THE RESPONSIBILITY TO PROTECT: A RESTRICTION ON STATE SOVEREIGNTY?

BY

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Supervisor's certificate

I …….....hereby certify that the research and writing of this dissertation was conducted under my supervision.

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Signature Date

Declaration

I, the undersigned, hereby declare that the work contained in this dissertation for purposes of obtaining my degree of bachelor of laws, is my own original work and that I have not used any other sources other than those listed in the bibliography and quoted in the references.

…… ……

Signature Date

Dedication

To my pillars of strength, my parents and Lifalaza Nomai Munsu whom I so dearly love.

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I would like to thank the almighty God for the strength and courage in completing this study. There a number of individuals who have supported me to whom I am truly indebted. I would like to thank my father and mother for all their love, care and support, my friends Angeline Shimwondubo, Martha Shilongo, Saima Ndatewapo and Ndapewa Hendricks. I would like to thank my siblings Vicky, Gift and Ivan for allowing me to complete this study without any disturbances. To Lifalaza Nomai Munsu, thank you for the encouragement, motivation, support, and for always believing in me. A big thank you to my supervisor, Mr. Francois Bangamwabo for his guidance during the course of completion of this study.

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Abstract

Alongside the human security framework is the emerging doctrine of the responsibility to protect, which has as its central tenet that the responsibility to protect one's citizens lies with the state but if it is unable or unwilling to do so, the responsibility must be borne by the broader community of states.

The responsibility to protect is not limited to military action, however. The International Commission on Intervention and State Sovereignty (ICISS) noted:

> " the debate on military intervention form human protection purposes was ignited in the international community essentially because of the critical gap between, on the one hand, the needs and distress being felt, and seen to be felt, in the real world, and on the other hand the codified instruments and modalities for managing world order."[1]

The notion of the responsibility to protect which the human security concept entails or supports is a move away from a right of military intervention on humanitarian grounds to a responsibility to prevent, a responsibility to react, including militarily in the most serious cases of human insecurity, and a responsibility to rebuild. Military intervention falls under the responsibility to react[2].

The international community has the responsibility to prevent the crisis to avert the need for robust action, measures here include development assistance, mediation to mention

[1] Edwards, A. & Ferstman, C. (Eds) (2010). *Human Security and Non-Citizens: Law, Policy and International Affairs.* Cambridge University Press. P. 43.
[2] Pattison, J. (2010). *Humanitarian Intervention and the Responsibility to protect: Who Should Intervene?* Oxford University Press. P. 13.

but a few. Where these efforts fail and a serious humanitarian crisis arises, the international community has the responsibility to react. The responsibility to protect is concerned with encouraging states to live up to their responsibilities to protect their citizens' human rights and to realise that sovereignty entails responsibility. Hence as this paper tries to find out whether the responsibility to protect is a restriction on state sovereignty.

Chapter one

1.1. Introduction

1.1.1. Statement of the problem

One of the fundamental rights of any state in international law is that of sovereignty, Sovereignty in this right being a description of legal personality accompanied by independence[3]. Is humanitarian intervention thus, an unacceptable assault on sovereignty? If it is, how then should the international community respond to the gross and systematic violations of human rights that offend every precept of our common humanity?

All states have a right to sovereignty, but does this presuppose or envisage the abuse of the human rights of the citizens of those particular states? Human rights are universal and all states have an obligation to protect its citizens from all sorts of human rights abuses, failing which, protection of these citizens can be so protected by the international community.

1.1.2. Background

International law still protects sovereignty, but, not surprisingly, it is the people's sovereignty rather than that of a sovereign. Under the old concept of sovereignty, it was regarded as an invasion of the sovereignty of a state where an outsider state would

[3] Brownlie, I. 1998. *Principles of public international law.* Oxford: oxford university Press p 107

scrutinize the international human rights of the peoples of that state without first having sought the permission of the sovereign.[4]

Popular sovereignty is violated when an outside force invades and imposes its power and will on the people, hence, the invasion of Afghanistan in 1979 by the Soviet Union. But what happens to sovereignty in its modern sense when it is not an outside force but rather, someone who is already in power wishing to wield the authority of the government against the wishes of the people. Hence the very purpose of this study which will focus on the events that have unfolded in the Arab world with regard to leaders who have been in power for more than three decades but still refuse to step down even when the people that have voted them into power no longer want them to be their leader.

1.1.3. Literature review

The responsibility to protect doctrine is still in its infancy and is not yet fixed.[5] As it has been extended to the international arena, the responsibility to protect doctrine has evolved away from that envisaged in the original International Commission on Intervention and State Sovereignty (ICISS) report. For instance, the United Nations (UN) High Level Panel Report on Threats, Challenges and change in 2004, a more secure world, makes no mention of action outside the auspices of the Security Council[6]. The agreement reached at the world summit waters down the ICISS account of the

[4] Fox, GH, Roth, BR. (Eds) 2000. *Democratic governance and international law.* Cambridge University press p243
[5] Pattison, J. (2010). *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?*. Oxford University Press. P. 13.
[6] Unlike the ICISS Report.

responsibility to protect in a number of ways.[7] On the ICISS version of the responsibility to protect, (a) the responsibility to protect transfers to the international community when the state involved is unable or unwilling to look after its citizens' human rights. (b) military intervention will meet the just cause threshold in circumstances of serious and irreparable harm occurring to human beings, or imminently likely to occur and, in particular, actual or apprehended large scale loss of life or large scale ethnic cleansing.[8] (c) When the state primarily responsible for its people fails to act, reacting robustly to the crisis is a fall-back responsibility of the international community in general. [9](d) The Security Council should be the first port of call for humanitarian intervention, and (e) intervention must meet four additional precautionary principles.[10]

By contrast, according to the agreement reached at the World Summit, (a) the responsibility to protect transfers to the international community only when 'national authorities are manifestly failing to protect their populations',[11] (b) military intervention will meet the just cause threshold only in the more limited circumstances of genocide, war crimes, ethnic cleansing and crimes against humanity. (c) reacting to a crisis is not a fall-back responsibility of the international community. Instead, states are only prepared to take collective action on a case-by-case basis.[12](d) Any action is to be collective and to be taken through the Security Council and (e) no reference is made to

[7] Ibid.
[8] ICISS 2001 Report.
[9] Ibid.
[10] These are; right intention, last resort, proportional means, and reasonable prospects. ICISS 2001 Report.
[11] United Nations World Summit 2005.
[12] Pattison, J. (2010). *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?*. Oxford University Press. P. 14.

criteria for intervention. Francis Deng[13] proposed the idea of 'sovereignty as responsibility' in 1995.[14] In the Geneva Convention of 1948, there is a duty to prevent and punish. This can be read as a responsibility to protect, in that there is a specific duty imposed on states to take preventive steps to protect potential victims of genocide. Article 8 of the convention recognises the need for preventive measures to be taken against genocide. With the prevention of genocide, war crimes and crimes against humanity regarded as *jus cogens* norms within the corpus of customary international law, credence is given to the argument that in their prevention, the responsibility to protect can and should be invoked.[15]

1.1.4. Research methodology

The research process involves the fulfilment of a specific methodology. Methodology is a combination of both a theoretical context and the methods or techniques for generating data. The method of information gathering for this study will include desktop as well book and article research amongst others.

[13] UN Secretary General's Special Representative on Internally Displaced Persons between 1992 and 2004, and since 2007, the UN Secretary General's Special Advisor on the Prevention of Genocide.
[14] Sarkin, J. *Humanitarian Intervention and the Responsibility to Protect in Africa in:* Akokpari,J. & Zimbler,D.S.(Eds) (2008). *Africa's Human Rights Architecture.* Fanele Publishers. P.51.
[15] Ibid.

Chapter two

2.1. State sovereignty vis-à-vis the obligation to protect/respect the human rights of subjects

2.1.1. *The State System and Sovereignty*

The world of the twenty-first century is a world of sovereign states. The state system is the basis of political order on the planet, the primary organizing principle of world politics. The territory of the state is divided among a significant number of states having the attribute called sovereignty.[16]

States as they exist have a certain number of characteristics[17] that distinguish them as such; first, a state must have a defined territory. This is not to say that its frontiers must be undisputed, but it must claim a geographical area. Second, a state must have a permanent population, but there is no minimum necessary number.

