CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The perception of state sovereignty as a bedrock principle of international legal order has resulted in a fierce debate regarding the increased quest for humanitarian intervention. This has led to the emergence of tension between the state-centered international legal system and the increasing recognition of evolving international norms, particularly human rights norms, that function contrary to the accepted dogma of this state centered system. This debate has consumed a vast amount of scholastic ink and juridical thoughts. On the one hand, it is argued that the principle of state sovereignty in the international system, the doctrine of sovereign equality, must be preserved not only to guarantee the efficacy of the international system, but to protect the individual citizens of states whose rights might be violated by external state action.[1] To this group of scholars, the maintenance of international peace and security must respect and accord with the principles of state sovereignty as enshrined in the Westphalia declaration of 1648.[2]

To humanitarian Intervention crusaders, the state-centered system of sovereign equality is out of touch with evolving legal norms protective of individual human rights.[3] This view favours the new approach that sees protection of human rights far above the concept of state

[1] Brad Roth, 'The Enduring Significance of State Sovereignty', (2004) *56 FLA. L. REV. 1017*.

[2]The Treaty of Westphalia otherwise called the European settlement of 1648 brought to an end the eighty years' war between Spain, the Dutch and the German phase of the thirty years' war. The Treaty was negotiated, from 1644, in the Westphalia towns of Munster and Osnabruck (a town in Germany). The Spanish-Dutch Treaty was signed on January 30, 1648. The treaty of October 24, 1648, comprehended the Holy Roman emperor Ferdinand III, the other German's Princes, France, and Sweden, England, Poland, Russia, and the Ottoman Empire were the only European powers that were not represented at the two assemblies. The Westphalia treaties are credited with providing the foundation of the modern state and articulating the concept of territorial sovereignty. See www.britannica.com/event/peace of Westphalia. Accessed on 9 September 2018.

[3] Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', (*84 AM. J. INT'L L. 866, 869 1990)*.

sovereignty such that in event of conflict between state sovereignty and humanitarian intervention, the international community should intervene to protect human rights. To them, it is time to redefine the concept of sovereignty to accommodate the increasing demands for intervention. They have called for a re-conceptualization of sovereignty based on historical precedent that would better accommodate individual rights in international law.[4] The increasing debate over the legality of state intervention in the affairs of another state when the host state is unable to stop widespread abuses of human rights has created a huge tension between state sovereignty and humanitarian intervention. This conflict is vividly exemplified by the interventions in Kosovo in 1999 and the current civil war going on in Syria between Russia and the West led by the United States. Before then the ECOWAS military interventions in Liberia and Sierra Leone to restore peace and stability in the sub-region without any legal mechanism for such intervention within her Charter also raised serious questions of validity in international relations. These conflicts also raise questions about the inability of the international community to intervene in certain extreme cases of humanitarian crises, like the Rwandan genocide, Liberia, the Darfur crises and the conflict in Democratic Republic of Congo. In Liberia, it was after the ECOWAS community failed to even persuade the UN Security Council to even discuss the matter that led to the unprecedented intervention. Leaving the UN Security Council to either give *ex post facto* validation of the intervention or face international public opprobrium for her legal inertia. These scenarios have focused attention on the need for timely intervention by the international community when death and suffering are being inflicted on large numbers of people, and when the state nominally in charge is unable or unwilling to stop it. The question is who should undertake such intervention and under what circumstance?

[4]. Fernando R. Tesón, *The Kantian Theory of International Law*, (*92 COLUM. L. REV, 1992*) p.52

In Kosovo[5], a group of states under the auspices of North Atlantic Treaty Organization (NATO) intervened without seeking authority from the United Nations Security Council as required by law.[6] In East Timor, the United Nation Security Council authorized intervention, but only after obtaining an invitation from Indonesia and that was after thousands of people have died from the violence. The Government of Indonesia was unable to stop the carnage hence the invitation to the UN Security Council to intervene militarily. As in Rwanda in 1994, the international community stands accused of doing too little, too late. Kofi Annan[7], former Secretary General of the United Nations, said that neither of these precedents is satisfactory as a model for the new millennium. He had argued before the Assembly that:

> Just as we have learnt that the world cannot stand aside when gross and systematic violations of human rights are taking place, we have also learnt that, if it is to enjoy the sustained support of the world's peoples, intervention must be based on legitimate and universal principles. We need to adapt our international system better to a world with new actors, new responsibilities, and new possibilities for peace and progress.[8]

This is the dilemma of humanitarian intervention. In the context of the extant international law and conventions, is it legitimate for a regional organization to use force without a UN

[5] Kosovo lies in Southern Serbia and has a mixed population of which the majority are ethnic Albanians. The region enjoyed a high degree of autonomy until Former Yugoslavia Serbian Leader Slobodan Milosevic altered the status of the region and brought it under the direct control of Belgrade, the Serbian capital. The Kosovar Albanians strenuously opposed the move which led to the open conflict between Serbian military and police forces and Kosovar Albanians. On 13th October, 1998 NATO Council authorized activation orders for air strikes outside UN mandate.

[6] Article 51 of the UN Charter provides for collective action inherent in the members states for the common good but subject to approval by the Security Council. The US and her NATO allies sensing that Russia and China will veto any UN resolution for military intervention in Kosovo unilaterally and without UN mandate intervened militarily in Kosovo to protect the native Albanians from the advancing Serbian rebels.

[7].Kofi Annan, *Reflections on Intervention in the Thirty –Fifty Annual Witchley Foundation Lecture* (Press Release SG/SM/6613, 26 June, 1998) www.un.org./press/en/1998/19980626.sgsm6613. Accessed on accessed on 13 November 2015.

[8] *Ibid.,*

mandate? On the other hand, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked; as the world did in Rwanda in 1994. The inability of the international community to reconcile these two compelling interests informed the choice of this topic. To avoid a repeat of such tragedies as was seen in Rwanda, Somalia, Kosovo and presently in Iraq and Syria, the research opines that it is essential that the international community reach consensus not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom. The present conflict in Syria and its outcome have prompted a debate of worldwide importance on this issue. And to each side in this debate difficult questions can be posed. The background of the study led us to the principle of responsibility to protect which has laid down mechanism to avoid future occurrence of such large scale human rights violations.

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, and to those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, the question is: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the second world war, and setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?[9] In the words of Kofi Annan, there is nothing in the UN charter that precludes a recognition that there are rights beyond borders. What the UN Charter does say is that "armed force shall not be used, save in the common interest.[10]" But what is that common interest? Under whose

[9] *Ibid*
[10] See Article 51 of UN Charter

authority? And with what means of intervention? These are the questions that define the choice of this topic.

1.2 Statement of the Problem

The concept of state sovereignty, in both its internal and external meaning, lies at the centre of the contemporary international order. Its importance is embodied in the Charter of the United Nations. The UN Charter[11] is particularly focused on the external dimension, stating the principles of territorial integrity, and political independence against threats from other states. This position is dictated by the fact that a traditional conception of sovereignty as non-interference is one of the few guarantees for developing countries' independence *vis-à-vis* Western imperialism. Even the International Commission on Intervention and State Sovereignty Report (ICISS) which proposed the responsibility to protect doctrine recognized the importance of state sovereignty in its report that:[12]

[11] Article 2(4)

[12] The Report was produced by the Committee set up by the Canada Government and it submitted its report in 2001. The United Nations adopted the principles stated in the Report as a working document at the United Nations World Summit in 2005. At the Summit in September, 2005, all member States formally accepted the responsibility of each state to protect its population from Genocide, war crimes, ethnic cleansing and crimes against humanity. At the Summit, world leaders agreed that when any State fails to meet that responsibility, all states (the international community) are responsible for helping to protect people threatened with such crimes. Should peaceful means –including diplomatic, humanitarian and others –be inadequate and national authorities manifestly fail to protect their populations, the international community should act collectively in a timely and decisive manner through the UN Security Council and in accordance with the UN Charter on a case by case basis and in cooperation with regional organisations as appropriate. In April 2006, the Security Council made official reference to the responsibility to protect principle in Resolution 1674 on the protection of civilians in armed conflict. The Security Council also referred to that Resolution in August 2006 , when passing resolution 1706 authorizing the deployment of UN Peace keeping force to Darfur, Sudan. The responsibility to protect principle has featured prominently in a number of resolutions adopted by the Security Council. The Council referred to the doctrine recently on 26th February, 2011 in condemning what the UN Secretary General called "the gross and systematic violations of human rights" by Ghaddafi forces. On 17th March, 2011 the Security Council made reference to the principle again in Resolution 1973 authorizing member States to take all necessary measures to protect civilians under threat of attack in Libya, while excluding a foreign occupation force of any form on any part of Libyan territory. A few days later, acting on the resolution, NATO planes started striking at Ghaddaffi's forces leading to the eventual overthrow of the Ghaddafi regime. See the Report of the 15 man Committee of the ICISS. Available on http:// www.un.org/en/preventgenocide/rwanda/about/bresponsibility. Accessed on 13 November, 2015.

> In a dangerous world marked by overwhelming inequalities of power and resources, sovereignty is for many states their best and sometimes seemingly their only line of defence, being also a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny.[13]

This framework clearly shows that there is still no overwhelming majority in the international community ready to support a shift in the traditional concept of sovereignty in order to allow for unauthorized humanitarian interventions. How will the United Nations then handle a situation of gross violations of human rights without violating the concept of state sovereignty? The former United Nations Secretary-General Kofi Annan captured this dilemma immediately after the NATO intervention in Kosovo in the following words:

> This year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority….On the one hand is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked.[14]

[13] *Ibid.*

[14] .Annan, Kofi 1999, "Two Concepts of Sovereignty," (The Economist, 18 September 1999 Online) Available from http://www.un.org/Overview/SG/kaecon.htm. Accessed on 16 November 2015

The ICISS report did not agree on what the Council should do when a motion calling for a humanitarian intervention fails to get the support of all permanent members. Therefore, the norms of sovereignty remain those indicated in the Charter of the United Nations, based on non-interference and state equality, which recognize the possibility of military interventions under the provisions of the United Nations Charter only[15] for the actualization of the common interest. Many years before Kofi Annan, his predecessor in office and former Secretary General of the United Nations, Boutros-Ghali[16] stated, that 'the time of absolute and exclusive sovereignty has passed; its theory was never matched by reality.' Traditional sovereignty, incorporated in the Charter of the United Nations,[17] is characterized by the norms of non-interference and state equality. Humanitarian intervention challenges this notion, creating a tension between the norms of state sovereignty and the protection of human rights. In fact, there is a growing belief that the limits of state sovereignty and the principle of non-interference in the domestic affairs of a country are represented by the duty of the state institution to protect its citizens.

In this study, it is submitted that the norms of sovereignty has not changed to allow for unauthorized humanitarian intervention. The only interventions for humanitarian purposes that seem to be widely accepted are those authorized by the Security Council under the provisions of the Chapter VII of the Charter of the United Nations.[18] The problem then is what happens when there is no UN consensus on intervention due to veto paralysis? Who intervenes and under what auspices? This leads us to pose the following problem questions, thus:

[15] See Article 51 of the UN Charter
[16] Agenda for Peace: United Nations Report, 1992, pg.4
[17] Article 2(4)
[18] See particular Article 51 on collective action for common interest.

(i) In the absence of UN approved intervention on humanitarian grounds, how does the international community resolve an emerging humanitarian atrocity in a member state without violating the norm of sovereignty as enshrined in chapter 2(4) of the Charter?

(ii) Under what circumstance will an unauthorized humanitarian intervention be accommodated under the UN Charter?

(iii) Under the existing institutional framework on the enforcement of international humanitarian law, is it possible to have a legal framework acceptable to the international community for the enforcement of international humanitarian law especially during armed conflict?

(iv) Within the concept of responsibility to protect, can the international community build a consensus towards statutory intervention away from the traditional and contentious humanitarian intervention?

The task ahead is to answer these questions with a view to ending the dilemma between sovereignty and intervention. Therefore, as part of the statement of the problem, the work in a bid to resolve the legal and moral dilemma, discusses the centrality of sovereignty as the foundation of the contemporary world order and presenting the rising challenge of a more human-centred idea of security, from the notion of 'just war' to the concepts of 'human security' and 'responsibility to protect'.

1.3 Aims and Objectives of the Study

This research reviews a selection of international law and international relations literature on humanitarian intervention and the tension between same and state sovereignty, in particular

on unilateral intervention outside the United Nations mandate. The research again examines the right of intervention under the African Union Constitutive Act which was developed following the UN Security Council inaction in Rwanda and other African countries. It is not intended to be an exhaustive analysis. Rather, its purpose is to provide an overview of some of the important issues surrounding unauthorized humanitarian intervention with a view to facilitating a discussion of policy options for the United Nations Security Council in times of humanitarian crises anywhere in the world. It addresses the following questions: Is there a legal or moral right or obligation on the part of states to respond to situations of gross violations of human rights? Is there an emerging legal right or norm that allows humanitarian enforcement action outside of the Charter regime? What are the possible criteria for humanitarian intervention which could inform governmental decision-making in a situation where the Security Council is unable to take action? These questions have been answered with the conceptualization of sovereignty as 'Responsibility to Protect', and has challenged the absoluteness of sovereignty, suggesting the possibility, for external forces, to intervene in a sovereign country to save human lives.

The study shall attempt to analyze the emergence of different challenges to the traditional norms of sovereignty. The new progressive re-conceptualization of 'sovereignty as control' into 'sovereignty as responsibility' which is believed to have provided a new legal basis for intervention is rejected unless under the auspices of the United Nations. The objective of this research is to outline the major developments in the concept of state sovereignty and humanitarian intervention. In a traditional approach to international law, the norm embodied in Article 2(4) of the Charter[19] is recognized as *jus cogens*, it is 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is

[19] United Nations Charter

permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character.

In the light of the emerging era of humanitarian intervention, the research asked the question whether or not there is a new norm of *jus cogens* that reshapes sovereignty in a way that allows for unilateral humanitarian intervention. It shall trace the history of the concept of state sovereignty and humanitarian intervention especially interventions after the end of cold war.[20] It shall also attempt an appraisal of the report of the International Commission on State Sovereignty to see if it has altered the traditional concept of sovereignty or whether it has provided for a new norm of international law.

1.4 Research Methodology

The dissertation has adopted the doctrinal research method approaches in the examination of legal rules. In doing so, the dissertation is concerned with the analysis of the legal rules concerning or relating to state sovereignty and humanitarian intervention which are found in various international statutes, treaties, report and conventions which though in themselves do not provide a complete statement of the law in any given situation but have provided the basis for whatever assumptions that have been made. As a result, the dissertation has adopted the doctrinal research method by applying the relevant legal rules to the particular situation or facts under consideration. In the end, the dissertation made reference to several data including case law, statutes, international treaties and charters, regional charters, journal, articles, online resources or internet sources, news bulletin especially from international news media

[20] .Cold war was a state of political and military tension after World War 11 between powers in the Western bloc (the United State and its NATO allies) and powers in the Eastern bloc (Soviet Union and its allies in the Warsaw Pact). Historians have not fully agreed on the dates but 1947-1991 is common. The term "cold" war was used ,because there was no large scale fighting directly between the two sides, although there were major wars, known as proxy wars, in Korea, Vietnam and Afghanistan that the two sides supported. See Wikipedia, the free encyclopaedia https://en.m.wikipedia.org accessed on 7 November 2015.

houses like Aljazerra, British Broadcasting Corporation, the Cable News Network-CNN excetara.

1.5 Significance of the Study

Despite enduring commitment to state sovereignty as a principle, in practice, the revocation, temporary suspension, or violation of sovereignty rights has regularly occurred in the international society of states. Since the end of the Cold War, however, the revocation or temporary suspension of sovereignty has been justified on the basis of violations of fundamental human rights and international humanitarian law. The essence of this dissertation is to equip policy makers and international diplomats, staff and members of the International community, especially the 15 members of the UN Security Council to appreciate the remote and immediate causes of the conflict between sovereignty and intervention. To clearly inform them that it is the complete absence of statutory provision supporting humanitarian intervention whereas sovereignty enjoys unwavering statutory imprimatur under the UN Charter. Another significance of the work is to urge the members of the international community to look towards a reform of the United Nations Charter towards normative compatibility with the African Union Constitutive Act, 2000 which has provided for the right of the Union to intervene.

1.6 Scope and Limitations of the Study

The concept of humanitarian intervention which has eroded the traditional concept of sovereignty appears to have presented or is presenting a new legal norm in international law. Following the NATO intervention in Kosovo in 1999, the Western world has been adjusting the meaning of sovereignty to accommodate intervention on humanitarian ground. For

example, after the intervention in Kosovo, Vaclav Havel while justifying the NATO military intervention in Kosovo without United Nations mandate declared that:

> No person of sound judgment can deny one thing: this is probably the first war ever fought that is not fought in the name of interest, but in the name of certain principles and values. If it is possible to say of a war that it is ethical, or that it is fought for ethical reasons, it is true of this war.[21]

Havel[22] declared that the rights of human being are above the rights of states, and he invoked a higher moral law of human rights to guide the future international order. The dissertation is limited to analyzing the legal aspect of the contemporary concept of sovereignty and inquire to what extent the norm of unilateral humanitarian intervention has affected or altered the meaning or scope of sovereignty. The research will focus on the appraisal of the United Nations Charter on the non use of force and non interference *vis-a-vis* the unilateral military interventions by member states outside United Nations mandate and the right of intervention under the African Union Constitutive Act to find out if a new norm of international law has emerged -the norm of sovereignty as responsibility and not sovereignty as control. The research will also appraise the African Union Constitutive Act by way of comparative analysis with the UN Charter which now provides for a collective action by African states to protect widespread violations of human rights in African.

[21] Havel V, address by Vaclav Havel , President of the Czech Republic, to the Senate and the House of Commons of the Parliament of Canada, 29 April, 1999 ...https;//www.ucl.ac.uk.vol3-1 accessed on 7 November 2015.
[22] *Ibid.*

1.7 Organizational Layout

To undertake the research, the dissertation started in chapter one with the introduction of the topic and discussed the background of the study as well as the statement of the problem. The objectives as well as the purpose of the research work was exhaustively discussed in chapter one. The purpose of the work which is to bring to limelight the conflict and supremacy battle between sovereignty and intervention was discussed. At the end of chapter one, the dissertation set the agenda of the work; which is to achieve a normative compatibility between sovereignty and intervention in the affairs of state conduct, and to ensure respect for the rules of war which is at the heart of every quest for intervention.

In chapter two of the work, the researcher conducted an extensive review of the existing literatures in the area of sovereignty and humanitarian intervention. The dissertation discussed the concepts and theories of state sovereignty, humanitarian intervention. In addition, we traced the historical origin of these concepts. For sovereignty, it started with the Westphalian treaty of 1648 down to the 1945 San Franscisco conference that gave birth to the present UN Charter. It also discussed the conceptual meaning and theories of humanitarian intervention. It traced the origin of humanitarian intervention and discovered that the concept predated the 1945 Charter then as state practice but however did not survive the 1945 UN Charter as a state practice. The 1945 UN Charter defined the new basis of international relations anchored on respect for territorial sovereignty and non-intervention.

However, it was later discovered in our Chapter three, that the 1948 Universal Declaration of Human Rights adopted by the United Nations and the subsequent adoption of the various human rights friendly Conventions especially the Geneva Conventions and its Additional Protocols which mandates member states to respect and protect human rights especially during armed conflict gave birth to a new concept which stood to challenge the

concept of sovereignty and has been vociferous against the doctrine of absolute sovereignty till date. It is that norm of human rights protection and growing concern of the international community against gross abuse of human rights by state and non state actors that gave rise to the norm of sovereignty as responsibility. The chapter also discussed the historical background of the concept of responsibility to protect as well as the African Union and ECOWAS legal regimes on the protection of sovereignty and humanitarian intervention. Chapter two ended with a summary of the literature review where the dissertation identified the views of the various authors on the subject as well as the limitations of their definition. It is that limitations discovered that induced the choice of the topic which aims to proffer solutions to the problems identified. In the literature review, the dissertation considered many existing literature on sovereignty and intervention. The research observed that it is the institutional gap in the UN Charter which did not provide for any legal regime for humanitarian intervention that is at the root of the tension and the aim of this work is to try and set an agenda or solution to resolve the tension.

In chapter three, the study discussed the general principles and legal framework for state sovereignty and humanitarian intervention. The dissertation discussed theories of sovereignty and humanitarian intervention. The erosion of the westphalian concept of sovereignty was also discussed as well as the domestic and international legal framework for the protection of sovereignty. The chapter equally discussed the legal and institutional framework on humanitarian intervention including the United Nations system on humanitarian intervention. Humanitarian intervention authorized by the UN Security Council and one without the authorization of the Council was equally discussed. The chapter discussed the meaning of threat to peace and considered circumstances when humanitarian intervention has been held to as amounting to threat to peace. Chapter three however laid the

foundation for the discussion of the responsibility to protect norm. State sovereignty and the principle of responsibility to protect which was based on report of the 2001 Commission on Intervention and State Sovereignty was equally discussed in chapter three. The report which was presented to the UN in 2001 sought to introduce a concept of sovereignty as responsibility and that when states are unable to provide the needed protection for its citizens and there is large scale violation of human rights resulting to crimes against humanity, war crimes and genocide, that the responsibility to protect the people falls on the international community through the UN Security Council or in the absence of the UN Security Council, by a coalition of willing states. So what are the principles that should govern the responses of the international community, if and when these kinds of situations come along? Can individual states anywhere else do what they like to their own citizens within their own borders? When internal catastrophe looms because of state action, inaction or incapacity, do sovereign rights yield to some larger international responsibility to protect, ultimately by military action? Who decides, according to what principles? And who should act?

Having realized that the essence of intervention is to restore sovereignty, it discussed the legitimacy of humanitarian intervention, intervention with UN Security Council approval which must be anchored on the threat to peace. The dissertation also discussed the legitimacy of intervention without the UN Security Council mandate and its legal implication and justification thereof. With all the developments witnessed in the international arena regarding sovereignty shifting away from its absolutism to a concept now anchored on sovereignty as responsibility, the dissertation discussed sovereignty in transition, moving from the westphalian non intervention stage to a stage with responsibility in absence of which the international community takes over the responsibility.

In chapter four, the study discussed state sovereignty versus humanitarian intervention: resolving the conflict and in the process identified the areas of conflict between state sovereignty and humanitarian intervention including the prohibition on non use of force which in international law has acquired the norm of customary international law of jus cogens for which no derogation is permitted. However, in chapter four, the dissertation identified the African Union Constitutive Act which in its article 4(h) has made provisions that appear to be in conflict with the principle on non use of force. There was also an attempt in chapter four towards a normative compatibility between sovereignty and humanitarian intervention particularly on the African continent as a result of the African Union Constitutive Act identified earlier wherein Africa has moved from the era of humanitarian intervention to statutory intervention.

In chapter five, the study did a comparative analysis of sovereignty and humanitarian intervention using the UN Charter and AU and ECOWAS Charters as reference guide and identified a normative incompatibility especially regarding the concept of humanitarian intervention. It deconstructed the AU and ECOWAS legal regime on intervention and the provisions of the UN Charter. In the analysis, it discovered that it is only under article 24 of the UN Charter that the International Community through the UN can authorize the use of force against a member state but the AU and ECOWAS framework provides the contrary. That laid the foundation for the normative incompatibility but it is submitted that the AU's position is caused by their experience regarding several instances of UN inaction in Africa. The dissertation equally analyzed these AU and ECOWAS legal framework against the backdrop of article 103 of the UN Charter which forbids member states from entering into any treaty inconsistent with the UN Charter provisions. This view is further supported by the position of the Africa Union on the proposed UN reforms as demonstrated in their common document called the *Ezulwini* Consensus. Practically, the AU in the document adopted a

relationship to be based on non subsidiarity basis with the UN Security Council as opposed to the present arrangement of subsidiarity. The dissertation concluded the chapter with analysis of a normative compatibility of AU and ECOWAS and UN Charter regimes in pursuit of humanitarian intervention and sovereignty. In the end, it is submitted that such normative compatibility together with the reform of the UN Charter will help ease the tension between sovereignty and intervention.

CHAPTER TWO

LITERATURE REVIEW

2.1 Theoretical Framework of Sovereignty and Humanitarian Intervention

The dissertation shall discuss the concept of sovereignty and humanitarian intervention to discover their conceptual and theoretical framework. The meaning and origin of the term ' sovereignty' shall be discussed as well as the meaning and origin of humanitarian intervention. The dissertation at the end shall attempt a discussion of the various concepts that appear in this dissertation as well as the various humanitarian interventions undertaken by the international community.

2.2 Sovereignty

The concept of state sovereign dates back to the Peace of Westphalia in 1648[23], which designed a system of independent nations based on the principles of autonomy, territory, mutual recognition and control. Its modern philosophical definition is normally ascribed to *Jean Bodin*[24] who described the nature of sovereignty as the absolute power over a territory which only obligations and conditions are dictated by the laws of God and nature. However, *Jean Bodin's* definition of state sovereignty is rather a construction of the 18th and 19th centuries, 'when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core principles of international society.

[23] *.Ibid*

[24] Jean Bodin lived from (1530-1596) was a French jurist and political philosopher. He was a member of the Parliament of Paris and Professor of Law in Toulouse. He is best known for his theory of absolute sovereignty. He is credited with expounding the concept of state sovereignty. Available on https://en.wikipedia.org/wiki/jean_Bodin. Accessed on 25 November 2015.

Bodin attributed the location of sovereignty in the sovereign represented in either the King or the Queen as the absolute monopoly of power. *Bodin* ascribed the location of sovereignty in one body called the sovereign who is not answerable to anybody except the law of God. From *Bodin* location of sovereignty in the Queen or King as the case may be, the theory of absolute Monarch, sovereignty was later identified with the state. It means equality of states. The concept of equality of nations is linked to sovereignty concepts because sovereignty has fostered the idea that there is no higher power than the nation-state, so its sovereignty negates the idea that there is a higher power, whether foreign or international unless consented to by the nation-state.

The general perception is that the concept of sovereignty began with that 1648 Treaty of Westphalia.[25] The Treaty represented the passing of some power from the emperor with his claim of holy predominance, to many kings and lords who then treasured their own local predominance. With time this developed into notions of the absolute right of the sovereign, and or what you call Westphalian sovereignty. One United States government official has succinctly defined the concept of sovereignty and its associated problems in the following words:

[1]

> Historically, sovereignty has been associated with four main characteristics. First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other

[25] .The 128 clauses of that *Westphalia* document is to wade through dozens of provisions dealing with minute details of ending the Thirty Years' War between the Holy Roman Emperor and the King of France and Their Respective Allies. Available *at* http://fletcher.tllfts.edu/multi/ texts/historical/westphalia. txt. Accessed on 14 November 2015.

> governments as an independent entity entitled to freedom from external intervention.[26]

These components of sovereignty as identified by *Hass*[27] were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components- internal authority, border control, policy autonomy, and non-intervention- is being challenged in unprecedented ways. He further went on to describe the four ways that the term "sovereignty" has been used:

> Domestic sovereignty, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control trans border movements; international legal sovereignty, referring to the mutual recognition of states or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations.[28]

There are no particular characteristics inherent in the concept of sovereignty, but its nature depends very much on the customs and practices of nation-states and international systems which practices could change over time. It is this evolving concept that allows the community of nations to intervene in the domestic affairs of a state who is not meeting its

[26] Richard N Haass, (former ambassador and Director of Policy Planning Staff, U.S. Department of State), 'Sovereignty: Existing Rights, Evolving Responsibilities', (being lectures delivered at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, 14 January 2003). A*vailable* athttp://www.georgetown.edu/_sfs/documents/haass_sovereignty_200301_14.pdf. Accessed on 14 November 2015

[27] *Ibid*

[28] *Ibid.*

internationally expected practices, especially when it concerns the gross violations of human rights. This is because sovereignty has now been seen as belonging to the people and no longer to the individuals who control the state. Even the Nigerian constitution has a provision to the effect that sovereignty belongs to the people of Nigeria from where Government derives its authority.[29] Jackson[30] aptly captured this evolving norm and the jurisprudential philosophy when he stated that:

> Weapons of mass destruction, genocide, failed states, and rogue states all pose extreme conceptual problems for doctrines of sovereignty. But, of course, an important dilemma develops when international institutions do not have the capacity or the will to act to prevent or redress such extreme dangers to world peace and security or to particular regions and populations. In what circumstances, then, should other entities, including powerful sovereign states, have the right or duty to step into the breach? And to what degree is there a requirement to exhaust recourse to international institutions before such action? Has the practice of nations already begun to develop new norms condoning such a practice?

He went on to explain that the inability of the state actors to protect the people from violations of their human rights will result in the international community stepping in to halt same even if it will amount to an assault on the state sovereignty. Sovereignty also plays a role in defining the status and rights of nation-states and their officials. Thus, sovereign

[29] See section 14 of the 1999 Constitution of Nigeria, (as Amended).
[30]John H Jackson, 'Sovereignty- Modern: A New Approach to an Outdated Concept', s (2003) *97 American Journal of International Law*, 782-802. Available online on http://schoolarship.law.georgetown.edu/facpub/110. Accessed on 22 September 2017.

immunity[31] and the consequential immunity for various officials of a nation-state is recognized. It means that a state cannot be impleaded before the courts of another state without its consent. The doctrine which used to be an absolute rule was later re-conceptualized to allow for certain exceptions to the rule. The exceptions became necessary due to the increase in commercial activities between states, many states moved in their practice to doctrine of restrictive immunity by which a foreign state is allowed immunity for acts *iure imperi* only as against acts *iure gestionis.*[32] *O`Connell*[33] stated this approach aptly in his book thus:

> The most that can be said of customary international law is that it enjoys immunity from the judicial process only in respect of government activities that pertain to administration, and does not compel it in respect of other activities which are more truly commercial than administrative.

In *Congreso Del Partido*[34] the House of Lords declined to grant state immunity to two Cuban owned commercial ships arrested on British water by Chile for breach of contract on the ground that sovereign immunity does not extend to states' commercial activities, that is, *acta iure gestionis*. Similarly, sovereignty implies a right against interference or intervention by any foreign or international power.[35] It can also play an anti-democratic role in enforcing extravagant concepts of special privilege of government officials. Therefore the logical connection between the sovereignty concepts and the very foundations and sources of

[31] Section 1 of Diplomatic Privileges and Immunities Act, Cap D15 Laws of the Federation of Nigeria, 2004.
[32] Acta juri imperi are acts of public function traditionally associated with states while acts *iure gestionis* are states acts in respect of commercial or trading activities which does not enjoy immunity. Acta juri *imperi* enjoys state immunity while acts *iure gestionis* does not enjoy state immunity. Available on www.dunaime.org>LegalDictionary
[33] .O` Connell, *International Law*, (2nd edn, Vol.11, 1970), p.841
[34] (1983) 1 A.C 244
[35] See Article 1(2) of OAU Charter, and the Constitutive AU Act, Articles 2(4) and 2(7) of the United Nations Charter

international law can easily be seen. If sovereignty implies that there is no higher power than the nation-state, then it is argued that no international law norm is valid unless the state has somehow consented to it. Of course, treaties or conventions almost always imply, in a broader sense, the legitimate consent of the nation-states that accepted and signed it. For instance, Article11 of the Vienna Convention on the Law of Treaties provides that[36] 'the consent of state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, acceptance, approval or accession, or by any other means if so agreed'. Therefore, from the foregoing a treaty cannot bind a state unless the state expressly consent to be bound by the treaty.

When it is argued for example, that Nigeria should not accept a treaty because that treaty infringes upon Nigerian sovereignty, what is implied is that a certain set of decisions should be made, as a matter of good governmental policy, at the nation-state (Nigeria) level, and not at the international level. Sovereignty can be described as the power of one state or body over another or the freedom of a State has to control it affairs. The key word here is State. This is the reason why Shaw stated that international law is based on the concept of State.[37] The State in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institution and eternally the supremacy of the State as a legal person.[38] The concept of sovereignty includes the power of State to take economic and political decisions without outside interference. The opponents of World Trade Agreement based their opposition to such agreement on the concept of sovereignty. As indicated earlier, sovereignty is deeply interwoven with the fabric of international law, and to abandon, wholesale, the concept of sovereignty requires very serious thought about a substitute that

[36] The Vienna Convention on the Law of Treaties 1969 was adopted in 1969 by 79 member states with one vote against and 19 abstentions, mainly by countries of the former Soviet bloc who were concerned by the non invitation of East Germany, Mainland China, North Korea and North Vietnam.
[37] Shaw M, *International Law (*6th edn, New Delhi, Cambridge University Press: 6th edn, 2008) p. 487
[38] Oppenheim, *International Law* (9th edn, London: 1992) cited in M N Shaw, *Ibid.*

could efficiently fill the gaps left by its absence. This is why the American system has been investigating the alleged Russian meddling in the 2016 US elections because it is seen as an affront on American sovereignty by a foreign power. Ralph Nader, in 1994 before a U.S. Congressional Committee hearing on the massive Uruguay Round Trade Agreement and the World Trade Organization, opposing Congressional approval of that agreement said:

> A major result of this transformation to a World Trade Organization would be to undermine citizen control and chill the ability of domestic democratic bodies to make decisions on a vast array of domestic policies from food safety to federal and state procurement to communications and foreign investment policies. Most simply, the Uruguay Round's provisions would preset the parameters for domestic policy-making of legislative bodies around the world by putting into place comprehensive international rules about what policy objectives a country may pursue and what means a country may use to obtain even GATT-legal objectives, all the while consistently subordinating non-commercial standards, such as health and safety, to the dictates of international trade imperatives. Decision-making power now in the hands of citizens and their elected representatives, including the Congress, would be seriously constrained by a bureaucracy and a dispute resolution body located in Geneva, Switzerland that would operate in secret and

without the guarantees of due process and citizen participation found in domestic legislative bodies and courts.[39]

This statement is correct because sovereignty is understood in jurisprudence as the full right and power of a State, government or any governing body to govern itself within a definite territory without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity. Sovereignty has evolved into a concept of international law and relations through roughly several centuries of modification and redefinition by philosophers and political scientists, including legal scholars and academics.[40]

Furthermore, analyzing sovereignty quickly indicates that it has many dimensions. Often, however, the term "sovereignty" is invoked by leaders in a context or manner designed to avoid and prevent analysis with intent to fend off criticism or justifications for international infringements on the activities of a nation-state or its internal stakeholders and power operators. In addition to the power monopoly function, sovereignty also plays other important roles, most importantly the role of protecting the state from outside interference. There are situations when nations even though a sovereign state do not control the majority of its internal and external decisions. The need to respect human rights norms and the ability of most powerful sovereign state to influence the decisions of less powerful sovereign also contributed to the erosion of the Westphalia sovereignty.

[39] Ralph Nader, The Uruguay Round of the General Agreement on Tariff and Trade: Hearing Before the US Senate Committee on Foreign Relations, 104th Congo (1994), 1994 WL 266499. Cited by John H. Jackson ," Modern Sovereignty: A new Approach to an Outdated Concept. Available on https://scholarship.law.georgetown.edu>cgi>. Accessed on 20 November 2015.

[40] See for example the works of the early writers on sovereignty like Jaen Bodin, François Hotman, and the Monarchomachs of the Sixteenth Century.

The principle of non interference on the nation-state level is closely linked to sovereignty, yet today's globalized world abounds in instances in which the actions of one nation particularly an economically powerful nation constrain and influence the internal affairs of other nations. For example, powerful nations have been known to influence the domestic elections of other nations and to link certain policies or advantages such as aid to domestic policies relating to subjects such as human rights and rule of law. In the last few years, the Western world has been threatening to withdraw their aid to African states unless the later recognizes and respect the rights of same-sex couples and homosexuals.[41] International organizations also partake in some of these linkages, as evidenced by the so-called conditionality of the International Monetary Fund (IMF) loans to the developing world. The monetary grants are given to countries with conditions which invariably affects the domestic policies of the borrowing nation. The Greece financial crises and the subsequent European Union and IMF bailout funds came with resultant harsh conditions that affected the way of life of the Greek people.[42] But the Government of Greece has no option than to accept the conditions unless the country will go bankrupt. For these and other reasons, some scholars would like to do away with sovereignty entirely. Henkin[43] wrote that 'for legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era'. But when he ran into difficulties seeing that the concept of sovereignty is indispensible in the organization of world order, he summed his thought by saying "to this end, it is necessary to analyze, 'decompose' the concept.[44]

[41] See www.forbes.com regarding Obama threats to Nigeria following the passage of the Anti-Gay Bill, In Uganda, European Donos did cut aid after the Parliament passes anti-gay bill. See www.guardian.com while Ghana vehemently refused to grant gay rights despite threats from UK and Europe to cut off aids. See https://www.bbc.com>news>world-africa. All accessed on 28 October 2018.

