CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

> 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.[1]

One of the basic objectives of the United Nations is to promote and encourage respect for human rights and fundamental freedoms.[2] In the same token, the United Nations (UN) Charter prohibits intervention in matters which are within the exclusive domestic jurisdiction of any state and stipulates to the effect 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.[3] Accordingly, the threat or use of force against the territorial integrity and political independence of any state is prohibited in international law. The UN Charter in its Article 2(4) provides that: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'

International human rights law exists in tension between the opposing tendencies of state centered guarantees of sovereign equality and non-intervention and the individual-centered commitment to human rights.[4] Many states have agreed by their own acceptance of international treaties and conventions prohibiting unnecessary suffering and safeguarding human rights to international scrutiny of certain aspects of the treatment of their citizens within the domestic realm of such individual state. A greater challenge in reality emerges therefore when these binding norms are infringed upon by states.[5] The question is how can the United Nations harmonize its mission of promoting human rights

---

[1] K Annan, *We the Peoples: The Role of the United Nations* in the 21st Century(Millennium Report of the Secretary General 2000) p.48 @ available at www. Un.org/millennium/sg/report. Accessed on 25/02/15.

[2] E Ruddick, 'The Continuing Constraint of Sovereignty: International Law, International Protection and Internally Displaced' (1997) Boston University Law Review, 429.

[3] United Nations Charter, 1945 Art. 2(7) .

[4] *E Ruddick, Op cit p.430*.

[5] *Ibid.*

with its commitment to state sovereignty? This global concern was aptly expressed by the United State President Barrack Obama thus:

> Different nations will not agree on the need for action in every instance, and the principle of sovereignty is at the centre of our international order. But sovereignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye… should we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica?[6]

The evolving legitimacy of humanitarian standards during the 1990s in the aftermath of the Cold war period established a paradigm shift inclined towards humanitarian intervention discourse within the framework of the United Nations Security Council.[7]

The principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states.[8]The application of the doctrine of humanitarian intervention apparently contradicts the doctrine of state sovereignty. However, it is becoming evident that the right of states to their sovereignty is in constant conflict with the protection of human rights that has gained ascendancy in the past two decades.[9]

Thus, it has been said that the palpable post-cold war shift in the matrix from state-centrism to human security has tended to alter the contemporary compact between the state and its citizens with the former now having a far greater responsibility to protect.[10]It is worthy of note that even those states that emerged from decolonization accepted limitations on their sovereign inviolability and Westphalia fundamentalism.[11]

There are multiple circumstances in the past of horrendous human rights infringements including large scale massacre of civilians occurring within the confines of a sovereign state.For example gross violations of human rights in Somalia, Haiti,

---

[6] Speech to the United Nations General Assembly in New York, 2013 DAILY Comp. PRES. DOC. 655, at 8 (Sept 24, 2013).

[7] A. Roberts 'UN and Humanitarian Intervention' in J Weish (ed) *Humanitarian Intervention and International Relations*, (Oxford: Oxford University Press, 2004) p. 73.

[8] M. Shaw, *International Law*(6th edn, Cambridge: University Press, 2008) p.1039.

[9]Ibid, p.1046.

[10] J Boutwell, 'Intervention, Sovereignty and International Security – Report of Pugwash Group Meeting held at Venice, December 9-12,1999.

[11] J Pattison, *Humanitarian Intervention and the Responsibility to Protect*(Oxford: Oxford University Press, 2000).

Rwanda, East Timor and Kosovo.[12]The prevalent of these atrocities that shocked the conscience of mankind boosted the clarion call for military action motivated by humanitarian considerations apparently in concurrence with the notion of humanitarian intervention as opposed to in humanitarian non-intervention.

In the context of this ideological and political uncertainty, intervention in the domestic matters of sovereign states seemed to take the centre stage in the international arena. The United Nations authorization of intervention in Northern Iraq with the mandate of the UN Security Council pursuant to Resolution 688 [13] has raised the awareness level of the international community to humanitarian concerns globally. Thus, a discourse on humanitarian intervention necessarily begins with basic issues about intervention and the influence of international law in regulating Charter framework.

Interestingly, the North Atlantic Treaty Organization (NATO) intervention in Kosovo has brought about a surge of views in legal literature heralding divergent positions towards the controversial subject of humanitarian intervention. Kosovo has come to be regarded as a watershed drawing a dichotomy between a former "Hegelian', state-centred system of international relations and an actual 'Kantian' model which is far more community oriented.[14]Accordingly it has been pointed out that the protection of fundamental human rights has been assigned such an overwhelming importance that state sovereignty should no more stand in the way in order to prevent gross violations of these rights.[15]These emerging norms of human rights are far-reaching in influencing the decision making process of the United Nations Security Council relative to permissible incursions into State Sovereignty on humanitarian grounds.

Further to this, the evolution of the responsibility to protect appears to bridge the gap between the two polarizing principles of humanitarian intervention and state sovereignty. The responsibility to protect doctrine in its scope and content re-conceptualizes sovereignty of state to include minimal commitment to human rights

[12]Humanitarian intervention in Somalia (1992-1995), Haiti (1994), Rwanda (1994), East Timor (1999) and Kosovo (1999).

[13] The United Nations Security Council Resolution 688 is generally described as the precursor to Humanitarian Intervention in International Law.

[14] P Hilpod, 'Humanitarian Intervention: Is there a Need for Legal Reappraisal?' (2001) vol. 12 No. 3 *EuropeanJournal of International Law*, 437.

[15]*Ibid.*

protection. The United Nations General Assembly Declaration of 2005 has not only endorsed this transformation, but venture to posit that when states fail to protect its vulnerable population under the scourge of gross human rights violations, the international community has the mandate to protect by reacting, preventing and rebuilding. [16] However, critics are quick to add that the doctrine of humanitarian intervention which finds expression in the concept of responsibility to protect is one of the most controversial concept in global politics in that it contradicts directly with the established principle of state sovereignty.

There were instances of humanitarian intervention prior to the creation of the United Nations.[17] However, in the aftermath of the Persian Gulf War, the practice of military intervention on humanitarian considerations gained momentum with the United Nations Security Council passing Resolution 688 on Iraqi Kurdistan and Resolution 794 on Somalia to halt large scale human rights violations.[18]

The development of the conception of international human rights identified substantive considerations that espouse the legitimacy of humanitarian intervention. Thus, it has been argued that a failure by the United Nations Security Council to authorize humanitarian intervention in certain instances may be tantamount to an international illegality and that in such instances, intervention might not only be legitimate but assume a modicum of international legality.[19]

The United Nations Charter encapsulates clearly the unconditional prohibition of intervention in the domestic matters of states for objectives other than threat to international peace and security. However this sacred principle of non-intervention has succumbed to rising pressure to intervene from three categorical perspectives, that is, the increasing prominence given to the implementation of fundamental standards of international human rights, the multi-dimensional erosion of sovereignty as the basis for

[16] See United Nations General Assembly, 2005 World Summit Outcome, 24 October, 2005 (A/RES/60/11)
[17] M Shaw, *op cit*, p.1045.
[18] Resolution 688 of April 5, 1991 by the UNSC was the pioneer authorization of military intervention by the UN on humanitarian ground. Resolution 794 followed on December 3, 1992.
[19] K Annan, in *Larger Freedom: Towards Development, Security and Human Rights for All* (2005) Report of the Secretary General, A/59/2005 available at URL http://www.un.org/largerfreedom/contents.htm accessed on 4th August, 2015.

ordering the relations between state and society and the media-induced awareness of humanitarian catastrophe. [20]

This research argues that egregious violations of human rights cannot be shielded by appeals to the preserved sanctity of state sovereignty. Similarly, state sovereignty cannot be breached without adequate legal resort to the UN Charter and its collective security enforcement mechanisms. The dilemma inherent in these two core norms of international law came to a head within the context of the NATO intervention in Kosovo. Consequent upon the humanitarian crises in Kosovo involving the Serbs and Kosovar Albanians, the United Nations Security Council passed Resolution 1199 condemning the gross and large scale human rights violations but did not authorize military intervention to halt the egregious violations of human rights occurring in Kosovo. However, NATO on its own initiative undertook military intervention without the authorization of the UNSC. NATO argued that its decision to intervene in Kosovo was founded on the UN Resolution albeit without express authorization to intervene and driven by the urgent need to halt the gross and systematic human rights violations that had assumed alarming proportion. [21] This apparent paradox is elucidated within the confines of the NATO military campaign in Kosovo as the dichotomy between legitimacy and legality of humanitarian intervention.

The NATO intervention in Kosovo for many constituted a paradigmatic situation of humanitarian interventions although it depicted the limitations of humanitarian intervention that have been on the increase following the post cold war era. [22] Even though the protection of human rights has gained ascendancy in the aftermath of the cold war rivalry, it is noteworthy that international law prohibited every non-defensive use of force by states inclusive of those activated by humanitarian considerations, except they were expressly authorized in advance by the UN Security Council. [23]Thus, the legality of humanitarian intervention can be viewed from two perspectives.

Firstly, where the gross human rights violations occur within the sovereign domain of individual states and secondly where gross and systematic violations of human

[20] *Ibid.*
[21] See Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press. 2000) p. 65.
[22] R Falk, 'Legality to Legitimacy' (2004) vol. 26,*Harvard Intervention Review*, 852.
[23] *M Shaw, op cit, p.1045.*

rights constitute a threat to international peace and security.[24]On the ambit of the second perspective, the UN Security Council on its mandate of collective security mechanism may authorize a unilateral or multilateral use of military force to halt the occurrence of such gross and systematic human rights violations.[25] Where humanitarian intervention is undertaken by the express authorization of the UN Security Council, it amounts to a permissible incursion into the state sovereignty. Essentially, States have exclusive control over their internal affairs subject to their international obligations which include *interalia* the protection of human rights.[26]Consequently, where these human rights are breached, the state is obliged to halt such violations. However, in some circumstances, individual state is unable or unwilling to halt these gruesome atrocities of gross and systematic human rights violations. Where such situation occur, the international community can intervene under the auspicious of the United Nations particularly if the systematic violations constitute a threat to international peace and security as classified by the United Nations Security Council.[27]

Understandably, the international community holds the threshold of prevailing large scale infringement of human rights culminating in humanitarian emergency on a pedestal that may be considered not only a crisis but also a catastrophe.[28] However, the human rights violations in context must be gross, systematic, sustained, large scale and so horrendous that they constitute a shock to the conscience of mankind and a threat to international and regional stability.[29]Thus, genocide, crimes against humanity and war crimes are instances of the category and scope of abuses which attain the pedestal capable of attracting the use of force in international law.[30]

It was this palpable dichotomy inherent in the two competing core norms of international law, to wit: protection of state sovereignty and protection of human rights that prompted Kofi Annan to ask, 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a

[24]*A* Roberts*, op cit, p.73.*
[25] O Schacter, 'The Right of States to Use Force' (1984) 82 MLR 1620.
[26]*Ibid* @ 1625.
[27]K Annan, *Ioccit*, p.59.
[28]M Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004) p.69.
[29]P Jessup, *A Modern Law of Nations,* available at http://www.ejil.org.journal/vol.10/com.html, p.17 Accessed 4th August, 2015.
[30]*Ibid.*

Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?[31] It is in clear response to this clarion call that the Canadian Government established the International Commission on Intervention and State Sovereignty (ICISS) in a bid to bridge the gap between the dictates of humanitarian intervention and state sovereignty.[32]

The publication of the ICISS Report heralded the evolution of the concept of responsibility to protect. Thus, at the 2005 World Summit, 190 states generated an agreement stipulating among other things, that every state has a responsibility to protect its nationals and to prevent genocide, war crimes, ethnic cleansing and crimes against humanity.[33] According to O' Donnell, 'Should a state fail to uphold this mandate, the international community has the responsibility to use appropriate diplomatic and peaceful means to protect the civilian population.In the event that such means are inadequate, the Security Council should be prepared to take timely and decisive action in accordance with Chapter VII of the UN Charter.'[34]

The evolving norm of international law anchored on the doctrine of responsibility to protect as a measure and procedure for consensus between preserving the sacred principle of state sovereignty and application of humanitarian intervention was affirmed by the UN Security Council in 2006 and subsequently reaffirmed by the UN General Assembly in 2009.[35] It has been said that the current United Nations Secretary-General, Ban Ki-Moon has endorsed the concept of responsibility to protect and has published three reports on its standing and application captured on the strength of three pillars that are non – sequential and of equivalent significance.[36]

The first ambit of the three pillars stipulates the responsibility of individual state to protect its nationals anchored on the fundamental principle of state sovereignty. The second ambit of the pillar stipulates the responsibility of the international community to

[31]K Annan, *Ioc cit.*
[32]See Ottawa Round Table Consultation of the ICISS 15 January 2001 Rapporteur's Report available at http://web.gc.cung.edu/icissresearch/ottawa/rapporteursreport.htm. Accessed on 15 August, 2015.
[33]See International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001) available at http://www.iciss.ca/pdf/commissionreport.pdf. Accessed 8 June 2015.
[34] C O' Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) 24 *Duke Journal ofComparative and International Law*, 562.
[35]*Ibid.*
[36]*Ibid.*

assist individual state to comply with its commitment under the first pillar. The third pillar relates to the intervention by the international community where a state is unwilling to protect its citizen from widespread and systematic human rights violations.[37]Consequently, individual states may not undertake humanitarian intervention, where human rights violations in one state are not a threat to any other state.

However, human rights violations that results into international migration by refugees such as the relative examples of Iraq and Libya manifestly impacts on other states and the international order, humanitarian intervention must be undertaken to halt the humanitarian catastrophe untainted by other motivations.[38] Pundits have however argued that in reality, it is difficult to undertake humanitarian intervention solely on the basis of humanitarian consideration without other ulterior motives and objectives.[39]
Given that Article 2(4) emphasizes peace over justice any intervention undertaken with pure justice goal would be outlawed. A more realistic view however, would permit that an individual state has many motives for acting and would give weight to the relation between human rights violations and the threat to stability of states due to human rights violations with international implications. However, like other challenges to the charter paradigm, selective humanitarian intervention may preserve state sovereignty that is required if the doctrine of state sovereignty is to sustain its pride of place in the global politics and if the UN Charter objectives of peace and security are to be attained and maintained.[40]

Subsequent developments and trends in international law points to the direction that concerted efforts are mounted to attain creating the opportunities for humanitarian intervention while preserving the doctrine of non-intervention within the framework of the UN Charter. The World Summit Outcome Document and the ICISS Report which was recently given credence to by the current UN Secretary-General, have assigned the exclusive rights to authorize intervention pursuant to the tenets of the responsibility to

[37]M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, New York: Basic Books, 2006) p.107.
[38]M Walzer, *op cit*, p.69.
[39]A Oxford, *Reading Humanitarian Intervention: Human Rights and use of force in International Law* (Cambridge: Cambridge University Press, 2003; further reading see also A Orford, 'Muscular Humanitarism: Reading the Narratives of the New Interventionism' (1999) vol. 10, *EuropeanJournal of International Law*, 679-711.
[40]Levitin, 'The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention' (1986) 27 *Harvard International law Journal* 612.

protect to the UN Security Council.[41]The UN Charter, therefore, provides a veritable platform for evaluating the implication of humanitarian intervention, particularly forceful intervention driven by military force or the threat of force if resistance is encountered.[42]

In this research, instances of forceful humanitarian intervention will be evaluated to provide the grounds for arriving at the conclusions about the controlling and authoritative nature of the UN Charter and the consequences for the doctrine and practice of state sovereignty.[43]

1.2 **Statement of Problem**

The fundamental challenge in any discourse relative to humanitarian intervention is the need to harmonize intervention with the principle of state sovereignty which essentially demands that a sovereign state be considered as an independent entity, its territorial integrity be respected and it be permitted absolute control of its internal matters devoid of external influence.[44]This, in essence underlines the principle governing inter-state relations that have evolved in the aftermath of the Treaty of Westphalia and thereafter encapsulated as positive substantive principles of international law incorporated in the UN Charter.[45]

The traditional Westphalia concept of sovereignty in the face of emerging international standards has fallen short of ensuring direction for humanitarian intervention and the United Nations Charter in particular seems to operate double standards in that in one breath it affirms the protection of human rights and in another breath re-affirms the protection of state sovereignty.[46]

Perhaps, it is in respect of the evolving international norm that Kofi Annan declared thus; 'it is not the deficiencies of the Charter which have brought us to this juncture, but our difficulties in applying its principle to a new era, an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples

[41]It seems the Charter's meaning is being interpreted away from an exclusive focus on state sovereignty towards an emphasis on balancing sovereignty with human rights, such as enunciated in the UN Charter, Article 55
[42]M Walzer, *Loc cit.*
[43] It is important to emphasize here that there is no clear cut provision under the Charter regime that articulates the application of humanitarian intervention.
[44] J Pattison, '*Humanitarian Intervention and the Responsibility to Protect*(Oxford: Oxford University Press, 2010)
[45]*Ibid.*
[46] J Tanguy, 'Redefining Sovereignty and Intervention' (2003) R2P Book Review, 14.

everywhere to attain their fundamental freedom.[47]Consequently, one is left with a sense that the effort at codifying emerging international standards will inevitably remain hostage to the controversial problems of authority and political will, the very issue that hampered the response to humanitarian crises in Rwanda, Bosnia, Kosovo and Chechnya.[48]The basic problem arising from the application of the tenets of humanitarian intervention is who has the authority to initiate and legitimate interventions?

Again how do we develop the political will for the protection of human rights inspite of the narrowly prescribed notions of national and collective interest?[49]

The dilemma of humanitarian intervention appears to revolve around whether the principles of state sovereignty are breached when intervention is driven by the goal to stop violations of human rights within a sovereign entity.[50]Thus, where a gross and systematic violation of fundamental human rights is perpetrated by the authorities of one state, can other states intervene forcefully to curb the grave breaches of human rights.

Since the NATO's military intervention in Kosovo in 1999 on the basis of the large scale human rights violation, the issue of what is generally regarded as humanitarian intervention has emerged as one of the most controversial subject in the international arena generating a very fierce debate as to the precise extent of its application.[51] On one hand there were those who contended vigorously in support of thee right to intervene on humanitarian reasons and on the contrary there were arguments in support of the primacy of state sovereignty already preserved by the UN Charter identified as a complete impediment to forceful intervention.[52]

Therefore, faced with the challenge presented by the NATO intervention in 1999 without the authorization of the UN Security Council, humanitarian intervention has been classified as unavoidable because diplomatic channels had been exhausted and the belligerents were avowed to continue with the mindless and senseless killings that

[47] K Annan, 'Two Concepts of Sovereignty' The Economist 18th September, 1999 available online from http://www.un.org/overview/SG/koacon.htm.

[48] J Tanguy *Loccit.*

[49] J Mayyall, 'The New Interventionism 1991-1994, United Nations Experience in Cambodia, Former Yugoslavia and Somalia (Cambridge 1996) pp.6-9.

[50] W Koji (ed), *Humanitarian Intervention: The Evolving Asian Debate* (Tokyo: Japan Centre for International Exchange, 2003) p.11.

[51] B Kouchner, 'Establish a Right to Intervene Against War Oppression' (1999) October 18, 1999, p.7.

[52] M De Sousa, 'Humanitarian Intervention and the Responsibility to Protect: Bridging the Moral/Legal Divides' (2010) UCLJuris Rev 51.

threatened to inflict humanitarian catastrophe on the civilian population, hence it was described as legitimate but not legal.[53]The challenge arising from the application of humanitarian intervention that contradicts non-intervention principle guaranteed by the UN Charter is to strike balance between legality and legitimacy question of intervention on humanitarian ground.[54] Valid as this may appear, critics have argued whether intervention would be permitted in the sovereign domain of a major power if its government grossly violated human rights or intervention contemplated in the territory of a permanent member of the UN to halt humanitarian emergencies?[55]This would be answered in the negative as it is a reflection of the reality in which the powerful are doing what suit their interests and the weak having to concede to such decisions.[56]

Humanitarian Intervention presents itself as a controversial doctrine of international law since it breaches the basic principle of state sovereignty which is the foundation of international law. It is this seeming contradiction with the tenets ofnon-intervention that intervention on humanitarian considerations requires strong justification and precise legal backing.[57]

However, it is the submitted that where the sanctity of state sovereignty is preserved over and above the protection of known rights, then there seem to be something absolutely baffling with a legal regime that condones the large scale massacre within the domain of individual state's territory.[58] Therefore, concerted efforts and mechanisms must be developed to create opportunities for humanitarian intervention to be undertaken while ensuring the protection of state sovereignty. As earlier mentioned, the fundamental problem of humanitarian intervention is characterized by its palpable violation of state sovereignty doctrine and the ultimate question is essentially which of the two principles gains primacy over the other when they are in conflict.[59]The evolution and development of the concept of responsibility to protect appears to present a

[53]The Kosovo Report, *Loc cit.*
[54] R Thakur, *The United Nations Peace and Security: From Collective Security to the Responsibility to Protect* (UK: Cambridge University Press, 2006) p. 18.
[55] K Kak, 'Reconciling Humanitarian Intervention and Sovereignty: An Indian perspective (2002) IJIL, 24.
[56] Ibid.
[57] M Desousa*loc cit.*
[58]Emphasis mine.
[59] S Simon, 'The Contemporary Legality of Unilateral Humanitarian Intervention (1993) Calif Western ILJ, p.119

framework for bridging the gap inherent in the protection of human rights in contemporary international law.[60]

This dissertation evaluate the prevailing approach of state sovereignty, the use of force and protection of human rights with a view to preserving the delicate balance between these basic concepts.[61] Consequently, the consensus to be drawn in reconciling the two concepts or core norms of international law will surely determine the direction and development of the concept of humanitarian intervention.[62]

1.3 **Purpose of Study**

The doctrine of state sovereignty which encapsulates the principle of non-intervention in the internal affairs of a sovereign entity is a well established principle upon which international law is founded. However, emerging international norms have questioned the sanctity of this doctrine particularly in the face of gross and systematic human rights violations within a sovereign state should the international community watch in helplessness where states undertake large scale and gruesome breaches of human rights and in turn law claim to the doctrine of non-intervention holding strongly to the doctrine of exclusive domestic jurisdiction as a shield against external interference. Faced with this dilemma, the objective of this dissertation is to evaluate the consequences of humanitarian intervention and their justification for the doctrine and practice of state sovereignty. The research work is driven by the objective to contribute to an understanding and examination of humanitarian intervention particularly in the wake of recent attraction its discourse has generated globally. The dissertation investigates whether the evolution and development of international human rights institutions have established the opportunities for humanitarian intervention under the auspices of the UN.[63] This research work further investigates the flexibility to the interpretation of non-intervention principle influenced by evolving international standards as measures and

[60]ICISS Report, *Loc cit.*
[61]A Al-Haj, 'Principle of the State's Sovereignty and the Phenomenon of Humanitarian Intervention Under Current International Law' (2013) vol.9 No.1 CSC, p.124 available @ http://www.cscanada.net. Accessed 14 August, 2015.
[62]G Vockel, 'Humanitarian Intervention in Cases of Overwhelming Humanitarian Necessity' (2005) Cov.LJ, p.38.
[63] Humanitarian Intervention is defined as the use of military force by a group of states against a sovereign state without the formal consent of its authorities for the purpose of halting widespread and gross violations of international human rights.

procedures in the search for a consensus to ultimately reconcile humanitarian intervention and the doctrine of sovereignty of states.

The research work further aims to evaluate the multiple perspectives of harmonizing humanitarian intervention and state sovereignty in terms of the historical underpinnings. global legal framework and the role of the United Nations in the implementation of the responsibility to protect doctrine.

Furthermore, the research seeks to identify spheres of convergence and differences relative to humanitarian intervention and state sovereignty and present practical policy recommendations. This research work is further driven by the objective to demonstrate how the rising legitimacy profile of human rights standards is shaping the meaning and scope of state sovereignty vis-à-vis the purpose of military force under the auspices of the United Nations Security Council to authorize and endorse humanitarian intervention.

1.4 Scope of the Research

The subject of the research has a universal outlook albeit that the research is conducted here in Nigeria. The research work cuts across the realm of international law touching on the core of international relations as guaranteed by the United Nations Charter.

The concept of humanitarian intervention is examined under customary international law, 'Soft law' instruments and state sovereignty under the UN Charter and Resolutions. As mentioned previously, the objective of the research is to harmonize the application of humanitarian intervention and its justification coupled with its consequences on the practice and doctrine of state sovereignty within the legal regime of the Charter System. The research would highlight humanitarian intervention prior to and post cold war era with the view to exposing the inadequacies of humanitarian intervention practices within the extant international law that prohibits the use of force and codified the doctrine of non-intervention. In consequence we shall examine whether the tensions between protection of state sovereignty and protection of human right that characterized the 1990s constitutes major obstacle to the application of humanitarian

intervention in the face of grave breaches of human rights articulated by the emergence of the concept of responsibility to protect.

Although, understanding the general concept of intervention is integral to the research work, it will be limitedto the discourse on the emerging international norms and state practices and their significant impact on the changing notion of Westphalia state sovereignty. Simply put, the research work is limited to the Legal regime of the UN Charter and Resolutions, customary international law and the case law of the International Court of Justice on the subject.

1.5 Significance of Study

The significance of this dissertation is anchored on the need to strike a balance between the two basic principle of international law, that is protection of state sovereignty and protection of human rights.

1.6 Methodology

Humanitarian Intervention literally is an infringement of the fundamental principle of non-intervention in domestic matters of states preserved by the UN Charter. The NATO intervention in Kosovo generally regarded as the threshold of humanitarian intervention and subsequent instances of humanitarian intervention has culminated in divergent views as to the legality and legitimacy of humanitarian intervention under contemporary international law. The interrogation of these issues entail the evaluation of the doctrine of state sovereignty clearly preserved by the United Nations Charter, Resolutions and customary international law on the subject. The researcher, in the evaluation and analysis of the dissertation shall adopt the doctrinal method of research which entails a twin process of identifying the sources of law, interpreting and the analysis of primary source material. The doctrinal method of research in this context shall be complemented by the analytical and comparative approaches in evaluation of primary source materials and secondary source materials, namely United Nations Charter and Resolution, customary international law, case law, textbooks, journal articles, research reports and internet sources on the subject. Reliance is placed on materials generated

from the world wide web to keep pace with the current developments in the field of discourse under consideration.

1.7 Literature Review

This research work reviewed a selection of international law literature on humanitarian intervention and state sovereignty. Essentially, it was driven by the need to provide an appraisal of fundamental issues relating to humanitarian intervention and its implications on the doctrine and practice of state sovereignty with the hope to generating further discussion of policy framework for harmonizing the two key concepts in context. Thus, various scholars have divergent opinions relative to the subject under discourse to which we now turn.

Arrend and Beck in their book titled: 'International Law and the Use of Forces[64] undertook a review of eleven cases since World War II that contain elements of humanitarian intervention. In Chapter 8 of the textbook, the authors comprehensively examined the concept of humanitarian intervention. On forceful intervention on humanitarian grounds, Anthony Arrend and Robert Beck expressed the view that, the brief overview of a number of cases in which the humanitarian intervention motive has been alleged or claimed shows a mixed picture. What does not emerge is a clear acceptance of the principle of humanitarian intervention and a clear rule guiding when a state may undertake a humanitarian intervention or a claim to it as a justification for its actions. The views expressed here significant as they may seem, did not take into cognizance the emerging international norms which now tend to shape the doctrine and practice of sovereignty.

Although the authors at page 113 of their book suggested that there must be within the target state an immediate and extensive threat to fundamental human rights to which the intervention must be specifically targeted as justification for forceful intervention, they appear still not have bridge the gap between the legality and legitimacy question of humanitarian law. Understandably, this book was published before evolution of the doctrine of responsibility to protect in the aftermath of the NATO Intervention in

[64] AArrend& R Beck, *International Law and the Use of Force (*New York: Routledge Publishers, 1993) pp.110-113.

Kosovo which has been endorsed by the United Nations. This dissertation intends to bridge this seeming gap.

However, Oppenheim &Lauterpacht in their book titled: 'International Law: A Treatise',[65] 8th edition at page 312 expressed the opinion that, there is a substantial body of opinion and practice in support of the view that there are limits to that discretion and that when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible. The opinion expressed by these learned authors tend to situate humanitarian intervention as being legally founded on customary international law which takes primacy over the application of Article 2(4) & (7) of the United Nations Charter. Again, the author have not provided the basis for the sanctity of non-intervention doctrine yielding to the dictates of forceful intervention. This dissertation intends to explore the basis of state sovereignty yielding to humanitarian intervention in the light the World Summit Outcome Document 2005 and the concept of Responsibility to Protect (R2P) which is gradually finding expression and approval at the United Nations General Assembly and Security Council respectively.

In his book titled: 'Akehurst's Modern Introduction to International Law'[66]MelanczukAkehurst opined that what underlies the humanitarian intervention and state sovereignty debate is a perceived tension between the values of ensuring respect for fundamental human rights and the primary of the dictates of sovereignty, namely non-intervention and prohibition of the use or threat of the use of force which are considered essential elements in maintenance of international peace and security. These values are set out in the United Nations Charter as fundamental purposes of the United Nations. However, while there are mechanism within the charter for the protection and enforcement of peace and international security, there are no equivalent provisions or mechanisms in the charter for the protection of human rights. The above view of the author correctly captures the position of international law underthecharter system. However, with the current attention that the tenets of R2P is attracting at the UN, there is

[65] L Oppenheim & H Lauterpacht, *International Law: ATreatise* (8th edn, London: Longman Green & Co., 1955) p.312.
[66] M Akehurst, *Modern Introduction to International Law* (7th edn, London: Routledge, 2006) p.68.

a need for a reform of the UN Charter to make clear provisions to incorporate the tenets of R2P that will provide the legal basis for humanitarian intervention.

In chapter 20 of his textbook, titled: 'International Law', Malcolm N. Shaw[67] analyzed the concept of humanitarian intervention in a sub-topic within the chapter. The author expressed that it is difficult to reconcile humanitarian intervention today with Article 2(4)of the UN Charter unless one posits the establishment of the right in customary law and that state practice over the years have been unfavorable to the application of the concept. This preposition does not seem to capture the gradual departure from the tenets of the Westphalian State Sovereignty to the principle of relative sovereignty in contemporary era.

This dissertation seeks to provide the stop-gap by a comprehensive evaluation of the changing trend of traditional absolute sovereignty of states to creating the opportunities for the application of intervention on humanitarian grounds.

In his book, titled 'International Human rights Law', JavaidRehman [68] treated comprehensively the emergence of human rights law as the most significant development in international law to have evolved since the end of World War II. On this score, the author opined that, 'a key aspect of the traditional legal order was the reliance of states upon the principle of non-interference in their domestic affairs which meant that violations of human rights were not a matter of international concern. The growth and expansion of human rights law has brought about a radical change to the ideological basis of international law. The investigation into human rights abuses cannot be prevented by arguments based upon the principle of state sovereignty and domestic jurisdiction.' This position canvassed by the learned author is no doubt in contradistinction to the stipulations of Article 2 (4) & (7) of UN Charter. However, it is in line with the customary international law principle of *ergaomnes* relating to the international obligation of states. This dissertation intends to demonstrate that where states obviates from their international obligations and engage in gross and systematic violation of human rights of their nationals resulting in threat to international peace and security UN

[67] M Shaw, *International Law* (5th edn, Cambridge: Cambridge University Press, 2005) pp. 1045-1046.
[68] J Rehman, *International Human Rights Law* (2nd edn, Longman Publishers, 2010) pp.15-17.

Security Council can undertake forceful intervention grounded on humanitarian ideals to halt the atrocities pursuant to its power encapsulated in chapter VII of the UN Charter.

In his book, titled 'Humanitarian Intervention: An Inquiry into Law and Morality'[69] the learned author Fernando Teson who is a leading proponent of the legal right to unilateral humanitarian intervention argued that, the human right imperative underlies the concepts of state and government and the people that are designed to protect them, most prominent article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting human rights found in article 1 (3) and by reference in article 2 (4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defence of fundamental human rights is therefore not a use of force inconsistent with the purpose of the United Nations. There is merit in the argument posited by the learned author. However, there is no clear legal basis for humanitarian intervention contained in the United Nations Charter and neither has the customary international law right to intervene crystallized going by the twin factors of state practice and opiniojuris. In this research, concerted effort would be made to trace the evolution of humanitarian intervention particularly after the NATO intervention in Kosovo and subsequent development of the responsibility to protect doctrine that is speedily attracting recognition by the United Nations as evident in the recent pronouncement of the current UN Secretary-General.

In his book, 'Aspects of International Law', the learned author Prof Godwin Okeke[70] in discussing the concept of humanitarian intervention expressed the view that, it is "an act of sending in the armed forces of ones state into the territory of another on the ground that sorry situation exist in the country which elicits strong human feeling to rescue such state or people of such a state from the situations. However, article 2(7) of the United Nations Charter forbids any intervention in the domestic affairs of the state by another state. Although the learned author discussed humanitarian intervention in Chapter Eleven of his book as a sub-topic, he dealt essentially with the crux of the subject. However, the discussion was not elaborate enough to embrace the evolving international

[69] F Teson, *Humanitarian Intervention: An Inquiry into Law and Morality (*New York: Transnational Publisherss, 1997) pp.173-174.

[70] G Okeke, *Aspects of International Law* (Enugu: Joen Printing & Publishing Company, 2007) p.95.

norm that challenges the sanctity of exclusive domestic jurisdiction of states in relation to instances of humanitarian emergencies. This research will provide a comprehensive evaluation of Article 2(4) & (7) of the UN Charter which enshrined the prohibition of the use of force and the doctrine of non-intervention vis-à-vis the emerging international standards of humanitarian concerns heralding a departure from the watertight position under the traditional Westphalian sovereignty.

Antonio Cassese in his article titled: 'Ex iniuraiusoritur: *Are we moving Towards International Legitimation of forcible Humanitarian Counter measures in the community*[71]argues that certain fundamental human rights are obligations *ergaomnes* and that 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 purpose. He further contends that, although the purpose of the Charter is to maintain international peace and security and to promote and encourage respect for human rights anytime that conflict or tension arises between these values, peace must always constitute the ultimate and prevailing factor. Laudable and meritorious as this contention may appear, it is not, with the greatest respect in tandem with the presentapproaches on the subject. Moreso when milestone is being attained in entrenching the humanitarian concerns into the practice and enforcement mechanism of the United Nations.

This dissertation would further demonstrate and articulate the emerging trends towards creating the legal basis for the practice and application of humanitarian intervention under the Charter system.

On his part Kofi Annan in his article titled: 'TwoConceptsof Sovereignty'[72]while expressing his views regarding humanitarian intervention and state sovereignty debate opined that there is a crucial gap in international law with respect to humanitarian intervention. He contended further that the NATO's humanitarian campaign in Kosovo is particularly significant because it not only highlights the deficiencies of international legal mechanisms when faced with potentially devastating humanitarian crises,but has

[71] A Casse, '*Ex iniuraiusoritur:* Are We Moving Towards International Legitimation of Forcible Humanitarian Counter measures in the World Community' (1999) 10 EJIL, 23-30.

[72]K Annan, 'Two Concepts of Sovereignty' *TheEconomist* September 18, 1999, p.49 available online from http://www.un.org/overview/SG/kaecon.htm.

brought the question of the rights of states to intervene for humanitarian purposes without the authorization of the UN Security Council back into the public debate. It is in addition to the contribution towards bridging the gap between the legality and legitimacy issue of humanitarian intervention in international law that we have embarked upon this research and we shall present practical policy recommendation in the search for the consensus.

In her book, titled, *International Authority and the Responsibility to Protect',*[73]'Anne Orford expressed the view that state sovereignty is no longer confined to the right of absolute control but embraces an obligation to protect its nationals in the face of humanitarian catastrophe and that when a state reneges on this obligation, the international community is authorized to intervene. This research work concurs with this opinion expressed by the learned Professor herein.

V D Verwey in his article titled, 'Humanitarian Intervention under international Law[74] articulated the view regarding the state sovereignty and humanitarian intervention debate to the effect that we would open another pandora's box and jeopardize respect not only for the UN Charter but for the rule of law in general and that international law must be able to cope with such situations, for if international law does not provide room for genuinely unselfish, morally obligatory, last resort humanitarian intervention, then it would lose control, and become irrelevant in some of the most dramatic situations. I cannot but agree with this learned author on this score. However, this research work would advance the discussion further to have a well defined criteria for humanitarian intervention as envisaged under the responsibility to protect doctrine to be formally enshrined into the legal regime of the UN Charter.

M. Reisman in his article titled, 'International Law After the Cold War'[75]argued that the purpose of the UN Charter included the promotion of human rights. The provision of security does not take precedence over promotion of human rights. If government violates the citizens' right, another state may intervene,the government persecuting state may not claim that such an intervention is a violation of its state sovereignty. He further argued that the violation of sovereignty is the government's

[73] A Orford, *International Authority and the Responsibility to Protect*(Cambridge: Cambridge University press, 2011) pp. 25-26.
[74]V Verwey, 'Humanitarian Intervention under International Law' (1985) 32 Netherlands ILR, 357.
[75] M Reisman, 'International Law After the Cold War' (1990) American Journal of International Law, 84.

violation of the sovereigntyof the people by its persecution of them and that intervention would protect the sovereignty of the people against the depredations of the sitting government. He further contended that, the advent of the UN neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, the charter strengthened and extended humanitarian intervention in that it confirmed the homocentric character of international law. The shortcoming of this contention is that humanitarian intervention is yet to crystallize into customary international law to be applied in the manner described by the learned author above. The challenge of adopting such a practice as opined by Reismanis to downplay the efficiency of article 2 (4) as the foundational basis of inter-state relations. This opinion so canvassed does not reconcile the competing tendencies but superimpose protection of human rights over and above doctrine of state sovereignty. This research will trace the legal basis of state sovereignty andevaluate in detail the emerging humanitarian standards toward striking a balance between the two core values of international law.

> On his own part, Marco De Sousa in his article titled, "Humanitarian Intervention and Responsibility to Protect: Bridging the Moral/Legal Divide,'[76] opined that the nature and scope of any right of humanitarian intervention is mired in academic and political controversy. Scholars are trenchantly divided on both the doctrine's moral and legal permissibility and states have shown great reluctance openly to embrace it. Some commentators argue that the concept a war waged in defence of human rights is inimical to the principle of non-intervention and is therefore fundamentally incompatible with the structure of modern international society. Others assert that humanitarian catastrophe give rise to moral imperative to respond that is strong enough to justify military action. The legal status of humanitarian intervention is more controversial still. Academics disagree about whether, such a right exists as an exception to the broad prohibition on the use of force under article 2 (4) of the UN Charter, or whether it is justified as a matter of customary international law.

[76]M De Sousa, 'Humanitarian Intervention and the Responsibility to Protect: Bridging the Moral/Legal Divide' (2010) UCLJuris Rev, 51.

O' Connell in his article, titled: 'The UN, NATO and International Law After Kosovo', contended that respect for sovereignty is conditional on respect for human rights which[77] has been reflected in the practice of the Security Council, and that article 2 (7) of the UN Charter prohibits the United Nations from intervening in the domestic jurisdiction of any state.Nonetheless since the end of the Cold War, the Security Council has availed itself of a right of humanitarian intervention by adopting a series of resolution which have progressively expanded the definition of a 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. The views of this learned writer though brief as it may appear summarizes the developing trend in international law, and this research work is in total concurrence with this, save to add that where humanitarian intervention is undertaken pursuant to the authorization of the UN Security Council it is not an assault on state sovereignty. However, this dissertation would take it further in discussing the possible reform of the Charter system to create the legal basis for a multilateral humanitarian intervention.

