



***JUST WAR THEORY REVISITED: THE CASE
FOR A NEW LEGAL REGIME FOR
HUMANITARIAN FORCEFUL
INTERVENTION***



BY AKAME GILBERT AJEBE

**A thesis submitted in partial fulfilment of the requirement for the degree of Master
of Philosophy in Peace and Conflict Transformation**

Faculty of Humanities, Social Sciences and Education

University of Tromsø

2011

ACKNOWLEDGEMENT

As I come to the end of this study, I will wish to express my sincere gratitude to the people who supported me during this difficult but inspirational process.

I will wish to extend my heartfelt gratitude to my supervisor Magne Frostad for his diligent and insightful guidance throughout the entire writing process.

A special thanks to the entire staff of the CPS, particularly to Lodve Svare and Percy Oware for their guidance and co-ordination throughout my period of study.

I owe gratitude to my colleagues and classmates for their collaboration and understanding during our study period, and to all my friends who encouraged and advised me during the writing process of this thesis. In particular to Adam, Haavard, Mashood, Brahima, Przemek, Moustapha, Randolph and others who have been helpful in one way or the other, but whose names I have not mentioned herein.

My gratitude to Maame for her support and encouragement during this process. And to my entire family, thank you for your endless and tireless support in all the difficult moments.

I remain grateful to God for his goodwill upon my life.

TABLE OF CONTENTS

ACKNOWLEDGEMENT	i
TABLE OF CONTENTS.....	ii
LIST OF ABBREVIATIONS	iv
ABSTRACT.....	v
CHAPTER I: INTRODUCTION.....	1
CHAPTER II: METHODOLOGY AND SOURCES	6
2.1 Choice of Method and Challenges	6
2.1.1 Enlightened Positive Methodology	6
2.1.2 Sources of Law	8
2.1.3 Rules of Interpretation of Treaties	10
2.2 An interdisciplinary approach.....	11
2.3 Conclusion	12
CHAPTER III: THE CURRENT LEGAL REGIME.....	13
3.1 State Sovereignty and Non-intervention	14
3.1.1 The Dilemma of the State Sovereignty Principle.....	14
3.1.2 Prohibition on the use of force	15
3.2 The Legal Right to Intervene with Armed Force.....	17
3.2.1. Humanitarian Intervention under the UN Charter	17
3.2.2. The Right to Intervention by Regional Organizations	25
3.3 Conclusion	27
CHAPTER IV: A LEX FERENDA VIEW BASED ON THE JUST WAR THEORY AND THE COSMOPOLITANT PERSPECTIVE.....	29
4.1 Just War Theory: A moral criteria for Humanitarian Intervention	30
4.1.1 Jus ad bellum and Humanitarian Intervention	32

4.1.2 The Jus in Bello Criteria	37
4.2 The Cosmopolitanism Ideal	38
4.2.1 Characteristics of Cosmopolitanism	39
4.2.2 Use of Force in a Cosmopolitan Society.....	41
4.3 Conclusion	43
CHAPTER V: THE RESPONSIBILITY TO PROTECT PROJECT: A NEW LEGAL REGIME?.....	45
5.1 Evolution.....	46
5.2 Responsibility to Protect: The new approach	48
5.3 R2P: A Panacea for the Humanitarian Intervention Dilemma?.....	50
5.3.1 The R2P Principle is full of challenges.....	51
5.3.2 Despite the challenges, a case may be made for R2P	56
5.4 Conclusion	63
CHAPTER VI: R2P IN ACTION: THE LIBYAN INTERVENTION.....	63
6.1 The Decision to Intervene.....	64
6.1.1 The Humanitarian Crisis	64
6.1.2 International Condemnation.....	65
6.1.3 Non-military measures	67
6.1.4 Resolution 1973	67
6.2 Evaluation	68
6.3 Conclusion	73
CHAPTER VII: CONCLUSION AND RECOMMENDATIONS	75
7.1 Summary	75
7.2 Findings.....	75
7.3 Recommendations.....	77
REFERENCES	82

LIST OF ABBREVIATIONS

AU:	AFRICAN UNION
EU:	EUROPEAN UNION
HI:	HUMANITARIAN INTERVENTION
ICISS:	INTERNATIONAL COMMITTEE FOR INTERVENTION AND STATE SOVEREIGNTY
ICC:	INTERNATIONAL CRIMINAL COURT
IGO:	INTERNATIONAL GOVERNMENTAL ORGANISATION
IDPs	INTERNALLY DISPLACED PERSONS
ICJ:	INTERNATIONAL COURT OF JUSTICE
JWT:	JUST WAR THEORY
NATO:	NORTH ATLANTIC TREATY ORGANISATION
NGO:	NON GOVERNMENTAL ORGANISATION
RO:	REGIONAL ORGANISATION
R2P:	RESPONSIBILITY TO PROTECT
UN:	UNITED NATIONS
UNSC:	UNITED NATIONS SECURITY COUNCIL
UNGA:	UNITED NATIONS GENERAL ASSEMBLY
UNSG:	UNITED NATIONS SECRETARY GENERAL
UNHCR:	UNITED NATIONS HIGH COMMISSION FOR REFUGEES
VLCT:	VIENNA CONVENTION ON THE LAW OF TREATIES

ABSTRACT

The current legal regime for use of armed force and the practice of humanitarian intervention (HI) have posed enormous challenges to international law and international relations, and HI has proven very controversial. This has seen regrettable loss of life and genocidal crimes being committed. This gap in the international legal system has no doubt given weight to the emerging principle of Responsibility to Protect (R2P), which despite the challenges it faces, has made significant strides towards norm building. The growing significance of this principle in the fight to protect civilians during conflicts has given me the courage to attempt a case for a new, consistent and clear legal regime for intervention. After discussing the current legal regime for and practice of humanitarian forceful intervention, I offer a theoretical framework cutting through a cross section of legal, moral, ethical and political theories that espouse the importance of protecting civilians in conflicts and using force when need arises - justly, proportionately and as a last resort. I sum up this part with the new framework of R2P as presented in the 2001 report of the International Committee for Intervention and State Sovereignty (ICISS), and the developments up to the last major UN General Assembly (UNGA) debates in 2009 on R2P. I round up my paper with an assessment of the R2P concept in relation to the most recent case of the Libyan intervention. However, despite the widespread support and the rapid evolution of R2P towards recognition as a legal norm, it still remains non-binding. And its relationship with the principle of non-use of force in Article 2(4) remains unclear. Despite the development and the application of the R2P principle in recent cases, it has not led to a consistent practice, as its application has not yet been up to the aspirations of the standards of the principle. However, in view of the current events of international relations, the incessant threat to, and actual loss of civilian lives in contemporary conflicts, the increasing understanding of human rights reshaping sovereignty and the growing demand for sovereignty as responsibility, one feels obliged to advocate for its legal application.

Key Words: *Humanitarian Intervention, Responsibility to Protect, New Legal Regime, Just War Theory, Cosmopolitanism*

CHAPTER I: INTRODUCTION

The legal status of Humanitarian Intervention (HI) has been quite problematic in the past. There is no express mentioning of the term HI in the UN Charter. By HI in this study I will be referring to the forceful intervention in one state by another state, some major powers or regional arrangements based on a flexible interpretation of Article 2(4) of the Charter or the argument for HI as a possible fourth exception to the principle of non-use of force. However, the right to intervene by use of armed force in situations of threat to international peace and security under the UN Security Council (UNSC) mandate in Chapter VII of the Charter, has been applied in some cases to intervene for humanitarian purposes. Though, the latter has hardly been used as a sufficient legal basis on its own. Nevertheless, strict Charter provisions for the non-use of force and non interference within the domestic affairs of a sovereign state by the UN, Articles 2(4) and (7) respectively, only emphasize the importance given to state sovereignty over the rights of its subjects which may be violated by the state with impunity. There are nevertheless agreed upon exceptions to the principle of non use of force to include: By Invitation, UNSC mandate (Articles 39 and 42) and Self Defense (Article 51). However, the interpretation and application of these provisions have nonetheless been problematic. This is especially so as regards Articles 39 and 42 on UNSC mandate which gives the UNSC the mandate to determine the existence of a threat to and breach of international peace and security, and authorize such measures including use of force. The application of Article 39 in circumstances where there was hardly any actual threat to international peace and security has been contradicting.

However, if for example, a dictator in a state commits massive violations of the rights of its citizens amounting to crimes against humanity or genocide, this may not necessarily be interpreted as a threat to international peace and security, or even if it did so, such a dictator may have strong ties with one of the veto powers at the UNSC leading to a possible veto of any decision to intervene in the said state. Given that such a situation would not amount to self defense since there has been no attack on another state, and such a dictator will not himself call for an intervention, would the citizens of that state be left to perish under the heavy hand of the dictator?

Even though it is argued that such a situation can be tackled by the insinuation of a doctrine of HI from a careful interpretation of the Charter provisions¹, its legal character is not distinct. This has posed enormous challenges especially to traditional legal scholars and positivist legal thinkers. Even the progressive development of the concept of HI under customary international law has been fraught with practical and methodological challenges. For instance there has been limited development of the rules on the use of force for HI by the International Court of Justice (ICJ); state practice in this respect has been blurred; and the stances often taken by the UN's norm creating bodies (the UN General Assembly (UNGA) and the UNSC) have been conflicting.² This lack of clear and consistent legal provision for HI has led to untold sufferings of civilians due to the failure from the international community to protect them from their states' brutality. As there would have been better chances to avoid such gross violations had there been a clear legal provision for such interventions

The emergence of the Responsibility to Protect (R2P) concept gives a window of opportunity to re-visit the HI discourse with a new language. The R2P concept is an emanation from the idea that sovereign states have a responsibility to protect their citizens from gross or massive violations of their rights. The foundation of this principle in international law is based on the report of the International Commission on Intervention and State Sovereignty (ICISS) from 2001 and its reception by states. This principle, it has been argued, could replace the controversial HI principle by re-conceptualizing and adopting a new approach to humanitarian forceful intervention. This is also the reason why I embark on this thesis, to make a case for a new, clearer and more distinct legal regime for forceful intervention based on the new R2P concept. The R2P concept so far remains an emerging norm of international law and its relationship with the principle of non-use of force is thus still problematic. It is still unclear whether it should apply as an independent regime for intervention not covered by the prohibition on use of force in Article 2(4), as a fourth exception to non-use of force, or as a modification of the UNSC mandate.

¹ Spencer Zifcak, *The Responsibility to Protect*, in *International Law* by Malcolm D. Evans (2010), page 506.

² *Ibid.*, 507.

The underlying assumption in this study is that the current regime for humanitarian forceful intervention has failed to provide sufficient answers to tackle the problem of humanitarian tragedies that occur within states. And so a new regime is necessary that will meet the changing dynamics of international relations, international human rights and international law, one that is founded on moral and ethical principles of use of armed force. The R2P concept seems to be pointing to the right direction despite the current challenges it faces.

My overall objective in this study is to analyze the controversial doctrine of HI, and the prospects for a new and distinct legal regime through R2P. In so doing I will be examining how the concept of state sovereignty and non-intervention is being progressively diluted to accommodate other norms of international law such as respect and protection of human rights. I will be guided in this process by two overarching questions, namely whether the current regime for HI is still tenable, and if not whether the new structure under R2P is the way ahead. From these main questions will emerge further sub-questions that I will be answering throughout this study namely:

1. Is HI in conformity with international law as traditionally understood?

This preliminary discussion in my thesis will attempt to clarify the legal status of the traditional HI, and its relationship vis a vis the principles of sovereignty, non-intervention and non-use of force. I will equally examine the right to intervene by ROs and their relationship with the UN Charter provisions. Here I will focus on the context of the African Union (AU). Then I will examine the practice of HI using a selected number of case examples. The purpose of this discussion is to illustrate the controversies inherent in the current legal regime and practice of HI. This discussion will be covered in Chapter 3 of my thesis.

2. Does the R2P concept possess sufficient moral, ethical and political foundations to right the wrongs of its predecessor HI?

The R2P concept is founded on the fundamental principles of morality in the resort to armed force for the protection of civilians, and is based on the acknowledgment of the principles of universality, egalitarianism and human rights for all. This question triggers the discussion on the

theories of just war and cosmopolitanism, embodiments of the R2P principle. This will be covered in Chapter 4 and part of Chapter 5 of my thesis.

3. What is the normative status of the R2P principle?

R2P is an emerging principle of international law. The analysis under this question will track the evolution of R2P from its shared normative understanding towards an international legal norm. Has it acquired yet the status of a legal norm under international law or is it merely accepted as a shared social norm? What is lacking for it to turn into hard law? This will be the bone of contention in Chapter 5 of this study.

4. Has there emerged an effective practice of R2P?

This question seeks to find out whether the R2P principle has been tested in practical terms, whether such practice has reflected the legitimacy and legality requirements, and whether there has been congruence with established rules and shared norms. The Libyan intervention which may be seen as R2P in action as presented in Chapter 6, will serve the purpose of this assessment.

This thesis does not seek to provide an exhaustive study of the doctrine of HI and the new R2P principle. Rather it attempts to answer certain questions as to the legal status of the HI principle and the future prospects for protection of people from gross human rights violations. The case examples of HI in this study are not exhaustive but, one may argue that they illustrate the prevailing controversies surrounding the principle. Equally, I am not going to adopt the integrated R2P approach as presented by the ICISS report, rather, I will be focusing on one of the arms of R2P namely that of responsibility to react or responsibility to protect. However for a better understanding of my study this integrated R2P approach will be given a short explanation in chapter five below before laying more emphasis on my area of concern.

The study is subdivided into seven chapters. After this introduction, chapter II will focus on the methodology applied to address the questions posed. In chapter III, I will tackle the normative principles of sovereignty/non-intervention and non-use of force vis a vis the controversial HI

doctrine. I will equally examine some case examples of alleged HI to further highlight the controversies surrounding the principle. In chapter IV, I will provide moral, ethical and political arguments for HI as it ought to be, based on the Just War Theory (JWT) and the cosmopolitan perspective. Chapter V will be based on the R2P principle; its evolution, its new approach to intervention, the justifications for the principle and challenges it faces. In chapter VI, I will be looking at R2P in action with the Libyan intervention as case study. Chapter VII will cover my final conclusions and recommendations.

CHAPTER II: METHODOLOGY AND SOURCES

2.1 Choice of Method and Challenges

The nature of my research questions require me to carry out my analysis within the framework of public international law. However, I will not limit myself strictly to this framework as I will partly apply the pattern of theoretical analysis in political and other social sciences to broaden the scope of my research and provide ideal answers to the questions posed. Moreover, as Oppenheim in 1908 rightfully observed, there is no one right method in international law.³ However, this does not mean that a choice of method needs not be made. Oppenheim states in this respect that the right method is the one that secures the best results in the light of the topic of investigation and research.⁴ In this chapter, I will be discussing the traditional positivist method and its challenges, the latter being the reason why I will adopt the more progressive form of legal positivism adopted by contemporary legal scholars. I will equally mention in brief the relevance of adopting an interdisciplinary approach to legal, philosophical and political science theories and methods of analysis for my thesis.

2.1.1 Enlightened Positive Methodology

The central foundation of the positive method of international law is state consent.⁵ This theory of law, wherein states are regarded as ends in themselves, could be said to be ‘an evil, but a necessary evil’, as Carty observes that the lawyer or legal scholar has no basis upon which to develop an alternative method.⁶ Classic positivists consider that there is only hard law and no soft law. However, this approach to international law based on the possibility of objectivity in law has been criticized as being old fashioned and conservative. It fails to take into consideration the changing realities of our time - from international conflicts to internal violence sometimes pitting the state against its own citizens.⁷ This coupled with the inability to incorporate all modes of state consent to be bound at all times has raised questions about the strict positivist

³ Oppenheim L. *The Science of International Law: Its Tasks and Methods* (1908) 2 *AJIL* 313, 314.

⁴ *Ibid.*, 327.

⁵ Roberto Ago, *Positive Law and International Law* (1957) *AJIL* 691, 698-700.

⁶ Anthony Carty, *the Decay of International Law?* (1989), Manchester University Press 108.

⁷ Bruno Simma and Andreas L Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View* (1999) 93 *AJIL* p. 302.

methodology of international law. Such criticisms have led modern scholars of legal positivism to reflect on new ways to adapt legal positivism to new developments in international affairs – leading to the development of the modern or enlightened positivist method.⁸ This is the methodology that I will adopt in my study. The enlightened positivists consider law not independent from its context, be it socio-political or historical.⁹ They equally give value to soft law instruments such as joint statements, declarations, General Assembly Resolutions, etc, as important interpretative tool,¹⁰ and above all affirm the central position of formal sources of law.

This choice of methodology which reaffirms long established norms of international law and at the same time recognizes the progressive development of the law to meet with modern realities, will imply a *lex lata* and *lex ferenda*¹¹ approach to legal analysis. The choice of this method of legal analysis will necessitate that I indicate at what point I am applying *lex lata* and *lex ferendi* respectively. The discussions in chapter three of this study which touches on traditional rules of international law namely, sovereignty, non-intervention and non-use of force, vis a vis the exceptions to the principle of non-use of force under the Charter, will imply a *lex lata* approach to legal analysis. Chapter IV and V which discusses on the future of HI inspired by the moral and ethical theories of just war and the ideal cosmopolitan world order and drawing on the R2P concept, will imply a *lex ferendi* approach to legal analysis. Chapter VI on the Libyan intervention wherein there is a blurring of the current law on use of force based on a UNSC mandate with the new R2P doctrine and testing to what extent the Libyan action stretched the *lex lata* would imply an interaction of *lex lata* and *lex ferendi* approaches in this chapter.

As mentioned above, the enlightened positivist method acknowledges the central position of the formal sources of law. And as well as it take cognizance of the presence of interpretative tools such as judicial pronouncements and teachings of qualified publicists, they equally give value to soft law instruments as other important interpretative tools. This necessitates that I at this point examine the sources of law which I will be applying in my dissertation.

⁸ Simma and Paulus (1999) p. 305, 306.

⁹ Ibid., 306.

¹⁰ Ibid., 306, 307.

¹¹ *The lex lata refers to the law as it is/law which has been made, positive law, while the lex ferenda refers to the law as it ought to be or law which ought to be made, future law*

2.1.2 Sources of Law

Sources of international law are the materials and processes out of which the rules and principles regulating the international community are developed.¹² States typically give their consent to be bound by international agreements by ratifying them, and the respect for international agreements results from the principle of *pacta sunt servanda* meaning that what is agreed to must be respected.¹³

The formal sources of law adopted under positivist international law are the sources listed under Article 38 of the Statute of the International Court of Justice (ICJ) which reflects customary international law.¹⁴ Article 38(1) (a) – (c) mentions treaties (agreements binding upon the parties to it and which must be performed in good faith in accordance with the principle of *pacta sunt servanda*); customary international law (which presupposes an established practice by states and a psychological element known as *opinio juris*); and general principles of law, as the formal sources of law, while 38(1) (d) mentions judicial pronouncements and teachings of publicists as means of ascertaining the rules of international law contained in the above mentioned formal sources.¹⁵ Treaties, customary international law and general principles of law will be very vital sources of law for my study. The UN Charter will be the main source of treaty law for this study, but other treaties such as the AU Constitutive Act will also be mentioned, and I will also apply teachings of publicists and judicial pronouncements of the ICJ to show the existence of relevant rules of international law.

However, these sources of international law can be said to be non-exhaustive. This essentially formalist system of sources of law could limit the creativity of legal scholars.¹⁶ Though it could be argued that creativity is bad for predictability, predictability could limit the participatory engagement necessary for a progressive system of international law. The challenges would be to the ambitious researcher in international law who wishes to take into consideration the political, social and historical realities of society and attain ideal solutions based on diverse perspectives

¹² Hugh Thirlway, *The Sources of International Law*, in *International Law* by Malcolm D. Evans (2010), page 96

¹³ Thirlway (2010) p. 97. Also mentioned in 1969 Vienna Convention Article 26

¹⁴ Girmachew Alemu Aneme, *The Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes* (Faculty of Law University of Oslo, 2008) p.11.

¹⁵ Ibid.

¹⁶ Carty (1989) p. 108, 109.

and empirical developments. However, as mentioned earlier, contemporary positivists adopt a more flexible approach that gives value to soft law as an important interpretative tool and takes into consideration the socio-political and historical context of law making.

The term ‘soft law’ was coined to describe instruments with non-legally binding effect which are not considered formal sources of international law. They comprise of principles, standards, commitments and general norms governing international relations.¹⁷ Such soft law instruments may include: declarations of intergovernmental conferences; resolutions of the UNGA and other multilateral bodies; codes of conduct, guidelines and recommendations of international organizations, to name a few.¹⁸ Even though soft law is not mentioned as one of the formal sources of international law it may have a legal effect based on ‘good faith’. Equally, its relevance as a constitutive element of international law making and development is now widely appreciated; the Universal Declaration of Human Rights for example has provided the basis for development of several human rights treaties.¹⁹ Soft law may be regarded as evidence of existing law or formative of the ‘*opinio juris*’ for law to come.²⁰ Its non-legally binding and less compelling nature could still considerably influence state practice generating customary law, as states may not be ready to accept binding resolutions at a particular time but may gradually take measures to conform to the sought international standards. Thus soft law can often serve as a compromise between sovereignty and the need to establish rules to govern international relations.²¹ Soft law will provide a wide variety of analytical tools in my study. The R2P report that culminated with the Report of the 2004 World Summit, which is the basis upon which I rely in advocating for a new legal regime for intervention, is a soft law instrument. Its non-compelling nature has no doubt contributed to its near global recognition, making it easier for states to digest and understand its content and standards and may gradually lead to its legal recognition.