[42] How Bad are things for the people of Grecce? BBC News. Available on https://www.bbc.com>news>world-europe. Accessed on 28 October 2018.

[43] Louis Henkin, '*International Law: Politics and Values'* (1995), cited in Jackson ,Op. Cit, p. 786

[44] *Ibid*. But Henkin did not state the means or the parameter to analyse and decompose the concept of sovereignty but simply summarised that the Westphalia idea of sovereignty is gone and a new concept of people-oriented government has evolved.

Despite the criticism, the concept of sovereignty is still central to most thinking about international relations, and particularly international law. The old Westphalian concept in the core test of a nation-state's right to monopolize certain exercises of power with respect to its territory.

However, with the development of human rights laws, this traditional meaning of locus of supreme power of the State within a certain territory has become something quite different in international law today. Sovereignty has now been re-conceptualized from the traditional state centred or State control aspect wherein the State is not answerable to another authority with respect to the conduct of its domestic affairs (including issues relating to or concerning violations of human rights) to a new definition or re-conceptualization of - responsibility to protect, wherein it is understood that in terms of human rights violations the state is liable to violation of same and can be subject of intervention in event of failure to protect human rights. At such, the new approach to sovereignty has altered the traditional concept and has now provided exception to the absolute doctrine of sovereignty which *Jean Bodin*[45] and earlier writers represent.

Nonetheless, even the current international understanding of sovereignty contains the germ of its original domestic origin. The doctrine of sovereign equality, as it has come to be understood or misunderstood, remains dependent upon the definitions of sovereignty elaborated over the past centuries by a succession of authors with widely varying motives. According to *Henkin*, the contemporary meaning of sovereignty had not already been defined in the westphalian treaties, but it is rather a construction of the 18th and 19th centuries, when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation

[45] *Ibid.* Life of Jean Bodin as recorded by goggle. Available online at https://www.google.com.ng/search. Accessed on 20 November 2015.

became the core principles of international society.[46] Sovereignty is considered to be the grund norm of international society. According to *Cronin*[47]

> Sovereignty is the constitutive principle of the nation-state system, yet is also derivative of that system. This underlies the paradox of sovereignty: states are sovereign only within the context of a broader global system of states, and thus they can remain independent only by maintaining a system that imposes constraints on their independence.[48]

The term 'sovereign state' means that political entity which is the governing body, has all the internal and external aspects of authority, and its authority is paramount. Since it is free in its actions and not subject to any higher internal or external authority, it practices authority over its lands, subjects and resources, it enjoys independence from any international entity be it a state or an international organization. In the words of Judge *Huber* in the *Island of Palmas* Case[49] that 'sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state'. This trend was supported by *Ney*[50] when he defined sovereignty as the legitimate domination within a certain region, and by necessity, sovereignty is the state's ultimate individual custody within the borders of its region as long as it is legitimate and free of autocracy. To *Ney*, sovereignty must have a form of democratic tendencies before it qualifies as a sovereign. However, Ney summarized that state's sovereignty, according to traditional

[46] See Henkin, *Ibid*
[47] Cronin Bruce, 'Multilateral Intervention and the International Community' in M. Keren & D. Sylvan, 'International Intervention: Sovereignty versus Responsibility', (2002) London, Frank Cass, 148
[48]. *Ibid*., p.150
[49] Shaw M, *International Law, Op. Cit*., 488
[50] . Ney Joseph, *Understanding International Conflicts: An Introduction to Theory and History*. (4th edn, Longman Classics Series, 2008), 59.

International law, is the supreme authority over its region and its inhabitants and its independence of any external authority that might influence it.[51]

Sovereignty was considered one of the basic premises for the positive conventional law, due to its connection with international law and international organizations which represents the basis for international relations. Sovereignty, according to Potter[52] does not exclude abiding by the law as it is, but would exclude abiding by the laws that are formulated by others, it would not accept to abide by the will of others unless they willingly choose to do so. The definition of sovereignty according to Potter simply means the ability of a country to govern itself without outside interference.

The word sovereignty is considered a synonym for independence and the difference between them is subtle. Sovereignty, on the one hand, is a legal idea because it is a quality for States and international law designate it to States after realizing certain elements like region, people, organized authority which is capable of controlling the order of things.[53] Independence, on the other hand, *is a fait accompli of* a State capable of performing the basic activities that are required to maintain the essence of the State which comprised security, order, management and the organization of its affairs according to what it deems appropriate while approving a constitution reflecting the aspirations and orientations of its nation. The positive aspect of independence is represented in the government's freedom on taking its decisions. Accordingly, Ibrahim opines thus:

> Independence and sovereignty are derived from one thought, whereas independence in action is a natural result of

[51] *Ibid*
[52] Potter, *Introduction of the Study of International organizations*, (New York, 1984) p.188 available on https://archive.org>details. Accessed on 28 October 2018
[53] . See Monte Video Convention, Article 1,*Ibid*

> sovereignty of the country and it is one aspect of sovereignty before foreign countries. So the Sovereignty can be described as an internal or regional, where in this aspect the state has ultimate authority in its region, i.e. it has ultimate jurisdiction in its region. Since sovereignty is one and ultimate, others should respect it. In this aspect, we can say that sovereignty means independence. The state has the freedom to reinforce its existence and to improve itself materially and non-materially without being subject to the authority of another state and without foreign intervention in its affairs, by that it practices its sovereignty.[54]

In his contribution, *Abbas* explains that the external sovereignty of a state is connected to internal sovereignty in a manner forming the aspects of the state's sovereignty. External sovereignty of the state is manifested in the state's practice of managing its relations with other countries out of its own free will without being subject to a foreign authority, where it trades diplomatic representation with other countries, participates in conferences, holds treaties and joins international or regional organizations based upon its free will which represents its sovereignty and other forms of practicing foreign international activities without the control of any other country.[55] The Nuremberg Charter which was signed in 1945 by the Allied Powers also contributed to the decline of absolute sovereignty. It is therefore necessary that a little discussion of the Nuremberg Charter and its principles will be undertaken to buttress its own contribution in this regard.

[54].Ibrahim H., *Globalization: Political Dimensions and Reflections* (1999) World of Thought, Number 2, Dec. p.190

[55]. Abbas A, *Sovereignty*, (1994) Damascus, Harvest House for Publication, p.110.

Sovereignty is the full right and power of a governing body over itself, without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity. It is a basic principle underlying the dominant westphalian model of state foundation. Westphalian sovereignty, or state sovereignty, is the principle in international law that each nation state has exclusive sovereignty over its territory. Every state, no matter how large or small, has an equal right to sovereignty.[56] The individual in the society cannot enjoy his freedom in the absence of a law which draws the line between his freedom and the freedom of others. The principle of equality is a logical result of the concept of sovereignty; the states are equal before the duties and responsibilities stipulated by the International law.

However, many rights which were understood in ancient times as belonging to the ultimate jurisdiction of individual states is today considered rights subject to international law protection. The development of many principles of international law and the globalization of international protection of human rights had a clear effect on the concept of state sovereignty. On the one hand, it steadily removed them from past isolation, where it became impossible for these states to answer questions of human rights violations. Individual states can now be called upon to answer questions regarding violations of human rights, an issue before now which is entirely subject to municipal laws. There have been so many reasons for this. First, the fact that international circumstances became more compelling for small and medium-size countries to join an international organization which shall foster their rights and preserve their sovereignty, like member states been required to join the United Nations Organization and her numerous organizations. Secondly, these circumstances which accompanied

[56].Westphalian sovereignty as recorded by Wikipedia. Available on https://www.google.com/search?client=firefox-bab&q=principles+of+sovereignty&sa=X&ved=0ahUKEwifnqn2pd3eAhXqJcAKHQ0KDlQQ1QIItgEoAQ&biw=1366&bih=636. Accessed on 18 November 2018.

contemporary International organization made it both obligatory and reasonable for these states to compromise a part of their sovereignty in order to achieve International peace and security.

Notwithstanding the foregoing, the highest level of sovereignty is at the State's regime, due to the existence of rights and obligations, which lay the foundation of its political entity and legal life. This represents its sovereignty over its people and land and the way it is internally managed. The traditional principles of international law however, called for absolute sovereignty of individual States. The emergence of the UN Charter[57] came introduced some flexibility into the system, mainly as a result of the provisions for the observance of human rights. The flexibility encouraged the development of the individual's status in the international law, elevating human rights to a status as international human rights, all these caused a retreat of the principle of absolute sovereignty of the State. For example, the signing of the African Union Constitutive Act in 2000 meant that the member states of the AU has ceded part of its sovereignty to the Union with right to intervene in her territory in event of the happening of the acts that could trigger intervention.

The establishment of the United Nations Organization played an important role in limiting the states' sovereignty in the light of limitations[58] drawn in the U.N. Charter. Limitations were imposed on these states through commitments made by member States of the United Nations Organization according to articles in order to achieve its objectives. These limitations contributed in making the Charter as a supreme constitutional principle of surpassing and transcending the constitutions of member states. It is established that United Nations Organization reflects a contemporary universal opinion, where the first job of which is to

[57] Article 2(4) as well as 2(7) of the UN Charter is widely regarded as the provisions protecting the inviolability of state sovereignty.
[58] It is however provided in article 2(7) that the provisions therein shall not prejudice any enforcement action pursuant to chapter VII of the Charter.

maintain global peace and security, due to tight relationship between them. In order to achieve the objectives of the United Nations Organization, it was necessary for member states to work on organizing the issues of International peace and security through surrounding its activities with a group of conditions and provisions, like the adherence to principles of international humanitarian law and international standards of human rights. States' non-adherence to principles of International Law makes the violation of the principle of sovereignty justifiable legally and ethically in order to confirm international legitimacy, especially if that implies grievous violations of human rights and international commitments. The charter, in conformity with this international trend, has imposed new circumstances allowing for surpassing the principle of sovereignty. Concerning this, it is sufficient to make reference to Article Seven of the Charter which was confirmed by the international Court in its Advisory opinion issued in 1996 where it concluded that it is permissible to resort to force under the ruling of the Human Rights Charter, an example of which is Article 51 which guaranteed the natural right for individuals and groups to legitimately defend themselves.[59] The ratification of many International treaties and the emergence of many International principles dictated by the interaction and development of International relations have led to the formulation of new concepts and expressions to keep pace with new conditions of modern International organization. One of this concept is the doctrine of responsibility to protect developed in 2000 to tackle the issue of humanitarian intervention. This was clearly reflected in the phenomenon of humanitarian intervention and the principle of equal sovereignty, where the right of intervention became a clear aspect of the years following the Cold War, where the invasion of Panama in 1989, followed by what happened in the north of Iraq after the 1991 war, in Somalia, Bosnia and Herzegovina in 1995, in Kosovo in 1999 and

[59] ICJ, Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons 1996, P22K. Retrieved on January 3, 2012 from http://www.icj-cij.org/docket/files/95/7646.pdf.

Macedonia in 2001, in Libya in 2011, and Syria in 2012 and Yemen in 2015. So many factors affected this shift in sovereignty. One of the factor includes the Nuremberg Charter which for the first time laid the foundation for the rejection of state immunity.

2.2.1 Theories of State Sovereignty

International law is dominated by two competing theories of state recognition, the declaratory theory and the constitutive theory. The constitutive theory of statehood defines a State as a person of international law if, and only if, it is recognized as sovereign by other States. However, a State may use any criteria when judging if they should give recognition to any State or not, and they have no obligation to use such criteria.[60] **T**he constitutive theory was the standard nineteenth-century model of Statehood, and the declaratory theory was developed in the twentieth century to address shortcomings of the constitutive theory. In the constitutive theory, a State exists exclusively via recognition by other states while in the declaratory theory of Statehood, an entity becomes a state as soon as it meets the minimal criteria for statehood.[61] Therefore, the fact that a particular state or group of states are yet to recognize a state as an entity in international law does not deprive that state of such status under the declaratory theory. The declaratory theory looks to the purported state's assertion of its sovereignty within the territory it exclusively controls to determine if it can access the international plane. It is the opposite of the constitutive theory in that it holds that recognition is almost irrelevant because states have little or no discretion in determining whether an entity constitutes a state. The status of statehood is based on fact, not on individual state

[60] Meaning of constitutive theory of state sovereignty as recorded by Wikipedia. Available on https://en.wikipedia.org/wiki/Sovereign_state. Accessed on 15 November 2018

[61] Meaning of Declaratory theory of state. Available on https://www.lawteacher.net/free-law.../declaratory-and-constitutive-theories-of-state.php. Accessed on 15 November 2018

discretion. .According to James[62] the majority of contemporary scholars and commentators favors the declaratory theory.

The constitutive theory states that recognition of an entity as a state is not automatic. A state is only a state when it is recognized as such and other states have a considerable discretion to recognize it or not. Moreover, only upon recognition by those other states does the new state exist, at least in a legal sense. There is considerable support for the argument that recognition is irrelevant for whether a state exists as such or not. The reason for this view is because the Montevideo Convention of 1933 states that the political existence of the state is independent of recognition by the other states.[63] The International Court of Justice has held in the Genocide Convention case that it adheres to the declaratory view, in the sense that the failure to maintain effective control over territory does not extinguish the legal entity in the eyes of the United Nations.[64]

Furthermore, many national courts have recognized international rights in states that accrued before international recognition of the entity as a new state, suggesting a rejection of the notion that the state did not exist before recognition.[65] The Permanent Court of International Justice, the predecessor to the International Court of Justice, appeared to endorse the constitutive theory in two opinions: the Lighthouses case[66] where effectiveness was disregarded for the fiction of continued sovereignty of the Turkish Sultan, and the Rights of Nationals of the United States of America in Morocco case, regarding the continued

[62] James Brierly, The Law of Nations: An Introduction to the International Law of Peace (1963) *Humphrey Waldock* ed., 6th ed. p.45.
[63] See Article 6 of the Convention on Rights and Duties of States,1933.
[64].Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovinian V Serbia & Montenegro.) Preliminary Objections, 1996 I.C.J. Reps. 595 (July 11).

[65] Robert Sloane, 'The Changing Face of Recognition in International Law: A Case Study of Tibet', (2002) *16 Emory Int'l L. Rev. 107,* p. 117.
[66] Light House (France v Greece), 1934 P.C.I.J. (ser. A/B) No. 62, at 4 (Mar. 17)

sovereignty of Morocco although under the French Protectorate.[67] In the *Čelebići* case, for example, the International Criminal Tribunal for the Yugoslavia held that the conflict within the former Yugoslavia was only of an international nature after international recognition of the independent statehood of Croatia and Bosnia and Herzegovina.[68] In the *Tadić* case also at the International Criminal Tribunal for the Yugoslavia, Judge Li, in a separate opinion, criticized the majority for applying the constitutive theory. Judge Li argued that the conflict should have been seen as international from the moment of Slovenia's and Croatia's declarations of independence, not because of recognition by others.[69] In addition to these decisions of international tribunals or commissions, the act of recognition seems to increasingly be attributed with constitutive effect within the international legal system. These cases are significant because they evidence that entities only receive international rights and obligations when they are recognized by other states as states. It is submitted in support of this view that only states sit on the United Nations Security Council, only states petition the International Court of Justice and only states participate in the Nuclear Non-Proliferation Treaty regime.[70] Recognition of statehood changes the range of actions available to an entity and also changes the expectations of the international community regarding the behavior of the new state.

It would appear that the support for the declaratory theory is partly legal and partly the more politically correct position. The constitutive theory does still attract some legitimacy, possibly partly due to the way it appears to be applied surreptitiously by tribunals. The

[67] Rights of Nationals of the United States of America in Morocco (France v United States), 1952 I.C.J. 175, 188.
[68] Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998)
[69] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) (separate opinion of Judge Li)
[70] Richard Caplan, Europe and the Recognition of New States in Yugoslavia 212 (2005) (citing Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, Norms, Identity, and Culture in National Security, in The Culture of National Security: Norms and Identity in World Politics 33, 35-6 (Peter J. Katzenstein, ed., 1996).

difficulty with the either/or approach is that there is an interrelation of the two sides of the question. The declaratory theory concentrates on the internal factual situation and the constitutive theory concentrates on the external legal rights and duties. Every act of recognition must necessarily contemplate both aspects, but generally one will be the predominant legitimizing force. When we choose between the recognition theories proposing the existence of the state prior to or only following recognition, we are choosing to concentrate our definition of the state on one of these two aspects of the state and, from that source, derive the other.

2.3 Humanitarian Intervention

The concept of humanitarian intervention has been defined as a state's use of military force against another state when the chief publicly declared aim of that military action is ending human rights violations being perpetrated by the state against which it is directed[71] or non state actors where the state actor is unwilling or unable to halt the situation. This definition may be too narrow as it precludes non-military forms of intervention such as humanitarian aid and international sanctions. On this broader understanding, humanitarian intervention should be understood to encompass – non forcible methods, namely intervention undertaken without military force to alleviate mass human suffering within sovereign borders.[72]

According to Jennifer[73] there is no one standard or legal definition of humanitarian intervention; the field of analysis (such as law, ethics or politics) often influences the definition that is chosen. This is quite true as the exigencies of the particular circumstance

[71] Marjanovic, Marko; 'Is Humanitarian War the Exception'?, (Mises Institute: 2011) available on https://mises.org/daily/5160 accessed on 15 August 2015.
[72] Scheffer, David, 'Towards a Modern Doctrine of Humanitarian Intervention' (*University of Toledo Law Review* Vol 23, 1992) p.253.
[73]Jennifer Welsh. 'Humanitarian Intervention and International Relations' (*Oxford University Press*, New York: 2004) p. 4 available on https:en.m.wikipedia.org.wiki/humanitarian intervention. Accessed on 12 October 2015.

will help determine the description of the situation. Differences in definition include variations on whether humanitarian intervention is limited to instances where there is an absence of consent from the host state; whether humanitarian intervention is limited to punishment actions; and whether humanitarian intervention is limited to cases where there has been explicit UN Security Council authorization for action.[74] The definition of humanitarian intervention will depend on the circumstances of the case. It can take the form of military or non military dimensions. However intervention occurs, it is an interference in the internal affairs of a sovereign state usually with or without the consent of the host state supposedly on humanitarian grounds.

There is, however, a general consensus on some of its essential characteristics. These characteristics includes that humanitarian intervention involves the threat and use of military forces as a central feature; it is an intervention in the sense that it entails interfering in the internal affairs of a state by sending military forces into the territory or airspace of a sovereign state that has not committed an act of aggression against another state and the intervention is in response to situations that do not necessarily pose direct threats to states' strategic interests, but instead is motivated by humanitarian objectives.[75] To *Stromseth*,[76] humanitarian intervention entails the:

> Threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundament al human rights of individuals other than its own

[74] *Ibid.,*
[75] Alton Frye. 'Humanitarian Intervention: Crafting a Workable Doctrine' (2000) *Council on Foreign Relations*, New York, p.18
[76] Stromseth, 'Rethinking Humanitarian Intervention: The Case For Incremental Change', (2003) in Holzgrefe, J.L. and Keohane, R. Humanitarian Intervention Ethical, Legal, and Political Dilemmas, *Cambridge University Press*, Cambridge, pp. 232-233.

citizens, without the permission of the state within whose territory force is applied.

Ordinarily, in international relations, forcible intervention in another state is prohibited under Article 2(4) of the United Nations Charter to the effect that all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. This general prohibition on the non use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case*[77] and the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*[78], and is considered to be a rule of *jus cogens* – that is, a peremptory norm of international law from which no subject of international law may derogate. The two main exceptions[79] to this general prohibition are: the right of a state to use force in self-defence or collective self-defence under Article 51 of the Charter, and the right of the Security Council under Article 42 to authorize the use of force to maintain or restore international peace and security. In legal terms, international peace and security has traditionally been narrowly defined as the maintenance of inter-state order. However, as stated below, the practice of the Security Council can be seen to have modified this concept to include grave humanitarian crises and it is generally recognized that the Security Council now has an exclusive right to authorize the use of force for the purpose of preventing or stopping widespread deprivations of internationally recognized human rights.

[77] *Corfu Channel* (U.K. v. Alb.), International Court of Justice 1949, (I.C.J.) 4
[78] Military and Paramilitary Activities(Nic. V U.S.), International Court of Justice, (Nic. v. U.S.), 1986 (I.C.J.) 14
[79] See Murphy, *Op. cit* for his discussion of possible exceptions with respect to rescue of foreign nationals and humanitarian aid drops.

By virtue of article 39 of the UN Charter, it is an obligation on the part of the Security Council to take such action as is necessary to maintain or restore international peace and security. Accordingly, it has been submitted that acts of genocide as defined in the Genocide Convention may trigger an obligation to act to prevent or stop such actions.[80] However, Murphy is of the view that "to date…the notion of a 'duty to intervene' by the United Nations, regional organizations, or states does not appear present in international law.[81] The Secretary-General of the United Nations has suggested that where crimes against humanity are being committed "and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community" to halt the acts of violence and protect human rights.[82]

The concept of humanitarian intervention has been defined as a state's use of military force against another state when the chief publicly declared aim of that military action is ending human rights violations being perpetrated by the state or sometimes non state actors against which it is directed. In the case of actions against non state actors, the state actor must be unwilling or unable to halt such violations before the international community can intervene. This definition may be too narrow as it precludes non-military forms of intervention such as humanitarian aid and international sanctions. On this broader understanding, humanitarian intervention should be understood to encompass – non forcible methods, namely intervention

[80] Simma, Bruno, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10th edn, *The European Journal of International Law*, p.2.
[81] Op.cit p.295
[82] Annan, Kofi, 'We the Peoples': The Role of the United Nations in the 21st Century,' (*Millennium Report of the Secretary-General of the United Nations)*. [Online] Available from http://www.un.org/millennium/sg/report/ . Accessed on 20 November 2015.

undertaken without military force to alleviate mass human suffering within sovereign borders.[83]

According to Jennifer[84] there is no one standard or legal definition of humanitarian intervention; the field of analysis (such as law, ethics or politics) often influences the definition that is chosen. This is quite true as the exigencies of the particular circumstance will help determine the description of the situation. Differences in definition include variations on whether humanitarian intervention is limited to instances where there is an absence of consent from the host state; whether humanitarian intervention is limited to punishment actions; and whether humanitarian intervention is limited to cases where there has been explicit UN Security Council authorization for action.[85] The definition of humanitarian intervention will depend on the circumstances of the case. It can take the form of military or non military dimensions. However it occurs, it is an interference in the internal affairs of a sovereign state with or without the consent of the host state supposedly on humanitarian grounds.

There is, however, a general consensus on some of its essential characteristics. These includes the fact that humanitarian intervention involves the threat and use of military forces as a central feature; it entails interfering in the internal affairs of a state by sending military forces into the territory or airspace of a sovereign state that has not committed an act of aggression against another state and the intervention is in response to situations that do not

[83] Scheffer D, 'Towards a Modern Doctrine of Humanitarian Intervention', (1992) *University of Toledo Law Review*, Vol. 23, p.62 available on https://www.scholars.northwestern.edu/en/publications/towards-a-modern-doctrine-of-humanitarian-intervention. Accessed on 5 October, 2018

[84] Welsh J, 'Humanitarian Intervention and International Relations', (2003) *Oxford University Press, London*, p. 55 available on https://philapers.org>rec>WELHIA. Accessed on 5 October, 2018.

[85] *Ibid*

necessarily pose direct threats to states' strategic interests, but instead is motivated by humanitarian objectives.[86] To *Stromseth,*[87] humanitarian intervention entails the:

> threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.

Murphy[88] defines humanitarian intervention as the 'threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights'. According to him, the latter phrase is a broad formulation "used to capture the myriad of conditions that might arise where human rights on a large scale are in jeopardy" and includes acts committed by both state and non-state actors. This clearly shows that humanitarian intervention can arise as a result of acts of non state actors and the state is unable or incapable or unwilling to stop the violence. The case of the Islamic State of Iraq and Lavente (ISIL) group capture of the *Sinjar*[89] province of Iraq is a vivid example. ISIL took control of the area in August 2014 and executed the Christian minority *Yadizi* tribes men and women because they are Christians. Iraqi government was unable to stop the Jihadist

[86] Murphy Sean , 'Humanitarian Intervention: The United Nations in an Evolving World Order', (1998) *Philadephia: University of Pennsylvania Press*, p.18

[87]Stromseth J, 'Rethinking Humanitarian Intervention: The Case For Incremental Change', (2003) in J L Holzgrefe, & Keohane, R, 'Humanitarian Intervention Ethical, Legal, and Political Dilemmas', (edns, Cambridge: Cambridge University Press, pp. 232-233.

[88] Murphy, *Ibid*, p.22 .

[89] The Fall of Sinjar in Iraq. Sinjar is a district in northern Iraq which was captured by ISIL in August of 2014. They executed between 2000-5000 Yadizi men and women mainly minority Christians. The events led to the United States airstrikes on ISIL from the 8th August, 2014, till date targeting ISIL units and convoys in Northern Iraq, which later developed into a larger coalition of several countries against ISIL. With the help of Kurdish and Peshmerga, PKK and YPG forces and supported by the US airstrike the city was recaptured and the Kurdistan Governor and troops entered Sinjar on November, 15 2015 after ISIL fled. Available on line https;//en.m.wikipedia.org/wiki/sinjar_massacre. Accessed on 20 November 2015.

hence the commencement of air strikes by the US and her allies on the invitation of the Iraqi government. However, the aim of the US led air strikes against ISIL is more of a war against terrorism than a humanitarian intervention.

In international relations, forcible intervention in another state is prohibited under Article 2(4) of the United Nations Charter to the effect that all member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

This general prohibition on the non use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case*[90] and the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*[91] and is considered to be a rule of *jus cogens* – that is, a peremptory norm of international law from which no subject of international law may derogate. What then are the guiding principles that will warrant a departure of this general prohibition. One such exception can be found in the principles underlining the responsibility to protect. The basic principles of the doctrine include the responsibility of state to protect its population from harm and grave crimes anchored on responsible sovereignty, the failure of that responsibility being a moral duty on the international community assume that responsibility to protect the individuals. The principle has a great effect on humanitarian intervention and provides that state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state. It further provides that where a a population is suffering serious harm, as a result of internal war, insurgency, repression or

[90] *Corfu Channel* (U.K. v. Alb.), International Court of Justice 1949, (I.C.J.) 4
[91] Military and Paramilitary Activities(Nic. V U.S.), International Court of Justice, (Nic. v. U.S.), 1986 (I.C.J.) 14

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.[92]

2.3.1 Theories of Humanitarian Intervention

Human rights are universal values inherent in a man because he has been born a human being. All humans should have their human rights respected. Unfortunately, many individuals in some states do not enjoy these rights because their governments either systematically violate those rights or sometimes fail to stop other individuals from violating them. In extreme cases, States use coercion to protect the rights of their own citizens. It is the duty of each government to promote respect for the human rights of its citizens, not to violate those rights itself and not to allow others to violate those rights. But when a state fail to do this, as is unfortunately often the case, are foreign governments justified in exercising coercive power to remedy the situation, or obligated to do so? The study discussed a variety of justifications or otherwise theories of humanitarian intervention that have been proposed. The study presented the theories in a roughly dialectical way, showing how each one in the series is an improvement on the previous one despite its own shortcomings.

On the first theory, humanitarian intervention is justified because the humanitarian crisis to which it responds represents a threat to international peace and security. It is the position of this theory that when humanitarian crises have effects beyond the state in which they occur, such as cross border floods of refugees, it poses a threat to the international community. If a state does something that undermines international peace and security, this is akin to aggression, and a military response is akin to defensive war. Under such a construal, humanitarian intervention is, morally speaking, a defensive war and so not in fact an

[92] ICISS Report, 2001a

exception to the non-intervention principle. In the words of Adelman,[93] humanitarian intervention is not invoked just because human rights have been violated, even in a massive way. The state may exist to protect the rights of its citizens, but its failure does not provide the grounds for intervention. Rather, humanitarian intervention is justified by the threat to international peace and security caused by the humanitarian crisis which causes a massive outflow of refugees, for example, the stability of neighboring states and the region is undermined. Therefore a state loses its legitimate right to have its sovereignty respected only when a humanitarian crises within its boards threatens the peace and security of its neighbors through the effects of cross boarder refugee inflow.[94] The defence of the rights of the population in the target state achieved by the humanitarian intervention is at most a product of that intervention but such intervention must be approved under Chapter VII of the Charter because by article 2(4) of the UN Charter, intervention in a state's domestic affairs is not permitted. So, when for example the Security Council has endorsed humanitarian intervention through resolution 688 to protect the Kurds in Northern Iraq after the 1991 Gulf War, it was done under the guise of Chapter VII of the Charter, which allows the authorization of military action as may be necessary to maintain or restore international peace and security. But this approach involves the legal fiction that a humanitarian crisis calling for humanitarian intervention always constitutes a threat to international peace and security. The theory is submitted has failed to capture all scenario when humanitarian crises will require intervention. The existence of a threat to international peace and security is not a necessary condition in the range of cases where humanitarian intervention intuitively seems justified. In cases of ethnic cleansing that has no cross boarder effect, reliance on the threat to peace theory will definitely not provide an answer. In Rwandan in 1994, the victims of the genocide

[93] Howard Adelman, 'The Ethics of Humanitarian Intervention: The Case of Kurdish Refugee' (1992) available on https://philpapers.org>rec>ADETEO-2. Accessed on 15 November 2018
[94] *Ibid*

were slaughtered largely before they had a chance to flee the country. It is submitted that the more ruthless and effective a campaign of domestic genocide is, the less likely it is to disturb international peace and security.

The second account of humanitarian intervention seeks to solve the moral problem by removing humanitarian intervention from the purview of just war analysis. On this account, humanitarian intervention is not really war, but a different sort of use of force, closer to crime fighting. As a result, the moral categories of the just war tradition may not apply to it. One of the proponent of this school of thought is *George Lucas*[95] when he stated that the attempt simply to assimilate or subsume humanitarian uses of military force under traditional just war criteria fails because the use of military force in humanitarian cases is far closer to the use of force in domestic law enforcement and peace-keeping. According to Lucas, humanitarian intervention would then fall under a distinctive set of moral criteria, which Lucas refers to as jus ad pacem, 'the justification of the use of force for humanitarian or peaceful ends', which are closer to criteria governing the use of force for domestic crime control than to those of jus ad bellum.[96] For example, police officers can enter private homes, normally a realm of local 'sovereignty', when they have good reason to believe that a crime is being committed within. Analogously, when human rights crimes are going on within a state, other states may be justified in intervening for that reason alone. Sovereignty, which is a bar to war, is not a bar to international crime control.

The next theory as propounded by *Hehir*[97] is what are the theoretical underpinnings that show the proper balance between the moral concerns of the non-intervention principle and

[95] George Luca, 'Humanitarian Intervention-Eight Theories Diametros' (2004) available on www.diametros.iphils.uj.edu.pl>download. Accessed on 15 November 2018.
[96] George Lucas, From Jus Ad Bellum to Jus Ad Pacem: Rethinking Just War (2003) available on https://philpaper.org>rec>LUCFJA. Accessed on 15 November 2018.
[97] *Bryan Hehir*, 'The Ethics of Intervention: Two Normative Traditions', in: Human Rights and U.S. Foreign Policy, Peter Brown and Douglas MacLean (eds.), Lexington Books, Lexington, MA 1979. Available on https://www.usna.edu>HehirPg1-28_Final. Accessed on 17 November 2018.

those of humanitarian intervention? In his discussions of humanitarian intervention, *Hehir* proposes that the limitations on sovereignty required to permit the proper humanitarian intervention exceptions should be understood in terms of the constraints of the just war tradition. There are two streams to the just war tradition: the older, moral tradition; and the modern, legal tradition.[98] It is the legal tradition that tends to limit justified war to defensive war, treating the non-intervention principle as a very high moral hurtle. If we want an adequate account of humanitarian intervention, *Hehir* argues, should consider instead the resources of the moral tradition, which represents the richness of the just war tradition that the legal tradition ignores[99]. The basic idea behind just war thinking according to *Hehir* is that force can and sometimes should be an instrument of justice.[100] In the case of human rights violations within a state, justice may be done by intervention. In contrast, the legal tradition tends only to address the injustice of aggression. The moral tradition can help because it recognizes more diversity in the criteria that must be satisfied for a war to be justified. The most important criterion is just cause. While the legal tradition recognizes only self-defence as a just cause, for the moral tradition, stopping human rights violations may be another. In order to limit the occasions of justified humanitarian intervention, *Hehir* appeals to the criteria of proper authority, right intention, last resort, and possibility of success stating that we must have a reasonable expectation that humanitarian intervention will do more good than harm. But his account is not completely satisfactory. He shows that sovereignty may be limited and humanitarian intervention permitted by an appeal to the broader understanding of just cause in the moral tradition. The non-intervention principle plays a weaker role in the moral tradition than in the legal tradition. Moreover, *Hehir* does set some limits on the scope

[98] *Ibid*
[99] *Ibid*
[100] *Ibid*

of humanitarian intervention by arguing that the other criteria of *jus ad bellum* may be used for this purpose.

Another theory of humanitarian intervention is the one that adopts a just war theory that grounds *jus ad bellum* in a fuller account of individual rights. David *Luban*[101] suggests this approach, proposing that we could "define *jus ad bellum* directly in terms of human rights, without the needless detour of talk about states. This is a cosmopolitan approach. If war is to be justified, it must be justified in terms of the human rights that all share equally. A cosmopolitan account of humanitarian intervention is offered by *Fernando Teson.*[102] *Teson* opines that States have no moral value in themselves though they may have some derivative moral value, but only to the extent that they further the protection of individual rights.[103] State sovereignty and the non-intervention principle are of instrumental rather than intrinsic value. According to Teson, permissible humanitarian intervention is "the proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect.[104] To *Teson*, it is tyranny and anarchy in a state that is the occasion for humanitarian intervention, and humanitarian intervention is permitted so long as the force used is proportional to the benefit achieved, the force is used in accord with the doctrine of double effect, and those to be rescued consent. This consent, generally unobtainable in fact, is 'ideal consent', that is, hypothetical consent the victims would offer, given that they are rational and understood that some of them would die, as collateral damage, in the fighting. The problem with this theory is its lack of specificity regarding

[101]. David Luban, ' Just War and Human Rights', in: International Ethics, Charles Beitz et al. (1985), edn, *Princeton University Press*, Princeton, NJ, pg 18.
[102] Fernardo Teson, 'Humanitarian Intervention: An Inquiry into Law and Morality', (1997) *Transnational Publishers*, Dobbs Ferry, pg 45
[103] *Ibid*
[104] *Ibid*

'tyranny' and 'anarchy'. These terms are presumably stand-ins for cases of severe and widespread human rights violations in a state, but how severe and how widespread do the violations need to be before humanitarian intervention is justified? Given that *Teson*'s account is explicitly one that founds justifiable humanitarian intervention on individual rights, his lack of discussion of what particular nature and extent of rights violations would justify humanitarian intervention is disappointing. Certainly some rights violations are more serious than others.

The lack of specificity is especially problematic in the case of 'tyranny', for it covers over one of the main fault lines among friends of humanitarian intervention. A tyranny is a state in which the people have little or no say in the government, but it need not include the kind of horrific rights violations one usually thinks of in connection with humanitarian intervention, such as genocide, ethnic cleansing, and enforced slavery. Is intervention when a tyranny does not engage in violations of this sort permissible? Is intervention to establish democracy permissible? To both *Teson* and *Luban*, the element of barbarism is a feature that moves a humanitarian crisis from a level in which humanitarian intervention is permissible to one in which it is obligatory. If humanitarian intervention is merely permissible, states are free to decide whether or not to intervene. But this suggests that *Luban* would allow, as opposed to require, intervention in a quite broad range of cases, a much broader range than is normally thought to be appropriate.