In his article titled: 'The State and Human Rights: Sovereignty versus Humanitarian Intervention,'[78] Simon Duke contended that concerns that humanitarian intervention is an open invitation for meddling in one another's affairs, especially by the developed western countries in the affairs of the third world, can be assuaged by codification and the framing of general principles conditioning humanitarian intervention. He further contended that abuse of humanitarian intervention may also be alleviated by strict UN control over humanitarian intervention and scrupulous observance of a voting system that ensures decisions are made on a collective basis. In holding the same views, Abiew in his article titled: 'The Evolution of the Doctrine and Practice of Humanitarian Intervention'[79]expressed the view that it is of paramount importance that humanitarian intervention take place only as in expression of the collective will of the international community. He further opined that a sovereign state that is cruel and in breach of the

[77]M E O' Connell.'The UN, NATO and International Law After Kosovo' (2000) 22 Human Rights Quarterly, 57-89.
[78] S Duke, 'The State and Human Rights: Sovereignty versus Humanitarian Intervention'.
[79]F Abiew, 'The Evolution of the Doctrine and Practice of Humanitarian Intervention' (1998) Kluwer Law International, the Hague, 61 & 73.

autonomy of its citizens relinquishes its moral claim to absolute sovereignty. These learned authors correctly pointed out that to attain legitimacy humanitarian intervention should be undertaken on a multilateral basis with the authorization of the United Nations Security Council. However, the dichotomy between the legality and legitimacy of humanitarian intervention debate still confronts contemporary international law. Thus, in this research the legality and legitimacy question of the application of humanitarian intervention and its consequences on the practice and doctrine of state sovereignty will be exhaustively discussed.

O' Hanlon articulated his views in his book titled: Saving Lives with Force Military Criteria for Humanitarian Intervention[80]where he argues that there is still no international consensus on how and to what extent the concept of sovereignty has been modified. He contended further that the lack of cooperative action necessary to effectively respond in cases of genocide such as that in Rwanda is due in large part to the existence of divergent definition and contested concepts including international law, human rights and sovereignty. It is not in doubt that Article 2 (7) of the UN Charter preserves the sanctity of state sovereignty. However, the controversies stem from the implication and impact of the emerging human rights norms on the practice of the hitherto absolute sovereignty. This dissertation considering these divergent views intends to explore the search for a consensus to sustain a balance between humanitarian intervention and state sovereignty.

In his contribution to the humanitarian intervention and state sovereignty debate, Ben Kioko in his article titled: 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention'[81] he argued that the United Nations is the only organization with the primary responsibility for the maintenance of international peace and security and the specific right under international law to authorize intervention. The views of this writer represent the position of the international law on the subject and the opinion held by many scholars. However, this research intends to

[80]M O' Hanlon, *Saving Lives with Force Military Criteria for Humanitarian Intervention* (Washington, DC: Brookings Institution Press, 1997) p.12.

[81] B Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' (2003) vol. 85, No. 853 IRRC, 807-808.

explore an exhaustive discussion on the emerging international norms that are gradually shaping the practice of the UN relative to humanitarian intervention.

Evans and Sahnoun in their article titled: 'The Responsibility to Protect'[82] argued that the new conception of sovereignty is considered as the most significant modification and adjustment to the concept of sovereignty since its inception and that this new understanding is advantageous because it does not place sovereignty on a higher scale than human rights and makes the objection based on the principle of non-interference senseless.

In contrast to the preceding views, Mohammed Ayoob in his article, titled: 'Humanitarian Intervention and State Sovereignty'[83] argued that this new articulation of sovereignty as responsibility raises the specter of a return to colonial habits and practices on the part of the major western powers. These two immediate opinions articulated by the learned authors is a summary of the divergent opinions expressed concerning the humanitarian intervention debacle. However, this research work will undertake a comprehensive analysis of the fact that the right to intervene is not captured specifically under the legal regime of the Charter System.

Nonetheless, series of international developments beginning with the concept of humanitarian intervention after the NATO military campaign in Kosovo, the emergence of the responsibility to protect doctrine consequent upon the ICISS report and the World Summit Outcome Document 2005 and the humanitarian intervention practice endorsed by the UN Security Council is redefining the conception of state sovereignty.

Bellamy in his article titled: 'Ethics and Intervention: The Humanitarian Exception and the Problem of Abuse in the case of Iraq'[84]opined that reconceptualizing the meaning of sovereignty has no utility to the humanitarian intervention debate since the major cause of inaction in the face of intra-state violence is not sovereignty but the lack of will of the international community to intervene. In expressing his views, the learned writer would seem to have gloss over the fact that effective and consistent humanitarian intervention is made unlikely by the geopolitical realities between the Permanent Five (P5) members of

[82]G Evans & M Sahnoun, 'The Responsibility to Protect' (2002) 80 Foreign Affairs, 99-110.

[83]M Ayoob, 'Humanitarian Intervention and State Sovereignty' (2002) vol. 6, No. 1, The International Journal of Human Rights, 85.

[84]A Bellamy, 'Ethics and Intervention: The Humanitarian Exception and the Problem of Abuse in the case of Iraq' (2004) vol. 41, No. 2, Journal of Peace Research.

the UN Security Council, resulting in the use of the veto and the inconsistent action in the face of humanitarian catastrophe. This research work will embark on a comprehensive discourse to demonstrate how the dictates of humanitarian intervention can be accommodated within the legal framework of the UN Charter.

In his article titled: 'NATO, the UN and the US and the Use of Force: Legal Aspects'[85]Bruno Simma expressed the view in relation to the humanitarian intervention and state sovereignty debate that, humanitarian intervention involving the threat or use of armed force and undertaken without the mandate of the authorization of the Security Council will as a matter of principle remain in breach of international law. The learned author further opined that such a general statement cannot be the last word, rather in any instance of humanitarian intervention a careful assessment will have to be made of how heavily such illegality weights against all the circumstances of a particular concrete case and of the efforts, if any undertaken by the parties involved to get as close to the law as possible and that such analysis will influence not only the moral but also the legal judgment in such cases. The opinion of this learned writer no doubt emphasizes existing dichotomy of the legitimacy and legality issue of humanitarian intervention.However, this research will further explore the fact that where force is used for humanitarian reasons, the legal requirements of necessity and proportionality are even more important. The research in furtherance of the search for a consensus will undertake a discussion that humanitarian intervention must be applied at a level equivalent to the atrocity it undertakes to halt, and that the use of force for humanitarian purposes whether it is authorized or unauthorized by the UN Security Council must comply with the principles of international law applicable in armed conflict and in particular the rules of international humanitarian law.

Michael William in his article titled, '*Hobbes and International Relations: Reconsideration'*[86]contended that the UN Security Council resolution on the conflict in the former Yugoslavia demonstrate a significant shift in the attitude of the council in favour of recognizing universal human rights and granting them greater weight in and

[85] B Simma, 'NATO, the UN and the Use of Force: Legal Aspect' (1999) 10 EJIL. 7; available at http://www.ejil.org/journal/vol10/No.1ab-7.Accessed 17/July, 2015.

[86] M William, 'Hobbes and International Relations: Reconsideration' (1996) vol 50, No. 2, International Organization Journal, 213-216.

promoting protecting international peace and security. He posited further that, this is an incremental rather than fundamental transformation which remains hamstrung by the absence of consensus on the relationship of human rights to international peace and security demonstrated by the Council's preference for the existence of agreements between the parties before consistently making such a connection. The author appears to be suggesting that changing attitudes towards sovereignty of states may signal a more widespread acceptance of the doctrine of humanitarian intervention. However the article failed to articulate the emerging international humanitarian standards resulting in the changing attitude towards sovereignty of states. This dissertation will explore an elaborate analysis of the practice and application of humanitarian interventions in the aftermath of the cold war that has sharpen the realities of a seeming departure from the Westphalian doctrine of state sovereignty.

On their part, Wheeler and Bellamy in the article titled: 'Humanitarian Intervention *and World Politics'* [87] opined that with good reason, humanitarian intervention just as the venture of humanitarian assistance will belong to the realm of not law but of moral choice which nations, like individuals must sometimes make, thus not emerging and warranted as a legal right but an action driven by mere moral and not legal imperatives. They further opined that, the claim that humanitarian intervention is morally required is a much stronger one that the proposition that there is a legal right to engage in this practice because whilst the existence of a right enables action it does not determine it. To say that the practice of humanitarian intervention is driven by mere moral persuasion, it would appear the authors did not take cognizance of the position that where gross and systematic human rights violations constitute threat to international peace and security humanitarian intervention can be undertaken under the legal regime of the UN Charter. This singular practice takes away humanitarian intervention from being solely within the realm of mere moral adulation. It is hoped that this dissertation will articulate these humanitarian intervention practices within the ambit of the legal regime of the UN Charter.

[87] N Wheeler &A Bellamy, 'Humanitarian Intervention and World Politics' in *The Globalization of World Politics*, Baylics, *et al* (2nd edn, Oxford: Oxford University Press, 2001) pp. 472-474.

Professor Greenwood in 'UK Parliamentary Select Committee on Foreign Affairs, Fourth Report [88]convincingly contended that any interpretation of international law which would forbid an intervention with the intention to prevent something as terrible as the Holocaust of the Germany would be contrary to the very principles on which modern international law is based. The view expressed by the learned Professor is incisive and apt on the subject. However, it has not resolve the seeming controversy relative to the legality and legitimacy question of humanitarian intervention which is the hallmark of this dissertation. This research will strive to harmonize this dichotomy.

It is evident from the foregoing that most of the authors and writers surveyed maintain that the use of force for humanitarian reasons to halt large scale and systematic human rights violations should be confined to the set humanitarian objections in instances of unauthorized humanitarian intervention.

On his part, Michael Walzer, a key proponent of humanitarian intervention on his book, titled: 'Arguing War' [89] opined that the application of humanitarian intervention is justified in the face of gross and systematic human rights breaches. He further contended that it is morally necessary whenever cruelty and suffering and no local forces seem capable of putting an end to the atrocities to undertake humanitarian intervention to halt the scourge.

The learned author further maintained his views in support of the application of humanitarian intervention in appropriatecircumstances in his subsequent book titled, 'Just and Unjust Wars: A Moral Argument with Historical Illustrations[90] where he subscribed to the view that humanitarian intervention is the appropriate response to actions that shock the conscience of mankind.

In rejecting the position that humanitarian intervention is an affront on state sovereignty and not cognizable under law but of moral choice, he opined that, is only a plausible formulation if one does not stop with the law as lawyers are likely to do. For

[88]See Greenwood as quoted in the UK Parliamentary Select Committee on Foreign Affairs, Fourth Report (2000) in R Dixon & R McCorquodale, *Cases & Materials on International law* (4th edn, Oxford : Oxford University Press, 2003) p.555.

[89] M Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (4th edn, New York, Basic Books, 2006) pp.107-109.

[90] M Walzer, *Just and Unjust War: A Moral Argument With Historical illustrations* (4th edn, New York, Basic Books, 2006) pp. 107-109.

moral choices are not simply made, they are also judged, and so these must be criteria for judgement. If these are not provided by the law or if legal provision runs out at some point, they are nevertheless contained in our common morality, which does not run and which still needs to be explicated after the lawyers have finished.

It would seem from the evolving developments and trends in contemporary international law particularly in the aftermath of the ICISS Report the views expressed herein find support and endorsement in the recent deliberations and resolutions of the United Nations General Assembly. We respectfully tend to concur with these views in the light of findings in this research.

In his contribution to the humanitarian intervention and state sovereignty dichotomy, Sean Murphy in his book titled: 'Humanitarian Intervention: The United Nations in an Evolving World Order' also expressed the view that humanitarian intervention constitute a threat or use of force by a state, group of state or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of international recognized rights. However, he further opined that the intervention should interfere with the ruling structure of the largest of the target state only as necessary to provide for an enduring peace and that in certain instances occasioning gross human rights abuses by both state and non-state acts may necessitate humanitarian intervention.[91] For want of repetition, we further adopt the comment made concerning the views of MichaelWalzer as our comment in respect of the views of Sean Murphy.

In their own contribution, Ramsbotham and Woodhouse in their book titled: 'Humanitarian Intervention in Contemporary Conflict'[92] particularly in Chapter six opined that, the core of the debate surrounding the issue of humanitarian intervention is anchored in the two competitive imperatives presents in the UN Charter which intersect with each other and which may sometimes work at cross-purposes.These are state system values and human rights values. The two fundamental imperativesarenon-intervention on one hand and popular sovereignty and the self-determination of people on the other

[91] S Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*(Philadelphia: University of Pennsylvania, Press1996) pp.314-323.

[92]O Ramsbotham& T Woodhouse, *Humanitarian Intervention in contemporary conflict* (Cambridge: Polity Press, 1996) p. 167-192.

part.The view expressed by his writer essentially captures the underling thread of the debate. However, the point to be made here is that it still throws us back to the inherent challenge challenging contemporary international law. This dissertation will provide for the seeming gap geared towards harmonizing the application of the competing imperatives.

However, in a sharp contrast and in his contribution to the humanitarian intervention versus state sovereignty debate, Jonathan Charney in his article, titled: 'Anticipatory Humanitarian Intervention in Kosovo' [93] articulated his opinion and maintained that on the strength of the accepted rules of treaty interpretation, textual analysis and an examination of the Charter, Article 2(4) was enshrined as a watertight prohibition against use of force. Accordingly, any customary right of unilateral intervention which may have existed was extinguished by the United Nations Charter.
Incisive and convincing this argument maysound, the writer is silent on the legal states of multilateral humanitarian intervention under the auspices of the UNSC. We hold the view that a multilateral intervention on humanitarian reasons under the platform of the UNSC is cognizable is cognizable under the Charter regime particularly where the grave breaches constitutea threat to international peace and security in the reckoning of the United Nations Security Council.

In his work, 'Failure of the Security Council in Syria: A Note on the continued Relevance of Humanitarian Intervention'[94]IkpomwonsaOmoruyi examined the relevance of humanitarian intervention in the face of the application of the doctrine of state sovereignty preserved by the United Nations Charter. The author succinctly articulated his views thus, 'Very few issues are as problematic in contemporary international law as that of humanitarian intervention. The reason for this is the perceived inconsistency between this concept and other well established principles like non-intervention in the domestic affairs of states, state sovereignty, self-determination and the illegality of the use of force. While the United Charter expressly permit the use of force on only two grounds, namely, collective action by the United Nations Security Council and self-

[93]J Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) vol 32, Vanderbilt Journal of Transnational Law, 1234-1235.

[94] I Omoruyi 'Failure of the Security Council in Syria: A Note on the Continued Relevance of Humanitarian Intervention' in O Omonuwa& I Omoruyi (eds), *On Judicial Integrity: Legal Essays and Materials in Honour of His Lordship, The Honourable Justice S. O. Uwaifo*(Benin City, Nigeria: Mindex Publishing Company Limited) p.428.

defence in response to an actual armed attack, the ethical arguments in favour of humanitarian intervention seem compelling enough to direct international law back to the search for a consensus on the legal justification for foreign armed intervention in the internal affairs of other states in order to halt grave breaches of human rights and the perpetration of crimes against humanity and to restore peace and security.' However going through the entire gamut of the learned author's 38-page well-articulated work, it is clear that he has situated the humanitarian intervention and state sovereignty dichotomy within the context of though no express provision for humanitarian intervention in the UN Charter, situations of gross human right violations and atrocity crimes occurring within a sovereign state should be construed as tantamount to threat to international peace and security in order to clothe humanitarian intervention with the required legal grounding in international law. We concur with the above contention, however this research work will endeavor to take the argument further to contend that a proposed Global Humanitarian Council should be created specifically to undertake humanitarian intervention in deserving within the requirements to be explicitly provided for in the UN Charter consequent upon its amendment to meet with current unfolding global human security challenges.

On his part in his textbook: 'Introduction to International Law' [95] U. O. Umozurike in his evaluation of the humanitarian intervention and doctrine of sovereignty of states debate opined that, 'the principle of sovereignty was traditionally given a wide interpretation and covered all aspects of a state's treatment of its own subject as matters within its domestic jurisdiction. The practice then developed that a state's treatment of its own nationals invited external intervention if it degenerated to a level that shocked the conscience of mankind. The right of humanitarian intervention was then acknowledged by many jurists though denied by others… A survey of the practice of states and international institutions, juristic and judicial opinions support the right of humanitarian intervention in appropriate cases. In our considered opinion, the learned author has offered a valid contribution on the subject. However, this writer intends to build on this contention with a view of proposing a recognized and acceptable framework for the

[95] U Umozurike, *Introduction to International Law (*1st ed, Ibadan, Nigeria: Spectrum Law Publishing, 1993) pp. 197-198).

harmonization of the humanitarian intervention vis-à-vis state sovereignty debate in contemporary international law.

In his own contribution relative to the subject of discourse, David Harris in his book titled, 'Cases and Material on International Law'[96]opined that, 'the UN Security Council acting pursuant to Article 39 could determine a conflict situation as constituting threat to international peace and security. In article 39, although certainly crucial for the maintenance of peace is that of threat to the peace. In practice, it is almost the only one used by the UN Security Council whereas the existence of breaches of the peace or acts of aggression is usually not specifically determined.While the concept of threat to the peace in article 39 may have originally referred mainly to threats of inter-state conflicts…, the Security Council soon abandoned such a strict reading and significantly reinforced such a broader interpretation and it seems by now widely accepted that extreme violence within a state can give rise of chapter VII enforcement action. This writer concurs with the preceding views expressed by the learned author and intends to build on it in the course of this research work.

In sum, the international law literature shows that there has been normative movement regarding humanitarian intervention in the aftermath of the cold war. Nonetheless the absence of consensus is still prevalent on the legality and legitimacy question on humanitarian intervention and its implications on the practice and doctrine of state sovereignty.

1.8 **Organization Layout**

The organizational layout of this dissertation is structural into seven chapters.

Chapter one covers the General Introduction to the research work which entails: Background to the Study, Statement of the Problem, Objective of the Research, Research Methodology, Literature Review and Chapter Outline.

Chapter two evaluates the Doctrine of Sovereignty of States as the foundational basis of international law tracing its birth, development and encapsulation in the United Nations Charter. The chapter further evaluates the core principle of non-intervention,

[96] D Harris, *Cases and Materials on International Law* (7th ed, London: Sweet & Maxwell, 2010) pp.796-797.

prohibition of the use of force and the evolving conceptualization of state sovereignty in contemporary international law.

Chapter three examines the concept of humanitarian intervention, its evolution and development, the legality and legitimacy question in the face of the extant legal regime of Article 2 (4) & (7) of the United Nations Charter and the consequences and relevance of the application of humanitarian intervention to the practice and doctrine of state sovereignty.

Chapter four discusses human rights, humanitarian intervention and the role of the United Nations.

Chapter five critically examines harmonizing the concept of humanitarian intervention and the doctrine of sovereignty of states towards the need to search for the preservation of the delicate balance between protection of human rights and protection of state sovereignty under the Charter regime of the United Nations

Chapter six evaluates the emergence of the responsibility to protect doctrine as a necessary corollary towards bridging the gap regarding the legality and legitimacy issue of the application of humanitarian intervention.

Chapter seven encompasses the conclusion, findings and recommendations

CHAPTER TWO

THE DOCTRINE OF SOVEREIGNTY OF STATES

2.1 Introduction

The earlier chapter presented the general introduction of the subject of the dissertation. This chapter focuses on the doctrine of sovereignty of states. In evaluating this, the chapter discusses the evolution of the traditional doctrine of state sovereignty and its recognition under the United Nations Charter as a core principle of international law and its changing context. Thus, international law is based on the concept of sovereign equality of states and the state in its turn lies upon the foundation of sovereignty which expresses internally the supremacy of the state as a legal entity.[97]The development of international law is upon the basis of the exclusive authority of a state within an accepted territorial framework.[98] It is anchored on the set of rules which regulate the conduct of sovereign states. Thus, individual states recognize no supreme authority than itself in the regulation of its internal affairs. Essentially, the Westphalian doctrine of state sovereignty constitutes the exclusive competence and capacity of states to make authoritative decision concerning the people and resources within its territorial domain devoid of any external interference. [99]However, the absolute sovereignty of state does not legally and morally entitle any independent state to treat its citizen in whatever manner it considers fit. Accordingly, the portrayal of sovereignty of states as providing an unrestricted authority in the conduct of its domestic affairs has never existed in the earlier theoretical framework of state sovereignty.[100]

Interestingly, traditional international relations characterizes the international system as one of chaos but the classical notions of state system depicts a sovereign state as comprising of people, sovereignty and a functional government that prevents internal anarchy.[101]However, the emerging trend and developments after the Cold War period was characterized by centrifugal forces of violent ethno nationalism regarding the normative concerns of human rights and democratization, which culminated in interventions by the

[97]M Shaw *InternationalLaw (6*th edn.Cambridge: Cambridge University Press, 2008) 574.
[98]*Ibid.*
[99]GEvans& M Sahnoun, 'The Responsibility to Protect' (2002) 80 *Foreign Affairs*, 100.
[100] J Welsh, 'The Responsibility to Protect: Where Expectations meet Reality', *Ethics and International Affairs Journal,* 24.
[101] B Hedley, *InterventioninWorldPolitics*(Oxford: Clarendon Press, 1984) p. 14.

international community. The international growing concern for the recognition of the respect and protection of human rights has largely impacted on the exclusive domestic jurisdiction of states. These interventions recognize a departure from a strict adherence to the doctrine of state sovereignty and the principle of non-intervention. Thus, the increasing scope and intensity of violent conflicts that heralded the Great Powers and United Nations authorized interventions in armed conflicts signifies the fact that principles, doctrines, practices institutionalized through frequent application may be modified, violated or changed in response to systemic disequilibrium.[102]

Consequently, where state sovereignty is changeable and contingent, then its scope and content is amenable to change including the conditions under which sovereignty of states doctrine must be upheld and respected. The content and scope of state sovereignty is already changing under the current international system necessitated by the United Nations paradigm shift relative to the rules concerning the use of force and non-intervention.[103]

2.2 The Evolution of Sovereignty of States

The concept of sovereignty emerged in the late 16th Century in the era when internal strife and violent conflicts had generated the craving for a powerful central authority, when monarchs had started to constitute themselves as super-powerful to the detriment of nobility and the modern nations state was evolving.[104] The concept of sovereignty gained both legal and moral force as the main western description of the meaning and power of a state. The social contract theory was largely accepted in 1800 as a mechanism for creating sovereignty.

The concept of sovereignty must be understood against the background of the religious war of the 16th and 17th centuries which caused regular disorder in Europe. Accordingly, Elizabeth Oji opined that, 'The doctrine of sovereignty emerged after the decline of the authority of the church.'[105]However, the doctrine of sovereignty attained its legal confirmation in the Peace of Westphalia, which halted the Thirty years war.

[102] S Krasner, Sovereignty: *OrganizedHypocrisy* (Princeton: Princeton University Press, 1999)p.36.
[103] *Ibid.*
[104] Thomas Hobbes, in *Leviathan*(1651) adopted Jean Bodin's description of sovereignty advocating for strong legal endorsement in the central authority which found in the Treaty of Westphalia in 1648.
[105] E A Oji, *Responsibility for Crimes Under International Law* (Lagos: Odade Publishers, 2013) p.116.

Essentially, it was this treaty that established the contemporary European state system as a key element of international relations under international law.[106]

The origin of the concept of sovereignty in international law is identical with the comprehensive origin of international law itself.[107] The Peace of Westphalia that ended the Thirty years War in 1648 provided an additional doctrine of state sovereignty to the modern history of international law. Prior to the thirty years war, that was in part a religious war, the European World of Christendom was of a diarchic component of Pope and Emperor. However, consequent upon its defeat, the Holy Roman Empire was dissolved into hundreds of relatively independent authorities with equal sovereignty over their population and territories.[108] This characteristically marked the evolution of the modern independent state system.[109]

Sovereignty which connotes the supreme authority over all things constitutes the bedrock of the Westphalian state system which established the fundamental constitutional doctrine of the law of nations.[110] Thus, the birth of state sovereignty has been a significant ingredient in the development of individual freedom and the freedom of people often described as self-determination. By codifying the liberty of people from the direct authority of the Catholic Church, the Treaty of Westphalian in 1648 formulated the doctrine of sovereignty of state and provided the basis for government accountability to the people and the freedom of states from external interference.[111]

However, in recent times, premised on the emerging trends and developments in international law, Westphalian state sovereignty has been whittled down by law and state practice. Independent states are willing participants in the imposition of these limitations on their sovereignty as evidenced in international treaty law.In certain instances limitations are imposed on unwilling states by the force of international customary law and normative limitations.

---

[106] F Abiew, *op cit,* p.29.

[107] S Helmut, '*Sovereignty'* in R Bernhardt ed., *Encyclopedia of Public International Law (2000).*

[108] N Arthur, *A Concise history of the Law of Nations* (New York: The Macmillan Company, 1954) p. 116.

[109] Essentially, the Treaty of Westphalia in 1648 which brought to a peaceful end the thirty years war in Europe meant the defeat of the Catholic authority providing a juxtaposition of Catholics and Lutheran – Calvinist Protestants.

[110] I Brownile, *Principles of Public International Law, (5th* edn. Oxford: Clarendon Press,1998) p. 289.

[111] T Weiss, *Humanitarian Intervention: Ideals in Action* (Cambridge: Polity Press, 2007) p. 19.

The aftermath of the Peace of Westphalia manifestly indicated that the concept of sovereignty that was evolving in the 17th and 18th centuries respectively is a radical departure from Hugo Grotius postulations on sovereignty.[112]

The concept of sovereignty was no longer limited by the notion of justice or humanity. Accordingly, the non-intervention principle clearly follows as Vattel correctly opined that, 'It clearly follows from the liberty and independence of nations that each has the right to govern itself as it thinks proper… No foreign state may enquire into the manner in which a sovereign rules, nor set itself up as a judge of his conduct nor force him to make any change in his administration.'[113]

Consequently the Treaty of Westphalia is largely recognized today as the foundation of state sovereignty establishing the fact that the formal structure of the international state system is built on the principle that each state is autonomous and independent and has the right in its internal affairs to be free from acts of coercion committed or assisted by other states.[114]

The doctrine of sovereignty of states gained momentum during the 17th and 18th centuries when the principle of exclusive domestic jurisdiction was developed which recognized state's independence from interference and legal impermeability regarding external influence and exclusive preserve of state's power over matters within its territorial frontiers.[115]

Jean Bodin is generally regarded as the first to bring up the concept of sovereignty as the domestic ingredient to the notion of the Republic describing the concept of sovereignty as that which any political community or state must possess, a sovereign authority with decisive and recognized powers as the foundation of authority within its sovereign domain.[116]

States in its modern connotation now consists of territory, people and the inherent powers of the state concerned.[117] It is pertinent to state here that the Treaty of Westphalia played a significant role in the configuration of the concept of independent state as it is

[112]F Abiew, *Op cit, p.29.*
[113] E Vattel*Drout des gens (1758) I, II, IV, paras 54-55.*
[114]M N Shaw, *op cit*, p.575.
[115]F Abiew, *op cit*, p.39.
[116] S Krasher, 'Sovereignty: An International Perspective.' Comparative Political studies, April 21 1988 @ pp. 66-94.
[117] O Fishbarch, *'Taria General del Estado, (Barcelona: Editorial Labor, 1915)*p.25.

presently constituted.[118] The peace of Westphalia made sovereignty a foundational principle in the comprehension of international politics. Thus, WilfridCareaves rightly articulated the point that, 'By codifying the freedom of people from the direct authority of the Catholic Church, the Treaty of Westphalian in 1648 formalized the principle of sovereignty and provided the foundation for the eventual establishment of government accountability to the people.'[119] However, in the early 19th century, the territorial sovereignty of states, the equality of states, non-intervention in the internal affairs of states became established as the fundamentals of international relations and the key principles of international law regulating the conduct and interaction of states.[120]

2.3 The Meaning of Sovereignty of State

The principle of state sovereignty was used after the Treaty of Westphalia as a framework to attain the stability of independent state.[121]

Generally, sovereignty of states constitutes the classical axiom upon which international law is anchored and provides the fundamental basics for international relations in contemporary international law. The doctrine connotes the capable resolve of states to reject intervention in their domestic affairs by any external authority or entity.[122]

Thus, sovereignty of states has been described to mean the supreme authority of any state to exercise exclusive domestic jurisdiction over the peoples and resources within its territorial borders not subject to any external authority.[123]

Essentially, sovereignty of states is a fundamental principle in international law which finds statutory approval in the United Nations Charter which 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.'[124]

---

[118]For further reading on the emergence of sovereignty of states, see E A Oji, *op cit,* pp. 116-118.

[119] W Greaves, 'The Intervention Imperatives: Contradictions Between Liberalism, Democracy and Humanitarian Intervention', (2008-2009) vol 8, *Innovation Journal of Politics*, 61-62.

[120] D Held, Law of states, Law of Peoples: Three Modes of Sovereignty, Legal Theory (2002) 8.

[121]J Delbrock, 'A fresh look at Humanitarian Intervention Under the Authority of the United Nations' (1991-1992) 67 *Indiana Law Journal,* 887-890.

[122]*Ibid.*

[123] E Rostow 'In search of a Major Premise: What is Foreign Policy For?'(1971) vol 61, *The Commonwealth Journal of International Affairs, 242.*

[124]Article 2(7).

Drawing from this encapsulation of the UN Charter, sovereignty of states implies that a state has the exclusive power to regulate itself devoid of any interference from external sources. It is a fundamental principle underlying the Westphalian model of state foundation.[125] Thus, it has been opined that respect for state sovereignty forms the cornerstone otherwise termed global covenant which acts as the foundation for international order.[126]

Sovereignty of States emphasizes equality of states and non-intervention in the domestic affairs of states in international relations. This is against the backdrop that international community considers the state as the repository of sovereign authority and founded on the assumption that international peace and stability can best be maintained where states respect each other's territorial sovereignty by strictly adhering to the principle and practice of non-intervention.[127]

Again, sovereignty of states is the cornerstone of the UN Charter as the fundamental principle of the United Nations Organization, which is a body established on the principles of universal membership and sovereign equality of states.[128]

According to BouteFlika[129] sovereignty of states is 'our last defence in an equal world.' Expanding this further,ShashiTharoor contended that the encapsulation of the doctrine of sovereignty of state is a healthy reminder that it was designed as a dam against the historical flood of imperial interventions.[130]

The emergence, development and recognition of regional and international human rights instruments and institutions have restricted the efficacy of the doctrine of sovereignty of state as an ultimate concept and has become under the management of international law often impacted by national interests. Thus, sovereignty of state in the

[125] H Bull, *The Anarchical Society: A study of Order in World Politics*(New York: Columbia University Press, 1977) 18.
[126] R Jackson, *The Global Covenant, Human Conduct in a World of States* (New York: Oxford University Press, 2000) 24.
[127]*Ibid.*
[128]Charter of the United Nations, 1945, Article 2(1).
[129]The President of Algeria.
[130] S Tharoor, 'Humanitarian Intervention, Principles, Problems and Prospects' (speech delivered at the Wilton Park Conference, Wilton Park, UK, February 19-23, 2001) available at http//:www.wab.gc.cung.edu//icissresearch//wiltonpark.tharoor.htm.Accessed 16 August 2015.

light of international recognition for the protection of human rights has rather become a relative and less comprehensive concept.[131]

According to Kofi Annan, the most basic sense of state sovereignty is in a process of redefinition by globalization and international cooperation, that states are being understood as instruments at the service of their people and not to the contrary and also brings up individual sovereignty, the freedom of each individual which has enhanced the consciousness of individual rights within concepts of human security.[132]

The doctrine of sovereignty of states is largely viewed as a basic principle of international law. The sovereignty of state in the aftermath of Westphalian foundation of state was clear and generally understood. However, the practice and application of the doctrine of state sovereignty in contemporary international law becomes unclear in view of the emergence of several principles of international law, where certain rights which were hitherto within the exclusive preserve of independent states were internationalized.[133]

Consequently, the evolving international trends and development and the international recognition of human rights protection has clearly impacted on the doctrine and practice of state sovereignty.[134]

2.4 The Nature and Scope of Sovereignty of States

Sovereignty of states implies independence and independence in relation to a portion of the globe connotes the right of an individual state to regulate its domestic affairs to the exclusion of any other state.[135] The principle of state sovereignty is so fundamental that it constitutes one of the foundational pillars of international law and has been so recognized and accorded extensive protection by the United Nations Charter.[136]

---

[131]A Al Omari, 'The Legal Concept of War: A study in Christianity and Islam (1995) *Social Affairs Journal*, 155.

[132] Kofi Annan is the Former Secretary General of the United Nations (1999-2007), address to the UN General Assembly, United Nations, 20 September 1999.

[133]W M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) vol 84, No. 4 *the America Journal of International Law*, 866-869.

[134]S Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996) p.28.

[135] Island of Palmas Case (1928) RI AA2 at pp. 829 & 838 cited in M N Shaw, *op cit.*

[136]Articles 2(1), (4) & (7).

Consequently, sovereignty of state encompasses the exclusive right of state to regulate their domestic matters in the manner they consider regular and proper. In otherwords, every state exercises the exclusive right to decide and implement its own political, economic and social system.[137]

Essentially, sovereignty of state entails the grundnorm of international society in that it authenticates a political order anchored on independence of sovereign states with domestic exclusive authority.[138]

According to Bruce Gronin, '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 this they can remain independent only by maintaining a system that imposes constraints on their independence'.[139]

The doctrine of state sovereignty embodies the fact that current international law is a legal order predominantly between coordinated states as its typical subject. Thus, state sovereignty remains the fundamental element of contemporary international society.[140]

As a consequence of sovereignty and its constituent rights, an independent state exercises control over its internal affairs. To fully appreciate the doctrine of sovereignty of states, it would be apt at this juncture to turn the discourse on the different perspectives of sovereignty even though our central focus is on the doctrine of sovereignty of states.

2.5 Different Perspective of Sovereignty

From the international law perspective all states are sovereign and are vested with judicial capacity to govern matters within their territorial frontiers. The constituent ingredients of sovereignty and their different perspectives are as follows:

---

[137] *Military and Paramilitary Activities Case* (*Nicaragua v. United States of America* (1986), *ICJReport 14).*

[138] R Jackson, '*Sovereignty at the Millennium* (Oxford: Oxford University Press, 1999) 10.

[139] B Gonin, 'Multilateral Intervention and the international Community in M Keren and D Sylvan eds, *International Intervention: Sovereignty versus Responsibility*.' (London,Frank Cass, 2002)p.26.

[140] E Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Cambridge: Cambridge University Press, 2008) p.45.

2.5.1 Absolute Sovereignty

The conception of absolute sovereignty connotes the exclusive control of matters within a sovereign domain without any form of external interference.This was the prevailing practice under the Westphalian sovereignty of State doctrine that is anchored as an absolute right of the State to regulate its internal affairs and this provide the sovereign State with the latitude to infringe on the human rights of its nationals with impunity.[141]

Thus, it has been contended that the conception of State sovereignty encapsulates the States liberty from foreign influence which essentially depicts the absolutist domestic control characteristic of absolute sovereignty of State.[142]

It is important to point out that sovereignty is the foundation of sovereign equality of States. It is the respect for the sovereign equality of States that contributes to the recognition and creation of State Sovereignty in current international law. Accordingly, under the dictates of international law, sovereign states are equal and independent constituent of the international community that operates on the principle of non-intervention as the basis for interstate-relations.[143]However, it has been argued that the absolute character of a sovereign State is not sacrosanct. This contention was rightly captured by Welsh when he pointed out that, 'even during Thomas Hobbes age of absolution, the legitimate power of the sovereign could be circumscribed in situations where the State was either itself a threat to individual or where it was either unwilling or unable to protect the individual from other threats to his or her security.[144] The views thus expressed here, which we find valid is to the effect that sovereignty of States was founded on the consent of the States citizens. It is in this respect that sovereignty of State was never contemplated as a mere capacity to compel, but there was always in existence limitations to exercising power within the confines of morality.[145]

The notion that a State exercises absolute control of its internal affairs is a misapprehension. This is against the backdrop that under the Current State System in

[141]J. Pattison, Humanitarian Intervention and the Responsibility to Protect (Oxford: Oxford University Press, 2010) p.2.
[142]*Ibid.*
[143]*Ibid*, pp 2-4.
[144]J Welsh, *loc cit*.
[145]*Ibid.*

international law, States require cooperation on several issues ranging from technology, communication, transportation *interalia*. This brings to the fore the concept of globalization being a restraint on the application of absolute sovereignty of State doctrine.

According to Steven Smith and John Baylis, globalization is 'the process of increasing inter-connectedness between societies such that events in one part of the world more and more have effects on peoples and societies far away.'[146]

Globalization, essentially presents sovereign states with new challenges to their autonomy and authority.[147]It must be noted that globalization considers the pursuit of interest on the global arena vide the application of unrestricted capitalism.

Accordingly, it has been opined that, 'implications for the sustaining of multilateral post-war arrangements are explored and analysed particularly in terms of war, its causes and its prevention. The notion of peace as human rights in action leads to the consideration of stances in a globalizing world of key multinationals in education – UNICEF, UNESCO and World Bank.'[148]

Thus, globalization which is facilitated today by unhindered flow of information and geometrical progression in technology constitute a driving force this, in this period of globalization, geographical distances are fading away and territorial frontiers do not constitute barriers.[149] Thus, technological advances in transportation and communication are eroding the boundaries between hitherto separate markets territorial boundaries, so much so that the most basic sense of state sovereignty is in a process of redefinition by globalization and international cooperation.[150]

Although absolute sovereignty postulate exclusive domestic jurisdiction devoid of external interference, the dictates of globalization presents a limitation to the sanctity of state sovereignty in reality.This was aptly captured by Oji and Ozioko when they opined that, 'We have lived in a world of essentially unchallenged sovereignty for several

[146]S Smith & J Baylis, *The Globalization of World Politics: An Introduction to International Relations* (6th edn, Oxford: Oxford University Press, 2011) p.14.
[147]M Beeson, 'Sovereignty Under Siege: Globalization and the State in Southeast Asia' (2003) vol 24 *Third World Quarterly*, 358.
[148]P W Jenes, 'Globalization and Internationalism: Democratic Prospects for World Education' (1998) vol 34
[149]M Beeson, *op cit*, p.362.
[150]R M Rocha, 'Does Sovereignty Remain as the Foundational Principle of the International System' (2013) vol 4, No. 2, *Law International Review*, 195.

generations now, and had begun to think of it as the national state of affairs. However, the idea of states as autonomous, independent entities is collapsing under the combined onslaught of monetary unions, global television, the internet, governmental and non-governmental organization.'[151]

However, inspite of the impact of globalization on international relations, state sovereignty still retains its pride of place as the foundational principle of international law.[152]More revealing is the fact that even the fundamental principles of sovereignty of States are in opposition to each other as evident in the competing imperatives of humanitarian intervention and non- intervention.International law encourages and promotes friendly relations among independent States pursuant to which conventions and treaties are subscribed to by States which in turn renders the absolute conception of Sovereignty of State a mirage.

2.6 Internal Sovereignty

The concept of sovereignty entails non-interference and respect for domestic affairs of states within its territorial frontiers and also the recognition of the equality of all states within the sphere of international relations.[153] Sovereignty is often described in relation to internal control and external autonomy. However since both control and autonomy wax and wane in the real world of politics, sovereignty is better understood as authority recognizing the right to exercise exclusive jurisdiction over a delimited territory and population within the state.[154]

Sovereignty viewed from the foregoing perspective recognizes two competent ingredients that is internal and external sovereignty.[155] The emphasis here is that an independent state exercises the liberty to regulate affairs within its domestic jurisdiction in a legitimate way provided that such exercise of state's powers or authority are in consonance with its international obligations.