¹⁷ Daniel Thurer, *Soft Law*, Max Planck Encyclopedia of Public International Law www.mpepil.com p.6.

¹⁸ A.E. Boyle, Some reflections on the relationship between treaties and soft law, ICLQ 1999 P. 2.

¹⁹ Thurer, p. 2.

²⁰ Thirlway (2010), p. 122

²¹ Thurer, p. 2.

2.1.3 Rules of Interpretation of Treaties

In international law, disputes as to the meaning of some specific treaty provisions often arise. Equally, the growing number of treaties developed to settle strategic issues both at international and regional levels often give rise to questions such as to what extent and under what conditions should a given provision apply. However, this problem was somewhat reduced by the coming into force of the 1969 Vienna Convention on the Law of Treaties (VCLT). This convention meant to give more weight to a literal, systematic and teleological interpretation of treaties (the textual and teleological approach) regarded as an ‘objective interpretation’. This was contrary to the initially favoured subjective approach based on the negotiating history (the preparatory works) of the treaty which considers the intention of the parties as a subjective element distinct from the treaty text.²² Article 31 (1) which I shall be very useful for my work is to the effect that: *‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.*²³

I will largely adopt the textual and teleological approaches in my work as contained in Article 31 (1) of the VCLT and which reflects customary law as per the 2007 ICJ Judgment in the case between Bosnia and Herzegovina v. Serbia and Montenegro concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide. In this case, the ICJ reiterated the rules of interpretation, as it held as stated in the provisions of Articles 31 and 32.²⁴ Article 31 is a vital provision which I will apply in my study whereas the UN Charter is the central treaty for the purpose of this study which will then be subjected to the rules of interpretation. Article 31(1) spells out the textual teleological approaches to treaty interpretation and states that treaties are to be interpreted in good faith according to the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2) goes further to observe that the context for this purpose shall comprise in addition to the text, including its preamble and annexes. Art 31(3) goes further to mention other issues to be taken into account together with the context, e.g. any subsequent practice in the application of the

²² Antonio Cassese, *International Law* (2005) Oxford University Press, p. 178.

²³ VCLT (1969), Article 31 (1).

²⁴ See ICJ Judgment 2007 between Bosnia and Herzegovina v. Serbia and Montenegro para. 160 www.icj-cij.org

treaty which establishes the agreement of the parties regarding its interpretation, and any rules of international law applicable in the relations between the parties. In this respect the 1970 Declaration on Friendly Relations, an instrument that demonstrates the norm clarification capabilities of the UNGA, is evidence of such subsequent practice relating to the interpretation of UN Charter provisions.

The textual approach to treaty interpretation, which considers the treaty text as the authentic expression of the intentions of the parties shall be resorted to in this study for the explanation of the text of treaties used for this study. However where the treaty text for this study is vague, as in the case of Article 2(4) and its open-ended nature that has attracted varying interpretations, I will resort to the teleological approach which allows for the interpretation of a treaty in line with the objectives and purposes of the treaty in the context spelled out Article 31(2).

Article 32 of VCLT gives room for recourse to the preparatory works of the treaty and the circumstances of its conclusion, but only as a supplementary means of treaty interpretation in order to confirm the meaning resulting from the application of Article 31 or clear some ambiguities and absurd results from its application. It will not be vital for this study.

2.2 An interdisciplinary approach

The nature of my topic and the objectives I intend to attain warrant me to look beyond the formal sources of international law for the necessary material for my analysis. Moreover, the *lex ferenda* approach that I adopt in parts of my analysis will call for a projection in different directions that might not be limited to soft law and the elaborate teachings of legal scholars. The broad and open ended nature of the *lex ferenda* approach of legal analysis would allow me to go on a wide chase for inspiration from different sources namely; legal philosophy, political science and other moral and ethical theories on the topic. The part of this study based on testing the practice of R2P in the recent Libya case will permit me to follow up the day to day progression of events based on media accounts and other sources of information.

2.3 Conclusion

As seen above, the traditional positivist international law methodology is somewhat limiting. Its strong reliance on hard law and the state as the main subject of international law making gives the individuals who are subjects of the state limited chances in defending their rights against infringements from the supposed guarantor. There is a need for other legal theories or methods to take into consideration the developing concerns about state anarchy and violations of rights of subjects. Equally, the strictly formalist system of sources of law limits creativity and misses empirical trends. However, the enlightened positivist methodology, which I adopt in my thesis, is more accommodative and progressive. As mentioned above, enlightened positivists consider law not to be independent from its historical, political, and sociological contexts, and they consider soft law as a relevant interpretative tool. This flexible approach to legal analysis would be worth venturing, taking into consideration the context of my study. Also, a combination of the legal method and political science theories, though challenging will be relevant in describing the direction in which the law can and should develop.

CHAPTER III: THE CURRENT LEGAL REGIME

The current legal regime governing HI has been widely criticized for its weaknesses. HI is not expressly mentioned in the Charter; it has remained one of the most controversial areas of international law as its status remains uncertain and the practice of states has raised protracted debates.²⁵ The practice of HI has evolved around the variety of legal basis: interpreting Article 2(4) of the Charter so that it does not cover HI, as a fourth exception to the principle of non use of force as provided for in Chapter VII of the Charter, and the occasional controversial application of UNSC mandate under Chapter VII. The UNSC holds wide powers under Chapter VII and its often flexible manner in interpreting this area of the law has led to the use of the latter for purposes of HI.²⁶ This lack of a distinct and clear provision for intervention has been partly blamed for the inconsistencies and apathy in the exercise of the right to intervene by the international community. Such inconsistencies have been expressed in the legal questions that usually arise when the question for intervention is tabled. Questions such as when is it right to intervene? Who has the ultimate authority to order intervention? Who is obliged to intervene? How such an intervention should be carried out? These are some of the questions that have generated contradictions in the domain of HI. The absence of clear answers to these questions has amongst other things led to the inactions and sometimes belated actions from the international community with the resulting consequences of many losses in civilian lives. And unless clear cut answers are provided for these questions, HI will remain questionable.

This chapter will be subdivided in two main parts. In the first part, I will be looking at the principle of state sovereignty and the dilemma it has created between respecting the core principles of non-intervention and non-use of force, and the need to violate these principles for humanitarian purposes. In the second part I will be examining the legal right to intervene as it is often inferred from Chapter VII of the Charter, i.e. UNSC mandate to intervene in event of threats to or breach of international peace and security, and from other interpretations of the Charter. I will illustrate the controversial and inconsistent application of HI with some case

²⁵ Christine Gray, *The Use of Force and the International Legal Order in International Law* by Malcolm D. Evans (2006) Oxford University press p. 595.

²⁶ Gray (2006), 606.

examples, before I examine the role of Regional Organizations like the African Union and their relationship with the international regime for intervention.

3.1 State Sovereignty and Non-intervention

3.1.1 The Dilemma of the State Sovereignty Principle

The consensus for the existence of an international society of sovereign states has remained predominant in international relations. In this regard, states have been predominantly concerned with defending their interests while equally upholding the institutions of international society.²⁷ However, the greatest challenge that this notion of international society and state sovereignty has faced in recent times has come from the contemporary ideals of major powers, international and regional organizations, to intervene in the domestic affairs of sovereign states for humanitarian purposes.²⁸ The acclaimed notion of state sovereignty, as laid down in the Treaty of Westphalia (1648), codified basic principles of territorial integrity, border inviolability and state supremacy.

This notion of state sovereignty has been the premise on which the rules governing international society and international relations have been established and the respect of the principle has been the foundation of international order.²⁹ Sovereignty in terms of authority has been defined as '*the right to rule over a delimited territory and the population residing within it*'.³⁰ This definition of sovereignty is not limited to the internal attributes of states, but equally represents the significant standard of behavior among members of the international society and the recognition by the community of states. This form of recognition is important in an international system in which power is distributed in an unequal fashion, as it moderates the existing inequality of power between states.³¹

²⁷ James Mayall, 'Introduction in Mats Berdal and Spyros Economides (eds.) *United Nations Interventionism 1991-2004* (2007) p. 4.

²⁸ Ayoob, M. (2002) P. 81.

²⁹ Ibid., 81.

³⁰ Ibid., 82.

³¹ Ibid., 82.

Amongst the main goals and purposes of the UN, the maintenance of global peace and security, and the need to develop friendly relations amongst states are crucial.³² In furtherance of these purposes, the international community after 1945 under the auspices of the UN, developed the cardinal principles now enshrined in Article 2 of the Charter to wit: the sovereign equality of its member States, the prohibition on the threat or use of force and the exclusion of any rights of the UN to interfere in matters essentially within the domestic jurisdiction of a State.³³ Article 2(7) notes however that the latter principle shall not prejudice the application of enforcement measures under chapter VII of the Charter.³⁴ The principles of sovereignty and non intervention have been and remain central in the attempt by the international community to maintain peaceful coexistence among states and banish war and violence from international relations.³⁵ These fundamental principles have even gained the status of non-derogatory norms of international law.³⁶

Despite the normative character of the principles of sovereignty and non-use of force, it is widely acknowledged that a strict adherence to these principles might lead to inaction in the face of massive violations of human rights.³⁷ This could be what the drafters of the Charter had in mind when introducing the exemption clause in Article 2(7). As a result, possible intervention and the need to respect the sovereignty principle have often come into conflict.

3.1.2 Prohibition on the use of force

Conventional international law prohibits the use of force against the territorial integrity or political dependence of any state, or in any other manner inconsistent with the purpose of the United Nations, according to Article 2(4) of the Charter. It has gained the status of customary international law, as the International Court of Justice (ICJ), in a case brought by Nicaragua against the USA for unlawful intervention and use of force, held that the principle of non-use of

³² UN Charter Article 1.

³³ Gareis, Sven Bernhard; Johannes Varwick *The United Nations. An Introduction* (2005) Pelgrave Macmillan, London p. 18, 19. See also article 2 of the UN Charter wherein there is a list of other principles of the UN that are of less relevance to my thesis.

³⁴ UN Charter Article 2(7).

³⁵ Gareis (2005), 20, 21.

³⁶ Shaw, Malcolm M. 'International Law' (2008) Cambridge University Press p 1118.

³⁷ *Ibid.*, 1155.

force was customary international law and that the USA was in breach thereof.³⁸ The massive abuse of human rights within a state by the state itself or as a result of ethnic rivalries or other intrastate conflicts, and the states' incapacity or otherwise inability to protect its citizens from such violations, has put to question this part of the non-intervention principle which is the cornerstone of state sovereignty. The post Rwanda and Yugoslavia era has seen a move towards an international consensus to prevent future Rwandas and Bosnia Herzegovinas. The last two decades have seen a rise of interventionism to protect foreign citizens who are victims of a state's violations of their fundamental human rights. As Ayooob observes, there are instances where state institutions collapse and cannot guarantee the protection of the people. In this circumstance, the social contract binding the state and citizens breaks down, and it can be argued that state sovereignty can be said to have ceased to exist.³⁹ Statements of international figures such as UN Secretary Generals⁴⁰, actions of the UN Security Council under Chapter VII involvement, and multinational coalitions such as NATO, have during the past few decades expressed a rebuttal of the notion of unlimited sovereignty as sacrosanct.⁴¹

However, there are acceptable exceptions to the principles of sovereignty and non-use of force to wit, by invitation of the concerned state, the Charter provisions self defense, and UNSC authorization.⁴² But just like the doctrine of preemptive self defense, the doctrine of HI has been criticized for allowing states to use force in circumstances that differ significantly from the above accepted grounds.⁴³ This among other factors has resulted in the often lukewarm attitude towards such interventions and the UNSC's reputation as the watchdog of global peace and security has been questionable. The UN's use of its chapter VII powers in places like Iraq (1991), Somalia (1992) and former Yugoslavia (1992)⁴⁴, though controversial, has nonetheless demonstrated the increasing strategic role of human rights in international relations. I will now examine the right to intervene.

³⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits Judgment, ICJ Reports 1986 paras 202-209.

³⁹ Ayooob (2002), 82.

⁴⁰ <http://www.un.org/millennium/sg/report/ch0.pdf>

⁴¹ Adams Roberts *The Use of Force in The UN Security Council* by David M. Malone (2004) Lynne Rienner Publishers London p. 136-37.

⁴² UN Charter Chapter VII, for the right to invitation, see also Christine Gray, *International Law and the Use of Force* (2008) Oxford University Press. P. 81.

⁴³ Roberts (2004) P. 133.

⁴⁴ See UNSC Resolutions 688, 794 and 795 respectively.

3.2 The Legal Right to Intervene with Armed Force

There are exceptions to the principle of non-intervention and the non-use of force and two of these are contained in Chapter VII of the Charter. The right to self defense in Article 51 is the main exception that gives right to collective or individual response to an armed attack by another state. Another exception is by invitation by the concerned state.⁴⁵ Lastly, the collective security mandate of the UNSC to respond to threats to international peace and security spells out in Articles 41 and 42 of the Charter certain measures including the use of armed force. This branch of international law has been subject to widespread controversies and contradictions as to what constitutes self defense on the one hand and the complex UNSC mandate on the other.⁴⁶ There have moreover been arguments in favour of HI based on some states' interpretation Article 2(4) of the Charter, an argument that has developed since the interventions in Iraq and Kosovo. Another position voiced has been HI as a possible fourth exception to the provision on non-use of force. This argument favours HI as an autonomous institution distinct from the UNSC mandate to authorize use of force against a threat to or breach of international peace and security.⁴⁷ In spelling out the duty of maintaining global peace and security, the Charter in Article 52 equally provides for the UNSC's role to be supplemented by Regional Organizations (ROs) where necessary. Therefore, it is relevant also to examine the role of ROs.

3.2.1. Humanitarian Intervention under the UN Charter

Considering the rapid development of human rights as universal principles and the need to protect people from gross violations, states and the international community as a whole are gradually embracing the concept of collective security through the UN Charter provisions under a centralized UNSC supervision. The practice of the UNSC is said to have established a direct link between humanitarian crisis and threat to the peace under Article 39 of the Charter that

⁴⁵ Gray (2008) p. 81.

⁴⁶ Gray (2006) p. 589.

⁴⁷ Ibid., 594-595.

triggers UNSC action under that chapter.⁴⁸ The relevant provisions of the Charter to such UNSC mandate include Articles 39, 41 and 42 cited below:

Article 39: *“The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what actions shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”*

Article 41: *“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and rail, sea, air, postal telegraphic, radio and other means of communication, and the severance of diplomatic relations”*

Article 42: *“Should the Security Council consider that the measures provided for in Article 41 would be inadequate or has proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations”*

It is from the above provisions that the doctrine of HI has often been inferred from the Charter by interpreting certain apparent humanitarian crisis situations as threat to international peace and security even in situations where there is no such threat in the literary sense. Presumably a demonstrable need to extend the threshold of Article 39. As mentioned above, this branch of international law and the doctrine of HI in particular have been subject to a lot of controversy. Such controversies have been blamed partly on the lack of a detailed framework and other structural deficiencies. The post cold war era saw the rise of numerous crises leading to military interventions particularly in states without the consent of their government. Such interventions have either been authorised by the UNSC or a regional organization or they have been unilateral interventions by powerful states with a variety of legal justifications. However, it has been

⁴⁸ Cassese (2005) p. 347.

observed that such actions have not been restricted and carried out in ways as envisaged in the Charter.⁴⁹ Even the actions carried out with a UNSC mandate under chapter VII have not been clear as to establish a right to do more than the text of the UN Charter Chapter VII opens up for. There has often been a controversial link between a humanitarian crisis and a threat to international peace and security despite the absence in some cases of any objective threat. Also, several of these actions have bypassed the central authority of the UNSC and have been justified on varying grounds. Ironically enough, the earlier practice of intervention often relied upon by supporters of HI, was not termed HI as such by the intervening states, as they preferred to rely on the better established right of self-defence. Such cases would be easily related to HI today, but several states at that time didn't think human rights violation should justify use of force.⁵⁰ And since they did not claim HI, it is difficult to refer to them as relevant state practice. Such were the 1971 intervention of India to end repression and support self determination in Bangladesh, the 1978 intervention by Vietnam to end the murderous rule of Pol Pot in Cambodia, and the 1979 intervention of Tanzania to end the dictatorship and repression by the Idi Amin regime in Uganda.⁵¹

The UK on its part, in defending its actions in Iraq (1991), developed the doctrine of HI as a separate institution, arguing that Article 2(4) of the Charter has developed over time to meet new situations and that HI without invitation of the country concerned can be justified in cases of extreme humanitarian need.⁵² If such an intervention is justifiable in situations of extreme humanitarian need, and does not violate the territorial integrity or political independence of the said state, and is consistent with the purposes of the UN, then it can be justified. But the question that comes to mind here is this: considering such an assertion by the UK, namely that HI was justified in cases of extreme humanitarian need, should an intervention be based on a unilateral decision by one or a coalition of states, or on a multilateral basis based on the UN mandate? Also, is there sufficient state practice to back the UK position? It can be said that such arguments on the implied existence of HI have equally inspired the consideration of HI as a possible fourth exception to the principle of non-use of force in the Charter. Nevertheless, it is difficult to infer

⁴⁹ Roberts (2004) p.133.

⁵⁰ Gray (2006) p. 595.

⁵¹ Ibid.

⁵² Ibid.

HI by any stretch of textual interpretation of the Charter provisions as provided by the VCLT. Equally, the teleological approach based on interpretation of treaties in light of declared or apparent objectives still poses a dilemma. This is in the sense that the purposes and objectives of the UN Charter as expressed both by the preamble and in subsequent agreements relating to the application of the treaty, together with subsequent practice in the application of the treaty, have been more in favour of developing friendly relations amongst states and the non-use of force save in situations provided for by the Charter. And though other purposes and principles of the Charter include the respect and protection of human rights and dignity, HI has remained controversial as the focus seems to have been more on the maintenance of international peace and security. Nevertheless, the quest for an autonomous regime for HI has remained constant since the Iraq and Kosovo intervention and has culminated with the emergence of the R2P concept. This trend in the development and understanding of HI is worth examining in more detail in the following cases:

3.2.1.1 Implied authority to act in Iraq 1991

The question of HI was debated upon during the 1991 invasion of Iraq. In response to Iraq's invasion of Kuwait, the UNSC in Resolution 678 by a unanimous vote authorized a US led military force to defend Kuwait against the Iraqi invasion.⁵³ The Council later imposed a ceasefire in Resolution 687 after Iraq had been driven from Kuwait, but failed to make provisions for the protection of human rights in Iraq.⁵⁴ When the Iraqi government turned to repress the Kurds and other ethnic groups, the Council passed another Resolution (688) in April 1991, asking Iraq to end its repression and allow access to humanitarian agencies. Though the Resolution did not provide for use of force, the USA, the UK and France instituted no fly zones and intervened to protect civilians.⁵⁵ This later intervention by the coalition powers in Iraq in 1991 was not sanctioned by an immediate UN authorization. They argued that their actions were purely justified on humanitarian grounds and that Resolution 688 had provided implicit legal authorization intervention.⁵⁶ However, such claim of implicit authorization of HI was difficult to

⁵³ Brian Frederking, *The United States and the Security Council* (2007) Routledge Publishers p. 79.

⁵⁴ Gray (2006) p. 595.

⁵⁵ Ibid.

⁵⁶ Spencer (2010) p. 509.

justify, as the terms of the resolution did not allow for such expansive interpretation.⁵⁷ This has led to controversial debate on the right of a state or states to unilaterally engage in intervention on humanitarian grounds without authorization from the UNSC. These arguments in favour of such an approach to HI laid a very fragile foundation for the concept.⁵⁸

3.2.1.2 Delayed action and failure to act in Somalia, Bosnia and Rwanda

In other places such as Somalia, Bosnia, and Rwanda, the UNSC was either reluctant to act, had a poor strategy, or failed to act at all. The failures by the Council in such places have been attributed to structural deficiencies of the Council, and sometimes to self interest and bad faith of the Council members.⁵⁹ In Somalia, the UNSC justified its intervention on the fact that the obstacles to delivering humanitarian assistance to the suffering population could constitute a threat to international peace and security.⁶⁰ In UNSC Resolution 794 from 1992, a landmark resolution, the UNSC declared that the internal humanitarian crisis constituted a threat to international peace and security, and authorized use of force.⁶¹ The overwhelming resolve of the international commitment to this crisis was to ensure a safe delivery of humanitarian assistance; this was especially the position of the US.⁶² However when the situation completely degenerated into chaos, the mission could not avert the subsequent tragic outcome. The killing of US soldiers and their subsequent withdrawal raised doubts about the viability of collective security without local consent.⁶³

The UN also faced difficulties in Bosnia amongst which was the challenge of deciding the purpose and style of intervention, whether it was enforcement under chapter VII of the Charter or peace keeping and the fear of the permanent members of the Council to be drawn into another complex conflict, which made them less inclined to support firm UN action in the crisis, and

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Roberts (2004) P. 47.

⁶⁰ Spencer (2010) p. 507.

⁶¹ UNSC Resolution 794 1992, preamble including paras 7 and 8. see also Frederking, Brian. *The United States and the Security Council: collective security since the cold*,(2007) p 49.