Third, a state must have a government; the type of government-democratic monarchy or oligarchy- is not important. Fourth, a state must have political independence so that it is capable of entering into legitimate relations with other states.

A further characteristic of states is that they are formally equal because they all enjoy the attribute of sovereignty, which is defined as independence and legal autonomy.

[16] Schoenbaum, T.J. (2006). International Relations the Path not Taken: Using International Law to Promote World Peace and Security. Cambridge University Press. P. 35.
[17] Schoenbaum, T.J. (2006). International Relations the Path not Taken: Using International Law to Promote World Peace and Security. Cambridge University Press. P. 36.

This formal equality is limited, however, because in reality, states have widely different economic, political, military, social, and cultural characteristics.[18]

In its traditional formulation, sovereignty means that the state is subject to no higher power, and this implies a dual claim. First, within its territory and with respect to its own citizens the state has absolute and exclusive authority.[19] Hence, that the state can do whatever it wants to the population within its territory. Second, the state has a right to exercise unrestrained power internationally that is, the doctrine that any state has a right to go to war to assert its interests.[20]

"These bold ideas came out of the formative period of the state system in Europe, and they were attributed to the Renaissance French thinker, Jean Boudin, and the English political philosopher, Thomas Hobbes. These men posit a system of anarchy in international relations."[21]

The theoretical independence of states makes them judges in their own cause, and they may do anything they can get away with to pursue their interests. As a legal and political idea, the notion of sovereignty has always been incorrect but, it has had tremendous influence that continues today. Hence, the 2011 Libyan civil war which is an ongoing armed conflict in the North African state of Libya being fought between those seeking to depose Muammar Gaddafi and are calling for democratic elections, and pro Gaddafi

[18] Schoenbaum, T.J. (2006). International Relations the Path not Taken: Using International Law to Promote World Peace and Security. Cambridge University Press. P. 37.
[19] Supra 37
[20] Schoenbaum, T.J. (2006). International Relations the Path not Taken: Using International Law to Promote World Peace and Security. Cambridge University Press. P. 37.
[21] Supra 38.

forces. Muammar Gaddafi has been the de-facto ruler of all Libya since the overthrow of King Idris I in 1969.The situation began as a series of peaceful protests which Gaddafi's security services attempted to repress, beginning on 15 February 2011. Within a week, this uprising had spread across the country and Gaddafi was struggling to retain control.Gaddafi responded with military force and other such measures as censorship and blocking of communications.

The situation then escalated into armed conflict, with rebels establishing a coalition named the Transitional National Council based in Benghazi. The International Criminal Court warned Gaddafi that he and members of his government may have committed crimes against humanity. The United Nations Security Council passed an initial resolution freezing the assets of Gaddafi and ten members of his inner circle, and restricting their travel.

The resolution also referred the actions of the government to the International Criminal Court for investigation. In early March, Gaddafi's forces rallied, pushed eastwards and re-took several coastal cities before attacking Benghazi. A further U.N. resolution authorized member states to establish and enforce a no fly zone over Libya. The Gaddafi government then announced a ceasefire, but failed to uphold it.[22]

Today, the doctrine of sovereignty has a new and simple meaning (as shall be discussed below) - the right of the citizens of a state to determine their own destiny. There is still, however, no higher authority than the state, but what is the status of

[22] Bates, A. (2011) *What's Happening in Lybia Explained.* Retrieved from: http://motherjones.com/mojo/2011/02/whats-happeningin-libya-explained. accessed on 28 March 2011.

sovereignty today? Objectively speaking, a certain erosion of the doctrine of sovereignty is undeniable. First, in the twentieth century, many international actors emerged that share power with states[23];

- Intergovernmental organizations, such as the United Nations and the International Monetary Fund which have the authority to take actions independent of states.
- Multinational and transitional Corporations; and
- Non-governmental Organizations such as the Red Cross. These international actors counterbalance the power of states in that they limit the sovereignty of the state. Sovereignty is limited in the sense that the states, after ratification to these international, national or regional actors become subject to the provisions of the latter and can thus not do as they please. Instead, the party states would have to abide to the provisions, failure which will result in action being taken against the offender state.

Second, it is no longer accepted that the state can exercise unrestrained power either internally or externally. Accepted international legal norms constrain state power. States, for example, no longer enjoy absolute immunity in domestic courts. Hence the act of state doctrine[24] according to which international law is said to require each state to respect the validity of the public acts of other states, in the sense that its courts will

[23] Schoenbaum, T.J. (2006). International Relations the Path not Taken: Using International Law to Promote World Peace and Security. Cambridge University Press. P. 38.
[24] Von Glahn, G. (1996*). Law Among Nations: An Introduction to Public International Law*. Allyn and Bacon. P. 111.

not pass judgment on the legality or constitutionality of a foreign sovereign's acts under his own laws:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory."[25]

For the sake of relevance, it is important to note, that the act of state doctrine is or does not form part of the rules of public international law and therefore, its application is not required.[26] The International Law Commission, which is an organ of the United Nations, has formulated broad rules for international state responsibility and states may have to pay damages for conduct that is in breach of international law.

Third, important standards for the protection of human rights were formulated that must be observed by all states. A state that mistreats its population may be subject to enforcement action under the United Nations Charter, and there may be a right of humanitarian intervention as will be discussed. It is worth noting that a head of state as well as state officials who perpetrate violations of human rights may be prosecuted criminally for their actions.[27]

Fourth, the international problems that we face; peace and security, protection of the environment, and economic development, are beyond the capability of one state and

[25] Dictum of Chief Justice Fuller in *Underhill v Hernandez* 1897, 168 U.S. 250.
[26] *Banco Nacional De Cuba v Sabbatino* 376 U.S. 398, 421.
[27] Ex Parte Pinochet, (2000) 1 AC 147 (House of Lords).

states thus have no choice but to cooperate.[28] Hence, interdependence has replaced independence as a characteristic of the global order of states.[29] Every state and its citizens are affected by events that may occur in far flung places. Fifth, it is accepted today that states have international responsibility as well as rights. State responsibility arises from the violation by a state of an international obligation which can be derived from customary or treaty law. International responsibility means that a state must desist from breaching the obligation and must, as already mentioned, make reparation for any damages caused.[30]

2.1.2. State Sovereignty vis-a-vis Respect/Protection of Human Rights

> "Anachronism...1: an error in chronology; esp: a chronological misunderstanding of persons, events, objects, or customs in regard to each other . . . 2: a person or a thing that is chronologically out of place; esp: one that belongs to a former age and is incongruous if found in the present . . ." [31]

Sovereignty often came to be an attribute of a powerful individual, whose legitimacy over territory rested purportedly on a direct or delegated divine or historic authority. The public law of Europe, the system of international law established by the assorted monarchs of the continent to serve their common purposes, reflected and reinforced this conception by insulating from legal scrutiny and competence a b road category of

[28] Schoenbaum, T.J. (2006). International Relations the Path not Taken: Using International Law to Promote World Peace and Security. Cambridge University Press. P. 39.
[29] Supra 39.
[30] Ibid 40.
[31] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic governance and international law.* Cambridge University Press. P. 239.

events that were later enshrined as “matters only within the domestic jurisdiction”.[32] If another political power, for whatever reason, entered the territory of a sovereign without his permission, his sovereignty was violated. In such matters, the sovereign’s will was the only one that was regarded as being legally relevant. With the words “We the people”[33] the American Revolution inaugurated the concept of the popular will as the theoretical and operational source of political authority. The French Revolution and the advent of subsequent democratic governments confirmed the concept. Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power.

In the Universal Declaration of Human Rights (UDHR), a document then describing itself as “a common standard of achievement” but now accepted as declaratory of customary international law, Article 21 (3) provided that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[34]

The significance of this statement in the UDHR was that it was now expressed in a fundamental international constitutive legal document. In international law, the sovereign has finally been dethroned.