---

[151]E A Oji &MVCOzioko, 'Effects of Globalization on Sovereignty of States' (2011) vol 2 *NnamdiAzikiwe University Journal of International Law and Jurisprudence*, 257.
[152]R M Rocha, *loc cit.*
[153]D A Lake, 'The New Sovereignty in International Relations' (2003) 5 *International Studies Review*,304.
[154] J Thomson 'State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research' (1995) vol 39, No. 2, *International Studies Quarterly*, 213-215.
[155]*Ibid,* p.233.

The concept of sovereignty is not limited to internal characteristic of an independent state but also a clear recognition of its external attributes by the international community. Essentially internal sovereignty clothes independent state with exclusive authority to regulate its domestic matters which constitutes a shield particularly on the part of weaker states against external interference especially from stronger states. This was aptly stated by Benedict Kingsbury that, 'the normative inhibitions associated with sovereignty moderates existing inequalities of power between states and provide a shield for weak states and weak institutions.These inequalities will become more pronounced if the universal normative understandings associated with sovereignty are to be discarded.[156]

Consequently internal sovereignty connotes the relationship between an independent state and its own nationals. A fundamental concern of internal sovereignty is legitimacy. In other words, by what right does a government exercise authority? Thus, the claim to legitimacy may be derived from a social contract or divine right of monarchy.[157]

It is noteworthy emphasize that a state which possesses internal sovereignty is that with a government that has been duly put in place by the citizens on the heels of popular legitimacy. Internal sovereignty evaluates the domestic matters of a sovereign state and its regulations.

It is paramount for a state to possess strong internal sovereignty towards maintaining peace and stability within its domain. Thus, when a state has a feeble internal sovereignty, organized groups the rebel groups will undermine its independence and create instability within the state. The exercise of strong internal sovereignty by a state permits such a state to honour agreement and implement sanctions for the infringement of laws.[158]

Internal sovereignty therefore concern itself with the kind of authority within an independent state which is the ultimate authority conferred on the citizenry expressed in

[156] B Kingsbury 'Sovereignty and Inequality' in Andrew Hurrell and Ngaire Woods (eds) *Inequality Globalization and World Politics*(New York: Oxford University Press, 1999) p.86.

[157] A Heywood 'Political Theory' in Palgrove Macmillan available at http://www.scribd.com/doc/internalsovereignty#92.Accessed 25 August 2015.

[158] W Rider 'War, Peace and Internal Sovereignty' available athttp://spot.colarado.edu/wolfordm/implementation2.pdf.p3.Accessed 28 August 2015.

the idea of the general will of the people.[159] However, the practice and application of internal sovereignty have been greatly impacted by certain invitations occasioned by the development of international relations and the evolving principles of contemporary international law. The exclusive internal jurisdiction of independent state is shrinking since any state upon its commitment to international treaty is compelled to surrender certain aspect of its sovereignty and accordingly to give up some jurisdiction that hitherto was within the preserved scope of domestic territorial frontiers.

2.6.1 External Sovereignty

The external sovereignty of an independent state is anchored on the state's relations with other states, international organizations and other legal entities of international law. External sovereignty which is another component element of sovereignty relates to the recognition of sovereign equality of states within the scope of international relations.[160]

The dictates of external sovereignty is reflected in the way and manner an independent state manages its relations with other sovereign states devoid of external influence. This is replicated in manifold ways in terms of its trade and diplomatic relations with other states, domestic ratification and incorporation of international treaties and joining the membership of international and regional organization without compulsion or subject to foreign control of any other sovereign state.[161]

Sequel to the thirty years war, that is a European religious conflict which engulfed much of the continent, the Peace of Westphalia 1648 created the concept of territorial sovereignty as a fundamental element of international law heralding non-interference in the affairs of other states.[162]

Consequently, under international law sovereignty connotes that a government exercises full control over matters within its territorial precinct. However, the development of international law since the establishment of the charter of the United Nations in 1945 has been inclined towards intervention in spheres that are hitherto

[159]Heywood, *opcit* @ p.93.
[160]D A Lake, *op cit*, 304-305.
[161]A Abbas, '*Sovereignty'*(1st Edn, Damascus: Harvest House for Publication, 1994)p.110.
[162]AOsiander 'Sovereignty, International Relations and Westphalia Myth' (2001) vol 55,No. 2,*International Organization Journal*, 251.

considered to be within exclusive domestic jurisdiction of independent states.[163]However, international law permits derogation from the succinct concept of external sovereignty in certain circumstances permitting international bodies to intervene in the domestic realm of the state and the sovereign state in turn becoming subject to the application of international law principles necessitated by the synchronization of the state's interest with that of the international community.[164]

2.6.2 *De Jure and De Facto Sovereignty*

De jure sovereignty otherwise termed legal sovereignty relates to the expressed and institutional recognized right to exercise control over a territory. However *De facto* sovereignty relates to the instances of the actual existence of sovereignty. In otherwords whether the right to exercise exclusive domestic jurisdiction over people and resources within a territorial boundary does in fact exist.[165]

2.7 Sovereignty of States vis-à-vis the United Nations Charter

The creation of the United Nations Organization pursuant to the UN Charter provided a basis for entrenching the sovereignty of state doctrine.[166]This foundational basis of international relations among sovereign states in international law is enshrined in the UN Charter which stipulate to the effect that interference in the domestic matters of a sovereign state is disallowed in international relations under contemporary international law.[167]

The implication of this legal backing is that state sovereignty gives independent state the legal authority to manage their domestic affairs free from external interference and prohibit powerful states intervening in the internal matters of weaker states. Consequently, without the practice and application of state sovereignty as a basic principle, only international norm, balance of power or internal constraints would restrict interference in domestic affairs of other states.[168] Hence the preservation of the doctrine

[163]*Ibid.*
[164]Weiss, *op cit*, p.20.
[165] D Held, *op cit*, p.26.
[166] The United Nations Organization constitute membership derived from sovereign states.
[167] Article 2 (7);
[168] M Keren& D Sylvan, *op cit*, p.24.

of state sovereignty by the charter system has been acknowledged as a fundamental element of a rule-based framework for international relations among the comity of nations.

2.7.1 The Principle of Non-Intervention

The principle of non-intervention law is generally viewed as its basic principle established to safeguard international order and sovereignty of states. The commitment of states to respect the rights of each state and relate on the basis of equality imposes the obligation on states not to intervene in the domestic matters of other states.[169]

The founders of the United Nations Organization were extremely engaged with the pervading challenge of states waging war against each other consequent upon which the charter of the United Nations universally prohibited the use of force save for exceptional circumstances of self-defence in confronting an attack and authorization by the United Nations Security Council to act in instances of threats to international peace and security.[170]

The non-intervention principle of international law finds statutory expression and attestation in the UN Charter which 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.'[171]Flowing from this statutory safeguard, the UN Charter guaranteed non-intervention in the matters of sovereign states that are at the core of domestic jurisdiction of states. Intervention in international law constitutes forced military action of a sovereign state(s) against another independent state(s) without the consent of the latter and also without the approval of the UN Security Council to halt gross and large scale human rights violations.[172]

Thus, the intervention by the international community or any regional or international organization in the domestic matters of an independent state with the authorization of the UN Security Council or General Assembly pursuant to Article VII of the UN Charter is not viewed as an intervention in the sovereign state's domestic

[169] J Fonteyne, *op cit,*p.207.
[170] See United Nations Charter 1945, Articles 39 & 51.
[171]Article 2 (7).
[172] J Fonteyne, 'Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter' (1973) *California Western International Law Journal*, p. 203.

affairs.[173] Non-intervention essentially relates to the prevention of states from interference in the matters of other states by abstention from actions exceeding their mere interest in reconciliation between belligerent states seeking to influence the will and fundamental liberty of another independent state.[174] Thus, the dividing line between intervention in the domestic affairs of state and the infringement of state sovereignty and the corresponding reaction of the international community provides the legal and legitimate framework for a multilateral response to certain domestic situations.[175]

Essentially, it has been opined that humanitarian intervention constitutes a camouflage for an unjustified intervention in the domestic jurisdiction of an independent state, particularly as it relates to weak states.[176] Accordingly, the International Court of justice did not accept the assertion of the United States of America that its intervention was in order to compel Nicaragua to execute its internal commitment which it made before the Organization of American States which it did not execute in the sphere of human right and the creation of a democratic system.The ICJ viewed it as an exclusive domestic affair of the Nicaraguan people and as such the United States is bereft of authority to intervene since this singular act amount to an infringement of the non-intervention principle and sovereign equality of states enshrined in the UN Charter.[177]

Interventions grounded on UN Security Council authorization and those conducted by multilateral coalitions including organizations such as North Atlantic Treaty Organization (NATO) witnessed in the 1990s is a manifestation of the inherent tension between international concern rapidly transformed into intervention for humanitarian purpose and state sovereignty.[178] And so non-intervention in the internal affairs of a sovereign state is a significant corollary of state sovereignty that acts as a no trespassing sign protecting the exclusive territorial domain.[179]

The principle and application of state sovereignty and its attendant component of non-intervention has modified cases of increasing intervention on the part of the strong

[173] *Ibid*,p.209.
[174] B Basel, *The Sovereignty of State under International Protection of Human Rights*(1st edn, Abu Dhabi,2001) p.145.
[175] *Ibid.*
[176] Military and Paramilitary Activities Case, *op cit*, p.14.
[177] Article 2 (4), *op cit.*
[178] R Jennings and A Watts (edn), *Oppreheim's International Law (*9th edn, London: Longman, 1992)pp.90-92.
[179] R Vincent *Non-intervention and International Order*(Princeton: Princeton University Press, 1999) p.86.

states against the weak ones.[180] What is being said here is that the doctrine of state sovereignty presents itself as a check on the rapidly growing instinct of intervention in the internal affairs of weak states by the strong states.

The establishment of the United Nations brought with it the enlargement of its membership, especially during the decolonization period. Newly created states held their identity in high esteem and conscious of their delicate status embraced the non-intervention principle as one of the few brick walls to counter threats and pressures championed by the more powerful international actors aiming to advance their own economic and political interests.[181]

It is important to emphasize that laudable as the non-intervention principle portends, its application and practice is subject to certain exceptional instances such as the stipulations of the Genocide Convention.[182] The implementation of the convention was greatly inhibited particularly during the cold war era, even in circumstances where legal contentions relating to absence of provable intent was not in issue. The instance that stood out was that of Cambodia under Pol pot in the mid-1970s coming within the confines of a gross genocidal situation. However, instead of commendation upon crossing the boundary to displace the Khmer Rouge, Vietnam got large scale global repudiation.

Although the Vietnamese intention may have been neither pure nor humanitarian, its intervention halted the genocidairies in their tracks. Notwithstanding, all global attention and pressure was on the intervening state instead of being on the perpetrators of the horrendous massacres.[183]

The application of the non-intervention doctrine was further beginning to be circumscribed by the emergence of relevant international human rights instruments during the cold war era.[184] Despite these evolving instruments concerning human rights protection, its practical implementation remained grossly inadequate and the non-

[180] *Ibid.*

[181] H Bull *The Anarchical Society: A Study of Order in World Politics*(New York: Columbia University Press, 1977) p.20.

[182] Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

[183] Convention on the Prevention and Punishment of the Crime of Genocide: UN Doc A/Res/260 available at http://ods-dds-ny.un.org/doc/resolution/gen/nro/044/31/img/pdf accessed 16 August 2015.

[184] The International Human Rights Instruments include, the Universal Declaration of Human Rights, 1948; the 1966 Convention on Civil and Political Right and the 1966 Convention on Economic Social and Cultural Right, also dubbed the twin international human rights covenants.

intervention in the internal affairs of sovereign states held sway in terms of international relations.However, in the aftermath of the cold war and the new period of international cooperation between previous belligerents,there was a paradigm shift towards active and effective international security system.[185]

This was evidently buttressed by the international defence of Kuwait against the 1991 invasion by Iraq presenting a worthy illustration of the international system working as it was conceived in response to international armed conflict.Interestingly, the UN Charter does not allow the Security Council to authorize forceful intervention to halt infringement of human rights that does not pose a threat to international peace and security.[186] Article 2 (7) of the UN Charter clearly proscribe the United Nations from intervention in affairs that are basically within the territorial domain of a sovereign state.[187] It follows that any intervention undertaken by state(s) not sanctioned by the Security Council would be tantamount to a breach of the charter provision that guaranteed sovereign equality of states.[188]

The principle of non-intervention has been strongly established in international law over a long period of time that unless intervention from an external authority in a human rights or humanitarian issue can be brought within the ambit of the principle of *juscogens***,** such an established position does not admit of any deviation.[189] Accordingly, states are prohibited from the exercise of authority inclusive of the use of force within the territorial domain of other sovereign state.[190]

The application of the non-intervention principle over the years has become evident through the various resolutions issued by the United Nation which forbid armed or unarmed intervention or any other threat directed at an independent state and its fundamental economic, political and other national interests. [191] These resolutions

[185]ICISS Report, *Loc cit.*

[186]Chapter VIII of the Charter of the United Nations, 1945.

[187] Non-intervention principle occupies a fundamental position in contemporary international law and has been consistently reaffirmed by the United Nations General Assembly and the International Court of Justice.

[188] Article 2(4) of the Charter requires all member states to refrain 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..

[189] M De Sousa, *Loc cit.*

[190]*Ibid.*

[191] See generally, Declaration Number 2625 on Principles of International Law Concerning Friendly Relations and Cooperation Among States pursuant to the Charter of the United Nations of 24th October, 1970.

enunciated comprehensive principle of non-intervention where the rights and independence of sovereign states as well as their liberty to choose their socio-political system are recognized.

The purport of these several UN resolutions is to the effect that it is disallowed to intervene in the domestic matters of independent state with firm emphasis on the significance of protecting the entrenched doctrine of state sovereignty. [192]

2.7.2 Prohibition on the Use of Force

The use of force in international relations between independent states is forbidden by international law and has since attained the status of classical principle of customary international law.[193]So intrinsic is the rule of international law prohibiting the use of force by one state against another sovereign state that it has been globally acclaimed as a classic example of *JusCogens*.**[194]** Being a principle of customary international law, the prohibition against the use of force is distinct from subsequent treaty obligations. However, the subsequent treaties and conventions have tremendously imparted the application and exact scope of the ban against the use of force. The treaty stipulation which culminated in the substantive development of the prohibition of the use of force is enshrined in the UN Charter, article 2 (4) that provides thus: '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.' For a clearer understanding of the prohibition against the use of force, the discourse under this sub-head will centre on article 2(4) of the UN Charter.

Consequently, what readily comes to mind in this regard is what kind of force is prohibited in international relations among sovereign states? It seems from general consensus that there are two perspectives in this respect. The wide approach which

---

Declaration on the Inadmissibility of Intervention and Interference on the Internal affairs of States pursuant to the Resolution of the UN General Assembly Number 36/103 of 9th December, 1981.

[192] J Fonteyne, 'Forcible self-help to Protect Human Rights: Recent Views from the United Nations in Lillcch (ed) *Humanitarian Intervention and the United Nations* (Charlottes: University of Virginia 1973) pp. 209-211.

[193] *Military and Paramilitary Activities Case*, supra.

[194] J Dugard*International Law: A South African Perspective*(2nd edn) 2000 @ 41.

considers the word 'force' to include force of any kind be it physical, political, economic or otherwise.[195]

On the other hand, is the narrow approach which follow the traditional view that the force banned is restricted to armed force.[196] This work focuses on the prohibition against the use of armed force. The use of force in this regard is further classified into direct and indirect armed force which has been outlawed.[197] In *Military and Paramilitary Activities Case*, the ICJ declared that arming and training of a group fighting against the Nicaraguan government was tantamount to the threat or use of force by the United States of America.

Another issue arising from the stipulation of article 2(4) is the scope of the force required to render the action unlawful. The provision of article 2(4) clearly provides that not only actual use of force is prohibited, but also the threat of the use of force. Bringing this connotation in practical terms it can be said that the buildup of military force or specific deployments may be considered unlawful where the purpose of this action is to compel an independent state into compromising its position. Accordingly, every particular situation of alleged threat of force must be determined on the basic individual factual situation. According to Schechter, 'two of the most important factors to be considered in such a determination are, firstly, the preponderance of the military strength of the state and its political relations with potential target states.'[198]

The prohibition in article 2 (4) makes it clear that the use of force is unlawful only if it is during the course of international relations and only if it is against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. In depicting this limitation, Antonio Cassese opined that, 'force may be neither against states, nor against people having a representative organization and falling in one of the categories entitled to self-determination.'[199] In another breath, Schechter further opined that the relationship between the phrases "territorial integrity", "political independence and "inconsistent with the purposes of the

[195] O Schachter, *International Law in Theory and Practice* (Dordrecht: MartinusNijhoff Publishers, 1991) p. 111.
[196] *Ibid.*
[197] Military and Paramilitary Activities Case, (*Supra)*, pp. 118-119.
[198] O Schachter, *op cit, p.113.*
[199] A Cassese, 'A follow-up: Force Humanitarian Counter-Measures and *OpinioNecessitates*' (2000) vol. 10, *European Journal of International Law*, 791-800.

United Nations" are not mere qualifications of the prohibition but rather to ensure a complete ban on the use of force with the exception of those exceptional circumstances contained in the Charter.[200]

Thus, any forceful invasion of armed troops into the territorial domain of an independent state devoid of its consent infringes on the territorial integrity of that state.[201] The implication of this is that the presence of the armed troops in a sovereign state without its consent constitutes a breach of its sovereignty notwithstanding the purpose of the intervention. In this regard, the view has been expressed that "any use of force to coerce a state to adopt a particular policy or action must be considered an impairment of that state's political independence.[202] Thus, it is the author's submission that any use of force in international relations subject to recognized exceptions would be inconsistent with international law and the dictates of the United Nations Charter.

Accordingly, a state that reneges on its treaty obligations owed to other states would attract international penal responsibility. Moreso, where the violations of the treaty obligation is essential for the safeguard of basic interests of the international community, it may be categorized as an international crime.[203]

Sequel to the above, the Charter of the UN does not give credence to the use of force as a mechanism for the resolution of international conflict.Essentially, the Charter framework is designed to regulate international relations of the weak and mighty states. Hence, no state no matter the potency of its armed forces is allowed to threaten another state with the use of force. Similarly, as earlier mentioned, no state is allowed to use force against the territorial integrity of another sovereign state. However, where a state uses force against the territorial integrity of another state, for example coercive incursion of armed troops in a foreign state, it would render the aggressor state responsible for the resultant damages to the state so invaded.[204]

It is pertinent to point out here that the UN Security Council has the primary responsibility to maintain international peace and security.Thus, the UNSC determines

[200] Schechter, *loccit,*see generally Article 51, 53 & Charter VII of the UN Charter.
[201] B Widner, 'Can Panetics Help Humanitarian Interventions Do More good than Harm' available at http://www.panetics.org/displayoneevent.cfm accessed on 13 August, 2015.
[202] *Ibid.*
[203] E AOji, *Responsibilities for Crimes Under International Law*(Lagos:Odade Publishers, 2013) p.29.
[204] *Nicaraguan Case (1986) I.C.J Rep p.14* culled from M.N Shaw op citp.1036.

the measures to be taken in the event of the use of force or the threat of same in international relations in flagrant breach of the Charter stipulations to restore peace and security. [205] Furthermore, the UN Charter prohibits individual states and regional organizations from the use of force in international relations except with the authorization of the UNSC. [206] Notwithstanding the entrenched prohibition on the use of force in international relations pursuant to the provisions of the UN Charter, there are certain established exception that warrant deviations from the general principle inhibiting the use of force. These exceptional grounds are encapsulated in the UN Charter as exceptions to the application of Articles 2 (4).

The first exceptional ground prescribed by the Charter is contained in Chapter VII relating to enforcement action taken under the auspices of the United Nations Security Council. The second exception is the customary international law of the right of self-defence that finds statutory expression in Article 51 of the UN Charter which permits the use of force by states in situation of self-defence. This Charter stipulation recognizes that self-defence is an inherent right of states that often provide the basis for justification for the use of force against aggression and external attacks on its territorial sovereignty.[207] The third Charter exception is contained in Article 53 that provides for regional organizations enforcement action under the auspices of the UNSC. It must be noted that, actions undertaken pursuant to this charter exception may only be undertaken if the prevailing circumstance constitutes a threat to peace, breach of peace or act of aggression.[208]Considering the Charter exceptions, Article 51 provides that, 'Nothing in the present charter shall impair the inherent right of individuals or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and

[205]Charter of the United Nations, 1945, Article 39.
[206] B Winder, *op cit, p.44.*
[207]The emphasis here is that the Charter regime absolutely recognizes the use of force in the face of unprovoked armed attack by a Sovereign State against external aggression.
[208] See Charter of the United Nations, Articles 39 & 42.

security.Consequently, Article 51 contemplates the circumstances where force could be legally used by states in defence against actual armed attack. The interpretation and application of this Charter stipulation has been a subject of intense controversy concerning whether a state would have to wait to be attacked before undertaking self-defence. Again the controversy stems further to whether a state anticipating an armed attack from another sovereign state can undertake pre-emptive attack against the state intending the attack. According to Grotious, the acclaimed father of international law anticipating attack against planed attack is proper and commensurate.[209]

2.8 Emerging Trends of the Doctrine of State Sovereignty

The doctrine of state sovereignty it would seem is no longer sacrosanct, in that notion of intervention in the domestic affairs of a sovereign state has over the years received a qualitative new and different focus.[210]

Intervention in the contemporary international law is increasingly determined and measured in terms of the set goals which are a significant departure from the traditional purposes which intervention was intended to accomplish prior to the 1990s.[211]

Accordingly, these new objectives are supposed to be humanitarian and universal in character rather than political and strategic. Again, intervention is projected to be carried out by or on behalf of the international community as opposed to intervention undertaken for the narrowed interest of unilateral or multilateral forces under the auspices of coalition of states. It is in this respect that, it has been contended that such intervention is represented as international intervention that is carried out to attain humanitarian ideals and that these objectives are supposed to be humanitarian and universal in character rather than political and strategic. It is alsocontended that these objectives are intrinsically far too valuable to be held hostage to the norm of state sovereignty and therefore ought to override that norm.[212]

---

[209] H Grotious, *Rights of War and Peace Including the Law of Nature and of Nations* (London: Walter Dunne, 1901)

[210] T Weiss, 'Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention' (1992) vol 6,*Ethics and International Affairs*, 98.

[211] *Ibid.*

[212] See Generally Kofi Annan's Statement to the UN General Assembly on 20th September, 1999 published under the title "Human Security and Intervention in *Vital speeches of the Day* (New York, 5th October, 1999).

The evolving dimension relative to the application of the doctrine of state sovereignty as clearly pointed out by the erstwhile UN Chief scribe[213] represents a radical departure from the cold world period where intervention was carried out frequently to advance strategic goals and justification were provided within the framework of sovereignty rather than in contravention of that norm.[214]

It has further been contended that the manner in which international law conceives of these legal spaces has metamorphosed from an absolute to a conditional conception of state sovereignty and that this metamorphosis is essential for the comprehension of the legality of humanitarian intervention.[215]A classic example denoting the evolving trend of state sovereignty is the Report of the International Commission on Intervention and State Sovereignty (ICISS) which succinctly depicted that the reality of global interdependence has consistently downplayed the traditional conception of state sovereignty as an exclusive domain with domestic jurisdiction restricted only by the sovereignty of other states.[216]

Interestingly, the report contends that absolute sovereignty relinquished non-intervention principles which corroborate the unwillingness of international law to approve the application of humanitarian intervention. The report further posited that the concept of absolute sovereignty is gradually substituted for a more conditional conception of sovereignty that accommodates intervention in certain circumstances. For example, in situations of gross and systematic human rights breaches by a sovereign state, intervention is allowed to halt the catastrophe as was in case in Libya in 2011.

This ICISS Report is steadily gaining momentum of global outlook hence it has been aptly opined that, 'it would be extreme to suggest that sovereignty is absolute to the point of protecting the right of a state to carry out genocide, massive human rights violations and generally terrorizing the population.[217]

---

[213] Kofi Annan.

[214] *Ibid.*

[215] F Deng, *Sovereignty as Responsibility, Conflict Management in Africa*(Washington DC: Brookings, 1996) p. 27.

[216] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre for ICISS, 2001) available at http://www.gc.ca.Accessed on 25 August 2015.

[217] F Peterson, 'the Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign State.'(1998)vol 15, No. 3, *Arizona Journal of International and Comparative Law*,889.

The evolution and development of several principles and norms of international law and the universal attainment of international protection of human rights had manifestly impaired on the hitherto absolute conception of state sovereignty.[218] Again evolving international standards compelled small and medium size sovereign states to join international organizations with the ultimate objective to foster their rights and preserve their sovereignty. [219] Correspondingly, these compelling circumstances that accompanied contemporary international organization made it equally obligatory and reasonable for the sovereign states to cede certain aspects of their domestic preserves to attain international peace and security.[220]

The practice and application of the traditional principle of absolute state sovereignty began to experience a departure particularly in the aftermath of World War II actuated with the challenge in handling the emergingdevelopment in the global order accommodating compromise on a number of fundamental principles that direct and organize the international community.[221] It is noteworthy that the creation of the United Nations Organization in 1945 played a significant role in placing restraint on the previously absolute conception of state sovereignty. The claim to absolute state sovereignty was imposed by the Charter system as derived from commitments adopted by member states of the UNO. Thus, these obligatory restrictions imparted in galvanizing the Charter as a supreme constitutional principle that superseded and transcended the constitutional enactments of member states of the UNO.[222]

Although the doctrine of state sovereignty is concerned with the exclusive right of an independent state to practice and pursue its internal affairs and external relations within the limit of legislations which organize the various activities of the state without foreign intervention; the changes in international relations on the global arena in the last three decades had significant impacts on the principles of international law where the old

[218]W M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) vol 84, No. 4, *The American Journal of International Law,* 868.

[219]*Ibid*: The evolving international standards towards humanitarian intervention would be examined subsequently in the course of thus dissertation.

[220] J Emilio, 'About the Impossibility of Absolute State Sovereignty' available at http://link.springer.com/articleininternationaljournalforthesemioticsoflaw accessed 26 August 2015.

[221]*Ibid.*

[222] Article 103 of the Articles of Association of the International Court of Justice; see also the Charter of the United Nations, Chapters I&II.

world order was dependent on bipolarityepitomized in the United States of America as the champion of the capitalist western camp and the soviet union the leader of the communist camp.[223] The era of the cold war engendered aggressive competition for these polarized super powers, which eventually collapsed in the aftermath of the transformation experienced by States of Eastern Europe and Soviet union in adopting the principles of political pluralism and forms of liberal democracy and free economy on the domestic front and these states became predisposed and receptive to the western camp democratic norms.[224]

Consequently, the end of the old order and the emergence of the new order have had universal consequences to which many sovereign states adopted democratic systems and human rights in tandem with international law principles in a paradigm shift from the absolutism of the conception of state sovereignty.

The emerging trend of the doctrine of state sovereignty further departs from the absolute conception of the exclusive domestic preserve of states within their territorial jurisdiction to describing state sovereignty as a legal trap improvised to protect criminals acting on the guise of official state acts with the preoccupation to obviate criminal responsibility.[225] This is aptly captured, by Kofi Annan when he said, 'Sovereignty would not comprise ofimmunity against the international law and international organizations when it hides legal violations and crimes against humanity.[226] This epitomizes the seeming agreement between the domestic measures and provisions that are anchored within the sphere of internal sovereignty and international stipulations, on the one hand and the international legal rules that epitomizes the will of the international community and international legitimacy on the other hand by virtue of the separation of authorities and jurisdictions between sovereign states and international regulatory agencies and the commitment of complying with the requirements consequent upon international treaties. This synergy will essentially attain the integration of domestic systems and international

[223]P Evans, 'The Eclipse of the State? Reflections on Stateness in an Era of Globalization' (1997) 50 *Journal of World Politics,* 62.
[224]*Ibid.*
[225]ICISS Report, *loc cit.*
[226]O El-Shafie, 'Intervention and State Sovereignty' Cairo Round Table Consultation of the ICISS 21 May 2001, Discussion Paper available at http://web.gc.cuny.edu/ICISSresearch/Reports/cairo.discussionpaper.omran.shafei.htm.Accessed 26 July 2015.

treaties with the potentiality of retaining the practice and application of state sovereignty while permitting interventions where the circumstances so require.

2.8.1 Sovereignty of States and Human Rights

There has been a continuous claim for a depreciation of the Westphalian concept of state sovereignty that tilts towards relative sovereignty of state.[227]It is important to note that human rights connote the inalienable rights accruable to a man simply because of the status of human being. The global recognition of human rights emerged in the aftermath of the World War II with the creation of the United Nations in 1945.Humanitarian considerations arise where it involves the large scale violations of human rights. Humanitarian intervention comprises the responsibility to protect in situations of cruel and consistent breaches of human rights that exceed the bounds within which independent state are supposed to act.[228]Further to this, principles of international law left a free zone in where it is allowed for the state to move freely provided the independent state is obliged not to compromise certain legal rules that symbolizes the basic standards of international legal rules.

Consequently, matters which previously were considered only within the exclusive domain of sovereign states are currently accomplished on the basis of international cooperation in different ramifications.[229]

In the area of International Human Rights Law (IHRL), there is an increasing agitation that the strict application and practice of state sovereignty would constitute a barrier to the promotion and protection of human rights. This is because before the evolution and international recognition of human rights, such matters were solely within the jurisdictional competence of sovereign states.[230]

---

[227]K Annan, 'We the people: The Role of the United Nations in the 21st Century' (2000) Millennium Report of the Secretary General of the United Nations. Available at http://www.un.org/millenium//sg/report.pdf.Accessed 26 July, 2015.

[228]J Donnelly, 'State Sovereignty and International Intervention: The Case of Human Rights*' in G Lyons & M Mastanduno (eds), Beyond Wesphalia? State Sovereignty and International Intervention* (Baltimore: John Hopkins University Press, 1995) 115.

[229] The Universal Protection of human rights has developed into the recognition and application of treaty obligations that takes away genocide, war crimes and crime against humanity outside the realm of domestic jurisdiction, the violations of which attract international criminal responsibility.

[230]The emphasis here is that the Westphalian model of State Sovereignty dictated absolute control of all matters within the sovereign territory on independent states.

However, under contemporary international law, states cannot lay claim to the doctrine of state sovereignty as a shield in the face of wanton and gross human right violations. Notably, it has been vividly enunciated by some authors juxtaposing the connections between the conception of state sovereignty and the protection of human rights in the following three dimensions, namely; in the field of international organizations, states accept that the organizations like the United Nations or the European Union can take decisions on which they no longer have decisive influence. Secondly, in the field of regional and international quasi-judicial institutions, state accepts that individuals can turn to these international bodies that have jurisdiction on human rights issues and thirdly in the field of conflict and foreign intervention, states tend to accept infringement on their sovereignty for the protection of individuals from grave human rights violations.[231]

2.9 Sovereignty of States: From Right to Control to Responsibility to Protect

There has been frantic effort particularly in the beginning of the 1990s towards the redefinition of the conception of state sovereignty to embrace the notion of responsibility.[232]

Essentially, this portends the addition of respect for a basic standard of human rights as an integral element of the doctrine of state sovereignty. This responsibility, it has been opined cast an obligation on the state both to its nationals and to the international community and those of its institutions that represent the custodian of international norms of civilized conducts.[233]

The application of the doctrine of state sovereignty has over the centuries sustained the galvanization of international order by sovereignty constituting a normative impediment against the plundering instincts of the more powerful states and entrenching the doctrine of non-intervention in the domestic matters of states as an integral element of international law.[234] However, in the aftermath of the ICISS Report, its proponents

[231] I Boerefijn and J Goldschmdt (eds) *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of CeesFlinerman*(Mortsel: Intersentia, 2008)p.62.
[232] F Deng *etal*, 'Sovereignty as Responsibility' (Washington DC: The Brookings Institution, 1996) p. 28.
[233] *Ibid.*
[234] *Ibid.*

contend that absolute sovereignty yielded the principle of non-intervention that underscores the restraint of international law to embrace humanitarian intervention.

Under this postulation, international law confers sovereignty in a state to ensure the protection of its citizenry. Thus, where a state reneges to meet this responsibility and its people is groaning consequent upon gross human rights violations, the principle of non-intervention capitulates to an international responsibility to protect the people of such an independent state from untold hardship, by where necessary through military intervention.[235]

However, the application of state sovereignty doctrine may not have totally forestalled interventions in the past, it has contributed immensely as a normative attribute of mandating intending or actual interveners to render justification for their intervention. On the contrary, it has also been contended that altering the normative benchmarks regulating intervention may result in substantial harm than good to the international order.[236]

In the light of the preceding discourse, it is the researcher's submission that the doctrine of state sovereignty is an international legal entitlement, where sovereignty of state was hitherto absolute, it was a creation of international law and where state sovereignty is to be conditional it should be the creation of international law.

Consequently, the emerging conception of state sovereignty from absolute control to responsibility to protect is clearly depicted, thus, 'the defence of state sovereignty by even its strongest supporters do not include any claim of the unlimited powers of the state to do what it wants to its own people… Sovereignty implies a dual responsibility: externally to respect the sovereignty of other states and internally to respect the dignity and basic rights of all the people within the state.'[237]

The changing concept of state sovereignty culminating in limitations on freedom of action of sovereign state may assume the form of customary international law rules or treaty obligations subscribed to by the state. Accordingly, the international community

[235] J Rawls, *The Law of Peoples*(Cambridge: Harvard University Press, 1999) p.80.
[236] H Kelson, *The Law of the United Nations: A Critical Examination of its Fundamental Problems* (1959) p. 280
[237] C Corrigan, 'The Hard Choice: To Intervene or Not?' Available at http://www.riml.org/index.php/actiondisplaydoc/corrigan.pdf.Accessed on 14 August 2015.

has come to take such limitations not to only relate to foreign activities of states but also matters of domestic concerns of the sovereign state.[238]

2.10 Limitations of Sovereignty of State

A generally accepted limitation to the application of the doctrine of state sovereignty is embedded in the rule that the exercise of a state's external independence must not be undertaken in such a manner as to cause any interference in the domestic affairs of another sovereign state.[239] This limitation is a natural concomitance of the established doctrine of sovereignty of state.

The practice and application of the doctrine of state sovereignty is further limited by the combined effects of treaty provisions and the rule of customary international law. Treaties which connote contractual obligations subscribed to by states parties thereto often permits restricted interference into the otherwise exclusive domestic matters of independent state. Thus, treaties like the twin 1966 International Covenants[240] and the 1949 Geneva Conventions together with their Additional Protocols established limitations that bind contracting states to safeguard the basic liberties and human rights of their nationals and attract penal sanctions in the event of grave breaches of these restrictions.[241]

It is important to emphasize that although sovereignty of states may be circumscribed in certain situations,it must be noted that sovereignty of states is the foundational basis of the contemporary state system. It is in this regard that where a sovereign state acts in such a way as to impair upon the sovereignty of another state in which such action is not sanctioned by the rule of customary international law or by the stipulations of Treaties then such actions violate the sovereignty of the latter state.

According to Jennings & Watts, 'In absence of treaty provisions to the contrary, a state is not allowed to intervene in the management of the internal or international affairs

[238] *Military and Paramilitary Activities in Nicaragua Case*(*supra*) p. 131.
[239] See *CorfuChannelCase*(1949) *ICJReport* 35.
[240] The International Covenant on Civil and Political Rights, 1966 & the International Covenant on Economic, Social and Cultural Rights, 1966.
[241] See generally Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

of other states, or to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse.'[242]

Permissible treaty stipulations to interfere in the domestic affairs of sovereign state are required because of the entrenched principle of non-intervention in the internal affairs of states and the prohibition against the use of force in international relations.[243] This is essential because, the non-intervention principle and the prohibition against the threat or use of force have both been held to be customary international law principle that are different from limitations imposed by treaties.[244]

[242]R Jenning&AWatt, *op cit*, 384.
[243]United Nations Charter, Article 2 (4) & (7).
[244]*Military and Paramilitary Activities case* (Supra) at p. 100.

CHAPTER THREE

INTERNATIONAL HUMANITARIAN INTERVENTION

3.1 Introduction

The concept of humanitarian intervention is essentially not limited to the gruesome atrocities of the last few years. However, questions are increasingly being posed as to whether indeed there is in existence the conception of humanitarian intervention. Thus, it has been argued, 'is humanitarian intervention a euphemism for war in the pseudo name of human rights, a dangerous political maneuvering that is at the verge of replacing multilateralism with aggressive unilateralism?'[245]

The aftermath of the Second World War established the United Nations Charter and subsequent conventions which imposed limitations on intervention in international relations. This brought about the use of force in international relations within the competence of the United Nations Security Council.[246]

However, the emerging norms and development in international law resulted in the crystallization of the humanitarian intervention concept which to a large extent has modified various principles upon which the United Nations Organization is founded.

However defining the concept of humanitarian intervention is enormously challenging and its application to varied situations is controversial. Nonetheless, the concept of humanitarian intervention has been generally described as an armed intervention in another state devoid of the consent of that state to halt humanitarian emergency occasioned by gross and systematic human rights breaches.[247]

International humanitarian intervention in the light of understanding its tenets is viewed as a direct infringement on the sacred doctrine of state sovereignty sanctioned by the Charter regime. But, in the heat of the Cold War period,international law relating to the prohibition against the use of force and non-intervention was downplayed. In its place, the superpower rivalry and ensuring balance of power in international relations

---

[245] W Mamah, 'Is Humanitarian Intervention A Pseudonym for Aggressive Unilateralism?' in CC Nweze (ed), *Contemporary Issues on Public International and Comparative Law: Essay in Honour of Professor Christian NwachukwuOkeke* (USA: Vandeplas Publishing, 2009) p.644.

[246] See generally United Nations Charter, 1945, Chapter VII.

[247] G Wilson-Roberts, 'Humanitarian Intervention: Definition and Criteria' (2000) vol 3, No. 1, *Canadian Social Science Journal* at http://www.vum.ac/css.Accessed on 20 August 2015.

blossomed.[248] Interestingly, the end of the Cold War ushered in an era in the global system that was characterized by rapid instancesof humanitarian intervention. In this regard, the North Atlantic Treaty Organization (NATO) military intervention in Kosovo in 1999 on humanitarian considerations seen today as the prime illustration of such intervention.[249] Accordingly the concept and application of humanitarian intervention presents a fundamental challenge in international relations. The competing imperative is manifested by the inherent tension between the primacy of state sovereignty and the protection of human rights.

This chapter evaluates the concept of humanitarian intervention, its evolution and development in the face of the United Nations Charter stipulation on the sanctity of non-intervention doctrine. In addition, we examined the practice and application of humanitarian intervention in varied instances and its implications on state sovereignty under current international law.