⁶² Frederking (2007) p. 49.

⁶³ Ibid., 50.

instead demanded that the Europeans should take the lead.⁶⁴ The lack of cooperation between the UN and the parties, the ambitious but unrealistic mandate given to the UN Protection Force (UNPROFOR), and its subsequent authority to use force, led to conflict between UNPROFOR and the Bosnian Serbs.⁶⁵ The UNSC used its authority under Chapter VII in a series of resolutions; including Resolution 770 from 1992. Once again the UNSC recognized that humanitarian crisis constituted a threat to international peace and security and called upon states to take measures for delivery of humanitarian aid to Sarajevo and other places in Bosnia and Herzegovina.⁶⁶

When another crisis broke out in Rwanda, the experience of Somalia influenced the UNSC to retreat from chapter VII to VI of the Charter, and the limited peace keeping force present at the time was barely capable of defending itself.⁶⁷ Like the previous case, the UNSC held that that the crisis constituted a threat to international peace and security and though late, authorized the French military to intervene to prevent further mass atrocities.⁶⁸ However, at the start of the crisis in Rwanda, the small force had no robust mandate and could not intervene to prevent the mass slaughter of 500,000 people in three months by the Hutu government and militia.⁶⁹ As Mayall puts it, this crisis was the UN's worst hour in Africa.⁷⁰

3.2.1.3 New doctrine of humanitarian intervention in Kosovo

The 1999 NATO action in Kosovo equally led to a prolonged debate. The debate centered on a possible reinterpretation of Article 2(4), an implied authorization of the UNSC, and the implied existence of an autonomous regime for HI in cases of extreme humanitarian need.⁷¹ In the case brought before the ICJ by Yugoslavia against NATO member states concerning the *Legality of Use of Force*, the various state actors gave a variety of explanations and legal justifications for

⁶⁴ Spyros Economides and Paul Taylor: *Former Yugoslavia, in United Nations Interventionism 1991-2004* by Mats Berdal and Spyros Economides (2007) p. 69.

⁶⁵ Gray (2006), p. 612.

⁶⁶ UNSC Resolution 770, August 1992, preamble and para. 2.

⁶⁷ Mayall (2007), p. 12.

⁶⁸ Spencer p. 507 See also UNSC Resolution 929 22 June 1994.

⁶⁹ Gray (2006), 612-613.

⁷⁰ Mayall (2007) p. 12.

⁷¹ Gray (2006) p. 594-595.

their actions.⁷² The UK argued for an autonomous regime for HI.⁷³ Belgium equally raised the argument of evolvment of Article 2(4) and that the use of force was allowed since it was not directed against the territorial integrity or political independence of Yugoslavia, but was necessary to protect those human rights which had achieved the status of jus cogens.⁷⁴ Other parties such as the Netherlands argued that the intervention by NATO followed directly from the Security Council Resolution 1203 and as such could not be described as unilateral.⁷⁵ Other countries joined Yugoslavia in vehemently opposing the action by NATO, and condemning HI in general, stating that Article 2(4) should be construed strictly as prohibiting the use of force and that only the UNSC acting under Chapter VII could authorize the use of force.⁷⁶ This event can be said to have further complicated the controversies surrounding the doctrine of HI. The fact that the UNSC failed to condemn NATO's actions, though hardly surprising, raised further controversies about HI.

3.2.1.4 Failure to protect in Darfur

The violent conflict in Darfur (Western Sudan) began in 2003 and resulted in serious violations of human rights and international humanitarian law according to the reports of the International Commission of Inquiry on Darfur and a later finding of the International Criminal Court (ICC).⁷⁷ This commission was appointed by the UNSG acting under UNSC Resolution 1564 of 18 September 2004 requesting the UNSG to establish an international commission of inquiry to investigate the alleged violations in Darfur by the parties to the conflict.⁷⁸ According to the UN report, over 300,000 people lost their lives, about 2 million became displaced persons, and over 250,000 refugees.⁷⁹ Once again the world stood aside and watched a near repetition of Rwanda

⁷² Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, p. 124.

⁷³ Gray (2006) p. 596.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ E.g. the Ministerial Declaration produced by the meeting of 132 Foreign Ministers of the Group of 77 on 24 September 1999, where they reject the so-called right of humanitarian intervention as having no basis in the UN Charter or International Law. The declaration is mentioned in Ian Brownlie, *Principles of International Law*, 7th ed. (2008) Oxford University Press, p. 744.

⁷⁷ UN Report on Darfur (2005) para 630 See http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_02_05darfur_report.pdf See also decision by the Pre-trial Chamber I on Second Warrant of Arrest for Omar Al Bashir ICC doc. No. ICC-02/05-01/09.

⁷⁸ UNSC Resolution 1564 para 12.

⁷⁹ UN Report on Darfur (2005) para 226.

and Bosnia as the government sponsored militias launched an ethnic cleansing on civilians in the western region of Darfur.⁸⁰ Despite the findings and condemnation of the human rights abuses in Darfur by governments, the civil society and intergovernmental organizations, the UN and the AU remained passive. A majority of the UN member states expressed reluctance in pressing for action in Darfur. The debate over imposing sanctions on the Sudanese government or taking military action remained deeply divided, and also, there was dispute over who should bear responsibility to protect the people of Darfur - the UN, AU or Sudan.⁸¹ The UN, AU and member states were not willing to take action in the absence of consent by the Sudanese government.⁸² The international community left the political and military action to a feeble AU that could not effectively respond to the mass killings and destruction.⁸³ The AU's unwillingness to conduct proper inquiries into the Darfur crisis, their unwillingness to cooperate with the UN and human rights organizations to that effect, and the failure to identify the mass killing of civilians as crimes against humanity, demonstrated their lack of political will to take action according to the Constitutive Act.⁸⁴ Even the implementation of a UNSC proposal for a UN force or a hybrid AU/UN force with power to take action to protect civilians was delayed by the lack of cooperation from the Sudanese government.⁸⁵ The crisis in Darfur raised a lot of complex issues in relation to the law on HI. The UN's unwillingness to take action coupled with the contradictory stance of the AU led to the adoption of less robust measures and the continuous sufferings of the people of Darfur. This crisis further revealed the gaps in the present legal structure on HI and the failure to match the 'responsibility to protect' rhetoric with action.⁸⁶ At this point, I will discuss the right to intervene by ROs and their relationship with the 'mother regime' of the UNSC.

⁸⁰ Ibid., para 633.

⁸¹ Bellamy (2005) p. 43.

⁸² Christine Gray, *International law and the Use of force* (2008) Oxford University Press p. 53.

⁸³ Ibid., 54.

⁸⁴ Alemu (2008) p. 313-314.

⁸⁵ Gray (2008) p. 55.

⁸⁶ Ibid.

3.2.2. The Right to Intervention by Regional Organizations

Article 52 of the Charter provides for UN action under chapter VII to be supplemented by regional action.⁸⁷ The Charter gives ROs the right to intervene in such matters relating to the maintenance of peace and security as are appropriate for regional action, and such regional agencies and their actions must be consistent with the purpose and principles of the UN.⁸⁸ However, according to the wordings of Article 52(2), such action shall be limited to pacific settlements. And although Article 53(1) holds that the UNSC shall utilize such ROs for enforcement actions, it also states that no enforcement action shall be taken by the ROs without UNSC authorization. The role of ROs in assisting the UN in its role of maintaining international peace and security is crucial. This is seen in the increasing and significant cooperation between the UN and ROs in responding to humanitarian crisis situations in places such as the Ivory Coast, Sierra Leone, Liberia, and in Yugoslavia, where for the first time the UNSC authorized regional agencies to use force to implement economic embargoes and facilitate delivery of humanitarian aid.⁸⁹ However, there has been controversy over the use of armed force by ROs without the authorization of the UNSC, and whether failure by the UNSC to condemn such actions as was the case of NATO in Kosovo, amounted to acceptance, certainly contradicts the aims of UN as enshrined in the Charter.

Another important but problematic area of the right to intervene by ROs is the provision under the African Union (AU) Constitutive Act Article 4(h).⁹⁰ This provision gives the African Union the right to intervene in a Member State pursuant to a decision of the AU Assembly in respect of grave circumstances, such as war crimes, genocides, and crimes against humanity. Non intervention, being a peremptory norm of international law, is nevertheless also reflected in the AU Constitutive Act⁹¹. Though not similar to the provision of Article 2(7) of the UN Charter, Art. 4(g) of the Constitutive Act provides for non interference by any member State into the

⁸⁷ Gray (2006) p. 614.

⁸⁸ UN Charter article 52.

⁸⁹ Gray (2006) p. 614.

⁹⁰ The AU Constitutive Act 11 July 2000 http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm

⁹¹ *The AU Constitutive Act is a regional treaty among 53 African States adopted 11 July 2000, entered into force 26 May 2001. It is the basis of AU's right of intervention against genocide, crimes against humanity and war crimes.*

internal affairs of another. Also, other principles of the AU express the non-intervention norm.⁹² However, the numerous abuses of human rights by African states against their citizens, the failure by the then Organisation for African Unity (OAU) to stop massive human rights violations from dictators like Idi Amin in Uganda, Bokossa in the Central African Republic, and the lessons from Rwanda, led to the decision to incorporate the right of intervention in the Constitutive Act of the AU.⁹³

The debate has been centered on the need for prior UN Security Council authorization for the implementation of the decision to intervene under Article 4(h) of the Constitutive Act, and the need to respect the jus cogens rule in Article 2(4) of the Charter. The AU being a regional organization under the provision of Article 53 of the UN Charter requires a prior UNSC authorization for intervention. Equally, several provisions of the Constitutive Act and the AU Peace and Security Council (AUPSC) Protocol stress the need for guidance and cooperation with the UNSC. Nevertheless, neither the Constitutive Act nor the AUPSC Protocol provides explicitly for prior UNSC authorization for intervention under Article 4(h).⁹⁴ Even the views expressed in the 'Ezulwini Consensus'⁹⁵ are not clear as on the one hand it affirms the need for UNSC authorization for intervention of ROs, and on the other hand affirms the legality of use of force under Article 4(h) of the Act without referring to the UN Security Council authorization. According to the statement of the Ezulwini Consensus, Member States declared their willingness to act and get approval 'after the fact'.⁹⁶ Another possible way for the AU to avoid need for prior UNSC authorization for forcible intervention into a member state in grave situations is the idea of consent by treaty which is a possible future approach for African states. Under such an approach, member states would be deemed to have consented or called for intervention by invitation in grave situations upon ratifying certain regional protocols such as the AUPSC.⁹⁷

⁹² Alemu (2008) p. 40.

⁹³ Ben Kioko (2003) p. 812.

⁹⁴ Alemu (2008) p. 136.

⁹⁵ AU Executive Council (March 2005) 'Ezulwini Consensus' Ext/EX.CL/2(VII) *The Ezulwini Consensus represents the common position held by the AU Executive Council on the proposed reform of the United Nations.*

⁹⁶ Alemu (2008) p. 137.

⁹⁷ Yoram Dinstein, *War, Aggression and Self Defence* (2005) p. 115.

However such an invitation would only be valid as long as the consent is not withdrawn by the concerned state. Given that such a consensual engagement is only valid as long as it lasts⁹⁸

Moves by ROs to take security responsibility into their own hands and sometimes bypass UNSC authorization demonstrate the dwindling nature of the trust in the international peace and security machinery. As Arend observes, the conflict between the UN and ROs represents the tension in contemporary times between globalism and regionalism, and makes it more complicated to develop a well functioning international security system.⁹⁹

The difficulties of the global peace and security regime, and the sometimes troubled relationship with regional security organizations, pose a threat to future interventions to protect against violations of fundamental human rights and prevent civilian loss of lives. On the other hand, some ROs like the AU have demonstrated a lack of political will and the capacity to single handedly perform the role of maintaining peace and protecting the lives and rights of civilians. Such lack of will and capacity, coupled with the sometimes lack of cooperation between the UN and ROs has led to inactions in the face of massive violations in places like Darfur. This calls for a need for more cooperation and action in order to ensure protection of people from massive violation of their rights, and doing so in accordance with the Charter and principles of international law.

3.3 Conclusion

The events of the last more than two decades have left the question of HI widely open, and therefore back to the default position of prohibition except for the acceptable exceptions. And thus the extension of the UN traditional role of maintaining international peace and security to other situations such as humanitarian based interventions still undecided. Even the question of regional bodies acting in situations where there is urgent need for action and the UNSC has failed to act has been problematic. The problem with ROs' action has not only been limited to the conflict with the UN Charter and the UNSC powers, but also their lack of political will and capacity. This situation calls for the need to adopt a new structure to guide and govern

⁹⁸ Ibid., 116.

⁹⁹ Arend, Anthony Clark (1996) p. 4.

humanitarian forceful interventions. A new structure that would meet the demands for the changing dynamics of international relations and international law – from the understanding of sovereignty as a right to a more responsible sovereignty leading to respect for human rights. A new structure that will only allow a just and proportionate use of force, and as a last resort.

CHAPTER IV: A LEX FERENDA VIEW BASED ON THE JUST WAR THEORY AND THE COSMOPOLITAN PERSPECTIVE

As Frank and Zolo put it, interventions to protect peoples from the Venal acts of their government or rulers would have been '*angelic interventions*' if humans were angels. But since humans are humans and not angels, the other governments or coalition of governments who undertake to rescue peoples from the fangs of their government's brutality are equally subject to veniality.¹⁰⁰ However, though humans are not angels, they are nevertheless rational beings capable of reason and acting morally, free from egoism and self interest. Hence Kant's categorical imperative: '*Act so as to use humanity, whether in your own person or in others, always as an end and never as a means*'.¹⁰¹ There are ethical and moral standards of how an ideal scenario of HI ought to be. Based on these views I will in this chapter present an argument in favour of HI along the lines of the just war and cosmopolitan theories. This is in a bid to further bolster the argument for the need of a new, clear and consistent legal regime for the use of force to protect peoples suffering from gross human rights violations.

Traditional JWT provides moral criteria for going to war and the conduct of war itself as it was in the ancient medieval period.¹⁰² However, JWT has evolved with time to meet the realities of contemporary warfare, as intrastate conflict which was not within the realm of the pioneer scholars on the theory have been taken into consideration in contemporary writings. JWT can still be said to be relevant today as it has evolved with time to meet with the realities of contemporary conflicts; from interstate conflicts as it was traditionally understood, to intrastate conflicts in contemporary times.

On the other hand, the need to protect people from violent crimes, crimes against humanity and crimes of genocides is a universal obligation and a central idea in cosmopolitan ethics. Applying the theory of cosmopolitanism in defending HI will go a long way to further the just war arguments, and will provide an ideal scenario for its application. Despite the cosmopolitanism

¹⁰⁰ Thomas Frank, Humanitarian Intervention and Danilo Zolo Humanitarian Militarism in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (2010) Oxford University Press, p 531 and 549.

¹⁰¹ Stanford Encyclopedia of Philosophy: Kant's Moral Philosophy <http://plato.stanford.edu/entries/kant-moral/>

¹⁰² War is not used here in its technical legal understanding. The term war is commonly used in this thesis to represent armed conflict, armed confrontation or armed intervention.

ethical and universal obligation of nonmaleficence, Bohman and Lutz Bachman opine that: ‘*If there is any room for coercion in cosmopolitan law, it is in enforcement of human rights precisely against States that use their sovereignty to abuse human rights*’.¹⁰³

4.1 Just War Theory: A moral criteria for Humanitarian Intervention

JWT saw its first expression in ancient Christian theology and during the medieval period. The moral theory was pioneered by Catholic bishops based on natural law and Christian theology.¹⁰⁴ However, scholarship on the JWT has evolved with time to meet with the changing vagaries of armed conflicts. From the protestant theologian Ramsey in the 1960s to Walzer and his classification of JWT under a set of ideas (“the theory of aggression” and “the war convention”), the theory spiraled in other contemporary writings on the justification for the use of armed force when and where necessary and to ensure its proper conduct. It has equally been used by policy makers, and more recently reiterated by the US president Obama in his Nobel Peace Prize Speech to justify America’s involvement and role in fighting terrorism and interventions to protect the rights of people around the world.¹⁰⁵ Thus, the JWT is relevant to contemporary armed conflicts and has provided a moral criterion for humanitarian forceful intervention.

The development of JWT has been a complex one. Its variety of content from the different approaches, both Christian and secular, emphasizes the tension that its development has encountered. But as Turner observes, the just war approach to the ethics of the use of force necessitates the ongoing dialogue between the different approaches as a means of developing meaning out of the tradition for contemporary usage.¹⁰⁶ The moral questions as to when and how to use force are reflective of contemporary positive international law on the use of force as enshrined in the UN Charter and the Geneva Conventions on war. I support the argument put forward by Turner, namely that just war principles should not be understood as if they were fixed for all time. Rather, by applying the wisdom they contain in a moral discourse of contemporary

¹⁰³ Bohman and Lutz-Bachman Introduction in *Perpetual Peace* (1997) MIT Press p.18.

¹⁰⁴ James Turner *Morality and Contemporary Warfare* (1999) , New Haven and London: Yale University Press p.22.

¹⁰⁵ The New York Times, Obama’s Nobel Remarks December 10, 2009 <http://www.nytimes.com/2009/12/11/world/europe/11prexy.text.html?pagewanted=all>

¹⁰⁶ Turner p. 25.

armed conflicts, one may contribute to the development and enhancement of the tradition. However, as some scholars observed, the just war tradition has seldom been expressly referred to in the discussion and evaluation of HI, even though most arguments in the intervention literature fit the framework of the Just War tradition.¹⁰⁷ It is very important to consider the moral and strategic questions of HI hand in hand since they are interconnected, though the tendency has been for most scholars to separate them.¹⁰⁸

The UN involvement either directly or indirectly in attempting to prevent a breach of international peace and security in places like Iraq (1990-1991 and 2002-2003) and Bosnia (1995), ushered in a commitment by the international community to cooperate and put an end to violent conflicts and increase human rights protection. However, a purely humanitarian motive is absent in most interventions, and this has raised concerns about the UN's dwindling role, especially in the second US led invasion of Iraq.¹⁰⁹ This coupled with the lack of a strong and distinct legal character of the concept of HI has raised salient questions about the body charged with authorizing such interventions. As observed by Walzer, it is difficult to find examples of pure 'so called' HI – the humanitarian aspect it is often one among several motives.¹¹⁰ The causes, motives, and outcomes of such interventions have often been characterized by contradictions, falsehood and uncertainties. But I believe that if HI is to be effective, it should be rooted and guided by the principles of JWT, no matter how difficult this may seem. I will in the following paragraphs discuss HI in the light of the just war criteria and the extent to which this has been reflected in policy.

¹⁰⁷ Mona Fixdal and Dan Smith Humanitarian Intervention and Just War (1998) Mershon International Studies Review p. 283-284.

¹⁰⁸ Ibid., 284.

¹⁰⁹ David M. Malone The UN Security Council: From Cold War to the 21st Century (2004) LYNNE RIENNER Publishers p. 1-2.

¹¹⁰ Michael Walzer Just and Unjust Wars (2006) p. 101.

4.1.1 Jus ad bellum and Humanitarian Intervention

The jus ad bellum doctrine of JWT deals with the elements to consider before resorting to the use of military force.¹¹¹ Jus ad bellum has developed around a set of principles for justifying a resort to the use of armed force and they include: the just cause principle, the requirement for a proper authority, a right intention, that war must be undertaken only if there is reasonable hope for success, that it is proportionate, of a last resort, and is waged to achieve a peaceful outcome.¹¹² I will now consider some of the elements in greater detail.

The classical just cause principle that allowed the use of force for defense against wrongful attack, retaking something wrongfully taken, or punishment for evil has been narrowed down or redefined in contemporary writings to mean defense against the crime of aggression as Walzer puts it, or self defense as in contemporary positive international law (Article 51 of the Charter). However, in the last one and a half decades, the language of self defense has been gradually replaced by intervention for humanitarian reasons as a ‘just cause’.¹¹³ Crimes of genocide and other massive violations of human rights seem to have qualified as a just cause in contemporary just war scholarship. However, while the events of the last two decades have put to bare the lapses in the international legal machinery, they have equally evidenced a serious rift between the moral/ethical and strategic concerns for resort to intervention by the international community. Most of such interventions have proved to be more for the strategic interests of the intervening states, than for the often advanced moral justifications.¹¹⁴

Proponents of JWT hold that the UN could have intervened in Rwanda to stop the massacre that the former government allowed or could not stop, and could equally have intervened earlier in Bosnia to prevent the massive loss of human life there. And so on. Most commentators in these cases observed that neither inaction nor neutrality is justified in the face of such horrid crimes.¹¹⁵ In this regard, it has been observed that the gross human rights abuses perpetrated against the

¹¹¹ Turner (1999) p.27.

¹¹² Ibid.

¹¹³ Atack Iain *The Ethics of Peace and War* (2005) Edinburgh University Press p. 64.

¹¹⁴ Fidal and Smith (1998), p.297, 298.

¹¹⁵ Ibid., 297.

Albanian population of Kosovo by the Serbian forces gave NATO a just cause to intervene.¹¹⁶ However, the intervention by NATO raised questions as to who is the proper authority to authorize such interventions. It also brought to light the tension between self defense and HI as just cause criteria. As Atack illustrates, NATO might claim a just cause in bombing Serbia in the name of ending massive abuses of human rights, while Serbia might claim just cause in the name of self-defense against NATO's interference in its internal affairs without a UN authorization.¹¹⁷ Hence, the need to consider the just cause criterion alongside other elements of JWT such as the right authority. This leads me to the next element of the just war theory, the question about who has the right to authorize such interventions.