Another theory of humanitarian intervention is the one that says what is necessary to have an unimpeded humanitarian intervention is a re-conceptualization of sovereignty. There is one final account of humanitarian intervention to consider that promises this, one that recommends a conceptual shift in our understanding of humanitarian intervention. When a person has a human right, this implies a duty others have, or a responsibility they have, to respect that right. The understanding of human right is that a person's right implies that

others have a duty not only to respect this right, but also to protect the person from violation of that right by third parties. Thus, humanitarian intervention could be understood as a responsibility to protect those suffering rights violations at the hands of others, even when national boundaries intervene. This shift in understanding was suggested by the late *Kofi Annan*, former UN General Secretary, and developed by the International Commission on Intervention and State Sovereignty, which issued a report, The Responsibility to Protect[105] in 2001. However, the report's main contribution to the debate was primarily conceptual: changing the language from a 'right of intervention' to a 'responsibility to protect. Part of the point of the re-description was to emphasize the protection of the rights of those suffering rights' violations rather than the rights of potential interveners.

There is now a conceptual shift in the idea of the responsibility to protect, concerning the concept of sovereignty. The responsibility to protect applies not only to third parties, but also to states in relation to their own citizens. When states are said to have this responsibility toward their own citizens, it can be seen as a condition on their sovereignty. A person should have her rights protected, and if her state does not do so, the responsibility falls on a third party to intervene. Indeed, this is so especially if her state is the one violating those rights, in which case, the state has failed its responsibility to protect her and morally opened itself up for another state to do the job. It is submitted that this is a genuine theoretical advance, whether or not it also is a practical advance. But it gets the cart before the horse.

2.4 Conceptual Framework

The dissertation shall discuss the meaning and implication of all the concepts that appear in this dissertation. The essence is to enable the audience to appreciate the meaning of the terms and concept used in the wok.

[105] .The report was issued in 2001 and form the basis for the international recognition of the principle/concept of responsibility to protect.

2.4.1 Human Rights

Human rights are natural rights, rights inherent or innate rights every person is born with. Human rights are rights given to every person by God. A person is born with human rights. The natural school posits that human rights are possessed by human beings before their recognition by legal system, and not minding their denial by a legal system. When a man is born, he naturally has and exercises human rights such as right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private life and family life, right to own property excetara. *Kayoed Eso*[106] JSC as he then was holding the view that human rights are given by God said:

> We could only talk of a journey in regard to human rights in terms of movement from the old attitude to the new; for human rights, it must be appreciated, have existed from the beginning of time. For instance, the idea which crystallised in the phrase *audi alterem partem*, a first generation right, was established right from the ante-deluvian age, by God himself, who would not send out his creature, *Adam*, from His cherished Garden of *Eden* without first listening to Adam's and his wife, *Eve*'s explanations, if any, for their disobedience of his injunction that: 'of every tree of the garden, thou mayest freely eat; but of the tree of the knowledge of good and evil, thou shall not eat of it.

[106] Kayode Eso, 'Judge-Lawyer Co-operation in the Protection of Human Rights" Individual Rights under the 1989 Constitution' (1993) *NIALS*, p. 81

Every human being anywhere in the world is born with human rights. Human rights are rights that make a person a human being; without them a human being is completely robbed. Towards the end of the 21st century, human rights started acquiring a legal status in international law such that the international community started tinkering with the concept of absolute sovereignty, to protect human rights when the sovereign state is in violation of human rights. In the words of *Itse Sagay*'s so important are human rights that the human rights of the individual are now recognized under international law.[107] After the second World War and seeing the need to erect a long –lasting global peace and human rights regime, the United Nations championed the first effort at erecting minimum human rights standard applicable in all corners of the globe and this was successfully consummated by the promulgation of the Universal Declaration of Human Rights.[108] According to *Obiaraeri,* from then on, there has been no looking back as human rights have been elevated from being matters of muted trumpets or isolated dialogue to matters of clarion call occupying the front burner of national and international discuss.[109]

2.4.2 International Human Rights

The historical evolution of human rights as rights that are innate in a person by virtue of being a human being and its radical transformation from a domestically protected norm to a matter on the front burner of the world discourse gave rise to the norm of international human rights.[110] International human rights law is the law that deals with the protection of individuals and groups human rights against violations by governments of their

[107] Itse Sagay, 'A Legacy of Posterity: The Works of the Supreme Court 1980-1988', (1988) *Nigeria Law Publications*, p.170
[108] .Obiaraeri Nnamdi, *Fundamental Themes on International Human Rights* (edn, Zubic Infinity Concept, Owerri, 2015) , p.3
[109] *Ibid*
[110] *Ibid* p.55

internationally guaranteed rights and with the promotion of these rights.[111] With the formation of the United Nations in 1945 and the subsequent universal declaration of human rights in 1948, human rights have since acquired an international legal norm placed above the concept of sovereignty, the recent demonstration been the re-conceptualization of sovereignty from sovereignty as control to sovereignty as responsibility.

2.4.3 Responsibility To Protect

The phrase 'Responsibility to Protect' emerged in the international stage following the report of the International Commission on Intervention and State Sovereignty produced in December 2001, which aims to develop global political consensus about how and when the international community should respond to emerging crises involving the potential for large-scale loss of life and other widespread crimes against humanity. This report forms the basis for the Responsibility to Protect principles. The report in its preamble stated that state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.[112] 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. This report stated that the state as sovereign has a responsibility to protect its own citizens from human rights violations and that the primary responsibility lies with the state, and that the failure of the state to carry out this responsibility the principle of non-intervention will yields to the international responsibility to protect. The

[111] *Ibid*

[112] The Report of the International Commission on Intervention and State Sovereignty, 2001, produced by the Government of Canada as a response to the various debate and issues concerning intervention in another state to protect human rights. The debate intensified after the NATO military intervention in Kosovo without United Nations mandate. The report was presented to the United Nations General Assembly in 2001 and was duly adopted as a working document of the United Nations at the UN World Summit in 2005. The report sought to legitimize the concept of unauthorized intervention. Available online at responsibilitytoprotect.org>ICISS Report. Accessed on 15 September 2016.

report deals with the question of when, if ever, it is appropriate for states to take coercive and in particular military action, against another state for the purpose of protecting people at risk in that other state.

Late Kofi Annan, the then United Nations Secretary General, in 1998, called for an interpretation of sovereignty as a matter of responsibility, not just power.[113] Here lies the potential change in the norms of sovereignty. One of the first proponents of this shift was Deng[114] who explained how the concept of sovereignty is undergoing a fundamental change in the recent past, moving toward the idea of 'responsible sovereignty.[115] Drawing upon Deng's work, the ICISS developed the 2001 report -The Responsibility to Protect which is seen as an attempt to redefine the limits of sovereignty in order to answer the question expressed by Annan that if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a *Rwanda*, to a *Srebrenica*, to gross and systematic violations of human rights that offend every precept of our common humanity.[116]

Finally, the report suggests that 'sovereignty' in its Westphalian[117] meaning of 'sovereignty as control', should be re-conceptualized as 'sovereignty as responsibility' of a state towards its citizens and the international community.[118] That when a state is 'unwilling or unable' to protect its citizens who are suffering humanitarian disasters, military intervention is a viable option, primarily under the authority of a Security Council resolution.[119] With the emergence of the responsibility to protect principle, there is now an

[113] UN Secretary-General's Report, 1998. Available on www.un.org>sgreports>1998. Accessed on 16 September 2016
[114].Deng Francis, 'Sovereignty as Responsibility: Conflict Management in Africa,' (1999) *The Brookings Institution*, Washington, D.C on https://id.foreignpolicy.com/identity. Accessed on 12 November 2015
[115] Ibid
[116] *Ibid.*, footnote 50
[117] *Ibid*
[118] .See the Report ICISS 2001, *ibid.*
[119] *Ibid*

emerging international norm that is gradually reshaping the concept of sovereignty. That norm is called responsibility to protect.

2.4.4 Rules of Engagement in Armed Conflict

Whenever there is any debate regarding intervention or non-intervention in international law, what the proponent of the intervention is simply saying is that there has been a violation(s) of the laws of war or law governing armed conflict for which there should be international effort to curb or stop it. This is because there are rules and principles guiding conduct of war. It is the violation(s) of these rules by any of the warring parties that calls for intervention. International humanitarian law covers two areas namely the protection of those who are not, or no longer taking part in fighting and restrictions on the means of warfare in particular weapons and the methods of warfare, such as military tactics. International humanitarian law protects those who do not take part in the fighting, such as civilians and medical and religious military personnel. It also protects those who have ceased to take part, such as wounded, shipwrecked and sick combatants, and prisoners of war. These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction. More specifically: it is forbidden to kill or wound an enemy who surrenders or is unable to fight; the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals and ambulances must all be protected. According to *Nwigwe*[120] there are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families. The

[120] Nwigwe Chris, *Op. Cit*. p.45

law sets out a number of clearly recognizable symbols which can be used to identify protected people, places and objects. The main emblems are the Red Cross, the red crescent and the symbols identifying cultural property and civil defence facilities. This rules of engagement becomes necessary whenever there is armed conflict. This will lead to a discussion on armed conflict.

2.4.5 Armed Conflict

The 1949 Geneva Conventions as well as the Additional Protocols of 1977 do not offer any definition of the term 'armed conflicts'. This is not an oversight because parties to the treaties deliberately avoided the technicalities that may arise from any definition. In the previous Conventions[121] before the Geneva Law, states parties could argue that they were not at war and so the laws of war did not apply to them. It was because of this problem that a definition of armed conflict or war was avoided. However, the states parties to the 1949 Geneva Conventions have entrusted the International Committee of the Red Cross, through the Statutes[122] of the International Red Cross and Red Crescent Movement, to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof. It is on this basis that the

[121] Referring to the Hague Law or Hague Laws of War

[122] Article 5(2) of the Statute provides that the role of the International Committee, in accordance with its Statutes, is in particular:
a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
b) to recognize any newly established or reconstituted National Society, which fulfils the conditions for recognition set out in Article 4, and to notify other National Societies of such recognition;
c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;
f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in cooperation with the National Societies, the military and civilian medical services and other competent authorities;
g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;
h) to carry out mandates entrusted to it by the International Conference.

International Committee of the Red Cross takes this opportunity to present the prevailing legal opinion on the definition of 'international armed conflict' and 'non-international armed conflict' under International Humanitarian Law.[123]

International humanitarian law distinguishes two types of armed conflicts, namely international armed conflicts, opposing two or more States, and non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only.[124] International humanitarian law also established a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Article 1 of Additional Protocol II. They are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I. Non-international armed conflicts are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting against each other. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II. International humanitarian law applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.

As earlier noted, it is important to differentiate between international humanitarian law and human rights law. While some of their rules are similar, these two bodies of law have developed separately and are contained in different treaties. In particular, human rights law unlike international humanitarian law applies in peacetime, and many of its provisions may be suspended during an armed conflict.

[123] Armed Conflict-International Committee of the Red Cross legal position on the notion of armed conflict. Available on https://www.icrc.org>irc_97_900-13. Accessed on 3 June 2019.
[124] Opinion of the ICRC. Available on https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf. Accessed on 8 October 2018.

(i) International Armed Conflict

Common Article 2 to the Geneva Conventions of 1949 states that:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[125]

According to this provision, International Armed Conflicts are those which oppose 'High Contracting Parties' meaning States.[126] An International Armed Conflicts occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Relevant rules of International Humanitarian Law may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required. The existence of an International Armed Conflicts, and as a consequence the possibility to apply to this situation, depends on what actually happens on the ground. It is based on factual conditions. For example, there may be an International Armed Conflicts, even though one of the belligerents does not recognize the government of the adverse party. The Commentary of the Geneva Convention confirms that

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the

[125] Common Article 2 to the Geneva Convention

[126] It is irrelevant to the validity of international humanitarian law whether the States and Governments involved in the conflict recognize each other as States.

> meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.[127]

Apart from regular inter-state armed conflicts, Additional Protocol I[128] extends the definition of International Armed Conflicts to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination like wars of national liberation. The International Criminal Tribunal for the former Yugoslavia proposed a general definition of international armed conflict. In the *Tadic*[129] case, the Tribunal stated that 'an armed conflict exists whenever there is a resort to armed force between States'. This definition has been adopted by other international bodies since then.

(ii) Non International Armed Conflict

Two main legal sources must be examined in order to determine what a Non International Armed Conflict under international humanitarian law is. To that extent it is pertinent to recall the provisions of the Common Article 3 to the Geneva Conventions of 1949 as well as Article 1 of Additional Protocol II. Accordingly the Common Article 3 provides that non-International Armed Conflicts applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'. These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-

[127] J. Pictet, 'Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field', (1952) *ICRC Commentary, Geneva*, p. 32 available on https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf accessed on 22 September, 2018

[128] Article 1(4) of Additional Protocol 1 1977.

[129] ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70

governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur 'in the territory of one of the High Contracting Parties' has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.

In order to distinguish an armed conflict, in the meaning of common Article 3 from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. It has been generally accepted that the lower threshold found in Article 1(2) of Additional Protocol II which excludes internal disturbances and tensions from the definition of Non International Armed Conflict also applies to common Article 3. Two criteria are usually used in this regard as summarized by Schindler to the effect that:

> First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces. Second, non-governmental groups involved in the conflict must be considered as parties to the conflict, meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.[130]

2.4.6 State Responsibility

[130]D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979) *RCADI*, Vol. 163, -II, p. 147. Available on https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf. Accessed on 22 September, 2018. For a detailed analysis of this criteria, see ICTY, The Prosecutor V Fatmir Limaj, Judgment, IT-03-66-T, 30 November 2005,para. 94-134

In any legal system, there must be liability for failure to observe obligation imposed by its rule. Such liability is known in international law as responsibility[131]. The rights accorded to states under international law imply responsibilities. States are liable for breaches of their obligations, provided that the breach is attributable to the state itself. A state is responsible for direct violations of international law, for instance, the breach of a treaty or the violation of another state's territory. A state also is liable for breaches committed by its internal institutions, however they are defined by its domestic law; by entities and persons exercising governmental authority; and by persons acting under the direction or control of the state. These responsibilities exist even if the organ or entity exceeded its authority. Further, the state is internationally responsible for the private activities of persons to the extent that they are subsequently adopted by the state. In 1979, for example, the Iranian government officially supported the seizure of the U.S. embassy by militants and the subsequent holding of diplomats and other embassy staff as hostages.[132] A state is not internationally responsible if its conduct was required by a peremptory norm of general international law, if it was taken in conformity with the right to self-defense under the UN Charter, if it constituted a legitimate measure to pressure another state to comply with its international obligations, if it was taken as a result of a *force majeure* (French: "greater force") beyond the state's control, if it could not reasonably be avoided in order to save a life or lives, or if it constituted the only means of safeguarding an essential interest of the state against a grave and imminent peril, where no essential interest of the states toward which the obligation exists (or of the international community) was impaired.[133] The position of state responsibility in international law has now been steeled with the adoption by the International Law Commission in 2001, of the draft Articles on Responsibility of States for Internationally Wrongful Acts.[134] The final text of the Article omits a controversial text (art. 19) in an earlier draft providing for the criminal responsibility of states, taking the view instead that international law knows no such concept.[135]A state must make full reparation for any injury caused by an illegal act for which it is internationally responsible. Reparation consists of restitution of the original situation if possible, compensation where this is not possible, or satisfaction.

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[131] . David Harris, *Casa and Materials on International Law*, (2010), Sweet & Maxwell, Thompson Reuters (Legal) Ltd, 7th Edn, South East Asian , p.421

[132] The Responsibility of State, available on https://www.britannica.com/topic/international-law/The-responsibility-of-states. Accessed 29 September, 2019.

[133] .*Ibid.*,

[134] .See David Harris, *Ibid*., p.421

[135] . *Ibid*

One controversial aspect of international law has been the suggestion, made by the International Law Commission in its 1996 draft on State Responsibility, that states can be held responsible for "international crimes" (comprising internationally wrongful acts resulting from the breach by a state of an international obligation so essential for the protection of the international community's fundamental interests that its breach is recognized as a crime by that community). Examples given included aggression, colonial domination, and genocide. In addition to the argument that states (as distinct from individuals) could not be guilty of crimes as such, serious definitional problems arose, and there was concern over the consequences of such crimes for states. Accordingly, in its draft articles finally adopted in 2001, the International Law Commission dispensed with this politically divisive approach but retained the idea of a more serious form of international wrong. The commission emphasized the concept of serious breaches of obligations arising under a peremptory norm of international law (i.e., the rules of *jus cogens*, or those deemed essential for the protection of fundamental international interests). In such circumstances, all states are under an obligation not to recognize such a situation and to cooperate in ending it.

2.4.7 Humanitarian Crisis

The term 'humanitarian crisis' or 'humanitarian disaster' is defined as a singular event or a series of events that are threatening in terms of health, safety or well being of a community or large group of people which can either be natural disasters, man-made disasters or complex emergencies.[136], particularly armed conflict. Each humanitarian crisis is caused by different factors and as a result, each different humanitarian crisis requires a unique response targeted towards the specific sectors affected. This can result in either short-term or long-term damage. Humanitarian crises can either be natural disasters, man-made disasters or complex emergencies. In such cases, complex emergencies occur as a result of several factors or events that prevent a large group of people from accessing their fundamental needs, such as food, clean water or safe shelter. Examples of humanitarian crises include armed conflicts, epidemics, famine, natural disasters and other major emergencies. If such a crisis causes large movements of people it could also become a refugee crisis. For these reasons, humanitarian

[136] .Meaning of Humanitarian Crisis. Available on *https://en.wikipedia.org › wiki › Humanitarian_crisis. Accessed 28 September, 2019*

crises are often interconnected and complex and several national and international agencies play roles in the repercussions of the incidences.[137]

There is no simple categorization of humanitarian crises. Different communities and agencies tend to have definitions related to the concrete situations they face. A local fire service will tend to focus on issues such as flooding and weather induced crises. Medical and health related organizations are naturally focused on sudden crises to the health of a community.

The war in Syria[138] also has seen horrendous human suffering as a result of actions by all sides, none more consequential than the of President Bashar al-Assad's regime.[139] The regime has repeatedly used tactics that deliberately harm civilians for political and military gain. Its core strategy in taking back opposition areas has been to drain them of resources, degrade infrastructure and target civilians and rebels alike, in order to drive those who oppose it out and leave no option other than submission to regime authority for those who remain[140]. The aim is also to send a clear message about the price of resistance. Backed by Russian air power, government forces have bombed civilians and civilian infrastructure including schools and hospitals in rebel-held areas. They have also used chemical weapons against civilians.

2.5 Histories of Humanitarian Intervention

Intervening in the affairs of another state on humanitarian grounds has been a subject of discussion in public international law since the 19th century.[141] According to Jonathan Friedman and Paul James[142] explicit assertions about humanitarian motives are not a new phenomenon and military action is instead often rationalized through such moral rather than

[137] *.Ibid,*
[138]. The war in Syria started in 2011 following the Arab spring. What started as a civil protest later snowballed into a full blown war with foreign backers for different rebel groups operating in the country. Syria later became the breeding ground for the ISIL terror network. The Republic of Russia and Iran has been the main backer of the Syria regime.
[139] .Report of World Economic Forum titled: Using Human Suffering as a Political Tool. Available on https://www.weforum.org/agenda/2018/06/using-human-suffering-as-a-political-tool/. Accessed 28 September, 2019.
[140] *Ibid.,*
[141] See the account of history of humanitarian intervention as recorded by Wikipedia available on https://en.m.wikipedia.org/wikipedia/Humanitarian_intervention. Accessed on 20 November 2015
[142] *Ibid*

political arguments. For instance, as a pretext for deploying troops in Italian Somaliland and Italian Eritrea for an intended invasion of *Ethopia, Benito Mussolini*[143] thus claimed that he was attempting to both secure the *Wal Wal* border area where some Italian soldiers had been killed and abolish the local slave trade.[144] Similarly, *Adolf Hitler*[145] justified his own forces' occupation of the Sudetenland by suggesting that they were attempting to quash ethnic tensions in *Czechoslovakia*.

Mills[146] views and that of the early writers positively influenced the early proponents of intervention. According to the account of Wikipedia, the first historical example of a state expressly intervening in the internal affairs of another state on the grounds of humanitarian concern was during the Greek War of Independence in the early 1824, when Britain, France and R*ussia* decisively intervened in a naval engagement at *Navarino*[147] in 1827 to secure for the Greeks independence from the *Ottoman Empire*.[148]

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[143] Benito Mussolini (1883-1945), was the founder of Fascism and Leader of Italy from 1922 to 1943. He allied Italy with Nazi Germany and Japan in the World War 11. Available on www.britanica.com/biography/Benito-Mussolini. Accessed on 12 November 2015.

[144] See the account of Townley, Edward *(2002).* Mussolini and Italy. *Heinemann. p. 107. ISBN 0435327259. cited* inhttps://en.m. wikipedia.org/Wikipedia/humanitarian_intervention. Accessed on 9 October 2015.

[145]Adolf Hitler, (1889-1945) was a military dictator. He was the leader of Nazi Germany from 1934 to 1945. He initiated the World War 11 and oversaw Fascist policies that resulted in millions of death. He became the Chancellor of Germany in 1933. As leader of the Third Reich, he invaded Poland, which started World War 11. He orchestrated the holocaust, which resulted in the deaths of 6 million Jews. Hitler was born in 1889, Adolf Hitler rose to power in German politics as leader of the National Socialist German Workers Party. His policies precipitated World War 11 and the Holocaust. Hitler committed suicide with his wife Eva on April 30, 1945, in his Berlin bunker. Available www.biography.com>people>adolf-hitler. Accessed on 20 November 2015

[146] *Ibid*

[147]The naval Battle of Navarino was fought on 20 October, 1827 during the Greek War of Independence (1821-1832), in Navarino Bay-modern day Pylos, on the west coast of the Peloponnese peninsula, in the Ionian sea. An Ottoman armada, which, in addition to imperial warships, included squadrons from the eyelets province of Egypt, Tunis and Algiers, was destroyed by an Allied Force of British, French and Russia vessels. It was the last major naval battle in history to be fought entirely with sailing ships, although most ships fought at anchor. The reports had it that the Allied victory was achieved through superior firepower and gunnery. Available online https://en.mwikipedia.org/wiki/Battle_of _the _Navarino. Accessed on 12 August 2015.

[148]. The Ottoman empire also known as Turkish Empire was an empire founded in 1299 by Oghuz Turks under Osman 1 in the northwest Anatolia. After conquest in the Balkans by Muradi 1 between 1362 and 1389, the Ottoman Sultanate empire was transformed into a continental empire and claimant to the caliphate. The last remnants of the Ottoman Empire is the present day secular state of Turkey. Available online https://en.m.wikipedia,org/wiki/Ottoman-Empire. Accessed on 17 November 2015.

During the Greek War, popular opinion in England was sympathetic to the Greeks, in part due to the Greek origin of the West's classical heritage. And according to the account of *Wynne H William*[149] the London Philhellenic was established to aid the Greek insurgents financially. In 1823, after initial ambivalence, the British Foreign Secretary George Canning declared in support of the Greek that: 'When a whole nation revolts against its conqueror, the nation cannot be considered as piratical but as a nation in a state of war.'[150] Another recorded humanitarian intervention was during the treatment of minorities under the *Ottoman* aegis which proved a rich source of liberal agitation throughout the nineteenth century. A multinational force under French leadership was sent to *Lebanon* to help restore peace after the 1860 *Druze –Maronite* conflict, in which thousands of Christian *Manorites* had been massacred by the *Druze* population. Following an international outcry, the Ottoman Empire agreed on 3 August 1860 to the dispatch of up to 12,000 European soldiers to re-establish order.[151] This agreement was further formalized in a Convention on 5 September 1860 with Austria, Great Britain, France, Prussia and Russia.[152]

Another intervention was the French military intervention in Syria on humanitarian basis. The war also known as 1860 Mount Lebanon civil War, it was the culmination of a peasant uprising which began in the north of Mount Lebanon as a rebellion of *Maronites* peasants against the *Druze* overlords and culminated in the massacre in Damascus.[153] The uprising later spread to the South of the country where the rebellion changed its character, with the

[149]Wynne William H; 'State Insolvency and Foreign Bondholders' (1951) *Yale University Press*, Vol. 2, p. 284 available online https://books.google.com.ng>books accessed on 15 November 2015.
[150] See Wikipedia, *Ibid*
[151] S Chesterman, 'Just War or Just Peace: Humanitarian Intervention and International Law', (2001) *Oxford University Press*, Vol. 32, available on www.academia.edu>Just_War_or_Just_Peace. Accessed on 18 October 2015
[152] *Ibid*
[153] Times report of the French Expedition , August 9, 1860 describing how the expedition was cast as humanitarian intervention available online at https://en.m.wikipedia.org>wiki>1860_Mount_Lebanon_Civil_War. Accessed on 20 November 2015.

Druze turning against the *Maronites* Christians. Around 20,000 Christians were killed by the *Druze* and 380 Christian villages and 560 churches destroyed.[154] The events led France to intervene and stop the massacre after Ottoman troops had been aiding Islamic forces either by direct support or by disarming Christians forces. France, led by Napoleon III, recalled its ancient role as protector of Christians in the *Ottoman* Empire deployed French troops to the region to help protect the Christians which was established in a treaty in 1523. Following the massacre and an international outcry, the *Ottoman* agreed on 3rd August, 1860 to the dispatch of up to 12,000 European forces to re-establish order in Syria. The European force was under the command of the French who supplied the greater percentage of the troops. Upon departure of the French troops the French leader addressed them in the following words thus:

> Soldiers you leave for *Syria*...France hails with joy an expedition the sole aim of which is to cause the right of justice and humanity to triumph. We do not go to make war against any foreign power but to assist the Sultan in bringing back the obedience of his subjects who are blinded by the fanaticism of the former century. In that distance land rich in great reminiscences fulfill your duty, show yourself the world children of those who once gloriously carried into that country the banner of Christ. You do not leave in great numbers but your courage and your prestige will supply the deficiency because wherever the French is seen to pass nation know that a great cause precedes it and a great people follows it[155]

[154] *Ibid*
[155] Ibid

After the World War II the most powerful nations of the world converged in SAN Francisco USA and agreed to the formation of the United Nations which led to the emergence of the UN Charter. The Charter[156] enjoins all member nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purpose of the United Nations. Article 2(4) has been credited to be a codification of customary international norm of non-interference, non- intervention in the internal affairs of another state. The purpose of the United Nations is eloquently stated to include inter alia –to maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, for the suppression of acts of aggression or other breaches of the peace, and to bring about peaceful means, and in conformity with the principles of justice and international law.[157] The provisions in Article 2(7) is a radical and paradigm shift from the practice of the defunct League of Nations. It provides that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[158]

[156] See Article 2(4)
[157] See Article 1(1) of the UN Charter, June 1945.
[158] Article 2(7) UN Charter.

The United Nations has on several occasions[159] resorted to this provision to justify intervention whenever such acts were capable of threatening international peace and security. As a result, many United Nation Resolutions[160] have been adopted on the strength of article 2(7) to justify intervention. This is a more liberal provisions and it allows the United Nations a discretionary degree of flexibility to intervene in the internal affairs of a sovereign state on humanitarian purposes. Such intervention before now would have amounted to violation of state sovereignty. Several of United Nations backed interventions have taken place since after the establishment of the United Nations. The United Nations Mission in Rwanda, 1994 which was rather an intervention too late because it came after the genocide in *Rwanda* in which the majority *Hutu* tribes killed almost 800,000 minority *Tutsi* in a campaign of ethnic cleansing that lasted between 7th April to 21st May, 1994, the United Nations Mission in East *Timor* in 1999, The NATO coalition bombings in *Libya* in 2011 are all examples of United Nations resolution authorizing intervention to safe humanity even though most of the interventions are not strictly speaking humanitarian in nature.

For example, the United States on the pretext that it is responding to a situation of near anarchy in the republic of *Haiti* and to protect human rights militarily occupied *Haiti* from 1915-1934. During this time, they installed puppets government, ran the economy, military and police and for all intents and powers were in absolute control of the Country.[161] The United Nations Operation in the *Congo* ONUC (July 1960-June 1964) was established with a

[159] See for example Resolution 1973 authorizing the intervention in Libya in 2011 relied on article 2(7) of the UN Charter to justify the intervention. The UN on the 20/11/15 approvingly adopted a resolution supporting the American led intervention in Iraq against the Islamic state in Iraq and the Levant.

[160] See for example UN Resolution 1674 of 28th April, 2006 after reaffirming resolutions 1265 of (1999) and 1296 of (2000) concerning the protection of civilians in armed conflict and resolution 1631 of (2005) on co-operation between the United Nations and regional organisations, the Council stressed a comprehensive approach to the prevention of armed conflict and its recurrence. The resolution was adopted after six months of debate among council members. It was the first time the Security Council had recognised a set of criteria to form a basis for humanitarian intervention in situation of armed conflict. Available online https://en.m.wikipedia.org/United_Nations_Security_Resolution_1674. Accessed on 18 December 2015.

[161] https://latinamericanhistory.about.com/od/historyof_thecarribbean/p/08haiti1915.htm. Accessed on 18 December 2015.

mandate to ensure the withdrawal of Belgian forces, to assist the Government in maintaining law and order and to provide technical assistance. The functions of the ONUC was subsequently modified to include maintaining the territorial integrity and political independence of the *Congo*, preventing the occurrence of civil war and the securing of the violations of human rights and the removal of all foreign military in *Congo*.[162]

The North Atlantic Treaty Organization (NATO) military campaign in *Kosovo* was termed humanitarian intervention. By 1999 NATO led an air campaign in *Kosovo* without the authority of the UN in order to protect the ethnic *Albanians* from the repression of *Serbian* forces under President *Slobodan Milosevic. Kosovo* lies in southern *Serbia* and has a mixed population of which majority are ethnic *Albanians*. Until 1989, *Kosovo* the region enjoyed a high degree of autonomy within the *Yugoslavia* Federation, when Serbian leader *Slobodan Milosevic* altered the status of the region, removing its autonomy and bringing it under the direct control of Belgrade, the *Serbian* capital. The *Kosovar Albanian* strenuously opposed the move. *Slobodan Milosevic* moved *Serbian* forces and para-military police into the region to enforce the move and it led to humanitarian crises. All efforts to resolve the dispute diplomatically were rebuffed by *Slobodan Milosevic* including withdrawal of *Serbian* force from *Kosovo* and the safe return of more than 800,000 refugees who had fled to neighboring countries of Bulgaria, Republic of *Macedonia, Bosnia* and *Albania*. On the 23rd of March, 1999 sensing that *Russia* and *China* would veto any UN sanctioned military intervention in *Kosovo*, NATO announced the commencement of air strikes against *Yugoslavia* called Operation Allied Force. The operation last for 77 days when it was called off on the 10th day

[162] Culled from the United Nations available on www.un.org/en/peacekeeping/missions/past/onuc.htm last visited on 08/07/15 by 09.23am

of June, 1999 following the acceptance of *Yugoslavia* to allow for diplomatic purse and to withdraw *Serbian* forces out of *Kosovo*.[163]

The NATO intervention in *Libya* is one of the most recent humanitarian interventions recorded and it was the first intervention anchored on the emerging norm of responsibility to protect. A peaceful protests in *Benghazi* meet with violent repression by the *Qadhafi* regime. In February, 2011 UN Security Council adopted Resolution 1970[164] which imposes an arms embargo on Libya. By 17th March 2011, the UN Security Council, adopted another resolution (Resolution 1973) which imposes a no-fly zone over Libya and authorized member states to take all necessary measures to protect civilians-populated areas under attack or threats of attack. Following the repression targeting civilians in February 2011, NATO answered the United Nations call to the International Community to protect the Libyan people. In March 2011, a coalition of NATO Allies and partners acting on UN Resolution 1973[165] of 2011 began enforcing an armed embargo, maintaining a non-fly zone and protecting civilian populated areas from attack or the threat of attack in Libya under Operation Unified Protector (OUP). OUP was successfully concluded on 31st October, 2011.[166]

The recent international military intervention led by the US against the Islamic State of *Iraq* and the Levant which began in 2014 is the latest in the norm of humanitarian intervention. An American-led intervention in *Iraq* started on 15th June, 2014 when President *Obama* ordered US Forces to be dispersed to the region, in response to offensive in *Iraq* conducted by the Islamic State of Iraq and the Levant (ISIL). American troops went, at the invitation of Iraqi Government, to assist Iraqi forces and the threats posed by ISIL. The

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[163] See generally the history of the NATO actions in *Kosovo* as recorded in https: www.nato.int/kosovo/history.htm. Accessed on 21 November 2015.

[164] The summary of NATO intervention in Libya. Available on https://www.nato.int/cps/en/natolive/topics_71652.htm. Accessed on 20 November 2015.

[165] *Ibid*

[166] *Ibid*

Islamist group had captured several Kurdish held territories of northern Iraq and massacred the Christians minorities especially in *Sinjar*.[167] The US had been supplying the *Kurdish Peshmerga*[168] forces with weapons and air support on August 5, 2014. By august 7, 2014 the US started humanitarian aid air droppings of food, water and medicine for the civilians fleeing ISIL positions in the *Sinjar* mountains.[169] *Sinjar* was liberated in November, 2015 but ISIL still control other territories in Iraq including *Ramadi, Mosul* and some towns in *Syria*. On 20th November, 2015, the United Nations Security Council called on all countries that can do so to take the war on terrorism to ISIL territories in Syria and Iraq and destroy its safe haven, warning that the group intends to mount further terror attacks like those that devastated Paris and *Beirut* in mid November, 2015.

These interventions have been referred to as humanitarian interventions. However, in some cases this is only a retrospective classification of actions that were the result of a variety of motivations. Vietnamese's invasion of Cambodia for instance, was justified as self-defence rather than humanitarian and has only later come to be seen as a possible example of humanitarian intervention.

2.5.1 ECOWAS Intervention in Liberia

Within Africa, ECOMOG represented the first credible attempt at a sub- regional security initiative. In an attempt to end the bloody civil war in Liberia, in August 1990, a group of West African nations under the auspices of the Economic Community of West African States[170] (ECOWAS) took the unprecedented step of sending a peacekeeping force into Monrovia. It was the first attempt by any organization in Africa to wage war in order to

[167] *Op.cit*

[168] See *American-led Intervention in Iraq* (2014-present)on https://en.m.wikipedia.org/wiki/American-led_intervention_in_Iraq_(2014%E2%80%93present). Accessed on 20 November 2015.

[169] *Ibid*

[170] ECOMOG: https://en.wikipedia.org/wiki/Economic_Community_of_West_African_States_Monitoring_Group. Accessed on 28 September, 2019

maintain peace. ECOWAS members established ECOMOG in 1990 to intervene in the civil war in Liberia (1989–96). There was merit in the argument that the establishment of ECOMOG did not conform to the constitutional legal requirements of ECOWAS because at the time ECOMOG was formed, there was no interventionist legal regime within the ECOWAS Treaty for such intervention. It was this development that led to the Revised ECOWAS Treaty in 1993 and the subsequent MCPMRPS Protocol which introduced humanitarian intervention in the sub-region.[171] It was this provision that spurred the OAU transition from the non-intervention principle to non-indifference under the AU Constitutive Act.[172]

It is therefore safe to conclude that the arguments used to establish ECOMOG had more solid grounds in politics than in law and the intervention in Liberia by ECOMOG was justified largely on humanitarian grounds. Following Charles Taylor's election as President of Liberia on 19 July 1997, the final Field Commander, General Timothy *Shelpidi*, withdrew the force fully by the end of 1998. ECOWAS deployed ECOMOG forces later on to control conflict in other cases: 1997- Sierra Leone, to stop the RUF rebellion, and later 1999- *Guinea-Bissau* to end the *Guinea-Bissau* civil war.[173]

2.5.2 ECOWAS Intervention in Sierra Leone

The Sierra Leone Civil War which lasted from 1991-2002 was the second humanitarian intervention by ECOWAS to restore peace and halt large scale human sufferings. The civil war in Sierra Leone began on 23 March 1991 when the Revolutionary United Front (RUF), with support from the special forces of Charles Taylor's National Patriotic Front of Liberia

[171]. Article 25 of the MCPCRMP Protocol provides that: in cases of aggression or conflict in any Member State or threat thereof, in case of conflict between two or several Member States; In case of internal conflict: that threatens to trigger a humanitarian disaster, or that poses a serious threat to peace and security in the sub-region; In event of serious and massive violation of human rights and the rule of law. In event of massive and serious violation of human rights and the rule of law or in event of an overthrow or attempted overthrow of a democratically elected government; Any other situation as may be decided by the Mediation and Security Council.[171]

[172]. Article 4(h) of the AU Act.