3.2 Evolution and Development of Humanitarian Intervention

The concept of humanitarian intervention has a firm historical background in the moral political theory of just war.The early discussion of the concept is traceable to the sixteenth and seventeenth century classical writers on internationallaw, particularly in their discussions on just wars.[250] Vitoria, Gentili, Suarez, Vatteland Grotius are well-known names in this tradition. Grotius,opined that, states are entitled to exercise the right "vested in humansociety" on behalf of oppressed individuals.[251] The Grotian formulation allows thefull-scale use of force to end human suffering. There has been a strong Grotiantradition in international relations and this idea is shared and amplified by the works of learned authors on the subject today. Throughout the eighteenth and nineteenthcenturies, philosophers of political liberalism, such as Mill, related the concept

[248]F Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention (*Hague: Kluwer Law International, 1999) p.147.
[249]*Ibid.*
[250]M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, New York: Basic Books, 2006) p.107, B Parekh, 'Humanitarian Intervention: Legal and Political Aspects' (1999) *Danish Institute of International Affairs*, 78.
[251] H Grotius, *De Jure Belli ac Pacis*, 1625; see also H Grotius, *Rights of War and Peace including the Law of Nature and of Nations.*Translated by A Campbell (London: Walter Dunne, 1901).

ofhumanitarian intervention to the concept of human rights. [252] Apart from theseintellectual precursors, the modern concept of humanitarian intervention isgenerally associated with state practice in the nineteenth century, when statesstarted to invoke humanitarian reasons to justify their interventions.The well-citedcases were generally directed against the Ottoman Empire for the protection ofChristians, such as the Greek War for Independence, Lebanon-Syria, the BulgarianAgitation and Armenia. The Nordic approach here interprets it in a larger contextand includes the interventions carried out within the framework of the Concert ofEurope.[253]The strategic motives behind all these interventions and the origin of those whose rights were being defended threw into question the humanitarian characterof the intervention. The lack of a prohibition on the use of force in internationalrelations was an important reason to explain the existence of this practice.Therefore, it can be said that international lawyers discussed it within theframework of just wars. Partly due to the efforts to outlaw the use of force afterWorld War I, there was a decline in the practice during the first half of thetwentieth century. As to the question of whether this historical practice wasoffering enough precedents to establish itself as a doctrine of humanitarianintervention in customary international law, the majority of scholars tended torefuse it, especially in the absence of consistent state practice and *opiniojuris*. Yet,Nordic interpretation generally accepts that a traditional doctrine of humanitarianintervention was established during this period.[254]

The UN Charter introduced a new solution to the use of force in international relations by endeavouring to qualify the use of force in internationalsociety and imposing limits upon it. First, it extended the doctrine of noninterventionto all states and made it a universal norm for the first time in history.Second, it allowed the use of force only in case of self-defence or collectivesecurity measures under Chapter VII of the Charter. By doing so, it left the threatto international peace and security as the only possible justification for interventionin the domestic affairs of a state. Moreover, allacts of intervention were

[252]H Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950); see also R Lillichm*Humanitarian Intervention and the United Nations* (Charlottes: University Press of Virginia, 1973) pp. 26-29

[253]J Mill, 'A Few Words on Non-Intervention.'In collected works of John Stuart Mill, *Essays on Equality, Law and Education* (Toronto: University of Toronto Press, 1984) pp.111-124.

[254]G Tanja, 'Humanitarian Intervention and Humanitarian Assistance: An Echo from the Past and a Prospect for the Future', in European Commission, Law in Humanitarian Crises Access to Victims: Right to Intervene or Right to Receive Humanitarian Assistance?, Vol. II, Luxembourg, Office for Official Publications of the European Communities, 1995, p. 73.

subject toauthorization by the UN, acting as the representative of the internationalcommunity.[255]

Along with the emergence of non-intervention as a universal norm, a UNinitiatedparallel development was in conflict with this principle: the developmentof human rights as a global issue. Article 1 of the Charter emphasizes promotingrespect for human rights and justice as one of the fundamental missions of theorganization. Article 55 states that the UN shall promote and respect the humanrights and basic freedoms, and subsequent UN initiatives have strengthened theseclaims. Humanitarian intervention, as the most assertive form of promoting humanrights at a global level was clearly incompatible with norms such as noninterventionand state sovereignty.[256]

As a result, with some restrictions, the UN Security Council has, since 1945, had the right to authorize the use of force to end human rights violations as well asto authorize non-forcible measures. Yet, practice throughout the Cold War periodshows that, contrary to this expectation, the Security Council was hardly able toimplement the UN Charter's provisions on collective security due to ideologicalcompetition and global confrontation between the two superpowers, the emergenceof China as a global player, the emergence of Third World countries (especiallytheir valuation of sovereignty), North-South division and so on.

Due to the impossibility of collective action endorsed by the UN, the issueof intervention became understood as forcible self-help by states to defend humanrights in other countries. Hence, there were some unilateral interventions, whichare given as recent examples of humanitarian intervention. The well-knownexamples that could be said to emerge from humanitarian concerns are the Indianintervention in East Pakistan (later Bangladesh), the Tanzanian intervention inUganda and the Vietnamese intervention in

[255]For an account of the issue see: J Charvet, 'The Idea of State Sovereignty and the Right of Humanitarian Intervention', *International Political Science Review*, Vol. 18, No. 1, 1997; also for the description of this tension see Tanja, *op. cit.*, 68; K Himes, 'The Morality of Humanitarian Intervention', *Theological Studies*, Vol. 5, Issue 1, March 1994; T Weiss and J Chopra, 'Sovereignty under Siege: From Intervention to Humanitarian Space', in M. Lyons and M Mastanduno (eds.), *Beyond Westphalia?: State Sovereignty and International Intervention*, (Baltimore, Johns Hopkins University Press, 1995), pp. 96-101.

[256]S Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework' in Rodley (ed), *To Loose the Bands of Wickedness* (London: Brassey's Ltd, 1992) p.143.

Kampuchea.[257] Despite the existence ofother motives, they may be labeled humanitarian intervention to the extent thatthey were responses to humanitarian crises. But the striking point common to allthese cases is that, in spite of the existing humanitarian catastrophe in all thesecases and the possibility of justifying these interventions on humanitarian grounds,those intervening did not behave in this way. They rather relied on self-defence astheir legal justification. Furthermore, intervening states' "actions were generallycondemned and in some cases dictatorial and coercive character of the operationswas denied" In other interventions, political motives were much more obviousand many of them were either concerned with protecting a state's own nationalsabroad or were at the host government's invitation.[258] What is more, UN's responsewas almost routinely to condemn interventions.

This brief examination of the period shows that state practice throughout theCold War did not establish itself as a doctrine of humanitarian intervention incustomary international law or as a norm in international politics and it remainedan exception to the rule.Even the Nordicapproach here accepts that the Cold War practice cannot be interpreted asproviding a basis for a doctrine of humanitarian intervention.[259]

3.3 The Meaning of Humanitarian Intervention

Adam Roberts defines humanitarian intervention as a "militaryintervention in a state, without the approval of its authorities, and with the purposeof preventing widespread suffering or death among the inhabitants".[260] For TonnyBrems Knudsen, humanitarian intervention is "dictatorial or coercive interferencein the sphere of jurisdiction of a sovereign state motivated or legitimated byhumanitarian concerns".[261] According to Martha Finnemore, humanitarianintervention is a "military intervention with the goal of

[257]M Finnemore, *The Purposes of Intervention: Changing Beliefs About the Use of Force* (New York: Cornell University Press, 2003) pp. 175-180.

[258]N Craw, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2000) p.138.

[259]O Ramsbotham, 'Humanitarian Intervention: A Need to Reconceptulaize' (1997) Vol 23 *Review of International Studies*, 451.

[260]A Roberts, 'Humanitarian War: Military Intervention and Human Rights', (1993) Vol. 69, No. 3, *International Affairs*, 426.

[261]T Knudsen, 'Humanitarian Intervention Revisited: Post-Cold War Responses to Classical Problems', in M Pugh, *The UN, Peace and Force* (London: Frank Cass, 1997) p. 146.

protecting the lives andwelfare of foreign civilians".[262] In the words of Bhikhu Parekh, humanitarianintervention is "an act of intervention in the internal affairs of another country witha view to ending the physical suffering caused by the disintegrations or grossmisuse of authority of the state, and helping create conditions in which a viablestructure of civil authority can emerge".[263] In a proper legal sense, according to WilD. Verwey, it is understood "as referring only to coercive action taken by states, attheir initiative, and involving the use of armed force, for the purpose of preventingor putting a halt to serious and wide-scale violations of fundamental human rights,in particular the right to life, inside the territory of another state".[264] He further posit'There may be few concepts in international law today which are as conceptually obscure and legally controversial as humanitarian intervention. This results from a lack of agreement on the legal meaning of both the term intervention and the term humanitarian.'[265]

However, the foregoing definitions elicite certain similarities which include the following:

a) Use of military force: although some scholars tend to include non-forcibleactions in the definition of humanitarian intervention, the majority tends toexclude them. The main argument for including the military dimension is thefact that, since warring parties mainly cause the violations, their handlingneeds a military involvement.
b) The absence of the target state's permission: this is the main point, whichmakes it a humanitarian intervention and distinguishes it from peacekeeping.It is also meaningful in the sense that such an intervention is generallycarried out in cases of gross violations caused by the state itself or the state'scollapse, in which case there is no potent authority, as in the case ofSomalia.
c) Its aim is to help non-nationals. Despite some legal scholars' tendency toinclude interventions to protect a state's own nationals abroad (especially inthe form of rescue operations), recent literature tends to put those casesunder self-defence and

[262]M Finnemore, 'Constructing Norms of Humanitarian Intervention', in P Katzenstein (ed.), *The Culture of National Security: Norms and Identities in World Politics* (New York: Colombia University Press, 1996) p. 154.
[263]B Parekh, 'Rethinking Humanitarian Intervention', in J Pieterse (ed.), *World Orders in the Making*, (London: Macmillan Press Ltd, 1998) p. 147.
[264]WDVerwey, 'Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective', in J Pieterse (ed), *World Orders in the Making* (London: Macmillan Press Ltd, 1998) p.180.
[265]W D Verwey.*Humanitarian Intervention Under International Law'*, (1985) Vol 32, *NetherlandsInternational Law Review*, 357-358.

reserve the term 'humanitarian intervention' to thosecases that aim to help non-nationals.

d) Agency of intervention. Though some confine the term to interventions bystates on their own (self-help), there is a recent tendency to includeinterventions under a UN umbrella.

For the purposes of this research, the author adopts a working definition of whichhumanitarian interventionmay be definedas; Forcible action by states to prevent or to end gross violations of human rightson behalf of people other than their own nationals, through the use of armed forcewithout the consent of the target government and with or without UNauthorisation.

3.4 Nature and Content of Humanitarian Intervention

The nature and content of humanitarian intervention is based on the meaningof the concept, the role and the value of humanitarian intervention to humanity.The humanitarian intervention had been of immense value to victims of war due toits nature and content. By virtue of the justification of humanitarian interventionunder the UN Charter and customary international law, states have the right tointervene in the domestic conflict of other states of international dimension wheresuch state fails to protect her citizens from genocide, war crimes and crimesagainst humanity. Though there had been series of humanitarian interventionwithout the authorization of the United Nations but such intervention is justified ongrounds of gross and systematic human rights abuses, threat to the world peace and security.

However, there are variations in whether humanitarian intervention islimited to instances where there is an absence of consent from the host state;whether humanitarian intervention is limited to punishment actions; and whetherhumanitarian intervention is limited to cases where there has been explicit UN SecurityCouncil authorization for action.

There is however, a general consensus on some of its essentialcharacteristics:

1) Humanitarian intervention involves the threat and use of military forces as acentral feature.

2) It is an intervention in the sense that it entails interfering in the internalaffairs of a state by sending military forces into territory or airspace of asovereign state that has not committed an act of aggression against anotherstate.
3) The intervention is in response to situations that do not necessarily posedirect threats to states' strategic interests, but instead is motivated byhumanitarian objectives.[266]

The first recorded case of humanitarian intervention prior to theestablishment of the UN Charter was in 1827 when Britain, France and Russiaintervened to protect the Greek Christians in the Ottoman Empire. Again, in1860, France was authorized by other European powers to intervene in theOttoman Empire to save the maroniteChristian in Syria against suppressionin practicising their traditional religion. Other nineteenth century casesinclude Russia in Bosinia-Herzegovinia and Bulgaria in 1877 and the UnitedStates in Cuba in 1898.[267]

Essentially, humanitarian intervention is seen as an unwarranted incursion into the territorial boundaries of a sovereign state. Territorial domain of another sovereign state devoid of its consent do not generally it is doubtful that intervention unilaterally undertaken by an independent state within the territory of another sovereign state devoid of the latter state's consent would pass for humanitarian intervention. Thus, in *Nicaragua v United State*[268], Nicaragua in its complaint alleged that the United States laid mines in its ports and gave assistance to right-wing *contra guerillas* that sought the overthrow of Nicaragua's leftwing government.

The United States on its part contended that its intervention is justified on the ground of collective self-defence in that Nicaragua allegedly assisted rebels into neighbouring El Salvador. The United State further contended that the human rights situation in Nicaragua warranted its intervention. The International Court of Justice (ICJ) rejected the contention of United States for intervening in Nicaragua domestic affairs. The ICJ held that a strictly humanitarian objective cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. However, it must be emphasized that the ICJ drew a distinction between the delivery of humanitarian aid and weapons. It declared that, 'the provision of

[266]G Barrie, 'Humanitarian Intervention in the Post-Cold War Era' (2001) Vol 118, *South African Law* Journal, 155.
[267]U Umozurike, *Introduction to International Law* (3rd edn, Ibadan: Spectrum Books, 2005) p.199.
[268]*ICJ Report,* 1986, para 268.

strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives cannot be regarded as unlawful, or as in any other way contrary to international law.'

Accordingly, humanitarian intervention to prevent and alleviate human suffering and to protect life and health and to ensure respect for human beings with or without the consent of the state intervened in, is in tandem with international law.[269]

Consequently, international intervention undertaken whether unilaterally or multilaterally must be with the explicit authorization of the UNSC. The humanitarian intervention undertaken in Iraq discussed in this research presents a worthy illustration.

3.5 Humanitarian Intervention Prior to the Cold War Era

There were humanitarian interventions prior to the cold war era butwere not pursued with vigor until after the cold war had ended. Undercustomary international law, states had intervened in the domestic conflictsof other nations on humanitarian ground. Prior to the cold war era, there wereseries of international conflicts deserving humanitarian intervention whichnations found it difficult to timely intervene because of the principles of statesovereignty which precluded states from interfering in the domestic affairs ofother states. This does not suggest that countries ravaged by war did notreceive humanitarian intervention.

3.6 Humanitarian Intervention DuringCold War Era

Thecold war rivalry between the United States and the Soviet Union that lastedfor much of the second half of the 20th century resulted in mutual suspicion,heightened tensions and a series of international incidents that brought theworld's super powers to the brink of disaster.[270]

The cold war era witnessed several instances of humanitarianinterventions, as undertaken for example by the United States andSoviet Union. Since the cold war was not only a strategic contest but also anideological one, each side felt compelled to

[269] *Ibid,* para 243.

[270] The Civil War in Angola was a classical example of how polarized international relations was along the line of bipolar allegiance. In the Angolan armed conflict the then Soviet Union supported MPLA while USA massively supported the UNITA. For further reading, see http://www.emulateme.com/history/anghist.htm.

proclaim the moral basis for theiractions resulting in dubious claims that such interventions as that of theSoviet Union in Hungary and Czechoslovakia in 1968, and that of the UnitedStates in the Dominican Republic in 1965 and Grenada in 1983, were for humanitarian purposes. In addition, the other cases are Tanzania inUganda in 1979 to oust the despotic and tyrannical regime of the dreaded IdiAmin. Vietnam also intervened in Cambodia in the same year. Indiaintervened in East Pakistan in 1971 to rescue its population from theintolerable repression of West Pakistan. Although the humanitarian outcomesof these interventions are apparent, the intervenors were, hesitant to declarethem humanitarian interventions. This reflected the international uneasinesswith the practice then.[271]

Moreso, each side could argue that their political and economic systemserved humanity's interests, while the other side's represented oppression andthe violation of human rights. In such a contest, the definition of"humanitarian intervention" could apply to any superpower attempts toinfluence a nation to choose side. By the late 1960s and the 1970s, backlashagainst this idea spread as some Americans grew frustrated, with the nation'sforeign policy as a whole, but in particular toward its policy in southwestAsia which culminated into doubt notnecessarily on the ability of the United States to defeat the enemy but itscapability to build a nation. By 1979 and 1980, when Vietnam intervened inCambodia to end the murderous holocaust initiated by Pol Pot and the KhmerRouge, Americans supported relief efforts for thousands ofCambodian refugees.[272] On the other hand, they did not support United Statesintervention. The relief efforts were carried out almost entirely by non- governmental relief agencies, such as Oxfam, British Relief Agency, CatholicRelief Services among others.[273]In addition, the Security Council recognized the internal deprivation ofhuman rights in Rhodesia and South Africa, for example as constituting athreat to international peace and security. Thus, in the 1966 SouthernRhodesia conflict situation perpetrated there, the Security Council Resolution reaffirmed that the human rightsviolations created a threat to international peace and

[271]AArend& R Beck, *International Law and the Use of Force* (New York: Routledge Publishers, 1993) p.126.
[272]*Ibid*, p.122.
[273] M Bazyler, *loccit* .

security.The Security Council thereafter imposed economic sanctions and called upon member states to assist in the implementation of the sanctions.[274]

Although there was a revival of support for intervention in the name ofhumanitarianism during the presidency of Ronald Reagan from 1981 to 1989,it was highly contested. For example, congress placed curbs on the ability ofthe Reagan administration to assist the Contras in Nicaragua against the leftistSandinistas, despite administration claims that the Sandinistas were violatingthe human rights of Miskito Indians. In fact, during the 1980 Reagan facedconstant criticism from voluntary Organizations regarding the administrationpolicy toward El Salvador. The administration was criticized for its failure to intervene on behalf of victims of that nation's civil war, choosing instead tosupport the government despite its failure to curb abuses by the military andright-wing death squad.[275]

3.7 Humanitarian Intervention inPost-Cold War Era

The aftermath of the cold war period witnessed the disintegration of the Soviet Union which heralded a fresh global political climate, possibly creating the room for the United Nations Security Council to effectively undertake the tasks for which it was established.

According to Lillich, 'The conclusion of the Cold War… presented a once-in-a-lifetime opportunity for the nations of the world acting individually, collectively and through the UN… to help achieve two principal purposes of the UN: the maintenance of international peace and security and the promotion and encouragement of human rights and fundamental freedoms.[276]

As if to give credence to the optimism expressed by Lillich, at the end of the cold war period, the international consciousness in support of humanitarian intervention

[274] S McDougal & M Reisman, 'Rhodosia and the United Nations: The Lawfulness of International Concern' (1986) 62, *American Journal of International Law*, 15 & 18.
[275] *Ibid.*
[276] R Lillich, 'The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World (1994) 3 *Tulane Journal of International & Comparative Law* 1 at 2.

galvanized as portrayed by the unprecedented support to rescue the Kurds and Shiites in Iraq in 1991.[277]

Besides rescuing civilians from repressive regimes, the demands of thepost- cold war era have also drawn humanitarian interventions into situationsthat have been dubbed complex political emergencies, where conflict ofmultidimensional nature combines, overwhelming violence with large scaledisplacement of people, mass famine, fragile and failing economic, politicaland social institutions, as has been the experience in Kosovo, Rwanda,Sudan, East Timor, Bosnia and other parts of Africa, Asia and Europe, wherethere have been breakdown of government authority and massive humanrights abuses.

For instance, in the aftermath of the Gulf war, Iraqi forces utilizingtanks and helicopter gunships, extinguished Kurdish insurrections inNorthern Iraqi and Shia Muslim rising in Southern Iraqi. Approximatelytwo million Kurds fled the atrocities[278] caused by the Iraqi, suppression.[279] TheUNSecurity Council, reacting with unparalled speed and effectiveness,adopted resolution 688 on 5 April, 1991 which created the legal authorityfor other nations to intervene in Iraq for humanitarian purposes.[280] UnitedStates, Great Britain, and France dispatched armed forces to create humanitarian corridors for displaced Kurds in Northern Iraq within which humanitarian agencies could safely operate.However, surprisingly, Iraqi administration at the timevehemently opposedthese actions as an unwarranted violation of its state sovereignty[281].

The resolution demanded that Iraq immediately end the repressing ofthe Kurds and Shites Muslims and insisted that Iraq permit access byinternational humanitarian organization in order to assist those in need. Inaddition, the resolution commanded that Iraq honour its humanitarianobligation. The Security Council appealed to all member

[277] Note that for the first time human rights issues were discussed at the level of the United Nations Security Council and the subsequent approval of Resolution 688 otherwise termed the precursor of humanitarian intervention which effectively authorize military invasion of Iraq.

[278] S William, 'Duty to intervene', *New York Times*, 15 April 1991, p.17.

[279] D Scheffer, 'Use of Force After the Cold War: Panama, Iraq and the New World Order' (1991) International Law Perspective, 109 & 144.

[280] The UN Security Council on 3 April, 1991 passed Resolution 688 to the effect that the Security Council condemns the repressions of the Iraqi Civil population… Demands that Iraq as a contribution to removing the threat to international peace and security in the region, immediately end this repression… Appeals to all member states and to all humanitarian organizations to contribute to this humanitarian relief efforts.

[281] D Scheffer, *loccit*.

states andhumanitarian organizations to participate in the humanitarian reliefoperations. More importantly, the Security Council condemned Iraq'srepression of its civilian population and characterized the consequences ofthe Kurdish repression as creating a threat to international peace andsecurity.[282] Although the Resolution made copious reference to threat to peace and security, it was lacking in potency in invoking forceful measures contemplatedunder Chapter VII of the UN Charter.[283]

Furthermore, the outbreak of hostilities in Yugoslavia led the SecurityCouncil to imposean arms embargo on that country andas the situation deteriorated, thedecision was taken to establish a peace keeping force in order to ensure the demilitarization of threeprotected areas in Croatia[284]. The full deployment of theforce was authorized by Resolution of 49 of 1992. During the followingmonths the mandate of UNPROFOR was gradually extended. By resolutions762 of 1992, for example, it was authorized to monitor the situation in areas ofCroatia under Yugoslav army control while by resolution 779 of 1992UNPROFOR assumed responsibility for monitoring the demilitarization ofthe Prevlakapeninsula near Dubrovnik[285]. At the same time, the situation inBosnia and Herzegovina deteriorated. BothCroatia, Bosnia and FederalRepublic of Yugoslavia (Serbia and Montenegro) were criticized for theiractions in Bosnia.

The humanitarian intervention in post-cold war era saw the UN intervening in Somaliafollowing a prolonged period of civil war by urging all parties to agree to aceasefire and imposed an arms embargo on Somalia. The UN intervention in Rwanda further present the illustration of humanitarian intervention following the deaths of the president of Rwandaand Burundi in an airplane crash of 5th April 1994, full-scale civil warerupted which led to massacre of Hutu opposition leaders and genocidalactions against members of the Tutsi minority. Sierra Leone, the DemocraticRepublic of the Congo, also experienced similar humanitarianintervention.

---

[282]See generally the provisions of *Chapter VII of the United Nations Charter that vests the Security Council with enforcement powers to take action in response to threat to international peace and security.*

[283] N Wheeler, 'Legitimating Humanitarian Intervention: Principles and Procedures' (2001) Vol 2, *Melbourne Journal of International Law*, 550. Available at http://www.law.unimelb.edu.au/mjil/issues/archives/2001(2)/wheeler.pdf. Accessed 15 August 2015.

[284] The United Nations Peace Keeping Force, that is UNPROFOR was established pursuant to the Security Council Resolution 13 adopted on 5th September, 1991 and Resolution 49 of 1992.

[285] W Verwey, 'Legality of Humanitarian Intervention After the Cold War' in E Ferris (ed), *The Challenge to Intervene: A New Role for the United Nations* (Uppsala: life and Peace Institute, (1992) p.144.

In Sierra Leone, decades of misrule plundered the nation into serious economic and political crisis that left the country fundamentally bankrupt and corrupt. Thus, in March, 1991, Charles Taylor and his Revolutionary United Front (RUF) invaded Sierra Leone from Liberia claiming to salvage the deteriorating situation in Sierra Leone. This invasion further escalated the widespread violence and culminated into a civil war between the RUF and the government forces with the attendant collapse of state structure.[286] The ensuing senseless killings and atrocities necessitated intervention in Sierra Leone, in three categories. The first intervention was undertaken under the auspicious of the Economic Community of West African States (ECOWAS) and their Military Observer Group (ECOMOG).

ECOMOG recorded some level of success in curbing the humanitarian crisis, particularly in the 1996 presidential election in which Ahmed TijanKabba won. He was subsequently toppled in a *coup d' etat* by the RUF in 1997, but eventually completed his tenure from 1998 to 2007. However, the operation of ECOMOG was characterized by internal rivalry and coupled with lack of international support subsequently led to its withdrawal from Sierra Leone on the eve of the Lome Peace Accord.[287]

The second phase of intervention in Sierra Leone was under the auspices of the United Nations Mission in Sierra Leone (UNAMSIL).[288]The UNAMSIL was established by the UN primarily to facilitate the signing of the Lome Peace Agreement between President TijahKabbah and RUF leader, FodaySankoh and oversee its compliance by both parties.

However, UNAMSIL experienced some level of difficulty in the implementation of its mandate, then came the third phase of the intervention by the British Armed Forces under the platform of Operation Palliser in May 2000. The arrival of the British Forces had immediate impact that led to some level of stability in the country and facilitated the process of Disarmament, Demobilization and Reintegration (DDR).[289] The war in Sierra

[286] M Meredith, *The State of Africa: A History of Fifty Years of Independence* (London: Free Press, 2005) pp. 561-563.
[287] *Ibid.*
[288] UNAMSIL was established by United Nations Security Council Resolution 1270 of 22 October, 1999.
[289] K Nuamah& N Zartman, *CaseStudy*: *Intervention in Sierra Leone* (Maryland: Centre for International and Security Studies, 2000) available at http//www.CISSM.umd.edu/papers/display.php accessed on 10 August 2016.

Leone was declared over in January, 2002 is often described as a success story of international intervention.[290]

Similarly in the Democratic Republic of Congo (DRC) the outbreak of hostilities since 1998 has resulted in senseless massacres coupled with horrendous human rights violations. Although DRC has a notorious history of hostilities, the recent crises that culminated into the civil wars witnessed so far is traceable to the effect of the Rwanda genocide of 1994, the Congolese internal armed conflict was characterized by recruitment of child soldiers, sexual violence, senseless killings of civilians population and widespread human rights violations.[291]

The persistence of the horrendous and complicated humanitarian crisis in the DRC necessitated the International Intervention by the United Nations and the International Community. Thus, the UNSC created the United Nations Organization Mission in the Democratic Republic of the Congo saddled with the responsibility to superviseand implement the Lusaka Ceasefire Agreement.Inspite of this accord, the horrendous hostilities continued unabated that led to the second DRC war that lasted until the 2003 Peace Accord.

However, in a UN facilitated presidential election Joseph Kabila, the son of the late President Kabila became the first democratically elected president of the DRC in 2006.[292]It is important to note that following the signing of the Framework Agreement for Peace, Security and supervision for the DRC, the UNSC in March, 2013 created the United Nations Force Intervention Brigade (FIB) in the Democratic Republic of Congo.[293]

3.8 The Double Standard Approach of Humanitarian Intervention

[290] N Wheeler &A Bellamy, 'Humanitarian Intervention and World Politics', in Baylis& S Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2001) pp. 473-476.

[291]C Gegout, 'Cases and Consequences of the European Union's Military Intervention in the Democratic Republic of Congo: A Realist Explanation' (2005) 10 *European Foreign Affairs Review*, 427-429.

[292] K Koddenbrock, *The Practice of Humanitarian Intervention: Aid Workers, Agencies and Institutions in the Democratic Republic of Congo* (London: Rouledge, 2015) p.164.

[293]UN Security Council Reolution 2098 (March 28, 2013) UN Doc S/RES/2098, para. 9.

Humanitarian intervention is often undertaken to prevent or halt human rights abuses within a target state.[294] However several instances of this intervention have exhibited double standard approach. The exact extent of appropriate response by the international community have been largely inconsistent which was further made manifest by the unequal distribution of resources between the developed and the developing states. In certain instances international response is lacking in deserving cases of supreme humanitarian emergency. For want of repetition, we adopt here the earlier discussed deserving instances of humanitarian intervention addressed in chapter three.

Although, humanitarian intervention concept has gained some level of acceptance depending on the side of the divide it is being evaluated, it is important to establish fundamental criteria to enhance consistent practice notwithstanding the sphere of intervention where a benchmark requirement is established, it will engender checks and uniformity of actions.[295] It is significant to state that the international community increasingly became favourably disposed to the demand for humanitarian intervention at the end of the cold war. This brought about the prevalence of a sole super power consequent upon the collapse of the bipolar system that eventually consolidated international relations dictated by the United States.[296] With this development other states could rarely challenge humanitarian intervention undertaken which enjoyed the support of United States and its allied countries though the motivation was doubtful and tainted with double standards.[297]

The double standard approach of the practice of armed intervention on humanitarian basis was apparent especially in the Middle East. For example the armed intervention in Iraq consequent upon its maltreatment of the Kurds. However similar scenario was occurring in Turkey in relation to the treatment of Kurds there and did not attract humanitarian intervention. The reasons for this is perhaps Turkey is a NATO member that was strategic in the implementation of economic and military sanctions against Iraq. The seeming double standard approach of humanitarian intervention was

[294] B Parekh, 'Rethinking Humanitarian Intervention' in J Pieterse (ed), *World Order in the Making: An Introduction* (London: Macmillan Press Ltd, 1998) p.147.
[295] *Ibid.*
[296] M Ayoob, 'Squaring the Circle: Collective Security in a system of states' in T Weiss (ed), *Collective Security in a Changing World* (Boulder Co: Lynne Rienner, 1993) pp 45-62.
[297] *Ibid.*

succinctly espoused by Macfarlane and Weiss thus, 'The Intervention in northern Iraq reflected the connection of NATO to Turkey and America antipathy to Iran dating from the overthrow of the Shah and the hostage crisis of 1979. The effect of these strategic impulses were evident in that the Kurds on the Turkish border were the primary focus of the intervention, although the majority of the displayed Kurds were found not on the Turkish but on the Iranian border. These latter were receiving only 10 per cent of their assessed needs in April 1991. Although the crisis in Iran was 2-3 times as severe as that in Turkey, international assistance to Turkey was substantially higher.'[298]

Again, the conduct of humanitarian intervention in a target state is often dictated by the whims and caprices of major power blocs. This is underscored by the fact that forceful intervention carried out within the confines of the UN Charter on humanitarian considerations is characterized by horse-trading and projection of national interest particularly of the five permanent members of the UN. The serious armed conflict situation in Syria today deserving humanitarian intervention buttresses this point.[299] Thus, in June 1994, the need to project and protect national interest of the five permanent (P-5) members of the UNSC was taken into consideration to authorize intervention by France in Rwanda, America in Haiti and Russia in Georgia. These three permanent members of the UNSC manipulated the process of seeking authorization for humanitarian intervention under the auspices of the UNSC when they traded their votes for preferred intervention of the other in response for acceptance of their preferred military action.[300]

Accordingly, even when intervention is apparently undertaken for humanitarian concerns under the auspices of the UNSC, the decision to authorize such intervention is subject to intense negotiations among the P-5.[301]This in our considered view presents the application of humanitarian intervention as an international instrument for promoting selective justice.

3.9 Humanitarian Intervention as Customary International Law?

[298]S Macfarlane & T Weiss, 'Political interest and Humanitarian Action' (2000) vol 10, No 1, *Security Studies*, 136.
[299] For further reading, see R Gladstone, 'Friction at the UN as Russia and China veto Another Resolution on Syria sanction' *New York Times*, 19th July, 2012.
[300] See L Ziring, et al, 'The United Nations: *International and World Politics* (4th edn, London: Wadsworth Publishing, 2005) pp. 156-158.
[301]*Ibid.*

A substantial number of contemporary legal scholars regardhumanitarian intervention as an established canon of customary internationallaw[302]. This view is no doubt in line with the notion of humanitarianintervention as the use of armed force by one state against another to protectthe national of the latter from acts or omissions of their own governmentwhich shock the conscience of mankind[303]. The doctrine recognizes the rightof states, to use force in another state's internal activities when the latteris in gross and systematic violation of the human rights of its national.

Before the establishment of the United Nations legal scholars and statepractice alike substantiated the customary international Law doctrine ofunilateral humanitarian intervention as a permissible justification forintervention.[304]Other scholars contend that the doctrine is so clearly accepted undercustomary international law that there is no question as to its existence.

Although the UN Charter forbids the use of force, it can be contended that rules relating to the use of force are cognizable within the ambit of customary international law which is outside the precinct of the charter regime. In certain circumstances, intervention anchored on humanitarian considerations can be considered lawful even where not expressly enshrined in the substantive provisions of the UN Charter. [305] Thus, in *Nicaragua*v.*USA*, it was declared that 'There are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter supervenes the former, so that the customary international law has no further existence of its own.[306]

Accordingly, it can be argued that customary international law can be a source of rules concerning humanitarian intervention notwithstanding the extant stipulation of article 2(4) of the UN Charter. However, other legal scholars have dismissed the position that there is in existence customary international law rule relating to humanitarian

[302]*S McDougal& M Reisman, loccit,* see generally I Browline, *Principle of Public International Law* (5th edn) Oxford, UK: Claredon Press, 1988) p.226.
[303]*Ibid.*
[304]Teson, *op cit*, p.5 Fernando Teson contended that both international treaties and state practice demonstrated humanitarian intervention's validity in international law.
[305] N Ronzitti, 'Use of Force, Jus Cogens and state consents' in A Casses (ed), *The current Legal Regulation of the Use of Force* (Boston: MartinusNijhoff, 1986) p.147.
[306]*(1986) ICJ Report 14 at 94, para 177.*

intervention.[307]The views of these proponents of the non-existence ofcustomary law of humanitarian intervention strenuously derived strength from the judicial pronouncement of the International Court of Justice (ICJ) in *Corfu Channel Case*to the effect that no legal right of forceful intervention exists regardless of the shortcomings of international organization.[308]

However, international law prescribes two criteria for establishing an international custom, namely state practice and *opiniojuris*.[309]It is important to note that the practice must not be specifically long or consistent to create the basis for customary law. Accordingly, the principle of non-use of force as well as the doctrine of non-intervention represents serious barriers to the development of a customary right of humanitarian intervention.[310] However, these principles are not immutable and their meaning may change over time through the practice of state.

3.10 The Legality and Legitimacy of Humanitarian Intervention

The legality of humanitarian intervention relates to whether and under what requirements international law authorizes such intervention. On the other hand legitimacy of humanitarian intervention has to do with the normative status of such intervention as a measure of international justice.[311] Thus, it is imperative to draw a distinction between the legality and legitimacy question of humanitarian intervention. The requirement for the legal basis of humanitarian intervention is the authorization by the UNSC. But, legality is not often equivalent to legitimacy due to the fact that UNSC-Sanctioned humanitarian intervention is often not a product of a credible democratic process consequent upon the inconsistency of action and exercise of veto power by the P-5.[312]

Under the UN Charter, the legality of humanitarian intervention is fundamentally anchored on whether the human rights breaches relates solely to internal affairs of the target state or constitute a threat to international peace and security. In the recent past

[307]G Vockel, 'Humanitarian Intervention in Cases of Overwhelming Humanitarian Necessity' (2005) *CoventryLaw Journal*, 38.
[308]*(1949) ICJ Report 4 (UK v. Albania).*
[309]*The Rome Statute, 2002, Article 38.*
[310]G Vockel, *Loccit.*
[311] T Frank, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002) p. 35.
[312]R Falk, 'Legality to Legitimacy' (2004) vol 26, No. 1, Harvard International Review, 42.

large-scale human rights breaches like genocide, war crimes, crime against humanity and ethnic cleansing are considered matters that extend beyond the domestic jurisdiction of states that ultimately constitute threat to international peace and security.[313] This may be so because even though the categorized human rights violations occurred in a target state, such violations may be in contravention of international conventions stipulations, treaty provisions and customary international law that states are bound to uphold and respect.[314] It is in this regard that the UNSC resolved that the breach of international humanitarian law together with the degree of the human tragedy formed the basis of its criteria when it determined that the Somalian conflict amounted to a threat to international peace and security.[315] Similarly, genocide and crimes against humanity contravenes *jus cogens* norms by which all states are bound irrespective of the contravening state's treaty obligations.

Further, the gross and systematic violations of human rights within a target state may snowball beyond territorial boundaries of a sovereign state with its attendant threat to international peace and security.[316] However, the authorization of the UNSC to undertake humanitarian intervention as the basis for legality does not equally constitute the basic requirement for legitimacy of humanitarian intervention but on the normative imperative to undertake the intervention as an instrument of international justice albeit illegal.[317]

In our considered view, it appears that the question of the legality of humanitarian intervention is irrelevant to its legitimacy and on the other hand its legitimacy is irrelevant to its legality.[318] From the positivist perspectives, humanitarian intervention is illegal in international law. This contention is founded on the stipulation of the UN

[313] *Ibid.*

[314] For example states that are High Contracting parties to the Four Geneva Conventions of 1949 are obliged to observe the protection of human right within their sovereign domain and impose penal sanctions in the event of breaches.

[315] G Vockel, 'Humanitarian Intervention in Cases of Overwhelming Humanitarian Necessity' (2003) *CoventryLaw Journal*, 31.

[316] Such was the massive cross border movement of refugees consequent upon the Iraq's gross human rights violations of its population had led to the armed intervention by UNSC to halt the worsening crisis then that posed threat to International peace and security.