The classical, secular 'state centered' just war theory looked upon the sovereign state as the legitimate authority to authorize any resort to armed force. This has changed from the essentially moral and theological expressions of the likes of Aquinas who believed legitimate authority belonged to the prince who received it from God.¹¹⁸ In contemporary times, with the dwindling role of state sovereignty in favour of protecting individual human rights, the agenda has changed. The just war tradition has evolved to accommodate modern day realities of armed conflict that piths the state against its subjects or some other form of intra-state conflicts. HI has been gradually added to self defense as the main just cause for resorting to the use of armed force.

To the detriment of the perspective which holds that the state's role in international relations cannot be bypassed and that state sovereignty is absolute, internationalism recognizes the centrality of states and sovereignty, but stress the need for regulation of interstate relations and the moral, ethical and legal obligation to protect the human family from abuse of their fundamental rights wherever they may be. And so, if deemed necessary, intervention should be authorized by the society of states.¹¹⁹ Cosmopolitanism on its part takes a wider stance and considers the international system to consist of individuals rather than states. It views state sovereignty as a mere usurper of the rights of the world's citizens. Citing Reisman, Fixdal observes that sovereignty protected by international law is the peoples' sovereignty rather than

¹¹⁶ Atack (2005) p. 65

¹¹⁷ Ibid

¹¹⁸ Fidal and Smith (1998), p.292

¹¹⁹ Ibid., 293.

the sovereigns' sovereignty.¹²⁰ Accordingly, internationalists and cosmopolitan scholars both agree that the UN is the model authority of the international society to be charged with this task.

However, internationalist as well as cosmopolitan scholars still face a tough challenge as to who holds the ultimate right to authorize an external intervention?¹²¹ Should it ultimately remain the sole responsibility of the UN, or should other multilateral organizations like the EU, NATO, AU or even unilateral action from super powers such as the US come to the scene where the UN is unable or unwilling to sponsor the intervention? It is this back and forth debate from statism to cosmopolitanism and midway that has created a persistent dilemma. Even today, in the face of the frequent humanitarian crises and the dilemmas of intervention, there seem to exist no single right answer to the question as to who has authority. However, as Fidal observes, both the willingness and right to intervene exists only in 'rare circumstances', the first of such was in 1991 when in the face of repression of the Iraqi civilian population, the UNSC passed Resolution 688. Though the resolution did not provide for use-of force, it called on the Iraqi government to stop repression and allow foreign humanitarian organizations into the country.¹²² Most other situations have been controversial; characterized by delays and inaction on the part of the UN, and bypassing of the UN's authority by multilateral organizations like NATO and the US's unilateral actions. All these just go to show the need for an overhaul of the current state of affairs. Global think-tanks need to go back to the drawing table and reconsider strengthening the UN's authority, encourage multilateral cooperation with the UN, and institutionalize constraints on big states so as to stop them from exploiting intervention opportunities for self interest reasons. This leads me to the next element of the just war theory, the right intention.

The motive for a decision to act on a just cause should be predicated on the creation of a just peace. According to the classical just war theorists, the motives to act on a just cause should be void of the cruel thirst for vengeance, the passion for inflicting harm, the fever for revolt, the lust for power and aggrandizement motives. Instead it should seek to achieve peace, punish evil doers and uplift the good.¹²³ According to Augustine and as cited by Turner: "*we do not seek peace in*

¹²⁰ Ibid., 294.

¹²¹ Ibid., 294.

¹²² Ibid., 293.

¹²³ Turner (1999) p. 33.

order to be at war, but we go to war that we may have peace".¹²⁴ This standard has moved from its original purpose as used by medieval scholars to caution individual soldiers from fighting with wrong intentions, to cautioning sovereign authorities and the international community to ensure that the purpose of war is to be serving justice and achieving peace.¹²⁵ Even though not explicitly specified under positive international law, the just war rhetoric of right intention is found in every discourse on HI and forms one of the key debates. As such, it is a source of disagreement on the right to intervention.

As I mentioned earlier, the motive for actual use of armed force to protect foreign citizens is hardly ever purely humanitarian. Examples of interventions based on self interest motives abound. Scholars ascribe the Clinton administration's intervention in Haiti not to concerns for Haiti but for short-term political considerations in the US.¹²⁶ Equally most post colonial interventions in Africa by former colonial masters, for example France's role in Rwanda in 1994, have been seen as void of purely humanitarian reasons but the continued desire to play the role of colonial master.¹²⁷ Another issue that has highlighted the question of right intention is the inconsistency and selectivity of international actors. Why did the international community intervene in Bosnia but not in other war torn countries like Sudan? This inconsistency makes it difficult to know what exact motives drive the actors and as such leaves even well-intended actors open to criticism. It also exposes the weakness of the UN system with regards to its capacity of solely handling humanitarian forceful intervention.¹²⁸ The right intention criterion is crucial in the development and institutionalization of HI. Therefore, as theological reasoning ordains a godly duty to mean well and the just war tradition on right intention to some extent harness the resort to force for ulterior motives, so too could international law institutionalize sanctions against self interest and discipline hypocritical actions in the use of armed force.

I will now examine the last three criteria namely, reasonable hope for success, overall proportionality, and last resort jointly because they are considered to be additional measures to be applied when the above requirements are met. As Turner observes, religious just war theory

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Fixdal and Smith (1998) p. 300.

¹²⁷ Ibid.

¹²⁸ Ibid., 301.

and international law do not address them specifically, yet they often figure in contemporary just war reasoning.¹²⁹ Prominent has been the reasoning of contemporary just war theorists in redefining *jus ad bellum* as a *jus contra bellum* meaning a *prima facie* presumption against armed confrontations and using just war categories to deny the possibility of just war.¹³⁰ They argue that with the destructive capabilities of contemporary weapons, there can be no reasonable hope for success, and that contemporary armed conflict can never reasonably be a last resort for serving justice, order and peace but will instead create more injustice and disorder.¹³¹

However, as Turner argues, although such a presumption against the use of armed force appears in recent catholic thought on war, it does not feature in the classic just war tradition nor is it the view of Augustine and Aquinas who represent the classic catholic just war authorities. Rather, the concept of just war holds a presumption against injustices focusing on the need for responsible use of force in response to wrongdoing.¹³² Force according to the just war tradition is an instrument that may be good or evil depending on what use it is put to. And so the just war tradition specifies the terms under which the powers that be are authorized to resort to force to rectify injustices. The just war tradition is based on the assumption that harm has already been done and that the loss of value has already occurred (the just cause) prior to the consideration of whether force is justified to restore the original situation.¹³³

Proportionality as regards *jus ad bellum* means balancing the evil already done and the good/evil which the use of force might bring. Last resort requires that all peaceful methods must have been exhausted before the use of armed force can be justified. This in a way encapsulates JWT's moral presumption against use of armed force and its prudential and ethical imperatives. For example if diplomatic means could achieve the objectives just quickly and efficiently, or if delays in achieving objectives do not have a damaging effect then the costly and destructive military measures could cause more harm than good.¹³⁴ However, some scholars have argued that outside intervention should come earlier rather than later in a conflict, citing the case of

¹²⁹ Turner (1999) p. 34.

¹³⁰ *Ibid.*, 34.

¹³¹ *Ibid.*

¹³² *Ibid.*, 35.

¹³³ *Ibid.*

¹³⁴ Fixdal and Smith (1998) p. 302.

Rwanda where late intervention proved fatal.¹³⁵ Some argue that the alternatives to the use of armed force should be effective and quick, and should be morally less destructive than the use of armed force itself. For example economic sanctions might constitute a grosser violation of morality than forceful intervention itself as it might involve a systemic attack on civilians and noncombatants.¹³⁶ As such, one can conclude that last resort not only requires that the alternatives to the use of force be effective and moral, but also that forceful measures be adopted immediately when the alternative peaceful measures fail to yield the required results.

4.1.2 The Jus in Bello Criteria

The Jus in Bello criteria of the just war theory is the second arm of the moral theory of just war, and it applies when the jus ad bellum criteria are met and the war is ongoing. In taking into account what is justified to do when using of force, two major criteria have been developed: (1) proportionality, which is avoiding needless destruction to achieve justified ends; (2) discrimination, which involves avoiding direct or intentional harm to non combatants¹³⁷. These criteria on ensuring that war is fought in an organized manner, void of unwanted destructions and civilian casualties, only goes to emphasize the relevance of the principle to contemporary armed conflicts where rules are often disregarded.

Faced with the indiscriminate destruction to property and the civilian casualties recorded during the world wars, the international community gave serious attention to updating rules for the conduct of war. This is evidenced by the signing of the Geneva Conventions and Protocols on the conduct of armed conflicts and other rules of humanitarian law. However, contemporary experiences of the conduct of war raise serious questions and doubts on whether such measures are effective. The high number of civilian casualties in recent civil wars, for example, in Sierra Leone, Liberia, and Sri Lanka, where nonconventional weapons were used against civilians, the widespread use of child soldiers and the voluntary targeting of civilians in Rwanda and Darfur etc, makes it hard to say if such rules of war can be effective. Even the most sophisticated of precision weapons such as those used in Afghanistan and Iraq cannot eliminate civilian

¹³⁵ Ibid., 302.

¹³⁶Atack (2005) p. 68.

¹³⁷Turner (1999) p. 36.

casualties.¹³⁸ And this situation is complicated by the use of ‘human shields’ as a tactic in fighting. However, since it is often difficult to completely eliminate civilian casualties, the criterion of noncombatant immunity is often qualified with the principle of double effect in order for the JWT to overcome this difficulty. According to this principle, the death of civilians in a war can be morally excusable if it is not the intended consequence of war but merely an unfortunate byproduct. On the other hand, just as non-combatant casualties cannot be intended as the outcome of military action, they cannot be sought as a means to other military objectives.¹³⁹

The principle of discrimination together with its qualifications has been well regulated under international law in Protocol 1 of the 1949 Geneva Conventions. This is to ensure that this cardinal and fragile principle of just war be closely monitored. In addition, the just cause and proportionality principles of the just war theory by themselves further qualify the principle of discrimination. That is, the war must be aimed at pursuing a just cause, and the good of waging the war must outweigh the evil of unintended casualties to innocent civilians.¹⁴⁰ Further, as Walzer suggests, combatants have an additional positive responsibility to save civilian lives even if it means risking their own life, according to the principle of ‘due care’¹⁴¹

Having looked at the moral basis for resorting to the use of arms and the rules of engaging in an armed conflict, I will now move further to discuss ethical and political justifications for HI from a cosmopolitan perspective.

4.2 The Cosmopolitanism Ideal

Cosmopolitanism seems to idealize a world free from conflicts. The cosmopolitan ideal is compatible with JWT. The universality and respect for human rights characteristics, necessitates the use of force in some circumstances to protect these rights. Cosmopolitan scholars support the existing legal justification for HI, and advocate for a stronger and universal legal regime for intervention. Their ideal is a universal society with one world and one government. Radical

¹³⁸ Atack (2005) p. 69.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Walzer (2006) p. 156.

cosmopolitanism breaks the barrier of state sovereignty and regards all human occupants of the world as the major actors in the international community.

According to some cosmopolitan scholars like David Held, human beings are all part of a universal moral community and all moral claims should be treated equally regardless of one's location or cultural and political affiliation.¹⁴² Based on this moral thesis, held by most cosmopolitans, some suggest a world government though some see this as a radical move and would prefer the strengthening of the current global moral and legal community.¹⁴³ The ethical, moral and political dimensions of cosmopolitanism are important concerns in seeking to justify the need to protect individuals whose states or governments are unwilling or unable to protect them from gross violations of their rights. Nevertheless, this role of the international community to intervene in another state to protect and prevent crimes against people such as genocide and crimes against humanity, has been the basis of conflict between the cosmopolitan responsibility to protect and promote human rights due to their universality, and the obligation to respect state sovereignty as a basis for international order.¹⁴⁴ However, in spite of the dilemma of protection of human rights, the need to respect sovereignty and the concerns about the destructive consequences of military action, the cosmopolitan ideal does not tolerate state involvement in human rights violation or state inability to prevent them.

4.2.1 Characteristics of Cosmopolitanism

Cosmopolitan ethical theories share three important characteristics namely: egalitarianism, individualism and universality. As Charvet puts it, there is an ideal universal moral order to which human beings are immediately members and share rights and duties amongst them.¹⁴⁵ Egalitarianism in this sense implies impartiality. According to Beitz, in a cosmopolitan order the choices about what policies and which institutions we should establish should be based on an impartial consideration of claims of each person who would be affected.¹⁴⁶ This implies that if individuals are directly represented in making laws and directing policy at the international level,

¹⁴² David Held, *Cosmopolitanism: Globalisation tamed?* P. 470.

¹⁴³ Nigel Dower, *World Ethics* (2007) Edinburgh University Press p. 78.

¹⁴⁴ Atack (2005) p. 125.

¹⁴⁵ John Charvet, 'The Possibility of a Cosmopolitan Ethical Order', p. 523.

¹⁴⁶ Charles Beitz, *Social and Cosmopolitan Liberalism*, p. 519.

then international law and policy will take into consideration their basic rights and freedoms. A core commitment of the cosmopolitan ethical perspective is the mutual respect for all persons and the recognition of the moral worth of each individual.

The principle of universality is a cornerstone for cosmopolitan thinkers. Radical cosmopolitanism sees the state as a barrier to attaining the goals of ‘one world one government’. Kantian idealism assumes the ability of human beings to determine universally valid moral laws through the exercise of reason, and their equal ability to act according to these laws.¹⁴⁷ According to Kant, the ideal world should be a ‘kingdom’ of free rational beings equal in humanity, treated as ends in them no matter where they dwell.¹⁴⁸ Honneth suggests that the equal and inalienable dignity of every human being exists independently of and prior to any particular legal or political order. And because of this community of the world’s people, a transgression of rights in one place is felt everywhere.¹⁴⁹ However, Kant’s ideal of a universal and one moral world with individuals as the sovereigns has been put in more moderate terms by other scholars such as Shapcott. He opines in his discourse ethics that cosmopolitanism does not require the creation of a completely homogenous society but argues that individuals put in different contexts are capable of thinking in universalist terms and can determine norms which can be said to apply to all through debate and dialogue.¹⁵⁰ However, despite the different approaches adopted by cosmopolitan scholars, they all have in common, a commitment to universality, egalitarianism leading to respect and protection of human rights at the global level. The increasing focus on respect and protection for human rights in contemporary international law and politics is an indication of the growing cosmopolitan world view. This is as human rights exist by virtue of the universal moral theory which postulates the whole world as one moral sphere.¹⁵¹

Radical cosmopolitanism with its emphasis on universality and the preference for individual autonomy to any form of government or political order, can present a challenge to conventional political structures and theories¹⁵² as it emphasizes that individuals in a cosmopolitan society

¹⁴⁷ Carr, *The Twenty Years’ Crisis 1919-1939*, p. 40.

¹⁴⁸ Martha Nassbaum, *Kant and Cosmopolitanism*, p. 33.

¹⁴⁹ Honneth (1997), p. 167.

¹⁵⁰ Shapcott, *Cosmopolitan Conversations*, p. 225.

¹⁵¹ Dower (2007), p. 79.

¹⁵² Attack (2005) p. 45.

have moral obligations and rights that transcend national boundaries. However, as Kant suggests in his ‘Perpetual Peace’, the cosmopolitan order does not require dissolution of an international system based on states as a discrete political entity through the establishment of some sort of ‘super state’. It however requires that states’ behavior be circumscribed by international law.¹⁵³ And as also put forth by a moderate cosmopolitan view, cosmopolitanism need not be grossly universal to completely downplay the minimal legal principles that make possible the peaceful coexistence of peoples and states in a pluralistic society. And that any move to a cosmopolitan order would need to evolve from our current order.¹⁵⁴ Contemporary cosmopolitan scholars have expanded on Kant’s original vision of human rights as the domain of cosmopolitan law that institutionalizes basic human rights and the rule of law at the supranational level.¹⁵⁵ From this perspective, cosmopolitan theorists see the Universal Declaration of Human Rights as the turning point and a model. They hold that the respect and protection of universal human rights is a fundamental obligation of all states and governments. It is suggested by some cosmopolitan scholars like Held and Garrett that the UN system could act as a transitional measure if it lived up to its charter. This would require enforcement of the prohibition of the discretionary right to use force and the implementation of the various conventions on human rights.¹⁵⁶ The Cosmopolitan project however remains an ambitious one with divergent views on the modus operandi. While some scholars support a constitutionalism or a cosmopolitan law with an effective and accountable international police force to defend it others call for a cosmopolitan world ethic. However a complementary relationship between cosmopolitan law and world ethics as opined by Hans Kung cited by Atack could be a more favourable proposition.¹⁵⁷

4.2.2 Use of Force in a Cosmopolitan Society

Besides the compelling moral and ethical obligations of the international community which are imposed by the emphasis on universality and indivisibility of human rights, the cosmopolitan

¹⁵³ Ibid., 46.

¹⁵⁴ Garrett W. *Brown Moving from Cosmopolitan Legal Theory to Legal Practice: Models of Cosmopolitan Law* (2010) Polity Press p. 249.

¹⁵⁵ Atack (2005) p.47.

¹⁵⁶ David Held *Cosmopolitanism: Globalization tamed?* ... p. 474 see also Held *Principles of Cosmopolitan Order in The Cosmopolitan Reader* ... p. 243.

¹⁵⁷ Atack (2005) p. 51.

ideal finds the existing legal regime for humanitarian forceful intervention a useful interim measure. The cosmopolitan ideal gives the state the primary responsibility to protect its citizens from genocide, massive suffering, gross and systemic violations of their rights. If the state itself is said to be involved in perpetrating the abuses, the responsibility shifts to the international community.¹⁵⁸ Under cosmopolitan law intervention in another state to protect human rights is a fundamental obligation of all states and is in line with the just war principle of just cause. As Bohman and Lutz Bachman suggest, “*If there is any room for coercion in cosmopolitan law, it is in the enforcement of human rights precisely against states that use their sovereignty to abuse human rights*”.¹⁵⁹ Besides being a moral obligation, cosmopolitan scholars align themselves with the current regime of HI as provided under exceptions to the principle of non-use of force, Article 2(4). The UNSC authorization of the use of force to maintain or restore international peace and security (Article 42 of UN Charter) thus seemingly serves as a temporary and transitory measure to the ideal and autonomous regime advocated by cosmopolitans.

According to the cosmopolitan model of constitutionalism or cosmopolitan law, the coercive powers for forceful intervention to prevent acts of genocide are managed by a cosmopolitan institution based on world citizenship, not by existing states.¹⁶⁰ An effective and accountable international police force is necessary to ensure an organized intervention. The determination of a right and just authority to order and organize intervention is necessary for such to be justified under cosmopolitan law. According to many cosmopolitan scholars, the current UN system if well organized and respected could act as a model for a world government, and a reformed UNSC could effectively approve intervention.

The cosmopolitan ideal of restraint during the conduct of armed conflict is compatible with the just war elements of discrimination and proportionality to ensure a fair, just and proportionate use of armed force to achieve the intended results of lasting peace. Nevertheless, the cosmopolitan claim for morality which reaches beyond boundaries is often tested by the realities of armed conflict as it is often difficult there to maintain the sense of shared humanity with the

¹⁵⁸ Atack (2005) p. 126.

¹⁵⁹ Bohman and Bachman (1997) p. 18.

¹⁶⁰ Daniele Archibugi Architecture of Cosmopolitan Democracy in *The Cosmopolitan Reader*, Garrett W. Brown and David Held (2010) Polity p. 322.

enemy.¹⁶¹ This is especially seen in contemporary intra state armed conflicts and other forceful external interventions where civilian casualties are rife due to ‘collateral damages’, deliberate targeting, use of noncombatants as instruments and objectives of warfare, gross abuses and crimes against humanity often perpetrated by both government and opposition groups as was the case in the Balkans, Rwanda, Somalia, Darfur, Sri Lanka and so on.¹⁶² Such restraints in the conduct of armed conflict are made possible by the acceptance and acknowledge of the cosmopolitan approach and built on the cosmopolitan ethical foundation as espoused by Erskine namely that: *‘the enemy must be granted moral standing, even in the midst of violent conflict’*.¹⁶³

4.3 Conclusion

Cosmopolitanism and JWT are compatible and even complementary in nature. They both acknowledge the need to use force to protect human rights of people whose governments are unwilling or unable to do so. They equally acknowledge the need for a universal and just authority to authorize such use of force. And to this effect, they view a well representative and well organized UNSC as such ideal authority. As such, the cosmopolitan and just war perspective would regard the current exceptions to the principle of non-use of force under Article 2(4) of the UN Charter especially with respect to the UNSC mandate under Article 39, as important transitory measures to the ideal humanitarian forceful intervention regime they advocate for. Nevertheless, applying the current UN mandate under Article 39 to use of force for humanitarian reasons has been challenging. It is not one of the exceptions to Article 2(4), neither has there emerged an acceptable practice to be called customary law. Also, most controversies in this domain of international law have been centered on the lack of strict respect for some normative and precautionary standards of use of force, embodiments of cosmopolitanism and JWT. This is seen in the inconsistency in determining threshold for intervention, the lack of respect for authority, the lack of proportionality in the resort to force, self interest-motivated interventions leading to double standards, etc. This has posed enormous challenges to the doctrine of use of force and the current UN mandate, and has led to the move to adopt a new

¹⁶¹ Erskine, ‘Embedded Cosmopolitanism and the Case of War: Restraint, Discrimination and Overlapping Communities (2000) *Global Society*, p. 570.