[173].ECOMOG: https://en.wikipedia.org/wiki/Economic_Community_of_West_African_States_Monitoring_Group. Accessed on 28 September, 2019.

(NPFL), intervened in Sierra Leone in an attempt to overthrow the Joseph Momoh government.[174] Sierra Leone and Liberia are West African countries situated next to one another on the coast. After a member of a previous government, Charles Taylor, came back to Liberia to topple the current government in the early 1990s, a civil war started in Liberia that spilled over the border into Sierra Leone.

In 1991, Sierra Leone's president, *Joseph Saidu Momoh*, sent the country's army to push Taylor's rebels back into Liberia, but the army was attacked not only by Taylor's rebels, but by a former Sierra Leonean military leader named *Foday Sankoh* and his followers known as the Revolutionary United Front (or RUF). *Momoh's* focus on the war took his focus off the rest of the country, and two captains in the Sierra Leone military carried out a military deposition against *Momoh*, taking charge of the country through military might instead of an election. These men were captains in the military named *Yahya Kanu* and *Valentine Strasser*. Strasser ended up becoming the sole leader of the country, and this began a four year period of military rule from 1992 to 1996, with each leader being deposed by another leader in the military rather than elected freely.

In May 1997 a group of disgruntled SLA officers staged a coup and established the Armed Forces Revolutionary Council (AFRC) as the new government of Sierra Leone. The RUF joined with the AFRC to capture Freetown with little resistance. The new government, led by Johnny Paul Koroma, declared the war over. A wave of looting, rape, and murder followed the announcement. Reflecting international dismay at the overturning of the civilian government, ECOMOG forces intervened and retook Freetown on behalf of the government, but they found the outlying regions more difficult to pacify. This was the second humanitarian intervention in the West African sub-region by ECOWAS and it was these interventions that spurred the OAU transition to the new principles of non-indifference, thus abandoning the outdated principles of non-intervention and non-interference.

2.5.3 Tanzanian Intervention In Uganda in 1978

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[174]. The Civil War in Sierra Leone. Available on https://en.wikipedia.org/wiki/Sierra_Leone_Civil_War. Accessed on 28 September, 2019.

The *Uganda-Tanzania* war usually referred to in *Uganda* as the Liberation War which was fought between *Uganda* and *Tanzania* in 1978-1979, and led to the overthrow of dictator *Idi Amin's* regime. The *Idi Amin's* army included thousands of troops sent by *Libya*, and some Palestinian support.[175] Following the successful coup by General *Idi Amin* in *Uganda* former President *Milton Obote* was offered sanctuary in *Tanzania* by *Tanzanian* President *Julius Nyerere*. More than 20,000 refugees joined *Obote* in *Tanzania* due to the dictatorial regime of *Idi Amin. Nyerere* was later to support an armed rebellion against *Amin* by sending troops to *Uganda* to help liberate the country from the hands of Amin. He was eventually overthrown and he fled to Saudi Arabia where he died on 16th August, 2003.[176]

2.5.4 United Nations Intervention In Somalia in 1992

Faced with the humanitarian disaster in *Somalia*, exacerbated by a complete breakdown in civil order, the United Nations had created the UNOSOM I Mission in April 1992.[177] However, the complete intransigence of the local faction leaders operating in Somalia and their rivalries with each other meant that UNOSOM I could not be performed. The mission never reached its mandated strength. Over the final quarter of 1992, the situation continued to worsen.[178] Factions were splintering into small factions, and then splintered again. Agreements for food distribution with one party were worthless when the stores had to be shipped through the territory of another. Some elements were actively opposing the UNOSOM intervention. Troops were shot at, aid ships attacked and prevented from docking, cargo aircraft were fired upon and aid agencies, public and private, were subjects to threats looting and extortion. By November, General *Mohamed Farrah Aidid* had grown confident enough to defy the UN Security Council and formally demanded the withdrawal of peacekeepers as well as declaring hostile intent against any further UN deployments. This angered the United Nations. The Unified Task Force (UNITAF) was formed, which was a US led United Nations-sanctioned Multinational Force which was operated in Somalia between

[175] See the report: ''Idi Amin Military Rule'' Country Study: Uganda. Library of Congress, December 1990 wherein it was reported that by mid-march 1979, about 2000 Libyan troops and several hundreds of Palestine Liberation Organisation (PLO) fighters had joined in the fight to save Amin's regime. Available on http://memory.loc.gov./cgi-bin/query/r?frd/cstdy:@field%28DOCID+ug0140%29 last visited on 18/11/15 by 2.30am

[176] ibid

[177] Unified Task Force Somalia, https://en.m.wikipedia.org>wiki>Unified_Task_Force last visited on 21/11/15 by .43am.

[178] *ibid*

5th December 1992 to 4th May 1993. A United States initiative (Code named Operation Restore Hope) UNITAF was charged with carrying out United Nations Security Council Resolution 794 to create a protected environment for conducting humanitarian operation in the southern half of the country. After the killing of several Pakistani peacekeepers, the Security Council changed UNITAF's mandate issuing the resolution 837 that establishes that UNITAF troops could use ''all necessary measures'' to guarantee the delivery of humanitarian aids in accordance with Chapter V11 of the United Nations Charter and it was regarded as a success.[179]

2.6 Conflict Between Sovereignty And Humanitarian intervention

External military intervention for human protection purposes has been controversial both when it has happened – as in *Somalia, Bosnia* and *Kosovo* – and when it has failed to happen, as in *Rwanda*. For some the new activism has been a long overdue internationalization of the human conscience; for others it has been an alarming breach of an international state order dependent on the sovereignty of states and the inviolability of sovereign territory.[180] For some, again, the only real issue is ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger. NATO's intervention in Kosovo in 1999 brought the controversy to its most intense head.[181]

In the Kosovo's case, the Security Council members were divided; the legal justification for military action without the Security Council authority was asserted but largely unargued; the moral or humanitarian justification for the action, which on the face of it was much stronger, was clouded by allegations that the intervention generated more carnage than it averted; and

[179] *ibid*
[180]Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000*)*, p.32.
[181]Martha Finnemore. 'Constructing Norms of Humanitarian Intervention' cited in 'The Culture of National Security: Norms and Identity in World Politics', Peter J. Katzenstein (1999) edn, *Columbia University Press*, New York, p.153

there were many criticisms of the way in which the NATO allies conducted the operation.[182] At the height of the complaints against the NATO actions in Kosovo was the alleged violations of laws of war. At the United Nations General Assembly in 1999, and again in 2000, Secretary-General *Kofi Annan* (of blessed memory) made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues, to "forge unity" around the basic questions of principle and process involved. He posed the central question starkly and directly that 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a *Rwanda*, to a *Srebrenica* – to gross and systematic violations of human rights that affect every precept of our common humanity?

It was in response to this challenge that the Government of Canada, together with a group of major foundations, announced at the General Assembly in September 2000 the establishment of the International Commission on Intervention and State Sovereignty (ICISS). The Commission was tasked with the duty to wrestle with the whole range of questions – legal, moral, operational and political – rolled up in this debate, to consult with the widest possible range of opinion around the world, and to bring back a report that would help the Secretary-General and everyone else find some new common ground regarding the question of humanitarian intervention. The report which was later presented to the General Assembly unanimously agreed by the twelve Commissioners the need to establish an international norm anchored on the responsibility to protect instead of the absolute doctrine of state sovereignty. The central theme, reflected in the title, is the 'responsibility to protect", the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe

[182] Op.cit

from mass murder and rape, from starvation but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.[183]

This report is about the "right of humanitarian intervention": and the report tried to answer many questions regarding interventions like, question of when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk in that other state? All these issues has been discussed herein to ascertain the extend of the conceptualization of the norm. The nature and dimensions of that responsibility was vividly set out in the report including all the vexed questions about who should exercise it, under whose authority, and when, where and how. During the submission of the report on the floor of the United Nations General Assembly, the Committee's Co-Chairman[184] stated that they have been able to reach a consensus but that their consensus does not reflect the shared views of all Commissioners as to what is politically achievable in the world today but that they do not want more *Rwanda* or *Sebrenica*, and sincerely believed the adoption of the proposals/recommendations in their report is the best way of ensuring that. The report aimed at providing precise guidance for states faced with human protection claims in other states; and has not been framed to guide the policy of states when faced with attack on their own nationals, or the nationals of other states residing within their borders. The latter situation has been adequately covered under the UN Charter for which there is no ambiguity.[185] Not the least of the differences is that in the latter case the UN Charter provides much more explicit authority for a military response than

[183] ICISS Report, 2001a. The report was submitted to the UN General Assembly in New York on the 20th September, 2001 and would later form the basis of the future debate regarding intervention and state sovereignty. It was formerly adopted by member states in 2005 other called the World Output Summit, 2005.
[184] Hon Gareth Evans AO QC, President of the International Crisis Group and Co-Chair of the International Commission on Intervention and State Sovereignty
[185] Articles 24 and 51 as well as enforcement action under Chapter VII adequately takes care of situations of attacks within the borders of a sovereign nation.

in the case of intervention for human protection purposes. The UN Charter[186] acknowledges "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations", though requiring that the measures taken be immediately reported to the Security Council. For example, in Resolutions 1368 and 1373[187] passed unanimously in the aftermath of the September 11 attacks in Washington DC and twin towers of the once famous World Trade Center, the Security Council left no one in doubt as to the scope of measures that states could and should take in response.

Humanitarian intervention as a means of military intervention is not a concrete notion abiding by specific criteria and definition. Rather it has evolved from a notion that indiscriminate damage and loss of human rights is not permissible by a sovereign or during wartime; however interventionists, who are acting under its pretense, have caused immense damage during their campaigns. The carnage and loss of human lives occasioned as a result of the NATO's intervention in Kosovo in 1999 led anti-interventionist campaigners to argue that the intervention was unnecessary.[188] It is argued that interventionists led successful campaigns most times end up causing more violations of human rights than preventing it. Due to the complex nature of humanitarian intervention and its conflict with state sovereignty, determining criteria and assessing the success or failure of these campaigns is open to interpretation. To some people, the success of humanitarian intervention is determined by the lives saved during the intervention and the ability to resolve the pre-intervention conflict.

[186] See Article 51

[187] The resolutions were adopted by the United Nations Security Council on 12th September, 2001 after the deadly attacks on the twin towers of the World Trade Centre and Washington D.C. The resolutions titled "Threats to International Peace and Security caused by Terrorist Acts" called on all nation states to fight terrorism and reaffirmed the individual and collective self-defence contained in the Charter.

[188] Civilian Deaths in the NATO Air Campaign-Human Rights Watch (2019) Available on https://www.hrw.org>report>natm002 accessed on 4 June 2019. In March, 2019, Human Rights Watch research in Kosovo determined that an estimated nineteen prisoners were killed by NATO bombings on May 21, 1999 and many others thereafter.

According to *Taylor Seybolt*[189], success is solely determined by the lives it saves. He stated thus:

> To be more specific, if in humanitarian crisis some people would have died without assistance, but did not because of the actions of military personnel, the intervention succeeded.[190]

Although *Seybolt* assertion is apt and appears to be incontrovertible, however, his opinion and concise determinate in deciding success or failure does not take into account the loss of life that follows intervention due to instability or reverse oppression. Or cases of deliberate targeting of civilians by armed groups or state army as human shield. ISIL used this tactics in Iraq following the American's intervention. Focusing on 'lives saved' is viewed as the "lowest common denominator" across interventionist campaigns because it occurs in response to humanitarian crisis usually characterized by oppression, massacre, or genocide.[191] Another notable determinate for evaluating success was put forward by Alex and emphasizes the aftermath of intervention. He identifies political stability and the resolution of the conflicts that lead to intervention as the criteria for success.[192] While this dissertation agree that conflict resolution and political stability are incredibly important when evaluating a campaign, it is our submission that neglecting the loss of life caused by intervention reduces the need for restraint. If interventionist know success will not be judged based on their ability to prevent loss of life, they will not need to conduct their mission in a way to minimize loss of life.

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[189] Taylor Seybolt, 'Humanitarian Military Intervention: the Conditions for Success and Failure', (2007), p. 220. Available on https://www.sipri.org>SIPRI08Seybolt accessed on 4 June 2019.
[190] *Ibid*
[191] Martins, Alex A, 'Successes and Failures in Humanitarian Interventions: the Iraqi and Somalian cases*' (2013). Available on https://www.academia.edu>successes_a... Accessed on 4 June 2019.*
[192] *Ibid*

Since the reintroduction of humanitarian intervention, the North Atlantic Treaty Organization (NATO) has undertaken several operations with varying degrees of success. A leading scholar, and writer of Just and Unjust Wars, *Michael Walzer* is a strong advocate of state sovereignty and the lack of international authority to intervene in internal affairs.[193] He argues that citizens should be free under the confines of their government without foreign interruption, regardless of regime type, perceived oppression, or international skepticism.[194] *Walzer* only allows for international arbitration on the grounds of widespread massacre or enslavement of the citizens, which is only two of the human rights listed on the Universal Declaration of Human Rights. With the roots of humanitarian intervention being in explicit human rights violations, under *Walzer's* understanding, the interventions in Kosovo and Libya were illegitimate and illegal. This is the conflict between sovereignty and humanitarian intervention. The need to protect human rights and the desire to protect the frontiers of state sovereignty has refused to find an acceptable ground for compromise.

The concept of Responsibility to Protect that has become front and center in regards to interventions within sovereign states. Responsibility to Protect was centered on moralism and an embodiment of liberalism's school of thought. While Responsibility to Protect emphasizes morality, it also sidelines legality, and till date, is yet to find a legal basis for Responsibility to Protect. Characteristic of the liberalist school of thought because intervention post WWII has been through the UN or NATO, both international, intergovernmental institutions. However, the actions taken under the pretext of humanitarian intervention have resembled full scale invasions, destabilizing operations, and reigns of terror on civilian populations, most case, against the wishes of the sovereign state. The NATO intervention in Libya in 2011 was purportedly to protect human lives. However, the number of lives lost to the post

[193] .Walzer, Micihael, 'Just And Unjust Wars: A Moral Argument With Historical Illustrations' (2006) N.p.: New York: Basic Books, p.56
[194] *.Ibid*

invasion conflict cannot be compared to whatever live the intervention purport to have saved. Gibbs suggests that hegemons only conduct military operations where they have economic or strategic interests, and that humanitarian intervention is an attempt at justification.[195] Gibbs explores his understanding by critiquing U.S. intervention in the Balkans. His main argument is that humanitarian intervention is an excuse for military aggression and should be viewed the same as such[196].

2.7 Summary of Literature Review

This summary of literature review provides a summary of the literatures so far reviewed and to proffer the position of the paper. Regarding sovereignty, the consensus on the definitions reviewed is that sovereignty is the full right and power of a governing body over itself, without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity. It is a basic principle underlying the dominant westphalian model of state foundation. *Sovereignty* is also viewed by many philosophers as profoundly political in nature, and comes into existence through a process in which a group of people within a defined territory is moulded into an orderly cohesion through the establishment of a governing authority that can be differentiated from society and which is able to exercise an absolute power within the defined territory.

However, the most significant contribution on sovereignty is by *Jean Bodin*.[197] *Bodin* conceived sovereignty as a supreme, perpetual, and indivisible power, marked by the ability to make law without the consent of any other. Its possession by a single ruler, a group, or the entire body of citizens defined a commonwealth as monarchy, aristocracy, or popular state.

[195] .Gibbs David 'First Do No Harm: Humanitarian Intervention And The Destruction of Yugoslavia' *(2009), Nashville: Vanderbilt University Press*, p.33
[196] .*Ibid*
[197] Op. cit.,

Without it a commonwealth was not properly a state at all. *Bodin* came to favor absolute monarchy, but the legacy of medieval juristic ideas and the political conflicts of his time led him into some contradictions and changes of front. *Bodin*[198] ascribed the location of sovereignty in one body called the sovereign who is not answerable to anybody except the law of God. From *Bodin* location of sovereignty in the Queen or King began the theory of absolute Monarch. However, one of the criticism of this postulation is the absence of liberty since all the state powers are concentrated in one person or group of persons who owe allegiance to no other person except God. The inability of *Bodin's* theory of sovereignty to decentralized the powers of the sovereign is the main reasons why the westphalian concept of sovereignty got eroded with the emergence of responsible sovereignty.

Bodin used a comparative historical method to classify past and present states and empires and reviewed the opinions of Roman law jurists on the meaning of such terms as 'the highest authority' and 'unqualified authority'. In ''The Commonwealth[199] making and unmaking law became the sole function of the King, engrossing all the rest. Here *Bodin* was influenced by Roman Law traditions that saw legislative power as command or will, as expressed in the maxim "what pleases the prince has the force of law. His term for sovereignty became *souveraineté* in French and *majestas* in Latin.[200] Despite these limitations, the power of a royal sovereign was termed "absolute," and this is not surprising, since *Bodin* undermined most of these constitutional reservations. The sovereign was the sole judge of divine and natural law, he could tax without consent in emergencies; and he could decide that contracts were no longer operative when, in his view, a subject had ceased to benefit from them. While continuing to insist on the indivisibility of sovereignty and the impossibility of the mixed

[198] *Ibid*
[199] Jean Bodin, Six Books of Commonwealth: Contents. Available on https://www.constitution.org>bodin_six-books-of-the-commonwealth. Accessed on 17 November 2018.
[200] Jean Bodin. Available on https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/sovereignty-theory. Accessed on 17 November 2018.

state, *Bodin* made a distinction between the form of the state and the method of its administration. A sovereign might choose to administer his realm using officials of aristocratic or popular origin, thus giving the false impression of mixture.

The various postulations on sovereignty have all been associated with four main features which includes a requirement that a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory, that it is capable of regulating movements across its borders, that it can make its foreign policy choices freely while being recognized by other governments as an independent entity entitled to freedom from external intervention. Unfortunately, *Jean Bodin* or other scholars were not able to identify sovereignty with the people. Sovereignty as it is known today is derived from the people[201] who entrust same to the representatives to exercise it on their behalf. It is because of this new concept of sovereignty that humanitarian intervention gained international recognition. Under *Bodin* theory, the people are not the custodian of sovereignty but the Monarch who is himself above the law. This short coming is the main reason why *Bodin'*s sovereignty appear to have eroded giving way to a new concept of sovereignty based on responsibility.

However, with regard to humanitarian intervention, the survey of the various literatures reveals that there is no one standard or legal definition of humanitarian intervention. The various definitions are determined by the historical background of the author. The field of analysis such as law, ethics or politics often influences the definition that is given. Differences in definition include variations on whether humanitarian intervention is limited to instances where there is an absence of consent from the host state; whether humanitarian

[201] Section 14 of the 1999 Constitution of Nigeria, as amended.

intervention is limited to punishment actions; and whether humanitarian intervention is limited to cases where there has been explicit UN Security Council authorization for action.

The definitions surveyed did not include non-forcible interventions like sanctions and international isolations to force an international policy change by the target state. However, the general consensus is that humanitarian intervention is a state's use of military force against another state when the chief publicly declared aim of that military action is ending human rights violations being perpetrated by the state or sometimes non state actors against which it is directed. In the case of actions against non state actors, the state actor must be unwilling or unable to halt such violations before the international community can intervene. This definition is narrow because it precludes non-military forms of intervention such as humanitarian aid and international sanctions as earlier stated.

The definition of humanitarian intervention by *Murphy* regards it as the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.[202] This international law approach which was adopted by *Murphy* was used to capture the myriad of conditions that might arise where human rights on a large scale are in jeopardy" and includes acts committed by both state and non-state actors. Most of the writers[203] surveyed indicates a general acceptance on intervention to the effect that in order for military intervention to be considered, one of two conditions must exist: either that the government must be committing, supporting, or aiding and abetting widespread violations of internationally recognized human rights; or that there must have occurred a total

[202] Murphy Sean, 'Humanitarian Intervention: The United Nations in an Evolving World Order', (1996) *University of Pennsylvania Press*, Philadelphia, p. 232.
[203] Murphy D. Sean, *Ibid*, and Fernando R. Teson, 'The Liberal Case for Humanitarian Intervention-ResearchGate. (1988) Available on https://papers.ssrn.com>...Accessed on 17 November 2018. Both Murph and Teson holds the lead in this regard.

breakdown of law and order resulting in such widespread deprivations of human rights which the government of the target state is incapable of preventing. For example, the definition as stated in the Danish Institute Report provides that:

> The definition of violations which may justify humanitarian intervention should be narrow in order to avoid abuse and to establish clearly its moral and political legitimacy. Although a broad definition may be suggested by Security Council practice under Chapter VII (cf. *Haiti*), there is no parallel. Humanitarian intervention without Security Council authorization lacks the clear legal basis of Security Council action under the Charter as well as the institutional guarantees against abuse inherent in the Security Council procedure.[204]

The meaning of what constitutes widespread deprivations of internationally recognized human rights varies among writers. Murphy[205] who leans more in favour of a Security Council action suggests the existence of widespread deprivations resulting from a systematic and indiscriminate attacks on civilians by a central government or a system-wide breakdown of law and order producing the starvation and dislocation of the civilian population. The definitions agree that specifies gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity suggests situations of gross, persistent and systematic violations of human rights, including imminent threat of widespread loss of life resulting from mass killings, starvation or other activities could also justify humanitarian intervention. The Danish Institute Report

[204] . Danish Institute of International Affairs, 'Humanitarian Intervention: Legal and Political Aspects', Submitted to the Minister of Foreign Affairs, Denmark, December 7 otherwise called the 'Danish Institute Report'. Available on https://www.diis.dk>files>import>extra. Accessed on 17 November 2018
[205]Murphy, D Sean, Op. Cit., p. 232

suggest using the definitions of genocide, crimes against humanity, and war crimes which are set out in the Statute of the International Criminal Court as conditions that must exist to trigger a humanitarian intervention. It is submitted that using these definitions would be useful since there is already international consensus on their meaning.

On the other hand, the emerging international opinion is to the effect that the Security Council has the right, but no legal obligation (although there may be a moral obligation) to use force to intervene to prevent widespread deprivations of internationally recognized human rights. The report of the International Committee on Intervention and State Sovereignty which conceptualized the principle of responsibility to protect is yet to acquire a international legal framework so as to become binding. The 2009 UN statement on the report urged the international community to continue to fashion out ways for the implementation of the concept. As at today, there currently is no legal right or emergent right of states or regional organizations to forcefully intervene in another state for such a purpose without the authorization of the Security Council, although there may be a moral right to forcefully intervene in such circumstances except in Africa. The African Union model of statutory intervention appears to have altered the status quo. There is an emerging regional right of intervention pursuant to the African Union Constitutive Act.[206] The paper shall later discuss the normative incompatibility between the African Union Constitutive Act and the United Nations Charter. Notwithstanding the incompatibility, the fact that a regional body has initiated the debate by adopting a legal framework for humanitarian intervention outside the UN Charter is a significant paradigm shift in the international relation debates regarding humanitarian intervention. The reviewed literatures indicate that since the beginning of the 1990's, there have been normative developments on the issue of humanitarian intervention

[206] African Union Constitutive Act, 2000, Article 4(j) & 4 (h) respectively

but there remains a lack of consensus regarding the legitimacy of and appropriate circumstances under which both UN-authorized and unauthorized humanitarian interventions may take place. Hence it cannot be concluded that there is an emergent norm supporting such action.

Finally, while a strong argument can be made in favour of developing guidelines for both UN-authorized and unauthorized humanitarian intervention, there is currently no consensus among scholars as to the content of such guidelines and there is likely to be resistance in the international community to developing and formalizing such criteria. It is significant, however, that the Security Council is yet to develop a criteria when contemplating enforcement action in situations of humanitarian crisis though the Security Council's Report in resolution 1265[207] expressing, among other things a 'willingness to respond to situations of armed conflict where civilians are being targeted' and resolving to establish a mechanism to review the recommendations in the Report is a welcome development.

Unfortunately, the literature surveyed failed to proffer solutions to the main cause of the tension between sovereignty and intervention. It is no doubt an undisputed fact that any humanitarian intervention into the territory of a sovereign state is a violation of international law because the provisions in article 2(4) and 2(7) of the UN Charter is very clear on the approved exceptions. Humanitarian intervention is not one of the exceptions. The reason being that there is no statutory provisions in the UN Charter regime for humanitarian intervention whereas its sovereignty counterpart is adequately protected and secured. Humanitarian intervention should be called what it is-a violation of international law. There is no legal framework for humanitarian intervention whether authorized by the UN or not.

[207].UN Resolution Report 1265, 1999 UN Doc. S/RES/1265 1999, September 17. Available on https://en.m.wikipedia.org>wiki>United-Nations. Accessed on 17 November 2018. The resolution was unanimously adopted on 17 September, 1999 and was the first resolution to address the topic of protection of civilian in armed conflict.

The failure, absence or paucity of the legal literature addressing the absence of statutory codification of the humanitarian intervention is arguably one of the failures of the existing literature. It is one of the contributions of this dissertation to proffer recommendations towards achieving statutory humanitarian intervention in international relations.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR SOVEREIGNTY AND HUMANITARIAN INTERVENTION

3.1 Restrictions and Erosion of the Concept of Sovereignty

No doubt the concept of sovereignty since the emergence of the state has been affected by many factors through stages of states' lives. The concept of sovereignty in its first image started to take shape according to political and social circumstances of states at that time. With the formation of the United Nations in 1945 and adoption of the UN Charter, the concept of state sovereignty started losing it absoluteness. Member states are now expected to respect the rules of international law in conducting their domestic affairs. It was no longer fashionable for states to hide under the veil of domestic jurisdiction as an element of state sovereignty to perpetrate acts that are contrary to basic international law and rights of people within their domain. Domestic jurisdiction is no longer absolute as human beings are now subjects of international law. Even at the early stages of international law when states were the exclusive subjects, customary international law made allowances for the intervention, forcibly where necessary, in the domestic affairs of states on humanitarian ground. External intervention is also legitimate in furtherance of Security Council decision under chapter VII of the United Nations Charter. Article 2(7) of the Charter forbids intervention in the domestic affairs of states. It is however without prejudices to the enforcement action under the authority of the Security Council.

The concept of sovereignty of the state is no longer viewed as an abstract concept isolated from other principles of international law upon which the United Nations Organization was based. The concept of sovereignty now means first: respecting the

decisions of the state within its jurisdiction, and second: acknowledging equality of all states within the scope of international relations and third: the state respecting the rights of citizens within her borders. In international politics today, there is often a focus on "democratic legitimization," which is frequently meant to challenge more traditional concepts of sovereignty. This is aptly illustrated by views related to notions that sovereignty is gravitating away from ideas of "sovereignty for the benefit of the nation-state" and moving toward ideas of "sovereignty of the people. This, in turn, emphasizes that a given state is free to practice its jurisdiction within its borders in a legitimate manner, provided that the actions of the state are in harmony with international commitments derived from the principles of international law, which reflects the state's internal sovereignty represented in its relations with individuals and the state's external sovereignty represented in its relations with other states, organizations and other legal persons of international law. A sovereign state therefore must possess the attribute of statehood to qualify as a subject of international law. The criteria for statehood as a subject of international law was stated in the Monte Video Convention[208] and such state must possess the following qualifications:

(a) A permanent population;

(b) A defined territory;

(c) Government; and

(d) Capacity to enter into relations with other states.

The corollary of this emerging norm is that individuals are now liable for violations of international law and can no longer hide under the guise of state sovereignty. It is now firmly established that the obligations of international law bind individuals directly irrespective of

[208] Monte Video Convention on the Rights and Duties of States, 1963, Article 1 thereof.

their State laws.[209] The was popularized by the Nuremberg principles when the Tribunal held that crimes against international law are committed by men and women, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[210] Sovereignty has many different aspects and none of these aspects is stable. The content of the notion of sovereignty is continuously changing, especially in recent years. From the above, it is concluded that under international law the sovereignty of States has been reduced. International co-operation now requires that all States be bound by some minimum requirements of international law without being entitled to claim that their sovereignty allows them to reject basic international regulations.[211] Jackson concluded that the world community takes over sovereignty of territories where national governments completely fail to curb gross violations of human rights and that therefore national sovereignty has disappeared in those territories and that the world community has sufficient means to step in with the help of existing States and has therefore the obligation to rule those territories where the government fai1.[212]

In 1992 the then United Nations Secretary-General Boutros Boutros-Ghali said in his report to the Security Council that 'respect for the state's fundamental sovereignty and integrity is crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.[213] Almost a decade later, after some abject failures by the United Nations to meet apparent needs for action and intervention in *Bosnia, Somalia, Rwanda,* and *Kosovo,* the new Secretary General

[209] Hagler Okorie, 'The Concept of State Responsibility for Violation of International Humanitarian Law' in Law, Social Justice and Development: A Festschrift for Professor Uba Nnabue. (Imo State University Press, Owerri: 2013) p.39

[210] . See The Trial of German Major War Criminals, London, his Majesty's Stationary Office, Vol.1 1950, p.53 cited by Hagler Okorie, *Ibid*.

[211].*Op. cit*

[212] *Ibid*

[213]Boutrous Boutrous-Ghali, *Agenda For Peace-Preventive Diplomacy, Peacemaking, And Peace-keeping*, Report of the Secretary General, UN Doc. A/47/277-S/24111, para. 17 (1992), UN Sales No. E.95.1.15 (1995). Cited by John H. Jac, *ibid*

Kofi Annan introduced his 1999 annual report to the General Assembly by noting that 'our post-war institutions were built for an inter-national world, but we now live in a global world.[214] He then expressed his impatience with traditional notions of sovereignty and the growing inaction of the UN Security Council in the face of mass violations of human rights around the world in the following words:

> A global era requires global engagement. ...If States bent on criminal behaviour know that frontiers are not the absolute defence; if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign impunity. If the collective conscience of humanity-a conscience which abhors cruelty, renounces injustice and seeks peace for all peoples cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice.[215]

Kofi Annan[216] noted that this evolution in our understanding of state sovereignty and individual sovereignty have been met with distrust, skepticism, even hostility in some quarters. But it is an evolution that is warmly welcomed by natural school philosophers and human rights activists. It is a considered view that the complete elimination of the word or concepts associated with "sovereignty" would lose some important principles, recognizing that almost no perspective observer or practitioner and indeed the international community is prepared to sign off completely the full import of the traditional westphalian notion of

[214].UN Secretary-General Kofi Annan, *quoted in* Brus, *supra* note 9, at 19. HeinOnline -- 97 *American Journal of International Law* 788 2003 788, The American Journal Of International Law [Vol. 97:78.2 cited by John H. Jackson, *ibid*

[215] Ibid

[216] Kofi A. Annan, Secretary-General's Speech to the 54th Session of the General Assembly, UN Doc. *SGISMI* 7136 (1999). Available online at www.un,org>19990920.sgm7136.html accessed on 9 November 2015

sovereignty. Many, if not most, of the critics of the older sovereignty notions recognize, with varying degrees of support, some of the important and continuing contributions that the sovereignty concepts have made toward international discourse, stability, and peace.

For example, Ambassador Haass[217] noted:

> Sovereignty has been a source of stability for more than two centuries. It has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law. It has also provided a stable framework within which representative government and market economies could emerge in many nations. At the beginning of the twenty first century, sovereignty remains an essential foundation for peace, democracy, and prosperity.

These concerns have led us to take a somewhat different view of sovereignty in this work without completely rejecting the older Westphalia notions, but recognizing different important aspects of sovereignty notion, mainly its idea to define the limits of allocation of power in international relations. Sincerely speaking, one could see the antiquated definition of "sovereignty" as propounded by the likes of Bodin that should be relegated to the dustbin of history. The notion of a nation-state's supreme absolute power and authority over its subjects and territory, unfettered by any higher law or rule (except perhaps ethical or religious standards) unless the nation-state consents in an individual and meaningful way is presently antiquated and incompatible with the concepts of human rights law and rule of law.

[217] *Ibid*

Such notions of sovereignty which could be characterized as the nation-state's power to violate human rights, chop off heads without due trial, arbitrarily confiscate property, torture citizens, and engage in all sorts of other excessive and inappropriate actions is no longer accepted as a norm in international law. Today, no sensible person would agree that this antiquated version of sovereignty exists. States like North Korea and Iran deny the existence of such practices but evidence of such atrocities abound inside the country. A multitude of treaties and customary international law norms now impose international legal constraints that circumscribe and outlaw extreme forms of arbitrary actions even against a sovereign's own citizens.

3.1.1 The Nuremberg Charter

At the end of the World War II, the allied forces met in London on August 8, 1945 and signed the Nuremberg Charter which restricted trials to 'punishment of the major war criminals of the European axis Countries'. The legal basis for the jurisdiction of the Tribunal was that defined by the Instrument of Surrender of Germany, political authority for Germany having been transferred to the Allied Control Council, which having sovereign power over Germany could choose to punish violations of international law and the laws of war.[218] The trials of the Major War Criminals at Nuremberg was the first comprehensive attempt to unravel the factual complexity of the horrible crimes committed by German Nazi regime.[219]

The International Military Tribunal for the Nuremberg[220] and its counterpart Tribunal for the Far East were established by the United Nations pursuant to the defeat of Germany by the

[218] Orji Elizabeth, (as she then was) 'The Role of the International Criminal Tribunal in the Maintenance of International Peace and Security*',(* being a Ph.D dissertation submitted to Faculty of Law, Nnamdi Azikiwe University, Awka: 2006) p.34

[219] *Ibid*

[220]Charter of the International Military Tribunal, 1945. Available on https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf. Accessed on 29 October 2018.

Allied Powers. In the establishment of the Tribunal, the Allies expanded international law to increase the jurisdiction of the Tribunal. That expansion had impact on sovereignty because it extended the jurisdiction of the Tribunal to cover acts done by Heads of Government or by responsible Government officials who hitherto would have claimed state sovereign as defence for their actions. This is evident upon examination of the principles of the Charter. Principle II of the Charter provides that the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. Member states of the international community can no longer hide[221] under the doctrine of sovereign immunity to commit atrocities in their countries simply because their municipal law did not punish such acts. Principle II is even more encompassing as it specifically mentioned Head of State. The Principle states that the fact that a person who committed an act which constitutes a crime under international law, acted as Head of State or responsible government official, does not relieve him from responsibility under international law.

The Nuremberg principles were a set of guidelines for determining what constitutes a war crime. The document was created by the International Law Commission of the United Nations to codify the legal principles underlying the Nuremberg Trials of Nazi party members following World War II.[222] This principle went a long way in eroding the traditional sovereignty immunity of Heads of States who hide under same to commit atrocities. For example, on the 16th October, 1998, the immunity of Head of State was challenged following the arrest in London of General Augusto Pinochet of Chile and the subsequent decision of the

[221]Principles of Nuremberg Charter, 1945. Available on https://www.google.com/search?q=principles+of+nuremberg+charter&ie=utf-8&oe=utf-8&client=firefox-b-ab. Accessed on 29 October 2018.
[222] *Ibid*

House of Lords stripping him of immunity from legal proceedings in Britain.[223] In February, 2000, a court in Senegal indicted Hissene Habre[224] the Head of State of Chad from 1982-1990, for presiding over a reign of terror and torture during his period of rule in Chad. The indictment of Slobodan Milosevic in 1999 was a major victory of international law over impunity as he became the first Head of State to face trial for offences committed while he was in office. Thereafter, the cases of Charles Taylor[225] of Liberia and Saddam Hussein under Iraqi Law were to follow, and most recently, the trial of Laurent Gbagbo[226] of Ivory Coast.