[317] The Kosovo Report, *opcit.*

[318] Ib*id.*

Charter that categorically forbids the use of force.[319] The permissible circumstances that warrant the use of force in international relations are also covered by the Charter provision.[320] Consequently, there is nowhere mentioned in the Charter that endorses humanitarian intervention as an exception to the prohibition against the use of force.[321] Thus, in the *Nicaraguan case*, the International Court of Justice (ICJ) considered the basis of humanitarian intervention constituting an exception to the prohibition against the use of force in international relations. In that case, the United States of America sought to justify its intervention in Nicaragua as a measure of monitoring and preserving human rights within the territorial jurisdiction of Nicaragua. The court in reaching its decision correctly dismiss the contention of USA and clearly distinguished between genuine humanitarian aid and unwarranted armed intervention.[322]

The proponent of the conception of humanitarian intervention generally anchors its legitimacy on a high pedestal of morality so much so that even where humanitarian intervention constitute illegality it may be considered legitimate and justified on the basis of just war principles. However, the direct opposite contention that is championed by the positive thinkers is to the effect that lacking in clear legal codification, humanitarian intervention is illegal and as such since the cure was illegally administered, it was worse than the disease.[323] The nexus between the legality and legitimacy question of humanitarian intervention was clearly demonstrated and took the centre stage in international arena in the NATO military campaign in Kosovo. In one breath, the situation in Kosovo as previously analysed in the course of this work attained supreme humanitarian emergency that urgently required humanitarian intervention that was undertaken by NATO which ascribed legitimacy to it. However, on the other hand it was manifestly illegal having not been authorized by the UNSC.[324] Thus, it was opined that

[319]Article 2(4).
[320] See general Article 51.
[321] W Mamah, 'Is Humanitarian Intervention a Pseudonym for Aggressive Unilateralism? In C CNweze (ed) *Contemporary Issues on Public International and Comparative Law: Essay in Honour of Professor Christian NwachukwuOkeke*
[322]*Nicaragua v. United States (*1986) ICJ Report, pp. 134-135 quoted in M Shaw *International Law* (5th ed, Cambridge: Cambridge University Press, 2003) p.1047.
[323] R Hayden, 'Eastern Europe After Kosovo: Humanitarian Hypocrisy' (1999) vol 8, No. 3, Eastern European Constitutional Review, 1.
[324]R Falk, 'Legality to Legitimacy' (2004) vol 26 No. 1, *Harvard International Review*, 42.

the Kosovo situation has shown a dichotomy between legality and legitimacy or in other words between justice and the law.[325]

Consequently, the legitimacy question of humanitarian intervention is determined basically on moral or political consideration even though sometime it may embrace legal considerations that may have significant political implications.[326] The determination of whether or not a specific intervention has justification or not is considered on the basis of the overall responsibility of the coalition of the intervening states undertaking the intervention whether the modalities of the intervention, whether the intervention enjoys reasonable acceptance amongst the international community and considering the circumstances of the intervention whether it is necessary and proportionate. [327] Similarly, the overt manifestation of legitimacy ascribed to a particular intervention may be derived from the level of backing it gets from relevant regional organizations.[328] Although it is not always easy to generate a wide support of the international community in the conduct of humanitarian intervention, it is material and significant to canvass and solicit such support. This is because, the broader and diverse the degree of support for such intervention, the lower the tendency and perception that states undertaking humanitarian intervention are doing so to advance and protect their interest.[329] It is further evident that where humanitarian intervention enjoys wide range support, it presents an opportunity for *ex post facto ratification* particularly where the majority members of the UNSC lend credence to the intervention so undertaken. In a similar manner, the tendency of the humanitarian intervention attracting acceptance and the opportunity of *ex post facto* ratification is highly attainable where the UNSC by its resolution condemned the action of the target state.[330] The propensity of acceptance and legitimacy is further increased where the UNSC by its resolution declared that the conflict situation resulting in grave human rights breaches constitutes a threat to international peace and security.[331] In all

[325] Independent International Commission on Kosovo, *The Kosovo Report (*Oxford: Oxford University Press, 2000) pp.1-26.
[326] Danish Institute of International Affairs, Humanitarian Intervention: Legal and Political aspects, Submitted to the Minister of Foreign Affairs, Denmark, 7 December, 1999. The Danish Institute Report.
[327] Ib*id.*
[328] G Robertson *loc cit.*
[329] Cairo Round Table Consultation Rapporteur's Report, *loc cit.*
[330] G Robertson, *loc cit.*
[331] Ib*id.*

these therefore, regarding humanitarian intervention the driving force should be the humanitarian considerations and by necessary implications the national interests of intervening states downplayed.

Thus, even where certain situations have to be referred to as genuine instances of humanitarian intervention, there is no clear indication of the legal significance to be ascribed to such instances. It follows then, that ascribing legality and legitimacy to humanitarian intervention requires more than just state practice but a conviction that the state practice is the manifestation of a legal rule required in the crystallization of customary international law. [332] However, the legality and legitimacy question of humanitarian intervention appears to have found clear distinction wherein the ICJ opined that humanitarian intervention has no validity in international law.[333] It is in further clear distinction of the legality and legitimacy test that Disteen correctly observed that, it is almost impossible to avoid the conclusion that this language places the court as the authoritative legal institution of the UN in the camp of those who claim that the doctrine of humanitarian intervention is without legal basis.[334]

3.11 The Changing Context of Humanitarian Assistance in Crisis Situations

Almost 25 years after UN General Assembly resolution 46/182 created thepresent humanitarian system, the concept of humanitarian intervention has changedconsiderably. Inter-related global trends, such as climate variability, demographicchange, financial and energy sector pressures or changing geo-political factorshave led to increased demand for humanitarian action. This focuses around threetypes of humanitarian realities: armed conflicts, disasters caused by naturalhazards, and 'chronic crises' where people cyclically dip above and below acutelevels of vulnerability. Each scenario has its own characteristics and challenges.

There has also been an important shift in the number and nature of actorsinvolved in humanitarian action. The deepening consequences of disasters on longtermdevelopment have led many governments to boost national and

[332]M Mendelson, 'The Subjective Elements Customary International Law' (1995) 66 *BritainYear Book International Law*, 177 & 201.
[333]*Nicaragua v. United States, (supra).*
[334] Y Dinstein, *War Aggression and Self Defence*(3rd edn, Cambridge: Cambridge University Press, 2001) p. 67.

regionalcapacities for disaster management, prompting a more prominent role for affectedstates, regional organizations and neighboring countries in responding toemergencies. As more countries reach middle income status, their governmentsbecome donors or providers of in-kind assistance and share their experience andexpertise, including through increased South-South cooperation.

In addition, the number of NGOs operating in major emergencies have grown,with the largest recent increases being in the number of actors from the GlobalSouth. In recent years, national and foreign militaries and the private sector havealso taken on greater disaster response roles, and new forms of communicationenabled by fast-moving technologies have meant that humanitarian needs aredetected and communicated faster, information is better consolidated, and affectedpeople are able to express their needs and interests more strongly. We need a betterunderstanding of the impact of these interconnected trends and approaches.

In response to the challenges, humanitarian actors have sought toimprove their services and maximize their impact on people in need. Inparticular, the 2005 Humanitarian Reform and more recently the International Accounting Standards Committee (IASC)Transformative Agenda developed new approaches to working moreaccountably, predictably and effectively, and discussions to updateinternational humanitarian legislation take place each year in the UN GeneralAssembly.

But there has been no collective exercise to take stock of theachievements and changes that have occurred since the current system wasformed. Nor has a structured dialogue taken place between the four majorconstituencies that contribute to humanitarian action today: Member States(including affected countries, donors and emerging and interested partners);the global network of humanitarian organizations and experts; associatedpartners, (including private sector, religious charities, etc.); and, affectedpeople themselves – as first responders, communities and civil societyorganizations, to think through how to address the current challenges. Whilethe fundamental principles enshrined in General Assembly Resolution 46/182will continue to guide our work, we need to explore how to create a moreglobal, effective, and inclusive humanitarian system.

3.12 Contemporary Humanitarian Intervention Practices

The end of the Cold War has brought about a substantial change in theconception of humanitarian intervention as well as in its practice and application. This change isrooted in different developments. One of the main factors is the changing nature ofthe international system; the end of superpower rivalry has to some extent removedthe systemic constraints on intervention in domestic affairs.[335] The end of theideological confrontation has also largely undercut the rationale for supporting'friendly' repressive regimes to prevent them from falling into the other camp. Thisis especially true as far as the US is concernedas the Cold War had made noninterventiona universal norm.With the end of the Cold War, norms pertaining tothe protection of individual rights have increasingly received global acceptance,particularly among the Western States. This resulted in a suitable politicalatmosphere for initiating interventions.[336]

Humanitarian interventions are not only responses to the suffering caused byrepressive governments, but also they are directed to situations produced byinternal conflicts, state disintegration and state collapses, as a result of whichhuman rights are grossly violated.[337] The overwhelming majority of armed conflictsin the post-Cold War era are internal or civil war. This has resulted in an increasein the number of situations attracting humanitarian involvement, and theeffects can be seen in the growing number of UN Security Council Resolutionsunder Chapter VII. In some cases, the Security Council defined gross violations ofhuman rights and civil conflicts as a 'threat to international peace and security' anddecided to impose economic sanctions or authorised the use of force. Since 1989, ithas imposed economic sanctions on 14 occasions (compared with twice between1945 and 1988), and used force 11 times other than for self-defence (as opposed tothree times between 1945-1988).[338]

The humanitarian component, namely the definition of humanitarian crisis,is no longer confined to protecting fundamental human rights, but is extended toinclude the

---

[335] C Walling, *All Necessary Measures: The United Nations and Humanitarian Intervention* (Philadelphia: University of Pennsylvania Press, 2013).

[336] *Ibid.*

[337] M Walzer, *loccit*; Akeburst, 'Humanitarian Intervention' in H Bull (ed), *Intervention in World Politics* (New York: Oxford University Press, 1984) pp.26-29.

[338] G Evans, 'From Humanitarian Intervention to Responsibility to Protect' (2006-2007) 24, *Wisconsin International Law Journal*, 703.

question of upholding international humanitarian laws and providing humanitarian assistance.[339]

Strict interpretation in the Cold War period created the idea that interventionwas illegal per se because it breached the principles of state sovereignty and self-determination.But the shift of focus from Article 2(4) to 2(7) of the UN Charterhas opened the whole matter to reinterpretation and we have a situation where, asGreenwood states: "… it is no longer tenable to assert whenever a governmentmassacres its own people or a state collapses into anarchy that international lawforbids military intervention altogether."[340]

Instead of self-help by states, most of post-Cold War interventions were insome way related to regional or global interventions and legitimized or licensed byUN Security Council resolutions. This increasing UN involvement was so visiblethat, even in non-UN interventions, those intervening have attempted to link theissue to the UN.Apart from increasing UN involvement, multilateralism was another changein the interventioniststrategy the end of the Cold War brought about. Many observers have alwaysbeen suspicious of unilateral intervention due to the high risk of abuse. As stated before,Cold War conditions made a multilateral intervention difficult to realize, but, in thepost-Cold War period, multilateralism became one of the necessary conditions forhumanitarian intervention.[341] Accordingly, Martha Finnemore rightly observed that "humanitarian militaryintervention now must be multilateral to be legitimate".[342] Donnelly is quiteassertive in this matter; apart from thinking that multilateralism is largely immuneto most of the arguments raised against unilateralism, he further claims, "ifhumanitarian intervention has a real future, it is through multilateral action".[343]

Nevertheless, it must also be noted that the remaining division from the Cold Warera, namely the North-South division, continues to pose obstacles. Knowing that itwould be their sovereignty that is overridden, developing countries have

[339] *Ibid.*
[340] Professor Greenwood as quoted in the UK Parliamentary Select Committee on Foreign Affairs, Fourth Report (2000) in R Dixon & R McCorquodale, *Cases & Materials on International Law* (4th edn, Oxford University Press, 2003) p.555.
[341] C Walling, *loccit.*
[342] M Finnemore, *loccit*.
[343] Donnelly, Intervention to Protect Human Rights, (1969) vol 15, Mc Gill Law Journal, 205-210.

beenmaintaining traditional notions of non-intervention and state sovereignty and, inmany cases, opposing multilateral actions justified by an implied doctrine ofhumanitarian intervention.

Based upon this background, some instances involving humanitarian interventions haveevolved in the post-Cold War period. In this regard, UN Security CouncilResolution 688, about the situation in Northern Iraq, was the watershed, followedby the cases of Rwanda, Somalia, the former Yugoslavia (Bosnia), Haiti, Liberia,Kosovo and Sierra Leone *interalia*.

3.12.1 Humanitarian Intervention in Iraq

In the area of humanitarian intervention authorized by the United NationsSecurity Council, a good example was the humanitarian intervention undertaken pursuant to Resolution 688 by the UnitedStates, France, Britain in Northern Iraq in 1991 in order to provide safe havens forthe Iraqi Kurds who were victims of gross human rights violations by SaddamHussein's Regime.[344]

Saddam Hussein invaded and occupied neighbouring Kuwait in 1990 and in1991, the UN Security Council authorized the use of force to terminate theoccupation. In a collective military action code – named 'Operation Desert Storm'Saddam Hussein's forces were crushingly defeated. During the war, Husseinattacked Kurdish villages with troops and helicopter gunships in order to suppressKurdish revolts for independence.[345] Almost one million of these Kurds fled theirvillages in the North in an attempt to secure safety in Turkey. The Security Council, faced with mounting atrocities committed by the Iraqi government against Kurdsand others adopted resolution 688 condemning 'the repression of the Iraqi civilianpopulation in many parts of Iraq' and demanded that Iraq immediately end therepression. The resolution also urged Iraq to allow immediate access by'international humanitarian organizations' and appealed to all member states tocontribute to these humanitarian relief efforts. In intervening the United States,France and Britain interpreted the term 'humanitarian organizations' mentioned inresolution 688 to include military forces with the limited mission of humanitarianassistance. The

[344]F Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Hague: Kluwer Law International, 1999) p.153.
[345] G Vockel, *opcit*, p.38.

operation dubbed 'Operation Provide Comfort' brought great reliefto the refugees. There were about 452,000 major refugee camps along Iraqi –Turkey border and the death toll from disease and starvation was estimated atabout 1,000 per day.[346]

The governments involved in 'Operation Provide Comfort' decided it wasnecessary to establish protected safe havens inside Northern Iraq in order to enticeKurdish refugees to return from the border with Turkey. In order to facilitate this,the US Army Commander, Lt. Gen. J.M. Shalikashville on April 12, 1991 met withIraqi General N. Tahoon and told him to remove all Iraqi ground forces locationssouth of the 36th parallel and to cease all air operations north of the parallel or riskthe potential use of allied offensive military force. By the next day, elements of theUS 24th Marine Expeditionary Unit and the 10th Special Forces Group had beenairlifted into the town of Zakhu in Northern Iraq to secure the surrounding area andprepare for the construction of refugee repatriation camps. Iraqi military andgovernment officials quickly ceded control over the area to the intervention force.This humanitarian intervention was clearly justified in view of thegrave and serious human right violations by Saddam Hussein's regimeagainst the minority Kurds. The intervention was also meant to secure thehuman rights of victims of the violations and it was not covertly orclandestinely carried out.[347]

3.12.2 Humanitarian Intervention in Srebrenica

The massacre of 8,000 Muslims in the Bosnian town of Srebrenica, betweenJuly 9 and 20 1995, ought to have received humanitarian intervention as it is nowbeing globally reiterated. This was the largest single mass killing of the entireBosnian war, and indeed, it was the worst massacre that Europe has seen since the1940s.[348]

This massacre in Srebrenica was perpetrated even with the presence of UN peacekeepers. The United States, unable to persuade its western European allies to

[346] N Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000) pp. 146-156.

[347] J Stromseth, Iraq's Repression of its Civilian Population: Collective Responses and Continuing Challenges in LJ Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations, 1993) pp.77-80.

[348] B Kouchner, 'Establish a Right to Intervene Against War, Oppression, '*Los Angeles Times*, 18 October, 1999, B7, available at http://www.latimes.com/1999/10/media/righttointerveneagainstwar.html. Accessed 12 August 2015.

supportcoercive airstrikes, had hitherto refused to intervene decisively in the conflicttearing apart the Balkans. That changed after Srebrenica, which was the worstatrocity committed in Europe since World War II. As George Packer wrote,'in therun-up to the 2003 invasion of Iraq, the war in Bosnia-Herzegovina turned manyliberals into interventionist hawks. The main lesson these liberals took away fromBosnia was that the United States should never again "hide behind dithering alliesor a weak U.N." and instead take decisive action to fight ethnic cleansing andgenocide, acting unilaterally where necessary. Why, then, has the United Statescontinued to crave multilateral approval from the United Nations or NATO forhumanitarian military interventions?

Since the war in Bosnia, the United States has intervened for humanitarianpurposes in Kosovo (1999), Liberia (2003), and Libya (2011). In each case, priorto intervention, U.S. policymakers worked hard to secure multilateral approvalfrom the United Nations Security Council (UNSC) or NATO's North AtlanticCouncil (NAC). When the United States abandoned plans for humanitarianintervention in other cases, such as Darfur (2005–2006) and Syria (2013), the lackof multilateral backing played an important part in the decision.[349]

In the summer of 1995, U.S. officials backed military offensivesaimed at ending the Serb-led rebellion in Bosnia-Herzegovina, and a similar Serbrebellion in the neighboring Republic of Croatia. The anti-Serb offensives in thetwo republics were closely linked and carefully planned in advance. In April 1994,President Clinton himself approved a plan whereby the United States wouldfacilitate the delivery of arms to both Bosnia and Croatia. Also, the United Stateslater arranged for MPRI, a military contracting firm, to help retrain the Croatianarmy for offensive warfare. These preparations lasted more than a year beforethese newly retrained and rearmed forces were unleashed.[350]

3.12.3 Humanitarian Intervention in Kosovo

[349] A Schnabel & R Thakur, 'The Changing Contours of World Politics and the challenge of World Order, in A Schnabel & R Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (Tokyo: UNU Press, 2000) pp.1-7.

[350] Bill Clinton was the erstwhile President of United States of America.

Upon the conclusion of the Dayton Agreement on 21 November, 1995 it was the consensus that it has brought to a halt the armed conflicts in the Bulkans.[351] However, it became clear that this was not the case with the resulting tension in the Kosovo region occasioned by the maltreatment of the Kosovars by the President of the then Federal Republic of Yugoslavia (FRY).[352] The campaign of segregation was intensified and implemented against the Kosovo Albanian which has been described in some quarters as an apartheid system in Kosovo.[353]In a bid to resist this onslaught, the Kosovo Liberation Army (KLA) initiated a campaign of provocation and terrorist attacks so as to attract international attention. The FRY army in response engaged in the ethnic cleansing of the Kosovars with unrelenting intensity. The ethnic violence in Kosovo brought about a large number of internally displaced persons and refugees flow which attracted the attention of the Western Powers. Consequently, the United Nations Security Council resolved and clearly condemned the use of excessive force by Serbian Police Forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the KLA.[354]However, the UNSC resolution even though it condemned the conflict in Kosovo failed to make definite pronouncement on the resolution of the conflict. The UNSC only admonished the belligerents to resolve their conflicts amicably. The conflict was never resolved as the ethnic cleansing agenda by the Serbians against the Kosovars rapidly intensified. Consequent upon the renewed intensity of the conflict, the UNSC again in its resolution stated that, 'affirming that the declaration of the situation in Kosovo, Federal Republic of Yugoslavia constitutes a threat to peace and security in the region… demands… that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe'.[355]Although the humanitarian crisis in Kosovo was considered by the UNSC to be a threat to international peace and security, there was no express authorization for a military intervention to halt the humanitarian

[351] G Misha, *The Balkans 1804-1999: Nationalism, War and the Great Powers* (London: Granta Books, 1999) p651.
[352]Slobadan Milosevic was the President of the defunct Federal Republic of Yugoslavia.
[353] United Nations Security Council Resulution 1160 of 31 March, 1998.
[354]*For a detail discussion on this see Kosovo and the challenge of Humanitarian Intervention: Selective Indignation: Collective Action and International Citizenship, op cit, pp 83-148.*
[355]*See UNSC Resolution 1203, UN Doc S/RES/1203 of 24 October, 1998; UNSC Resolution 1199, UN Doc S/RES/1199 of 23 September, 1998; UNSC Resolution 1160, UN Doc S/RES/1160 of 31 March 1998.*

disaster reasonably due to the disposition of China and Russia to exercise their veto power against such resolution.[356]

Consequently, in consideration of the UNSC resolution that declared the situation in Kosovo a threat to international peace and securely, NATO strongly viewed the horrendous situation as being tantamount to sufficient grounds that warranted intervention to halt the senseless killings. Following this resolve, NATO warned to Serbs of an impending military intervention if the attacks on Kosovar settlements continued unabated. However, prior to the intending military action by NATO, a ceasefire agreement was reached and sanctioned by the UNSC.[357]But the KLA reneged on the ceasefire agreement and in an immediate response the FRY forces callously killed 45 civilians in the local community of Racak.[358]

In the wake of this worsening situation in Kosovo and in a move to amicably resolve the conflict, the belligerents were invited to Rambouillet for a peace deal. In the ensuing proposal, the KLA agreed to drop its demand for absolute independence and the FRY on its part would permit the presence of NATO forces in Kosovo. However, the FRY led by Slobadan Milosevic rejected the Rambouillet proposal on the ground that it was a violation of FRY's sovereignty.[359] In the aftermath of the collapse of the Rambouillet proposal, NATO commenced its military campaign in Kosovo by launching air strikes against FRY military and infrastructure in order to protect the lives of the ethnic Kosovars.

The NATO military intervention in Kosovo on the basis of humanitarian considerations though desirable in the face of the inaction by the UNSC was condemned in certain quarters since it was not backed by the Security Council resolution.

3.12.4 Humanitarian Intervention in Libya

According to James Pattison, 'the uprising for political reforms in Libyaagainst the Muammar el-Gaddafi regime occurred in the context of the so-calledArab Spring, in

[356] N Wheeler, *op cit*, p.260.
[357] United Nations Security Council Resolution 1203 of 24 October 1998. This Resolution reaffirmed Resolution 1199.
[358] D Kritsiotis, 'NATO's Armed Force Against Yugoslavia' (2000) 49 *InternationalComparativeLawQuarterly*, 320-337.
[359] *Ibid.*

which states in North Africa and the Middle East claimeddemocratization of their states.'[360] In mid-February 2011, several protesters werekilled by Gaddafi's forces in Benghazi and other eastern cities. During the clashesbetween the Libyan authority and the opposition group, Gaddafi's forces usedarmed force to contain those protesters. While the Gaddafi regime still maintainedits authority in Tripoli, the capital of Libya, the opposition headquartered inBenghazi occupied eastern Libya. Gaddafi denounced protesters as "cockroaches"and stated that he would "cleanse Libya house by house." On February 26, theSecurity Council imposed arms embargo on Libya as a measure of restraint on Libya forces.[361] In March, the UN also dispatchedsome officials to Libya to persuade Libyan government officials to end theviolent conflict. Moreover, UN Secretary-General Ban Ki-Moon personally engagedGaddafi on the senseless killings prevalent in Libyan territory, urging him to accede to the dictates of the Resolution. However,those diplomatic efforts yielded no results. Consequently, UNSecurity Council resolved in its resolution to authorize the adoption of "all necessarymeasures…to protect civilians…" On the next day, NATO air forces commencedbombings on Libya forces.[362]

Similar to the Conflict in Kosovo, NATO claimed that the international intervention in Libya saved Libyancivilians from Gaddafi's aggression. NATO also successfully collapsed theGaddafi regime, though the purpose of the intervention was not regime change.The majority of the bombing targets were also military-related facilities that wouldthreaten Libyan people. However, NATO again failed to improve thehumanitarian situation, and Libya remains highly unstable till today. The InterimNational Transitional Council (INTC), established by the Libyan opposition groupand supported by NATO, has been incapable of functioning as the centralauthority. Occasional clashes between militias are another reason for instability.Particularly, the opposition-sponsored militia "have unlawfully detained thousandsof regime supporters, executed others.[363] Furthermore, according to theInternational Crisis Group, roughly

[360] J Pattison, *Humanitarian Intervention and the Responsibility to Protect* (Oxford: Oxford University Press, 2000) pp.2-4.

[361]*UNSC Resolution 1970 of 26 February, 2011; A Hehir, 'Introduction: Libya and the Responsibility to Protect in A Hehir& R Murray (eds), Responsibility to Protect and the Future of Humanitarian Intervention (2013) pp.1-11.*

[362]United Nations Security Council Resolution 1973 of 17 March, 2011.

[363] This brings into question whether the armed intervention undertaken by NATO in Libya actually brought to a halt the gross violations of human rights there.

12,500 Libyans remained armed, and the smallarms proliferated throughout the country. Thus, considering Libya's chaoticsituation, it is questionable whether the NATO intervention can be viewed as a"humanitarian" intervention.

NATO member states expressed humanitarian concerns about the imminentthreat in Libya. According to Obama, "We cannot stand idly when a tyrant tellshis people there will be no mercy."[364] Similarly Nicolas Sarkozy opined that, "InLibya, the civilian population, which is demanding nothing more than the right tochoose their own destiny, is in mortal danger…it is our duty to respond to theiranguished appeal."[365] In addition, the UN Security Council condemned the atrocities conducted by pro-Gadaffi forces in its resolution, even though Russia and China argued that NATO expanded the resolution simply to justify its intervention in Libya."[366]Thus, Gaddafi'sexplicit aggression against protesters and the sense of moral duty to save them, tosome extent, prompted NATO intervention in Libya.

However, NATO intervening states had concrete national interests topreserve in Libya. First, restoration of access to Libya's oil reserve was vital forEuropean states. Libya has exported roughly 85 percent of oil to several Europeanstates, such as Italy, France, and the UK. Libyan oil accounted for more than 28percent of Italian oil imports, 17 percent of French oil imports, and 8 percent ofUK's oil imports.[367] During the civil war, oil production significantly dropped,amounting to less than 20 percent of Libya's domestic needs. This decline likelycaused great damage to the economies of those oil importing European states.Therefore, ending the civil war to restore Libya's oil production was the primarypurpose of their intervention albeit grounded on humanitarian reasons. Consequently, those European states played leadingroles in the intervention by providing air forces, training the Libyan rebels, andproviding them weapons.[368]

In addition, Western states feared that Libya could return to a terroristsponsoredstate if Gaddafi won the civil war. Since Gaddafi established

[364]S Groves, 'Obama Wrongly Adopts UN Responsibility to Protect to Justify Libya Intervention, in Heritage Found 31 March, 2011, p.3.Available at http://www.heritage.org/research/reports/2011/03/Libya-intervention-obama-wrongly-adopted-un-responsibilitytoprotect.Accessed 18 August, 2015.
[365]*Ibid.*
[366] S Tisdell, 'The Consensus on Intervention in Libya has Shattered in Guardian 23 March, 2011, p.11. Available at http://www.theguardian.com/commentisfree/2011/mar/23/libya-ceasefire-consensus.Accessed 20 August 2015.
[367]*Ibid.*
[368]*Ibid.*

terroristtraining camps in Libya in the early 1970s, the Libyan government provided alarge amount of weapons, money, and safe haven to various terrorist groups. TheUS then added Libya to the list of states sponsoring terrorism and implementedtrade restrictions against Libya. In 1999, Gaddafi started severing his relationswith terrorist groups, and his efforts eventually made the US decide to remove Libyafrom the list in 2006. Hence, it can be assumed that Gaddafi did not sponsor anyterrorist groups at the time of the civil war. Yet, Western states were afraid ofGaddafi's potential return to a sponsor of terrorism, which would greatly threatenthe security of Europe because of Libya's proximity.[369]

Moreso, Western states feared Libya's possession and potential use ofchemical weapons against them. In the mid-1970s, Gaddafi pursued nuclearweapons. Libya's use of chemical weapons against Chad was also severelycriticized in the late 1980s. In 2003, the Libyan government announced that itwould abandon its weapons of mass destruction (WMD) including nuclear,chemical, and biological weapons.[370] However, Libya still failed to completely giveup their chemical weapons. Because Gaddafi was not generally considered arational actor, his possession of weapons was a threat to Western states. Thus, theinterests of NATO member states including economic and security concerns weregreater driving forces behind the intervention than humanitarian concerns. Similarto Kosovo's case, realism seems to better explain states' motivations in Libya.

Several differences exist between Kosovo's case and Libya's case. First, theNATO intervention in Kosovo was illegal due to lack of Security Councilauthorization, whereas the intervention in Libya was legal because it was sanctioned by the Security Council which "provided the coalition with the legitimate authority tointervene." This change is worth noting because it suggests that NATO recognizedthe Security Council as the legitimate authority that can authorize intervention,which is stipulated in ICISS's report.Another significant change was that while it took almost a decade for theinternational community to mobilize the coalition in

[369]S Tisdell, *Loc cit.*For further reading, see Anne Orford, *International Authority and Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

[370] Notwithstanding the UN-Sanctioned Intervention undertaken by NATO, it's arguably armed intervention to Protect the strategic national interests of Europe, particularly economic and security interests.

Kosovo's case, it took only amonth for the Security Council to authorize the use of force in Libya's case sincethe conflict began.

3.13 International Conflict Situations Deserving Humanitarian Intervention

Since the end of Cold War, humanitarian interventions have been undertaken in several instances in conflict situations earlier discussed. However, the controversy lies in the fact that what level of humanitarian crisis deserves intervention. There is no specified benchmark for determining the extent of human rights violation that warrants intervention. It has been strongly contended that extreme human suffering of supreme humanitarian emergency is such deserving of humanitarian intervention.[371] Thus, most of the humanitarian crisis was occasioned by grave breaches of human rights often leading to senseless massacre on a large scale. Inspite of this evaluation, attention must be drawn to some instances of extreme humanitarian catastrophe that were not accorded humanitarian intervention even though in our opinion apparently deserving.

3.13.1 The Syrian Conflict

The conflict in Syrian presents a graphic illustration deserving of humanitarian intervention. The Syrian government has undertaken large scale systematic and indiscriminate attacks on harpless civilians resulting in senseless killings. Accordingly, Syria has apparently failed to safeguard its nationals. Assad's armed forces engaged in routine large scale grave human rights breaches by intensified attacks and indiscriminately utilizing heavy weapons against innocent civilians.[372] The Syrian internal conflict is characterized by extreme human suffering that shocks the conscience of mankind. The Assad security forces have been accused of shooting civilians, shelling residential areas and torturing hospitalized protesters. These widespread human rights violations constitute war crimes and crimes against humanity.[373]

More disturbing was the fact that on 21 August, 2013, chemical weapon attack was launched against Syrian nationals which was the aggregation of a number of chemical weapon attacks masterminded by the Syrian government. Worthy of note here

[371] N Wheeler, *op cit*, p.147.

[372] *B Shelter, 'Assad Denies Chemical attack in Interview for US Viewers New York' Times 8 September 2013 available at* http://www.nytimes.con/2013/09/09/business/media/assad-denies-attack-in-interveiw-with-charlierose.html. Accessed 24 August 2015.

[373] *Ibid.*

is that prior to the use of chemical weapons on the Syrian civilians, the UN Security Council was polarized by the humanitarian crisis in Syria to the extent that China and Russia vetoed series of resolution authorizing intervention in Syrian government.[374]

It was in the face of the worsening situation in Syria and the attendant extreme human suffering that prompted the British ambassador to remark thus, 'the UK is appalled by the decision of Russia and China to veto the resolutions aimed at ending bloodshed in Syria.[375] Similarly, the United States of America Ambassador also alluded to the paralysis of the UNSC concerning the Syrian conflict that she stated, 'two permanent members of the UN Security Council are prepared to defend Assad to the bitter end.'[376]Inspite of a large collective effort to halt the catastrophic internal conflict in Syria through peaceful mechanisms such as sanctions and peace plan, the senseless massacres remained unabated.Outside the purview of the UNSC, other collective efforts have been undertaken with the view to ending the senseless killings prevalent in Syria to no avail. For example, the Assad's regime reneged on the United Nations-Arab League ceasefire agreement and even attacked civilians in the presence of United Nations monitors.

Consequently, the worsening humanitarian crisis in Syria is certainly a deserving instance of intervention to curb the humanitarian emergency prevalent there. It is our humble submission that humanitarian intervention in Syria would be in consonance with the tenets of the charter regime and current international law.

3.14 The Conflict in Somalia

The conflict in Somalia no doubt deserves humanitarian intervention giventhe international dimension and the gravity of the atrocities committed therein.Somalia has had no effective government since 1991. A transitional governmentbacked by Ethiopian

[374] C O' Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) vol 24, No. 557 *Duke Journal of Comparative & International Law*, 569-570.

[375] R Gladstone, 'Friction at the Un as Russia and China Veto Another Resolution as Syria Sanctions' *New York* Times, 19 July 2012. Available at http://www.nytimes.com/2012/07/media/russiaandchinavetoresolutiononsyria.html.Accessed 26 August 2015. Sir Mark Grant was formerly a Permanent Representative of the United Kingdom to the United Nations. He is currently the National Security Adviser to the Prime Minister of United Kingdom.

[376] *Ibid*. Susan Rice was formerly the United States of America Ambassador to the United Nations. She is also the current United States of America National Security Adviser.

troops threw out Islamists from the capital, Mogadishu, inDecember 2006, but since then Islamism insurgents have carried out almost dailyattacks. About 20,000 people flee fighting Mogadishu each month. More than twomillion Somalis rely on food aid to survive.[377]

The young Islamist fighters launching attacks around Mogadishu are knownas Al-shabab. Recently placed on the United States list of "foreign terroristorganizations", Al-shabab began as a militia wing of the Union of Islamic Courts(UIC). Also involved are militia men from the Hawiye clan, the largest inMogadishu. In February, 2012, Al-shabab released a joint video with Al-Qaedaannouncing that the two groups had merged. Ethiopian troops entered the Countryin December 2006 to help Somalia's interim Government oust the Union ofIslamist Courts, which had taken control of much of Southern.[378] Ethiopian troops' presence wasviolently opposed by Somalia's non-state arms groups. The Islamists imposed Sharia Law during the secondhalf of 2006 and threatened to seize the Ogaden – Ethiopia's Somali's EasternRegion. Addis Ababa, for its part accused UIC of links with Al-Qaeda. Ethiopia'spresence in Somalia ended in early 2009, when it pulled its troops under anagreement between the transitional Somali government and moderate Islamists.

In October 2011, hundreds of Kenyan troops entered Somalia, escalatingtheir efforts to fight the Al-shabab militant group which it accused of kidnappingsand raiding Kenyan coastal resorts and refugee camps. The group soon threatenedreprisals against Kenya and witnesses reported seeing Al-shababfighters movetoward the areas invaded. However, it must be emphasized that in 1992, the United Nations resolved that the degree of humanitarian crisis in Somalia amounted to a threat to international peace and security authorizing UN Charter VII arms embargo and undertaking all necessary measures to secure safe humanitarian corridor for humanitarian aids operations.[379]

3.15 The Conflict in Rwanda

[377] For further reading on the Somalian Conflict, see G Vockel, 'Humanitarian Intervention in Cases of Overwhelming Humanitarian Necessity' (2005) *Coventry Law Journal*, 31.
[378] *Ibid.*
[379] G Vockel, 'Humanitarian Intervention in Cases of Overwhelming Humanitarian Necessity' (2003) *Coventry Law Journal*, 31; Resolution 733 & 794 of 1992 of the United Nations Security Council is instructive here.

The Rwandan conflict popularly known as the Rwanda Genocide of 1994was a case that genuinely required a humanitarian intervention and did not receiveone, irrespective of the fact that around eight hundred thousand people (mainly theTutsis and moderate Hutu population) were slaughtered in cold blood by Hutuextremists, the *Interahamwe.*[380]

At 8:30 pm, on April 6, 1994, President Juvenal Habyarimana of Rwandawas returning from a submit in Tanzania when a surface-to-air-missile shot hisplane out of the sky over Rwanda capital city of Kigali. All on board were killedin the crash. Since 1973, President Juvenal Habyarimana of Rwanda, a Hutu, hadrun a totalitarian regime in Rwanda, which had excluded all Tutsis from participating.

That changed on August 3, 1993 when Habyarimana signed the Arusha Accords,which weaken the Hutu hold on Rwanda and allowed the Tutsis to participate in thegovernment. This greatly upset Hutu extremists.[381]

Although it has never been determined who was truly responsible for theassassination, Hutu extremists profited the most from Habyarimana's death. Within24 hours after the crash, Hutu extremists had taken over the government, blamedthe Tutsis for the assassination and begun the slaughter which lasted for 100 days.

Specifically, the Hutu militia group, *Interahamwe*killed all male Tutsis,forced the women to dig graves to bury their men, and then threw the children inthe graves. One woman survivor recalled "I will never forget the sight of my sonpleading with me not to bury him alive. He kept trying to come out and was beatenback. And we had to keep covering the pit with earth until there was no movementleft".[382] Hundreds of bloated and mutilated body floated on, and passed down therivers on daily basis. The civiliansurvivors could not come out of their houses to even look for food. Those whowished to escape at that stage could not because the sea, air and land routes wereclosed. Everything in the country came to a halt. Only gun fighters ruled.

The inability of the international community to intervene in Rwanda truly scorched the conscience of theUnited Nations and its member states. In the aftermath of

[380] A Hansen, 'Drawing Lines in the Sand: The Limits and Boundaries of Peace Support Operations in M Malan (ed) *Boundaries of Peace Support Operations: The African Dimension (ISS: Monograph Series, 2000) pp. 7-19.*

[381] *Ibid.*

[382] For further reading, see UN Secretary-General, Letter dated 18 March, 1999 from the Secretary-General addressed to President of the Security Council, UN Doc. S/1999/339.

the Rwandan genocide,the international community ruefully made the historical declaration, "never again,not on our watch," and Kofi Anan, then Secretary-General of the United Nations,asked the members of the UN General Assembly how the world should respond "togross and systematic violations of human rights that offend every precept of ourcommon humanity?"[383] Consequently, it has been contended that the herculean task to surmount in order to undertake intervention is the political will. Unfortunately, the absence of political will was aptly demonstrated in the horrific humanitarian disaster in Rwanda as manifestly exhibited by the indifference of the international community concerning the Rwandan crisis of 1994.[384] It was the Rwandan genocide which attracted no interest from the UNSC that further expose the double standard approach of humanitarian intervention, particularly by the realization that the mobility of refugees of a large scale and massive genocide killings did not attract the intervention of the UNSC. Thus, it has been suggested that the reason partly responsible for this was the lack of interest by the United States to sanction intervention in Africa consequent upon the experience of the Somalian Crisis.[385]

3.16 The United Nations Justification for Humanitarian Intervention

As to the question of when to intervene in a domestic crisis, there has notemerged a consensus among the states or within international organizations,including the UN. The UN practice wasdeveloped on a case by case approach and it refrained from any codification aboutthe criteria for possible cases of humanitarian intervention in the future. Yet, out ofthe cautious approach of the UN and the arguments of the observers, a strongtendency can be discerned. When we look at the UN involvement in these cases,the most salient point is the tendency to link human rights and widespread humanrights violations within a country to Chapter VII of the UN Charter, starting fromResolution 688. [386] In this way, the traditional understanding that humanitarianintervention is unlawful because it involves neither self-defence norenforcement action under Chapter

[383] K Annan, *loccit*; '*We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nation, 2000) p.48. This is otherwise termed the Millennium Report of the UN Security General, 2000.
[384] A Hansen, *op cit*, 7-19.
[385] *Ibid.*
[386] The United Nations Resolution 688 of 1991 is popularly described as the precursor to the application of humanitarian intervention.

VII, was overcome. Furthermore the ban on UNintervention in domestic affairs without the consent of the target state enshrined inin the Charter[387] is eliminated since it makes an exception in that "this principle shallnot prejudice the application of the enforcement measures under Chapter VII".

But, the most interesting point is the fact that there is no reference toArticles 55 and 56 of the UN Charter, which require member states to take jointand collective action for the achievement of universal respect for, and observanceof human rights and fundamental freedoms for all. Instead of referring to thesearticles in recent UN authorizations, a linkage between threat or breach ofinternational peace security was made. By doing so, such anintervention was not justified on a purely humanitarian basis, instead it wasconsidered as long as it was related to international peace and security.

Another controversial point is that in Security Council Resolutions 688about Northern Iraq and 1199 about Kosovo there was no clear legal SecurityCouncil authorization for the member states' armed forces to intervene. In the caseof Northern Iraq, following the UN resolution, the US, Britain and France launchedOperation Provide Comfort, by creating safe havens and imposing no-fly zones. InKosovo, NATO countries conducted a full-scale operation against Federal Republic of Yugoslavia.Politically, these states' military actions seemed to be based on an implied right ofhumanitarian intervention given the fact that the UN Security Council hadpreviously defined the situation as a threat to international peace and security.

This broad interpretation of 'threat to peace and international security' in the post-Cold War era has resulted in considering internal conflicts and humanitariancatastrophes with cross-border repercussions as constituting threats to internationalpeace and security.[388] Therefore, the crises whose external implications are severeenough to make an exception to the non-intervention principle have warranted andmay, in the future, warrant humanitarian intervention. Yet, some states object tothis broad interpretation of humanitarian intervention authorised by the UNSecurity Council on the basis that the Security Council may act arbitrarily in somefuture cases. Furthermore, the argument that the Security Council, under theCharter and its practices, is not entitled to authorise

[387] United Nations Charter, 1945, Article 2(7) sanction the sacred doctrine of state sovereignty in international law.
[388] G Vockel, *Loccit* .

humanitarian interventionbased purely on massive violations of human rights with no cross-borderrepercussions raises questions about the legal and structural limits of the SecurityCouncil on matters of humanitarian intervention.