[32] Article 15(8) of the Covenant of the League of Nations, if the codicil found a dispute between any two parties “to arise out of a matter which by international law is solely within the domestic jurisdiction of that party,” the codicil would refrain from making any recommendations as to its settlement.
[33] Preamble of the Constitution of theUnited States of America
[34] United Nations Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948)

Unlike certain other grand statements of international law, the concept of popular sovereignty was not to remain a mere pious aspiration. The international law making system proceeded to prescribe criteria for appraising the conformity of internal governance with international standards of democracy. Modern communications technology has made it possible to verify that conformity rapidly and economically and to broadcast it widely.

International and regional organizational monitors now use the new technology in critical national elections so as to ensure that they are free and fair.[35] The results of such elections serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government. That is, in a democratic world, the people are able to decide who they want to be governed by through the exercise of their will. International law still protects sovereignty; but, not surprisingly, it is the people's sovereignty rather than the sovereign's sovereignty.

This contemporary change in content of the term sovereignty also changes the cast of characters who can violate that sovereignty. Popular sovereignty is violated when an outside force invades and imposes its will on the people.[36] One thinks of the invasion of Afghanistan in 1979 by the Soviet Union. But what happens to sovereignty, in its modern sense, when it is not an outsider but some home grown specialist in violence who seizes and purports to wield the power of the government against the wishes of the people, by naked power, by putsch or by coup, by the usurpation of an election or by

[35] For example in the Namibia elections, the ballot counter and tabulation were overseen by over a thousand electoral supervisors, part of a United Nations Transition Assistance Group (UNTAG).

[36] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic governance and international law.* Cambridge University Press. P. 243.

those systematic corruptions of the electoral process in which almost 100 percent of the electorate purportedly votes for the incumbent's list, is such a seizer of power entitled to invoke the international legal term "national sovereignty" to establish or reinforce his own position in international politics? We shall find out below.

2.1.3. Precedence of Sovereignty and Respect/Protection of Human Rights

Great Britain v Costa Rica[37]

Under the international law, the international usurper was so entitled, for the standard was *de facto* control: the only test was the effective power of the claimant. In the *Tinoco* case for example, Costa Rica sought to defend itself by claiming a violation of its popular sovereignty.

Tinoco, the erstwhile Minister of War, had seized the power in violation of the constitution. Therefore, the subsequent restorationist Costa Rican Government contended, his actions could not be deemed to have bound Costa Rica. But, Chief Justice Taft decided that by virtue of his effective control, Tinoco had represented the legitimate government as long as he enjoyed that control.

The *Tinoco* decision was consistent with the law of its time. Were it applied strictly now, it would be anachronistic, for it stands in stark contradistinction to the new constitutive, human rights based conception of popular sovereignty. To be sure there were policy reasons for Tinoco, which may still have some cogency, but the important is that there

[37] R. Int'l Arb. Awards I (1923)

was then no countervailing constitutive policy of international human rights and its conception of popular sovereignty.

In many countries, the internal political situation is murky and constitutional procedures for the orderly transfer of power are nonexistent or ineffective.[38] In circumstances in which free and fair elections are internationally endorsed as free and fair and the people's choice is clear, the international community does not need to speculate on what constitutes popular sovereignty in that country.

When those confirmed wishes are ignored by a local caudillo that either takes power himself or assigns it to a subordinate he controls, a jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty.[39]

This is entirely true when one considers the events that unfolded in the Arab world, i.e. Egypt and Libya. The international community of states, although not all, supported the ouster of Hosni Mubarak as the President of Egypt after he had ruled the country for over three decades. Mubarak is now charged with crimes against humanity and his trial is currently ongoing. Similar events unfolded in Libya, in all the two cases, the international community intervened on a humanitarian basis for the sake of the innocent civilians that were and still are the victims of the mass atrocities committed by their leaders.

[38] Examples of countries that have or are encountering such problems include the countries of the Arab world, Egypt and Libya. There is so much corruption going on that the constitutional provisions dealing with exchange of leadership are simply ignored.

[39] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic governance and international law.* Cambridge University Press. P.245.

Tanganyika

Tanganyika, which gained its independence in 1961, provides one of the earliest examples of an intervention that affirmed the modern human rights based conception of sovereignty. In January 1964, Tanganyika's small army mutinied. President Julius Nyerere turned to Britain for aid, and a small contingent of royal marines flew in and suppressed the mutiny in one day. The death toll amounted to three mutinous soldiers. No civilians were injured, and Britain's marines sustained no casualties. After it ended, President Nyerere promptly broadcast a message to his people, proclaiming that "an army which do not obey the people's government was not an army of that country and was a danger to the whole nation." Tanzania, as it is now known, may not be a political paradise but, there have been no more coups, and subsequent transfers of power have been unconstitutional. Tanzania, however, failed to establish a firm precedent.[40]

The Gambia (failure to intervene by the world community)

After Sir Dawda Jawara won the presidency in 1970, the Gambia had been for two decades one of Africa's few successful multiparty democracies. On July 23, 1994, a small contingent of disgruntled officers in the Gambia's national army of some 800 people ousted the elected government in a bloodless coup.[41]

The new military dictatorship barred all political activity, arrested journalists, and confined ministers of the former government to house arrest. President Jawara requested military aid to restore democracy but to no avail. Now contrast this failure to

[40] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic governance and international law.* Cambridge University Press. P. 245.
[41] Ibid.

intervene in the Gambia with the international community's response to the analogous, and relatively contemporaneous, circumstances that developed in Haiti[42]

Haiti

In December 1990, after decades of dictatorship, the Haitian people overwhelmingly elected Jean-Bertrand Aristide as President. Every aspect of the election was monitored by international organisations and confirmed as free and fair. Within months, the army, a force of some five thousand men led by General Raoul Cèdras, seized power, expelled Aristide, and brutally suppressed popular protest. Prompt military intervention was neglected and instead, the Organisation of American States and the United Nations condemned the coup and its aftermath and ordered economic sanctions to dislodge the military.

Not surprisingly, these sanctions failed. Economic sanctions are effective when the target is a rational economic maximize. The Haitian military elite may have been rational, but no evidence suggests that the economy was its principal concern. All the sanctions accomplished was to reduce the Haitian economy to rubble while creating economic opportunities for the ruling military elite. Here, the economic sanctions, far from ousting the military insurgents, contributed to the suffering of the very individuals whose political rights they were intended to vindicate. But critically, unlike in the Gambia, the international community did ultimately determine to intervene militarily on behalf of Aristide and Haiti's democratically legitimate government. The Security

[42] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic governance and international law.* Cambridge University Press. P.246

Council[43] acknowledging the gravity of the situation and recognizing that an exceptional response was required, passed resolution 940, authorising multinational military action.[44] This marked the first occasion on which the Security Council authorized the use of military force to reinstate a democratically elected government.

Cross-border military actions are brutal and destructive of life and property. If they displace the usurper and emplace the people who were freely elected, they can be characterized, in this particular regard, as a violation of sovereignty. The word "sovereignty" can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy. International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.

The international human rights program is more than a piecemeal addition to the traditional corpus of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of the people, it works qualitative changes in virtually every component. Human rights norms are constitutive and thus, they must be reinterpreted in their light. Hence, in the *South West Africa* opinion,[45] the International Court indicated the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes, and national courts have often expressed the need

[43] On July 31, 1994.
[44] SC Res. 940, 48th Sess. UN Doc. S/Res/940 (1994)
[45] South West Africa, Voting procedure, 67 ICJ (1955) 77 (advisory opinion of June 7).

and authority to actualize.[46] The same style of actualisation is required with regard to the assessment of the lawfulness of human rights actions. When this is not done, legal arguments and judgments will be marked by anachronism, hence, in the debate over the United States of America's (US) action in Panama in the United Nations where the issues in question were swept away by indirection, when the Permanent Representative said that "no argument can possibly justify intervention against a sovereign state."[47]

When the Security Council passed Resolution 940, authorizing armed intervention against the Haitian military regime, critics charged that UN military action against Haiti would violate its sovereignty. But whose sovereignty? In modern international law, what counts is the sovereignty of the people and not the "state".[48] If the *de jure* government, which was elected by the people, wants military assistance, how is its sovereignty violated? And if the purpose of the coercion is to reinstate a *de jure* government elected in a free and fair election after it was ousted by a renegade military, whose sovereignty is being violated? The military's? Multilateral intervention in Haiti did not violate but in fact vindicated Haitian sovereignty.