The Charter also abolished the defense of superior orders which previously was available to agents of states who would hide under the defence to perpetrate acts amounting to crimes in international law.[227] Principle IV of the Nuremberg Charter says that the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.[228] This principle could be paraphrased as follows: "It is not an acceptable excuse to say 'I was just following my superior's orders'. The Statute[229] of the ICJ also provides that the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; or (b) The person did not know that the

[223].Arrest and Indictment of Augusto Pinochet. Available https://www.google.com/search?q=arrest+of+augusto+pinochet&ie=utf-8&oe=utf-8&client=firefox-b-ab. Accessed on 29 October 2018.
[224] Senegal: Hissene Habre indicted for War Crimes and Crimes against Humanity. Available on https://www.fidh.org/en/issues/litigation/litigation-against-individuals/hissene-habre-case/senegal-hissene-habre-indicted-for-crimes-against-humanity-war-crimes-and-13629. Accessed on 29 October 2018.
[225].The Indictment of Charles Taylor: Available on https://www.google.com/search?q=arrest+and+indictment+of+Charles+taylor&ie=utf-8&oe=utf-8&client=firefox-b-ab. Accessed on 29 October 2018.
[226]The Indictment of Larent Gbagbo: https://www.google.com/search?q=indictment+of+laurent+gbabgo&ie=utf-8&oe=utf-8&client=firefox-b-ab. Accessed on 29 October 2018.
[227] Principles of Nuremberg Charter, *ibid.*,
[228] *Ibid*
[229] Article 33

order was unlawful; and (c) The order was not manifestly unlawful. For the purposes of the Article, orders to commit genocide or crimes against humanity are manifestly unlawful. The Nuremberg Charter therefore was one of the catalyst that triggered the eventual erosion of the westphalian sovereignty.

3.1.2 Sovereignty And The Principles of Responsibility to Protect

Following the report of the International Commission on Intervention and State Sovereignty which seeks to develop a framework for the adoption of a legal framework for humanitarian intervention, sovereignty was further dealt a blow because of the ideas which the report represents. The report outlined the basic principles of the doctrine to include the responsibility to protect population from harm and grave crimes anchored on the doctrine of sovereignty of state, the foundation of the principle being a moral duty on the international community to maintain international peace and security, the responsibility to prevent which the report sees as the most important aspect of the document and the responsibility to rebuild. The first basic principle of the report is that state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself; and 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.[230] According to the report, the foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in: obligations inherent in the concept of sovereignty; the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security; specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian

[230] ICISS Report, 2001a

law and national law; the developing practice of states, regional organizations and the Security Council itself.[231]

Writing about the element of the report and as stated in the language of the report, the responsibility to protect embraces three specific responsibilities:
(a) The responsibility to prevent: The principle is aimed to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk;
(b) The responsibility to react: The principle is expected to prepare states to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention;
(c) The responsibility to rebuild: The report seeks to provide measures aimed at, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.[232]

One of the main priority and objective of the report is prevention. According to the report, prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated.[233]
It outlined the principles for Military intervention to include the just cause threshold principle. The report stated that because Military intervention for human protection purposes is an exceptional and extraordinary measure, to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

[231] ICISS Report, 2001a
[232] ICISS Report, 2001 p.2
[233] ICISS Report, 2001 ix

> Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
> large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[234]

However, because of the seriousness of military intervention and the cost and human implications, the report state that military campaign should be the last resort. The report opined that 'military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.'

Under the principle, one issue was hotly debated and is still being debated today, and that is the issue of the right authority. It simply means which body has the legal and or moral authority to intervene inside the territory of a sovereign nation to protect the suffering population? There is no better or more appropriate body than the United Nations Security Council to authorize military intervention but the provisions of the UN Charter do not include intervention for human protection purposes.[235] The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. Bearing the criticisms of a "right to intervene" in mind, through its proposed change of mentality with the imposition of new terminology the International Commission on Intervention and State Sovereignty first brings to the attention of the international community those in need of support being the subjects of human suffering, rather than the rights of the

[234] ICISS Report, 2001a, 4
[235] See Article 24, 39, 42 of the UN Charter

intervener(s). Moreover, it places the responsibility first and foremost with the state itself. It is only if the state fails or omits to abide by its duties towards its citizens, or if it is the state itself that is the wrongdoer, then the responsibility lies with the international community to take appropriate action. In support of this argument, the Secretary of the United Nations *Ban Ki-Moon* noted thus:

> If principles relating to the responsibility to protect are to take full effect and be sustainable, they must be integrated into each culture and society without hesitation or condition, as a reflection of not only global but also local values and standards.[236]

Nevertheless, history reveals that due to political reasons and through the employment of the veto right by one or more of the five permanent members, the Security Council has become ineffective by virtue of continued exercise of veto right. Under such circumstances, for the adoption of a decision the General Assembly is considered as an alternative to refer the matter to, through a "meeting in an Emergency Special Session under the established 'Uniting for Peace' procedures" to employ forceful intervention.[237] The Commission considers also collective intervention by a regional or sub-regional organization "within its defining boundaries" as a third option.[238] The Report clearly identifies and determines two main criteria of just cause, and considers the satisfaction of one of these two enough to assert that there is a just cause to intervene. These are to stop a large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or secondly, a large scale

[236] Being a Follow-up to the Outcome of the Millennium Summit: Implementing the Responsibility to Protect, Report of the Secretary- General, 12 January 2009, para. 2, (p.12)
[237] ICISS 2001a, 53
[238] ICISS 2001a, 53

"ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[239]

In his call for more international support for the adoption of the responsibility to protect as a working framework, the late Secretary-General Kofi Annan in 2004 stated that the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international peace and security and as such evoke action by the Security Council.[240] Accordingly, the Report of the International Commission on Intervention and State Sovereignty establishes the central theme of responsibility to protect which is to the effect that 'sovereign states are responsible towards their citizens for their protection "from avoidable catastrophe, from mass murder and rape, from starvation but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.[241]

On this basis, the International Commission on Intervention and State Sovereignty first attempts to transform national sovereignty from a principle which traditionally implies that states are "untouchable" in their internal affairs into one that holds states responsible for the protection of their peoples from grave violations of human rights. It has been rightly suggested that the notion of national sovereignty generally implies the absence of "legal measures by which anyone could prevent a government doing whatever it liked to its own citizens, or certainly measures which involved direct force within the borders of the offending state.[242] But all that has since been eroded and is still undergoing reformation in favour of liberal and human rights friendly concepts.

[239] ICISS 2001a, 32
[240] See paragraph 200 of the Secretary-General's High-Level Panel on Threats, Challenges and Change" entitled "A More Secure World: our shared responsibility" submitted to the General Assembly in 2004.
[241] ICISS Report, 2001, (a) p.16
[242] David Robertson, 2004, p.119

It is to be observed that the Commission includes within the conditions, the acts that fall under the framework of the Genocide Convention involving "large scale threat or actual loss of life; the threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving state action; and various sorts of ethnic cleansing as conditions that justifies intervention. Other conditions includes "crimes against humanity and violations of the laws of war , as defined in the Geneva Conventions and Additional Protocols and elsewhere, which involve large scale killing or ethnic cleansing;" "situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war, cases of natural and environmental disasters, "where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened. The principle now sees sovereignty as responsibility and insist that where the state fails to provide protection for her citizens, it loses its sovereignty which shall be exercised either by the international community or any member state for the purpose of halting mass atrocity crimes.

3.2 Domestic and International Legal Framework on State Sovereignty.

Sovereign states guide their sovereignty jealously. Both at the municipal level and at the international level, there are sufficient binding provisions on state sovereignty and which individual states pay great attention to. For example in Nigeria, the Constitution provides that its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria and that any other law that is inconsistent with the provisions of this constitution shall prevail, and the other law shall to the extent of the inconsistency be void.[243] Even when the Nigeria state enters into treat with any foreign power or any multinational organization, such treaty shall not have the force of law except to the extent to which the

[243] See section 1(1) & 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended)

treaty has been enacted into law by the National Assembly.[244] The National Assembly in doing so shall not violate the provisions of the constitution because any law which is inconsistent with the constitution shall to the extent of the inconsistency be void.[245] The enactment shall be in accordance with provisions of the constitution. On the international stage, sovereignty is adequately protected. Article 2(4) of the UN Charter urges all Members to refrain in their international relations from the threat or use of force against another state. This general prohibition on the use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case*[246] and the Case *Concerning Military and Paramilitary Activities In and Against Nicaragua*[247] and is considered to be a rule of *jus cogens* – that is, a peremptory norm of international law from which no subject of international law may derogate. The two main exceptions[248] to this general prohibition are: the right of a state to use force in self-defence or collective self-defence under Article 51 of the Charter, and the right of the Security Council under Article 42 to authorize the use of force to maintain or restore international peace and security by virtue of Article 39. A third exception has been added by scholars of international humanitarian law insisting that humanitarian intervention is also an exception to the rule of non use of force against the territorial integrity of another state. However, there is no positive statutory support for this theory. The primary purpose of the United Nations is to maintain international peace and security.

Under article 24 of the UN Charter, the Security Council has a primary responsibility for maintenance of international peace and security, and in carrying out its duty under this responsibility, the Council acts on behalf of member states. Chapter VII of the Charter (action with respect to threats to the peace, breaches of the peace and acts of aggression) gives very wide powers to the Security

[244]Section 12, *Ibid. See* also the case of Fawehinmi V Sani Abacha (2000) 6 NWLR(pt.660) 228
[245] Section 1(3) *Ibid*
[246] *Corfu Channel* ((U.K. v. Alb.), International Court of Justice 19 49, (I.C.J.) 4
[247] Military and Paramilitary Activities(Nic. v. U.S.), International Court of Justice, (Nic. v. U.S.), 1986 (I.C.J.) 14
[248] See Murphy Sean, 'Humanitarian Intervention: The United Nations in an Evolving World Order', (2009) *University of Pennsylvania*, p. 9 available www.upenn.edu>pennpress>book. Accessed on 8 October 2018.

Council, and sets out the framework for its enforcement powers. Under article 2(7) of the Charter, these powers are not limited by the normal duty on the UN not to intervene in the domestic jurisdiction of member states. In accordance with Article 25 of the UN Charter, the decision of the Security Council has the binding effect upon the member states of the UN. Here again, under Article 103 of the UN Charter, the obligations undertaken by member states under the Charter prevails, in case of conflict, over their obligations under any other agreements. Indeed, the Council is empowered to use force for the purpose of maintaining international peace and security as part of its collective security function. It is important to note that the design of the UN constitutes a comprehensive international public order, and the assumption is that the organization, and in particular the Security Council has a monopoly of the use of force except in cases of self-defence. The practice under the Charter has led the Security Council to authorize states to use force on behalf of the international community rather than using force itself. This is attributable to the ideological confrontation between the two-blocks during the Cold War which prevented the political agreement enshrined in Article 43 of the UN Charter to set up the UN military forces.

It should be made clear here that the requirements of Article 39 of the Charter have to be fulfilled to invoke the use of force and the Security Council has to decide the measures it will take in order to restore international peace and security. Under this article, if the Security Council determines that there is 'any threat to the peace, breach of the peace, or acts of aggression', it may take such measures as are necessary to restore international peace, including the use of armed force under Article 42 of the Charter. Thus, it is of considerable importance to know what types of conduct may fall within Article 39 for this is the precondition to exercise these enforcement powers.

Secondly, another exception to the non use of force against state sovereignty as provided in article 2(4) is the right of self defence and it is provided in Article 51[249] to the effect that

[249] Article 51 UN Charter

the only armed attack against a member state must be in self defence or collective action of the UN. There is considerable controversy regarding article 51 of the Charter, as the scope of the self defence and the circumstances under which the right of self defence may be exercised are ill defined. And it is also applicable to what the Charter meant by armed attack. The most contentious issue being whether the right of self defence can only be invoked when an armed attack has occurred or whether it can be invoked in anticipation of armed attack. On the one side, there is a view that article 51 read in conjunction with article 2(4) will prohibit such anticipatory right where no attack has actually occurred and posit that there is no other circumstance to invoke the right of self defence except upon armed attack.[250] The reason why anticipatory self defence is frowned upon is that states should not be allowed on their own to determine what should be called preventive acts. If it were to be otherwise, they argued, it would lead to a world of uncertainty and would lead to the law of the jungle.[251]

According to *Nwigwe*, the right of self defence is not only limited to defence of the individual or the civilian population as a whole but extends to the defence of other objects like factories, military installments within the territory of the state being attacked.[252] The provisions under Article 51 implies that the use of force, war or armed conflicts are not totally illegal and can validly be termed legal if the provisions of Article 39-43 and 51 of the UN Charter are complied with. On the other hand, there are legal scholars who argue that article 51 should not be interpreted to exclude anticipatory self defence. The case of *Nicaragua V. United States*[253] is instructive with respect to the right of self-defence. The United States claim that she was acting in the collective self defence of *El Salvador* was held by the International Court of Justice that the US has been involved in the unlawful use of

[250]Louis Henkin, 'How Nations Behave: Law and Foreign Policy', (1979) *Columbian University Press*, New York, pp. 140-143
[251] *Ibid*
[252] Chris Nwigwe, *Ibid*
[253] 1984 ICJ Report. 392

force. They could not rely on article 51 of the Charter since they acted without the consent of El Salvador and thus the claim of collective self- defence cannot succeed or be sustained.

One basic element of self defence by victim states is that such actions must be necessary and proportionate to the acts of aggression by the other state. It is important to note that when a state acts in self defence, it must limit itself to rejecting the armed attack. As noted by the ICJ in *Nicaragua's case*[254], self defence only warrants measures which are proportionate to the armed attack and necessary to respond to it. The state acting in self defence must never occupy the territory of the attacked state unless such occupation is aimed at preventing the later from continuing the acts of aggression.

3.2.1 Sovereignty in Transition

The ideas inherent in sovereignty have changed over time in phases[255] and continue to do so up to today. These principles will continue to be reevaluated in light of new challenges and opportunities faced by individual states and the collective of states at the international level. The Treaty of Westphalia marks the first phase in the development of the modern notions of sovereignty. Interpretations of this document led to the establishment of the modern system of nation-states, in which the sovereign reigned supreme domestically, as well as in its relations with other states. Before the end of World War II, states were basically operating in an international system premised on the ideas inherent in classical westphalian doctrine. The second phase in the development of the principle of sovereignty was ushered in by World War II and its conclusion in 1945. In this phase, the absolute power claimed by sovereign states came face to face with the creation of the United Nations Organization and various Inter-governmental bodies that espoused the idea of collective actions and state accountability to an international community. The creation of these state-consented

[254] *Supra*
[255] Francis Deng, 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect',(No. 4 Global Responsibility to Protect 2, 2010):355-56

supranational organizations was geared toward predictability in the international system to potentially forestall another war on the global stage. This forms one aspect of the horizontal and vertical ceding of sovereign identified by *Cohan*[256] Here, states move away from absolute rule and begin to share some of its functions with institutions above and below the national level.[257] This idea is manifested when states become members of international associations that are geared towards pooling resources for common benefits, which may be economic, political or security-based. When states undertake actions to cooperate with each other for mutual benefits, they cede some of their authorities in those areas on decisions that are dictated by such supranational bodies. A vivid example of this is the European Union (EU) and its various quasi-state functionaries that have the authority to make binding decisions that take precedent over the decisions of member states.

Following World War II, there was a proliferation of international organizations which included various inter-governmental organizations, such as the United Nations, the International Criminal Court (ICC), the International Court of Justice (ICJ), the International Monetary Fund, the European Human Rights Convention, and the European Union. These cooperative international institutions were put into place to harmonize both economic and non-economic agendas of the world community. As a result of the overwhelming numbers of these institutions, the international system has now become a "tightly woven fabric of international agreements, organizations and institutions that shape states relations with one another and penetrate deeply into their internal economics and politics.[258]

[256] John Alan Cohan, 'Sovereignty in a Post-sovereign World',(932 *Journal of International Relations*), available on https://www.researchgate.net>publication. Accessed on 21 August 2018.

[257] Cohan, *ibid*

[258] *Abram Chayes*, and *Antonia H Chayes*, 'The New Sovereignty: Compliance with International Regulatory Agreements', (1995) *Harvard University Press*, Cambridge, p.26.

The norms of human rights are another area that has successfully made a push-back against sovereignty. Under current human right conventions, the sovereign state is no longer free to treat its citizens as it pleases. Under constitutional sovereignty[259] where the state serves the people who are seen as the source of state sovereignty[260] the state is held accountable to these citizens on that principle. Furthermore, sovereign states are increasingly held accountable to the international community for human right violations, especially under the new paradigm of conditional sovereignty expressed in the responsibility to protect. The world is now at a juncture in the history of state sovereignty where a state's admission into the international community is highly influenced by "good" conduct. Another area in which there is a vertical impact on sovereignty is through the influence of International Non-governmental Organizations on the ability of states to exercise absolute rules in their territories. These organizations[261] act as international lobbyists and pressure groups that seek to influence the policy options of international organizations and states.

Since the signing of the UN Charters in 1945 and the adoption of the Universal Declaration of Human Rights in 1948, there have been concerted efforts by the international community to push back the boundaries of state sovereignty. The situation is such that issues including minority and individual rights, which were once considered to be within the purview of states, have now become open to external scrutiny. This phenomenon follows signing of various human rights agreements by states as members of the UN. Becoming a signatory to any number of these international conventions[262] treaties and or covenants opens a state up to international condemnation, sanctions, on-site monitoring and visits, criticism,

[259]As we have in Nigeria where section 14 of the Constitution alleges that sovereignty belongs to the people of Nigeria where Government derives its power.
[260] See section 14 of 1999 Nigeria Constitution.
[261] For example, the Amnesty International Group that report violations of human rights of people within a defined territory with a view to holding the Government accountable.
[262] For example, the Vienna Convention on the law of treaty, the Geneva Conventions on Humanitarian Laws, the UN Charter etc

and armed intervention in cases where such actions threaten international peace or a state's citizens on a mass scale. It could be argued that organizations, such as the UN, have imposed international norms on their members through diplomatic and public persuasion, coercion, economic sanctions, isolation, and in more egregious cases, through humanitarian intervention. In addition to the norms being imposed by state actors against other states, in recent years, non-governmental organizations (NGOs) have played an important role in vertically influencing the behavior of states.[263]

In most instances, states cannot escape the diminishing of their sovereignties; once a state comes into existence, it automatically acquires external obligations based on customary international law. The very act of recognition by other states depends on whether the new member to the community has submitted itself to these establish norms. For example, a newly formed state such as South Sudan is obligated to become a member of a vast aerie of established rules, such as the Universal Declaration of Human Rights, the International Court of Justice, and the Nuclear Non-Proliferation Treaty in exchange for recognition.

The third phase of the development of state sovereignty is rooted in the wave of democratization that swept the world after the collapse of the Soviet Union and subsequent end to the Cold War, which saw an end to dictatorships around the world akin to the political order in the USSR. The challenges posed by ordinary citizens to absolute dictators, who could no longer count on their patrons for protection, saw the demands for democratic institutions, values, and practices necessary to make their government more attuned to their needs. In this phase, there was a renaissance of the idea of sovereignty as something that emanated from the people, rather than being something inherent in the state. The devolution of power to the people in this era occurred through elections and/or local councils in which the sovereign central government shared power with its population. The distribution of power resulting from this devolution helped to meet the

[263] Cohan, *Ibid*

peoples' demand for the accountability of their governments to their needs, in effect reducing the states monopoly of exercise of absolute power. In this era, where the people are the sovereign, sovereignty derives from the degree of respect merited by an institution, the capacity to rule, and the recognition that authority is exercised for the benefit of the people. It is this transition that has helped to reduce the tension between sovereignty and intervention with the later losing most of its draconian tenets in favour of human rights protection. To this end, sovereignty is now seen as owing a responsibility to protect towards its citizen and not the old fashioned idea of state having unlimited control within its borders regardless of how it treats its citizens.

3.2.2 Sovereignty as Responsibility

The Responsibility to protect refers to the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by international community as a whole: it is a principle based on the idea that sovereignty is longer seen as a privilege, but a responsibility. As late Kofi Annan[264] has put it, the UN Charter was issued in the name of 'the people, not the governments of the UN such that 'the Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power'. The Responsibility to protect focuses on preventing and halting four crimes, namely genocide, war crimes, crimes against humanity and ethnic cleansing, which it places under the generic umbrella term of 'mass atrocity' crimes or constitutional crimes. At the 2005 United Nations World Summit[265] member states included Responsibility to Protect in the Outcome Document agreeing to paragraphs 138 and 139[266] which gave final language to the scope of Responsibility to

[264] Secretary-General's Report, 1998
[265] See the 2005 World Summit Document, *ibid*
[266] Both paragraphs of the Summit Document gave final approval to the Responsibility to Protect and approved 4 crimes within the jurisdiction of the responsibility to protect namely war crimes, crime against humanity, ethnic cleansings and genocide.

Protect, as applies to the four atrocity crimes only, namely genocide, war crimes, crimes against humanity and ethnic cleansing. The outcome document represents the first global consensus on the responsibility of individual states and of the world community to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing. It affirms the international community's willingness to take timely and decisive action, through the UN Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to protect their populations from such crimes. The Geneva Laws also described the crimes as grave breaches of humanitarian law and urged member states to respect and ensure the observance of those laws. So both the Geneva Conventions and the World Outcome Document of 2005 places huge responsibility on states to ensure that these crimes are not committed and if committed to ensure the prosecution of the offenders. The World Summit consensus on the Responsibility to Protect was further endorsed by the UN Security Council in 2006[267] in its resolution on the Protection of Civilians in Armed Conflict, thereby formalizing its support for the principle.

Finally, in Africa, the AU's right to intervene is not just a political slogan but a legal obligation for action by the AU in the face of mass atrocity crimes. The AU has bound its members in advance to an obligation to intervene in prescribed circumstances. As responsible Members, by signing the AU Constitutive Act with the right to intervene under Article 4(h), AU Member States accepted responsibilities of membership flowing from that signature, as well as a *de facto* redefinition – from sovereignty as a right of exclusivity to sovereignty as responsibility in both internal functions and external duties. While the host state has the default 'responsibility to protect', a residual 'responsibility to protect' also resides with the broader AU, which is activated when the host state either is unwilling or unable to fulfill its 'responsibility to protect'. The AU right of intervention may

[267] UN security Council Resolution 1674 (2006) on Protection of Civilians in armed conflict. Available on https://www.un.org>blog>document. Accessed on 21 August 2018.

be seen as a natural corollary of the extant norm of 'sovereignty as a responsibility', which encompasses the duty of states to uphold human rights and humanitarian norms.

3.3 Legal and Institutional Framework on Humanitarian Intervention

It has been argued that humanitarian intervention is the third exception to the rule on non use of force by states but unfortunately, there is no express provision in the UN Charter which provides for humanitarian intervention as an exception to the rule on none use of force. Unless the authorization under collective enforcement measures and the right of self defence which has sound legal framework under the Charter, the rules governing humanitarian intervention is not stated in any provision(s) of the Charter. Even where Article 2(4) is read liberally or loosely, there is no clear inference to suggest that humanitarian intervention is permitted under international law. This is because at the time the Charter was drafted, international law sees human rights issues as matters within the ultimate jurisdiction of the state. Even the Universal Declaration of Human Rights came 3 years after the UN Charter was adopted. Because of the experience of the world war II, member states were pre-occupied with measures that will enable sovereign states to preserve their sovereignty and to avoid the incessant intra-state conflicts that was the order of the day before the world war II. However, because of this apparent lacuna and the United Nations Security Council's inaction or indifference towards human rights protection in Africa, exacerbated by the events in Somalia and tragically in Rwanda, the then Organization of African Unity[268] (OAU) began fashioning ways to solve African crisis by Africans. In the year 2000, the Union transformed from the OAU to AU following the adoption of the new Constitutive Act. The said Act in article 4(h) provides for the right of the Union to intervention militarily in another member state to halt large scales atrocity crimes like genocide, war crimes and crime against

[268] The OAU came into existence in September, 1963 with its main objective being to promote the consolation of independence already won and solidarity with those still under the yoke of colonization and domination. Organization of African Union formed in 1965, in Lome, Togo.

humanity. The OAU set out the framework that would later underpin the major transition from the OAU principle of non-interference to the future AU's doctrine of non-indifference.[269]

The transition had a tremendous effect on sovereignty and humanitarian intervention because member states of the AU now do not require to give their consent before any military intervention could be conducted in any of the Africa member despite the non approval of the United Nations. However, it was ECOWAS that set the agenda for an interventionist legal regime on the continent who between 1990-1993 intervened in Liberia and Sierra Leone to help stop the civil wars and restore sovereignty. Thus, the new humanitarian intervention regimes of AU and ECOWAS were spawned by the failures of the UN to intervene in Africa during crises situations and its lack of interest in and commitment to African crises and it was therefore up to African regional organizations to develop their own capacity in that respect.[270] As rightly noted, whatever legal debate the AU/ECOWAS humanitarian intervention may generate among scholars, one cannot over-emphasis the effects the 1994 Rwandan Genocide had in moving African states in establishing a mechanism to ensure that such mass killing would not happen again, and they were determined to achieve it even if it alters the existing concept of sovereignty away from non-intervention norm.

3.3.1 United Nations System of Humanitarian Intervention

What underlies the humanitarian intervention debate is a perceived tension between the values of ensuring respect for fundamental human rights and the primacy of the norms of

[269] See Declaration of the Assembly of Heads of State and Government on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution (1993) AHG/Decl. 3/(XXIX) adopted by the 29th Session of the Assembly of Heads of State and Government at Cairo, Egypt, from 28-30 June 1993. Available at http://www.africa- unioin.org/official_documents/Heads % of State Summit/hog/3HofGAssembly1993.pdf. Accessed on 7 February 2017.

[270] The Rwandan genocide was so devastating that the UN stood watch while about 1,000,000. (One Million) human beings were wasted in an ethnic hate campaigns between the Tutsi and the Hutu ethnic tribes of Rwanda. That incident forever changed the line of discussion regarding humanitarian intervention at least in Africa.

sovereignty, non-intervention, and self determination which are considered essential factors in the maintenance of peace and international security. In fact, in *Corfu Channel*'s[271] case, the court referred to Article 2(4) as a codification of a norm of customary international law. These values are set out in the United Nations Charter as fundamental purposes of the United Nations. Part of the reason for this tension was aptly captured by Peterson[272] in the following words thus:

> However, while there are mechanisms within the Charter for the protection and enforcement of peace and international security (Article 2(4) and Chapter VII), there are no equivalent provisions or mechanisms in the Charter for the protection of human rights.

While many developing states and their academics do not agree with the Western emphasis of the individual in current human rights doctrine it has been put forward forcefully by many Western states and academics that the development of international human rights norms and international humanitarian law has modified the traditional concept of sovereignty.[273] As a result of the foregoing, it has been suggested that human rights can no longer be considered a purely domestic concern and the concept of sovereignty cannot be used by governments to shield themselves from responsibility for gross violations of these rights, or from shirking their obligations with respect to the protection and treatment of civilians in situations of intra-state conflict.

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[271] . Supra

[272] Peterson Frederick,'The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations,' (1999) *Arizona Journal of International and Comparative Law* , Vol.15, 871-904.

[273] O'Halloran, Patrick, 'Humanitarian Intervention and the Genocide in Rwanda', Conflict Studies *(1995)* 277, 1-32.

The suggestion that respect for sovereignty is conditional on respect for human rights has been reflected in the practice of the Security Council. The United Nations Charter[274] prohibits the UN from intervening "in the domestic jurisdiction of any state." Nevertheless, since the end of the Cold War[275] the Security Council has availed itself of a right of humanitarian intervention by adopting a series of resolutions[276] which have progressively expanded the definition of threat to international peace and security under Article 39 of the Charter to allow for Security Council-mandated military intervention to respond to grave humanitarian crises, even where such crises have been purely domestic in nature.[277] It is has been submitted elsewhere that even where these internal conflicts have had international repercussions, the Security Council has not always made reference to these repercussions in defining a "threat to international peace and security"[278] It is submitted that based on this expansion of the meaning of international peace and security, that the Security Council has a legal right to intervene (or to authorize intervention by a group of states or a regional organization) in a target state to protect the latter's citizens from widespread deprivations of internationally recognized human rights and that such a right is now generally recognized in international law.[279] The case of ECOWAS intervention in Liberia and Sierra Leone in the 90's and the UN subsequent ratification of the intervention is a good example here.

While there are those who contest this idea, it is arguable that UN-authorized military humanitarian interventions over the past decade reflect an emerging consensus in the

[274] Article 2(7)
[275] *Op.cit*
[276] See for example Resolution 1973 authorizing the use of force to protect the civilian population in eastern Libyan city of Benghazi against the forces of Col Ghadaffi in 2011.
[277] . Guicherd, Catherine, 'International Law and the War in Kosovo', *(Survival Series Article)* 41(2), 1999) 19-34.
[278] . Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, Submitted to the Minister of Foreign Affairs, Denmark, December 7 1999, (called the "Danish Institute Report"). p.7 on www.diis.dk>media>import>extra. Accessed on 16 November 2015.
[279] .See article 39 of the Charter that provides that the UN shall take measures anywhere in the world to secure and repel any threats to international peace and security.

international community that respect for fundamental human rights is now a matter of international concern. At the same time, however, the instances of Security Council inaction or lack of timely action in the face of humanitarian crises over the same period show that this "international concern" is often outweighed by political and structural obstacles.

It is submitted that certain fundamental human rights are obligations *erga omnes,*[280] that is, obligations every state is bound to observe *vis-à-vis* all other states. However, although each state has the right to take action to ensure respect for these fundamental rights, this does not entail a right to use force without Security Council authorization for such a purpose. Although the purposes of the Charter are to maintain international peace and security, to develop friendly relations among nations based on respect for equal rights and self-determination, and to promote and encourage respect for human rights. It is submitted that "any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor, and it must be resolved within the mechanism of the United Nations. Thus while respect for human rights is considered important to a just international legal order, *Murphy* argued that neither the Charter, current state practice, nor scholarly opinion conclusively supports the view that there is a right of unilateral, unauthorized intervention to stop or prevent widespread deprivations of internationally recognized human rights.[281]

The question then is what type of situation could trigger a humanitarian intervention? It is submitted that it is not every situation that will justify a resort to intervention. It is only a

[280] . A *erga omnes* law or legal act applies as against every individual, person or state without distinction. For example, a judicial declaration that a certain marriage is null and void is stated to be *erga omnes* so that it is understood to have that status towards the world at large and not just the celebrants. In international law, some basic legal precept are stated to be *erga omnes*, such as a prohibition against torture, piracy, child labour, and support of state immunity. In deed, it is a frequent refrain in international law that what is *jus cogens* is *erga omnes* and superior in effect to other rules of international law. See Duhaime's Law Dictionary at www.duhaime.org/legalDictionary/E/ErgaOmnes.aspx last visited on 17/11/15 by 12.44am.

[281] Op.ci

series of events or a developing situation of a certain threshold that should trigger the need to resort to force to prevent or stop a humanitarian crisis by the Security Council or by a group of states with the authorization of the Security Council. As rightly noted by Kofi Annan in his 1999 report to the Security Council on the protection of civilians in armed conflict thus:

> The Security Council in deciding whether or not to intervene should consider, among other things, the scale of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations.[282]

Who determines the scale of the breaches of human rights and international humanitarian law? What are the parameters to so determine it in order to justify a resort to use of force? However, it is submitted that before military intervention is to be considered to curb the violations of human rights, one of two conditions must exist: the government must be committing, supporting, or aiding and abetting widespread violations of internationally recognized human rights; or there must have occurred a total breakdown of law and order resulting in such widespread deprivations of human rights which the government of the target state is incapable of preventing.

A situation to call for humanitarian intervention must present a gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity. It must suggest or involve a situations of gross, persistent and systematic violations of human rights, including imminent threat of widespread

[282].United Nations, 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', UN Doc. No. S/1999/957, 8 September. Available online https://books.google.com.ng>books. Accessed 17 September 2018

loss of life resulting from mass killings, starvation or other activities. However, both *Charney*[283] and the Danish Institute Report[284] suggest using the definitions of genocide, crimes against humanity, and war crimes which are set out in the Statute of the International Criminal Court.[285] It is urged that using these definitions would be useful since there is already international consensus on their meaning, and to eliminate or reduce the influence of personal interest to overshadow an international situation.

However, there may be gross violations of human rights which do not fall into these categories and thus reference to the major human rights treaties may also be useful. The use of force to prevent widespread deprivations of internationally recognized human rights is a highly contested issue on many levels. Developing international consensus on criteria to guide such interventions, and in particular unauthorized interventions, will require extensive discussion and debate in a wide variety of fora with input from, among others, academics, diplomats, policy framers, and non-governmental organizations with expertise in the area. In addition, the use of military force in humanitarian crises is a strategy of last resort and should be discussed as one facet of many in a comprehensive and proactive approach to dealing with such crises.

Finally, where an issue has been determined to pose a threat to international peace and security thus requiring an enforcement action under chapter VII, it is the duty of the United Nations Security Council to authorize the enforcement action. It is the duty of the UN Security Council to maintain international peace and security.[286] The Security Council is the sole body authorized to make decisions that United Nations member states must implement in

[283]. Charney, Jonathan, 'Anticipatory Humanitarian Intervention in Kosovo', (1999) *Vanderbilt Journal of Transnational Law*, 32, pp1243.
[284] .*Op.cit*, p.107
[285] Otherwise called the Rome Statute defined genocide in its Article 6, crimes against humanity in Article 7 of the Statute.
[286] Article 24

accordance with the Charter.[287] Under Chapter VII, the UN Security Council may determine threats to peace, "decide what measures not involving the use of force are to be employed to give effect to its decisions," and "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.[288] Therefore, the importance of the U.N. Security Council should not be underestimated, particularly in regard to conflict resolution. Although there are fifteen members on the Council, "the Permanent member states with their potential vetoes retain the status of *primus inter pares* and have used these to account for the vast majority of defeated UN Security Council resolutions. Since the end of the Cold War, the UN has taken a much more active role in resolving such conflict. Since 1990, there have been notable actions by the UN Security Council, which include attempts to alleviate humanitarian crisis in Somalia, halt ethnic cleansing in Bosnia, restore democratically elected rulers in Haiti, Sierra Leone, and Cote d'Ivoire, guarantee peace agreements resolving civil wars, and ensure post-conflict stability in Afghanistan, Bosnia, East-Timor, Kosovo, Haiti, and Iraq. In most of these cases, the recognized government of the nation in question agreed to the UN-authorized mission.[289] In fact any collective enforcement measures to halt humanitarian disaster must have the blessing of the UN Security Council. Though there is no provision in the UN Charter to authorize intervention on humanitarian ground, the United Nations had created the UNOSOM I Mission in April 1992[290] to enforce the laws of war in Somalia. The UN Security Council by Resolution 794 (1992), adopted unanimously on 3 December 1992 on Somalia, determined that "the magnitude of human tragedy caused the conflict in Somalia, further exacerbated by the

[287] See Article 24 of the Charter
[288] See Article 39 of the Charter
[289] Forsythe, David. 'The UN Security Council and Response to Atrocities: International Criminal Law and the P-5', (Vol. 34, Number 3, *Human Rights Quarterly* 2012). Available on http://muse.jhu.edu/journals/human_rights_quarterly/v034/34.3.forsythe01.html accessed on 18 September 2018
[290] Unified Task Force Somalia, https://en.m.wikipedia.org>wiki>Unified_Task_Force. Accessed on 21 November, 2015.

obstacles being created to the distribution of humanitarian assistance" constituted a threat to international peace and security and authorized Secretary-General and member states to use all necessary means to establish a secure environment for humanitarian relief operations in Somalia.[291] Of course, "all necessary means" includes the use of force. Thus, the Security Council has significantly enlarged the concept of 'threat to the peace' laid down in Article 39 of the Charter so as to embrace humanitarian crises within one state and internal conflicts, which previously subject to national jurisdiction.

3.3.2 International Committee of the Red Cross And the Media

Under the Geneva Conventions, there are international organizations established pursuant to the Conventions for the purposes of helping in the resolution of humanitarian crises caused by the effect of armed conflict. The International Committee of the Red Cross has a specific mandate to act in armed conflicts. It has the mandate to visit prisoners of war and other detained persons as well as provide medical care and protection for civilians in armed conflict.[292] Secondly, more than ever before, representatives of local and international media are present in and reporting on conflicts in the world today, often where access of others, such as observers and human rights groups or officials on monitoring duty, is limited. Independent media outlets play a crucial role in reporting on and publicizing violations. Given that reporting on and monitoring of violations is a fundamental part of ensuring respect for international humanitarian law and international law in general, the media has a vital role to play in the observance of international humanitarian law.