¹⁶² Atack (2005) p. 95.

¹⁶³ Erskine (2000) p. 570.

approach under the R2P concept. Therefore, put together, the cosmopolitan ideal principles and the JWT will be useful ingredients in my attempt to make a case for a new legal regime for use of force to protect foreign citizens. The moral and ethical ideals and the philosophical implications of the theories of just war and cosmopolitanism discussed above, and coupled with the weaknesses of the current legal regime of HI as seen in the previous chapter, give credence to a case for a new legal regime for intervention along the line of R2P.

CHAPTER V: THE RESPONSIBILITY TO PROTECT PROJECT: A NEW LEGAL REGIME?

The emergence of the R2P doctrine with its foundation in moral and ethical principles of just war and cosmopolitanism is evidence of the will to do good to protect and promote the dignity of the human family. R2P emerged as a desperate attempt by the international community to salvage the battered image of the predecessor regime of HI. It is commonly referred to as the ‘R2P Project’ presumably because it is still undergoing development and more work is still to be done to properly define and operationalise same. The basis of the concept is presented in the 2001 ICISS Report titled *The Responsibility to Protect*. The commission was an initiative of the Canadian government in September 2000 after a call from the then UNSG Kofi Anan. The phrase R2P has largely replaced HI in the discourse on intervention for humanitarian reasons. There is a gradual move towards reconceptualising and reforming the approach to HI. There is also a growing change in the understanding of humanitarian forceful interventions from ‘right to intervene’ to a ‘responsibility to protect’ of each state and the international community. R2P as a legal notion is the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophes such as mass murder and rape, and other gross violation of international human rights and humanitarian law. However, if they are unwilling or otherwise fail to do so, that responsibility must be borne by the broader community of states.¹⁶⁴

The underlying principle of R2P is that state sovereignty implies responsibility, and that primary responsibility for the protection of its people lies with the state itself. Furthermore, it is said that where a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.¹⁶⁵ There is an ongoing debate on the R2P project as to whether it is the way forward for intervention in another state for humanitarian reason. The question is whether R2P is the new legal regime for HI by stretching the UN mandate under Article 39 or whether it may turn into an adjustment of Article 2(4) of the Charter, or as a new exception to this provision. My discussions in this part of my thesis will

¹⁶⁴ Report of the International Commission for Intervention and State Sovereignty (ICISS) 2001: XI.

¹⁶⁵ Ibid.

focus more on R2P as an emerging legal norm for use of force for humanitarian reasons, and less on the integrated, political approach of responsibility to prevent, responsibility to react and responsibility to rebuild as presented by the ICISS Report. I will therefore only present a short description of the responsibility to prevent and rebuild.

5.1 Evolution

The statement of the former UNSG Kofi Annan in his address to the 54th session of the UN General Assembly was quite illuminating and promising on the question of HI. In view of the conflicts surrounding the principles of sovereignty/non-intervention and intervention for humanitarian reasons; coupled with conflicting legal dispensations; the UNSG advocated for consensus between states to protect fundamental values of humanity.¹⁶⁶ He reminded the world of the failures of the international community in places like Rwanda and Bosnia, and challenged member states to find common grounds to uphold the Charter. He challenged state sovereignty as being redefined by the forces of globalization and international cooperation, according to him: *‘the state is now widely understood to be the servant of its people and not vice versa’*.¹⁶⁷ He emphasized that the changes in world geopolitics, economics and technology requires the UN to adapt to a world of new actors, new responsibilities and new possibilities to peace and progress. To this end, the SG challenged the UNSC and the UN as a whole to forge unity behind the principle that massive and systemic violations of human rights, wherever they may take place, should not be allowed.¹⁶⁸ In his Millennium Report to the UN, the UNSG restated the dilemma of HI as follows:

*“... if humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systemic violations of human rights that offend every precept of our common humanity?”*¹⁶⁹

The Canadian government responded to this call by initiating the ICISS, an International Panel of Experts to engage in finding solutions to this problem.¹⁷⁰ After a series of consultations with

¹⁶⁶ Spencer (2010) p. 511.

¹⁶⁷ Annual Report of UN SG (1999) para 7.

¹⁶⁸ Ibid paras 5 and 15.

¹⁶⁹ Millennium Report of the UNSG (2000) P.48.

governments, international governmental organizations, non-governmental organizations, and scholars, the result was the final report entitled *Responsibility to Protect*.¹⁷¹ This report raised debates and disagreements between states, and led to a more cautious approach by the UNSG in his own 2004 report: *A More Secure World: Our Shared Responsibility* where he endorsed the R2P norm for protection from genocide, large scale killings, ethnic cleansing and other serious violation of human rights and humanitarian law.¹⁷² The UNSG's High-Level Panel on Threats, Challenges and Change equally endorsed the emerging norm of R2P. Many states at the UN World Summit of political leaders in 2005 endorsed the norm as well.¹⁷³ At the close of the Summit, while acknowledging the primary responsibility of the concerned state to protect its citizens, and stressing the need for the General Assembly to continue deliberations on the R2P question, the world leaders addressed the question of international responsibility to protect as follows:

*“...we are prepared to take collective action, in a timely and decisive manner, through the Security Council in accordance with the UN 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 manifestly failing to protect their populations from genocide, ethnic cleansing and crimes against humanity”*¹⁷⁴

The consensus arrived at the 2005 World Summit and the formal recognition of the doctrine of R2P by the UNSC and world leaders has been widely acclaimed despite the professed gaps in its present status and in the operationalisation of the concept.¹⁷⁵ The UNSC in Resolution 1674 from 2006 reaffirms paragraphs 38 and 39 of the outcome document of the World Summit, on the responsibility to protect populations from mass murder and humanitarian catastrophes.¹⁷⁶ In its Resolution 1706 from 2006 concerning the situation in Darfur, the UNSC, when authorizing the deployment of a UN peacekeeping force, also recalled its endorsement of the outcome of the

¹⁷⁰ Spencer (2010) p. 512.

¹⁷¹ ICISS Report, 2001.

¹⁷² Gray p. 52.

¹⁷³ Spencer (2010) p 513, see also Report of the High-Level on Threats Challenges and Change: *A more secure world: Our shared responsibility* (2004) para 203.

¹⁷⁴ UN doc A/60/L. 1 para 139.

¹⁷⁵ Spencer (2010) p. 516.

¹⁷⁶ UNSC Res 1674 para 4.

2005 World Summit in its Resolution 1674.¹⁷⁷ The R2P doctrine and the standards adopted at the World Summit have been subject of further debate at the UN General Assembly and other international governmental and non-governmental fora in a bid to establish and consolidate its actual meaning, legal status and implementation. The current UN SG Ban Ki Moon has pledged his support and furtherance of the doctrine in his report to the GA implementing the Responsibility to Protect.¹⁷⁸

5.2 Responsibility to Protect: The new approach

The new approach re-conceptualizes the use of force by the international community to halt a humanitarian crisis from HI to R2P. In so doing, it attributed primary responsibility upon the sovereign government for taking action to prevent a humanitarian crisis. Only when that responsibility has not been exercised would the international community under the auspices of the UNSC engage its responsibility to intervene for the sake of humanity.¹⁷⁹ The ICISS Report proposed that three forms of responsibility be engaged; (1) *the responsibility to prevent*: addresses both the root causes and direct causes of internal conflict and other human made crises that put populations at risk, and adopt preventive strategies such as good governance and respect for human rights; (2) *responsibility to react*: involves actively responding to situations of compelling human need with appropriate measures such as diplomacy, economic means and in extreme cases military intervention, and finally, a (3) *responsibility to rebuild*: provides, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm which the intervention was designed to halt or avert.¹⁸⁰ This tripartite approach seems to provide an integrated response to internal conflicts. It includes preventive measures to limit the occurrence of such gross violation of human rights, the resort to measures that allow a non-militarily and militarily response when need arises, and finally ensure post conflict peace building measures. Below, i will limit my discussion to the responsibility to react arm of the R2P project.

¹⁷⁷ UNSC Res 1706.

¹⁷⁸ Report of the UNSG, *Implementing the Responsibility to Protect*, UN Doc. A/63/677.

¹⁷⁹ ICISS Report (2001) p XI.

¹⁸⁰ Spencer (2010) p. 512.

Inspired by the *jus ad bellum* principles of the JWT, the R2P demands new criteria for military intervention as proposed in the 2001 ICISS report and later endorsed by the International Panel of Experts in their 2004 report.¹⁸¹ The recommended criteria for military intervention include the following:

a) **A Just Cause:** According to the commission's report, the just cause threshold requires that there is proof of occurrence of a genocide or large scale ethnic cleansing etc, as a result of a deliberate action of the state involved or its inability or failure to act. The commission's intention is to allow intervention only in situations of extreme need and irreparable harm so as to limit the exceptions to the principle of non-intervention.¹⁸²

b) **Proper Intention:** The primary purpose of intervention must be to halt humanitarian catastrophes and anything short of or further than that, for example 'regime change' or 'territorial occupation' is not *prima facie* justified. However, the report goes further to state that disabling the regime's capacity to harm its people may be essential to discharging the mandate of protection and that any unavoidable occupation of territory must be subject to returning the territory to its sovereign owners at the end of hostilities. To ensure that the right intention criterion is satisfied, the ICISS report advises that the intervention be carried out on a multilateral basis, with regional support and direct support of the people concerned.¹⁸³

c) **Last Resort:** Military intervention must be a last resort; all other peaceful means such as negotiations, ceasefires, and peacekeeping operations must have been explored.¹⁸⁴

d) **Proportionality and Reasonable Prospects:** Military action is permissible only if it is carried out with the minimum scale, duration and intensity necessary to secure the humanitarian objective, and should ensure a maximum possibility of success if it is to be justified. If the intervention results in more harm than good, it is not considered justified.¹⁸⁵

e) **Right Authority:** The question of who has the authority to order intervention is crucial for the future of R2P. The ICISS as well as the Panel of Experts acknowledge that the UNSC is the ideal institution to authorize such sensitive critical actions. Though they equally

¹⁸¹ ICISS Report (2001) XII, see also High Level Panel Report (2004) para 207.

¹⁸² ICISS Report (2001) para 4.18-19.

¹⁸³ Ibid., para 4.33-34.

¹⁸⁴ Ibid., para 4.37-38.

¹⁸⁵ Ibid., para 4.39-41.

acknowledge the need for cooperation with ROs, and the inherent weaknesses present in the current role of the UNSC, they rather recognize a need for the Council to work better, than a need for replacing it.¹⁸⁶

The idea behind these new criteria for intervention as explained by the panel of experts, is to ensure that the decisions of the collective security system under the UNSC are not only seen as legal but also legitimate - that is being made on solid evidentiary grounds, and for the right reasons morally and legally.¹⁸⁷ The panel equally suggests that for such important decisions of the UNSC to be made better and be better substantiated and communicated, it is important for the Council to adopt and systematically address a set of agreed guidelines. These are then meant to guide the Council in deciding whether or not to use force. According to the panel of experts, such guideline should not necessarily be meant to determine whether force can legally be used, but whether as a matter of good conscience and good sense it should be.¹⁸⁸

5.3 R2P: A Panacea for the Humanitarian Intervention Dilemma?

R2P can be considered a cosmopolitan project that has culminated from the progressive and near universal acceptance of human rights protection as a priority for all. The idea of protecting people from the brutal acts of their government cannot be achieved without compromising the state sovereignty principle. International law has been in favour of the non-intervention principle, and its derived principle of non-use of force which can only be violated by the use of armed force in exceptional circumstances as seen above. However, international law has seen some inclination towards respect and protection of human rights against the strict respect for the state sovereignty principle. But this has not come without resistance from states, especially weaker states that see interventionism as an excuse for stronger states to meddle into their affairs in order to protect their own interests.

¹⁸⁶ ICISS Report (2001) para 6.13-14, see also High Level Panel Report (2004) para 198.

¹⁸⁷ High Level Panel Report (2004) para 204.

¹⁸⁸ Ibid., para 205.

5.3.1 The R2P Principle is full of challenges

This dilemma of state sovereignty and the need for interventionism, the inherent constraints in international law making and the possibility of abuse by intervening states or bodies have hampered the development of the law of HI. The emergence of the new doctrine of R2P has been welcomed by many as a possible panacea to the HI dilemma, but with all the surrounding uncertainties, it would be challenging to make a case for it as representing ‘de lege lata’.

The first major problem is its conflict with the sovereignty and non-intervention principles. The principles of state sovereignty and non-intervention remain until the present date, the principal guarantors of global legal order. Its replacement by a clear and distinct legal regime for intervention might jeopardize this world order strenuously put in place by the international community over a long time. And if this order is to be compromised, it would presumably require an exceptional commitment, a greater resolve and stringent guiding principles to be followed by state parties to ensure that such intervention is carried out in good faith based on a just cause. Smaller and weaker states have been very critical of any further move to interfere with the Charter provisions and the provisions of the 1970 UN Declaration of Friendly Relations on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. To them, the sovereignty and non-intervention principles are the only guarantees for their protection and autonomy from stronger states that might use the R2P principle as an open window to go in and out of a state as it suits their whims and caprices. To these states the principle of sovereignty equally ensures recognition of their equal worth and dignity, a protection of their unique identities and national freedom and the affirmation of their right to determine their own future.

The established principle in Article 2 (1) of the UN Charter is seen as a means to ensure the protection of the sacred values of international relations that allow equal existence and co-existence. Even the drafters of the R2P report recognize the importance of this core principle of international relations.¹⁸⁹ This protective stance adopted by developing states was reflected in the negotiations preceding the 2005 World Summit as they objected to the UNSC authority to

¹⁸⁹ ICISS Report (2001) para 1.32.

authorize coercive measures in matters within their borders.¹⁹⁰ The Algerian Permanent Representative is quoted as saying in a discussion on the UNSG's 2005 Report 'In Larger Freedom' that:

*"...interference can occur with the consent of the state concerned... we do not deny that the United Nations has the right and duty to help suffering humanity. But we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defense against the rules of an unequal world, but because we are not taking part in the decision making process of the Security Council..."*¹⁹¹

Further debates at the UNGA, such as those on the 2009 UNSG's report on implementing R2P, have seen a cautious approach to the sovereignty and intervention dilemma, especially from many developing states. They consider sovereignty as inviolable and that any intervention should be permissible only upon invitation of the state concerned. And even when they choose to support the principle they do so cautiously.¹⁹² This sort of precautious attitude of states when it comes to the sovereignty and intervention question shows how delicate this area of international law is. Even the cautious support by a majority of states at the World Summit and during the UNGA debates that followed could be attributed to the fact that R2P is considered by some as soft law. And that they could shy away when it comes to taking legally binding dispositions and implementations.

The next difficult question in relation to the R2P regime is its current legal standing and its possibility of becoming hard law, should it not already constitute this. In the 2009 UNGA debate on the SG's report on implementation of the R2P, the Assembly president was quick to remark that R2P had no binding status in international law and that there had been no genuine agreement as to its terms.¹⁹³ This sort of reservation only echoes the fact that R2P is yet to mature as a binding principle in international law and that much still needs to be done to achieve the required binding consensus. Although some member states accept R2P as an evolving norm of

¹⁹⁰ Spencer (2010) p. 513.

¹⁹¹ Ibid Spencer, citing Abdallah Baali, Permanent Representative of Algeria's Statement to the informal Thematic Consultations of the General Assembly to discuss Secretary General's Report 'In Larger Freedom'.

¹⁹² Ibid Spencer (2010) p. 518.

¹⁹³ Ibid.

international law and even as one that could possibly be inferred from the UN Charter, others see it as a mere political commitment that has no specific legal content or obligation.¹⁹⁴

Some hold that HI already exists as law within the scope of UN Charter. Proponents for this argument such as the UK in its post Iraq and Kosovo intervention, view HI or the intervention to protect civilians as not falling within the scope of the prohibition on the use-of force under Article 2(4) of the Charter, based on their own interpretation of that provision. According to them, Article 2(4) of the Charter has evolved with time to exclude forceful interventions in cases of extreme humanitarian need from its prohibition. This would be the case as long as the use of force is not directed against the territorial integrity or political independence of a state, and is necessary to protect human rights, which is consistent with the Charter's fundamental purpose.¹⁹⁵ Others who support R2P as an existing legal norm argue that the interpretation of Article 39 could be stretched to provide the UNSC powers to authorize intervention when the prerequisite requirements for intervention under R2P are met, i.e. presumably where the situation does not strictly constitute a threat to international peace and security. The Council has in the past interpreted such crimes as a threat to or breach to international peace and security and has correspondingly taken necessary action.¹⁹⁶ Such gaps between the law and practice only reveal the need for a well established and consistent approach.

Even though the above arguments are plausible, it is a well known fact that R2P for the moment has no place in international treaty law. Instead, the explicit prohibition on intervention in the Charter and the later UN Declaration on Friendly Relations from 1970, were both aimed at protecting smaller or weaker states from frivolous interference with their internal affairs.¹⁹⁷ Admittedly, treaty provisions have the ability to change over time through the practice of states as per Article 31 (3) (a) of the VCLT.

Also, prior to the Libyan intervention, R2P had so far not been invoked to justify collective use of force, and so there is very little development of the concept under customary international law. Even proponents of the principle aim to distinguish it from the old HI regime, thus severing

¹⁹⁴ Ibid., 520

¹⁹⁵ Gray (2006), p. 596.

¹⁹⁶ For example in places like Somalia, Rwanda and Haiti mentioned above.

¹⁹⁷ Spencer (2010) p. 506.

any alleged connections between the two that could have constituted state practice. Actually, even the alleged existence of consistent customary practice on HI has been disputed. The legal justifications for interventions by states themselves have been far from clear, they are often mixed with political and security concerns. Also, the limited development of case law by international courts and tribunals, and the often conflicting stances by the UNGA and the UNSC leaves the former HI regime more obscure.¹⁹⁸

However, as much as there exist objections to the legal character of the R2P regime, such objections might not necessary be against interventions as such but to other circumstances surrounding the exercise of such a right. Popular amongst these is the argument that HI is a ‘right’ claimed by strong states against the weak.¹⁹⁹ That argument would also fit R2P. The question for example as to who authorizes such an intervention is settled by the recommendation of both the ICISS and the International Panel of Experts’ report proposing the UNSC as the best organ to take charge of such exceptional measures. However, the problem doesn’t stop here; even the ICISS questioned the authority and credibility of the Council.²⁰⁰ The UNSC in its present composition has been blamed for inactions that have marred the intervention regime. The use of the veto power has stopped or delayed possible interventions to rescue civilians in the past, and could still be a threat to the R2P regime. Equally, the report observes the lack of political will by the Council, its uneven performance, the unrepresentative membership and the often double standards of the five veto powers as inherent flaws of the Council’s functionality. These are some of the reasons why smaller and weaker states are concerned about the effectiveness of the UNSC and are calling for reform. An example is the declaration by the Algerian Permanent Representative quoted above. But a proposed reform of the UNSC, especially as to rules concerning the use of the veto power, has not been welcomed by the five permanent members. The ability for the veto powers to obstruct such changes using their powers under Articles 108 and 109 (2) poses a big challenge.²⁰¹ Equally, there has been no consensus on

¹⁹⁸ Ibid., 507.

¹⁹⁹ Thomas Franck p. 541.

²⁰⁰ ICISS Report (2001) para 6.13.

²⁰¹ See UN Charter Articles 108 and 109 (2).

a proposal that the UNGA should play a role in authorizing intervention in the event of failure by the Council.²⁰²

Another issue that has been raised is what should be the threshold for intervention and who should determine such? This is a very critical issue when it comes to determine when it is right to intervene in a given crisis. The ICISS proposed as just cause threshold for intervention that there is evidence of large scale loss of life, genocide or large scale ethnic cleansing or other serious violation of international humanitarian law actually taking place or being about to take place. Additionally, the sovereign government must have proved unable or unwilling to prevent it. These criteria have been widely approved. However, critics of this doctrine have raised the problem whereby the intervening powers carry on their act in circumstances where the facts do not support the intervener's assertion of a humanitarian crisis.²⁰³ The US intervention in Iraq in 2003 exposed the weakness of indiscriminate intervention when proper evidence of the existence of circumstances to warrant intervention is missing, when no weapons of mass destruction were found or no links to Al-Qaeda were established.²⁰⁴ The skepticism created by the invasion of Iraq as to the threshold for intervention, has not been assuaged by the coming of R2P. The issue of proper instruments²⁰⁵ and what institution in each case should determine when a particular situation justifies intervention has not been settled by the Commission. The recent UNSC sanctioned intervention to protect civilians in Libya has further brought to light such worries.

Finally, the establishment of the R2P doctrine, however well-intentioned, could be hampered by the poor precedence of past interventions characterized by inconsistency, self interest motives and double standards of the intervening powers. Prior to the Libyan intervention, some legal scholars expressed their worry over the issue of lack of congruence of action with existing law, and shared norms. Such fears being inferred from the past US and UK led actions in Iraq in 2003 and the NATO actions in Kosovo in 1999 - all actions arguably violating existing rules.²⁰⁶ Thus the emphasis on the need for a sense of obligation amongst states and a commitment to act

²⁰² Spencer (2010) p. 520.