Sierra Leone

Analogous circumstances in Sierra Leone led to a similar multilateral intervention. On May 25, 1997, a military coup deposed Sierra Leone's first elected president. The Organisation of African Unity (OAU) Council of Ministers, affirming the strong link between popular sovereignty and international political legitimacy, called upon "all

[46] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic Governance and International Law.* Cambridge University Press. P. 250.
[47] Supra 250.
[48] Supra.

African countries and the international community at large, to refrain from recognizing the new regime and lending support in any form whatsoever to the perpetrators of the *coup d' etat."* Here, the United Nations again endorsed the use of a cross-border military action to restore a democratically elected regime that had been toppled by a military coup and it was the latter and not the global community's intervention that violated national sovereignty. [49]

Under the version espoused by Nicaragua's representative in the debate over Panama, sovereignty is not international protection of the will of the people, but international protection for a group that calls itself the government against the wishes of the people. There is no international test of the legitimacy of a self-proclaimed government. Hence the rebel government that is, the Transitional National Council that took charge of Libya to overthrow Gaddafi's regime which was officially recognised by France, Portugal and the Arab League. The decision to recognise and deal with the Council being driven by a severe case of "anyone but Muammar" desperation[50] and from this recognition it can indeed suffice to say that recognition of governments is most certainly without a legitimate international test.

Under this theory, Panama's sovereignty is violated by the removal of the usurper and the establishment of conditions for the assumption of power by the legitimate government.[51] That is an anachronism and the latter can only be avoided in legal

[49] Reisman, W.M. *Sovereignty and Human Rights in Contemporary International Law in:* Fox, GH, Roth, BR. (Eds) 2000. *Democratic Governance and International Law.* Cambridge University Press. P.252.
[50] Mahanta, S. (2011) *What's Happening in Libya Explained*. Retrieved from: http://mootherjones.com/mojo/2011/02/whtas-happening-in-libya-explained: accessed on 28 March 2011.
[51] Ibid. P. 252.

decision by systematic actualization, which considers inherited norms in the context of changed constitutive normative systems. In practice therefore, there may be factual grey areas between unequivocal expressions of popular will through internationally supervised, observed, or validated elections, on the one hand and the atrocities that warrant humanitarian intervention hence, the chapter immediately below.

2.1.4. The traditional international humanitarian intervention

It has sometimes been argued that intervention in order to protect the lives of persons situated within a particular state and not necessarily nationals of the intervening state is permissible in strictly defined situations.[52] It is argued that distinct from rights in respect of foreign nationals there is a right to intervene on humanitarian grounds. For an intervention to be justified on humanitarian grounds, four aspects have to be considered.[53]

First, there must be within the state in question an immediate threat to human rights, particularly a threat of extensive loss of human life. Secondly, the intervention must be limited to protecting basic human rights. Thirdly the action is one that has not been taken at the invitation of the government of the territory. Fourthly, the action is not taken under the authority of a Security Council Resolution.

However, the difficulty then arises; how does one go about identifying an example of such humanitarian intervention? The reason for this question is because there may be

[52] Shaw, M. (2003). *International law.* Cambridge. Cambridge University Press. P. 1045.
[53] O'Brien, J. (2001). *International law.* London. Cavendish Publishing Limited. P. 687.

other motives for the intervention (not humanitarian) such as the desire to rescue foreign nationals or the wish to put in place a particular government.[54]

Be that as it may, it can be argued that the requirements for humanitarian intervention are met. Hence, the desire to rescue foreign nationals for example still presupposes an immediate threat to human rights whereas the desire to put in place a new government also meets the requirements in the sense that it is the "current" government that is responsible for the violation of the human rights of the people, thus, putting a new government in place can suffice as a reason for humanitarian intervention as it is the very human rights of the peoples for which protection is being sought.

2.1.5. Humanitarian Intervention: State practice

In traditional international law, intervention was defined as the dictatorial interference of one state in the domestic or external affairs of another.[55]The question determining whether or not humanitarian intervention i.e. armed intervention is acceptable, is not an independent problem, but must be posed and solved in relation to the prohibition of the use of force. What has to be determined is whether exceptions to Article 2 (4) of the UN Charter are acceptable only in the case of self defence[56] or also in the case of humanitarian intervention.

[54] Such as that of Belgium in the Congo in 1960, 1963, and 1964, and also the intervention in the Dominican Republic in 1965.

[55]Conforti, B. *The Principle of Non-Intervention* in: Bedjaour, M. (Ed) (1991). *International Law: achievements and prospects.* London: Martinus Njihoff publishers. p. 468.

[56] Article 51 of the UN Charter

According to *Conforti* [57] the exceptions are not acceptable in the case of humanitarian intervention not only according to the UN Charter but also on the basis of customary law and that although widely sanctioned, the argument that precedent exists in this respect is totally unacceptable. In other words, that humanitarian intervention is unlawful. Humanitarian intervention is part of customary law[58] but it is subject to very strict criteria. Hence, it is preferable to secure the express authorisation of a Security Council Resolution. The nature of any right of humanitarian intervention came to a head during the NATO military action in Kosovo[59].

The military action was *prima facie* an intervention in a foreign state and contrary to Article 2 (4) of the UN Charter; it was outside the ambit of Article 51 and had not been expressly authorised by the Security Council. The question arose as to whether any right of humanitarian intervention existed in customary international law; it was answered in the affirmative.

The existence of links between international security and the protection of individual rights has been widely recognized for some years now. Today it is generally accepted that the maintenance of peace presupposes a certain respect for individual rights, and conversely, that severe violations of fundamental rights may create a situation threatening international peace and security.[60] On this basis it suffices to say that the

[57] ibid
[58] NATO military action in Kosovo in the form of Operation Allied Force 26 March 1999-10 June 1999
[59] ibid
[60] Corten, O. *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?* In: Alsten, P & Euan, M. (2008). *Human rights intervention and the use of force*. Oxford. Oxford University Press. p. 87.

link between maintaining peace and protecting human rights does not call into question the cardinal principle of the sovereignty of states.

By exercising their sovereignty to commit themselves to respect and guarantee fundamental rights, states have accepted that these rights go beyond their national competence and have accordingly waived the invocation of the principle of non-intervention in connection with them.

On this view, every UN Member State has also accepted that the Security Council should, in conformity with the charter, take measures to maintain international peace and security. Should the Security Council find that severe violations of human rights constitute a threat justifying the adoption of coercive measures, as expressly indicated by Article 2 (7) of the UN Charter there is no breach of the principle of non-intervention. Furthermore, the author would argue that intervention although not so authorized by the Security Council, can be deemed to be of a humanitarian nature for as long as the considerations for humanitarian intervention are met. Hence, the following precedents:

Precedents Where the Intervening Powers Based their Actions on Explicit Authorizations from the Security Council

The military interventions that took place in Somalia, Rwanda and Bosnia-Herzegovina were all based on explicit authorization previously formulated in UN Security Council Resolutions.[61] As regards Somalia, Resolution 794 of 3 December 1992, and the Council: "Acting after chapter VII of the Charter of the United Nations authorises the

[61] Corten, O. *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?* In: Alsten, P & Euan, M. (2008). *Human rights intervention and the use of force*. Oxford. Oxford University Press. p. 91.

Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."

And in the case of Rwanda, the Council in Resolution 929 of 22 June 1994: "acting under Chapter VII of the Charter of the UN, authorizes the State Members cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in sub-paragraphs 4 (a) and (b) of resolution 925 (1994).[62]

The case of Bosnia-Herzegovina is more complex since it involved the adoption of several similar resolutions, among them Resolution 770 of 13 August 1992, whereby the Council: "calls upon states to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the UN humanitarian organizations and others of humanitarian assistance to Sarajevo and whenever needed in other parts of Bosnia and Herzegovina."[63]

The military operations in these three countries took place on the basis of these texts. Where those intervening felt the need to justify themselves in legal terms, they clearly invoked the title constituted by the extracts in the texts just mentioned. As regards the intervention in Somalia, justification for the intervention was thus:

"I think the powers under the charter are perfectly adequate. Although the UN is prohibited in intervening in the internal affairs of Member States, Article 2 (7) of the

[62] Ibid.
[63] Ibid.