3.3.3 Humanitarian Intervention with UN Security Council Mandate

[291] *Ibid*
[292] International Committee of the Red Cross. Available on https://www.google.com/search?q=ICRC&ie=utf-8&oe=utf-8&client=firefox-b-ab. Accessed on 29 October 2018.

The Security Council has the power and primary responsibility under the UN Charter for the maintenance of international peace and security.[293] Over the years, the Security Council has not exercised its powers extensively against states that have engaged in gross and persistent violations of their citizens' human rights due to the use or threatened use of veto by one or more of the Council's permanent five. However, in few cases the Council has found a state's violations of humanitarian laws to constitute a threat to the peace and adopted mandatory sanctions against that state, for instance economic sanction against Southern Rhodesia (Zimbabwe) in 1966[294] and arms embargo against apartheid rule in South Africa in 1977.[295] The question arises whether the Security Council has the authority, under the UN Charter, to conduct or authorize humanitarian intervention?

It is generally agreed that the Security Council has the authority, under chapter VII of the UN Charter, to conduct or authorize humanitarian intervention. This is by activating article 39 of the Charter and to hold that grave violations of international humanitarian laws as enshrined in the Geneva Laws constitute threats to peace and international security. Again the remaining question is when and how the intervention should be carried out? In general, the Security Council is empowered, under chapter VII of the UN Charter, to use, or authorize the use, of force including forcible intervention when there exist a threat to international peace and security. It is worth reminding that under Article 24(1) of the Charter, members "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf." In turn, under the Charter, members 'agree to accept and carry out the decision of the Security Council'.[296] The Security Council has also the power to

[293] See Article 24 of the UN Charter
[294] UN Security Council Resolution 221 (1966)
[295] UN Security Council Resolution 418 (1977)
[296] See Article 25 of the Charter

determine which member states shall be authorized to carry out its decisions. In short, the specific powers granted to the Security Council which enable it to discharge its duties are found in chapter VII of the Charter. Article 39 provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

The Charter[297] authorizes the Security Council to order economic sanctions against states that commits acts amounting to violations of humanitarian law. Article 39 permits her to order military action including 'demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.[298] *Chesterman*[299] observed that Article 39 of the UN Charter suggests 'that a determination of a threat to the peace, breach of the peace, or act of aggression must be made before the Security Council can decide what measures should be taken. So, it seems to be the case that the determination of the occurrence of, in particular 'threats to the peace' is a prerequisite for the Security Council to take military action envisaged in article 42 of the Charter.

3.3.4 Humanitarian Intervention without UN Security Council Mandate

The linkage between human rights and international peace in the UN Security Council practice was widely recognized by the international community and humanitarian

[297] See Article 41 of the Charter
[298] See Article 42 of the Charter
[299] Simon Chesterman; 'Legality Versus Legitimacy: Humanitarian Intervention, The Security Council and the Rule of Law'. Available on journals.sagepub.com>doi>abs. Accessed on 20 August 2018

intervention with a mandate of the Security Council did not create so much controversy.[300] But if intervention is not authorized by the Security Council, its legality under the Charter is more controversial.[301] Although the UN Security Council authorized most of the Post-Cold War interventions, the practice of intervention without the Security Council mandate has not disappeared completely. And in the emerging state practice as seen with AU/ECOWAS legal regime, some organizations are now inclined to embark on humanitarian intervention in their regions with or without UN Security Council authorization.[302] In several instances, states have intervened with force and without advance authorization from the Security Council, at least in part to halt alleged violations of human rights. Recent examples include ECOWAS intervention in Liberia, intervention after the Gulf War to protect *Kurds* in Northern *Iraq*[303] as well as NATO's intervention in *Kosovo*.[304] The *Iraqi* and *Kosovo* cases are quite complicated because there were prior Security Council resolutions defining the situation as a threat to peace, but none giving explicit authorization for the use of military force. The debate about these cases has not been settled among scholars.

3.3.5 Requirement of Threat to Peace

Peace means freedom from disturbance, a state of tranquility. Peace is synonyms of tranquility, calm, calmness, restfulness. Peace means a state or period of which there is no

[300] Newman, Edward. 'Review Article-Humanitarian Intervention Legality and Legitimacy', (2002) Vol. 6, The International Journal of Human Rights, Available on-line at http://dx.doi.org/10.1080/714003777. Accessed on 12 September 2018.
[301] See Newman, *Ibid*
[302] See Article 4(h) of the AU Constitutive Act, Article 4(j) & (k) of the AUPSC Protocol and Article 10 of the ECOWAS MCPMPRS Protocol
[303] United Nations Security Council Resolution 688 adopted on 5th April, 1991 in which the Council condemned the sufferings of the Iraqi Kurds but failed to authorize intervention. The US and her allies were later to launch an intervention without the UNSC authorization. Available on https://en.m.wikipedia.org>wiki>united-nations. Accessed on 20 August 2018.
[304] Security Council Resolution 1244 on the Situation relating to Kosovo/ UN. Available on https://peacemaker.un.org>kosovo-resolution. Accessed on 20 August 2018. This resolution provides a framework for the resolution of the conflict in Kosovo by authorizing the deployment of an international civilian peace keeping mission. This fell short of military intervention. The US and her allies under the auspices of NATO later launched a military intervention in Kosovo without the UNSC approval.

war or war has ended.[305] Peace therefore is a state of calmness. Threat itself means a statement of an intention to inflict pain, injury, damage or other hostiles action on someone.[306] Whereas threat to peace is a threat to freedom and democracy, of something posing a direct threat to peace. According to Galvan, 'threat to the peace' cannot be separated. An analysis of both terms has been done so now we can infer that the meaning of the term as a whole is the intention to injure, damage or endanger the freedom of public disturbance or tranquility.[307] It is difficult to resist the conclusion that in international law, customary practices and law of treaties forbid unilateral employment of military force to aid victims facing grave violations of humanitarian laws except in pursuit of UN Security Council authorization, thus upholding the statist world order that has dominated international political life for centuries. But the growing states practice and regional organizations to intervene to help victims of human rights violations with or without UN Security Council mandate have taken place in the past, and would be likely in the future as well. And in doing so, there must be in existence a threat to international peace and security. It is of considerable importance to know what types of conducts may constitute this 'threat to peace and security' so as to fall within Article 39 of the UN Charter. This is so because it is a precondition for enforcement measures to be taken by the Security Council. In short, what constitute "a threat to the peace"? None of those three phrases mentioned under Article 39, "threat to the peace", "breach of the peace" and "act of aggression", is defined anywhere in the UN Charter. The historic context in which article 39 was drafted indicates that the intention of the drafters was to give the Security Council wide discretion to define these terms.[308] It was thought that an exhaustive list of "threat to the peace", "breach of the peace" or "act of aggression" would be

[305] Advanced Learners Dictionary, (6th Edn,) p. 345
[306] *Ibid.*, p
[307] Serna Galvan, Threat To Peace, available on www.scielo.org.mx>pdf>amdi. Accessed on 30 October 2018
[308]The Charter of the United Nations: A Commentary, edited by Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus. Available on https://global.oup.com>product>the-charter-of-the-UN. Accessed on 20 August 2018

impossible as it limits the freedom of the Security Council to perform its duty in maintaining international peace and security.[309]

In fact, armed military actions are encompassed by Article 39, but, *inter alia*, "threats to the peace" are not limited to military situations or international conflicts. Since the end of the Cold War, the Security Council has interpreted the phrase "threat to the peace" broadly as not limited only to inter-state conflicts. During the meeting of the Council at its 47th Session[310] it was confirmed that the absence of war and military conflicts among states does not ensure in itself international peace and security, and further recognized that non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.[311] Humanitarian crisis do have international consequences, in particular the flow of refugees across state borders. However, such crises, in general, do not pose the threat of armed conflict across border. So, the question arises whether humanitarian crises can be described as a 'threat to the peace'? Nevertheless, the language of Article 39 expressly gives the Security Council the authority to determine what constitute a threat to the peace. Thus, it is the discretion of the Security Council to determine this matter.

3.3.6 Humanitarian Crises as Threat to Peace

Can large-scale and systematic violations of human rights in a given state amount to a threat to international peace and security sufficient to justify humanitarian intervention? It has been suggested that even though the Charter did not specifically grant the Security Council the authority to initiate military intervention to protect human rights in crisis situations, such inherent power recently was validated by resolutions of the Council in response to internal

[309] *Ibid*
[310] UN DOC. S/PV.3046 47th Session 1992 available on https://www.jstor.org>stable. Accessed on 18 August 2018. The session took place on the 13th January, 1992 47 years after the formation of the UN. The session also held that ecological fields and other non-military ware fare can constitute threat to peace and security.
[311] *Ibid*

crisis in Syria.[312] In the Resolution, the Un Security Council held that the humanitarian crises in the Arab Republic of Syria constitute threat to the peace and security of the region. For example, by Article 85 of Protocol I States are obliged to punish grave breaches of the Geneva Conventions like war crimes, genocide, mass murder.[313] Furthermore, if a State is unwilling to prosecute an offender within its territory, it is obliged to hand over the alleged offender to any Party to the Convention who can make out a prima facie case.[314] So what if a state actor who commits any of these grave breaches refused to respect the provisions of the Geneva Conventions? Every party to the Convention pledged in Common Article 1 to respect the provisions of the Conventions and third party states are obligated to take positive steps to halt the continued commission of the breaches including unilateral or collective action. This again allows the Security Council to rely on the Geneva Conventions to activate article 39.

The evolving norm in international humanitarian law now with the emergence of the responsibility to protect concept posits that respect for sovereignty is conditional on respect for human rights. This has been reflected in the practice of UN Security Council which has increasingly considered gross violation of human rights in internal conflicts as legal grounds for international action.[315] When authorizing humanitarian intervention, the Security Council typically determines that a humanitarian crisis poses a threat to the peace. The UN Charter[316] stipulates that the Charter does not authorize the UN to intervene in "matters which are essentially within the domestic jurisdiction of any state". It will appear that article 2(7) of the Charter is meant to rule out authorized humanitarian intervention but the latitude given to the Security Council in Article 39 seems to have erased that doubt. As the last sentence of this

[312] Security Council Unanimously Adopts Resolution 2332 (2016) available on ...https://www.un.org/press/en/2016/sc12651.doc.htm. Accessed on 20 August 2018.
[313] See Article 85 of Additional Protocol
[314] See Article 49 of Geneva Convention I, Article 50 Geneva Convention II, Article 129 Geneva Convention III and Article 146 Geneva Convention IV respectively
[315] *Ibid*
[316] Article 2(7)

provision indicates, however, non-intervention principle shall not prejudice the application of enforcement measures under chapter VII. It follows that Article 2(7) is generally not taken to limit the authority of the Security Council under chapter VII of the Charter.

Today violations of fundamental human rights cannot be considered to be a matter of domestic jurisdiction again. As noted earlier, there has been a progressive development of international humanitarian rights law since the establishment of the United Nations and it has been recognized in *Barcelona Traction Case*[317] as most of fundamental rights of human person belong to *Erga Omnes* obligations. It is submitted that the Security Council may take enforcement measures without taking into account the general principle of non-intervention in the internal affairs of a state when determining whether a particular situation is a threat to international peace and security. Thus, humanitarian intervention is lawful if authorized by the UN Security Council as part of its collective security function.

In short, since the end of the Cold War, the Security Council has availed itself of a right of humanitarian intervention by adopting a series of resolutions which have progressively expanded the definition of "a threat to international peace and security" under Article 39 of the Charter and authorized member states to intervene even where such crises have been purely domestic in nature. This is what the Security Council did in the cases of *Somalia*[318] and *Bosnia-Herzegovina*[319] and *Rwanda*.[320] However, some states like *Russia* and China objected to this broad interpretation of "a threat to international peace" on the ground that the Security Council may act arbitrarily in future cases. However, the recent UN Resolution 1973 authorizing no fly zone in *Libya* cannot be said to have reflected the real intentions of

[317] ICJ Report. 1, (1971) otherwise called Barcelona Traction, Light and Power Ltd (Belgium v. Spain) in which the Court recognized the human rights of the employees of the Traction Company as constituting a ground to initiate the suit.
[318] UN Security Council Resolution 794 (1992)
[319] UN Security Council Resolution 770 (1992)
[320] UN Security Council Resolution 929 (1994)

all the 5 (five) permanent members of the United Nations. The language of the draft resolution was to halt mass violation of human rights in eastern *Libya* by the *Gaddafi* forces but the US and her Western allies forced a regime change in *Libya* which angered *Russia* and *China*. It was because of the outcome of the *Libya* military campaigns that made *Russia* and *China* to be suspicious of any US backed resolution to protect civilians in Syria. In recent practice of UN Security Council, the link is made between widespread human rights violations within a country and the threats of international peace and security. For example by using such languages as 'deeply disturbed by the magnitude of the human suffering caused by the conflict and concerned that the continuation of the situation...constitutes a threat to international peace and security'[321] the Security Council has evolved a practice of determining each case on case by case basis.

There was no reference to the human rights provisions of the Charter which require member states to take joint and collective action for the achievement of universal respect and observance for human rights.[322] Rather Security Council resolutions link human rights violations to the threats to international peace. *Kardas*[323] noted that Security Council authorized interventions were justified not on a purely humanitarian basis, rather it was connected to international peace and security. There is an argument that the UN Security Council is not entitled under the Charter to authorize humanitarian intervention based purely on violations of human rights without cross-border repercussions. Regarding the legal status of humanitarian intervention with a UN Security Council mandate, *Teson*[324] observed that 'international law today recognizes, as a matter of practice, the legitimacy of collective humanitarian intervention, that is, of military measures authorized by the Security Council for the purpose of remedying tyranny' He further concluded that 'while traditionally the only

[321] See the preamble to the UNSC Resolution 746(1992) on Somalia.
[322] See Article 55 and 56 of the UN Charter
[323] Saban Karda, *Ibid*
[324] *Teson*, *Ibid*

ground for collective military action has been the need to respond to breaches of the peace international community has accepted a norm that allows collective humanitarian intervention as a response to serious human rights abuses'.

It is safe to conclude that any internal crisis with or without external effects with grave breaches of the laws of war justify humanitarian intervention with Security Council mandate. Further, it is submitted here that international human rights law takes humanitarian intervention outside the ban on intervention in domestic affairs of states. The authority of the Security Council under chapter VII of the Charter is unimpaired to conduct or authorize humanitarian intervention in situations internal crisis produce humanitarian catastrophes with or without cross-border repercussions. Thus, the answer to the questions posed at the beginning of this section is that UN Security Council has legal authority, under chapter VII of the Charter, to conduct or authorize humanitarian intervention when a state engages in gross and persistent violations of its citizens' human rights, and also when non state actors engage in gross and persistent violations of its citizens' human rights and the state is either unwilling or unable to halt.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF LEGAL AND INSTITUTIONAL FRAMEWORK OF SOVEREIGNTY AND INTERVENTION UNDER INTERNATIONAL LAW

4.1 An Introduction of UN Charter, African Union & ECOWAS Charters on Sovereignty and Humanitarian intervention

Comparative analysis of the institutional framework for state sovereignty and humanitarian law using the legal regime of the AU regional legal framework and the ECOWAS sub-regional military intervention legal regimes and the United Nations Charter will be attempted. The concept of sovereignty will be examined under the two legal documents and a comparative analysis carried out to demonstrate that the UN Charter principle of non-intervention and non-interference unfettered whereas in the African Union Charter, the Union has accepted to reject the norm of non-intervention and indifference in the face of mass atrocity crimes. As a theoretical inquiry, the dissertation focuses on interrogating whether these African Union and ECOWAS treaty provisions for humanitarian intervention can be valid under international law, in view of the comprehensive provisions of the UN Charter which provide guidelines for any military action against any state whether for humanitarian purposes or otherwise in international relations.

The objective of this chapter is twofold: first, it outlines specific provisions of AU and ECOWAS and UN instruments relating to sovereignty and humanitarian intervention in order to deconstruct their normative contents. Second, it considers the relationship between these provisions and relevant provisions of the UN Charter regarding sovereignty and humanitarian intervention and outlines the areas of apparent normative conflict or ambiguities. At the end of the comparative analysis, it identifies three main areas of normative clash between the

ECOWAS/AU regimes and the UN Charter regarding sovereignty and humanitarian intervention.

Firstly, the UN Charter prohibits the use of force against any member state except in self-defence[325] and enforcement action.[326] Under the UN Charter, there is still no substitute to the sanctity of sovereignty. Humanitarian intervention is not to find express positive endorsement under the Charter. By providing for new legal grounds on which force could be used outside these two grounds, article 4(h) of the AU Act and article 10(d) of the ECOWAS MCPMRPS Protocol are in conflict with article 2(4) of the UN Charter in respect of the concept of sovereignty and intervention. A second arena of normative ambiguity identified arises from the question of which organization, between the UN, AU and ECOWAS, has primary responsibility for the maintenance of peace and security in Africa in view of the following provisions: article 24 of the UN Charter, articles 16 and 17 of the AUPSC Protocol, and articles 22 and 25 of the ECOWAS MCPMRPS Protocol. The third arena of normative clash identified arises from the question of which organization between AU and ECOWAS and the UN who authorizes the use of force in Africa in view of the following provisions: articles 16 and 17 of the AUPSC, and articles 10(c) and 25 of the ECOWAS MCPMRPS, all suggesting that the AU and ECOWAS do not require UN Security Council authorization to use force in their regions, contrary to article 53(1) of the UN Charter that requires regional organizations to obtain UN Security Council authorization for enforcement actions. The provisions surveyed are compared with the supremacy clause in article 103 of the Charter, which prohibits UN Member States from entering into treaties whose obligations are

[325] See Article 51 of the UN Charter
[326] Enforcement action under the Charter is provided in Chapter VII.

inconsistent with their Charter obligations, to demonstrate their normative compatibility with the UN Charter.

4.2 Deconstructing The UN Charter, African Union and ECOWAS Charters On Sovereignty And Humanitarian Intervention

The Economic Community of West African States was the first organization to undertake humanitarian military intervention in Liberia and Sierra Leone at a time when it has no legal basis for doing so. Those interventions ignited calls for a legal framework for humanitarian intervention in the Africa and the sub-region. As a result, the member states met[327] and agreed on a legal framework to tackle the growing issue of intrastate and interstates conflicts. The establishment of the Protocol Mechanism set the objective of the framework to be the establishment within the Economic Community of West African States (ECOWAS), a mechanism for collective security and peace to be known as Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security.[328] The principles[329] of the Protocol was stated by the member states who each reaffirmed her commitment to the principles contained in the Charters of the United Nations Organization (UNO) and the Organization of African Unity (OAU) and to the Universal Declaration of Human Rights, as well as to the African Charter on Human and People's Rights., particularly the following fundamental principles: - that economic and social development and the security of peoples and States are inextricably linked; - promotion and reinforcement of the free movement of persons, the right of residence and establishment which contribute to the reinforcement of good neighborliness; - promotion and consolidation of a democratic government as well as democratic institutions in each Member State; protection of fundamental human rights and

[327] In Cotonu on the 24th July, 1993 and adopted the Revised ECOWAS Treaty. 'Economic Community of West African States' (ECOWAS)- WIPO. Available on www.wipo.int>ecowas>trt_ecowas. Accessed on 30 October 2018

[328] . See Article 1 of the ECOWAS MCPMRPS Protocol

[329] See Article 2 of the ECOWAS MCPMRPS Protocol

freedoms and the rules of international humanitarian laws; equality of sovereign States; territorial integrity and political independence of Member States.[330]

The relevant provisions we are concerned with here under ECOWAS law are article 58 of the ECOWAS Revised Treaty, paragraph 46 of the Framework for the Establishment of the MCPMRPS, and articles 10 and 25 of the ECOWAS MCPMRPS Protocol. For the AU, we consider article 4(h) & (j) of the AU Constitutive Act, and articles 4(j), 16 and 17 of the AUPSC Protocol. By article 3(b) of the AU Constitutive Act, it is stated that the objective of the Union shall be to defend the sovereignty, territorial integrity and independence of its Member States. This provision is further supported under article 4 which deals with the principles of the Union.[331] It further reinforces the provision on sovereignty by providing that prohibition of the use of force or threat to use force among Member States of the Union and non-interference by any Member State in the internal affairs of another.[332] These provisions seek to establish a humanitarian intervention legal framework that have a great effect on sovereignty distinct from the UN Charter structure, because there is no explicit UN Charter provision on humanitarian intervention. The provisions are radically innovative and has alters the debate regarding the concept of sovereignty and humanitarian intervention in Africa. To implement article 58 of the Revised Treaty, article 25 of the MCPMRPS of ECOWAS provides that the Protocol is to be invoked:

> In cases of aggression or conflict in any Member State or threat thereof, in case of conflict between two or several Member States; In case of internal conflict: that threatens to trigger a humanitarian disaster, or that poses a serious threat to peace

[330] See the preamble to the ECOWAS MCPMRPS Protocol
[331] The Union here refers to the African Union by Article 1 of the AU Constitutive Act.
[332] See article 4(f) & 4(g) of the AU Constitutive Act.

> and security in the sub-region; In event of serious and massive violation of human rights and the rule of law. In event of massive and serious violation of human rights and the rule of law or in event of an overthrow or attempted overthrow of a democratically elected government; Any other situation as may be decided by the Mediation and Security Council.[333]

By the same token, the ECOWAS MCPMRPS empowers the Mediation and Security Council to:

> decide on all matters relating to peace and security; decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security; authorize all forms of intervention and decide particularly on the deployment of political and military missions; (d) approve mandates and terms of reference for such missions; review the mandates and terms of reference periodically, on the basis of evolving situations.[334]

ECOMOG is appointed as the military wing of ECOWAS and responsible for all its military operations.[335] The interventions in both Liberia and Sierra Leone in the early 1990's were led by ECOMOG troops. It was the first time Africans solved African problem by Africans without foreign aid. It was the experience of Liberia and Sierra Leone that provided the

[333] Protocol Relating to the ECOWAS Mechanism for Conflict Prevention Management, Resolution, Peace-keeping and Security, signed at Lome, Togo on 10 December 1999 and entered into force upon adoption (hereinafter the 'ECOWAS MCPMRPS Protocol'). See also paragraphs 17 and 46 of the Framework Establishing the ECOWAS Mechanism for Conflict Prevention Management, Resolution, Peace-keeping and Security, Abuja, 31 October 1998 (hereinafter 'ECOWAS MCPMRPS Framework')

[334] See article 10 of the ECOWAS MCPMRPS Protocol

[335] See Article 17 of the ECOWAS MCPMRPS Protocol as one of the supporting organs of the ECOWAS MCPMRPS and it is authorized to carry out all military interventions of ECOWAS including humanitarian intervention in support of humanitarian disasters, enforcement of sanctions and embargo, prevention deployment, peace building operations, disarmament and demobilization.

impetus for further action by the larger OAU. Under the AU regime, article 4 of the AU Constitutive Act provides that the Union shall function in accordance with the following principles; that the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; the right of Member States to request intervention from the Union in order to restore peace and security.

The above provisions of the AU's Constitutive Act has redefined sovereignty when considered side by side with the UN Charter. This is because the UN Charter did not enact any mechanism for humanitarian intervention. The ever ubiquitous article 2(4) of the Charter and article 2(7) providing sufficient shield and protection to sovereignty than the African Union Constitutive Act has done. Similarly, the Protocol of the African Union Peace and Security Council[336] provides that in discharging its duties, the African Union Peace and Security Council shall *inter alia* be guided by 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity in accordance with Article 4(h) of the Constitutive Act'.[337] It also provides for 'the right of Member States to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the Constitutive Act.[338] The relationship between the African Union and sub-regional groups like ECOWAS, on the one hand, and other organizations particularly the United Nations, on the other hand, is clearly set out in the AUPSC Protocol the regional mechanisms

[336].The Protocol was signed in 2003 but became operational on December, 2003.
[337].See the Protocol Relating to the Establishment of the Peace and Security Council of the African Union signed on 9.July 2002 at Durban, South Africa, and came into force on 26 December 2003, article 4(j) (hereinafter the 'AUPSC Protocol').
[338] Article 4(k) of the AU Constitutive Act

are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.[339]

In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.[340] To that effect, the Act provides that where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security.[341]

These provisions have serious implications for the UN Charter system and international law. This is because the provisions have introduced new legal regime for humanitarian intervention outside the authority of the UN Charter and the UN Security Council[342] which seeks to enforce the non-intervention norm as demonstrated by Article 2(4) of the UN Charter. The concept of sovereignty in Africa is acquiring a new meaning with the emergence and implementation of these legal frameworks. Under the AU states, sovereignty is now conditional and member states can activate the provisions under review to restore peace and security if there is a humanitarian crisis. At the drafting of the Charter in San Francisco,[343] the

[339].See Article 16 (1) of the Protocol Relating to the Establishment of Peace and Security Council of the African Union otherwise called the AUPSC Protocol. Emphasis mine
[340] See Article 17(1) of the AUPSC
[341] Article 17,(2), *Ibid*
[342] The UN Security Council is charged with maintaining international peace and security under article 24 of the UN Charter.
[343] The UN Charter was signed in 1945 by the major allies during the World War II.

relationship between regional organizations and the UN was hotly debated with some advocating the principle of universalism and others, like the Latin American states, preferring regionalism.[344] The African Union which was not in existence by 1945 favours the principles of regionalism which they have already started to implement and which is articulated in their Common African Position on the Proposed Reform of the UN.[345] Under the heading, Collective Security and Use of force, the *Ezulwini* Consensus outlined the position of the African Union thus:

> Authorization for the use of force by the Security Council should be in line with the conditions and criteria proposed by the Panel, but this condition should not undermine the responsibility of the international community to protect.

The study then continued to state what is considered the general position of the African member states and thus their common position on the vexed issue of regional relationship with the United Nations as well as on the issue of collective use of force. Africa states had always sought for a kind of leeway to control their own affairs and to reduce or if possible reduce their dependency on foreign aid. In the draft consensus they stated thus:

> Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organizations, in areas of proximity to conflicts, are

[344] S. N. MacFarlane and T. G. Weiss, 'The United Nations, Regional Organisations and Human Security: Building Theory in Central America', (15.2 Third World Quarterly (1994): 277, at 280 cited by John-Mark Iyi, *Op.cit*

[345] Usually called the Ezulwini Consensus adopted on the 8th of March, 2005 at Addis Ababa, Ethiopia.

> empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.[346]

So even the position of the AU towards the proposed UN reform did not leave any doubt as to what their future relationship with the UN should look like. The *Ezulwini* Consensus and these legal regimes reiterates the obligation of member states to protect their citizens, and in the process advertently undermines the sovereignty, independence and territorial integrity of member states. Was it a deliberate attempt-yes, it was a deliberate design. With regard to the use of force, the Union did not leave anyone in doubt that it is abandoning the outdated UN Charter[347] which authorizes the use of force only in cases of legitimate self-defence or collective enforcement action under Chapter VII. In addition, the Constitutive Act of the African Union[348] authorizes intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, by the *Ezulwini* Consensus, any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act should be prohibited.

The provisions in chapter VIII of the UN Charter reflects the compromises by the groups that anchored the relationship between the UN and regional organizations like AU and ECOWAS

[346] *Ezulwini* Consensus, *Ibid*, page 6.
[347] See Article 51
[348] See Article 4(h)

on the principle of subsidiarity but also left some issues unresolved.[349] It means that enforcement action by regional organization not in collective self-defence must be authorized by the UN Security Council and any provision in a regional agreement that permits the organization to take enforcement action against a member state without UN Security Council authorization is inconsistent with the provisions of the Charter.[350] The unilateral action provisions contained in the AU/ECOWAS framework apparently amount to a subtle attempt to renegotiate the provisions of the UN Charter. The consensus position of the AU regarding the proposed UN reform clearly shows that the emergence of Article 4(h) of the AU Constitutive Act was not a mistake but a bold statement by African states to renegotiate the UN Charter provisions. It has therefore been argued that the AU and ECOWAS legal regime of unilateral humanitarian intervention is incompatible with the UN Charter and thus invalid in international law.[351] We shall now examine the framework of the apparent normative incompatibility between the regimes.

4.3 Areas of Normative Incompatibility Between The UN Charter And AU/ECOWAS Charter on Sovereignty And Humanitarian Intervention

The provisions of the AU/ECOWAS legal regimes authorizing unilateral humanitarian intervention in Africa which said provisions appears to be in normative conflict with the provisions of the UN Charter have so far been discussed. From the discussions, there are three main areas of normative incompatibility between the AU and ECOWAS regime of unilateral humanitarian intervention and the UN Charter. From the survey of the relevant

[349] Issues like collective enforcement action by the regional organisation without the authority of the UN. The AU through their position as shown in the *Ezulwini* Consensus advocate wants to undertake urgent collective enforcement action to halt widespread cases of crimes like genocide, war crimes and crimes against humanity, and to report such action to the UNSC who shall then bear the cost of the operation.

[350] Article 53 of the UN Charter provides that the UNSC shall, where appropriate utilize such regional arrangements or agencies for enforcement action under its authority but no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the UNSC.

[351] Harhoff F, 'Unauthorized Humanitarian Intervention - Armed Violence in the Name of Humanity', (2001) 70 *Nordic Journal of International Law,* 65, at 102 cited by John-Mark Iyi, *Op.cit,* pg.8

legal regimes, the following areas are apparently in conflict. They are: the prohibition of the use of force in interstate relations; the lawful agency with primary responsibility for the maintenance of peace and security in Africa, and the lawful agency to authorize the use of force in Africa. All these provisions have effect on sovereignty and humanitarian intervention. Despite the commitment of the African Union in articles 3 and 4 of the Act to defend the sovereignty, territorial integrity and independence of its Member States[352] and supporting the prohibition of the use of force or threat to use force among Member States of the Union and non-interference by any Member State in the internal affairs of another,[353] the African Union went ahead in Article 4(h) to provide for the right of the Union to intervene in the internal affairs of the member state in event of grave violations of human rights. Sovereignty under the AU Act is now conditional whereas there is no such provision under the UN Charter. The paper shall now consider the specific areas of incompatibility identified.

4.3.1.Article 2(4) of the UN Charter and Article 4(h) of the AU Charter

Article 2(4) of the UN Charter prohibits the use of force in inter-state relations and this has been accepted as a peremptory norm of international law which does not permit any derogation.[354] Under this Charter provision, sovereignty is firmly protected and there can be no external intervention except pursuant to the provisions of the Charter. The only exception must be in accordance with article 39 and article 51 of the Charter. There is no other exception. The AU's Act on her own has similar provision in article 3(b) to the effect that the Union shall defend the sovereignty, territorial integrity and independence of its Member States and to support the prohibition[355] of the use of force or threat to use force among Member States of the Union and non-interference by any Member State in the internal affairs

[352] Article 3(b) of the Act
[353] Article 4(f) & 4(g) of the Act
[354] See the judgment of the ICJ in the Nicaragua case, supra.
[355] See article 4(f) and 4(g) of the AU Constitutive Act

of another. Looking at the provisions, it would thus appear that sovereignty enjoys the same protection under the AU Charter just like the UN Charter. But it is not so. The provisions of article 4(h) of the AU Act, article 4(j) of the AUPSC Protocol and article 25 of the ECOWAS MCPMRPS Protocol are in conflict with article 2(4) of the UN Charter. Article 25 of the ECOWAS MCPMRPS provides that the Mechanism shall be applied in cases of aggression or conflict in any Member State or threat thereof or in case of conflict between two or several Member States or in event of any internal conflict that has the potential to threaten or to trigger a humanitarian disaster, or one that poses a serious threat to peace and security in the sub-region or in event of serious and massive violation of human rights and the rule of law and finally in the event of an overthrow or attempted overthrow of a democratically elected government.

The Mediation and Security Council has the powers to determine that any other situation calls for intervention. Whereas Article 2(4) of the Charter provides for non-intervention or interference into the internal affairs of another state thus shielding sovereignty from external aggression, articles 4(h) of the AU Act and 4(j) of the AUPSC Protocol provides the opposite. Article 4(h) specifically provides for the right of the African Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity. By providing for the right of the AU and ECOWAS to use force within member states on grounds not provided for in the UN Charter, these laws apparently violate the international law norm of non-use of force against the sovereignty and territorial integrity of another state. Under international law, it would thus be invalid because article 103 of the UN Charter still prevails over any regional instrument inconsistent with the Charter. As John-Mark observed, these provisions have introduced and codified new grounds for exceptions to the rule on the use of force besides those of self-defence and chapter VII enforcement actions, and thus pose a fundamental

challenge' to the UN System as they seek to supersede the provisions in article 2(4) and chapter VII of the Charter.[356]

However, it may not be correct to say that the provisions have introduced new exceptions to the rule on non use of force because the AU framework requires the consent of the affected state before the intervention. This is achieved once the state signs the AU Treaty. Therefore, it can be argued validly that the African Union is intervening on the invitation of the host country thus consistent with the UN Charter. The grounds for intervention under the AU Act are war crimes, crimes against humanity and genocide, and with reference to the proposed amendment to the AU Act, includes a threat to legitimate order.[357] These are legitimate grounds that could amount to threat to international peace and security under article 39 of the UN Charter.

Under ECOWAS, new grounds as exceptions to the prohibition of the use of force rule now include internal conflict threatening humanitarian disasters or sub-regional peace and security, massive violation of human rights and overthrow or attempted overthrow of democratically elected governments.[358] These new grounds has effectively altered the scope of sovereignty or at least is redefining sovereignty. Sovereignty in the concept of the westphalian idea is fast eroding into a more responsible sovereignty, at least in Africa. The UN approves the rhetoric of the AU but is yet to agree on the modus of implementation. Both Russia and China believe that humanitarian crises is an event sufficient to warrant military

[356] John-Mark Iyi, Op.cit

[357] See Article 4(h) which provides thus: the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

[358] Article 25 of the ECOWAS MCPMRPS Protocol provides that the Mechanism shall be applied in any of the following circumstances: In cases of aggression or conflict in any Member State or threat thereof; In case of conflict between two or several Member States; In case of internal conflict: a) that threatens to trigger a humanitarian disaster, or b) that poses a serious threat to peace and security in the sub-region; In event of serious and massive violation of human rights and the rule of law. In the event of an overthrow or attempted overthrow of a democratically elected government; Any other situation as may be decided by the Mediation and Security Council.

incursion into the territory of another state but has refused to support any resolution to draw up a framework for such intervention. In the past, the UN Security Council has had to develop the Charter provisions through a reinterpretation and expansion of what constitutes 'threat to international peace and security' in order to be able to respond to the challenges arising from massive violations of human rights in internal armed conflicts, which was not covered by the UN Charter or was hitherto deemed prohibited by article 2(7) of the Charter.

In the early 1990's for example, the UN Security Council in her resolutions[359] determined while interpreting Article 39 of the UN Charter that the situation in Liberia constitutes a threat to international peace and security, and also that the later situation in Sierra Leone constitute a threat to international peace and security. Before then, and up till now, what constitute threats to international peace and security has been left at the wisdom of the Security Council members and most times, there geopolitical interest and national interest has not allowed the members of the UN Security Council to take decisive action when required. The use of veto power has been the major stumbling block. This approach by the UN Security Council has not been devoid of controversy and has largely remained problematic in its relationship with sovereignty, hence the emergence of the Responsibility to Protect norm. Though it can be argued that the AU/ECOWAS framework attempts to remedy this or to fill in the gap whenever the UN is unwilling to act, its provisions present a unique challenge to the UN system. As has been rightly observed thus:

> The coming into force of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, which operationalises the Constitutive Act of the

[359] UN R/RES/788 available on unscr.com>resolution>788. Accessed on 9 October 2018 and UN R/RES/1132 available unscr.com>resolution>1132. Accessed on 9 October 2018.