²⁰³ Thomas Franck (2010) p. 541

²⁰⁴ Thomas G. Weiss *The Responsibility to Protect in a Unipolar Era* (2004) Security Dialogue p. 149.

²⁰⁵ Thomas Franck (2010) p. 541.

²⁰⁶ Jutta and Stephen p. 77-78.

according to established law.²⁰⁷ This is the crucial gap which the new R2P regime needs to fill in order to be dissociated with the former regime for HI that was marred by inconsistency and unevenness. This is an issue I will echo a bit more in chapter VII.

The critics of the R2P totally castigate the idea of a new legally binding norm for intervention which would undermine the sovereignty principle. They worry that such would lead to the legitimization of a unilateral and unbalanced right to use force by powerful states against small and weak states.²⁰⁸ According to them, it is preferable to maintain the ambiguous nature of the present regime of HI and thus allow for a flexible ‘case by case’ evolution of a consensus on HI amongst the world community.²⁰⁹

5.3.2 Despite the challenges, a case may be made for R2P

5.3.2.1 R2P: Political commitment to act on shared moral beliefs

R2P is a cosmopolitan project rooted in the increasingly shared understanding that human rights are one and indivisible, and as such a violation in one place could be felt everywhere. This is in the spirit of the cosmopolitan ideal of equality of human rights, egalitarianism, and universality. The 1948 United Nations Declaration of Human Rights, recognized by many states and incorporated in their national constitutions, is an indication of such universality of human rights since at least the middle of the last century. Various categories of human rights have been incorporated in many conventions and ratified by states: the 1966 UN Convention on Civil and Political Rights, the 1948 Genocide Convention and so on. The international commitment to guarantee respect and protection of human rights and the elimination of genocidal crimes is not a novelty in international law. The R2P doctrine is merely an extension of such a commitment. The near global acceptance of UN authority with respect to interventions to protect people from gross violations of their rights, crimes against humanity and genocide, despite some reservations, emphasizes such universality and the need for a consistent, coherent and global approach towards such delicate problems of the international community.

²⁰⁷ Ibid., 78.

²⁰⁸ Zolo (2010) p. 564.

²⁰⁹ Ibid.,563.

R2P is equally rooted in and guided by the moral principles of engaging in the use of armed force as enshrined in the principles of JWT. As indicated above, the use of force under cosmopolitan law can only be permitted if such is meant to protect people from the brutality of their own states, and that such use of force should be guided by the moral principles of engaging in warfare. R2P clearly endorses this by institutionalizing JWT. This is a step beyond the traditional international law rules on the use of armed force which, though often reflecting such principles has not expressly referred to them. Having institutionalized JWT, the R2P regime is moving towards transforming the existing legal regime for intervention which has been criticized for its lack of coherence and for being based on achieving the interests of the strong nations against the weak. If applied according to its standards, it could transform HI into ‘angelic interventions’ to save the lives of innocent civilians at risk of their states’ failure or inability to protect them.

The just cause threshold of genocide, large scale killings, ethnic cleansing or other serious violation of international humanitarian and human rights law, according to the ICISS report and the report of the International Panel of Experts, will warrant the use of military force only as an exceptional and extraordinary measure.²¹⁰ The delicate nature of the resort to military force, its destructive capabilities, could be of more harm than good to the people it is meant to protect and this is the reason why the threshold for intervention is raised to a high bar. This coupled with the inviolability of the concept of sovereignty and the need for it to be upheld, have led policy makers to allow interventions only as an exceptional measure.

Equally, in the spirit of JWT, an intervention on a just cause should be sanctioned by a right authority. And according to the ICISS, that right authority should be based on a reformed UNSC rather than an alternative to it.²¹¹ From the above analysis it is clear that the issue of the UNSC authority is not the major problem, but rather that there is need for it to be reformed to meet with demands of contemporary global security and fairness. This could not only provide enhanced legitimacy, but equally a clearer and more consistent approach to all cases where forceful

²¹⁰ ICISS Report (2001) p. XII.

²¹¹ Ibid.

intervention is necessary. The problem remains how such a reform could be realistically achieved.

As rightly stated in the ICISS report, *'finding a consensus about intervention is not simply a matter of deciding who should authorize it and when it is legitimate to undertake. It is also a matter of figuring out how to do it so that decent objectives are not tarnished by inappropriate means'*.²¹² Enforcing decisions on intervention in the past have attracted a lot of criticisms due to the inappropriate means adopted. And this has caused even well intended objectives to be blurred by hasty decisions to intervene without any hope of success, and the lack of respect for proportionality often leads to additional and unnecessary suffering among the people. It can be said that the internal function and the enforcement of UNSC decisions have provided even more controversy. This has been attributed to the failure of UNSC consensus on intervening to protect people in situations where they should have intervened, and the lack of international support for the Council's decisions to intervene forcefully whenever it has managed to go that far.

In seeking to solve this problem, the R2P regime addresses which other considerations the UNSC may take into account besides threshold, prior to authorizing any interventions. The High Level Panel suggests that this could be in the form of agreed guidelines adopted and addressed by the Council in deciding whether or not to use force.²¹³ However, the point of adopting such guidelines, according to the panel, must not be to guarantee that the objectively best outcome will always prevail. These considerations include as mentioned above: proper intention, last resort, proportionality and the hope for success. It is hoped that if decisions of the UNSC to use military force are based on such considerations, they could ensure a higher degree of success, continuity and reliability.

I find the need to seek peaceful means to settle conflicts in the spirit of the R2P regime a worthwhile attempt to mitigate civilian casualties. This is exemplified by the 'last resort and proportionality' conditions in resorting to military force. All other peaceful means of settling the conflict such as negotiations, diplomacy, ceasefire agreements, sanctions, peace keeping missions, and other forms of international pressure must have been sought or deemed insufficient

²¹² Ibid., para 1.23.

²¹³ High Level Panel Report (2004) para 205.

before any resort to the use of military force may be undertaken. This as mentioned earlier is the spirit of JWT's moral presumption against war and its prudential and ethical imperatives. This need to explore all other peaceful means before resorting to armed force is nothing new in the international law on the use of armed force. The R2P concept in this sense reaffirms Article 41 of the UN Charter which prescribes the use of such measures not involving the use of force in maintaining or restoring international peace and security and further emphasizes in the opening statement of Article 42 the need to exhaust such measures before resorting to force.²¹⁴ However, if all such peaceful means are exhausted and do not achieve the intended results of stopping civilian repression and killing, then such use of force which only target combatants, and which is proportionate to the humanitarian outcomes, can be allowed. However it is also argued that forceful measures should come earlier than later in a humanitarian crisis. The pro and con arguments for last resort could be deeply divided, however, I believe that any intervention to protect civilians in a conflict should not wait until the last hour like was the case in Rwanda, but come in earlier in order to avert a regrettable loss of life.

5.3.2.2 Understanding sovereignty as responsibility

Sovereignty as seen above plays a vital role in balancing the overwhelming inequalities that characterize the existing system of states and ensures equality in international relations. However, overreliance on respecting the state sovereignty principle could risk allowing gross violations of human rights within states. The notion of sovereignty has indeed changed over time with the emergence of human rights and the growing complexities of international security. There has been an ongoing debate since the beginning of the 21st century on whether the protection of human rights should perhaps be regarded as having equal weight with the principles of sovereignty and nonintervention.²¹⁵ In this light, some scholars have interpreted the first three words of the preamble of the Charter, '*we the peoples*' to express the fact that the UN was not dedicated exclusively to the realization of interests and concerns of states, but that the activity of the state is also bound by its responsibility towards the people who inhabit it.²¹⁶ The R2P project

²¹⁴ UN Charter Article 41 and 42.

²¹⁵ Gareis (2005) p.18.

²¹⁶ Ibid.

has given more light and laid the ground work towards a possible change in the normative understanding of sovereignty in this direction.

There has been a continuous call in recent times for a change in the understanding of the notion of sovereignty from a right to control, to more of an obligation to respect the rights and dignity of the people within the state, while equally upholding the sovereignty of other states.²¹⁷ Kofi Annan in his 1999 address to the GA as cited above emphasized the changing role of states from merely being the masters, to being the servants of their people, and that individual sovereignty has been enhanced by the growing respect for human rights. By this the UNSG must have replicated some of the elements of Rousseau's social contract theory wherein he postulates a system whereby individuals unite in a society by mutual consent, agree to give up sovereignty to an authority in return for social order, and where the sovereign should be committed to the good of the individuals who constitute it.²¹⁸ Such a contractual relationship must equally be guided by mutual respect of each others' rights and obligations.

The early signals for a change in the understanding of the concept of sovereignty in the post cold war era were received after the Deng Commission's findings on the growing number of Internally Displaced Persons (IDPs) as a result of the upsurge of armed conflict within states.²¹⁹ Deng and his colleagues pioneered the acknowledgement of sovereignty as responsibility, when they ensured recognition of the primary responsibility for protecting IDPs lying with the host government.²²⁰ The US and UK foreign policies in the late 1990s and early 2000s have been guided by the idea of 'contingent sovereignty', the idea that sovereign rights are not absolute but dependent on the observance of fundamental state obligations,²²¹ though this idea been criticized for its selectivity and bias towards the third world. Equally, the AU's development in the 1990s of the right to intervention echoed this shift towards sovereignty as responsibility within the African context.

²¹⁷ ICISS (2001) para. 1.35.

²¹⁸ Jean Jacques Rousseau's Social Contract Theory, Internet Encyclopedia of Philosophy www.iep.utm.edu/soc-cont

²¹⁹ Alex J. Bellamy Global Politics and the Responsibility to Protect (2011) Routledge p. 10.

²²⁰ Ibid.

²²¹ Ibid., 12.

Annan's challenge to world leaders for achieving consensus was taken up by the Canadian government when it initiated the ICISS and the R2P report published thereafter. The report allots the primary responsibility to the state for protecting its people and when the state is unable or unwilling to protect its people from serious violations, non-intervention yields to the international responsibility to protect. However, this understanding of sovereignty as being conditional on responsibility has met with resistance. Only after protracted debates preceding the 2005 World Summit and after compromises from the various actors did the states arrive at a consensus. However, despite raising the threshold for intervention higher than originally proposed by the ICISS, amongst other things, the consensus favoured a more 'responsible' notion of sovereignty.²²² The adoption by a great majority of states of the R2P concept at the summit meant an acceptance to uphold sovereignty not only with its endowed rights to control but equally with the ensuing responsibilities towards the citizens of that state and the international community at large. This near universal adoption and acclamation of R2P equally marked an important milestone in its normative recognition.²²³

5.3.2.3 Progress towards legal recognition?

Though the R2P concept would seem to remain non-legally binding, there have been significant steps towards its legal recognition. Some scholars even argue that despite it not being agreed upon and ratified in treaty form, it has met with other significant criteria in international law.

First, as an emerging legal norm, R2P like most legal norms is rooted in a shared normative understanding. Generally, legal norms do not come out of nowhere, they are rooted in shared social understandings, and if accompanied by other criteria of legality such as generality, prohibiting or permitting certain conduct, non-retroactivity, clarity, and promulgation, it can be called law.²²⁴ Legal norms such as the emerging R2P arise when shared normative understandings evolve to meet the criteria of legality, as per Jutta and Stephen's 'interactional'

²²² Ibid., 24, see also UN General Assembly Resolution A 60/L.1 '2005 World Summit Outcome' (2005) paras 138-139.

²²³ Bellamy (2011) p. 24.

²²⁴ Jutta Brunnee and Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?* In Alex J. Bellamy, Sara E. Davis, Luke Glanville *The Responsibility to Protect and International Law* (2011) Martinus Nijhoff p. 73-4.

account of international law.²²⁵ This kind of shared understanding and need has been considered in the development of R2P as a legal norm. And one needs not overemphasize the fact that the need for a novel concept or approach to the protection of civilians has been highly and widely anticipated in this era of typically intrastate conflicts and the accompanying hostilities towards civilians. The general consensus on some key issues from the ICISS proposals at the 2005 summit was a significant milestone towards the development of R2P as a legal norm. As per Jutta and Stephen, though textual representation cannot be taken as reflective of a social norm, they can be helpful in the process.²²⁶ Thus the conclusions at the 2005 summit based on a compromise, the ensuing debates, deliberations and the recognition of a commitment to R2P in the UNGA have all served as an important platform for further development of the norm. The adoption and recognition by a majority of states at the 2009 UNGA debate of the R2P provisions in the 2005 World Summit outcome document could be a further attestation to the growing understanding and gradual recognition of the R2P norm.²²⁷ Equally significant is the UNSC's unanimous reaffirmation of the provisions in Articles 38 and 39 of the Summit document in its 2006 Resolution No. 1674.²²⁸

R2P has been associated with existing principles and practices of international law. First, the crimes of genocide, crimes against humanity etc, based on whose commission the principle is to be operational, are already crimes under international criminal law.²²⁹ Though hesitantly, the R2P doctrine has also been associated with the HI regime. Its supporters would not want to associate the new doctrine with the old regime of HI due to the intricacies attached to the latter; but, one cannot deny the proximity between the two concepts. As such one would not be wrong to opine that R2P has gained significant practice in international law under its predecessor doctrine, however inconsistent.

Also, as an independent legal regime, and though not fully promulgated into law, R2P is making significant strides towards international legal recognition. As well as R2P meets some of the above mentioned criteria for legality, it has equally acquired some of the elements of the formal

²²⁵ Brunnee and Toope (2011) p. 71.

²²⁶ *Ibid.*, 72.

²²⁷ Bellamy, Davis and Glanville (2011) p. 81.

²²⁸ UNSC Resolution 1674, para. 4.

²²⁹ Bellamy, Davis and Glanville (2011) p. 9.

requirements of international law according to Article 38(1) of the ICJ Statute. An *opinio juris* seems to be gaining ground and if it is accompanied by consistent state practice, this would constitute customary law under Article 38 (1) of the ICJ Statute. Such required state practice could be said to be establishing itself even though it is still in its early stages. The articulation of R2P in recent conflict situations in Darfur 2003, and in Kenya after the post election violence in 2008²³⁰, though not culminating to the application of forceful measures, signifies some degree of acknowledgement and acceptance of the norm. Moreover, the UNSC in its Resolution 1973 on Libya, for the first time authorized an intervention for the sole objective of protecting civilians.²³¹ The above examples are such that could constitute significant evidence of practice accepted as law, and thus a source of international law as per Article 38(1) (b). Moreover, the proliferation of writings by highly skilled international jurists could be classified as teachings of qualified publicists as per Article 38(1) (d) and thus constitute a subsidiary source of international law.

5.4 Conclusion

R2P, as many commentators agree, has not yet fully acquired the status of an international legal norm. This is partly because of its lack of some important qualifiers for legality such as clarity and the absence of legislation.²³² However, R2P certifies other important requirements for legality, and above all has made significant strides in the domain of international law making. Equally, one should not undermine the importance of R2P as a soft law instrument in the process of international law making. Referring to Thurlway on the importance of soft law, the less compelling nature of the R2P concept could considerably influence state practice that generates customary law. This is seen in the ability of states to gradually take measures that conform to international standards, even when they are unwilling to accept binding regulations on the same subject. All in all R2P is a rapidly emerging legal norm which so far is still regarded as a political commitment to act on shared moral beliefs, much of which is embedded in already existing international law’.

²³⁰ See report of the ICRtoP <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

²³¹ UNSC Resolution 1973, 14 March, 2011.

²³² Alex J. Bellamy and Ruben Reike, *The Responsibility to Protect and International Law*, in Alex J. Bellamy, Sara E. Davis, Luke Glanville *The Responsibility to Protect and International Law* (2011) Martinus Nijhoff p. 82.

CHAPTER VI: R2P IN ACTION: THE LIBYAN INTERVENTION

6.1 The Decision to Intervene

The UNSC decision to intervene in Libya is said to be the first time that the international community is setting in motion the new R2P concept for forceful intervention in another state.²³³ When taking the decision to intervene in Libya using its Chapter VII powers, the UNSC equally found in accordance with the R2P principle, namely that the Libyan government had failed to protect its citizens by itself committing gross violations of their rights.²³⁴ This phrasing and the actual move towards adopting a new approach to intervention for humanitarian reasons has led to the argument that the action in Libya was based on R2P. Thus, as espoused in this study, the extension of the UNSC powers under Article 39 to cover situations of purely humanitarian crisis where there is no actual threat to international peace and security could be one of the possible ways of practicing R2P. Based on this assumption, I will proceed to bring out the R2P elements in the Libyan action while still taking into consideration the *lex lata*. Though, this does not make R2P the current *lex lata*.

6.1.1 The Humanitarian Crisis

The crisis began on 15 February 2011 with anti government protests asking for an end to Colonel Gaddafi's 41 years in power.²³⁵ The early days in the Libyan uprising saw the government's resolve to brutally crack down on the protesters by dispatching the national army. Colonel Gaddafi in a speech on 22 February, called upon his supporters to attack the protesters and 'cleanse Libya house by house'.²³⁶ The bloody confrontations that ensued saw the anti-government protesters seize the important opposition stronghold of Benghazi in the east including other strategic towns such as Misrata, Ras Lanuf, Tobruk Zawlya, Bin Jawad, Brega and Ajdabiya on their way westwards.²³⁷ This progress by the protesters was brutally countered

²³³ Gregg Calstrom: *Responsibility to Protect or right to meddle?* Al Jazeera In Depth analysis March 24, 2011 <http://aljazeera.com/indepth/features/2011/03/2011324121253913547.html>

²³⁴ See preamble for UNSC resolution 1973.

²³⁵ International Coalition for Responsibility to Protect (ICRtoP): The crisis in Libya <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>

²³⁶ BBC News as it happened 22-02-11 <http://news.bbc.co.uk/2/hi/africa/9405325.stm>

²³⁷ BBC News as it happened 02-03-11 <http://www.bbc.co.uk/news/world-africa-12626496>

by government forces bent on quelling the uprising. This crackdown saw the death of hundreds of civilians. And according to early reports of the UNHCR a mass refugee crisis was underway on the borders with Tunisia and Egypt. In their update no. 1 on the humanitarian situation in Libya on 2 March 2011, the UNHCR reported a huge humanitarian crisis and that thousands of people were stranded in the borders between Libya and Tunisia and Egypt.²³⁸

The situation in Libya had already deteriorated into a humanitarian crisis when the UNSC in condemning the actions of the Libyan government against civilians and imposing sanctions on the regime in UNSC resolution 1970, also found that the Libyan government was committing gross and systemic violation of human rights.²³⁹ The turning point of the crisis came when the government succeeded in taking over some rebel captured cities and vowed to launch a more virulent crack down on the opposition protesters in the densely populated city of Benghazi. Several media outlets and sources from Libya reported of violent fighting in the eastern towns along the road to Benghazi. Government forces were reported to be pounding the city of Ajdabiya with tanks, artillery, and war planes, and according to Libyan state TV, the government was cleansing the city of armed gangs.²⁴⁰ This was the point in the crisis that saw the UNSC yielding to calls from the Libyan people, the Arab League, and a cross section of the international community to vote for Resolution 1973. Non-forceful measures yielded to measures involving the use of force.

6.1.2 International Condemnation

The international community was shocked by the development of events in Libya, and the unrepentant nature of Colonel Gaddafi and the Libyan government bent on using sophisticated military hardware to maintain power. The international condemnation of Gaddafi has been overwhelming. The UNSG, the US President, the UK prime minister, the French President, the EU, the Arab League, the Organisation of Islamic Conference (OIC), the African Union, the UNSC and a host of other governments and personalities termed the use of force by a

²³⁸ UNHCR Update no. 1 on the humanitarian situation in Libya, 2nd March 2011 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4d7788729&query=libya>

²³⁹ UNSC Resolution 1970.

²⁴⁰ BBC News March 2nd 2011 <http://www.bbc.co.uk/news/world-africa-12756874>

government against the anti-government protesters as outrageous and urged the government of Libya to meet with its responsibility to protect its people.

UNSG Ban Ki Moon emphasized that the attack on civilians constituted a gross violation of humanitarian and human rights law, and that those responsible must be held accountable.²⁴¹ On 22 February, in a press release on the situation in Libya, the UNSC called upon the Libyan government to meet its responsibility to protect its population.²⁴² The African Union's Peace and Security Council in its 265th meeting on 10 March 2011 decried the humanitarian situation and condemned the use of lethal weapons causing loss of civilian lives.²⁴³ In a meeting held in Abu Dhabi on 7 March 2011, the member states of the Gulf Cooperation Council demanded that the UNSC should take all necessary measures to protect civilians including the imposition of a no-fly zone.²⁴⁴ The Arab League on its part strongly condemned forceful suppression of anti-government protest by the Gaddafi regime and proceeded on 12 March to call on the Security Council to impose a no-fly zone.²⁴⁵ It is this international condemnation of the crisis in Libya by statesmen, leaders of international governmental and non-governmental organizations, regional organizations and the UN, coupled with the enormous threat it posed to the civilian population, that led to the UNSC's decision to take additional measures against the Gaddafi regime.

At the peak of the fighting in Libya, the UN High Commission for Refugees (UNHCR) declared that tens of thousands of people were made to flee their homes and were stranded at the Libya-Tunisia boarder. This caused a serious and large scale humanitarian crisis, as most of these people were waiting for several days to cross the border in search for safe havens and had to go without food, water and shelter.