Charter speaks of matters which are essentially internal matters, and humanitarian matters are of course, now matters of international concern. The prohibition of interference by the UN in internal affairs has also an important exemption: if you take action under Chapter VII, the prohibition does not apply. But to take action under Chapter VII, requires a determination that the situation or the dispute is a threat to international peace and security. In the case of Somalia the Council has already reached that determination some months ago when it imposed an arms embargo because the lack of stability in the country was a threat to its neighbours, as was the refugee situation." [64]

The operation carried out by the French army in Rwanda was justified on the basis of similar arguments. The Prime Minister at that time put it clearly to the National Assembly:

"This is a humanitarian operation indeed to save threatened populations, and it is subject to a number of conditions or specific principles governing this humanitarian intervention. First principle: France will act only with a mandate from the UN Security Council. The government considered that action of this type, responding to a humanitarian duty ought despite its urgency to be authorized by the international community."

In light of the above considerations, it is disputable that the military operations in Somalia, Rwanda and Bosnia-Herzegovina are precedents sufficient to justify the right of humanitarian intervention and with the even more recent events as unfolded in the

[64] Douglas Hogg, the then Minister of State.

Arab World; it can be argued that humanitarian intervention is indeed a necessary *jus cogens* of international law. The Arab events will be discussed under chapter 3 of the study.

Precedents where the Intervening Powers Were Unable to Base their Actions on Explicit Authorization from the Security Council

Two military interventions for humanitarian ends will be analysed under this heading. These are the operations that took place in Liberia in August 1990 and in Iraq in April 1991.

Intervention of ECOWAS in Liberia

During 1989 an armed rebellion took shape in Liberia aimed at overthrowing President Doe, who had come to power following a *coup d'état* some nine years earlier. In the first months of 1990, several hundred thousand Liberians embarked on an exodus, their destination being mainly the neighbouring countries. In July the rebel forces, themselves divided into two dissident groups, approached the capital and threatened the government in place. [65]

According to international press, each of the forces involved was guilty of considerable extortion against civilians resulting in many victims and bringing an increase in the flow of refugees and displaced persons on August 24, after vain attempts at mediation to bring about a ceasefire among all the belligerents, troops of the Economic Community

[65] Corten, O. *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?* In: Alsten, P & Euan, M. (2008). *Human rights intervention and the use of force*. Oxford. Oxford University Press.

of the West (ECOWAS), entered Liberian territory, after violent fighting a ceasefire was concluded on 28 November.

The intervening powers advanced several types of arguments to justify their operation. In general terms, in August 1990, an ECOWAS communiqué put forward the objective of 'stopping the senseless killing of innocent civilians, nationals and foreigners, and to help the Liberian people to restore their democratic institutions.'[66]

It will however, be noted that these objectives are accompanied by a justification based on fairly classical legal arguments, namely, consent by the state and legitimate collective defence. The legal title of the ECOWAS states is a classic case of legitimate collective defence, with the state suffering aggression calling for the aid of allied states to eliminate the aggression of which it is a victim.

It should be noted in this connection that in the case of ECOWAS a special institutional framework was invoked to justify the operation. A *Protocol Mutual Assistance on Defence*, adopted in Freetown on 29 May 1981, provided that "any armed threat or aggression directed against fellow members shall constitute a threat or aggression against the entire community," specifically mentioning the case of 'internal armed conflict within any member state engineered and supported from the outside...likely to endanger the peace and security in the region.' In such a case, ECOWAS can initiate

[66] Corten, O. *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?* In: Alsten, P & Euan, M. (2008). *Human rights intervention and the use of force*. Oxford. Oxford University Press. p.99.

collective intervention in the territory concerned provided that the government concerned so requests and it was on this basis that Liberia invoked the intervention.[67]

Operation Provide Comfort in Iraqi Kurdistan

At the very moment that Iraq suffered severe military defeat in the Gulf War, an uprising broke out in both the North and South of the country. Saddam Hussein's military troops however, reacted fairly quickly and managed to re-conquer the portions of territory that had fallen into rebel hands.[68]

This campaign was accompanied by brutal repression that led to the exodus of several hundred thousand refugees. The Iraqi Shi'ites took refuge in Iran, while the Kurds were prevented from entering Turkish territory by that country's authorities. The UN Security Council adopted Resolution 688 on April 1991, condemning the repression of the civilian population, the consequences of which were to create a genuine threat to international peace. In the face of the resulting humanitarian disaster, negotiations began Baghdad and representatives of the UN Security Council.

Just as these negotiations were on the verge of succeeding, French, British, American, Dutch, Italian, Spanish, and Australian troops entered Iraqi Kurdistan, officially to constitute safe havens to encourage the return of those blocked in the mountains which form the frontier with turkey.

[67] Liberia ratified the Protocol.

[68] Corten, O. *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?* In: Alsten, P & Euan, M. (2008). *Human rights intervention and the use of force*. Oxford. Oxford University Press. p.100.

Operation *Provide Comfort* was justified essentially by moral considerations. The intervening powers and their allies insisted on the humanitarian disaster and the imperative to put an end to it. Further, that the deployment of these forces was entirely consistent with the objectives of Security Council Resolution 688.[69]

While these declarations are far from being unambiguous, they show a concern to base the reference to humanitarian objectives on an extensive interpretation of a resolution previously adopted by the Security Council. A sovereign can limit its authority to act by consenting to an agreement according to the principle *pacta sund servanda,* which principle is based on the notion that contracts entered into must be honoured. These contracts entered into by states and which are regarded as legally binding on party states form part of the doctrine of state practice. This therefore presupposes that where a member state to the UN for example breaches humanitarian law principles, membership to the UN alone already is a waiver to its sovereignty and other states will, on the basis of the state practice doctrine be empowered to intervene should anyone of the already discussed atrocities occur.

With sovereignty as well as humanitarian intervention having been dealt with, the question follows; is the responsibility to protect a restriction on sovereignty? A discussion on the doctrine of the Responsibility to Protect now follows and an attempt shall be made to provide the best possible answer to the question that is, whether the responsibility to protect limits the sovereignty of states.

[69] Corten, O. *Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?* In: Alsten, P & Euan, M. (2008). *Human rights intervention and the use of force*. Oxford. Oxford University Press. p.102.

Chapter three

3.1. The Responsibility to Protect

Sovereignty implies responsibility; accordingly, each state has the primary responsibility to protect its own population. When the state is unable or unwilling to carry out this fundamental obligation, the international community has the responsibility to respond in full respect of the principles of the UN Charter and international law.[70]

The responsibility to protect has become a widespread phenomenon in present day international law. The mass killings of innocent civilians in the Middle East, the Arab World as well as the Ivory Coast to mention but a few, have enormously contributed to the popularity of the doctrine. This part of the paper shall deal with the doctrine of the responsibility to protect in general, the criticisms that have been leveled against it, its praises as well as the politics of the doctrine.

Following the genocide in Rwanda and the international community's failure to intervene, former UN Secretary General Kofi Annan asked the question, when does the international community intervene for the sake of protecting populations? Annan urged member states to come up with a new consensus on the competing visions of national and popular sovereignty and the resulting challenge of humanitarian intervention.[71]

[70] Warner, D. & Giacca, G. *Responsibility to Protect* in: Chetail, V. (Ed) (2010). *Post-Conflict Peacebuiding: a Lexicon.* Oxford University Press. P. 291.
[71] Thakur, R. (2006). *The United Nations, Peace and Security.* Cambridge University Press. P.246.

Responding to the challenge, Canadian Foreign Minister[72] set up the International Commission on Intervention and State Sovereignty. The Canadian government established the International Commission on Intervention and State Sovereignty (ICISS). [73]

In December 2001, the ICISS released its report, The Responsibility to Protect. Building on the idea that sovereignty is a responsibility, the report outlined that the international community has the responsibility to prevent mass atrocities with economic, political, and social measures, to react to current crises by diplomatic engagement, more coercive actions, and military intervention as a last resort, and to rebuild by bringing security and justice to the victim population and by finding the root cause of the mass atrocities.

