁶⁹ of the UN Charter, the Security Council should ensure that disputes that may endanger international peace and security are settled through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to other regional agencies or arrangements, or other peaceful means of their own choice.
3. The use of force must be authorised by the Security Council in accordance with Chapter VII of the UN Charter.⁹⁷⁰
4. The Security Council should ensure that the use of force produces very minimal violence and instability. Furthermore, any use of force should not create more harm than it was intended to prevent.⁹⁷¹
5. Any use of force authorised by the Security Council should be proportionate, judicious, and limited to the objectives established by the Security Council.⁹⁷²
6. The Security Council should ensure accountability to those whom authority is granted to resort to force.⁹⁷³ This should be done by establishing a monitoring and compliance mechanism which will assess the manner in which resolutions are interpreted and implemented.⁹⁷⁴
7. When using force, organisations or bodies that go beyond what they were mandated to do should be held accountable by the Security Council.
4. The treaty should state that failure to invoke the Responsibility to Protect by the Security Council could lead to some form of legal sanction.⁹⁷⁵ Arguably, it may be difficult to establish the legal consequences of noncompliance by a political body such as the Security Council.⁹⁷⁶ However, this is something that should be considered.
8. The treaty should indicate that parties with known strategic interests within a country in crises, particularly the permanent members should not be allowed to vote in any resolution relating to a crisis. This will ensure that there is objectivity, and that personal interests are not placed above the interests of citizens facing genocide, war crimes, crimes against humanity, and ethnic cleansing.

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⁹⁶⁹ Article 33, United Nations, Charter of the United Nations, 24 October 1945

⁹⁷⁰ Chapter VII, United Nations, Charter of the United Nations, 24 October 1945

⁹⁷¹ RWP Concept Note', supra note 951

⁹⁷² RWP Concept Note', supra note 961

⁹⁷³ RWP Concept Note', supra note 961

⁹⁷⁴ RWP Concept Note', supra note 961

⁹⁷⁵ Stahn, supra note 69

⁹⁷⁶ Stahn, supra note 69

In a rare case where all permanent five members have known strategic interests, then the Regional Organisation should take lead in deciding on how to apply the Responsibility to Protect.

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3.2. The Role of the General Assembly

1. Under Article 11(3)⁹⁷⁷, of the UN Charter, the General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. The General Assembly should therefore notify the Security Council of any potential or ongoing acts of genocide, war crimes, crimes against humanity, and ethnic cleansing.
2. As recommended by the ICISS document, in cases where the use of force is required and the Security Council fails to act, the General Assembly has the residual right to recommend the use of force.⁹⁷⁸
3. As with the Security Council, any use of force recommended by the General Assembly should be proportionate, judicious, and limited to the objectives established by the General Assembly.⁹⁷⁹ Furthermore, when using force, any organisation that goes beyond what was recommended by the General Assembly will be held accountable

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3.3 The Role of Regional Bodies

1. The treaty should outline the role of regional organisations in averting crises, or restoring peace, or rebuilding a society after a crisis. As shown in the Kenya case study, regional organisations can play a powerful role in averting a crisis through diplomacy measures. Furthermore, as with the Arab League, a regional organisation can resort other measures such as imposing sanctions or expelling a state from the organisation.
2. The treaty should also give regional organisations authority to act in cases where the Security Council fails to intervene. Regional organisations may consider collective interventions.⁹⁸⁰ Article 52⁹⁸¹ of the UN Charter can be interpreted as giving these organisations the right to do this.

⁹⁷⁷ Article 29, United Nations, Charter of the United Nations, 24 October 1945

⁹⁷⁸ ICISS Report, Supra note 31

⁹⁷⁹ RWP Concept Note, supra note 961

⁹⁸⁰ ICISS Report, Supra note 31

⁹⁸¹ Article 52, United Nations, Charter of the United Nations, 24 October 1945

3. As with the Security Council and the General Assembly, the treaty should emphasise that any use of force recommended by a regional organisation should be proportionate, judicious, and limited to the objectives established by the regional organisation.⁹⁸²

4.—The treaty should also emphasise that in cases where regional organisations go beyond what was recommended, the organisation should be held accountable.

4. Sovereignty

The treaty should adapt the definition of sovereignty as outlined in the ICISS document – sovereignty as a responsibility. The treaty should clearly indicate that this definition applies in cases where genocide, war crimes, crimes against humanity, and ethnic cleansing occur.

Conclusion

It can be submitted that establishing Responsibility to Protect in treaty law may appear to be the ideal solution in dealing with the inconsistency of the concepts application. However, there may be some drawbacks in establishing treaty law. Such drawbacks include countries refusing to ratify the treaty, and lodging formal reservations. Both drawbacks will limit the effectiveness of the treaty in terms of limiting the scope of the legal obligation owed by a state under the treaty and having states not legally obligated to comply with a treaty due to lack of ratification. Considering these drawbacks, it may be prudent to consider other sources of international law such as soft law and customary law. These sources do however have their own drawbacks. It is therefore strongly recommended that for consistent application of the concept, embedding it in treaty law is a viable option

Conclusion

~~The concept of Responsibility to Protect is a welcome and noble concept which not only averts the abuse of sovereignty, but also protects civilians from mass atrocities. As found in the research, the concept is subject to neglect and abuse. Entrenching it in treaty law hopefully lead the implementation of the concept more effectively and consistently.~~

⁹⁸² RWP Concept Note, supra note 961

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