In addition, the inability to intervene in Rwanda truly scorched theconscience of the United Nations and its member states. In the aftermath of theRwandan genocide, the international community ruefully made the historicaldeclaration, "never again, not on our watch," and Kofi Anan, then SecretaryGeneralof the United Nations, asked the members of the UN General Assemblyhow the world should respond "to gross and systematic violations human rightsthat offend every precept of our common humanity?" Answering the challenge, theCanadian government and a number of renowned global foundations, establishedthe International Commission on Intervention and State Sovereignty (ICISS),which developed the Responsibility to Protect (R2P) doctrine.[389]

The very principles and purposes upon which the United Nationswere founded, particularly the protection and promotion of human rights throughoutthe world, justify the defense of humanitarian intervention.Some proponents of thedoctrine point to the fact that while article 2(4) is an important provision of theCharter, it is a single principle competing with other significant Charter goals, suchas the advancement of human rights.The preamble and first article of the Chartermake clear that the framers intended to link international peace and security withfundamental human rights.[390] The Charter's preamble expresses the determination ofthe members to uphold essential human rights and to make certain that armed forceis only utilized for the collective good.

Through the foregoing reasoning, the use of force in support of the commoninterest, such as for humanitarian purposes, may be lawful. Other provisions in theCharter support this conclusion. Article 1(3) states that one of the purposes of theUnited Nations is the achievement of international cooperation in furtheringrespect for human rights. Above all, the Security Council has stretched article 42 toprovide a justification for intervention, e.g. in Somalia in 1993 and Libya in 2011.However, without a consensus in the Security Council, this is not achievable.

[389] See International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001). Available at http://www.iciss.ca/pdf/commissionreport.Accessed on 14 August 2015.
[390] G Vockel, *Loc cit.*

Furthermore, notwithstanding the UN justification for humanitarianintervention, many learned scholars have endeavoured to articulate the legalprinciples necessary for a valid and legitimate humanitarian intervention ininternational law. Professor Antonio Cassese[391] identified 6 legal principles namely:

a. Severe, fragrant violations of individual rights, amounting to adownright crime against humanity;
b. Systematic refusal by the state concerned to cooperate with theinternational organization, in particular, the UN;
c. Blockage of the security council, able only to condemn or deplore thesituation, while calling it a threat to international peace and security;
d. Exhaustion of all peaceful and diplomatic channels;
e. Organization of armed action by a group of states, not a singlehegemonic power, with the support or at least the absence ofopposition of a majority of UN member states; and
f. Limitation of the military intervention to what is strictly necessary toreach the humanitarian objective.

On his part, Paul Christopher[392] mentioned three conditions that mustbe satisfied for intervention on humanitarian ground to be justified. They are:

a. The political objective should be publicly declared by lawful authorityin advance. In other words, the intervention should not be covert andclandestine, but should be preceded by a formal public declaration of thepolitical objectives of the contemplated intervention;
b. Humanitarian intervention must be a last resort. This condition is metwhen reasonable non-violent efforts have been unsuccessful and thereis no indication that future attempts will fare any better; and
c. The cost must be proportional to the expected objectives. This involvesa consideration of how many innocent persons one may put at risk inorder to achieve a worthy political objective – ending humanitarianabuse.

[391]A Cassese, 'Ex iniurialusOritur: Are we moving towards International legitimization of forcible humanitarian counter measures in the world community' *in P Alston & E Macdonald (eds)Human Rights, Intervention and the Use of Force* (Oxford: Oxford University Press, 2008) p. 135-136.
[392]P Christopher, *op. cit. p*p. 252-253.

To Professor FerdinandoTeson, [393] five conditions are necessary for a justifiablehumanitarian intervention namely:

a. A justifiable intervention must be aimed at ending tyranny or anarchy.
b. Humanitarian interventions are governed like all wars by the doctrineof double effect. This means that the intervention should do more goodthan harm; the intervention has to be proportionate to the evil it isdesigned to suppress as innocent persons should never be targeted asmeans to achieve the humanitarian end;
c. Generally, only severe cases of anarchy or tyranny qualify forhumanitarian intervention;
d. The victims of tyranny or anarchy must welcome the intervention;
e. Humanitarian intervention should preferably receive the approval orsupport of the community of democratic states.

3.17 Humanitarian Intervention WithoutUnited Nations Security CouncilAuthorization

The United Nations Security Council reserves the sole competence to authorize intervention on the grounds of what it considers the existence of gross violations of human rights by the target state against its citizens that amount to a breach of peace or threat to international peace and security contemplated within the confines of Articles 39 of the United Nations Charter.[394]

Humanitarian intervention undertaken upon the invitation of the target state or pursuant to authorization by the United Nations Security Council is generally considered appropriate and legitimate. However, even with this connotation, controversy still surroundsUNSC authorized interventions. On the other hand the legality and legitimacy of humanitarian intervention embarked upon without the authorization of the UNSC becomes even more questionable and subject to varied interpretations. [395] A prime illustration in this regard is the North Atlantic Treaty Organization (NATO) military intervention in Kosovo on humanitarian consideration. The UNSC passed a resolution in

[393] F Teson, *op. cit.* pp. 144-150.
[394] See *Military and Paramilitary Activities in Nicaragua case (supra), para 268.*
[395] *Ibid.*

1998 demanding a stop to the sporadic attacks against Kosovar civilians without any express authorization of military intervention in Kosovo.

Inspite of the absence of UNSC – sanctioned military campaign and for the fear that Russia and China would exercise their veto powers to block any UNSC resolution to authorize military intervention, NATO unilaterally undertook military intervention in Kosovo against the Federal Republic of Yugoslavia claiming that its authorization was anchored on the said UNSC resolution that merely condemned the humanitarian crisis.[396] Notwithstanding the humanitarian catastrophe prevalent in Kosovo at the time ostensibly calling for intervention, the absence of the UNSC authorization renders the NATO campaign in Kosovo controversial and suspicious. Accordingly, it has been opined that, the Security Council even if flawed instrument, at least gave some degree of legitimacy to actions taken on behalf of the society of states. The Kosovo intervention not only ignored the Security Council, but its proponents and executor worsened the controversy by continuing to proclaim that it had been undertaken on behalf of the international community. If generalized, this type of justification for intervention, either by a single power or by a multinational coalition undertaken without proper authorization and oversight by the Security Council, is likely not merely to confuse the discussion about humanitarian intervention but to discredit the very idea itself.[397] It is likely to do so because such intervention is based on the unilateral arrogation by a state or a coalition of states of the right to speak and act on behalf of the international community and to represent international will when this is patently not the case.[398]The consequences of undertaken humanitarian intervention without the authorization of the UNSC was vividly espoused by BrunoSimma to the effect that, 'The decisive point is that we should not change the rules simply to follow our humanitarian impulses, we should not set new

[396] C Marie-Janine, 'Kosovo in the Twentieth Century: A Historical Account' in A Schnabel and R Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (Tokyo: UNU Press, 2000) p. 19.

[397] *Ibid.*

[398] T Judah, *Kosovo: War and Revenge* (Yale: Yale University Press, 2000) pp. 182-185 available at http://www.timjudah.com/article/kosovo:warandrevenge/html accessed 25 August, 2015.

standards only to do the right thing in a single case. The legal issues presented by the Kosovo crisis are particularly impressive proof that hard cases make bad law.[399]

However, in certain circumstances, states have utilized force to halt humanitarian emergences without the express authorization of the UNSC.It is our considered view that such interventions have come to be considered as unwarranted assault on the independence of a sovereign state.

The debate about humanitarian intervention was mainlyfocused on the question of whether violations of human rights constitute a threat tointernational peace and security, to accord humanitarian intervention legitimacy. But,later on the linkage between human rights and security was largely recognized andhumanitarian intervention through UN authorization did not create so muchcontroversy. By the end of the 1990s, especially with the NATO intervention inKosovo, the debate has gained a new dimension raising the question whether suchinterventions need UN authorization.

There is no consensus in the legal doctrine, but most American legalscholars have defended the legality of the alternative of self-help for a long time,even as early as the 1960s and 1970s.[400] For example Verwey, one of the pioneersof this genre, maintains the necessity of keeping this alternative alive andunderlines that it must be regulated in a strict manner. This way of thinking goesfurther, confining the term humanitarian intervention to self-help by states and notincluding interventions under the UN in this category.[401] Even some proponents of aright to humanitarian intervention without UN authorization argue that measuresdecided upon by the Security Council under Chapter VII cannot fall within thedoctrine of humanitarian intervention, rather they might be called 'enforcementmeasures for humanitarian purposes'. For them, this is necessary to prevent furthermisunderstanding and ambiguities about the concept.[402]

Politically, self-help is generally opposed on the basis that it would lead toabuse or disorder in the international system. According to the opponents of self-helpby states,

---

[399] B Simma, 'NATO, the UN and the Use of Force: Legal Aspects (1999) vol 10, No. 1, *European Journal of International Law*, 1-2.

[400] N Kerton - Johnson, '*Justifying America's Wars*: *The Conduct and Practice of US Military Intervention* (USA: Contemporary Security Studies, 2011) pp. 63-64.

[401] O Ramsbotham& T Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press, 1996) pp. 167-192.

[402] D Luban; Intervention and Civilization: Some Unhappy Lessons of the Kosovo War' in *Global Justice and Transnational Politics* (Cambridge: MIT Press, 2002).

it might be difficult to distinguish between humanitarianintervention and real politics, hence, as a way to reduce the danger of abuse, it isnecessary to restrict humanitarian intervention to those cases carried out under theauspices of the UNSC and refuse any kind of self-help.[403] Proponents of a right to self-help,on the other hand, underline the need to consider two points. First, growing globalawareness about human rights makes gross violations of human rights intolerable.Second, UN actions may not respond in an effective and timely way to crises.Hence, in their view, the option of self-help must be recognized as a back-uppolicy to interventions under the UN framework. Furthermore, keeping thisalternative as a viable policy option is ethically justified as well.[404] Yet, it must benoted that those who argue for such a right to self-help, both politically and legally,should not be seen as those who are not concerned with the problem of abuse ordisorder; on the contrary the proponents of the right to self-help are also aware ofthe possible dangers of accepting such a right. It is for this reason that the attemptsto formulate the necessary criteria to regulate humanitarian intervention comemainly from these scholars.

There were interventions without UN authorization in the post-Cold Warperiod, such as the Economic Organization of West African States' intervention inLiberia, the US-, UK- and French-led interventions in Iraq since 1991 and NATO's intervention in Kosovo.[405]The Iraq and Kosovo cases are quite complicated in thesense that there were prior Security Council resolutions defining the situation as athreat to international peace and security, but none giving explicit authorization for the use of military force,as stated before. Thus, the debate about these cases has not been settled amongscholars.

Although there is no clear cut legalprescription of the doctrine of humanitarian intervention, the normative approach accepts that, especiallywhen it is carried out

[403]T Weiss, 'Triage: Humanitarian Intervention in a New Era', (1994) *World Policy Journal* II.

[404]M Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues', (1998) Vol. 12, *Ethics & International Affairs Journal,* 11.

[405]The intervention by the Economic Community of West African States (ECOWAS) in the summer of 1990 in Liberia to halt the grave breaches of human rights occasioned by the civil war was not initially authorized by the UNSC. The intervention which was originally a peace keeping exercise was subsequently sanctioned by the UNSC after two years.

through the UN, humanitarian intervention has become a *defacto* norm at least in the declarations and practices of the Western democracies.[406]

Furthermore, four distinct attitudes or approaches to the legitimacy ofhumanitarian intervention in the absence of Security Council authorizationscan be identified.

1. S*tatus quo:* Categorically affirms the military intervention in responseto atrocities is lawful only if authorized by the UN Security Council orif it qualifies as an exercise in the right to self-defense. Under thisview, NATO's intervention in Kosovo constituted a clear violation ofArticle 2(4). Defenders of this position include a number of states, mostnotably Russia and the People's Republic of China. Proponents of thisapproach point to the literal text of the UN Charter, and stress that thehigh threshold for authorization of the use of force aims to minimize itsuse, and promote consensus as well as stability by ensuring a basicacceptance of military action by key states. However, Kosovo war hasalso highlighted the drawbacks of this approach, most notably wheneffective and consistent humanitarian intervention is made unlikely bythe geopolitical realities of relations between the Permanent Fivemembers of the UNSC, leading to the use of the veto andinconsistent action in the face of humanitarian crises.
2. *Excusable breach*: Humanitarian intervention without a UN mandate istechnically illegal under the rules of the UN Charter, but may bemorally and politically justified in certain exceptional cases. Benefitsof this approach include, that it contemplates no new legal rulesgoverning the use of force, but rather opens an "emergency exit" whenthere is a tension between the rules governing the use of force and theprotection of human rights. Intervening states are unlikelyto be condemned as law-breakers, although they take a risk of violatingrules for a purportedly higher purpose. However, in practice, this couldlead to questioning the legitimacy of the legal rules themselves if theyare unable to justify actions the majority of the UN Security Councilviews as morally and politically justified.

[406]J Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) vol 93, No. 4, *American Journal of International Law*, 89. Weiss and Clopra are two renounced proponents of humanitarian intervention who opined that though there have been many achievements towards erosion of sovereignty and expansion of humanitarian assistance, it is still not yet a norm.

3. *Customary Law*: This approach involves reviewing the evolution ofcustomary law for a legal justification of non-authorized humanitarianintervention in rare cases. This approach asks whether an emergingnorm of customary law can be identified under which humanitarianintervention can be understood not only as ethically and politicallyjustified but also as legal under the normative framework governingthe use of force. However, relatively few cases exist to providejustification for the emergence of a norm, and under this approachambiguities and differences of view about the legality of anintervention may deter states from acting. The potential for an erosionof rules governing the use of force may also be a point of concern.
4. *Codification*: The Fourth approach calls for the codification of a clearlegal doctrine or "right" of intervention, arguing that such doctrinecould be established through some formal or codified means such as aUN Charter Amendment or UN General Assembly declaration. Althoughstates have been reluctant to advocate this approach, a number ofscholars, as well as the Independent International. Commission onKosovo, have made the case for establishing such a right or doctrinewith specified criteria to guide assessments of legality. A major argumentadvanced for codifying this right is that it would enhance thelegitimacy of international law, and resolve the tension between humanrights and state sovereignty principles enshrined in the UN Charter.However, the historical record on humanitarian intervention issufficiently ambiguous that it argues for humanity regarding efforts tospecify in advance the circumstances in which states can use force,without Security Council authorizations, against other states to protecthuman rights.

3.18 Humanitarian Intervention and Protection of Civilians

The conception of humanitarian intervention is essentially anchored on the need to protect civilians enmeshed in the web of humanitarian crises. The civilians are the major casualties of any conflict, thus,deserve protection by virtue of humanitarian intervention. The core ofhumanitarian intervention is the protection of civilians.[407]The responsibility to protect individuals fromgenocide, war crimes, crimes against humanity, and ethnic cleansing lies withactors at all levels of society. It follows that one of the key players involved inupholding Responsibility to Protect is the UN Security Council, both

[407] See World Summit Outcome Document, 2005, paras 138 & 139

in terms ofresponding to early warning signs and taking preventive measures, as well as inidentifying escalating violence and conflicts that require a timeous response fromexternal forces in deserving cases. In addition, the World Summit Outcome Document emphasizes that theinternational community – including the Security Council – must use "appropriatediplomatic, humanitarian and other peaceful means under Chapter VI and VIII ofthe UN Charter" when carrying out its Responsibility to Protect, thus ensuring thatdecisions made on this score align with accepted interpretations ofinternational law. Given that the Security Council is vested with the "primaryresponsibility" for maintaining international peace and security under the UNCharter, its roles in the protection of civilians in moments of grave breaches of human rights in armed conflicts occupies a fundamental position in global politics.[408]This has been reflected in Security Council resolutions, the expanding debate onthe protection of civilians (POC), and the use of the veto amongst the 5 permanentmembers.

On 28 April 2006, the UN Security Council unanimouslyadopted Resolution 1674 on the Protection of Civilians in Armed Conflict (POC),which emphasizes concern for noncombatants affected by violence and unrest.Importantly, Resolution 1674 contains the first official Security Council referenceto the Responsibility to Protect by reaffirming the provisions of Responsibility toProtect as they were initially outlined in the World Summit Outcome Document (WSOD).[409] The Resolution also notes the Council's readiness to address grossviolations of human rights, such as genocide and crimes against humanity, which itnotably confirms may constitute threats to international peace and security.[410]

On 28 June 2006, the Security Council held its first open debate on theprotection of civilians in armed conflict. Each year thereafter, the Council has heldsemi-annual open debates to take stock of developments in the area of protectionof civilians and to assess progress in the implementation of the commitments madeunder Resolution 1674. States were overwhelmingly positive in affirmingtheir support for Responsibility to Protect during the first open debate, as well as insubsequent debates.

[408] See generally the powers of the UNSC to determine what constitute a threat to international peace and security and the attendant Enforcement Measures encapsulated in Chapter VII of the UN Charter.
[409]Paragraphs 138 & 139.
[410] The adoption of Resolution 1674 in 2006 by the UNSC is a further manifestation that humanitarian considerations is rapidly gaining momentum in the deliberations of the UNSC.

Importantly, on 11 November 2009, during the eighth open debate on theProtection of Civilian, the Security Council reaffirmed its commitment to preventthe victimization of civilians in armed conflict and end ongoing violence againstcivilians around the world.[411]The UNSC recognizes that States have the primaryresponsibility to protect their population, and reaffirms the fundamental provisionsof responsibility to protect. More than twenty Member States mentionedresponsibility to protect in their statements, recognizing that sovereignty includesresponsibilities of the state to protect populations from mass atrocities, and that itis the responsibility of the international community to assist national governmentsin fulfilling their protection obligations.[412]

These States' endorsement of the first informal debate on responsibility toprotect illustrates the linkages between concerns generated in discussions onprotection of Civilians, and those arising from situations in which responsibility toprotect is applicable. For example, both responsibility to protect andProtection of Civilians aim to protect the individual and centre on universallyacceptedprinciples of international humanitarian/human rights, and refugee law.

3.19 Impediments to Humanitarian Intervention

There are certain impediments that had become a clog in the wheel ofprogress in the application of humanitarian intervention. The most obvious are: the veto powerof the United Nations Security Council, lack of political will, resources andenduring notion of state sovereignty.

While one of the fundamental content of the United Nation Charter is that allmembers are deemed equal, this theoretical principle does not reflect thepractical reality that only five members of the Security Council possess thepotent veto power.[413] During the formation of the United Nations, numerousstates initially hoped to eliminate the veto but quickly understood that it wasa precondition to ensuring the very existence of the United Nations.[414] Theveto power was the cost that less influential nations paid for

[411]*Ibid.*

[412] The essence of this practice calls into reality the extent of the application of non-intervention doctrine sanctioned under the Charter regime.

[413]The Permanent Five Members of the UNSC are USA, Russia, Britain, France and China.

[414]The P-5 members of the UNSC consequent upon the collapse of the League of Nations, that is the Precursor to the United Nations, played a significant role to establishing the current system of the UN.

the inclusion ofthe five major powers in the new collective system. The veto privilegeguaranteed that no major action could be undertaken without the consent ofall five permanent members and that this power could never be changedunless all five agree to amend it.[415] It is important to recall, however, that theCharter was drafted under conditions drastically different from the current international environment.The founders assumed the wartime alliance would endure and that the fivepermanent members would serve as global policemen.[416]

The veto power remains one of the most significant impediments to theeffective workings of the Security Council vis-à-vis humanitarianintervention. As a result of their special privilege, the five permanentmembers, with their disproportionate power and singular interests, haveoften precluded the Security Council from acting according to the purposes of theUnited Nations.[417] One veto by a permanent member negates affirmative votesby all the other members of the Council.[418] Thus, when a breach orthreat to international peace and security affects a permanent member or one of its allies, the vetopower forestalls any action. Examples of this type of occurrences includethe 1980 Soviet veto of a draft resolution criticizing the invasion ofAfghanistan; the United States veto of a similar resolution regarding themining of Nicaraguan ports; the United States veto of endeavor to condemnthe invasion of Panama; and the triple veto with regard to Rhodesia in1977. At the same time, when an act of aggression has no impact upon apermanent member's own interest, no action is taken and collective securitybecomes a casualty of state indifference.[419]

During most of the major crises since 1945 the Security Council has beendeadlocked and paralyzed. The Uniting for Peace Resolution, adopted by theGeneral Assembly in 1950, is further evidence of the Security Council'sunresponsiveness,largely due to the potency of the veto power possessed by individual member of the P-5. Under

[415]N Padelford, 'The Use of the Veto' (1948) 2 *InternationalOrganization Journal*, 227-228.

[416]C Tickell, 'The Role of the Security Council in World Affairs (1988) Journal of *InternationalComparativeLaw*, 307-308.

[417]*Ibid.*

[418]T Batra, 'Veto Power of the Security Council' (1998) 18 *Indian Journal of International Law*, 76-78.

[419]Worthy of note is that from 1966 to 1986, the permanent five members of the United Nations Security Council exercised 119 vetoes, namely: 57 vetoes by the United States, 23 by the United Kingdom, 21 by China, 18 by the Soviet Union and 12 by France.

the Resolution, in the event that the Security Council cannotexercise its Chapter VII powers due to failed concurrence among the permanentmembers, the General Assembly becomes operative and is granted the power toexecute the duties and powers of the Security Council, including, if necessary, therecommendation of armed force.[420] The Uniting for Peace Resolution established astandard procedure whereby the General Assembly could meet in emergencysession when the veto created a stalemate.[421]Essentially, the adoption of the UNGA Uniting for Peace Resolution was adopted as a reaction to the tactical approach of the Union of Soviet Socialist Republic (USSR) to frustrate any authorization by the UNSC on measures to be undertaken for the protection of Republic of Korea against the aggression launched by the military forces from North Korea. There was a clear lack of unanimity on the part of the Permanent members of the UN regarding the resolution of the Korean conflict. This necessitated the UNGA to successfully utilize the Uniting for Peace resolution in the Korean crisis. Historically, stalemate among the fivepermanent members was more the rule than the exception.In addition to the Iraqiinvasion of Kuwait the only other case where the permanent members agreed touse military force under United Nations authorization was Korea,which was onlypossible because the Soviet representative was absent and unable to exercise theveto power. In 1958, the crisis in Lebanon prompted the UNSC to convoke an emergency special session of the UNGA.[422]The Lebanon crisis was referred to the UNGA because the UNSC was deadlocked on resolving the crisis. However, unlike in the Korean crisis, the Uniting for Peace Resolution of the UNGA was not successful implemented in the Lebanon crisis. This was made possible due to the resistance mounted by France and United Kingdom.

Thus, the inability of some countries ravaged by war to get timelyhumanitarian intervention is as a result of the politics of the veto privilege of the fivepermanent

[420]United Nations General Assembly, Uniting for Peace Resolution 377(V) of 3 November, 1950. For further reading on Resolution for peace, see E Stein & R Morrissey, 'Uniting for Peace Resolution in *Encyclopedia of Public International Law* (Amsterdam: Elsavier, 2000) pp. 1232-1235.

[421]United Nations General Assembly Resolution 129 of 7 August, 1958.

[422]D Zaum, 'The Security Council, 'The Uniting for Peace Resolution in Low – Vaughan *et al* (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford: Oxford University Press, 2008) pp. 154-158.

members of the United Nations Security Council. Example Syria,Libya, Georgia, Kosovo among others suffered the polarizing impacts of the veto power politics.[423]

The other impediments such as lack of political will, resources and enduringnotions of state sovereignty are no less impediments to humanitarian intervention.Most countries are in better position to intervene when there is humanitarian crisisbut lack the political will and resources to do so. Similarly the enduring notions ofstate sovereignty recognized by the UN Charter that the UN or any state will notintervene in the domestic affairs of any country on ground of the principle of statesovereignty except when the world peace is threatened or there is massive violationsof human right also constitutes impediment to timely humanitarian intervention. Additionally, it has been generally argued that humanitarian intervention is often conducted on a selective basis and the same criteria are not applied uniformly and globally in every case. This brings into serious question the credibility and legitimacy of humanitarian intervention.[424] However, a fundamental concern arises from the absence of control by the UNSC in relations to UN – sanctioned intervention. A number of these interventions have been led by coalition of states who determine the military and political objectives of such interventions.

3.20 Consequences of United Nations Charter on Humanitarian Intervention

The consequences of the United Nations Charter on humanitarianintervention cannot be over emphasized. Arising from the justification of thehumanitarian intervention by the United Nations Charter, gross human rightviolations by government against their own people are no longer encompassedwithin the internal affairs of states.The domestic jurisdiction limitation ishinged on two levels.First, by the Security Council determination that thedeprivation of the rights constitutes a threat to international peace and security; and second, by virtue ofthe state's violations of its international legal obligations. In either case, Iraq'sbrutal treatment of the Kurdish population could no longer be considered a purelyinternal matter insulated within the confines of sovereign

[423] R Falk, 'The Complexities of Humanitarian Intervention: A New World Order Challenges (1996) vol 17, *Michigan Journal of International Law*.

[424] A Roberts, 'The Road to Hell: A Critique of Humanitarian Intervention' (1993) vol 16, No. 1, *Harvard International Review,32*

inviolability. This is against the backdrop thatsuch flagrant transgressions are no longer considered to be related solely to matters within the ambit of thedomestic jurisdiction of states, thus rendering, the principle of non-intervention in internal affairsinapplicable in such circumstances of gross human rights violations with international repercussions.

Again, human rights have become increasingly internationalized as stateshave undertaken international commitments for the protection and promotion of respect for human rights, either by treaty orunder customary international law. Consequently, article 2(7)'s ban on interventionin the domestic jurisdiction of state only applies where human rights are notsubsumed under international obligations. For example, as a signatory to theUnited Nations Charter, Iraq has a duty to protect human rights and may not claimthat the maltreatment of citizens is purely an internal matter. Conformity withessential human rights obligations is no longer limited to matters within exclusivedomestic jurisdiction but has developed into an issue justifying concern by theinternational community. Thus, gross and systematic violation of human rights regardless ofwhether they are deemed a threat to the peace, are no longer considered to besolely within a state's domestic jurisdiction and are arguably considered a necessary exception to the application of the stipulation of non-intervention principle enshrined in the UN Charter.[425] The Iraq and Syria internal conflicts and their attendant overflow of refugees beyond their territories are instructive on this score. However, it must be emphasized that the victims of gross human rights breaches do not necessarily require a spill across territorial borders for the attraction of humanitarian intervention to bring such violations to a halt.Consequently, the Charter in effect seems to have shut the nuances through a general ban on the use of force, while allowing self-defence only in the event of armed attack. However, humanitarian intervention can still be explored by a UN-Sanctioned Intervention where the UNSC consider a prevailing conflict within a sovereign state as constituting a threat to international peace and security.

3.21 Relevance of Humanitarian Intervention Practice under the CurrentInternationalLaw

[425] See generally the provisions of UN Charter VII, Articles 2(4) & (7).

The relevance of humanitarian intervention practice under thecurrent international law is of utmost importance given the position of theinternational community and the United Nations Security Council. Under thecurrent international law, states as well as citizens are held responsible for grosshuman rights abuses, genocide, rapeamong other things. The doctrine of the responsibility to protecthas come to stay and is a major rationale for the protection of humanity. Thus, nostate whose conflict has attained international dimension and threatens theworld peace would not attract international concern paving the way for humanitarian intervention. The internationalcommunity can no longer pretend that it would not be threatened by the domesticconflict of any independent state if not timely addressed and normalcy restored.

In addition, refugees that are victims of conflicts now have hope as a resultof the relevance of humanitarian intervention under the current international law.For instance, the ongoing Syrian conflict is a case study, because notwithstandingthe conflict of interest of the world powers such as United State of America andRussia/China, the Syrian refugees have been receiving humanitarian assistance due to theprimacy accorded the conception of humanitarian intervention under current international law. The implication of the charter regime is that the fundamental responsibility for authorizing the use of force to protect human rights is vested on the UNSC which is attainable by the positive exercise of political will and reaching consensus among the permanent members of the UNSC.[426]

3.22 Conclusion

Humanitarian Intervention as a concept in international law, the practice and application which has evolved over the decades is of tremendous volatility. There is a wide range of controversies concerning the precise definition of what qualified as a basis for intervention and the mechanisms employed in attaining the objectives of the humanitarian intervention. The dilemma surrounding the application of humanitarian intervention is characterized by the absence of express provision in the UN Charter that guarantees its application. Furthermore, a consensus among the community of states has not determined the crystallization of humanitarian intervention concept into a norm of

[426]Hansen, *opcit*, p.20.

customary international law. However, recent practices and deliberations of the UN points to the direction of the concept of humanitarian intervention gaining momentum and acceptability through channel of the Responsibility to Protect doctrine.

CHAPTER FOUR

INTERNATIONAL HUMAN RIGHTS DEVELOPMENT AND THE ROLE OF THE UNITED NATIONS

4.1 Introduction

The Cold War era, must be mentioned witnessed the emergence of human rights protection instruments. Thus, the creation of the Genocide Convention established a major exception to the application of the non-intervention doctrine.[427] However, the application of the Genocide Convention suffered a fundamental setback during the cold war era upon its inception. For instance, the Cambodian conflict in the mid-1970s presented a prime illustration of a horrendous genocidal situation that defied the implementation of the Convention. Consequently, the intervention of Vietnam to stop the genocidal killings and other accompanying atrocities was greeted with large scale international condemnation although it stopped the genocidal killings.

Apart from the Genocide Convention, the increasing global sensitivity and recognition of human rights protection also heralded the emergence of other relevant human rights instruments which include the Universal Declaration of Human Rights,[428]Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights[429] and the subsequent creation and global recognition of other specific and group human rights protection instruments of international and regional nomenclature. However, inspite of this far-reaching developments, the application of the tenets of these human rights protection international instruments remained largely at the realm of grandiloquent rhetorics and intervention in the domestic matters of a sovereign state remained unassailable. The increasing importance attached to human rights protection continued globally and the rapid progression in the awareness of the

[427] See Convention on the Prevention and Punishment of the Crime of Genocide, 1948 entered into force January, 12, 1951. Available at http://www.unhchr.ch/html/menu3/b/p-genoci.htm. Accessed on 12 November 2015.

[428] The United Nations General Assembly on December, 10, 1948 adopted and proclaimed the Universal Declaration of Human Rights.

[429] The twin Covenants were adopted by the United Nations General Assembly on December 16, 1966 and entered into force on 26 March 1976. The Convention Against Torture was adopted 10 December 1984 and entered into force in 1987, Convention on the Right of the Child was adopted 20 November 1989 and entered into force on 2 September 1990, African Charter on Human and People's Right was adopted in 1981 and entered in force in 1986 and European Convention on Human Rights was adopted and entered into force September 1953.

responsibility for the scourging human rights violations was established by the works and decisions of the Nuremberg and Tokyo military tribunals respectively.[430] Closely connected to human rights protection was the development of laws of armed conflict explicitly embedded in the four Geneva Conventions and their Additional Protocols all in an attempt to reduce the impact of warfare and protect vulnerable populations and civilians during armed conflict. These historical milestone developments coupled with the practice of states have somewhat permitted the protection of vulnerable populations as a legitimate basis for undertaking humanitarian intervention. The increased global recognition of human rights protection and the need to prevent or halt atrocities and human rights abuses was indeed aptly demonstrated by the extant and previous three Secretaries-General of the United Nations to the effect that the evolution of international human rights standards and support for their implementation has now reached the stage where norms of non-intervention and the related deference to sovereignty rights, no longer apply to the same extent in the face of severe human rights abuses.[431]

However, the events of the Cold War period should not be glossed over as it provided attitudinal basis for states to justify intervention on grounds of humanitarian considerations. Consequently, the conduct of interventions on the basis of humanitarian concerns seemed to have shaped and may continue to impact on the application of the doctrine of state sovereignty.

It must be noted that with the establishment of the UN Security Council and its subsequent deliberations, human rights issues were considered as matters within the realm of domestic jurisdiction of sovereign states.[432] Hence, any discussion on human rights issues were considered as a violation of state sovereignty doctrine made manifest in non-intervention principle of international lawguaranteed by the UN Charter.[433] However, the North Atlantic Treaty Organization (NATO) intervention in Kosovo in 1999 brought the legality and legitimacy question of humanitarian intervention to a head.

[430] See further E A Oji, *Responsibility for Crimes Under International Law* (Lagos, Nigeria: Odade Publishers, 2013) pp. 160-161.
[431] The present Secretary General of United Nations is Ban Ki-moon (2007-till date) and the three previous Secretaries-General are Kofi Annan (1997-2006), Boutros Boutros-Ghali (1992-1996) and Javier Perez de Cuellar (1982-1991).
[432] For further reading see P Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal' (2001) vol 12, No. 3, *European Journal of International Law*, 443.
[433] Article 2(7).

But what is interesting here is that even though the authorization of the UN Security Council was not obtained to conduct the military intervention, the UN Security Council declined to formally condemn NATO's forceful intervention against the rights-abusing Serbian government that championed ethnic cleansing in Kosovo, perhaps because the justification for the intervention was humanitarian considerations.[434] Again, all these developments served to indicate that the promotion and protection of human rights against violations is a legitimate concern of the international community.[435]

These rapid progression in the global recognition of human rights protection against violations after the establishment of the United Nations in 1945 was characterized by the development of relevant international instruments to protect and safeguard human rights chronicled above. To further show the direction of the premium ascribed to human rights protection, for the first time human rights issue was deliberated upon at the level of the UN Security Council that led to the passage of Resolution 688 regarded as the precursor to humanitarian intervention that authorized the forceful intervention in Iraq under the auspices of UN Security Council to halt the humanitarian catastrophe and atrocities occurring in Iraq at the time.[436] Since then, human rights concerns became a regular part of UN Security Council deliberations in deserving cases and it is increasingly becoming obsolete for states to anchor on the doctrine of state sovereignty embodied in non-intervention in its domestic affairs as a shield against international intervention in the face of gross human rights violations and the commission of atrocities.

Thus, human rights developments which began with the formulation of the Universal Declaration of Human Rights in 1948, followed by the Genocide Convention in 1948 and the subsequent creation of the twin international human rights covenants in 1966 together with other international and regional rights instruments have continued to impact humanitarian intervention. The effort of the international community in the quest for drastic reduction of the catastrophic impact of warfare on human populations and the

[434] See generally, Independent International Commission on Kosovo, *the Kosovo Report* (Oxford: Oxford Report University Press, 2000).

[435] W Mamah, 'Is Humanitarian Intervention a Pseudonym for Aggressive Unilaterism?' C C Nweze (ed), *Contemporary Issues on Public International and Comparative Law: Essays in Honour of Professor Christian Nwachukwu Okeke* (USA: Vandeplas Publishing, 2009) p.648.

[436] The UN Security Council-sanctioned forceful intervention in Iraq in 1991 presented a prime example of the UN Security Council undertaking actions in accordance with the fundamental purpose of its creation in the protection of human rights while preserving the doctrine of state sovereignty.

imposition of penal sanctions on violators of prescribed rules of engagement in armed conflict had led to the establishment of the Four Geneva Conventions and their Additional Protocols coupled with the creation of the International Criminal Tribunals. The works and contributions of these ad hoc international or quasi-international criminal tribunals have actively facilitated the birth of the International Criminal Court which is a major milestone in international law development. To all these major legal development of international standards towards humanitarian intervention we now turn.

4.2 The Concept of Human Rights

The concept of human rights is founded on the recognition that all persons are born equal. Thus, the evolution and crystallization of human rights spanned through a prolonged duration. Throughout history various schools of thought converged in the emergence of the consciousness of human rights which found formal attestation and recognition in the Universal Declaration of Human Rights. It must be emphasized that this Declaration significantly contributed to the development of the rising profile of human rights. Consequently, the UDHR exposed the universal respect for fundamental human rights and liberties as indispensable requirements for peace and security.

4.2.1 Evolution and Development of Human Rights

Human rights protection has its evolution and development upon the contributions of various schools of thought, particularly those founded on several religions, philosophies and law school.

Thus, the first historical stage in the evolution and development of human rights is rooted in religious and classical philosophical trends n natural rights. Here, the emphasis was on the recognition of people as endowed with innate, absolute, universal and inalienable rights. However, the articulation and juridical – political application of these religious and philosophical ideals was enormously driven by the Western Civilization[437].

Although religious and philosophical ideals contributed immensely to the theoretical dimension of human rights and consequent global responsibilities and duties, the practical

[437] http://www.ohchr.org>OHCHR>English.html Accessed on 10/05/2017

implementation of these ideals in political, economic, social and intellectual spheres over a period of time saw the emergence of drastic changes in theory and practice which culminated into legislation in various civilizations[438].

It is pertinent to state that the Hammurabi's code and the complete legal code of distinction of lus Gentisum and Ius Naturae come within the ambit of these practical changes.[439]These legal codes postulated that the laws of the peoples are the products of the nature of the peoples themselves and not from the state.

This development further heralded the creation of particular responsibilities and global rights extended to every human being as members of a universal community.[440]

Consequently, in the Medievaltimes, Catholic theologians and philosophers concretized the growth of the globalization of human dignity and equality anchored on natural law in Western civilization. Thus, the contributions of Saint Augustine and Saint Thomas Aquirias were germane in establishing a synthesis of elements from classic Greek philosophy and Christianity based on the theory of natural law in recognition of the rights of individuals independent of the state the person belong[441].

The evolution and development of human rights recorded further advancement in the five centuries consisting of the Renaissance, the Reformation and the formation of national states, entering into Enlightenment, the Independence of the United States of America and the French Revolution[442]. Driven by a rational and enlightenment philosophy in this period, the rights and liberties of individuals were preserved and in some instances became exclusive. The works of Erasmus of Rotterdam on the concept of justice, equality and individual freedom as natural right that states are obligated to protect and citizens to respect contributed in no small measure to advance the development of human rights protection[443].

[438] Ibid, for a comprehensive reading see generally the Universal Declaration of Human Rights, 1948
[439] N Aiken, 'The Reconstruction of a Culture of Human Rights: Transnational Justice and Human Security *Human Security Journal* (2009) vol 8, 16-18.
[440] M Goodhart, *Human Rights, Politics and Practice* (Oxford: Oxford University Press, 2009) pp. 11-25
[441] Ibid
[442] Ibid
[443] Ibid

The contributions of Hugo Grotius, John Locke, Jean – Jacques Rousseau and Montesquieu in this second stage of human rights origin and development are worthy of mention here. Hugo Grotius posited the need to recognize the natural rights of all persons who on the basis of their humanity should be treated in a just and equal manner independent of their religious or civil status[444].

Subsequently, John Locke on his part emphasized the natural rights to life, liberty and private property that deserve government protection[12]. In their contributions Jean – Jacques Rousseau and Montesquieu were emphatic on the natural, innate and inviolable rights of all persons to equality, freedom and association that deserve the protection and respect of government via the instrumentality of a social contract.[445] These contributions, it must be noted galvanized into the birth of the English, American and French Revolutions.