> African Union, is the first true blow to the international framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council.[360]

As noted above[361] the African Union has demonstrated their collective determination to create a new legal regime or at least to introduce a new legal regime governing humanitarian intervention. There is so far no such attempt by the UN except the introduction of the responsibility to protect norm. The principle is yet to gain or acquire any legal framework. For the African Union, they have continued to move in the direction of acquiring the competence to solve their own problem. The most important evidence yet of this resolve to create an extra-Charter humanitarian intervention legal regime is the Common African Position on the Proposed UN Reform - the *Ezulwini* Consensus.[362] Adopted in 2005, it states the position of the AU on its relationship with the UN Security Council, and article 4(h) of the AU Act vis-à-vis article 2(4) of the UN Charter. The *Ezulwini* Consensus maintains that self-defence remains the principal ground of exception to the prohibition of use of force; however, the AU insists at the same time that the African Union can 'authorize intervention in grave circumstances such as genocide, war crimes and crimes against humanity.[363]

Consequently, the African Union's position can be interpreted from their common position to the effect that any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act should be prohibited. According to

[360] See Allain J, Op. cit cited by John –Mark Iyi, *Ibid*
[361] John- Mark Iyi, Op.cit,
[362] The Common African Position on the Proposed Reform of the United Nations: The '*Ezulwini* Consensus', Executive Council 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ethiopia. Ext./EX. CL/2 (VII), p. 6 (hereinafter the '*Ezulwini* Consensus'), available at http://www.cfr.org/ africa/common-african-position-proposed-reform-united-nations-ezulwini-consensus/p25444. Accessed 10 August 2018.
[363] Article 4(h) of the AU Constitutive Act

Acevedo[364] three inferences can be drawn from the above excerpt. First, the AU construes the rule on the use of force in article 2(4), and the exceptions in article 51 and chapter VII of the Charter as the applicable law between the AU, its members and other states outside Africa as well as the UN the general law applicable. The AU asserts a second rule encapsulated in article 4(h) of the AU constitutive Act which it deems to be applicable between the AU and its member states only. A third inference is that the AU insists that article 4(h) and the grounds recognized therein are additional exceptions to the general rule prohibiting the use of force in the UN Charter[365] but applicable only in Africa by the Union alone. Therefore, it is only the Union that can alter or violate the concept of sovereignty to allow humanitarian intervention in Africa. The ICJ had earlier on warned regional organization against operating outside the provisions of the Charter to the effect that all regional, bilateral and even multilateral arrangements that the Parties to this case may have made touching on the issue of settlement of disputes must be made always subject to the provisions of Article 103 of the Charter.[366] As already noted, the codification of the right of humanitarian intervention by the AU and ECOWAS without the UN Security Council authorization introduces a new dimension to this debate. According to *Teson*:[367]

> It is unclear what this will entail in practice, but as a starting point, it should be emphasized that given the immense changes that have taken place since 1945, the efficacy of the Charter in particular and international law in general can only be achieved

[364] Acevedo D, 'Collective Self-defense and the Use of Regional or Sub-regional Authority as Justification for the Use of Force', (1984) 78 *American Society of International Law Proceedings,* p.69 at 73.
[365] *Ibid.*
[366] The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V United States of America) Jurisdiction and Admissibility Judgment, ICJ Reports 1984, 392, at 440
[367] Teson F.R 'Humanitarian Intervention: An Inquiry into Law and Morality', (1997) 2nd edn, *Transnational*, p. 150.

> if they are 'interpreted and applied in a manner commensurate with the requirements of an evolving international community.

4.3.2 Primary Responsibility for the Maintenance of Peace and Security in Africa

The first area of conflict between the AU/ECOWAS frameworks and the UN Charter having been discussed, it is now time to discuss the second area of normative conflict. And that is the normative clash between the UN Charter and the AU/ECOWAS Charter regime which is the authoritative agency with primary responsibility for the maintenance of peace and security in Africa? In view of the provisions surveyed above, the question becomes: which organization, between the UN, AU and ECOWAS, has the primary responsibility for the maintenance of peace and security in Africa in the case of the AU, and West Africa in the case of ECOWAS? The answer to this question may not be as straightforward as it might first appear.

The Regional Mechanisms[368] are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa, thus giving the AU the authority for the maintenance of peace and security in the continent while the ECOWAS MCPMRPS Protocol[369] says that the Mediation and Security Council of ECOWAS shall take decisions on issues of peace and security in the sub-region on behalf of the Authority. It shall also implement all the provisions of this Protocol. Both provisions apparently conflict with the UN Charter[370] which provides that:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and

[368] See Article 16(1) Protocol Relating To The Establishment Of The Peace And Security CTouncil Of The African Union adopted by the 1st Ordinary Session of the African Union in Durban on 9th July, 2002 otherwise called the AUPSC Protocol. The Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.
[369] See Article 10(a) of ECOWAS MCPMRPS Protocol
[370] See Article 24(1) of the UN Charter

> security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

These provisions have consequences on sovereignty. Under the UN Charter which does not have any positive legislation on humanitarian intervention, any intervention must be conducted within the framework of the Charter and in doing so, utmost respect is paid to the concept of sovereignty. Sovereignty can only be violated in accordance with article 39 and 51 of the UN Charter. But this is not so under the AU/ECOWAS Charters. It appears that the language of both the AU and the ECOWAS Charter on the use of force in Africa recognizes the AU status as a chapter VIII regional organization under the UN Charter in relation to the maintenance of international peace and security, but that is where the conformity with the Charter ends. In other material respects, the AU and ECOWAS provisions seek to dislodge the UN Security Council as the authoritative agency having primary responsibility for the maintenance of peace and security in Africa. Thus, the African states in principle have agreed to cede part of their sovereignty in return for human rights protection of their people. This is not so under the UN Charter and other regional organizations as the principle of non intervention is still held supreme. This dissertation had earlier noted the historical antecedents that led to the emergence of these regional intervention regimes, particularly the experience of the African Union to the indifference of the UN Security Council to various security challenges in Africa were highlighted. Even though the AU recognizes the ultimate authority of the UN Security Council in the maintenance of international peace and security, it decided to share or at least take up same role simultaneously with the UN Security Council in respect of Africa. This can be seen from the provisions of Article 17(1) of the AUPSC Protocol which recognizes the primary responsibility of the UN Security Council in the

maintenance of international peace and security but at the same time, article 16(1) allocates exactly the same role to the AUPSC.

Although the AU recognizes that the UN has primacy in the maintenance of international peace and security, the AU reserves the right of unilateral action in Africa which only 'reverts to the UN where necessary.[371] This is because article 17(2) AUPSC Protocol says that the AU shall when necessary work closely and co-operate with the UN Security Council in the discharge of her duties under the Protocol. This simply means that the AU only reverts to the UN Security Council when it considers necessary and to ignore her when it is not necessary. This provision has grave consequences for sovereignty in Africa and humanitarian intervention. It is understandable if the AU insists that the organization will intervene in Africa with or without UN Security Council authorization.[372] This is essentially because the AU Act and the AUPSC Protocol have arrogated to the AU the primary responsibility for 'promoting peace, security and stability in Africa' by vesting the powers in its decision-making organ - the AUPSC.[373] Contrary to what is envisaged by chapter VIII of the UN Charter, article 17(2) of the AUPSC Protocol implies that the AU will only seek assistance from the UN when necessary and that it is not obliged to defer to the UN Security Council on peace and security matters in Africa. Article 17 (2) of the AUPSC provides thus:

> Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Unions' activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter

[371] Aning K, 'The UN and the African Union's Security Architecture: Defining an Emerging Partnership', (2008) 5 *Critical Currents*,11-23, at 17. Available on https://works.bepress.com>kwesi_aning. Accessed on 15 August 2018.
[372] Aning, *Ibid*
[373] Kuwail, 'The End of Humanitarian Intervention', *Ibid*, 44

> on the role of Regional Organizations in the maintenance of international peace and security.[374]

For its part, ECOWAS is not so explicit in its provisions about its relationship with the UN in this respect, but by virtue of the powers conferred on the Mediation and Security Council to perform the role reserved for the UN Security Council under the Charter, the ECOWAS regime arguably has the same effect.[375] In fact, the ECOWAS provisions are even more direct and somehow confrontational so to say. Article 10 provides thus:

> The Mediation and Security Council shall take decisions on issues of peace and security in the sub-region on behalf of the Authority. It shall also implement all the provisions of this Protocol. Pursuant to the provisions of Article 7 of this Protocol and Paragraph 1 above, the Mediation and Security Council shall:
>
> Decide on all matters relating to peace and security;
>
> Decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security; authorize all forms of intervention and decide particularly on the deployment of political and military missions; approve mandates and terms of reference for such missions; review the mandates and terms of reference periodically, on the basis of involving situations; on the recommendation of the Executive

[374] Article 17(2) of AUPSC Protocol
[375] See Article 10 of the ECOWAS MCPMPRS Protocol

Secretary, appoint the Special Representative of the Executive Secretary and the Force Commander.[376]

Even prior to adopting its humanitarian intervention instruments, ECOWAS had launched unilateral humanitarian interventions[377] without the backing of any legal instrument in its peace and security or human rights corpus. As was observed, it was such interventions that apparently influenced the AU.[378] Within a few years of initiating the legal mechanism for unilateral action by ECOWAS, the system which was originally created for the sub-region alone was adopted for all of Africa, underscoring the failure of the UN Security Council to prevent or halt genocide in Africa.[379] It is submitted that the ECOWAS and the AU intervention and the right to unilateral intervention it claims for itself was due to the failure of the UN Security Council to respond to crises in Africa and the frustrations faced by African leaders when they tried to make the UN take any meaningful action in African crises. One therefore cannot blame the AU/ECOWAS Mechanism for their initiative which evolved as a buffer to UN Security Council veto paralysis, and in the case of ECOWAS, they have been more proactive and successful in responding to the peace and security demands of members and the sub-region compared with the UN Security Council.

Notwithstanding several proposals for UN reform[380] so far, the fact that ECOWAS had to resort to unilateral action to initiate three military interventions in Liberia and Sierra Leone is itself indicative of three points: first, that the Brahimi Report[381] was either not being implemented or the implementation sidelined Africa; second, it underscored the failure of the

[376] Underlined mine for emphasis.
[377] Referring to the interventions in Liberia and later Sierra Leone led by ECOMOG without any legal framework. It was the criticism that followed the interventions that led to the adoption of the Revised ECOWAs Treaty in 1993 to provide for such humanitarian intervention.
[378] See Allain J, *Ibid*, p.262
[379] See Allain J, *Ibid*, p.262
[380] The AU position as articulated in the *Ezulwini* Concensus.
[381] Being the report of the Panel on United Nations Peacekeeping Operations (A/55/305). Available on https://peacekeeping.un.org>report-of-peacekeeping operation. Accessed on 14 August, 2018.

UN to take the initiative to intervene; third, it highlighted the rejection of a 'colonial-policy' approach underpinned by a lack of commitment to African crises.[382] During the Liberian crisis, it was after ECOWAS had unsuccessfully tried to get the UN Security Council to even discuss the matter let alone intervene, that ECOWAS proceeded to intervene and left the UN Security Council with the awkward choice of either condoning the intervention or condemning it and risking global opprobrium for its legal inertia and moral paralysis.[383] Understandably, and in a bid to save itself from the international outcry, the UN Security Council chose the former, granting what some have variously described as *ex post facto* ratification[384] to the interventions.

Since the UN has demonstrated a lack of interest in crises in Africa, the AU and ECOWAS have to develop a regional humanitarian intervention mechanism that defies sovereignty and build the legal and institutional framework to respond to mass atrocities in Africa and West Africa respectively. It has been submitted that the diffusion of the primary role of the Security Council over issues of international peace and security as developed in Article 17 of the AUPSC, in essence, turns the United Nations system on its head, as the United Nations Security Council is meant to assist the African Union Peace and Security Council not vice versa.[385] As a result of the fact that the Protocol, while paying lip-service to the primacy of the United Nations Security Council seeks, at every turn, to dissipate its pre-eminence, makes clear that intervention as envisioned by the Constitutive Act of the African

[382].Borgen C.J , 'The Theory of Practice of Regional Organization Intervention in Civil Wars' (1993-4) *Journal of International Law and Policy*, New York University, p.797. Available on https://scholarship.law.stjohns.edu>cgi. Accessed on 9 October 2018
[383] Borgen C.J i*bid*, @823
[384][384] See the account of Nina Wilen, 'Intervention, Justifications and Interpretations: The Case of ECOWAS in Liberia ' –Springer Link available on https://link.springer.com>content>pdf. Accessed on 20 November 2018.
[385] See Allain, *ibid*.

Union usurps the ultimate control vested in the United Nations System over the use of force.[386]

It is therefore important that the future legal relationship between the UN and the AU/ECOWAS be clarified, more so when these regional bodies have acquired legal capacity and are building military and logistics capacity for humanitarian intervention. The call for a greater role for regional organizations in conflict resolution and closer partnership and cooperation with the UN cannot take place outside the context of a redistribution of authority and competency, and that in itself is also tied to UN Security Council reform, which is unlikely to happen any time soon. While the UN insists that cooperation with regional organizations should be pursued within the framework of chapter VIII, the AU, ECOWAS and other regional organizations think otherwise. The Organization of American States, for example, has made it clear that it rejects any collaboration framework with the UN built on the 'basis of prescription by one organization to another' or the superintendence of the UN over regional organizations.[387] And that is exactly what chapter VIII does. The AU's primary responsibility to promote peace, security and stability in Africa aims at utilizing its unique position as a regional organization in areas of prompt response to peacekeeping and peace enforcement in Africa, and this is not inconsistent with the primacy of the UN Security Council, which is responsible for the maintenance of international peace and security.

4.3.3 Who Authorizes The Use of Force in Africa?

The third arena of normative conflict identified from the comparative analysis between sovereignty and humanitarian intervention under the UN Charter and AU/EOCWAS Charters is the question of who should authorize the use of force in Africa. The three regimes locate

[386] *Ibid*

[387]. Boutros-Ghali 'Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping', (Report of the Secretary General, (1993) UN Doc. S/25996, pp. 13, 14, 18. See also Borgen, 'The Theory and Practice of Regional Organisation Intervention', *ibid.*, at 822-3.

authority for the use of force in different agencies. By virtue of article 52 of the UN Charter, ECOWAS and the AU have the authority to settle disputes amicably without reference to the UN Security Council, that is, for dispute involving non use of force. However, under article 53(1) of the UN Charter, only the UN Security Council can authorize the use of force anywhere in the world against a member nation for any purpose whatsoever including humanitarian intervention. Therefore under the UN Charter regime, it is only the UN Security Council that can authorize the AU to use force for the maintenance of international peace and security anywhere in Africa. A combined reading of articles 4(j)[388] 16 and 17[389] of the AUPSC Protocol, however, gives the power to authorize the use of force in Africa to the African Union. These provisions are in conflict with article 53(1) of the UN Charter, which provides that the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. The article makes it clear that the relationship between the UN and other regional organizations like the AU is based on prescription from one to another.

But that is not the case with the AU. By article 17(1), the AUPSC is expected to 'cooperate' with other agencies, in the discharge of her mandate, one of which is the UN Security Council. Rather than prescribe that the AUPSC obtains authorization from the UN Security Council, article 17(2) provides that the AU shall when necessary seek the co-operation of the UN and that the UN should provide assistance and support to the AUPSC. It has been observed that the African Union has, by way of regional instruments, overridden the multilateral control over the use of force which has been vested in the United Nations

[388] African Union Constitutive Act,
[389] Protocol Relating To The Establishment Of The Peace And Security Council Of The African Union

Security Council since 1945.[390] It is doubtful if the African Union is to do this alone without the UN intervention. The case of Libya is a case point. The African Union was in paralysis and undecided as to what to do in Libya especially when the US and her Western allies had interest. So African Union stood by and watched while NATO took the lead in enforcing Resolution 1973. Both the AU Constitutive Act and the AUPSC Protocol were in force by 2011 when the crisis started but were never activated. However, one thing is clear, in principle, the African Union have decided that they will, henceforth, not require Security Council authorization to act on the continent, and in fact, they have given themselves the prerogative to intervene militarily, not only beyond the authority of the UN Security Council, but by widening the scope of permissible use of force in Africa, by acting in 'respect to grave circumstances' such as war crimes, genocide, and crimes against humanity.[391] Thus in Africa, humanitarian intervention has provided valid exception to warrant use of force against the sovereignty of another state outside the UN Charter framework.

The implication of the current AU legal regime regarding humanitarian intervention in Africa as exemplified by the AUPSC Protocol is that it pays allegiance to the primacy of the UN Security Council on the one hand and, but regrettably, on the other hand, espouses a new role that would see African states take control of processes that deal with enforcement measures in Africa. Under this current regime, implementation of humanitarian intervention now takes precedent over sovereignty in African states while under the UN Charter, following the responsibility to protect emerging norm, humanitarian intervention in principle takes precedent over sovereignty but the implementation must be pursued within the UN Charter framework. The UN Security Council is yet to agree on that implementable framework and that is where the African states have taken a giant lead. Again further to the

[390] Allain, *Ibid* @ 259
[391] Allan J, *Ibid* @286

above illustrations, the AU left no one in doubt of her determination to chart a new course for humanitarian intervention and to take charge of collective enforcement action in Africa than the position as stated in the *Ezulwini* Consensus, where the AU stated that:

> African Union agreed with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.[392]

Thus, although the AU agreed in principle that its intervention should be with UN Security Council approval, it attached a condition, however: 'that such approval would be sought only where the UN accepts to fund the operation.[393] The UN Charter does not provide for such a condition and though there has been cooperation between the UN and ECOWAS in the past, nothing in practice suggests how this AU condition would be implemented and the normative impact on UN-AU relationship. In the *Ezulwini* Consensus, the AU demonstrated an unwillingness to continue to subject itself to the principle of subsidiarity enshrined in chapter VIII of the Charter, particularly article 53(1). Based on its framework, it is arguable that the AU and ECOWAS appears not to be under obligation to obtain authorization from, or to defer to, the UN Security Council on the use of force in Africa, thus raising questions about the legal validity of such provisions under the Charter.[394] Another point to be made here is the *ex post facto* approval proposed in the *Ezulwini* Consensus. Many writer and commentators supports the view for an *ex post facto* ratification, arguing that since the

[392] See *Ezulwini* Consensus, *Op. cit*
[393] See *Ezulwini* Consensus, *ibid*
[394] Wippman, 'Pro-Democracy Intervention', *Op.cit*

Charter does not explicitly state whether the authorization should be prior or *ex post facto, ex post* ratification should be adopted especially in urgent cases as a way of circumventing delays occasioned by the UN Security Council.[395] Such *ex post facto* ratification has been used at least in two instances: first in Liberia[396] and subsequently in Sierra Leone.[397] However, not all supports the idea of *ex post facto* ratification.[398]

The legal framework of the African Union has been discussed. If the AU's provision for unilateral action is audacious, then the ECOWAS framework is even much more audacious and direct. With an unassailable precedent in unilateral action in regional humanitarian intervention, ECOWAS has located the right to authorize the use of force in West Africa in its Mediation and Security Council by virtue of article 10(c) of the ECOWAS MCPMRPS. The provision says the Mediation and Security Council shall 'authorize all forms of intervention and decide particularly on the deployment of political and military missions. The provision does not require the Mediation and Security Council to obtain UN Security Council authorization. Again, this is in conflict with article 53(1), which requires all regional organizations to obtain UN Security Council authorization for use of force deployments. This normative ambiguity is still present and was mildly put by the AU Commission Chairperson thus:

> The challenge for the AU and the UN is how to apply the spirit of Chapter VIII without prejudicing the role of the UN Security Council, on one hand, and without undermining or otherwise curtailing the efforts of the AU to develop its own capacity to

[395] Moore J. N, 'The Role of Regional Arrangements in the Maintenance of World Order', in C. E. Black and R. A. Falk (eds), (1971) 'The Future of the International Legal Order',Vol. III, *Princeton University Press*, p. 159
[396] S/ RES/788(1992) 19 November, 1992
[397] S/RES/1132(1997).
[398] *Deen-Racsmany,* Z 'A Redistribution of Authority Between the UN and Regional Organisations in the Field of the Maintenance of Peace and Security', (2000) 13 *Leiden Journal of International Law,* p. 297, at 307

provide adequate responses to the security challenges in Africa,

on the other.[399]

ECOWAS has created for itself, a 'micro Security Council' modeled after the UN Security Council to which it gave the power to unilaterally authorize and initiate regional military intervention in the territory of ECOWAS members. By its 1999 Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, MCPMRPS Protocol, ECOWAS decided that its newly established Mediation and Security Council could 'authorize all forms of intervention and decide particularly on the deployment of political and military missions. The implication of the foregoing now is that both the AU and ECOWAS laws suggest a paradigm shift in regional practice by asserting a right to unilateral enforcement action without the prior authorization of the UN Security Council.[400] The AU and ECOWAS legal regimes seek to bring clarity and consistency to the normative arena of unilateral humanitarian intervention by regional organizations by codifying both the substantive and procedural criteria for their legal validity. It perhaps seems that the NATO and ECOWAS interventions marked the gradual erosion of the old system and the beginning of an evolving new normative regime of humanitarian intervention by regional organizations, thus undermining the concept as sovereignty as espoused in Westphalia and codified as a peremptory norm under Article 2(4) of the Charter. It is therefore submitted that the utility of this regime at a time the world is searching for a legal framework for the implementation of responsibility to protect cannot be over-emphasized and a partnership of cooperation rather than one of subsidiarity and competition between the UN and AU and ECOWAS should be preferred.

[399]. See Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security: Towards Greater Strategic and Political Coherence, Peace and Security Council 307th Meeting, Addis Ababa, Ethiopia, 9 January 2012, PSC/PR/2.(CCCVII), pp. 23, 25.
[400] .See Wippman, *Op.cit*

However, this is not to say that the position of the ECOWAS in the entire security arrangement is quite confusing. ECOWAS members are part of the UN system. They are bound by the decision of the United Nations. Being in Africa, they are bound by the decision of the African Union having all ratified the Constitutive Act. And then they are subject to the ECOWAs Revised Treaty of 1993 and its Protocol each having provisions on humanitarian intervention. Each of these Agencies located the ultimate source of authority for intervention in a different organ. This puts the ECOWAS members in a self inflicted dilemma. It is hoped that the ECOWAS member states will harmonize their position in future to avoid the normative conflict inherent in the present arrangements in which they are subject to three different Charter on the same issue each locating the source of authority in three different organs.

4.4 Analytical Implications Of Article 103 Of The UN Charter And AU And ECOWAS Charter On Sovereignty And Humanitarian Intervention

Article 103 of the UN Charter is described as the supremacy provision of the Charter and it provides that in the event of any conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The scope of this provision is not clear, however, and has been disputed. For example, does article 103 invalidate the entire inconsistent treaty or only void the specific provisions which are inconsistent with the UN Charter? In context, does article 103 invalidate the entire AU and ECOWAS treaties or merely void article 4(h) of the AU Act, articles 16 and 17 of the AUPSC, and articles 10(a)&(c) and 25 of the ECOWAS MCPMRPS Protocol? Are the provisions void *ab initio* or are they merely voidable?[401] States are bound to carry out the binding decisions of the UN but it is agreed that UN and state practice could change the obligations that the state originally

[401] Cha, 'Humanitarian Intervention Under the Charter', *Op. cit*, at 136.

assumed under the Charter. It is possible that new obligations emerge over time not caught by article 103. It is submitted herein that only the specific provisions that violate the Charter should be treated as invalid rather than the entire treaty. Where the obligations under the entire treaty conflict with the Charter, then the entire treaty is void *ab initio* but where it is only specific provisions that are inconsistent with the Charter, then only those specific provisions are void.

As put by *Cha*[402] 'it is understood that the provisions in a regional Charter could not, under any circumstances, contravene the UN Charter; if so, article 103 would make UN rights and obligations preeminent should they come into conflict with the provisions of a regional Charter'. The implication of the foregoing analysis is that the concept of sovereignty as espoused under the UN Charter remains so despite the provisions contained in the regional Charter. Article 2(4) remains the cornerstone principle on the protection of sovereignty and there is yet no positive international law legal framework that undermines the provisions of article 2(4). Sovereignty under the UN Charter can only be violated pursuant to the Charter framework with the UN Security Council leading the mission. Another pertinent observation regarding this issue is that the inconsistencies in the obligations of AU and ECOWAS states extend to both substantive and procedural matters. At the substantive level, the scope of the circumstances under which force may be used under the Charter has been substantially expanded by both the AU and ECOWAS frameworks. Under the AU and ECOWAS regimes, force can now be used by the AU and ECOWAS not only in accordance with article 51 and chapter VII of the UN Charter, but in other situations including in both intra- and inter-state conflicts as provided in their respective legal instruments.[403] ECOWAS even expands the legal and normative basis for the use of force within its member states to a new height by

[402] Cha, *ibid*, @ 136

[403] Allan J, 'The True Challenge to the United Nations', Op. cit, at 239. Under article 4(h), the AU can also use force where a situation constitutes a 'threat to legitimate order'.

introducing the novel right of pro-democratic intervention in its legal regime.[404] There is no doubt these provisions create obligations for member states which are inconsistent with the UN Charter provisions already highlighted above; but it has been forcefully argued that the AU and ECOWAS provisions derive from state consent, which falls outside the ambit of articles 2(4) and 53 and so is not open to the application of article 103.[405]

This is a novel and persuasive argument in favor of humanitarian intervention and ultimately against sovereignty. These provisions introduce far-reaching norms to the law on use of force and humanitarian intervention in particular and international law in general, such that even if the AU and ECOWAS accept the principle of subsidiarity and only intervene in their member states with UN Security Council authorization, the impact of these regional norms on general international law will be profound nonetheless. It will not be too much to expect that should the Charter be amended as part of a proposed UN reform agenda, these AU and ECOWAS norms would be some of the issues to be considered for incorporation into the Charter, taking into account current developments in international law.[406]

4.5 Achieving Normative Compatibility Between The UN Charter and AU And ECOWAS Charters on Sovereignty and Humanitarian Intervention

Given the arenas of normative ambiguities and/or conflicts identified and discussed above, the immediate task now has been to design a regime of compatibility between the two Organizations. In this regard, it is important to bear in mind the circumstances that led to the present situation in the first place. The increase in the number of intra-state conflicts in the post-Cold War world demanded more interventions than had hitherto been possible, and an effective response from the international community would have required a restructured UN

[404] See Article 25(b) of the ECOWAS MCPMRPS Protocol, *Op. cit*
[405] Kuwali, 'The End of Humanitarian Intervention', *Op. cit* at 46
[406] Allan J. *ibid*, at 248

and a shift in the paradigm of global governance, none of which was likely then or even now.[407] These failures of the UN have eroded the credibility and legitimacy of the organization, thereby bolstering the call for a higher degree of independence and positive roles by States and regional Organizations such as the African Union in the exercise of sovereignty at the regional level.[408] The position of the African Union regarding the proposed UN reform has been articulated in the *Ezulwini* Consensus document and subsequent events in Africa shows that the new legal regimes are not a mere inadvertence but through reflections of the envisaged future relationship between the AU and ECOWAS and the UN Security Council. A UN reform agenda to incorporate and accommodate the AU and ECOWAS legal instruments on sovereignty and intervention must be considered.

For instance, during the constitutional crises in the Gambia in 2017 following the disputed presidential election in which the incumbent President lost, the ECOWAS agreed to mobilize a military force to intervene militarily in the Gambia to force out President *Yaya Jammeh* if he refuses to step down. Just after the opposition leader Barrow who was then living in Senegal was sworn in as the new President of the *Gambia* in the *Senegalese* capital *Dakar*, the United Nations Security Council unanimously approved Resolution 2337[409] on the same day, which expressed support for ECOWAS efforts to negotiate the transition of the *Gambian* presidency, but requested the use of 'political means first' without endorsing military action.

Despite the lack of endorsement of military action by the UN Security Council, Senegalese armed forces entered the *Gambia* on the same day, along with some forces from *Ghana*, with air and sea support from the Air Force and Navy of Nigeria. *Gambia* was consequently

[407] Tiyana Maluwa, 'The OAU/African Union and International Law: Mapping New Boundaries or Revisiting Old Terrain?', (2004) 98 *American Society of International Law Proceedings,* March-3 April, p.232, at 236.
[408] Tiyana Maluwa, *ibid* @ 289.
[409]ECOWAS military intervention in the Gambia to Restore Democracy. Available on https://en.wikipedia.org/wiki/ECOWAS_military_intervention_in_the_Gambia. Accessed on the 17 August 2018

placed under a naval blockade and the siege forced the defeated President to step down. Thus, the development effectively ignored the UN Security Council rhetoric and moved in to halt the situation before it become a major humanitarian catastrophe. Africa has been a conflict-prone region and this led Africa to the pro-interventionist legal framework of the AU and ECOWAS through which they seek to obviate the UN structure which many developing countries feel has marginalized them. According to a legal scholar, these countries and organizations hope to bring about change in the international legal order by taking the initiative to expand the legal discourse and create new norms.[410] Given the changing pattern of global relations, regional organizations (not the least the AU and ECOWAS) have realized that major powers are disinclined to intervene abroad, least of all in Africa, as they become more and more consumed by their own domestic problems, thus, they will have to take up the challenge of intervening in their own regions. *Wippman* puts it succinctly thus:

> ECOWAS has concluded that humanitarian emergencies in member States invariably spill over into neighboring States and jeopardize regional security generally. ECOWAS has also concluded that it cannot rely on the UN to intervene effectively in such cases, and so it must be prepared to shoulder much of the burden itself.[411]

It was on the basis of this logic that ECOWAS agreed to enter into the Gambia in January,2017 in an operation code named 'Operation Restore Democracy'.[412] The problem of

[410] Tiyana Maluwa, ibid., 238
[411] David Wippman, 'Kosovo and the Limits of International Law', *Op cit* at 145
[412] The ECOWAS military intervention in the Gambia or the ECOWAS Mission in The Gambia (abbreviated ECOMIG) – code-named Operation Restore Democracy – was a (is) an ongoing military intervention in the Gambia by several West African countries. The intervention was launched to resolve a breakdown of internal order in the government of the Gambia that resulted from a dispute over the country's presidency. The dispute had led to a constitutional crisis in the country. The intervention began in January 2017, and in June 2017, the term of the ECOWAS military mission was extended by a year. Available on

how best to deal with such unilateral actions of humanitarian intervention whether by states, coalitions of the willing or regional organizations depends on how one views the situation and also the position the person has taken. There are those who supports the idea of a tolerable breaches approach[413] while some rely on the ex post factum ratification approach[414] and other condonation and condemnation approaches. Whatever approach is adopted, the failure of the Charter system to prevent the atrocities in *Rwanda, Liberia, Sierra Leone, Somalia* and *Darfur*, all in Africa, is perhaps a reason for arguing that the current system has been transformed by the consequences of these failures, leading to a system that now finds expression in the AU and ECOWAS legal regimes which gives supremacy to humanitarian intervention far above sovereignty. This according to *Kuwail*[415] is an important achievement for the AU, which translates to the legal capacity to bypass the UN Security Council deadlock and evolve an independent humanitarian intervention mechanism for Africa. *Kuwail*[416] has argued that there is little utility both for the object of humanitarian intervention and the Purposes and Principles of the UN, in the UN setting up international criminal tribunals to prosecute perpetrators of mass atrocity crimes, spending huge sums of money it claims not to have, when there was yet an opportunity to intervene and rescue the victims.

The major practical implications of the AU/ECOWAS, at least for now, is that Africa has several policy prescriptions from which to draw in the enforcement of human rights and prevention of atrocities through the legal framework they have laid down by which member

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https://en.wikipedia.org/wiki/ECOWAS_military_intervention_in_the_Gambia. Accessed on the 17 day August, 2018

[413].Tolerable breaches' as explained by Wippman here means 'an action contrary to formal treaty rules but desirable on humanitarian grounds and accepted, or even approved, by most States; an action that necessarily loosens somewhat the rules governing the use of force, but only modestly, given the unique circumstances and the purposes for which force was used'. See Wippman, 'Kosovo and the Limits of International Law', Op cit, at 135-6.

[414]Scholars Wippman who hold this view rely on several UN Security Council resolutions such as those that did not condemn but 'commended' the unilateral interventions of ECOWAS in Liberia S/RES/788/(1992), 19 November 1992, para. 1; and Sierra Leone S/RES/1270 (1999) 22 October 1999.

[415] Kuwali, 'The End of Humanitarian Intervention', *Op. cit*, at 45

[416] *Ibid*, 42

states ceded away part of their sovereignty in return for the collective protection of community citizens.[417] The scheme creates a primary responsibility to protect legal obligations for AU members and a role for the AU should members fail. With this arrangement, the tension between sovereignty and intervention would reduce as the former has effectively ceded part of its powers to member states to act on its behalf when the proscribed events occur.

[417] M. Banda, 'The Responsibility to Protect: Moving the Agenda Forward', (2007) United Nations Association in Canada, p. 21. Available at http://www.unac.org/en/library/ unresearch/2007r2p_banda_e.pdf. Accessed on 17 August 2018.

CHAPTER FIVE

STATE SOVEREIGNTY VERSUS HUMANITARIAN INTERVENTION: RECONCILING THE CONFLICT

5.1 Areas of Conflict Between State Sovereignty and Humanitarian Intervention

The doctrine of humanitarian intervention and its legitimacy in international law has long been a subject of controversy. The critical issue in any debate on humanitarian intervention is the need to harmonize intervention with the principle of sovereignty so as to avoid tension and conflict of interest. This work had earlier identified the root cause of the tension- total non existence of any legal framework for humanitarian intervention unlike sovereignty that is adequately protected. The second cause of conflict is the non existence of any enforceable mechanism for the enforcement of international humanitarian laws during armed conflict. This is because what is stated in the Geneva Convention is a mere rhetorical statement that the High Contracting Parties to the Geneva Conventions agreed to respect the provisions of the Convention and to refrain from taking any positive action that could lead to violation of the treaties.[418] The Geneva Convention did not establish any legal framework for contracting parties to employ in event of massive humanitarian crises but Article 26 of the Vienna Convention on the Law of Treaties urged member states to observe their international treaty obligation in good faith. Being a peremptory norm of customary international law, can state parties rely on Article 26 of the Vienna Convention on the law of Treaties as well as Common Article 1 to the Geneva Convention to justify intervention in order to halt the commission of grave atrocity crimes? The UN Charter is the only international legal

[418] Article 1 Common to the Geneva Conventions, 1949.

framework on the use and non-use of force and the authority to use force does not include humanitarian ground.

The question then is how to resolve tension or dilemma between sovereignty and intervention within the framework of the UN Charter. When a state actor is the one violating the provisions of international humanitarian law, how does the international community respond while still respecting the sovereignty of the target state, which in essence requires that a sovereign state be treated as an independent political unit, its territorial integrity be respected, and it be allowed to pursue its domestic affairs without external interference. These stipulations are essentially those regulating inter-state relations that have evolved since the peace of Westphalia and have been codified as core principles of international law.

5.1.1 Prohibition on Non Use of Force

The Security Council has the power and primary responsibility under the UN Charter for the maintenance of international peace and security.[419] However, the UN Charter forbids the UN from interfering in the internal affairs of its member nation. But the most important provision of the UN Charter on the non use of force against a member state is article 2(4) of the Charter. In international relations, forcible intervention in another state is prohibited under Article 2(4) of the United Nations Charter which states:

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

[419] See Article 24 of the UN Charter

This general prohibition on the non use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case*[420] and the Case Concerning Military and Paramilitary Activities In and Against *Nicaragua*[421] and is considered to be a rule of *jus cogens* – that is, a peremptory norm of international law from which no subject of international law may derogate. Therefore, the international legal framework on sovereignty protection has been identified as a customary international law. Under this Charter provision, sovereignty is firmly protected and there can be no external intervention except pursuant to the provisions of the Charter. Whereas Article 2(4) of the Charter provides for non-intervention or interference into the internal affairs of another state thus shielding sovereignty from external aggression, pro-intervention activist calls for intervention on the basis or article 39 of the Charter. The only exception to this general prohibition is clearly stated in the same Charter. The two exceptions[422] are the right of a state to use force in self-defence or collective self-defence under Article 51 of the Charter, and the right of the Security Council under Article 42 to authorize the use of force to maintain or restore international peace and security. Before doing so, the Security Council must first determine that there is a threat to peace and security. This is because article 39 of the UN Charter places that obligation on the part of the Security Council to take such action as is necessary to maintain or restore international peace and security. It is pursuant to this provision that the UN Security Council sometimes rely on to approve humanitarian intervention on the ground that it constitute a threat to international peace and security.[423] As a result, it has been submitted that acts of genocide as defined in the Genocide Convention may trigger an obligation by the UN Security Council to act to prevent

[420] *Corfu Channel* (United Kingdom v. Albania), International Court of Justice 1949, (I.C.J.) 4
[421] Military and Paramilitary Activities(Nicaragua v. United States), International Court of Justice, (Nicaragua v. United States), 1986 (I.C.J.) 14
[422] . See Murphy Sean, *Op.cit* for his discussion of possible exceptions with respect to rescue of foreign nationals and humanitarian aid drops.
[423] An example is resolution 688 in Iraq in 1991. The resolution relied on the cross boarder effect of the refugee flow to hold that it constitute a threat to regional security and thus requiring intervention.

or stop such actions.[424] However, Murphy is of the view that till date the notion of a 'duty to intervene' by the United Nations, regional organizations, or states does not appear or exist presently in international law.[425] It has been strongly argued that where crimes against humanity are being committed "and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community" to halt the acts of violence and protect human rights.[426] Unless any humanitarian crises is such that is considered a threat to international peace and security, the Security Council's alleged moral obligation to intervention in the territory of a sovereign state is a violation of positive international law. There is no statutory provision for humanitarian in international law but there is provision on sovereignty in the Charter. The absence of such provision for humanitarian intervention is the main source of conflict because any intervention into the territory of another is a violation of international law. Except of course, the intervention has been approved by the UN Security Council.