²⁴¹ International Criminal Law Bureau February 24th 2011 <http://www.internationallawbureau.com/blog/?p=2499>

²⁴²UNSC Press Statement, SC10180, 22nd February 2011. <http://www.un.org/News/Press/docs/2011/sc10180.doc.htm>

²⁴³ A.U PSC/PR/Communique of 265th meeting

²⁴⁴Gulf States back Libya no-fly zone <http://www.heraldsun.com.au/news/breaking-news/gulf-states-back-libya-no-fly-zone/story-e6frf7jx-1226017478548>

²⁴⁵Arab League backs no-fly zone in Libya, BBC News Africa, March 12 2011.

6.1.3 Non-military measures

The international condemnation of the Libyan government for its atrocious activities led to certain early and non military measures being taken to deter the government from continuing to brutally suppress the movement for democratic change. First, the UN Human Rights Council suspended Libya from the Council and urged the international community to step in and stop the brutal crackdown on anti government protesters.²⁴⁶

The UNSC on 26 February 2011, by a unanimous vote, passed Resolution 1970 adopting certain non-forceful measures, while emphasizing the government's responsibility to protect its people.²⁴⁷ The resolution also referred the Libyan crisis to the International Criminal Court (ICC) for investigation into reports of crimes against humanity.²⁴⁸ The resolution equally imposed travel bans on 16 key figures in Libya and froze the assets of Colonel Gaddafi and his family members.²⁴⁹ Resolution 1970 moreover imposed an arms embargo on Libya and included a provision facilitating humanitarian assistance.²⁵⁰ In response to this UN Resolution, NATO decided to put in place measures to monitor the arms embargo. Other countries such as the US and UK have put in place unilateral measures including sanctions targeting key Libyan government officials, freezing their assets and severing of diplomatic relations with the Gaddafi government. Several former diplomats, government officials and top military officers defected from the Gaddafi administration to join the pro-democracy movement.

6.1.4 Resolution 1973

The UNSC on 17 March 2011, acting under the Chapter VII of the Charter, passed Resolution 1973. Ten of the fifteen UNSC permanent members voted in the affirmative, none voted against, and five abstentions from India, Germany, Brazil and more importantly China and Russia which hold veto power but nevertheless abstained to use it.²⁵¹ The resolution not only reinforced the

²⁴⁶ Libya suspended from HRC, Aljazeera News/English, 02 March 2011
<http://english.aljazeera.net/news/africa/2011/03/201131202637185959.html>

²⁴⁷ UNSC Press release 26 February 2011, SC/10187/Rev.1
<http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>

²⁴⁸ UNSC Resolution 1970 para 4

²⁴⁹ Ibid., para 15-17

²⁵⁰ Ibid., para 9

²⁵¹ <http://www.un.org/apps/news/story.asp?NewsID=37808&Cr=libya&Cr1=>

provisional measures adopted under Resolution 1970, but also established more coercive measures involving the use of armed force.²⁵² In paragraph one of the resolution, the council demands a ceasefire and an end to all violence and attacks against civilians.²⁵³ More importantly, the resolution imposes a no-fly zone over the airspace of Libya in order to help protect civilians from attacks.²⁵⁴ Even more crucial is paragraph four titled ‘protection of civilians’ which authorizes concerned member states and regional groupings to take all necessary measures to ensure the protection of civilians and civilian populated areas including Benghazi.²⁵⁵ However, the resolution prohibits any foreign occupation force of any form on any part of the Libyan territory.²⁵⁶ The resolution reinforces and strengthens the arms embargo passed in Resolution 1970, and calls for its enforcement by member states through inspection of suspect vessels in their territorial waters and on the high sea of any vessels and aircrafts bound for Libya.²⁵⁷ It equally reinforces the assets freeze on top Libyan officials close to and cooperating with the Gaddafi regime in committing violence against civilians.²⁵⁸

6.2 Evaluation

The intervention in Libya is said to be a milestone in the development of the R2P regime of interventionism. Although the R2P concept has been invoked in different conflict situations in the past decade, for example in the Darfur conflict and in Kenya during the 2008 post electoral violence, it is the first time the UNSC has applied the R2P concept for intervention in a state for the protection of civilians using Article 41 (peaceful measures), and Article 42 (use of force) of the Charter. This argument linking the Libyan intervention with the practice of R2P by extension of the UNSC powers under Chapter VII to cover same is presumably based on the recent developments around the R2P such as its wide recognition at the 2009 UNGA debates and its progressive normative development. Despite the prevailing disagreements over the R2P principle, as the first test, the Libyan case could serve as an assessment of the R2P regime in

²⁵² UNSC Resolution 1973.

²⁵³ *Ibid.*, para 1.

²⁵⁴ *Ibid.*, para 6.

²⁵⁵ *Ibid.*, para 4.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, para 13.

²⁵⁸ *Ibid.*, para 19.

general, whether it satisfactorily reflects certain requirements of legality and legitimacy, and whether there has been congruency of actions with established law/rules and shared norms. This could be important in determining the progress of the R2P principle as an international legal norm. A success in the enforcement of the intervention mandate in Resolution 1973 in accordance with R2P standards would limit criticism that could contradict its acceptance as relevant practice in the development as customary international law.

The civilian protection agenda of R2P was very prominent in the UNSC Resolution 1973 on the use of force in Libya. This is despite the use of the traditional Chapter VII grounds for the use of force as entry point and legal basis. Once again, there was an even more significant absence of any threat to international peace and security in the literary sense of the term. Although the resolution in its preamble stated that there was such a threat presumably based on the refugee crisis and the fragile situation at that time in the neighboring Egypt and Tunisia. Yet the existence and scale of such cross-border dimension is highly disputable. Whereas, the resolution reiterated the R2P principle, stating that the primary responsibility to protect the Libyan people was on the government and its failure to do so establishes international responsibility.²⁵⁹ The condemnation of the violence against pro-democracy protesters by many states, NGOs, IGOs, and ROs, all reiterating the need to protect civilians in Libya, was testimony of the growing shared social and normative understanding of R2P. The initiation and success of this vote could symbolize a gradual acceptance and development of R2P as a legal norm based on practice that could constitute customary international law.

The decision to intervene in Libya was legal under international law and justified under the R2P preconditions for intervention and the jus ad bellum principles of JWT. It could be said that the just cause threshold of actual or imminent occurrence of irreparable harm to humans such as large scale loss of life, genocide or ethnic cleansing or other serious violations of international humanitarian law was met. Colonel Gaddafi's forces were brutally crushing the protesters using heavy artillery and were heading for a bloodier campaign in the densely populated city of Benghazi; there was thus a likelihood of an imminent occurrence of irreparable harm. Many scholars and statesmen argued that inaction at this point could have led to a disaster that would

²⁵⁹ UN Resolution 1973.

once again leave a stain on the conscience of the international community like that of Rwanda's 1994 genocide.

The UNSC accorded the necessary prior authorization for any military intervention to go ahead using its authority under Article 39 of the Charter. Despite the contradictory use of this provision, this authorization did not only conform to the JWT requirement for right authority, but did also conform to the cosmopolitan ideal of 'one world, one government' with a right and just authority to approve any use of force in another state. The Council's vote was once more a testimony of the recognition of its continued role under the current *lex lata* and the move towards expanding same to situations where there is no actual threat to international peace and security but a threat to the lives of foreign citizens. Even the critics of the Council's decision seldom suggest its replacement, rather its possible reformation.

Equally, the decision to intervene forcefully in Libya came only after other peaceful measures did not stop the killing of civilians. Even after the heavy sanctions against key figures in the Gaddafi regime, the arms embargoes and other unilateral measures by states, the Gaddafi regime still attacked and threatened to clamp-down on protesters in the densely populated cities of its eastern region. One could argue at this point that the last resort requirement of both JWT and R2P was fulfilled though some critics question whether all other peaceful measures were exhausted.²⁶⁰ However, the potential damaging effect of any delays to act requires that any peaceful measures be quick and effective and that there is an immediate shift to forceful measures immediately peaceful measures fail. This last resort argument is likened to the provision for non-forceful measures according to Article 41 of the UN Charter.

Furthermore, the motives at the outset of the intervention were given, namely to protect civilians. This was in accordance with the R2P requirement for guarantees to support 'right motive' based on multilateral rather than on a single country basis of intervention, regional support and the support of the people concerned. All these conditions were satisfied prior to the decision to intervene in Libya. However, there have been worries about the manifestation of mixed motives of the intervening state. This was the case for example according to the declarations of China and

²⁶⁰ UNSC MEETING 10 MAY 2011 (Venezuela) <http://www.un.org/News/Press/docs//2011/sc10245.doc.htm>

other countries in the May 2011 UNSC meeting to debate the protection of civilians in armed conflicts.²⁶¹

The decision to intervene in Libya received widespread support from the international community at its inception, but did not go without criticism regarding its implementation. At the time of writing, there are already questions about the lack of proportionality, mixed motives, and the double standards involved in the action.²⁶² There have been rising concerns over civilian casualties resulting from airstrikes from coalition forces; there have equally been records of heavy bombardments of both military and non-military infrastructure, an act openly admitted by NATO.²⁶³ This act of NATO has even been condemned by some NATO members like Italy who called for a halt to the bombing raid, equally, the Arab League which initially called for the action expressed its reservations on the intensity of the bombing campaign.²⁶⁴ Moreover, the decision by France to supply the Libyan rebels with arms has raised a lot of controversy. This has raised questions over the ulterior motives of some NATO members and the apparent violation of resolution 1973 and the arms embargo in resolution 1970.²⁶⁵ This has led to worries about how proportionate the action to protect civilians really was. A potential disproportionate action risk tainting the continuing legitimacy of the action carried out to protect civilians. And this also risks tainting the entire credibility of the emerging R2P doctrine. The inability of the UNSC to take any steps to protect the civilians in Syria corroborates the latter assertion.

However, the question of overall proportionality when it comes to HI often requires balancing the overall good/evil the use of force will bring, and the evil of not resorting to force.²⁶⁶ There have often been divergent views when it comes to assessing the overall good and evil of an

²⁶¹ UNSC MEETING 10 MAY 2011 (China) <http://www.un.org/News/Press/docs//2011/sc10245.doc.htm>

²⁶² UNSC MEETING 10 MAY 2011 (Russia) <http://www.un.org/News/Press/docs//2011/sc10245.doc.htm>

²⁶³The New York Times, NATO admits missile hit civilian home in Tripoli, June 19, 2011 http://www.nytimes.com/2011/06/20/world/middleeast/20libya.html?_r=1

²⁶⁴ UK Guardian: UK and France dismiss Italy's call for pause in NATO bombing of Libya June 22, 2011 <http://www.guardian.co.uk/world/2011/jun/22/libya-nato-bombing-uk-france-italy>

²⁶⁵ UK Guardian: NATO reviews Libya campaign after France admits arming rebels June 29, 2011 <http://www.guardian.co.uk/world/2011/jun/29/nato-review-libya-france-arming-rebels> See also EJIL: Talk <http://www.ejiltalk.org/can-gaddafi-invoke-self-defence-against-nato-have-nato-leaders-committed-the-crime-of-aggression/>

²⁶⁶ Fixdal and Smith (1998) p. 304.

operation.²⁶⁷ Like in the case of Libya, it is often difficult to get a true picture of the events on the ground in an ongoing operation in order to measure the overall good and evil. This coupled with the fact that the cause for intervention or the evil to be avoided is not necessarily based on calculation but sometimes on speculation, makes the issue of proportionality more complex. Nevertheless, the destructive capacity of armed force and the possibility of harm inflicted upon civilians seemingly call for more caution and a stricter application of the rule of proportionality.

There have also been controversies over the mixed messages sent by some members of the coalition forces about the need for Colonel Gaddafi to leave office, and other allegations of self interest motives of the individual powers involved in the enforcement of resolution 1973. This is contrary to the R2P principle against self interest motives and the overthrow of regimes. The decision to intervene in Libya and not in Syria, Yemen and Bahrain which saw similar gross violations, abuses and threats to civilians, has raised serious questions about double standards and how it could affect future decision making. These worries have been expressed by some veto powers of the UNSC like China and other major states and ROs.²⁶⁸ And has even culminated to Russia and China vetoing a UNSC resolution that threatened sanctions against the Syrian regime²⁶⁹

At the UNSC meeting on 10 May 2011 to discuss the protection of civilians in armed conflicts, the members of the Council, several other representatives of UN member states, and representatives of international governmental institutions expressed their concerns over the plight of civilians in armed conflicts.²⁷⁰ While commending the UNSC for taking action in time to stop the massacre of civilians, most participants at the meeting lamented the continuous killing of civilians and cautioned against lack of proportionality, mixed motives or hidden agenda which compromise the noble civilian protection objectives, the double standards, the need for a consistent and comprehensive approach to civilian protection and above all, the respect for fundamental principles of international law. The UN Under-Secretary-General for Humanitarian Affairs Ms Amos specifically cautioned against the potential undermining of the civilian

²⁶⁷ Ibid.

²⁶⁸ UNSC MEETING 10 MAY 2011 (China, Cuba) <http://www.un.org/News/Press/docs//2011/sc10245.doc.htm>

²⁶⁹ UK Guardian: Russia and China veto UN Resolution against the Syrian regime October 5, 2011 <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution?INTCMP=SRCH>

²⁷⁰ Ibid UNSC MEETING 10 MAY 2011 <http://www.un.org/News/Press/docs//2011/sc10245.doc.htm>

protection agenda in Libya, and reiterated the important role of the action in providing a framework for action in future crisis.²⁷¹

6.3 Conclusion

From the above, one can conclude that the Libyan action is a major case where R2P has been put to test. It serves as a further platform for states to test the practice and boundaries of the R2P doctrine. The condemnation of the Libyan government for failing to protect its people by many states and some ROs, and the eventual implementation of non-forceful and forceful measures, proved once again the degree of international recognition of the principle. However, the R2P principle did not serve as a legal basis for intervention; rather, the UNSC preferred once again the more established and legally binding proviso of threat to international peace and security despite the apparent lack of any such threats. This is an apparent move to extend the threshold under Article 39 of the Charter to cover not only situations where there is breach of international peace and security but equally where there are gross violations of rights of foreign citizens. Nevertheless, this action proved the ability of soft law to influence states action that conform to international standards and one that could lead to customary law.

One can equally draw from the above that some of the major obstacles to the noble principle of the protection of civilians include the failure to match action with established laws and shared norms, and the violation or misuse of an intervention mandate which might affect future decision making. As observed above, the ICISS report holds that finding a consensus on the intervention regime would require more than determining who authorizes an intervention and when. That enforcement action must equally be based on clear and strict rules that are objective and proportionate. Equally it is important for the purpose of legitimacy and continuity, that each mandate for intervention is based on clear and specific terms which are respected. According to Jutta and Stephen, a mere UNSC vote will not be enough, and the R2P will not emerge as a

²⁷¹ UNSC Meeting 10th May 2011, Briefing by Ms Valerie Amos.

global legal norm unless there emerges a consistent practice that adheres to requirements of legality and upholds shared norms.²⁷²

The failure to act in Syria is perhaps the best example of the effects of such failure to match action with established norms, and the abuse or violation of intervention mandates. The crisis in Syria which is still ongoing at the time of writing had resulted in the killing of more than a thousand people and other gross human right violations.²⁷³ Yet the UNSC has been reluctant to react to the situation. It took a long struggle and hesitation for the UNSC to issue a mere statement condemning the massive killing of civilians and other acts of violations of human rights. And yet hundreds of civilian lives continue to be in danger every day as the protesters remain defiant and the government is bent on brutally cracking down on the protests. This delay to take action in Syria to protect civilians may be attributed partly to the reluctance of some members of the UNSC to give their accord to another military mandate that might end up being misinterpreted and overstretched according to the priorities of the intervening powers. This is evidenced by the vetoes of Russia and China of any serious UNSC resolutions on Syria, arguing that they are against any resolutions in Syria that could herald a Libya-style intervention.²⁷⁴

²⁷² Brunnee and Toope (2011) p. 79.

²⁷³ Human rights watch, June 1 2011 <http://www.hrw.org/sites/default/files/reports/syria0611webwcover.pdf>

²⁷⁴ UK Guardian October 5, 2011.

CHAPTER VII: CONCLUSION AND RECOMMENDATIONS

7.1 Summary

I have been arguing for the need of a new legal regime for intervention for humanitarian purposes. In doing this, I have attempted to respond to two overarching questions namely; whether the current legal construction of HI is still tenable, and if not whether a new legal structure under R2P is the way ahead. From the above questions emerged other sub-questions which are: (1) Is HI in conformity with international law as traditionally understood? (2) Does the R2P provide sufficient doctrinal remedies for the controversies surrounding HI? (3) What is the normative status of the R2P principle? (4) Has there emerged an effective practice of R2P? My working hypothesis has been that the current regime humanitarian forceful intervention has failed to provide sufficient answers to the question of intervention in another state to prevent humanitarian tragedies and protect civilians. And that a new regime is necessary that would meet the changing understandings of international relations, international human rights and international law.

7.2 Findings

In approaching the first main question as to whether the current construction of HI is still tenable, I posed a further sub-question to wit: Is HI in conformity with international law as traditionally understood? In other words, does it conform to the requirements of treaty law or has it emerged from an effective practice that could qualify as customary international law? The response to these questions raised first, the dilemma of sovereignty and non-intervention (peremptory norms of international law) vis a vis the need to intervene for humanitarian reasons. I found that the traditional sovereignty and non intervention principles have been a strong force guiding the relations between states. However, this controversial section of international law has witnessed a growing compromise between the respect for sovereignty and non-intervention with the need to intervene in exceptional circumstances. This could be a result of the consequences of a strict adherence to the principles of sovereignty and non-intervention. Another worrying issue remained the fact that HI is not explicitly provided for as one of the exceptions from UN Charter Article 2(4). This has been one of the main problems with the need to intervene for humanitarian purposes and has been the cause of most controversies surrounding the principle of HI. However,

the growing importance of human rights, especially the need to protect people from gross violations of their rights, have however seen the UN through the UNSC in some rare cases invoke its powers under Chapter VII of the Charter to intervene for humanitarian purposes. Other states and ROs have equally invoked the doctrine to intervene in some places where the UN was delaying to act or failed to act at all. These actions have been seen as not in conformity with the UN Charter and have been subject to a lot of criticisms. And the principle of HI itself has hardly gained universal acceptance or recognition. It is on this basis - the lack of HI in the Charter, the inconsistencies in the UN actions, and the lack of sufficient *opinio juris* and state practice - that there has failed to emerge a consistent and customary practice of HI. Thus, the doctrine of HI has not lived up to expectations, hence the move to reconceptualize and adopt a new approach under the R2P principle.

In responding to the second overarching question, namely whether the R2P principle is the panacea, other sub-questions (two to four above) arose namely, whether the R2P concept provides sufficient doctrinal remedies for the controversies surrounding HI, what the normative status of the R2P principle is and finally whether an effective practice of R2P has emerged. I answered the second overarching question by finding that, R2P is the way forward for intervention for humanitarian purposes despite its current legal status and the challenges to its application. This conclusion follows from the findings namely that, R2P is rooted in ideal moral and ethical principles of JWT and cosmopolitanism. R2P has been widely accepted as a shared social norm and is fast emerging as an international legal norm, though for the moment still remains non-binding. However, that despite the widespread recognition of the principle, there has not emerged an effective and consistent practice. Even the recent practice of R2P in Libya has raised serious worries regarding its credibility and its ability to set precedence for customary international law. There has already been some implications on subsequent policy and practice on intervention. The Syrian case and the inaction of the UNSC in the face of gross violations against civilians is evidence of this gap. The reluctance of the UNSC members to act and condemn the violence is seemingly linked with the apparent failure of the enforcing states in Libya to act fully in accordance with the mandate and shared normative standards (the congruency test).

Summing up, though the R2P doctrine has gained widespread support and is developing rapidly as a legal norm, like its predecessor regime of HI, it has yet to gain a universal acceptance and legal recognition. However, its current status as soft law and its ability to mobilize state practice and provide *opinio juris* could signal the direction of future legal development. There is no doubt that the foundations of the R2P principle are solid but it requires continuous dialogue to achieve the necessary compromises. Also, there is need for its precise normative character to be clearly defined and for the criteria for its legality to be met and applied to the letter. If the cosmopolitan ideals of universalism and egalitarianism leading to respect for human rights are held to be true, the need to prevent violation of rights anywhere would be a moral obligation. And when we decide to act forcefully based on the acknowledgement of our cosmopolitan nature, it would be based on a just cause and with restraint. Interestingly enough, the R2P project provides a bridge between the radical and ambitious just war and cosmopolitan ideals, and the realities of our current international community of sovereign states. This is as the R2P adopts position of contemporary just war scholars by for example developing new threshold for what constitutes just cause to fit the realities of contemporary conflicts. Also, the R2P acknowledges the possibility of a universal protection of human rights in the current system of community of sovereign states rather than the ‘one world one government’ approach of some radical cosmopolitans.