In consequence of this development, natural law that relates to human rights which was concerned to the aspect of ethics and political philosophy metamorphosed into the confines of positive rights through enactments embodied in legal system consequently the United States Declaration of independence centred on the inalienable human rights to life, liberty happiness and popular consent for legitimate government. Similarly, the fresh Revolution terminated absolute monarchist regime and in its place a liberal constitutional system rooted in popular sovereignty, equality under the law and natural, inalienable and sacred rights of man.[446]

The American and French Declarations fused the political philosophies of liberalism and individualism. This subsequently became the basis not just for the eradication of absolute monarchies and the creation of states of law in Europe, but further the creation of constitutions of previous European Colonies that emerged into independent sovereign states andfor a significant number of contemporary liberal constitutional democracies.[447]

---

[444] P Gordon, *The Evolution of International Human Rights: Vision Seen (*2nd edn, Philadelphia: University of Pennsylvania Press, 2003) 64-68.
[445] Ibid
[446] Desiderius Erasmus of Rotherdam was one of Europe's most famous and influential scholars
[447] P Gordon, *op cit,* pp. 86-90

The encapsulation of human rights protection guarantees in constitution of sovereign states had a tremendous effect in safeguarding human dignity, equality and liberty of individuals. This was evident in the 19th Century that saw the eradication of solve trade, the rise in religious and civil society organizations dedicated to the provision of relief to the exploited the marginalized and the establishment of the international committee of the Red Cross to provide succor to persons wounded in armed Conflict.[448]

However, this rapid development in the rising profile of human rights protection did not proceed without opposition and resistance. There were counter reactions from several segments of the society with hierarchical interests and oligarchical privileges who saw human rights protection as a threat to domestic sovereign jurisdiction that inhibits any external intervention.[449]

The theory stage of the evolution and development of human rights must be emphasized here was consolidated into international and domestic legislation that was largely inspired by creation of the Charter of the United Nations and fundamentally advanced by the stipulations of the UDHR.

The precise meaning of the term right is shrouded in controversy and is the subject of intense continued philosophical debate. However, there is a consensus that human rights includes different categories of rights although there is further lack of consensus as to which of these rights should come within the framework of human rights.[450]

It is important to note that the ancient peoples did not have the same modern day conception of universal human rights. The concept natural rights that appeared as part of the medieval natural law tradition became prominent during the European enlightenment era that predominantly characterized the political discourse of the American and French Revolutions. Thus, the modern human rights debate evolved in the 20th century understandably as a reaction to slavery, torture genocide and war crimes apparently in

[448] J Locke, *Two treaties of Government* (Newyork: Hafner Library of Congress, 1947)
[449] P Gordon, *op cit, 68*
[450] M Goodheart, *op cit,* p. 1125

recognition of the innate human vulnerability and as a pre-requisite for a just and human world.[451]

4.2.2 The Nature and Content of Human Rights

Human rights are moral principles that describe certain standards of human behaviour and are regularly protected as legal rights in domestic and international legislations. They are universally acclaimed as inalienable fundamental rights to which an individual is inherently entitled as a human being irrespective of nation, location, language, religion, ethnic origin or any other status.[452]

They are applicable everywhere and every time in terms of being global and egalitarian in terms of being same for all. Human rights are considered as invoking empathy and the rule of law a duty on individual to respect the human rights of others. They are prescribed safeguards that enures to the individual inherently as a human being that cannot be derogated from except in accordance with due process of law.[453]

Consequently, the ideals of human rights have had tremendous impact on the subsequent transformation of international law and the emergence of global and regional institutions geared towards human rights preservation and the penal sanctions of gross and systematic human rights violations.[454]

4.2.3 Classification of Human Rights

Human rights may be grouped into several classifications some rights may come within the ambit of the available classifications. The major groupingsof human rights is expressed in two categories, to wit, civil and political rights and social rights.

Essentially, civil rights place restraint on governmental powers concerning actions that affect the individual's autonym and vest upon individual the opportunity to contribute in

[451] United Nations Development Programme, *Human Development Report*, (Newyork: Oxford University Press, 1994)
[452] Robert Picciotto *etal, Global Development and Human Security* (London: Transactions Publishers, 2010).
[453] G Beco, 'Human rights Indicators: From Theoretical Debate to Practical Application' *Journal of Human Rights Practice* (2013) vol. 5, No. 2, 380-397.
[454] The establishment of Nuremberg Tribunal, Tokyo tribunal, ICTR, ICTY and the subsequent ICC is a testament to the rising profile of Human Rights Protection.

the determination of law and actively engage in matters relating to governance. On the other hand social rights oblige the government to take positive and interventionist action in order to establish the required condition for human life and development.

Thus, the government is required to encourage and promote the wellbeing of its citizenry in accord with social solidarity.

It is worthy of note that all human right entail corresponding obligations which must be interpreted into practical duties to safeguard these rights accordingly.

4.4 Human Rights Protection International and Regional Instruments

4.4.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights was one of the products of the intense awareness and global recognition of the need to put in place a legal framework to guard against human rights violations. As earlier mentioned, there was an increased global sensitivity and awareness of the need for human rights protection after the establishment of the United Nations. This concerted effort to ensure the promotion and protection of human rights led the United Nations General Assembly to adopt and proclaim the Universal Declaration of Human Rights.[455] Thus, in the wake of this landmark development the UN General Assembly invited member countries to publicize its tenets within their territorial domain.

4.4.2 The Genesis of the Universal Declaration of Human Rights

The creation of the Universal Declaration of Human Rights represented a major milestone in the annals of the global recognition and acceptance of human rights protection. Thus, the signing of the Universal Declaration of Human Rights was effected by the coming together of representatives from forty eight countries under the auspices of the United Nations in Paris according to which the fundamental value and dignity of human life was proclaimed.[456] The process of creating this document was not without its challenges and so before the eventual emergence of the final version of the Universal Declaration of Human Rights, the initial draft of the UDHR passed through several

[455] M Shaw, *International Law* (6th edn, United Kingdom: Cambridge University Press, 2008) pp. 159-160.
[456] *Ibid.*

debates and alterations. The Universal Declaration of Human Rights was an embodiment of fundamental rights considered by the international community as the inherent legacy that enured to humanity.

The events of the Second World War and their attendant horrendous experiences that culminated in catastrophic human sufferings, especially the genocidal killings perpetrated by the Nazi regime was a conscience shocking experience to humanity as a whole. Hence, the aggregation of interests and efforts against war being subsequently used as an excuse for the commission of crimes against humanity and again the resultant human suffering and deaths on a large scale of innocent populations cannot be overlooked.[457] The process leading to the signing of the UDHR afforded the international community to reject gross human rights violations in the name of upholding the dictates of state sovereignty. Thus, for the first time in human history, human rights were recognized as an international responsibility, according to which a firm and unified declaration of human rights protection against their violations were encapsulated. It must be mentioned here that the United Nations by constituting a Commission for that purpose midwived the putting together of the international bill of rights that transcended the various political, religious and cultural beliefs, which eventual became the final draft of the UDHR adopted in 1948.[458]

The tenets of the UDHR was very instructive when it recognized that the inherent dignity, equal and inalienable rights of the human race constituted the basic foundation of freedom, justice and peace in the world at large. Thus, the UDHR proclaimed as follows:

> - Whereas disregard and contempt for human rights have resulted in barbarousacts which have outraged the conscience of mankind, and the advent of aworld in which human beings shall enjoy freedom of speech and belief andfreedom from fear and want has been proclaimed as the highest aspiration ofthe common people,
>
> - Whereas it is essential, if man is not to be compelled to have recourse, as alast resort, to rebellion against tyranny and oppression, that human rightsshould be protected by the rule of law,

[457] The Universal Declaration of Human Rights (hereinafter called UDHR) was a significant encapsulation of human rights protection framework albeit not legally binding.
[458] M N Shaw, *op cit* p.164.

- Whereas it is essential to promote thedevelopment of friendly relations between nations,

- Whereas the peoples of the United Nations have in the Charter reaffirmedtheir faith in fundamental human rights, in the dignity and worth of thehuman person and in the equal rights of men and women and havedetermined to promote social progress and better standards of life in largerfreedom,

- Whereas Member States have pledged themselves to achieve, in cooperationwith the United Nations, the promotion of universal respect forand observance of human rights and fundamental freedoms,

- Whereas a common understanding of these rights and freedoms is of thegreatest importance for the full realization of this pledge.[459]

Thus, the UDHR served to present a common standard of achievement for all people and all notions.

4.4.3 The Principles and Relevance of the Universal Declaration of Human Rights

The UDHR is a complete reflection of the fundamental consensus of beliefs and values of the universal recognition of human rights. The UDHR is essentially segmented into two parts, namely: the preamble according to which the purpose of the emergence of the UDHR was clearly enunciated on one part and the thirty article provisions that outlined our fundamental human rights.[460]

The preamble to the UDHR proclaimed that to attain a better quality of life for the human race as a whole, human rights protection legal instruments must be enforced and respected globally, the preamble further proclaimed that where there human rights so enunciated are upheld, freedom, justice and peace in the world can be attained.The thirty article provisions of the UDHR encapsulated a divergent categories of human rights which includes basic rights, political rights, civil and liberties rights, economic, social and cultural rights. All these rights were considered as constituting the inalienable human rights. The 30 articles of the UDHR consist of varieties of rights ranging from liberty and security of the persons contained in article 3 equality prohibitions on torture before the

[459] See generally the preamble to the Universal Declaration of Human Rights, 1948.
[460] See Universal Declaration of Human Rights, 1948 the Preamble & Articles 1-30.

law in article 7, effective remedies in article 8, due process contained in articles 9 and 10, arbitrary interference with privacy contained in article 12 to rights protecting freedom of movement and asalym in articles 13and 14, right safeguarding freedom of conscience and religion contained in article 18 and freedom of expression and assembly encapsulated in articles 19 and 20 respectively.[461]Additionally, the UDHR encompass economic, social and cultural rights which are enshrined in articles 22-27. It further postulated that these rights are the entitlements of all persons without discrimination. In particular, article 22 prescribes these rights as indispensable for human dignity and the free development of personality to be realizable through national effort and international cooperation.

The relevance of the UDHR is depicted in its universal recognition for the respect and protection of human right anchored on three fundamental components. First being that, human rights are inalienable, according to which it can never be taken away from human beings, secondly human rights are indivisible according to which human beings cannot be entitled to a measure of them and deprived of the others, and thirdly human rights are interdependent, meaning that they constitute aspect of a larger framework and function together to enthrone safe, free and productive life.[462]

However, it is important to emphasize that the UDHR is not a binding legal document and as such states that are signatories and party to it cannot be held legally responsible for non-compliance with the stipulations of the UDHR. Notwithstanding this legal impediment, the UDHR provided a basic standard of conduct for states and individual to imbibe in that it is an encapsulation of the fundamental principles and ideals concerning human rights protection.It is important to note that the UDHR was conceived as a common standard of achievement for all peoples and all nations. It provided a benchmark to measure the extent of respect for and compliance with international human rights standards. Consequently, adopting the UDHR as a common standard states have established municipal legislations to safeguard universal human rights. This, essentially provides for prosecution of individual or groups found culpable of human rights violations within the realm of domestic legal system. For instance Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) is a clear

[461]UDHR, 1948.
[462]M N Shaw, *loc cit*.

manifestation of the incorporation of the human rights standards set out in the UDHR in Nigerian legislation.

4.4.4 The Convention on the Prevention and Punishment of the Crime of Genocide, 1948

This is another landmark legal instrument that provided protection against the commission of atrocitycrimes, particularly genocidal killings as the name of the Convention implies. The Convention confirms that the commission of genocidal killings whether in peace period or period of warfare is tantamount to a crime under international law.[463]

Furthermore the Convention defined genocide to mean '…any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group as such:

a. Killing members of the groups;
b. Causing serious bodily or mental harm to members of the groups;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group'.[464]

In our considered view, in furtherance of the standards of human rights protection enunciated in the UDHR, the definition of genocide above explicitly made the violations of right to life, bodily and mental integrity and human dignity a crime and the violators culpable to penal sanctions.[465] It must be noted that the creation of the Genocide Convention is another major step taken by the United Nation to address humanitarian issues. Thus, according to Elizabeth Oji, 'the International Court of Justice in *Barcelona Traction Case* (second Phase) recognized the outlawing of acts of genocide as obligations

[463] Article 1.
[464] Article 11. The Convention on the Prevention and Punishment of the Crime of Genocide is hereinafter called the Genocide Convention.
[465] For further reading, see E A Oji, *opcit*, pp. 39-41.

erga omnes for, due to the importance of the rights involved all states can be held to have legal interest in their protection.[466]

Inspite of this Genocide Convention stipulations, its application presented a daunting challenge in international law. This is essentially against the background that the Genocide Convention made no clear implementation procedures under the auspices of any international institution. However, it provided that persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the genocidal act was committed. Again, the question of intent is such that states may deny liability of any genocidal killings by emphasizing that the relevant intent to destroy in whole or in part was absent. The genocidal situations that occurred in Cambodia and Rwanda earlier referred to represent the lack of implementation of the Genocide Convention.The atrocities that characterized the Rwandan genocide and the atrocities that characterized the inability or unwillingnessof the United Nations to halt same is generally regarded as the major failure of the United Nations system since its creation in 1945.[467] Happily, though the establishment of the International Criminal Court has presented a more robust legal framework to impose penal sanctions on perpetrators of genocide be it state or individual found culpable.

4.4.5 The Four Geneva Conventions of 1949

The Diplomatic Conference for the protection of victims of war, convenedby the Swiss Federal Council, (as trustee or Depository of the Geneva Conventions) was held in Geneva from April 21 to August 12, 1949. After four months of continuous debate, (involving not only legal experts and military advisers, but also representatives of the International Committee of the Red Cross) the conference adopted four new conventions to replace the 1929 convention, and in part the Haque Convention No.IV. The breakdown is as follows:

i. Geneva Convention for the Amelioration of the Condition of the Wounded, andSick in Armed Forces in the Field.

[466] E A Oji, *opcit*, p.41.

[467] N Winfield, 'UN Failed Rwanda', *Associated Press/Nando Media,* December 16, 1999. Available at http://www.apnando/media/unfailedrwanda.htm. Accessed 22 July 2016.

ii. Geneva Convention for the Amelioration of the Condition of the Wounded, sick and Shipwrecked Members of Armed Forces at Sea.

iii. Geneva Convention Relative to the Treatment of Prisoners of War.

iv. Geneva Convention Relative to the Protection of Civilian Persons in Time ofWar.

All the four Geneva Conventions came into force on August 12, 1949. Theyare presently binding on virtually all the UN States. Theworld community had learnt from its bitter experience, namely that in times of Armed Conflict, the most serious violations of the sanctity of life and the worst forms of violation and abuse of human rights are perpetrated against the civilian population in occupied territory. Accordingly, the Fourth Geneva Convention of 1949 directed its attention to the proper treatment of the civilian population.

Another very important dimension in the 1949 Conventions is the extension of protection to victims of civil wars, otherwise known as Non-International Armed Conflicts. First of all, States realized that unbridled violence, murderous weapons and complete lack of feeling for the sanctity of human life areas prevalent in civil wars as in wars among independent States, if not more prevalent. The horrible example of the Spanish Civil War, the Liberian Crisis(whose open disastrous military confrontation ended in an "election" of Charles Taylor as president), the Biafran war (where bombs were freely dropped from high altitudes unto civilian population, like market places etc) are all examples of how civil wars devastated human beings to a level of International condemnation. Thus, it is not surprising that there is a provision, common article 3, of the 1949 Convention dealing on this issue. It states:"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties, each party to the conflict shallbe bound to apply, as minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria. To this end, the following acts are and shall remain prohibited at anytime and at any place whatsoever with respect to the above-mentioned persons:

a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b. Taking of hostages;
c. Outrages upon personal dignity, in particular, humiliating and degrading treatment;
d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regular constituted Court, affording all judicial guarantees which are recognized as indispensable by civilized peoples.[468]

2. The Wounded, Sick and Shipwrecked shall be collected and cared for. An important humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties of the conflict. The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present convention. The application of the preceding provisions shall not affect the legal status of the parties to the conflict. Thus, the adoption of these four Geneva Conventions by the United Nations under the auspices of the red Cross is a further indication of the increasing global recognition of human rights norms towards the relevance of humanitarian intervention and in redefining the application of state sovereignty doctrine.[469]

Again, according to Elizabeth Oji, 'The purpose of these conventions is to ensure that persons who are not combatants be treated in a humane manner by the prohibition of such practices as the taking of hostages, illegal execution of certain categories of those involved in armed conflicts and the use of reprisals against persons who are protected by the Conventions.' [470] All these innovative stipulations are essentially motivated by humanitarian considerations which has largely shaped international relations.

4.4.6 The International Covenant on Civil and Political Rights, 1966

[468] For further reading, see E A Oji, *opcit*, pp. 90-93.
[469] *Ibid*, p.81.
[470] *Ibid.*

The International Covenant on Civil and Political Rights was adopted in 1966 and entered into force in 1976 By article 2, all states parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Convention. These Rights are clearly intended as binding obligations. They include the right of peoples to self-determination(article 1), the right to life (article 6), prohibition on torture and slavery (articles 7 and 8), the right to liberty and security of the person (article 9),due process (article 14), freedom of thought, conscience and religion (article 18),freedom of association (article 22) and the rights of persons belonging to minorities to enjoy their own culture (article 27).

It is important to note that prior to the adoption of the UDHR in 1948, there was in existence the broad arrangement that the rights encapsulated in the UDHR would be translated into a legally binding obligation through the subsequent negotiation of one or more treaties. Thus, after nearly twenty years of negotiations two distinct treaties encompassing virtually all the rights embodied in the UDHR were adopted. The rights encapsulated on one part is that relating to civil and political rights termed International Covenant on Civil and Political Rights (ICCPR) and on the other part the one relating to economic, social and cultural rights, termed the International Covenant on Economic, Social and Cultural Rights (ICESCR) which will be discussed further on. These twin human rights Covenants were adopted by the UN General Assembly on 16th December, 1966 and entered into force on 23rd March, 1976.[471]

The tenets of the ICCPR guaranteed the protection of civil and political rights.Particularly,it guaranteed the equal right of men and women to enjoy all the civil and political rights contained in the covenant.[472] However, the application of the ICCPR is subject to certain limitations in that some of its stipulations guaranteeing the rights and freedoms also provided for the possibility of states parties to place restraint or derogate from them in certain circumstances.

Accordingly, the ICCPR embraced the application of certain restrictions in the exercise of the right to freedom of expression in a bid to ensure the respect of the rights

[471] M N Shaw, *op cit, 286.*
[472] Article 3.

or reputation of others or the purpose of protecting national security.[473] Again, the covenant stipulates that states parties in time of public emergency which threatens the life of the nation, may take such measures which derogate from their obligations under the covenant. However, such measures may only be taken to the extent strictly required by the exigencies of the situation provided that they are not inconsistent with a state party's other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[474] A further protective mechanism against human rights violations was imbued into the covenant to the effect that a state party which avails itself of the right of derogation must have proclaimed the existence of such a public emergency and must inform the other states parties of the provisions from which it has derogated and the reasons for which it does so. The state party must also communicate the date on which it terminates the derogation under considerations.[475]

4.4.7 The International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR)as earlier mentioned was adopted in 1966 and entered into force in 1976.[476] The ICESCR as the name indicates is the second of the twin covenant on human rights that encompasses the economic, social and cultural rights that were not contained in the ICCPR. The ICESCR also outlined the rights encapsulated in the UDHR and further included other economic, social and cultural rights. These rights embodied in the ICESCR include right to self-determination (article 1), the right to work (article 6 and 7), the right to social security (article 9), right to adequate standard of living (article 11), right to education (article 13), the right to take part in cultural life and enjoy the benefits of scientific progress and its applications (article 15) among others.

The ICESCR is segmented into various parts, according to which part 1 recognizes the right to self-determination, Part II requires states parties to undertake all reasonable measures to accomplish the realization of the rights enshrined in the covenant

[473] See generally Article 19 of the International Covenant on Civil and Political Rights, 1966.
[474] Article 4.
[475] Article 4(2).
[476] M N Shaw, *loccit.*

and further requires states parties to guarantee the rights contained in the covenant to all persons devoid of any discrimination whatsoever.[477]However, Part II of the covenant permit developing countries to determine the extent to which they would guarantee the economic rights in Part III to non-nationals taking into cognizance human rights and their national economy.[478]

Furtherance, Part III of the covenant outlined the rights to be protected and the measures to be undertaken to achieve the realization of these rights already identified above. Most importantly, Part IV chronicled the enforcement procedures in order to ensure the observance of the rights enshrined in the ICESCR. Inspite of these laudable human rights provision contained in the ICESCR, its implementation was characterized by peculiar difficulties against the backdrop of the perceived vagueness of a number of the stipulations enshrined in it, the relative lack of legal texts and judicial decisions coupled with the ambivalence of many states in dealing with economic, social and cultural rights.

It is important to note that there were other international and regional human rights instruments that also galvanized efforts at safeguarding human rights of populations within a sovereign state from gross violations. These human rights instruments include, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture)[479], Convention on the Right of the Child[480], the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) the International Convention on the Elimination of all Forms of Racial Discrimination[481], African Charter on Human and People's Rights[482], the European Convention on Human Rights.[483]

The Convention Against Torture (CAT) placed an obligation on contracting state parties to take steps to prevent torture within their territorial domain and to ensure that all

[477] Article 2 & 3.
[478] Article 2(3).
[479]CAT was signed on 10 December 1984 and entered into force in 1987.
[480]Adopted by the United Nations Geneva Assembly on 20 November 1989 and entered into force on 2 September, 1990.
[481]Signed in 1965 and entered into force in 1969.
[482]Adopted by the Organization of African Unity (now African Union) in 1981 and entered into force in 1986.
[483] Signed on 4 November 1950 and entered into force in September 1953.

acts of torture are criminalized under their domestic legislations.[484] Importantly, the prohibition of torture in whatever guise has attained the status of customary international law. Malcolm Shaw succinctly, pointed out this position when he declared that, 'the prohibition of torture is contained in a wide variety of human rights and humanitarian law treaties, and has become part of customary international law. Indeed it is now established as a norm of *jus cogens.*[485]

The convention on the Rights of the child prescribes that in all matters relating to children, the utmost interests of the child shall be the fundamental consideration for all intent and purposes. This convention consists of a wide range of rights which are essentially a replication of the stipulations of UDHR earlier discussed. Accordingly, state parties have accepted of physical and mental violence and from economic exploitation and illicit use of drugs.[486]

Similarly, the International Convention on the Elimination of all Forms of Racial Discrimination imposes an obligation on all contracting party states to condemn racial discrimination and put in place appropriate measures to eradicate racial discrimination in all its ramifications.[487]Thus, distinction on the basis of race, colour, ethnic or national origin capable of denying human beings their human rights and fundamental freedoms is prohibited.[488]

The regional human rights instruments of African Charter on Humanitarian and People's Rights and the European Convention on Human Rights both recognize civil, political, economic, social and cultural rights. The evolution and development of these human rights instruments have created international standards towards humanitarian intervention and further whittle down the sanctity of absolute sovereignty of states in the face of gross human rights violations.

4.5 Enforcement of Gross and Systematic Human Rights Violations

The numerous international human rights instruments discussed above have been ratified by a number of sovereign states. However, the recognition of the efficacy of these

[484]Articles 2, 3, 4 and 5; see also E A Oji, *op cit,* p.142.
[485]M N Shaw, *op cit,* p. 303.
[486]Articles 19, 32, 33 and 38.
[487]M N Shaw, *op cit*, p.266.
[488]International Convention on the Elimination of All Forms of Racial Discrimination, 1965, article 1.

human rights does not necessarily transform into acceptance and enforcement within the territorial domain of individual sovereign states.[489] Consequently, states may externally endorse human rights protection framework but may take no measures internally to protect human rights of their own populations. Thus, compliance with these international obligations imposed on states by the tenets of these human rights instruments have been largely achieved through the use of international institutions established to enforce individual conventions with the UN General Assembly and UN Security Council retaining the ultimate authority.[490]

Apart from these human rights instruments and other relevant conventions that sought to protect civilian populations against grave human rights breaches and atrocities in warfare, the establishment and development of international criminal tribunals and their decisions relative to war crimes and other atrocities have contributed in no small measure in redefining the international standards of conduct for states and individuals in contemporary international law. To some of these international criminal tribunals albeit *adhoc* we now turn.

4.5.1 The International Military Tribunal for Nuremberg

Immediately following World War 1, the victorious Allied powers convened a special commission on the responsibility of the authors of the war and enforcement of penalties. The commission's report recommended that war crimes trials be conducted before the victor's national courts and when appropriate before an inter-allied tribunal. Thus, it has been opined that the Nuremberg trial, '…was the first comprehensive attempt to unravel the factual complexity of the undeniably horrible crimes committed by the German Nazi regime. It also remains the most comprehensive attempt to punish those responsible for those crimes. It was recognized the crimes were cruel and inhuman to a degree not previously known to humanity…'[491]

[489] For examples Chapter 2 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) contains the socio-economic rights as an extraction from the ICESCR which are not enforceable within the context of Nigeria legal system since the articulation of the rights therein are non-justiceable.

[490] For example perpetrators of genocide today as prohibited by the Genocide Convention can be meted with penal sanctions by the international community under the auspices of International Court Court.

[491] E A Oji, *Responsibility for Crimes Under International Law* (Lagos, Nigeria: Odade Publishers, 2013) p.160 .

The Allies prepared an initial list of about 900 suspectedwar criminals and submitted the list to Germany.[492] Although heads of statestraditionally had enjoyed immunity from prosecution, the commission's main targetwas Germany's Emperor (Kaiser) William II, whom most of the Allies (though notthe United States) wish to hold responsible for numerous violations of the laws ofwar. William, however, took refuge in the Netherlands, which refused to extraditehim, and he was never tried. Most of the remaining suspected war criminals on thelist similarly managed to avoid prosecution, because Germany was reluctant to turnthem over to the Allies. Instead, a compromise was reached whereby the Alliespermitted a small number of suspects to be tried in Germany before the SupremeCourt in Leizig. These prosecutions resulted in few convictions, with mostsentences ranging from a few months to four years in prison.

The next attempt to prosecute war criminals occurred in Europe and Asiaafter World War II. Throughout the war, the Allies had cited atrocities committedby Nazi regime of Adolf Hitler and announced their intention to punish those guiltyof war crimes. The Moscow Declaration of 1943, issued by the United States, GreatBritain, and the Soviet Union, and the Potsdam Declaration of 1945, issued by theUnited States, Great Britain, and China (and later adhered to by the Soviet Union),addressed the issue of punishing war crimes committed by the German andJapanese governments, respectively.

At the conclusion of the second World War, representatives of the United States, the UnitedKingdom, the Soviet Union, and the provisional government of France signed theLondon agreement, which provided for an international military tribunal to trymajor Axis war criminals whose offenses did not take place in specific geographiclocations.[493] This agreement was supported by 19 other governments and included theNurnberg Charter, which established the Nurnberg Tribunal and categorized theoffenses within its jurisdiction. The charter listed three categories of crime: (1)crimes against peace, which involved the preparation and initiation of war ofaggression. (2) war crimes (or "conventional war crimes"), which included murder,ill treatment, and deportation, and

[492] G Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008) p.832.

[493] For a comprehensive reading on the discourse of the International Military Tribunal at Nuremberg, see E A Oji, *op cit*, pp. 160-170.

(3) crimes against humanity, which includedpolitical, racial, and religious persecution of civilians. The last category includedwhat is commonly called genocide.[494]

The International Military Tribunal in Nuremberg, Germany, tried 22 Nazileaders, including one, Martin Bormann, who was tried in absentia. The trial wasconducted in four languages and lasted nearly 11 months. All but three of thedefendants were convicted; 12 were sentenced to death. The remaining defendantsreceived lengthy prison terms, which they served at Spandau prison in West Berlin.Subsequent trials were held under the auspices of Control Council Law No. 10,which was used to prosecute accused Nazi war criminals whose crimes took placein specific locales. It is important to emphasize here that because the Nuremberg trials proceeded the Genocide Convention, the Nazi war criminals were not prosecuted for genocide.

4.5.2 The International Military Tribunal for Tokyo

The International Military Tribunal for Tokyo (1946-1948) was establishedby Charter issued by a US Army General Douglas MacArthur to try Japanesedefendants accused of war crimes. The Tokyo Charter closely followedthe Nuremberg Charter. The trial were conducted in English and Japanese and lastednearly two years. Of the 25 Japanese defendants (all of whom were convicted), 7were sentenced to hanging, 16 were given life imprisonment, and 12 were sentencedto lesser terms. Except for those who died early of natural causes in prison, none ofthe imprisoned Japanese war criminals served a life sentence. Instead, by 1958 theremaining prisoners had been either pardoned or paroled.[495]

4.5.3 The International Criminal Tribunal for Former Yugoslavia

The International Criminal Tribunal for former Yugoslavia was establishedin 1993. Nearly fifty years passed between the Nuremberg and Tokyo trials and thenext

[494] *Ibid.*

[495] For a comprehensive reading on the works and contributions of the International Criminal tribunals towards evolving international standards of conduct of states and individuals, see generally E A Oji, *op cit*, pp.157-199.

formal international prosecution of war crimes.[496] In May 1993, in an attemptto prevent further acts of "ethnic cleansing" in the conflict between states of theformer Yugoslavia and to restore peace and security to the Balkan Region, theUnited Nation Security Council established the International Criminal Tribunal forthe Prosecution of Persons Responsible for Serious Violations of InternationalHumanitarian Law Committed in the Territory of Former Yugoslavia since 1991,otherwise termedInternational Criminal Tribunal for former Yugoslavia (ICTY).

The ICTY was internationalin composition and neither sat in the country where the covered conflict occurred;instead it was located in the Hague. The Tribunal had governing statute and anappellate chamber. Although the Nuremberg and Tokyo tribunals wereempowered to impose capital punishment, the ICTY could impose only terms ofimprisonment. However, no centralized international prison system wasestablished to house persons convicted of war crimes before the tribunal.

The ICTYwas given jurisdiction over four categories of crimes:[497]

1. grave breaches of the Geneva conventions,
2. violations of the laws or customs of war,
3. genocide, and
4. crimes against humanity.

In the tribunal, rape, murder, torture, deportation andenslavement were subject to prosecution. The tribunal was among the firstinternational bodies to recognize sexual violence as a war crime.

Like the statutes of the Nuremberg and Tokyo Tribunals, the ICTY statutesdid not consider the official position of an individual including his position as headof state, to be a sufficient basis for avoiding or evading criminal culpability.

Accordingly, in 1999 the ICTY indicted Slobodan Milosevic, the Serbian President (1989-1997) and Yugoslav (1997-2000), for war crimes, and in 2001 he wasarrested and extradited to The Hague. Likewise, military and civilian leaders

[496] R Mulgrew, *Towards the Development of the International Penal System* (Cambridge: Cambridge University Press, 2013) pp. 335-340.

[497] International Criminal Court. Chambers. Web. 10 November 2012. http://www.icccpi.int/EN_Menus/ICC/Structure%20of%20the%20Court/Chambers/Pages/chambers.aspx Accessed on 16 August 2015.

whoknew or should have known that their subordinates were committing war crimeswere subject to prosecution under the doctrine of command or superiorresponsibility. Finally, individuals who committed war crimes pursuant togovernment or military orders were not thereby relieved of criminal liability,though the existence of the order could be used as mitigating factor. Thus, the rulesadopted for the Nuremberg and Tokyo trials continued to influence later efforts tobring suspected war criminals to justice. In essence, individual criminal responsibility for gross human rights violations and commission of atrocities was established by the work and decision of the ICTY which further indicated the changing behavior of the international community towards intervention in the domestic affairs of a sovereign state hitherto strictly precluded.

The establishment of ICTY brought about extensive investigations and prosecution of wartime sexual violence culminating in indictments and convictions. In *Prosecutor v Dusko Tadic*[498], one of the detainees in the camps was compelled by combatants which included Dusko Tadic to bite off the tentacles of another detainee. Tadic was convicted by the trial chamber in May 1997 of cruel treatment and inhuman acts considered to be crime against humanity for the role he played in this incident. Upon appeal, Tadic was further convicted for grave breaches of the 1949 Geneva Conventions inhuman treatment and willfully causing great suffering of serious injury to the body or health. This case illustrates the first international war crimes trial since Nuremberg and Tokyo involving charges of sexual violence. Tadic was subsequently sentenced to 20years imprisonment.

Similarly in *Prosecutor v Drugo Ijub Kunarac & Ors*[499] the three accused Bosnian Serb army officers, Drugoljub Kunarac, Zoran Vukovic and Radomir Kovac were charged with sexual violence consisting of organizing and maintaining the system of infamous rape camps in the eastern Bosnian town of Foca. They were all convicted by the trial chamber of rape as a crime against humanity. Upon appeal, the Appeals chambers upheld the conviction of the three accused persons and sentenced Kunarac, Kovac and Vukovic to 28, 20 and 12 years imprisonment.

[498]Case No. IT.94-1-AR72, Judgement of the Appeals Chamber, 15 July 1999.

[499]Case No. IT-96-23 & OT-96-23/1-A. Judgement of the Appeals Chamber, 12 June 2002. This was the first such conviction since ICTY was established, sequel to the landmark precedent established by the Judgment of the ICTR in *Prosecutor v Jean-Paul Akayeso,* Case No. ICTR-96-4-A, Judgement of the Appeals Chamber, 1 July 2001.

The decision of the ICTY in *Prosecutor v Zdravko Mucic & Ors*[500] established a significant milestone in international justice system wherein it recognized rape as a category of torture consisting of both a grave breach of the Geneva Conventions and a breach of the laws and customs of war. In that case, where three out of the four accused persons were charged and convicted with sexual violence against Bosnian Serb civilians kept in prison custody, the trial chamber declared that rape of any person is a despicable act which strikes at the very core of human dignity and physical integrity. The Appeal chamber of the ICTY upheld the conviction of three accused persons and sentenced Zdrauko Mucic to 9, Esad Landzo to 15 and Hazim Delic to 18 years imprisonment respectively.

4.5.4 The International Criminal Tribunal for Rwanda

In November 1994, the UN responded to charges of genocide in Rwanda bycreating the International Criminal Tribunal for Rwanda (ICTR), formerly known asthe International Criminal Tribunal for the Prosecution of Persons Responsible for genocide and such other violations committed in the territory of neighboring statesbetween 1 January and 31 December 1994.[501]

The ICTR was equally international in composition and never satin the country where the covered conflict occurred. The ICTR was located inArusha, Tanzania. The tribunal had governing statutes and sharedthe appellate chamber of the ICTY.Just like the ICTY the ICTR could impose only terms of imprisonments.

The governing statutes of the ICTR defined war crimes broadly. The ICTRwas given jurisdiction over four categories of crimes: (1) grave breaches of theGeneva conventions, (2) violations of the laws or customs of war, (3) genocide,and (4) crimes against humanity. In the tribunal, rape, murder, torture, deportationand enslavement were subject to prosecution. Thus, in *Prosecutor v Jean-Paul Akayesu*[502] four years after the large scale senseless killings that occurred in Rwanda, Jean-Paul Akayesu, a former

[500]Case No. IT-96-21. Judgment of the Appeals Chamber, 8 April 2003.
[501]J Starke, Introduction to International Law (9th edn, London: Butterworths, 2002) p. 125.
[502]Case No: ICTR-96-4-A. Judgement of the Appeals Chamber, 1 July 2001. This case represents the first ever prosecution of rape as genocide.

mayor was charged and convicted on a nine counts of genocide and crimes against humanity. He was sentenced by the Appeals chambers of the ICTR.

Similarly in *the Prosecutor v Jean Kambando*[503], the erstwhile Prime Minister of Rwanda was charged with genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity (murder) wherein he pleaded guilty to the charges before the trial chamber upon appeal and after verifying that the accused understand the charges brought against him, the Appeals Chamber upheld his conviction by the trial Chamber and sentenced him to life imprisonment. Thus, Kambanda became the first head of government to be convicted of genocide. Following the 1994 Rwandan genocide and the subsequent establishment of the ICTR by the UNSC, ninety three individuals were indicted. They include politicians, businessman, high-ranking military and government officials, heads of media and religious leaders and two-thirds of them were convicted.[504]

It must be pointed out that the ICTR has transferred various genocide cases to Rwandan National Courts since 2011. The first was *Prosecutor v Jean-Bosco Uwin Kindi* [505] wherein Jean-Bosco Nwinkindi was sent to Rwanda in April 2012 and *Ntuyahaga Bernard*[506]in July, 2013 preliminary trials in these case have commenced in the High Court in Kigali.[507]

4.5.5 The Special Court for Sierra Leone

The Special Court for Sierra Leone was set up in 2002 as the result of arequest to the United Nations in 2000 by the Government of Sierra Leone for a"special court" to address serious crimes against civilians and UN peacekeeperscommitted during the country's decades-long (1991-2002) civil war.[508]

---

[503]Case No: ICTR 97-23-5. Judgement of the Appeals Chamber, 4 September 1998.
[504]A Leithhead, 'Rwanda Genocide: International Criminal Tribunal Closes', *BBC News: Africa Correspondent* 11 December 2015.
[505]Case No. MICT-12-25-R14.1.
[506]Case No. ICTR-98-40. See also Human Rights Watch, *Leave None to Tell the Story:Genocide in Rwanda* (Newyork: Human Rights Watch Publications, 1999). Available at http//www.hrw.org/reports/1999/03/none-tell-story. Accessed on 22 July 2016.
[507]A Leithhead, *loc cit.* for reading on the Rwandan Genocide Cases, see W Nwangi, 'Developments in International Criminal Justice in Africa During 2010' (2011) vol II, No. 1, *African Human Rights Law Journal,* 251-281.
[508]E A Oji, *opcit*, p.20.

Negotiations between the United Nations and Government of Sierra Leone onthe structure of the court and its mandate, produced the world's first "hybrid"international criminal tribunal, mandated to conduct the trial of those "bearing the greatestresponsibility" for crimes committed in Serra Leone after 30th November 1996. It was the first international moderntribunal to sit in the country where the crimes took place, and the first to have aneffective outreach programme on the ground.[509]

The special court for Serra Leone was the first international court to be fundedby voluntary contributions and, in 2013 became the first court to complete itsmandate and transition to a residual mechanism. Accordingly, in March 2003 theprosecutor brought the first of 13 indictments against leaders of the RevolutionaryUnited Front (RUF), the Arm Forces Revolutionary Council (AFRC), and the CivilDefence Forces (CDF), and then-Liberian President Charles Taylor. Ten personswere brought to trial. Two others died, one of them before proceedings couldcommence (RUF Leader Foday Sankoh) and one outside the jurisdiction of thecourt (RUF Battle field commander Sam Bockarie). A third, (AFRC chairmanJohnny Paul Koroma), fled Serra Leone shortly before he was indicted. Whilesome evidence suggest that Koroma is dead, it is not considered conclusive and istherefore officially considered to be at large. One person (Samuel Hinga Norman)died during the course of his trial, and proceedings against him were terminated.[510]

Nine persons were convicted and sentenced to terms of imprisonmentranging from 15 – 52 years. Sentences of the eight RUF, CDF and AFRC prisonersconvicted in Freetown are being enforced at Rwanda's Mpanga Prison due tosecurity concern.