The African Union pioneered the concept that the international community has a responsibility to intervene in crisis situations if the State is failing to protect its population. In the founding Charter in 2005, African nations declared that the:

"Protection of human and people's rights" would be a principal objective of the AU and that the Union had the right "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."[74]

The AU also adopted the Ezulwini Consensus in 2005, which welcomed the responsibility to protect as a tool for the prevention of mass atrocities.

[72] Lloyd Axworthy.
[73] The Commission was established in 2001.
[74] Constitutive Act of the AU

The responsibility to protect doctrine rose to prominence largely because of the genocides in Bosnia, Rwanda and Darfur[75]. It became something of an official UN position in 2005, when hundreds of heads of state publicly endorsed the idea at a general assembly in New York.

The doctrine was explicitly invoked in Resolution 1973 when it was declared a core goal of "protecting civilians and civilian populated areas under a threat of attack." The Resolution derives its legitimacy from Chapter VII of the UN Charter which gives the Security Council wide ranging authority to identify and stop "threats to the peace" and "acts of aggression".[76]

Heads of state and government agreed to the following text on the responsibility to protect in the outcome document of the High-Level Plenary Meeting of the General Assembly in September 2005:

"Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility and support the UN in establishing an early warning capability." [77]

[75] ibid

[76] Carlstrom, G. (2011) *Responsibility to Protect or Right to Meddle?* Retrieved from: http://english.aljazeera.net/indepth/features/2011/03/2011324121253913547.html. accessed on 13 April 2011.

[77] Outcome document of the High-Level Plenary Meeting of the General Assembly in September 2005.

It further reads: “the international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

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

We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves as necessary and appropriate, to helping states build capacity to protect their citizens from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”[78]

This decision and resolution is considered as the birth of the concept of the responsibility to protect. In 2006, 150 heads of state and government met as the General Assembly of the UN in its 60th anniversary year and unanimously resolved:

[78] Paragraphs 138-139 of the World Summit Outcome Document retrieved from: http://responsibiltytoprotect.org/worldsummitdoutcomedoc2005/(1)/pdf: accessed on 13 April 2011.

"each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity... we accept that responsibility and will act in accordance with it." [79]They then went a step further, promising to surrender sovereignty should they fail to protect their populations from mass violence.[80]

Furthermore, on March 17, the UN Security Council authorized the use of "all necessary measures" to protect civilians in Libya from their government's military forces. In passing the, the Council invoked a new international norm for the first time: The Responsibility to Protect. This responsibility originated out of a 2001 report from the International Commission on Intervention and State Sovereignty. In 2005, 150 heads of state and governments officially accepted the responsibility to protect at a New York Summit.[81]What the resolution in essence means is that in situations that threaten international peace and security, the Security Council has the power, under the UN Charter, to authorize action by member states that would otherwise be subject to two key international law prohibitions: on intervention in the internal affairs of another state, and on the use of force. International law has longstanding and tolerably clear rules on foreign intervention in internal conflicts.

A state may, if invited, assist the government of another state to suppress a minor rebellion or domestic unrest, but if the internal conflict develops into a civil war, that is, if the rebellion is on a large scale or the outcome is uncertain, then any foreign

[79] Mamdani, M. (2010). *Saviors and survivors:Darfur, Politics, and the War on Terror.CORDESRIA Publishers. P. 327.*
[80] Ibid 327.
[81] Knutson, K. (2011). *Libyan Involvement Testing UN Principle*. Retrieved from: www.righttoprotect/knuston.org. Accessed on 13 April 2011.

intervention, invited or not, is forbidden.[82] The present day standing on the issue of intervention based on the doctrine of the responsibility to protect is therefore that resort to military intervention will and should remain an exception, not the rule.[83]

The responsibility to protect is the responsibility of states, and where they fail the international community, to protect civilians from mass atrocity crimes. This doctrine is relevant in the sense that it is the right thing to do. Hence, our common humanity demands that the world never again sees another holocaust, let alone the atrocities that took place in Cambodia, Rwanda or Bosnia.

It is also worth noting that responsibility to protect is in the interest of each and every state. Sates that will not stop internal mass atrocities equal states that will turn a blind eye to things such as terrorism, and weapon proliferation to mention but a few. The responsibility to protect focuses on prevention but if the latter fails, the doctrine requires that whatever measures, be they political, economic, diplomatic, legal, security or military (in the last resort) become necessary to stop mass atrocity crimes.[84]

[82] Pert, A. (2011). *Legality blurred in Libya Intervention*. Retrieved from: http://theaustralian.com.au/news/world/legality-blurreed-in-libya-intervention/story-6frg6ux-1226039308281: accessed on 13 April 2011.

[83]Rosenberg, SP. (2011). *The Responsibility to Protect: Libya and Beyond.* Retrieved from: www.tehrantimes.org: accessed on 13 April 2011

[84] Evans, G. (2011). *Responsibility to Protect.* Retrieved from: http://www.crisisgroup.org/en/key-issues/responsiblit-to-protect.aspx?gclid=CMay2omvnqgCFQoa4Qod3GvgHQ: accessed on 13 April 2011

Hence the UN Security Council authorising the use of force in Libya essentially authorising any member country to take upon itself to enforce the no fly zone.[85] Security Council Resolution 1973 "authorises member states that have notified the Secretary General, acting nationally or through regional organisation and arrangements, and acting in cooperation with the Secretary General to take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya." The resolution further goes on to prohibit a "foreign occupation force" on Libyan territory and "requests that member states inform the Secretary General immediately of the measures they take pursuant to the authorisation.[86]

For individual states, responsibility to protect means the responsibility to protect their own citizens, and to help other states build their capacity to do so. For international organizations, including the UN, responsibility to protect means the responsibility to warn, to generate effective prevention strategies, and when necessary, to mobilize effective reaction, this is evident from the UN's reaction during the uprising in Libya when the General Assembly unanimously voted to temporarily suspend Libya's membership to the UN Human Rights Council. That the country will be prevented from participating in the assembly until the body makes a more permanent decision. Hence the UN Secretary General Ban Ki-Moon when he said that "the world has spoken with one voice: we demand an immediate end to the violence against civilians and full respect for their fundamental human rights, including those of peaceful assembly and

[85] Mahanta, S. (2011) What's Happening in Libya Explained. Retrieved from: http://motherjones.com/mojo/2011/02/whats-happeningin-libya-expalined. accessed on 28 March 2011.
[86] Ibid.

free speech,"[87] and for civil societies and individuals, responsibility to protect means the responsibility to force the attention of policy makers on what needs to be done, by whom and when.[88]

The responsibility to protect captures a simple and powerful idea. The primary responsibility for protecting its own citizens from mass atrocity crimes lies with the state itself. State sovereignty implies responsibility, not a license to kill. But when a state is unwilling or unable to halt or avert such crimes, the wider international community then has a collective responsibility to take whatever action is necessary.[89] As has been mentioned, responsibility to protect emphasizes preventive action. That includes assistance for states struggling to contain potential crisis and for effective rebuilding after a crisis or conflict to tackle its underlying causes, thus the doctrine's primary tools are persuasion and support. Not military or other forms of coercion.[90]

The responsibility to protect embraces three specific responsibilities:[91]

- The responsibility to prevent;
- The responsibility to react;
- The responsibility to rebuild.

[87] Mahanta, S. (2011) What's Happening in Libya Explained. Retrieved from: http://motherjones.com/mojo/2011/02/whats-happeningin-libya-expalined. accessed on 28 March 2011.
[88] Ibid.
[89] Thakur, R. (2010). *The United Nations, Peace and Security.* Cambridge University Press. P.251.
[90] Ibid 257.
[91] Thakur, R. (2010). *The United Nations, Peace and Security.* Cambridge University Press. P.251.