5.2 Towards a Normative Compatibility Between Sovereignty And Humanitarian Intervention

The issue of humanitarian intervention is raised whenever there is armed conflict anywhere and the resultant failure of the warring parties to respect the rules of engagement. The Geneva Convention governing the conduct of war. It is the failure of the state actors to ensure compliance with the laws of war that will trigger the issue of intervention. When intervention is raised, the state actor will readily come up with the defence of sovereignty arguing that as a

[424].Simma, Bruno, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10th edn, *The European Journal of International Law,* p.2.
[425] *Op.cit* p.295
[426] Annan, Kofi, 'We the Peoples': The Role of the United Nations in the 21st Century', Millennium Report of the Secretary-General of the United Nations. [Online] Available from http://www.un.org/millennium/sg/report/. Accessed on 20 November 2015.

sovereign state, it has exclusive jurisdiction within its territory. The said state is well protected under article 2(4) of the Charter and article 2(7) restrained the UN from interfering in the internal affairs of a member state. There is no such provision for humanitarian intervention. There is therefore a compelling need to balance these two competing ends. That prompted international humanitarian law experts and scholars to develop the concept of responsibility to protect, placing the duty to protect and respect the laws of war squarely at the door of the sovereign state. The state loses its sovereignty only when it is unable to halt the mass atrocity crimes or where the perpetrator is the state itself. Then the larger international community assumes the responsibility to protect the population from these crimes. The African Union's right to intervene is, by and large, on all fours with the notion of Responsibility to Protect. The confluence of both humanitarian streams is shifting the paradigm from sovereignty as a right to sovereignty as a responsibility. Both notions have now imposed an obligation to protect populations from mass atrocity crimes.

Thus, like the normative commitment of responsibility to protect, Article 4(h)[427] acknowledges that the State has the principal responsibility for protecting its citizens from avoidable catastrophe, but when they are unable or unwilling to do so, that responsibility must be borne by the wider community of States, in particular the African Union. This view conforms to Judge Alvarez's opinion in the *Corfu Channel*[428] case that sovereignty is no longer absolute but rather an institution which has to be exercised in accordance with international law. According to Stacy:

> National governments must discharge their duty of care towards their citizens, and the 'court' of international opinion

[427] African Union Constitutive Act, 2000
[428] ICJ Report, 1949, 43

> passes judgment. The international community acts as proxy for a state's citizens in judging its care for them. If the sovereign fails to treat its citizens, and by that government's own standards, the social contract between the ruler and the ruled collapses, an assessment of the government's failings becomes a tripartite negotiation between sovereign, citizens, and the international community.[429]

Today, sovereignty encompasses both the rights and responsibilities of States and underlies the rights and freedoms of peoples and individuals. With the idea of sovereignty as a responsibility follows ideas that other States could have a responsibility to react to the needs of populations suffering from their own States' failure to act responsibly. When the scenario painted above happens, the sovereignty right gives way to the rights of the international community or a coalition of the willing to enforce the human rights of the people. The principle of 'sovereignty as a responsibility' connotes that one of the most important functions of governments, and authorities in general, is to uphold the rights and dignity of community members.

According to Article 29(2) of the Universal Declaration on Human Rights, governments are entitled to impose only such limitations on rights 'as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. This provision implicitly endorses a trust concept of government under which all laws must secure 'due recognition' of the rights of citizens, must be for the benefit

[429] Stacy Helen; 'Humanitarian Intervention and Relational Sovereignty', (SJIR Reports, 2006) p.4, available on https://web.stanford.edu>group>sjir. Accessed on 18 August 2018.

of citizens, and must, moreover, be consistent with a democratic society.[430] The Security Council can, within the framework of Article 39 of the Charter, 'do away' with the international dimension in situations which involve grave human rights violations and embark on a collective action to protect human rights.

Thus it can be safely argued that there are provisions in the UN Charter which will support humanitarian intervention and it will still be in pursuance of the objective of the UN. The fact that there is no specific UN Charter provision authorizing humanitarian intervention does not mean that such exercise is unlawful. This is evident in other provisions of the Charter, such as the provisions[431] affirming that 'everyone has the right to life, liberty and the security of person, and the provision[432] that commits the UN to 'promote universal respect for, and observance of, human rights and fundamental freedoms' and the provisions[433] that pledges all members 'to take joint and separate action' toward this end. It is submitted that unilateral action taken by any member state or states to halt mass atrocities as captured under the 2005 World Summit Document may be justified under these provisions of the Charter, but whether the justification will stand is a different issue. The African Union initiative for unilateral humanitarian intervention though without the UN authorization can be justified under the above provisions which enjoined member states to protect human rights.

By incorporating the right of intervention in the African Union Act, the African Union States consented that sovereignty carries with it the responsibility of States to provide for the security and well-being of those residing on their territories. Notably, the preceding Article, 4(g) of the AU Act, establishes the principle of 'non interference by any Member State in the internal affairs of another. Although these provisions may initially appear contradictory, but

[430] See Stacy, *ibid*
[431] See Article 3 of the UN Charter
[432] See Article 55 of the Charter
[433] See Article 56 of the Charter

they are not but instead are complementary. They are complementary in the sense that while Article 4(g) warns against unilateral intervention, while 4(h) provides for a doctrine of non-indifference in the form of multilateral action based on a decision of the Assembly of Heads of State'. This is so because once the member states signs the Constitutive Act, it automatically cedes parts of its sovereignty to the Union only to be activated in event of the occurrence of any of the prohibited crimes within her territory. With the arrangement as shown by the AU Act, there is no tension between sovereignty and intervention as the concerning state has already given her consent by ratifying the Constitutive Act. This is normative compatibility.

5.3 From Humanitarian Intervention To Statutory Intervention In Africa

The provision of the right to intervene under the AU Constitutive Act is not only a radical departure from the traditional notions of the principle of non-interference and non-intervention in the territorial integrity of nation States but it is also in sharp contrast with the long-standing principle of state sovereignty. Through Article 4(h), the AU created a regional normative framework for sovereignty as a responsibility equal to Responsibility to Protect as embraced by the World Summit Outcome Document. The consensus endorsement of the Responsibility to Protect reoriented the debate on humanitarian intervention by focusing on the responsibilities of individual States and, if necessary, the UN and its Member States. The notion of responsibility to protect falls squarely within the objective of Article 4(h) of the AU Act which is intended to protect populations facing mass atrocity crimes.

Going by Article 4(h)[434] the contemporary view in Africa is the observation of the laws of war- the Geneva Convention and that of protection of human rights from mass atrocity

[434] African Union Constitutive Act, 2002.

crimes, rather than state sovereignty. This explains the endorsement of the statutory right to intervene in a Member State by the supranational body, the African Union. With this provision, the African Union is no longer talking about humanitarian intervention but have moved on to the era of statutory intervention with the consent of the host state. Given the prevalent mass atrocity crimes in Africa, Article 4(h) of the AU provides additional instruments to protect human rights and humanitarian laws on the continent. The African Union has by this introduced enforcement by consent in the form of the right to intervene in Article 4(h). Article 4(h) may be seen as a complement and a valuable contribution, not a substitute for the existing structures and instruments obtaining under the UN Charter. In this case, Article 4(h) offers a wider menu of legal options to respond to mass atrocity crimes which is self-evidently essential. However, financial and institutional incapacity stand in the way and that is the reason why the AU in their *Ezulwini*[435] Consensus recommended enforcement action by the Union with UN bearing the financial burden.

Article 4(h) gives the AU a strong legal basis for intervention in the face of mass atrocity crimes. This is statutory intervention, which removes the need to justify intervention on moral and ethical grounds. The ratification of the Constitutive Act signaled the end of 'humanitarian' intervention, at least, in Africa amongst the AU member states. The AU right to intervene cannot be viewed as a euphemism for humanitarian intervention but as a normative commitment of AU States to prevent mass atrocity crimes on the continent. By consenting to Article 4(h), AU States understood themselves to be granting a responsibility to the AU and the international community to intervene where a Member State is unable or unwilling to undertake to protect its population from mass atrocity crimes. In a quest to avoid a repeat of inaction in Rwanda in 1994, now the legal basis has been laid for the continent to

[435] The Report containing the consensus position of the African Union on the proposed UN reform.

move from a culture of paralysis to a culture of protection. This intervention regime ought to culminate into a culture of prevention and compliance. The conditions for intervention under Article 4(h) are mass atrocity crimes which are subject to universal jurisdiction both under the Rome Statute[436] and the Geneva Conventions and its Additional Protocols. The non-interference principle in the internal affairs of States embodied in Article 4(g) is qualified by Article 4(h), since mass atrocity crimes are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction.

This has ushered in the era of statutory intervention in Africa. In Africa, it is submitted that through the AU Constitutive Act, a normative compatibility has been achieved between intervention and sovereignty. We witnessed the erosion of sovereignty from its absolutism to a state of responsibility. Today the sovereign is now responsible for the protection of its people from the mass atrocity crime or what the Geneva Convention described as grave breaches. It is universally accepted that where a state is unable to protect its population from these crimes, them the responsibility falls on the international community. The redefinition of sovereignty to include a duty to respect human rights is widely reinforced in contemporary international law. Even if state sovereignty remains the basic norm of international law, a state cannot pretend absolute sovereignty again without demonstrating a duty to protect human rights. International law becomes more permissive regarding cross-border intervention to protect human rights.

[436] See Articles 6, 7 and 8

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 **CONCLUSION**

The values ‘respect for state sovereignty’ and ‘respect for human rights’ were accepted by the founding members of the United Nations Organization as a bedroom of International law in 1945 but it was the ‘respect for state sovereignty’ that was adequately protected by the UN Charter with positive enforcement mechanism provided, whereas ‘respect for human rights’ was left at the discretion of the State parties to observe. The co-existence of these two principles has not been easy. The uneasiness between these two concepts-sovereignty and humanitarian intervention and the resolution of the conflict if possible, is the main focus of this research work, hence the topic, resolving the conflict between state sovereignty and humanitarian intervention in international law. The development of human rights movement particularly after the world war II saw with the desire to curtail the boundaries of sovereignty to accommodate respect for human rights. This led to the re-conceptualization of sovereignty. The redefinition of sovereignty to include a duty to respect human rights is widely reinforced in contemporary international law. It is that redefinition of sovereignty to accommodate respect for human rights that engineered the conflict between sovereignty and humanitarian intervention which this research set out to resolve.

The dissertation reviewed literature on the topic. The study traced the history of the concepts of humanitarian intervention and state sovereignty from the medieval era to the present. In the end, the study observed that both concepts have changed tremendously from what it used to be when they were first conceived to what it is today. Sovereignty has been transformed from the traditional concept of being indentified with the sovereign to later state

centred and now as belonging to the people- now it is the people's sovereignty. In the past several reasons were advanced to justify intervention in the internal affairs of another state but following the formation of the United Nations in 1945, such interventions are now at the behest of the United Nations which must anchor any such intervention as an operation to stop or prevent threat to international peace and security. The dissertation x-rayed all the known humanitarian interventions recorded in history from the time of the Ottoman empire to the present day military interventions in Syria, Iraq, Yemen and so on.

The study reviewed the principles of state sovereignty and responsibility to protect which seeks to create a new norm in international law relaxing the doctrine of absolute sovereignty, thus shifting the argument from absolute sovereignty to a responsible sovereignty. This is to enable the international community to be able to intervention when necessary to save human populations suffering from grave humanitarian crises, particularly the four crimes as agreed in the 2005 World Summit Outcome Document and as enshrined in the Geneva Laws. The crimes include the crime of genocide, war crimes, crimes against humanity and ethnic cleansing. It is instructive to note that the 2005 Document is not a legal document imposing obligation on the member states but by adopting and agreeing to stop the commission of these crimes against her citizens, the member states are merely restating their commitment under the Rome Statute which define theses crimes under articles 6,7 & 8 except that of ethnic cleansings. Again, member states by Article 1 Common to the Geneva Conventions agree to respect the laws of war and to refrain from positively encouraging its violations. It is this lack of positive sanction against violations of human rights and rules of engagement during armed conflicts that necessitate the call for humanitarian intervention.

Also discussed are the core principles of the report of the International Commission on Intervention and State Sovereignty[437] and the long debate by the General Assembly in its effort to evolve the principle into a legal framework. The suspicion and indifference of member states of the UN has stalled the recognition of the principle as a binding document or one carrying a legal obligation. The report merely urged the international community not to remain indifferent to specific cases of mass humanitarian atrocities. Regrettably neither the ICISS report nor the subsequent UN reports including the Summit Outcome Document contained any explicit or implicit statement to support the legal recognition of the principle. There is also no statement to support a conclusion or belief that the Document strengthens the justification for unilateral action. As can be inferred from the General Assembly debates of July 2009, the majority of states are against the idea of unilateral (humanitarian) interventions, all insisting on a collective enforcement action pursuant to the UN Charter. The member states fear albeit rightly too, because there concern/suspicion that the concept of responsibility to protect might be abused to justify arbitrary conducts of individual states. It is because of this lack of consensus by the international community regarding humanitarian intervention that made the African Union to seek a regional framework to tackle such cases in deserving circumstances, in her resolve to force member states to respect the laws of war or international humanitarian war.

In chapter four, the dissertation identified ways of reconciling sovereignty and humanitarian intervention. The dissertation identified the African Union (Constitutive Act) 2000 as well as the ECOWAS Revised Treaty of 1993 as the target legislations. By incorporating the right of intervention in the African Union Act[438], the African Union consented that sovereignty carries with it the responsibility of States to provide for the

[437] Otherwise called ICISS Report
[438] Article 4(h) of the Act

security and well-being of those residing on their territories. Notably, the preceding Article, 4(f) and (g) of the AU Act, establishes the principle of 'non interference by any Member State in the internal affairs of another. Although these provisions may initially appear contradictory, but they are not but instead are complementary. They are complementary in the sense that while Article 4(g) warns against unilateral intervention, Article 4(h) provides for a doctrine of non-indifference in the form of multilateral action based on a decision of the Assembly of Heads of State. This has ushered in the era of statutory intervention in Africa. With statutory intervention, there is no more tension or conflict between sovereignty and humanitarian intervention, at least, on the African continent.

In Africa, it is submitted that through the AU Constitutive Act, a normative compatibility has been achieved between intervention and sovereignty. We witnessed the erosion of sovereignty from its absolutism to a state of responsibility. Today the sovereign is now responsible for the protection of its people from the mass atrocity crime or what the Geneva Convention described as grave breaches. It is universally accepted that where a state is unable to protect its population from these crimes, them the responsibility falls on the international community. The redefinition of sovereignty to include a duty to respect human rights is now widely reinforced in contemporary international law. Even though state sovereignty remains the basic norm of international law, that respect comes with a price because a state cannot pretend absolute sovereignty without demonstrating a duty to protect human rights. International law becomes more permissive regarding cross-border intervention to protect human rights. When it happens, the African Union has shown that it is not a violation of sovereignty.

In chapter 5, a thorough comparative analysis was done by deconstructing of Articles 2(4) of the UN Charter, article 4(h) of the African Union Constitutive Act, articles 16 and 17

of the AUPSC Protocol; and articles 10 and 25 of the ECOWAS protocol relating to Mechanism for Conflict Prevention, Management Resolution and Peace-Keeping and Security (otherwise called ECOWAS MCPMRPS), on sovereignty (for the UN Charter) and humanitarian intervention in Africa has been done. These provisions are all institutional framework for the enforcement of sovereignty and humanitarian intervention. Building on the analysis of the legal validity of the AU–ECOWAS regional legal regimes which provides statutory intervention, the chapter discovers that by the AU–ECOWAS regional military intervention regimes, African Union has adopted a theory of "regional responsibility to protect" for the implementation of Responsibility to Protect in Africa. We also observed a normative incompatibility between the AU/ECOWAS regional intervention regime and the UN Charter regarding the concept of sovereignty and humanitarian intervention. Sovereignty despite the development of the human rights movement has not lost it potency under the UN Charter because article 2(4) remains the contemporary binding legislation on the protection of sovereignty. The principles of non-intervention laid down in article 2(4) of the Charter has not been compromised. However, the same cannot be said of the African Union Constitutive Act which in article 3(b) and article 4(f) and (g) provides for the non-interference into the internal affairs of a member state including respect for her territorial integrity, but subsequently provides for the right of the Union to intervene in article 4(h).

These instruments are the first attempt by any regional organization to codify the right of humanitarian intervention otherwise refers to as statutory intervention, and in the case of ECOWAS, the first to create and codify a right of intervention to restore democracy in a regional treaty.[439] Yet, enforcement action taken by a regional organization, even if authorized by the UN Security Council, must be compatible with its own Charter and the UN

[439]. P. D. Williams, 'From Non-intervention to Non-indifference: The Origins and Development of the African Union's Security Culture', (2007) 106, (423) *African Affairs* 253-79, at 23.

Charter. For now, the credibility of the UN and its claim to primary responsibility to the maintenance of international peace and security depends on the ability of the international community 'consistently' to apply and impartially to implement the collective security mechanism it lays claim to across regions and nations - something it has obviously failed to do in the last sixty years.

As a way of resolving the normative ambiguities, some have called for the redistribution of authority between the UN Security Council and regional actors,[440] others have called for an expansion of the scope of authority of regional actors as long as they further the principles and purposes of the UN Charter.[441] However, these and other proposals like them try to resolve the normative ambiguity problem without paying significant attention to the systemic changes in the global constitutive process since 1945 and the impact they have on the theoretical foundations of unilateral actions of humanitarian interventions. But it is only through a careful deconstruction of the normative ambiguities that one can identify possible grounds for normative compatibility between unilateral regional intervention provisions like those of the AU/ECOWAS and the UN Charter. This chapter has comparatively deconstructed these provisions as a prelude to resolving the conflict between state sovereignty and humanitarian intervention in international law. It is submitted that from the foregoing comparative analysis, sovereignty has yielded to the concept of humanitarian intervention (otherwise now refers to statutory intervention) in Africa than under the UN Charter.

[440]. Z. Deen-Racsmany, 'A Redistribution of Authority between the UN and Regional Organisations in the Field of the Maintenance of Peace and Security', (2000) 13 *Leiden Journal of International Law*, 297, at 307
[441].C J Borgen, 'The Theory of Practice of Regional Organization Intervention in Civil Wars'(1993-4) *Journal of International Law and Policy, New York University*, p.797
at 831

6.2 **RECOMMENDATIONS.**

Having discussed extensively the research topic in the preceding chapters, it is time to proffer observations and recommendations in respect of the conflict between sovereignty and intervention. In the course of the research, it was discovered that there is a linkage between human rights violations and threats to international peace in the UN Security Council practice which was widely recognized by the international community, especially when the human rights violations acquires a cross boarder effect. It was also discovered that humanitarian intervention authorized by the Security Council did not create so much controversy and the power of the Security Council is not limited by the normal duty of the UN not to intervene in the domestic jurisdiction of member states. Thus, the authority of the Security Council under chapter VII of the Charter is also unimpaired to conduct or authorize humanitarian intervention in situations internal crisis produce humanitarian catastrophes with or without cross-border repercussions. It is as a result of these observations that the following recommendations will be proffered with a view of contributing to the resolution of the conflict.

6.2.1 Immediate UN Reform.

It was discovered in the cause of the research that where intervention is not authorized by the UN Security Council, its legality under international law is more controversial. Even where the UN Security Council fails to condemn same due to geopolitical interest and consideration, the legality of such intervention as was the case in Kosovo will remain for a long time. This is because the UN Charter prohibits all non-defensive use of force not authorized by the UN Security Council and hence unilateral humanitarian intervention has no legal grounds under the UN Charter. Simply put, there is no positive international legal framework for humanitarian intervention unlike its sovereignty counterpart which enjoys firm statutory

protection. The attempt by the AU/ECOWAS Charter to provide for right of humanitarian intervention with or without the approval of the UN Security Council conflicts with the UN Charter. Also the pre-existing customary law of unilateral humanitarian intervention did not survive or co-exist with the Charter's prohibition of non-defensive unilateral use of force.

Thus, there is no crystallized customary international law (*de lege lata*) in the area of unilateral humanitarian intervention. In sum, current international law, both under the UN Charter and customary international law, does not provide sufficient legal ground for unilateral humanitarian intervention. Unilateral humanitarian intervention, in extreme cases, may arguably be justified on moral and political grounds, but such kind of intervention has no legal basis under positive international law. The responsibility to protect which is pushing for humanitarian intervention by the UN or by a coalition of willing states is yet to gain unanimous legal acceptability. Apart from the draft of the World Summit Document of 2005 and the rhetoric's of the world powers adopting the paragraphs of the document, there has not been any legal framework to cement the principle of responsibility to protect as a working international law document.

Consequently, there is need for immediate UN reform to provide for legal mechanism for humanitarian intervention. Part of the reason for this tension between sovereignty and intervention being that there are mechanisms within the Charter for the protection of sovereignty and enforcement of peace and international security. Article 2(4) of the Charter unequivocally provides for principle of non-intervention in the internal affairs of a member state while article 2(7) provides that nothing shall authorize the UN to intervene in the internal affairs of member state except for the purposes of collective enforcement measures. Whereas sovereignty is firmly protected in international law, there are no equivalent provisions or mechanisms in the Charter for the protection of human rights or for

humanitarian intervention. What we have in all the Human Rights Conventions is a mere moral adjuration on member states to respect and protect human rights without corresponding panel sanction in event of violations. There is therefore need to reform the UN system including the provisions of the Charter to provide for humanitarian intervention with positive legislative sanctions provided for defaulters.

6.2.2 Redistribution of Authority Between the UN and Regional Organizations

As a way of resolving the normative ambiguities, there is urgent need for the redistribution of authority between the UN Security Council and regional actors as well as for the expansion of the scope of authority of regional actors as long as they further the principles and purposes of the UN Charter. Article 53 of the UN Charter provides that the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority but no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.[442] The reason which the African Union gave to justify their statutory right of intervention is the proximity of the regional organizations to the area of conflict since they are closer and could easily assemble intervention team in a short time. In doing so, the Africa Union is aware of the significant and systemic changes in the global constitutive process since 1945 and the impact they have on the theoretical foundations of unilateral actions of humanitarian interventions. The relationship between regional organizations and the UN has been one of subsidiarity with the UN prescribing orders to the regional bodies. This centraliized power system was opposed by many regional blocs during the San Francisco conference of 1945. The contemporary events today shows the potency of that opposition is still valid. In most cases, lack of any national

[442] Article 53(1) of the Charter

interest by the permanent members of the UN Security Council or the interest thereof has always stalled urgent positive action during humanitarian crisis.\

By way of observation, it will be recalled that when the Charter of the United Nations was debated and adopted in San Francisco in 1945, the overwhelming preoccupation of the 50 nations present was with conflict between states and the need to preserve the sovereignty of member nations. Human rights protection was not much on the front burner. The central task was to build a system of collective defence against the centuries old problem of states waging aggressive war: expanding their territory by force, expanding the reach of their own sovereign authority by destroying the sovereignty of others. Seventy three years later, it is possible to say that this central motivating dream of the UN founders has indeed been realized - at least in the sense that in not a single case since the end of World War II has a state's sovereignty been extinguished by force. There is therefore need to rethink the composition and the entire organization of the Union.

However, what has replaced the old problem is the emergency of conflicts and mass violence within states. This occupied far less of the attention of the UN's founding fathers seven decades ago, but has proved to be a far bigger and more intractable problem than inter states wars. More troubling is the re-emergence of the ugliest of all forms of inhuman behavior, ethnic cleansing and outright genocide. The nightmare that the world thought long behind it with the end of the Nazi holocaust, and finally buried with the end of the Cambodian genocide in the mid 1970s, had to be relived all over again in the 1990s with the series of horrors in the Balkans, and in Rwanda calls for measures to empower regional organizations to stand in for the UN in deserving circumstances.

6.2.3 State Responsibility for Violations of Human Rights

At that early stage, the UN founders were conscious of the catastrophic human rights violations of the preceding years especially knowing the experience of the Nazi genocide. The experience helped to generate a new momentum for the better protection by international law of individual human rights. At least a threshold of recognition was gained for human rights in the terms of the Charter itself, and standards were spelled out more comprehensively in the Universal Declaration of Human Rights and the subsequently negotiated Conventions on Civil and Political Rights, and on Economic, Social and Cultural Rights, not to mention the very specifically focused Genocide Convention. But at the formation of the UN, the world leaders did affirm their commitment to save the world from catastrophe caused by war to the effect that the UN is committed to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.[443] The continued debate leads only to the emerging solutions to this international problem – the need to provide for state responsibility for violations of human rights in terms of monetary compensation and international isolation.

6.2.4 Statutory Intervention

It is submitted that the much delayed UN reform should be implemented. A reform of the UN system to accommodate emerging norms and state practice becomes necessary in view of the incessant inter-state conflict which usually produce human rights violations and abuse. In the *Ezulwini* Consensus wherein the African Union stated their common position, the idea of

[443] See the Preamble of the UN Charter, 1945

regional humanitarian intervention was adopted by the African Union. That position represents a partial adoption of the responsibility to protect principle and a gradual movement towards statutory intervention. On the issue of collective security and use of force and the responsibility to protect, the African Union stated their position very clear in the *Ezulwini* Consensus. They want to be in charge for the authorization of the use of force in the African continent. That position will require an amendment of articles 24, 53 and chapter VII of the UN Charter generally.

The African Union from the above extract was seeking validity for their legal framework on intervention which has shifted from humanitarian intervention to statutory intervention. The AU seeks a greater autonomy for regional organizations. In the wisdom of the African Union, the regional bodies are closer to the conflict zone than the United Nations. A reform of the UN in the direction of allowing regional organization to take the lead in humanitarian intervention will allow for a new form of intervention-statutory intervention which is already applicable in Africa but without universal international acceptability.

6.2.5 A Reform of the Use of Veto System by the UN Security Council

A reform of the UN which reduces the influence of veto by the five permanent members of the UN Security Council will herald a new world order. Such reform will eventually agree with the new redefinition of sovereignty as responsibility and not control. Such reform should also empower the regional organization like the AU to take the lead in conflict control and prevention in their region but with the UN approval though the AU suggested that such approval can be obtained after the fact. The jurisprudence is to enable a quick decision making in urgent situation to avoid the paralysis of the UN Security Council stalemate usually caused by national and geopolitical interest of the permanent members. Such redistribution of authority and reduction of the effect of veto power will reduce the age long

dilemma between sovereignty and intervention because human rights protection has now acquired a legal status in international politics. Human security has now been placed far above state security and any dispute between sovereignty and humanitarian intervention will surely be resolved in favor of humanitarian intervention.

6.2.6 Adoption of the Responsibility to Protect as a Legal Framework.

It is submitted that the most substantial effort so far to identify the relevant principles, and build an international consensus around them to solve the problem of state sovereignty and humanitarian crises has been the work of the International Commission on Intervention and State Sovereignty (ICISS), which work has since formed the basis of the debate regarding humanitarian intervention. It is submitted that the adoption of the principles encapsulated there as a universal legal framework will help defuse the tension between sovereignty and humanitarian intervention, the only problem being how to achieve international consensus. The report of the Commission in our observation made four main contributions to the international policy debate which we hereby adopt as part of our recommendation towards resolving the lingering conflict between sovereignty and intervention.

The first, and perhaps ultimately the politically most useful, was to invent a new way of talking about the whole issue of humanitarian intervention. The report which has since gained international recognition now places the responsibility to protect on states and it is only when states are unable to protect its own people from mass human rights violations that eternal bodies are called in. It is therefore part of the recommendation that the international community adopts the principles of the responsibility to protect as a way of resolving the age long dilemma between sovereignty and intervention.

The second contribution of the principle, perhaps most conceptually significant was to come up with a new implication of sovereignty. It is now argued that the essence of

sovereignty should now be seen not as control but as responsibility. The implication being that the international community is mandated to intervene to halt mass scale human rights violations when state actors are unable to do so.

The starting point is that an individual state has the primary responsibility to protect the individuals within it. But it did not end there. It continued that where the state fails in that responsibility, a secondary responsibility falls on the international community acting through the UN apparatus.

This is a radical change to the westphalian concept of sovereignty. It is submitted that the international community should as a matter of urgency reach a consensus on this new language of sovereignty. The key point, and it is one very respectful of the concern about protecting the concept of sovereignty that one hears about so much in this part of the world - is that the responsibility to protect lies on both the state and on the international community as a whole.

The third contribution of the principle which is recommended to the international community as part of the solutions to solving the crisis between sovereignty and intervention was that the 'responsibility to protect' was about much more than intervention, and in particular military intervention. It extends to a whole continuum of obligations which includes:

(a) The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk. Here the principle is urging the international community to adopt a preventive approach to solving human security crises instead of waiting until the situation gets out of control before thinking humanitarian intervention. At this stage, non-coercive measures like economic sanctions, political isolation may help to deter the sovereignty state to halt the mass violations where the state actor is the culprit.

(b) The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

(c) The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert. Of these three dimensions to the responsibility to protect, the report of the Commission was very clear and its view that prevention was the single most important aspect of the report. The report spent a lot of time spelling out preventive strategies, both long term and short term – political and diplomatic strategies, legal and constitutional strategies, economic development strategies, and military strategies (like security sector reform) falling short of the actual use of force.

It is equally submitted that, as a matter of principle, the exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied. But that said, the question of military action remains the central one in the debate. Whatever else it encompasses, the responsibility to protect implies above all else a responsibility to react - where necessary coercively, and in extreme cases with military coercion - to situations of compelling need for human protection.

So the fourth contribution of the principle of responsibility to protect was to come up with some guidelines for when military action is appropriate, setting up criteria of when to apply military force and the conditions that must be fulfilled. The adoption of the guidelines regarding any military action is to help reduce abuse of smaller states by powerful nations. Is the harm threatened sufficiently clear and serious to justify going to war? The report

deliberately set the bar for military intervention high, and tight, excluding many kinds of unconscionable behaviour (imprisonment and torture of political opponents, overthrow of a democratically elected government) that would certainly other forms of coercive response like targeted sanctions. However, in West Africa, ECOWAS has included overthrow of elected Government as one of the reasons to trigger military intervention in the affected state.

The next important question is what is the primary purpose of the proposed military action? Is it to halt or avert the threat of mass human rights violations in question, whatever other motives may be in play? If it is not meant to halt or avert humanitarian crises, then it should not be undertaken. The next most important question is whether the international community has in its wisdom tried every non-military option for the prevention or peaceful resolution of the crisis, with reasonable grounds for believing lesser measures will not succeed? It is when the answer to the above is in the affirmative that military intervention should be employed.

Proportional Means. The next question is to determine whether the scale, duration and intensity of the planned military action the minimum necessary to secure the defined human protection objective? If yes, the action will proceed. These are safeguards to ensure that the responsibility to protect is not abuse. Thereafter comes the question of reasonable Prospects. The interveners must ask and answer this question in the affirmative and that is whether there is a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? This is the reason why there can never be any humanitarian intervention against any of the five permanent members of the UN Security Council.

Then the question of right authority must be resolved. The last question of who is the right authority to authorize military is a crucial one in international law. This was the hardest issue

for ICISS commission to wrestle with – and has continued to be regarding the question of who authorizes humanitarian intervention. The experience with the AU/ECOWAS legal regimes regarding intervention has changed the debate on this topic. The argument is compelling that, when it comes to authorizing any kind of military intervention, immediate self-defence apart, the United Nations, and in particular the Security Council, should be the first port of call. There is and can be no better answer to the question of who decides whether the criteria are satisfied. But the difficult question – starkly raised by the events in Rwanda, and in Darfur where the UN security Council refused to act – is whether it should be the last port of call, in the event that the Security Council cannot or will not make a decision, or makes what seems to be the wrong decision. What if the Security Council fails to discharge its own responsibility to protect in a conscience-shocking situation crying out for action? A real question arises as to which of two evils is the worse: the damage to international order if the Security Council is bypassed, or in the damage to that order if human beings are slaughtered while the Security Council stands by. The debate here is not settled but an adoption of the AU model will help a great. That is pretty much what happened with the U.S. and NATO intervention in Kosovo, and the UN cannot afford to drop the ball too many times on that scale. This is where the AU/ECOWAS legal framework on intervention disregarding the UN Security Council architecture gained momentum. Africa Union has sine adopted the principles of responsibility to protect at least, in Africa outside the Charter of the UN system.

6.2.7 Redefinition of State's national interest.

It is important to observe here that the traditional notions of sovereignty alone are not the only obstacle to effective action in humanitarian crises. The world has changed in profound ways since the end of the cold war, but the conceptions of national interest have not followed suit. This therefore will call for a new broader definition of national interest, which would

induce states to find greater unity in the pursuit of common goals and values. The national interest of many state usually determine their quest for intervention. The United States in 2003 announced that the pre-emptive invasion of Iraq in order to locate and remove Weapons of Mass Destruction (WMD) was to protect American national security, whereas in truth the interest was to remove Saddam Hussein and install an American puppet who would guarantee the flow of Iraqi oil to the West as well as to maintain a geostrategic position in the middle east. Subsequent events in Iraq especially after the fall of Saddam Hussein showed that it was never in the interest of international community to oust Saddam Hussein from power. That intervention was not in the interest of the international community as demonstrated by lack of approval by the UN Security Council. No weapons of mass destruction was ever found in Iraq till date.

The emergence of the so called Islamic State and the rising profile of Iran and its Shia militias as a major player in the Middle East today are all a painful consequences of the demise of Saddam Hussein. Thus, humanitarian intervention was used as a smoke screen to cover the national interest of America which was to expand their base in the Middle East.

6.2.8 A Call for the UN Security Council to Lead in UN Approved Humanitarian Intervention

In cases where forceful intervention does become necessary, the Security Council, the body charged with authorizing the use of force under international law must be able to rise to the challenge and lead the intervention so that it will be conducted squarely within the framework of the resolution approving the intervention. The choice must not be for the UN Security Council to approve the intervention and then urge member states to use any means necessary to protect human rights as was done in Libya under resolution 1973. The situation made it possible for NATO to unilaterally modify the text of the resolution and pursued regime

change instead of protecting civilians which was approved in the text of the Resolution. It is submitted that in such situations, the UN should have been able to find common ground in upholding the principles of the UN Charter, and acting in defence of our common humanity. The UN is yet to set up its military wing in accordance with article 43 of the Charter mainly due to disagreement amongst the permanent members. For more than 75 years, the United Nations has functioned without the benefit of chapter VII, article 43 commits all United Nations members to make available to the security council, on its call, armed forces, assistance, facilities including right of passage necessary for the purposes of the United Nations. This is why the UN usually relies on organizations like NATO to help. A general support for UN authorized interventions is also suggested by the most recent developments represented by the 2011 intervention in Libya[444] and the 2013 military operations in Mali.[445] These interventions ought to be spearheaded by the UN Military force to avoid abuse of process.

[444]United Nations Resolution, No.1973, 2011 which authorized the enforcement of no fly zone over the Libyan air space to stop the Libyan military air bombardment of the people of Benghazi who were protesting against the regime of Ghadafi.

[445] The United Nations Resolution, No. 2071, 2012 which authorized the use of force by France to help the Malian army to repel the advance of the Tuareg rebels who had seized sizeable parts of Northern Mali and were advancing towards the capital Bamako.

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