7.3 Recommendations

Therefore, if R2P is the way forward for a new legal regime for humanitarian forceful intervention, it goes without saying that there is need for more to be done for it to become a legally binding norm of international law. Though the ICISS report and the 2004 High Level Panel Report provide guidelines on how a new R2P concept should be operationalised, there is still much to be done to clearly define what is and what is not part of R2P. Also, in the view of Bruneau and Toope’s interactional account of international law; on how international law is created and maintained through an interaction of three elements, namely our shared understanding of social norms, the specific criteria for legality and application, one can say that the R2P concept has not so far met with some elements of the specific criteria of legality such as

clarity and promulgation.²⁷⁵ Even its application in the Libyan conflict, which I consider the major first test of the principle, did not emerge a complete success due to the challenges with the implementation of the UNSC mandate on forceful intervention. Thus, the R2P concept has not acquired a well defined character, is still non-binding and without a consistent practice. This leaves open the debate for suggestions or recommendations.

First, I believe that if R2P is well operationalized, this could significantly enhance its legal character. Operationalization here would mean making the concept clearer and distinguish what is and what is not a part of it. For example it is still unclear whether R2P should apply as a component of the UNSC mandate under Article 39 of the Charter, or if it should be considered as not being covered by the prohibition in Article 2 (4), or as a fourth exception to the latter article. However, the wide recognition of a UNSC role by many states and scholars with regards to authorizing humanitarian forceful interventions under R2P seems to suggest the relevance of the UNSC authorization in no matter what approach is adopted for R2P. I will therefore advocate for continuous dialogue and debate e.g. in the UNGA in a bid to properly define and determine the precise character of R2P and encourage state practice that could test its boundaries. By so doing it is possible to go a long way to establishing the necessary *opinio juris* and state practice that constitutes customary international law. However, it is worth emphasizing that any such dialogue or debate on collective action under R2P should take into consideration the progressive development of relevant principles of international law.

Also, to further enhance the legality of R2P besides the three elements of Brune and Toope's interactional account of international law, there has been a widely held view that certain institutional reforms are necessary within the UNSC to further enhance predictability and wider representation in this body widely regarded as ideal to authorize humanitarian forceful intervention. Any such reforms should be geared towards increasing the credibility and effectiveness of the Council. One could also seek to motivate other institutions to work more effectively with the UNSC in assisting in this critical task of civilian protection, for example the collaboration with international human rights or humanitarian organizations to determine when such crimes have reached the bar that would warrant intervention under the R2P doctrine. Also,

²⁷⁵ Brune and Toope (2011) p. 61

other measures could be taken to ensure accountability of member states charged with implementing UNSC mandates for forceful humanitarian interventions. Such may include, implementing sanctions or actions against states for overstepping intervention mandates. Moreover, future UNSC mandates should have clearer terms and be as void as possible of ambiguities. However I will only consider the proposed UNSC reform in more detail below.

The debate on the UN Charter and UNSC reform has been recurrent in recent times in international fora, especially at the UNGA. It is often considered that the present composition of the UNSC is anachronistic. It is considered unrepresentative of the growing membership and changing dynamics in world politics,²⁷⁶ and its functioning has been flawed by the veto politics. This has partly been the reason behind the inconsistencies of the UNSC in the face of massive human rights violations and crimes against humanity. There has been a persistent outcry from other major powers and developing countries for the need for more representation on the Council. This is seen as a reasonable request that could enhance the functioning and legitimacy of the UNSC and could be decisive for the new R2P doctrine. To this end, there are plausible suggestions tabled by the high-level panel report which are worth considering by the UNGA in order to fill this gap and meet with the expectations and the changing global dynamics. The first suggestion proposes six new permanent seats with no veto, and three new two-year non-permanent seats, divided amongst the major regional areas as stated in the report. The second proposal provides for no new permanent seats but creates a new category of eight four-year renewable term seats and one new two-year non-permanent and non-renewable seat, divided amongst the major regional areas as stated in the report.²⁷⁷ Both proposals are crucial for meeting the growing need for a broader representation on the UNSC. However, I believe the second proposal may serve more in terms of continuity and review of effectiveness of the Council by avoiding the creation of more permanent members who might at a given time be found unsuited for the role. It can possibly also avoid the trouble of constantly reviewing permanent membership according to the changing demands of the respective regional areas or new demands from other states. Equally important is that both proposals seem to answer the question of expansion of the veto with a categorical no.

²⁷⁶ Thomas G. Weiss, *The Illusion of UN Security Council Reform* (2003) Washington Quarterly p. 148.

²⁷⁷ See Panel of Experts Report (2004) Paras 252 and 253.

However, the question still remains as to what proper criteria should be followed for the selection of the new permanent or more non-permanent representatives. The panel of experts' report mentions in paragraph 249 four items to be taking into consideration: a more representative and broader membership including especially developing countries, new members should not impair the effectiveness of the Council, the new set-up should increase the democratic and accountable nature of the Council, and above all the requirement in line with Article 23 of the Charter, to involve in decision making those states who contribute most to the UN, militarily, financially and diplomatically.²⁷⁸ The above requirements seem reasonable to me and it is important that the overall purpose of broader representation and increased effectiveness be ultimately prioritized. This process of reform may seem farfetched or unrealistic, but, it is important to have in mind that these are very important decisions hinging on the very important foundational roles of the UN, the infrastructure of world peace and security, so it would require caution and due diligence.

Also, the issue of veto remains complicated. The veto wielding UNSC permanent members have in the past used or threatened to use their veto powers to either delay or bar actions irrespective of the human cost and international condemnation. Amongst the scenarios often cited are the violent and largely failed attempts to stem armed conflicts in Iraq and Kosovo, and the less robust action or inaction in stopping genocide and crimes against humanity in Rwanda and Sudan. It is worrying that this anachronistic and undemocratic embodiment of the UNSC could be a major obstacle for the new commitment to avoid the repetition of scenarios such as that of Rwanda in 1994. However, with the practical difficulties involved such as the powers of the veto powers under Articles 108 and 109 (2), it could be very difficult to change this status quo. Thus, avoiding a further expansion of the veto powers as suggested by the panel of experts will be the right thing to do. However, there is another plausible way out of the veto problem or any UNSC failure to act in the event of genocide or other crimes against humanity, not involving any unilateral or bilateral forceful interventions of states. This could be as proposed by the panel of experts, to recourse to the entire community of states through the UNGA for a vote in the form

²⁷⁸ See Panel of Experts Report, para 249, see also Article 23 of UN Charter.

of the 1950 ‘Uniting for Peace Resolution’.²⁷⁹ This is an approach that could fit well in the category of a possible fourth exception to the prohibition on use of force. That is where the UNSC fails to take action.

²⁷⁹ The UNGA in 1950 passed Resolution 377 A (V) November 3, 1950 titled ‘Uniting for Peace’. (UNGA Resolution 1950 Para 1). This resolution was a result of the concern by the UNGA over the lack of unanimity amongst the permanent members of the UNSC or their misuse of veto leading to failure to act according to its powers provided by the UN Charter and in the event of threat to the peace, breach of the peace or acts of aggression. The UNGA resolved to act immediately with view of making recommendations to members with respect to collective security measures which include use of armed force if necessary. The UNGA resolution equally adopted the ‘the emergency special session’ wherein the UNGA will be convened for an emergency session if not in session at the time. The above resolution came about as a result of the strategy of the former USSR to block any determination by the UNSC on measures to be taken to protect the former Republic of Korea from aggression from North Korea during the 1950 conflict. The UNSC had earlier adopted Resolution 83 (1950), recommending member states to take measures to assist the Republic of Korea in repelling aggressions from North Korea. This resolution was only possible as a result of former USSR’s boycott of UNSC sessions at the time. It was their later decision to return to the UNSC sessions to block further votes by the Council condemning the continued aggression of North Korea that led to the adoption of the Uniting for Peace Resolution. The resolution has been used about ten times though seldom for use of force, but to challenge the use of veto, for example during the Suez canal crisis in 1956, to overturn the veto of France and Britain when the UNSC called for their withdrawal. The ‘Uniting for Peace’ session passed a withdrawal resolution. See Christine Gray (2008) p. 259-260, and Koerner (2003) (In the debate on UNSC veto where he argues that UNSC vetoes can be bypassed by ‘Uniting for Peace’ Resolution). Despite the lack of consistent actions on the Uniting for Peace Resolution, it is still possible to revitalize it especially taking into consideration the recent developments of the panel of experts on the need of the UNGA to take action in the event of a failure to act by the UNSC. However, the current *lex lata* restricts the UNGA to merely making recommendations, and referring questions which require action to the UNSC. See UN Charter Article 11 (2) and Certain Expenses of the United Nations (Art. 17 (2) of the Charter) Advisory Opinion, ICJ Reports 1962, p. 164

REFERENCES

BOOKS AND ARTICLES

Ago, Roberto, 'Positive International Law' (51 AJIL, 1957) 691

Alemu, Girmachew Aneme, 'The Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes' (Faculty of Law University of Oslo 2008).

Archibugi, D. 'Architecture of Cosmopolitan Democracy' in Garrett W. Brown and David Held (eds.), *The Cosmopolitan Reader* (Polity Press 2010) pp. 312-333.

Arend, Anthony Clark, 'United Nations, Regional Organisations and Military Operations: The Past and the Present' (Duke Journal of Comparative and International Law, 1996) Vol.7.

Ayoob, M 'Humanitarian Intervention and State Sovereignty' (International Journal for Human Rights, 2002) Vol. 6

Beitz, C. R. 'Social and Cosmopolitan Liberalism' (International Affairs, 1999) Vol. 75, No. 3.

Bellamy, A. J. 'Global Politics and the Responsibility to Protect' (Routledge 2011).

Bellamy, A. J. and S. E. Davis, Luke Glanville, 'The Responsibility to Protect and International Law' (Martinus Nijhoff, 2011).

Bellamy A. J. and Ruben Reike, 'The Responsibility to Protect and International Law' in Alex J. Bellamy, Sara E. Davis, Luke Glanville (eds.), *The Responsibility to Protect and International Law* (Martinus Nijhoff, 2011) pp 81-100.

Bohman, J. and Lutz Bachman, M. 'Introduction' in Bohman and Lutz Bachman (eds.) *Perpetual Peace* (MIT Press 1997) pp.1-22.

Boyle, A.E. 'Some Reflections on the Relationship between Treaties and Soft Law' ICLQ (1999)

Brendan I. Koerner, 'Can you bypass a U.N. Security Council Veto?' Slate.com. March 12, 2003

Brownlie Ian, 'Principles of Public International Law', 7th ed. Oxford University Press (2008)

Brunnee J and S. J. Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' in Alex J. Bellamy, Sara E. Davis and Luke Glanville (eds.), *The Responsibility to Protect and International Law* (Martinus Nijhoff Publishers, 2011) pp 59-80

Buchanan, A. and Keohane, R. O., 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal' (Ethics and International Affairs, 2004) Vol. 18, No. 1

Carty, Anthony 'The Decay of International Law?' Manchester University Press (1989)

Carr, H. E., 'The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations' (2nd edition Harper and Row, New York 1946)

Cassese Antonio, 'International Law' (2nd edition Oxford University Press 2005)

Charvet, J., 'The Possibility of a Cosmopolitan Order Based on the Idea of Universal Human Rights' (Millennium Journal of International Studies, 1998) Vol. 27 No. 3

David Malone, 'The UN Security Council: From Cold War to the 21st Century' (Lynne Rienner Publishers 2004)

Dower, N. 'World Ethics' (Second Edition, Edinburgh University Press 2007)

Erskine, Toni, 'Embedded Cosmopolitanism and the Case of War: Restraint, Discrimination and Overlapping Communities' (Global Society, 2000) Vol. 14, No. 4 pp 569-590

Fixdal, M. and Smith, D. 'Humanitarian Intervention and Just War' (Mershon International Law Studies Review 1998) 42: 283-312

Frank Thomas, 'Humanitarian Intervention' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press 2010)

Frederking, Brian 'The United States and the Security Council: Collective Security Since the Cold War' (Routledge Publishers 2007)

Gareis, Sven Bernhard and Johannes Varwick, 'The United Nations: An Introduction' (Pelgrave Macmillan, London 2005)

Garrett W. Brown, 'Moving from Cosmopolitan Legal Theory to Legal Practice: Models of Cosmopolitan Law' in Garrett W. Brown and David Held (eds.), *The Cosmopolitan Reader* (Polity Press, 2010) pp. 248-266

Garrett Wallace Brown and David Held, 'The Cosmopolitan Reader' (Polity Press, 2010)

Gray Christine 'The Use of Force and International Legal Order' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2006) pp. 589-618

Gray Christine 'International Law and the Use of Force' (Oxford University, Press 2008)

Held, D. 'Cosmopolitanism: Globalization tamed?' (Review of International Studies, 2003) Vol. 29 pp. 465-480

Held, D. 'Principles of Cosmopolitan Order' in Garrett W. Brown and David Held (eds.), *The Cosmopolitan Reader* (Polity Press, 2010)

Honneth, A. 'Is Universalism a Moral Trap? The Presuppositions and Limits of a Politics of Human Rights' in Bohman and Lutz-Bachman (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan ideal* (MIT Press, 1997) pp 155-178

Ian, Atack 'The Ethics of Peace and War' (Edinburgh University Press 2005)

Johnson, James Turner, 'Morality and Contemporary Warfare' (New Haven and London: Yale University Press 1999)

Kioko, Ben, 'The Right of Intervention Under the African Union's Constitutive Act: From non-interference to non-intervention' (International Review of the Red Cross 2003) Vol. No. 85 No. 852 pp. 807-825

Mayall, James, 'Introduction' in Mats Berdal and Spyros Economides (eds.), *United Nations Interventionism 1991-2004* (Cambridge 2007) pp. 1-32

Nassbaum, M. C. 'Kant and Cosmopolitanism' in Garrett Wallace Brown and David Held (eds.), *The Cosmopolitan Reader* (Polity Press 2010)

Oppenheim, L. 'The Science of International Law: Its Tasks and Methods' (2 AJIL 1908) 313.

Roberts, Adam 'The Use of Force' in *The UN Security Council* by David M. Malone Lynne Rienner Publishers London (2004) pp. 133-152

Shaw, Malcolm N. 'International Law' (Cambridge University Press 2008)

Simma, Bruno, and Paulus, Andreas L. 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (93 AJIL 1999) 302.

Spencer Zifack , 'The Responsibility to Protect' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press 2010)

Spyros Economides and Paul Taylor, 'Former Yugoslavia' in Mats Berdal and Spyros Economides (eds.), *United Nations Interventionism 1991-2004* (Cambridge 2007) pp.65-107

Thirlway, Hugh 'The Sources of International Law' in Malcolm D. Evans (ed.), *International Law* (Oxford University Press 2010)

Thurer, Daniel, 'Soft Law' Max Planck Encyclopedia of International Law
<http://www.mpepil.com/>

Walzer, M. 'Just and Unjust Wars' (Fourth Edition, Basic Books New York 2006)

Weiss, Thomas G. 'The illusion of UN Security Council Reform' (Washington Quarterly 2003)

Weiss, Thomas G. 'The Responsibility to Protect in a Unipolar Era' (Security Dialogue 2004)

Zolo, Danilo, 'Humanitarian Militarism' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press 2010)

MAIN TREATY SOURCES

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980)

Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001)

UNITED NATIONS SOURCES

UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

http://www.un.org/Docs/sc/unscl_resolutions.html

UNSC RESOLUTION 1564 (18th September 2004) on the Report of the Secretary General on the Sudan

UNSC RESOLUTION 688 (5 April 1991) on Iraq

UNSC RESOLUTION 770 (13 August 1992) on Bosnia and Herzegovina

UNSC RESOLUTION 794 (3 December 1992) on Somali

UNSC RESOLUTION 795 (1992) on Former Yugoslavia

UNSC RESOLUTION 929 (22 June 1994) on Rwanda

UNSC RESOLUTION 1674 (28 April 2006) on the protection of civilians in armed conflicts

UNSC RESOLUTION 1706 (31 August 2006) on the Sudan

UNSC RESOLUTION 1970 (26 February 2011) on peace and security in Africa
http://www.un.org/Docs/sc/unsc_resolutions11.htm

UNSC RESOLUTION 1973 (17 March 2011) on the situation in Libya
http://www.un.org/Docs/sc/unsc_resolutions11.htm

UNSC PRESS RELEASE AND STATEMENTS

UNSC Press Statement on Libya (22 February 2011)
<http://www.un.org/News/Press/docs/2011/sc10180.doc.htm>

UNSC Press release on the crisis in Libya (26 February 2011)
<http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>

UNSC Press Release on the crisis in Libya (17 March 2011)
<http://www.un.org/apps/news/story.asp?NewsID=37808&Cr=libya&Cr1>

UNSC 6531st Meeting on the protection of civilians in armed conflicts (10 May 2011)
<http://www.un.org/News/Press/docs/2011/sc10245.doc.htm>

UNGA REPORTS, RESOLUTIONS AND RELEASES

Annual Report of UNSG (20 September 1999)
http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID=28

International Commission of Inquiry on Darfur: Report to the Secretary-General
http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

Millennium Report of the UNSG (2000) <http://www.un.org/millennium/sg/report/full.htm>

Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change: 'A more secure world our shared responsibility' (2004) <http://www.un.org/secureworld/report2.pdf>

Report of the UNSG, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf?OpenElement>

UNGA RESOLUTION 377, 'Uniting for Peace' <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/059/75/IMG/NR005975.pdf?OpenElement>

UNGA RESOLUTION 60/1 (24th October 2005), World Summit Outcome UN Doc A/60L.1
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>

ICJ JUDGMENTS

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits Judgment (ICJ Reports 1986) www.icj.cij.org

Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999 (ICJ Reports 1999) www.icj.cij.org

ICJ Judgment between Bosnia and Herzegovina v. Serbia and Montenegro (ICJ Reports 2007)
www.icj.cij.org

Certain Expenses Case of the United Nations (Article 17 (2) of the Charter) Advisory Opinion, (ICJ Reports 1962) www.icj.cij.org

SOURCES FROM OTHER IGOS AND NGOS

The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (2001) <http://www.iciss.ca/pdf/Commission-Report.pdf>

Report of the International Coalition for Responsibility to Protect (ICRtoP), 'The crisis in Libya' <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>

Report of the International Coalition for Responsibility to Protect (ICRtoP), 'Kenya' <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

UNHCR, 'Update no. 1 on the humanitarian situation in Libya' (2 March 2011)
<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4d7788729&query=libya>

African Union Peace and Security Council, Communiqué of the 265th meeting

The African Union Executive Council 7th Extraordinary Session (8th March 2005), 'The Ezulwini Consensus', Ext/EX.CL/2 (VII)

EJIL: Talk (6 July 2011) <http://www.ejiltalk.org/can-gaddafi-invoke-self-defence-against-nato-have-nato-leaders-committed-the-crime-of-aggression/>

International Criminal Law Bureau, 'UN SG Ban Ki Moon condemns Gaddafi's actions against protesters' (February 24th 2011) <http://www.internationallawbureau.com/blog/?p=2499>

MEDIA SOURCES

The New York Times, December 10, 2009 'Obama's Nobel Remarks'
<http://www.nytimes.com/2009/12/11/world/europe/11prexy.text.html?pagewanted=all>

BBC News as it happened 22-02-11 <http://news.bbc.co.uk/2/hi/africa/9405325.stm> last accessed 20.08.2011

BBC News as it happened 02-03-11 <http://www.bbc.co.uk/news/world-africa-12626496> last accessed 20.08.2011

BBC News 02-03-2011 'Libya revolt: Gaddafi targets Ajdabiya and Misrata'
<http://www.bbc.co.uk/news/world-africa-12756874> lastly accessed 20.08.2011

BBC News Africa, 03-12-2011, 'Arab League backs no-fly zone'
<http://www.bbc.co.uk/news/world-africa-12723554> last accessed 20.08.2011

Aljazeera News/English 02-03-2011, 'Libya suspended from UNHRC'
<http://english.aljazeera.net/news/africa/2011/03/201131202637185959.html> last accessed
22.08.2011

The New York Times 19-06-2011, 'NATO admits missile hit civilian home in Tripoli'
http://www.nytimes.com/2011/06/20/world/middleeast/20libya.html?_r=3 last accessed
22.08.2011

UK Guardian 22-06-2011, 'UK and France dismiss Italy's call for pause in NATO bombing of
Libya' <http://www.guardian.co.uk/world/2011/jun/22/libya-nato-bombing-uk-france-italy> last
accessed 22.08.2011

UK Guardian 29-06-2011, 'NATO reviews Libya bombing campaign after France admits arming
rebels' <http://www.guardian.co.uk/world/2011/jun/29/nato-review-libya-france-arming-rebels>
last accessed 22.08.2011

Herald Sun 08-03-2011, 'Gulf States back Libya no-fly zone'
[http://www.heraldsun.com.au/news/breaking-news/gulf-states-back-libya-no-fly-zone/story-
e6frf7jx-1226017478548](http://www.heraldsun.com.au/news/breaking-news/gulf-states-back-libya-no-fly-zone/story-e6frf7jx-1226017478548) last accessed 22.08.2011

OTHER INTERNET SOURCES

Internet Encyclopedia of Philosophy, 'Jean Jacque Rousseau's Social Contract Theory'
<http://www.iep.utm.edu/soc-cont/>

Debate: UNSC veto,
[http://debatepedia.idebate.org/en/index.php/Debate: UN Security Council veto](http://debatepedia.idebate.org/en/index.php/Debate:_UN_Security_Council_veto)

Stanford Encyclopedia of Philosophy, 'Kant's Moral Philosophy'
<http://plato.stanford.edu/entries/kant-moral/>