Prevention, as already indicated, is the single most important dimension of the responsibility to protect; prevention options should always have been exhausted before intervention can even be contemplated. Military intervention for human protection purposes is an exceptional and extraordinary measure, which, in order to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur. That is:

- Large scale loss of life, actual or apprehended, with genocidal intent or not, which is either the product of either deliberate state action or state neglect including failure to act or a failed state situation;
- Large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

The responsibility to prevent requires addressing both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.[92]

The primary purpose of the intervention must be to halt or avert human suffering regardless of whether there may be other motives on the side of the intervening state.[93] Hence, Italian Prime Minister[94] who condemned the killings in Libya as unacceptable, Secretary of State[95] also shared similar sentiments as those of the Italian Prime Minister and stated that "the government of Libya has a responsibility to respect the universal

[92] Thakur, R. (2010). *The United Nations, Peace and Security.* Cambridge University Press. P.257.
[93] Ibid.
[94] Silvio Berlusconi.
[95] Hillary Clinton of the United States of America.

rights of the people, including the right to free expression and assembly. Now is the time to stop this unacceptable bloodshed."[96]

The responsibility to protect is a norm or set of principles based on the idea that sovereignty is not a privilege, but a responsibility. Responsibility to protect focuses on preventing and halting four crimes: genocide, war crimes, crimes against humanity, and ethnic cleansing. The responsibility to protect can be thought of as having three parts:

1. A State has a responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing (mass atrocities). Critically, the responsibility to protect acknowledges that responsibility rests primarily on the state concerned. Only if the state is unwilling or unable to fulfill this responsibility, or is itself the perpetrator, does it become the responsibility of others to act in its place.[97]
2. If the State is unable to protect its population on its own, the international community has a responsibility to assist the state by building its capacity. This can mean building early-warning capabilities, mediating conflicts between political parties, strengthening the security sector, mobilizing standby forces, and many other actions.
3. If a State is manifestly failing to protect its citizens from mass atrocities and peaceful measures are not working, the international community has the

[96] Bauman, N. (2011) What's Happening in Libya Explained. Retrieved from http://motherjones.com/mojo/2011/02/whats-happeningin-libya-explained.
[97] Thakur, R. (2010). *The United Nations, Peace and Security.* Cambridge University Press. P. 251.

responsibility to intervene at first diplomatically, then more coercively, and as a last resort, with military force.[98]

In the international community responsibility to protect is a norm, not a law. Responsibility to protect provides a framework for using tools that already exist (like mediation, early warning mechanisms, economic sanctioning, and chapter VI powers) to prevent mass atrocities. Civil society organizations, States, regional organizations, and international institutions all have a role to play in the operationalisation of responsibility to protect. The authority to employ the last resort and intervene militarily rests solely with United Nations Security Council and the General Assembly.

According to the ICISS Report in 2001 (which was not adopted by national governments), any form of a military intervention initiated under the premise of the responsibility to protect must fulfill the following six criteria in order to be justified as an extraordinary measure of intervention:[99]

1. Just cause
2. Right intention
3. Final resort
4. Legitimate authority
5. Proportional means
6. Reasonable prospect

[98] Thakur, R. (2010). *The United Nations, Peace and Security.* Cambridge University Press. P. 257.
[99] Chetail, V. (Ed) (2009). *Post-Conflict Peacebuilding: a Lexicon.* Oxford University Press. P.297.

As common cause suggests, there are pros and cons of every legal doctrine there is and the responsibility to protect is thus no exception. The paper will now turn to a discussion of the criticisms as well as the praises of the responsibility to protect.

3.1.1. Praises of the Doctrine of the Responsibility to Protect

The responsibility to protect considers military intervention as being the last resort. That it should only be resorted to where all possible means, that is to say, only after diplomatic measures have failed; it is argued that the international community has now accepted the principle that when a leader like Moammar Gadhafi is inflicting harm on his own population through warfare, they will not sit idly by and let this happen.

There is a consensus that collectively they have an obligation to the people of Libya-and the populations in every nation state when people are under threat of large-scale atrocities. This new responsibility to protect norm stipulates that individual states themselves still hold the primary responsibility to protect their citizens from mass atrocities. On this note the responsibility shifts to the international community when any state proves either unable or unwilling to fulfill its obligation to its own population.[100]

It is an undeniable fact that tragic historical circumstances motivated us in the direction the responsibility to protect. Hence, the unchecked killing sprees in Cambodia, Rwanda, and the Balkans for example led the world's leaders to recognize that they have, as the UN Secretary General Put it; "a sacred calling to prevent mass atrocities."

[100] Knutson, K. (2011). *Libyan Involvement Testing UN Principle.* Retrieved from: www.righttoprotect/knuston.org: accessed on 13 April 2011.

The responsibility to protect is further praised on the basis of the Resolution 1973, which has rightly been described as historic and essential.[101] It is considered that the prevention of a return to serious violence in Guinea in 2010, following the massacres of 2009, was also a successful invocation of the responsibility to protect, as was Kenya after the 2008 elections where swift international diplomacy averted mass atrocity. These are referred to as instances where the responsibility to protect doctrine is most effective, where "states act to prevent mass atrocity without ever needing to get the last resort of military action- which can only be fraught with moral, legal, and political conundrums."[102]

Looking at the responsibility to protect from the other side of the coin however, one of the main concerns surrounding the doctrine is its infringement on national sovereignty. Be that as it may, this concern was rebutted by the UN Secretary General Ban Ki-Moon in the Report "implementing the Responsibility to protect". According to the first pillar of the responsibility to protect, the state has the responsibility to protect its populations from mass atrocities and ethnic cleansing. As per the second pillar of the responsibility to protect, the international community has the responsibility to help other states in the fulfillment of their responsibility to protect. It can be argued on this point that the UN Charter is itself an example of an international obligation voluntarily accepted by member states. On the one hand, in granting membership to the UN, the international

[101] Pert, A. (2011). Legality blurred in Libya Intervention. Retrieved from: http://theaustralian.com.au/news/world/legality-blurreed-in-libya-intervention/story-6frg6ux-1226039308281: accessed on 13 April 2011.

[102] Rosenberg, SP. (2011). *The responsibility to Protect: Libya and Beyond.* Retrieved from: www.tehrantimes.org accessed on 13 April 2011.

community welcomes the signatory state as a responsible member of the community of nations. On the other hand, the state itself, in signing the charter, accepts the responsibilities of membership flowing from that signature.[103] There is no dilution or transfer of state sovereignty, but there is a redefinition from sovereignty as a right of exclusivity to sovereignty as responsibility in both internal and external duties.[104]

Advocates of the responsibility to protect claim that the only occasions where the international community will intervene in the internal affairs of a state without the latter's consent, is when the state is either allowing mass atrocities to occur or is committing them, in which case the state is no longer upholding its responsibilities as a sovereign. And in this sense, responsibility to protect can be thought of as reinforcing sovereignty, not as a barrier inhibiting the protection of human rights.[105]

Critics of the responsibility to protect will occasionally equate responsibility to protect and humanitarian intervention. This is incorrect in the sense that the responsibility to protect offers a broader set of tools with which to prevent and halt mass atrocities, including capacity building, mediation, and sanctions. Intervention is the last of many options. Even when it comes to intervention, there are still a number of differences between responsibility to protect and humanitarian intervention. Humanitarian intervention can be applied to situations beyond mass atrocities, and it can be implemented unilaterally. Conversely, responsibility to protect is confined to mass

[103] Ibid 257.
[104] Ibid 257.
[105] Mamdani, M. (2010). *Saviours and Survivors: Darfur, Politics, and the War on Terror.* CODESRIA Publishers. P.327.

atrocities and is generally carried out multilaterally, hence with the approval of the Security Council.[106]

3.1.2. Criticisms of the Responsibility to Protect Doctrine

Gadhafi's offensive rebels in eastern Libya have undoubtedly killed civilians and he has vowed to go "house to house", killing protestors but critics say Libya's civil war is ultimately a Libyan issue and that the responsibility to protect goes too far in giving powerful countries a mandate to intervene in the affairs of others.[107] But it is "unimaginable that someone is killing his citizens, bombarding his citizens, how can officers be ordered to use machine bullets from machine guns, tanks and guns against their own citizens?... this is unacceptable, let the people speak, be free, decide to express their will... do not resist the will of the people."[108]

Advocates of the responsibility to protect are quick to point out that the responsibility to protect concept is applied selectively. However, Gadhafi's crimes against his own people were apparently enough to justify international intervention. But, the leaders of Bahrain and Yemen-both of whom have ordered brutal crackdowns on peaceful protestors face no such threat.[109] It has been said that some of the harshest critics of the Libya campaign could also be accused of acting out of self interest. For example, Turkish Prime Minister Recep Tayyip Erdogan and Russian Prime Minister Vladimir

[106] Ibid

[107] Carsltrom, G. (2011). *Responsibility to Protect or Right to Meddle?* Retrieved from: http://english.aljazeera.net/indepth/features/2011/03/2011324121253913547.htm: accessed on 13 April 2011.

[108] Iranian President Mahmoud Ahmedinejad condemning Gaddafi for the "unimaginable repression" against his people.

[109] ibid

Putin both condemned the airstrikes, the former calling it a bid to seize Libya's oil reserves, the latter likening it to the crusades.[110]

Furthermore, advocates of the Libyan intervention have invoked the responsibility to protect to justify the campaign. But responsibility to protect is narrowly and specifically aimed at stopping genocide, war crimes and crimes against humanity on a very large scale. It does not give the international community an excuse to pick sides in a civil war when convenient.[111] Be that as it may, the author is inclined to believe that the intervention in Libya was justifiable and for the benefit of the Libyan civilians whose human rights were being severely violated by their sovereign.

International law views civil war as an internal matter; it is for the people of each state to determine their own political fate, and other states cannot interfere in that process. The only exception to this prohibition is that a government facing a civil war can still invite outside assistance where the rebels have themselves received foreign help. So far as intervention to assist the opposition is concerned, this is, and always has been, illegal in international law.

The theoretical basis for this has been debated over the years but the generally recognized rationales for the prohibition are the principles of non-intervention and respect for state sovereignty. As the International Court of Justice (ICJ) has made clear on more than one occasion, the principle of non-intervention prohibits a state "to intervene directly, or indirectly, with or without armed force, in support of an internal

[110] ibid
[111] Larison, D. (2011). *"They had to Destroy the 'Responsibility to Protect' Doctrine to Save it".* Retrieved from: http://www.amconmag.com/larison: accessed on 13 April 2011.

opposition of another state". The merits or otherwise of the rebels' cause is immaterial: whether they are fighting to depose a brutal tyrant or a model democratic regime, no state may legally assist them. Had the international community turned a blind eye to the mass atrocities that were taking place in Libya and the other Arab Countries that would have been interpreted as a green light for all other leaders to employ similar tactics. In other words, the strong international response has the potential to restrain those regimes from unleashing the hounds of war.[112]

The US would be particularly aware of this from its experience with the funding and arming of the Contras in Nicaragua in the 1980s. In Nicaragua's case[113] against the US complaining of these activities, the ICJ considered whether the assistance given by the US to the Contras, in their attempts to overthrow the left-wing Sandinista Government, could be justified on ideological grounds.

The court firmly rejected this, declaring that there was no exception in international law allowing intervention in support of an opposition who's political or moral values seemed worthy.[114]

This fundamental rule is not altered in Libya's case by the resolutions passed by the Security Council.[115]

[112] Mahanta, S. (2011) What's Happening in Libya Explained. Retrieved from: http://motherjones.com/mojo/2011/02/whats-happeningin-libya-explained.
[113] Nicaragua v The United States of America 1986 ICJ reports.
[114] Ibid.
[115] Pert, A. (2011). *Legality blurred in Libya Intervention*. Retrieved from: http://theaustralian.com.au/news/world/legality-blurreed-in-libya-intervention/story-6frg6ux-1226039308281: accessed on 13 April 2011.

We hear that the Gadhafi regime has “lost legitimacy”, but regime change has never been accepted as legalising unilateral intervention unless and until the rebels’ National Transitional Council is recognized as the government of Libya, as France, Italy, and Qatar have done, it remains for the other 189 members of the UN opposition. It is obvious that any use of force to protect civilians, because it is necessarily directed at the government, will be of direct benefit to the rebels.[116]

At this point it can be argued that the rebel government represent the will of the people and thus deserve the recognition that has been afforded to them, *support for anyone other than Gaddafi.*

Interested states have covertly, and sometimes overtly, assisted opposition groups in other states since time immemorial, and it would be naive to expect that to change. But recent comments do not seem to notice the clear legal prohibition of such assistance. It would be regrettable if the renewed respect for international law evident in Resolution 1973 were to be simultaneously undermined by a flagrant violation of that law, however tempting it may be.

The scope of the responsibility to protect is often questioned. The concern is whether the responsibility to protect should apply to more than the four crimes; genocide, war crimes, crimes against humanity and ethnic cleansing. In other words, should responsibility to protect be used to protect civilians in peril following natural disasters?[117]

[116] ibid
[117] ibid

The question of military intervention under the third pillar of responsibility to protect remains controversial. Several states have argued that the responsibility to protect should not allow the international community to intervene militarily on states as to do so would be an infringement on sovereignty. Others, on the other hand, argue that this is a necessary facet of the responsibility to protect, and is necessary as a last resort to stop mass atrocities.

A related argument surrounds the question as to whether more specific criteria should be developed to determine when the Security Council should authorize military intervention.[118] Another concern surrounding responsibility to protect is that the Security Council in the UN, when deciding to which crises the responsibility to protect applies, will be selective and biased in favour of states that are economically or politically powerful.

Hence, not intervening in Chechnya because Russia is a powerful member of the UN Security Council, this has been acknowledged as an issue of major concern and has hindered the implementation of the responsibility to protect.[119]It can be argued that the responsibility to protect is not a restriction on sovereignty in its modern sense; hence, sovereignty being the popular will of the people and not the will of the sovereign.

3.1.3. Responsibility to Protect as a Limitation/Restriction on State Sovereignty

[118] ibid
[119] ibid

Following the Pinochet[120] decision by the House of Lords in 1999 there was a broad international campaign to bring to justice heads of states and those leaders that were accused of human rights abuses. Sovereignty must give way in places where crimes against humanity, war crimes, genocide are being committed. We depend on sovereign states to defend human rights. The relationship between sovereignty and human rights is under evolution and at present it is not possible to foresee how one might defeat the other. National sovereignty locates the state as the ultimate seat of power and authority, unconstrained by internal or external checks[121]; of course, sovereignty may be "limited" through the invocation of the doctrine of the responsibility to protect as well as on humanitarian grounds.

The responsibility to protect's core principle is that sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. If the state should default, the responsibility lies with the broader community of states. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the government in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[122]

The international order is based on a system of sovereign states because this is seen as the most efficient means of organising the world in order to discharge the

[120] Ex parte Pinochet (2000), AC 147.
[121] Thakur, R. (2006). *the United Nations, Peace and Security.* Cambridge University Press. P. 252.
[122] Ibid 251.

responsibility to the people of protecting their lives and livelihoods and promoting their well-being and freedoms.

If sovereignty becomes an obstacle to the realisation of freedom, then it can, should and must be discarded. The steady erosion of the once sacrosanct principle of national sovereignty is rooted in the reality of global interdependence: no country is an island unto itself anymore.

As per the ICISS therefore, it is necessary and useful to reconceptualise sovereignty as responsibility, thus, military intervention for human protection purposes takes away the rights flowing from the status of sovereignty, but does not in itself challenge the status as such.

4. Conclusion

The responsibility to protect doctrine, although not formally institutionalised, can be seen as influencing various activities by the international community. The operational capacity problems of establishing who should make the judgment, who should act, and what kind of actions should take place, have still not been resolved.[123]

The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. The goal of the intervention for human protection purposes is not to wage war on a state in order to destroy it and eliminate its statehood, but to protect victims of atrocities inside the state.

Sovereignty is a jus cogens norm but nevertheless, it is clear that sovereignty increasingly cedes moral ground to the discourse on human rights, particularly where gross human violations are concerned and it is on this basis that the author concludes that the responsibility to protect does indeed impose a restriction on state sovereignty.

[123] Chetail, V. (ed) (2009). *Post-Colonial Peacebuiding: a Lexicon.* Oxford University Press. p. 301.

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