4.5.6 The Chamber of the Court of Cambodia

After gaining independence from France in 1953, Cambodia was not able toavoid the chaos of the Vietnam war, The civil war there was waged under theunwritten code of the Cold War: on one side, the government of Lon Nol wasbacked by the United States, and on the other side, Pol Pot's Khmer Rouge weresupported by China. Finally, in the middle, came communist Vietnamese fighterswho sought refuge in the neutral territory

[509] *Ibid*, pp. 200-2001.
[510] *Ibid*. Again for detailed reading on the Special Court for Sierra Leone, see E A Oji, pp.200-2012.

that was Cambodia at that time. SecretUS bombings, which allegedly caused more than 150,000 casualties, probablypaved the way for Pol Pot and his troops to take up power.[511]

On 17 April 1975, Pol Pot's troops marched into Phnom Penh. Theirproclamation of "year zero" opened up an era of terror and horror.Ultra-Maoist Khmers tried to set up a classless agrarian society, which wasto bring the country back to the Stone Age. In one single week, the 2.5 millioncitizens from Phnom Penh were forced out to the countryside. Citizens, teachers,lawyers, monks or physicians were now all "new people". The Khmers mercilessly held to the maxim: "Keeping you is not benefit, losing you is no loss. The merefact of appearing to be intellectual by wearing spectacles was sufficient reason tobe condemned to death. An unknown number of persons were thrown into slavery,arbitrarily executed, or died of starvation, disease or exhaustion in labour camps.Children were taken from their families. In the space of four years, the KhmerRouge genocide annihilated around 2 million people in the "killing fields", orabout a quarter of Cambodia's population at that time.[512]

The 1979 Vietnamese invasion brought the terror to an end. Pol Pot and his acolytes fled to seek refuge in the jungle where they cynically backed in their fight against the Vietnamese communist occupation by China and the West. After ten years of occupation, and the establishment of its regime, the Vietnamese army left the country. However the exiled Khmer Rouge government still continued to represent Cambodia at the United Nations until 1992.Twenty years after the genocide, the United Nations finally passed a resolution in favour of prosecuting the main leaders of the slaughter, and proposed its help to the Cambodian government. A report by experts recommending the creation of an international court and the setting up of a truth commission was rejected by Cambodia, which argued that it was an unacceptable interference in its sovereignty.

In June 1997, the Cambodia government requested help from the UN in prosecuting former leaders of the Khmer Rouge for crimes committed between 1975 and 1979. Initially, the UN wished to establish a third *ad hoc* International Criminal Tribunal such as for the former Yugoslavia or for Rwanda. However, the Cambodian government refused to countenance the establishment of such mechanism, which led the parties to

[511] H Kissinger, 'Cambodia: Pol Pot's Shadow Chronicle of Survival' *Frontline World Magazine,* October 2002 available at http//www.pbs.org/Cambodia/tl02.html. Accessed on 14 February, 2016.
[512] *Ibid.*

draft a Memorandum of Understanding(MOU) concerning "significant international cooperation" in trials before Extraordinary Chambers of the Cambodian Courts. In August 2001, Cambodia finally promulgated a law which was not entirely consistent with the terms of theMOU, for which reason the Secretary-General decided to pull the UN out of the negotiations in February 2001. However, the UN General Assembly requested him to pursue negotiations. This resulted in an amended bi-lateral agreement on 6thJune2003, following the adoption by UN General Assembly on 13thMay 2003, of a resolution, approving a proposed agreement between the UN and Cambodia.[513] Nevertheless, the agreement signed on 6 June 2003could only come into force in April; 2005, when the donors conference receivedpromises covering the quasi-totality of the necessary international contributions. The 2001 Law was then amended on 27thOctober 2004 to bring it into conformity with the international agreement.

In March 2003, after four years of tough negotiations, the United Nations and Cambodia reached an agreement on the creation of "Extraordinary Chambers "within the existing court structure. The composition of the organs of investigation, prosecution and judgment provide for the involvement of both Cambodians and foreign officials.

Avery sluggish start to this hybrid international tribunal meant that a certain number of Khmers Rouges, having died in the interim, were not brought to judgment. These included Pol Pot, Son Sen (Defence Minister and responsible forthe Santebal, the Political Police), Yun Yat (Minister), Thiounn Thioeunn(Minister), Ta Mok (Chief of Military Command)

4.5.7 The International Criminal Court

The creation of the International Criminal Court (ICC) constitutes a significant change in the area of international penal repression and violations of International Humanitarian Law (IHL). The ICC was established pursuant to the enactment of the Rome Statute in 1998[514] and isthe first permanent, treaty based, international criminal court established to helpend impunity for the perpetration of the most serious crimes of

[513] See UN General Assembly Resolution (A/RES/57/228).
[514] The Rome Statute was adopted in 1998 and entered into force in 1 July 2002.

concern to the international community.[515] The ICC is an independent international organization, and it is not part of theUnited Nations system. Its seat is at The Hague in the Netherlands. Although thecourt's expenses are funded primarily by States Parties, it also receives voluntarycontributions from governments, international organizations, individuals,corporations and other entities.

The international community has long aspired for the creation of a permanentInternational Criminal Court, and, in the 20th century, it reached consensus on definitions ofgenocide, crimes against humanity and war crimes. The works and decisions of the Nuremberg and Tokyotrials previously addressed war crimes, crimes against peace, and crimes against humanitycommitted during the Second World War, which it must be said contributed to facilitate the realization of the establishment of the ICC. In the 1990s after the end of the Cold War, tribunals like the internationalCriminal Tribunal for the former Yugoslavia and for Rwanda were the result ofconsensus that impunity is unacceptable. However, because they were establishedto try crimes committed only within a specific time-frame and during a specificconflict, there was general agreement that an independent, permanent criminalcourt was needed, in order to adequately deal with impunity against crimes of international concern and provide a stable legal framework for the continued and consistent adjudication on the perpetrator of these atrocities instead of the hitherto *adhoc* arrangements.[516]

On 17th July 1998, the international community reached an historicmilestone when 120 States adopted the Rome Statute, the legal basis forestablishing the permanent International Criminal Court.The ICC has been in operation since1st July 2002. The ICC adjudicate upon cases against people accused of genocide, crimesagainst humanity, war crimes, or crimes of aggression. Jurisdiction can becomplicated in some situations, but generally, the court may only assertjurisdiction onstates that have signed the Rome Statute.[517] Interestingly, the ICCcannot try cases for crimes committed before a State signed on to the statute. As of1st July 2012, 121 states signed and ratified the Rome

[515] *K Quashigah,* 'The Concept of Responsibility to Protect Within the Proposed African Union Intervention System' CC Nweze (*ed)*, *Contemporary Issues on Public and Comparative Law: Essays in Honour of Professor Nwachukwu Okeke*, (USA: Vandeplas Publishing, 2009) p.663.
[516] E A Oji, *opcit*, pp. 213-214.
[517] *Ibid*, pp. 216-217.

Statute. The ICC consists ofthe Presidency, the Judicial Divisions, the Office of the Prosecutor, and theRegistry.

4.5.7.1 Jurisdiction of the International Criminal Court

The International Criminal Court (ICC) is an independent judicial body vested with jurisdiction to try individuals accused of serious crimes of international concern. Thus Article 5 provides that, 'The jurisdiction of the courts shall be limited to the most serious crime of concern to the international community as a whole. The court has jurisdiction in accordance with this statute with respect to the following crimes: (a) the crime of genocide, (b) crime against humanity; (c) war crimes, (d) the crime of aggression.'[518]

Essentially, the ICC has jurisdiction over nationals and the territory of countries that are parties to the Rome Statute. However, the ICC's jurisdiction over territory and people can be expanded beyond those of contracting state parties where the UNSC adopts a resolution referring a situation to the court or where a non-state party lodges a declaration of acceptance of jurisdiction with the ICC registrar.[519]

Accordingly, it is the obligation of a sovereign state to exercise its criminal jurisdiction over those culpable of international crimes. The ICC can only intervene where a state is unable or unwilling genuinely to undertake the investigation and prosecution of perpetrators.[520] It is important to note that the ICC does not exercise retroactive jurisdiction, it can only determine cases alleging crimes that occurred after July 1, 2002.[521]

The ICC assumes jurisdiction when an ICC state party refers a situation to the court or a Pre-Trial chamber of ICC judges grants an application of the Prosecutor to open an investigation on her own initiative. This position was aptly captured by Elizabeth Oji, when she opined that, 'The court has jurisdiction with respect to the crimes referred to in Article 5 over all parties to its statute. It will exercise jurisdiction in a situation in which one or more of the crimes appear to have been committed and is referred: (a) to the

[518]International Criminal Court Statute, Article 5 (hereinafter ICC statute).
[519] D Akande, 'The Jurisdiction of the ICC Over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justoce*, 618-620.
[520]ICC Statute, Article 17(a).
[521]D Akande, *loc cit.*

Prosecutor by a state party, (b) to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter or (c) the Prosecutor initiated an investigation in respect to such a crime.'[522]

Thus, the ICC will only undertake the determination of a case where multiple or very massive atrocities have been deliberately planned. The ICC is a court of last resort in which it only exercises jurisdiction to entertain cases where the state is genuinely unwilling or unable to undertake the investigation and prosecution of such cases.[523] The recognition of the jurisdiction of national courts to deal with crimes within its competence is elaborately enshrined in the ICC statute which stipulated *inter alia* that the court shall be complementary to national criminal jurisdictions.[524]

Thus, it has been opined that, 'the third preambular paragraph stated that the court was intended to complementary to national criminal justice systems where such trial procedures may or may not be available or may be ineffective.'[525]

Therefore, the dictates of state sovereignty as preserved by the UN charter cannot preclude the ICC from assuming jurisdiction to determine serious crimes of international concern that occurred within a sovereign territory in the face of unwillingness or inability to investigate and prosecute such crimes.

4.6 The Role of the United Nations and Human Rights Development.

The catastrophic impact that greeted the first and second world wars necessitated the establishment of the United Nations Organization. The purpose of the United Nations was to bring about lasting peace and security between sovereign states. However, the UN was further driven by the objective to guarantee the fundamental human rights of individuals and protect individuals against violations.[526]

The pursuit for the protection of human rights of individual led to the creation of international legations to guarantee human rights protections commencing with the

[522]E A Oji, *op cit,* p.223.
[523]See generally ICC statute, Article 17.
[524]*Ibid,* Article 1.
[525]E A Oji, *op cit,* p.224.
[526]http://www.jstor.org.stable.html Accessed 10/05/2017

birth of the Universal Declaration of Human Rights. The emergence of the UDHR further presented a new period in the evolution and development of human rights. Although not a legally binding document, the declaration by virtue of its universal acceptance and practice of its principles as law, has become the Magna Carta and internationally recognized legal and ethical framework for international, regional and national human rights mechanisms.[527]

The UDHT blazed the trail and advanced subsequent resolutions, declarations and laws relating to safeguarding human rights. Thus, the Council of Europe in 1950 adopted the European Convention on Human Rights.

The decolonization process from the end of the 1940s to the 1970s saw various African, Asian, Caribean Countries gained independence from their imperialists. However, the cold war period witnessed a gradual momentum of systematic persecution of human rights defenders viewed as threats to the sacred doctrine of state sovereignty. The end of the cold war period and the universal process of democratization brought about a paradigm shift in denouncing human insecurity and absence of human rights protection.[528] Thus, from its traditional focus on state sovereignty preservation from external intervention, emphasis began to be placed on security as embracing the concept that elevated individual freedom as a top priority.[529]

Consequently, the United Nations facilitated by this paradigm shift confined the term human security with the United Nation focus on populations security and the territorial sovereignty of states.[530] This shift in focus placed responsibilities on states to promote human rights protection that ultimately constitute an indispensable requirement for the legitimacy of a sovereign state.

The creation of the United Nations it must be said fundamentally contributed to the rising profile of human rights protection globally. Interestingly, in 2006 the United Nations

[527] P Gordon, *op cit,* 68
[528] UN Human Right Report, *op cit*
[529] G Battistella (2009) 'Migration and Human Rights: The Uneasy but Essential Relationship in Ryszard Cholewinski et alled, *Migration and Human Rights: The United Nations Convention on Migrant Workers Rights* (Oxford: Oxford University Press, 2009).
[530] R Picciotto *et al, op cit*

General Assembly by a resolution created the United Nation Human Rights Council which accorded formal status to human rights within the United Nations.[531]

Traditionally, the discourse on the concept of human rights was predominantly centred on the misconception that civil and political rights solely requires negative obligations while economic social and cultural rights denotes positive obligations. In this context, the rights to freedom of speech is protected when the state leave individuals alone. In contrast, the state must undertake positive step to safeguard the right to health by building clinics and the provision of health delivery services.[532]

However, this seeming positive and negative dichotomy has been recently debunked to the effects that positive and negative elements are key components of all human rights.[533] Thus, the right to freedom of speech an example of civil and political right requires the positive deployment of state resources for the provision of functional judicial system and education of its citizenry concerning their rights. On the other hand all economic, social and cultural rights also embrace negative component in that some states preclude individuals from the free exercise of these rights. Consequently, the obligations for all human rights can be categorized into various classifications anchored on their manner of obligations, namely: obligations to respect, to protect and to fulfill.[534]

The obligation to respect is the negative element that obliges responsible parties from acting in such way that derogates from the guaranteed rights of individuals. The obligation to protect focuses on the element which obliges responsible parties to ensure that their parties do not derogate from individually guaranteed rights. The obligation to fulfill is the positive element that obliges responsible parties to create political, economic and social systems for the provision of access to the guarantee rights of individuals.

4.7 Conclusion

[531] http://www.cmsny.org>publications.chiatello.hu Accessed on 12/05/2017
[532] N Aiken, *op cit,* ps. 16-18
[533] http://www.lincoln.edu.criminaljustice.org Accessed 10/05/2017
[534] G Battistella, *op cit*

In the light of the above, it is in no doubt that the establishment of these international human rights instruments, conventions regulating the conduct of armed conflict and the subsequent works and decisions of the International Criminal Tribunals even though on *adhoc* basis have to a large extent redefined the international standard of conduct of states and individuals in international relations. The increased global recognition and acceptance of human rights protection has shown that human rights violations have transcended beyond the realm of domestic jurisdiction into matters of international concern imposing international obligation on states to respect and ensure the respect and protection of human rights within their territorial domain.

Thus, the establishment of the International Criminal Court which is the product of the culmination of the works and contributions of the international *adhoc* criminal tribunals in a fundamental way constitutes a major check against sovereign state committing atrocities and gross human rights violations by the application of its complementary jurisdiction principle.

Additionally, under the current United Nations dispensation, human rights issues have ascended the front burner unlike what previously obtained prior to the landmark Resolution 688 of the UN Security Council. Thus, a calm evaluation of the practices of the United Nations in the Post-Cold War era revealed a rapid developing trend towards the conduct of interventions on the basis of humanitarian considerations largely championed by the West. All these go to show evolving international standards that give credence to the relevance of humanitarian intervention.

CHAPTER FIVE

HARMONZING INTERNATIONAL HUMANITARIAN INTERVENTION AND THE DOCTRINE OF SOVEREIGNTY OF STATES

5.1 Introduction

The fundamental issue in the discourse concerning humanitarian intervention and the doctrine of state sovereignty is the need to harmonize intervention with the sovereignty of states doctrine. The doctrine of state sovereignty entails that a sovereign state be treated as an independent political unit, its territorial integrity be respected and the state be permitted to pursue its internal affairs without external interference. What necessarily follows then is, whether the principles of state sovereignty are considered violated when international intervention seeks to halt the gross and systematic violations of human rights by an independent state of its nationals.

Consequently, the issue surrounding how sovereign state should respond to circumstances of gross human rights violations consistently presented an enormous challenge to the international community. The dilemma vigorously came to limelight consequent upon the global failure to halt the genocidal killings in Rwanda and in the aftermath of the North Atlantic Treaty Organization (NATO) military intervention in Kosovo that generated wide range controversy relating to the precise dictate of humanitarian intervention.[535]

It was the prevalence of this dilemma that prompted Kofi Annan in challenging the United Nations member states to search for a consensus on how to respond to such situations of supreme humanitarian emergency. Annan was particularly concerned with the question of whether forceful intervention was legitimate to halt gross human rights violations occurring in a state.[536] However, if military intervention for humanitarian purposes is undertaken with the consent of the target state, it amounts to legal and legitimate humanitarian intervention that does not derogate from the dictates of state sovereignty preserved by the UN Charter.[537]

---

[535] The massive ethnic cleansing agenda in Rwanda in 1994 culminating in genocide even though was a situation of supreme humanitarian emergency did not attract the deserved humanitarian intervention bringing into question the precise application of humanitarian intervention.

[536] K Annan, 'Two concept of sovereignty' The massive ethnic cleansing agenda in Rwanda in the Economist 18 September 1999, p. 49 available at http://www.un.org/overview/SG/koecon.htm.

[537] United Nations Charter, 1945, Article 2(4) & (7).

Similarly, if intervention is undertaken for humanitarian objectives consequent upon the approval of the United Nations Security Council (UNSC)it does not erode the sanctity of state sovereignty doctrine but becomes legal and legitimate.[538] Thus, what is required is a collective global security system that advances a combined obligation for regulating emerging threats and safeguarding human rights of citizen within a sovereign domain while at the same time preserving the hallmark of the challenge posed by Kofi Annan to the international community. It was perhaps in response to the sovereignty of states and humanitarian intervention debate that necessitated the Canadian government to establish the International Commission on Intervention and State Sovereignty (ICISS), which in its report advanced and promoted the principle of Responsibility to Protect (R2P).[539] The emergence of this principle was greeted with tremendous support from the member states of the United Nations (UN) and was viewed as a marked departure from the hitherto imprecise humanitarian intervention practice[540]

This chapter examines these competing imperatives of international law, that is sovereignty of states and humanitarian intervention whether it comes within the purview of the UN Charter. It further evaluates the basis and application of humanitarian intervention and its implications on the sanctity of state sovereignty doctrine preserved by the Charter regime. In driving the point home, we undertake the analysis of the classical doctrine of state sovereignty, its seeming paradigm shift to the conception of relative sovereignty and whether the prevailing humanitarian intervention practices have attained the status of customary international law. Furthermore, the legality of the right of humanitarian intervention lacks a clear cut backing in international law which in our humble view deserves urgent consideration.

5.2 Sovereignty of States and Humanitarian Intervention: The Debate

The controversy surrounding the two competing imperatives of state sovereignty and humanitarian intervention in international law generally revolves around the legality question of humanitarian intervention against the backdrop of the extant Charter

[538] See generally the Enforcement Powers of the UNSC in Chapter VII of the UN Charter.
[539] See International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001) available at http://www.iciss.ca/pdf/commissionreport.pdf accessed 8 June, 2015.
[540] *Ibid.*

stipulation of non-intervention and prohibition against the use of force in international relations.[541] It is a reflection of the dichotomy between the non-intervention principles and the demand of human rights protection of individuals within a sovereign entity. In the propagation of the conception of humanitarian intervention, the proponents of the concept contend that human right violations brought to bear on hapless citizens by despotic government or state's non-challant attitude are morally repugnant and that in certain instances military intervention to safeguard these citizens in the target sate is allowed on the basis of humanitarian considerations.[542]

However, the non-intervention principle prohibits state from intervening *vietarmis* in the domestic affairs of another state. This is in direct contrast to the application of humanitarian intervention. The principle of non-intervention is considered the foundational basis of international law which finds international statutory expression in the UN Charter.[543] Furthermore, it has been committedly reasserted by the United Nations General Assembly (UNGA) and the International Court of Justice (ICJ).[544]

However, the Mechianvalian thinkers, that is, the realist deny the validity of humanitarian intervention while the rationalists posit that state sovereignty is a fundamental principle of international law, but instances of supreme humanitarian emergency may justify humanitarian intervention.[545] The realists contend that validating humanitarian intervention principle would seriously erode the core basis of international relations fundamentally rocking the stability of the state-centred model of international society in contemporary times. In the views of also the revolutionist, humanitarian intervention is very necessary where states fail to meet the basic requirement of human decency.

Thus, preservation of non-intervention doctrine and protection of human rights are composite components of the United Nations Charter, the regulatory framework of

[541]M Fixdal& D Smith, 'Humanitarian Intervention and Just War' (1998) vol 22, No. 2, *Mershon International Studies Review*, 286.
[542]*Ibid.*
[543] Article 2(7)
[544] See *Military and Paramilitary Activities in Nicaragua Case* (Supra).
[545] M Desousa, 'Humanitarian Intervention and the Responsibility to Protect: Bridging the Moral/Legal Devide' (2001) *University College LondonJurisprudenceReview*, 54.

inter-state relations.[546]Consequently, the operation of state sovereignty doctrine should not prelude the functioning of the other aspect of the UN Charter.[547]The underlying thread in relation to the humanitarian intervention and state sovereignty debate is the perennial problem of order and justice in international relations. In one perspective there is the requirement of human rights protection which provides the foundational basis and sometime a disguised platform for humanitarian intervention which is anchored on the demand for justice in appropriate instances contrary to the state's demand for order prior to justice.Thus, a state as an independent entity within its sovereign domain possesses the requisite authority to channel the requirement for justice to the requirement of order. In another perspective, humanitarian intervention is considered as an unwarranted incursion into the sovereignty of state particularly championed by the weaker states in that quest for justice against the stronger states imposition of their preferred opinion of international order on the weak state in the name of justice within states.[548]

The Military Intervention undertaken by NATO in Kosovo presented a starting point for the humanitarian intervention and state sovereignty debate with the attendant controversy prevalent under current international law.[549] The controversy generated in the aftermath of the NATO's intervention in Kosovo elicited a wide range of academic discourse in which questions were raised concerning the legitimacy and readability of the model of humanitarian intervention.[550]

It appears that the general consensus favours the prevalence of moral and ethical objectives on the methodology adopted in the application of humanitarian intervention. However, it is doubtful whether consensus have been attained regarding the conditions and precise instances under which such intervention is considered legally permissible. Consequently, there is no gainsaying the fact that there is no detail legal instrument under

[546] See generally, United Nations Charter 1945 preamble & Article 1.
[547] Essentially the ultimate purpose of the United Nations is the preservation of the sovereign equality of states and the promotion and protection of human rights.
[548]R Falk, "Kosovo, World Order and the Future of International Law' (1999) vol 93, No. 4, *the American Journal of International Law*, 852.
[549] J Macrae, 'Humanitarian Aid and Intervention: The Challenges of Integration, Understanding Integration from Rwanda to Iraq' (2004) vol 18, No 2 *Ethics and International Affairs Journal*, 30.
[550] M Shaw, *International Law* 5th ed (Cambridge: Cambridge University Press, 2008) pp. 1046-1047.

international law encompassing human rights protection and the *modus operandi*of the protection mechanism. [551]

Essentially, the dichotomy revolve around the tension existing between the imperatives of the protection of state sovereignty as encapsulated by the UN Charter and the protection of human rights within a target state arguably sustained and attained through the application of humanitarian intervention. However, in the debate over humanitarian intervention, certain truism exists, intervention often undertaken is characterized by numerous reasons, but humanitarian concerns is often projected as the basis for such intervention. It is important to state here that the decision to intervene is also motivated by a number of factors including political, military and economic interests which are often tailored under the auspices of humanitarian intervention. Notable illustrations here is the humanitarian intervention in Iraq and Libya.

According to the Danish Institute Report, what underlines the humanitarian intervention debate is a perceived tension between the values of ensuing respect for fundamental human rights and the primacy of the norms of sovereignty, non-intervention and self-determination which are considered essential factors in the maintenance of peace and international security.[552] The cause for concern is the fact that these competing imperatives are encapsulated within the UN Charter as the basic objectives of the United Nations Organization (UNO). The Charter provides adequate protection for state sovereignty doctrine coupled with enforcement mechanisms while on the other hand there is a lack of enforcement mechanisms and protection of human rights in the Charter.[553]

However, it has been opined that the emergence and development of International Human Rights Law(IHRL) and International Humanitarian Law (IHL)has redefined the Westphalian doctrine of state sovereignty. [554]The application of the doctrine of state

[551] The preamble to the United Nations Charter merely stipulated the objectives of the UN to promote and protect Human Right without enforcement mechanism scheme.
[552] Danish Institute Report, *opcit.*
[553] See generally United Nations Charter 1945, Articles 2(4) & (7), 42 and Chapter VII. See also the preamble to the UN Charter.
[554] K Bennoune, 'Sovereignty versus Suffering' Re-examining Sovereignty and Human Rights Through the Lens of Iraq (2002) vol 13, No. 1, *European Journal of International Law,* 247-248.

sovereignty to exercise domestic jurisdiction has been curtailed by the level which human rights matter have attained in contemporary international law.[555]

Accordingly, it has been opined that human rights concerns are no longer exclusively matters within the domestic realm of a sovereign state and that the doctrine of state sovereignty cannot be used by independent states as a cover against responsibility from gross human rights abuses.[556]

5.3 The Doctrine of Act of State

A nation is sovereign within the confines of its territory and its internal activities may not be subject to the jurisdictional powers of another municipal court to determine the propriety or legality of an act of the state.Thus, going by the stipulations of the act of state doctrine, it becomes difficult to situate humanitarian intervention within the context of the application and practice of state sovereignty. This is because gross human rights violations and the commission of atrocities within a target state are domestic actions occurring within the frontiers of a sovereign state. That being the case, the act of state doctrine presents independent states with substantive defence on the merit against external interference.[557]

However, even UN Charter which guarantees non-intervention in the domestic affairs of state is subject to the significant qualification that the principle shall not deprive the application of the UNSC enforcement mechanism under the Charter.[558] Essentially, national sovereignty can be derogated from where it constitutes a barrier to the UNSC's overriding obligation to maintain international peace and security.

There is no doubt act of a sovereign state is of such a character that the courts have no jurisdiction to entertain its lawfulness. However, where such acts of the state constitute atrocity crimes and gross and systematic human rights violations, it brings to question the shielding of such acts of the state under the doctrine of act of state.

[555] *Ibid.*
[556] P O' Halloran, *opcit.*
[557] Union of India v. Ram Kamal (1953) AIR, 116.
[558] The UN Charter, Article 2(7) & Chapter VII.

Thus, further affirmations of the responsibilities of sovereign state are demonstrated in the Genocide Convention and other international and regional human rights conventions that impose penal sanctions on perpetrators of atrocities and human right violations whether derived from acts of states, non-state actors or individuals.

5.4 The Overlap of State Jurisdiction and International Jurisdiction

It has been established that where the UNSC determines a gross and systematic human rights violation as constituting a threat to international peace and security, it can undertake armed intervention to prevent or halt the conflict situation within a target state.[559] However, international law imposes obligations on states to sanction the perpetrators of the grave breaches of human rights.[560] What is key here is that what happens where both the internal and international courts are competent to determine the atrocity crimes so perpetrated consequent upon gross human right violations within a sovereign territory. To resolve the controversy surrounding the overlap of state jurisdiction and international jurisdiction led to the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) by the United Nations Security Council which conferred these ad hoc tribunals with concurrent jurisdiction and the attendant primacy clause.[561] However, the vexed issue of jurisdictional competence between domestic and international courts over crimes against humanity that resulted from human rights breaches continued unabated inspite of the works and decisions of these *adhoc* tribunals. This position is aptly captured by Elizabeth Oji when she stated thus, 'The experience of the two *adhoc* international tribunals led to further developments of the notion of jurisdiction. The primacy given to these tribunals gave rise to much controversy, since states felt that their sovereignty was being eroded. A new type of relationship was required in order to preserve state sovereignty without detriment to the goal of reducing impunity. It was therefore considered that the international criminal court, instead of primacy over

[559] See generally the Four Geneva Conventions, 1949.
[560] *Ibid.*
[561] E A Oji, *Responsibility for Crimes Under International Law* (Lagos: Odade Publishers, 2013) p.294.

domestic courts, should be complementary to such courts and intervene only when national criminal jurisdiction was not available or unable to perform its tasks.[562]

Accordingly, the fundamental Principle of international law prescribes non-intervention in the domestic affairs of a sovereign state.[563] However, protection of human rights anchored on the emergence and development of international and regional human rights instruments have over the years whittled down the exclusivity of this doctrine of state sovereignty. In essence states cannot lay claim to this basic principle as a bar to international concern of domestic human rights abuses. Thus, Malcolm Shaw that, '…where a state accepts the right of individual petition under an international procedure, it cannot thereafter claim that the exercise of such right constitutes interference with its domestic affairs.'[564]

Thus states are obliged to resolve their domestic affairs within the framework of their national constitutional remedies. It is only when such obligation is neglected or honoured in breach that international mechanism can be invoked.[565] Hence the application of doctrine of state sovereignty is limited by the necessity to undertake intervention for humanitarian purposes, particularly where the target state is unwilling or unable to halt gross violations of human rights occurring on its territory. This warranted intervention is not an onslaught on the UN Charter sanctioned state sovereignty doctrine but a child of necessity' anchored on humanitarian imperatives in tandem with the objective of the United Nations. On one hand states are given the first line charge responsibility to exhaust domestic remedies relative to their internal affairs. It is the failure or neglect of the discharge of this primary responsibility that necessarily attracts the intervention of the international community.

Therefore, the fact that states possess the primary responsibility to address atrocities that occurred within its domestic frontiers alludes to the recognition of the doctrine of state sovereignty.

Conversely, the recognition of the secondary responsibility of the international community to intervene in the face of refusal or neglect by the state to so address these

[562] *Ibid.*
[563] United Nations Charter, 1945, Article 2(7).
[564] M N Shaw, *op cit,* p.254.
[565] *Ibid.*

atrocities occurring need for humanitarian intervention. The failure or neglect of states to act in the face of horrendous human rights violationspresent a platform for the harmonization of state sovereignty and humanitarian intervention.

5.4.1 The Complementarity Jurisdiction Principle

The complementary jurisdiction connotes the functional principle targeted at giving jurisdictional competence to a subsidiary body when the principal body fails to exercise its primary jurisdiction.[566]It simply relates to the principle of priority among various organs vested with the exercise of jurisdiction.**[567]** The notion of complementarity jurisdiction found expression within the Rome Statute wherein the principle of primacy of jurisdiction previously adopted by the International Criminal Tribunal for the former Yugoslavia and for Rwanda was redefined into the complementary jurisdiction principle.[568]

Thus, it has been opined that, the principle of complementarity jurisdiction in international law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law, when the former fails to do so, the later intervenes and ensures that the perpetrators do not go unpunished.[569] Essentially the dictates of the complementarity jurisdiction represents a mechanism for bridging the gap between the respect for state sovereignty doctrine and the respect for the universal jurisdiction principle.[570]

Accordingly, Xavier Philippe opined that, 'the principle of complementarity is a means of attributing primacy of jurisdiction to national courts but includes a safety net allowing the international criminal court to review the exercise of jurisdiction if the conditions specified by the statute are met.[571]

---

[566] X Philippe, 'The Principles of Universal Jurisdiction and Complementarily: How do the Two Principle Intermesh' (2006) Vol 88, No. 862, *International Review of Red Cross*, 380.
[567]*Ibid.*
[568] E A Oji, *op cit,* p.295.
[569] M El-Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) vol 23 *Michigan Journal of International Law*, 870 quoted in X Philippe, *op cit, 380.*
[570]X Phillippe, *op cit,* 380.
[571]*Ibid*; Xavier Philippe is ICRC Legal Advisor for Eastern Europe in Moscow and Professor of Public Law at the Universities of AIX. Marseille III and Western Cape.

Under the traditional state sovereignty doctrine encapsulated in the UN Charter, a state exercises domestic jurisdiction over matters within its territorial boundaries. Hence, states generally obviates responsibility for atrocity crimes perpetrated within its domain by laying claim to non-intervention doctrine preserved by the Charter regime. However, the evolving international norms over the decades have transcended issues of human rights violations beyond the realm of domestic jurisdiction so much so that where gross and systematic human rights violations occur within a sovereign state with international repercussions, state sovereignty at this stage yield to the international obligation to restore and maintain international peace and security. Correspondingly, the perpetrators of such atrocities are prosecuted and penal sanctions imposed on those found criminally culpable.[572] Thus, the birth of International Criminal Court (ICC) is a significant boost in reshaping state sovereignty doctrine in accommodating the application of humanitarian intervention in the judicial process.

The Rome Statute in creating the ICC vested it with complementarity jurisdiction stating that the International Criminal Court shall be complementary to national criminal jurisdiction.[573] In essence, where atrocity crimes such as crimes against humanity, war crimes and genocidal killings are committed during armed conflict consequent upon grave human right breaches and the state is unable or unwilling to act, the international community is enjoined to exercise jurisdiction to render perpetrators criminally liable and penal sanctions imposed appropriately.

The significance of the complementarity jurisdiction in the preservation of the delicate balance between domestic jurisdiction and international jurisdiction cannot be over-emphasized. This phenomenal development of contemporary international law further redefines the practice and application of state sovereignty doctrine. Again,Xavier Philippe puts it succinctly thus, 'The principle of complementarity will beyond any doubt leave member states free to initiate proceedings, but will also leave the ICC to decide whether the process has been satisfactory or not: there must be an impartial, reliable and depoliticized process for identifying the most important cases of international concern, evacuating the action of national justice system with regard to those cases and triggering

[572] For a more detailed reading on the subject, see E A Oji, *Responsibility for Crimes Under International Law* (Lagos: Odade Publishers, 2013) pp. 294-316.
[573] Rome Statute of International Criminal Court , the Preamble, Article 1 (Rome Statute, 1998).

the jurisdiction of the ICC when it is truly necessary.[574] The challenge in the implementation of the complementarity jurisdiction principle will be characterized by how to determine when a state is unable and unwilling to act in the face of atrocity crimes committed within such a sovereign state. However, this inherent challenge can be surmounted by striking the right balance in deserving circumstances.[575]

5.5 Sovereignty of State as Responsibility

Another way of harmonizing sovereignty of state and humanitarian intervention is by seeing sovereignty of state as responsibility. Sovereignty of state is the constitutive principle of the nation- state system, yet is also derivative of that system. This underlies the paradox of sovereignty of state. 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.[576] Although sovereignty of state essentially connotes exclusive domestic non-interference practices, it can no longer retain its absolute content especially where activities within its territorial domain attracts international implications.[577] For example when atrocity crimes committed within a particular state results in the cross border movement of refugees to another state where international peace and security is threatened. In this circumstances the independent state cannot firmly hold on to domestic jurisdiction principle. This was vividly illustrated in the UN-Sanctioned Intervention in Iraq.

The evolving character and universal acceptance of the normative demand to guard against human right abuses has tremendously tinkered with the exercise of absolute control by independent states of their internal affairs. The instances of humanitarian intervention dealt with in this work shows that during the cold war the UNSC was preoccupied with deliberations solely centred on Westphalian sovereignty of state

[574] X Philipee, *op cit*, 381.
[575] See generally Rome Statute, Article 17 for further reading on the four criteria that must be established before the ICC can exercise jurisdiction.
[576] B Cronin, 'Multilateral Intervention and the International Community in M Keren & D Sylvan (eds) *International Intervention: Sovereignty versus Responsibility* (London: Frank Cass, 2002) p. 150.
[577] *Ibid.*

doctrine.[578]However, with the removal of atrocity crimes within the realm of domestic jurisdiction, the application of state sovereignty as absolute control drifted to responsibility which has since gained ascendancy and endorsement in the UNSC. For example in driving this point home, the UNSC had intervened in the Iraqi conflict on the basis that the domestic human right abuses snowballed beyond the Iraqi territory thereby attracting international response.[579]

5.6 From Absolute Sovereignty of State to Relative Sovereignty of State Doctrine

The emergence of certain normative standards in international law over the years have brought about changes in international relations.[580]The development and global acceptance of certain human rights conventions and international instruments against atrocity crimes contributed immensely to fundamentally alter the dictates of the old world order as embodied in the traditional Westphalian conception of state sovereignty.[581] Under the old order, particularly during the cold era of bipolar system epitomized by the United States of America as the leader of the capitalist Western camp and the Soviet Union as the key proponent of the communist camp. This era witnessed the competition for alignment by countries to either of these super powers. The collapse of the Soviet Union culminated in the emergence of the sole super power symbolized by the United States of America.[582] The fall out of this development in the aftermath of the cold war was that states adopted the principles of political pluralism and forms of liberal democracy and free economy on the internal level and they became open to the Western Camp and active in the global economy on the external level.[583]

---

[578] J Delbrock, 'A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations' (1991-1992) 67 *Indiana Law Journal,* 887.

[579]F Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention (Cambridge: Kluwer Law International, 1999) p.153.

[580] Treaties and Conventions concerning to human rights protection have imposed obligation on States to prevent or halt human right breaches.

[581] This is evidenced in the works and decisions of the *Ad-hoc* International Criminal Tribunals that culminated into the creation of International Criminal Court.

[582] A Alhaj, 'Principles of the State Sovereignty and the Phenomenon of Humanitarian Intervention Under Current International Law' (2013) vol 9, No. 1, CS Canada, 121. Available at http//:www.cscanada.org. Accessed 13 September, 2015.

[583]*Ibid.*

Consequently, the end of the Cold War brought about the new order with the attendant global implication where a number of sovereign states adopted democratic system and acceded to human rights conventions compatible with international law principles to the detriment of exclusive domestic jurisdiction prevalent under the old order.It is noteworthy to emphasize that this changing content of international relations from exclusivity to international cooperation has contributed towards attaining global peace vide the impact of technological revolutions that delimit geographical distances and bridge the existing territorial boundaries between states.[584]

The emerging trends and norms in international relations established a new world order that resulted in the development of certain concepts related to international law principles. Following this, international relations among states began to experience a departure from the absolute conception of state sovereignty to the submission and adherence to certain legal principles implied in international treaties to guarantee international peace and security. [585] According to AymanAlhaj, 'Contemporary International Law and order have adopted the principle of state's relative sovereignty, that is considering the concept of the state's sovereignty within the legitimate legal provisions based upon the sovereignty of principles of the international law which comprised the minimum of legal principles when sovereign states shall take part in laying international rules and international rules do recognize the principle of sovereignty as one of the fundamental principles which it relies upon.'[586] The view expressed here buttress the synergy between domestic jurisdiction over internal affairs and international obligation in one perspective and the international legal rules that is a reflection of the will of international community and international legitimacy in another perspective.[587]

The relativity of state sovereignty involves a departure from the Westphalian sovereignty of state to creating a margin of estimation that accommodate the safeguard of human rights violations and imposing responsibility to protect human rights breaches. In this respect, where the competing imperatives of human rights protection and state security protection persists, then the stronger more domesticated imperative supersedes

[584] *Ibid.*
[585] For further reading, see generally the provisions of Universal Declaration of Human Rights, 1948; The Genocide Conventions, 1948 and the twin Human Right Covenants, 1966.
[586] A Al-Haj, *Loc cit.*
[587] States cannot lay claim to domestic jurisdiction to obviate international treaty obligations (emphasis mine)

the less developed. Thus, the concept of relative state sovereignty, under current international law is a logical concept which is identical to the concept of freedom for individuals within the domestic jurisdiction.[588] In this regard, the exercise of absolute control by states over their domestic matters is subject to its international duties and responsibilities imposed on such states by treaty and convention obligations.[589]

5.7 Whether the Prevailing Humanitarian Intervention Practices Has Crystallized into Customary International Law

It is not in doubt that the right of humanitarian intervention is not copiously enshrined in the UN Charter and other international law instruments.[590] Hence the legality question that surrounds the right of a state or coalition of states to undertake humanitarian intervention. However, under international law, norms that have attained the status of customary international law impose an obligation on states to exercise adherence to such norms irrespective of the absence of legal codification.[591] The burning question at this stage is what determines that a particular norm has attained the status of customary international law? In this context same question may be asked whether on the basis of the prevailing humanitarian intervention practices, the customary international law relating to the right of humanitarian intervention has crystallized?

For a norm to attain the status of customary international law, it must satisfy the duo criteria of *opiniojuris* and state practice.[592] On the requirement of *opiniojuris,* the contention here is whether or not the norm in question is legally binding in the determination of the international community. What is the evolving norm here? It is the primacy of human right and undertaking armed intervention to safeguard its grave breaches within a target state. The global acceptance of human rights protection and the fundamental premium placed on its promotion and protection by the international community is made manifest in the emergence and development of human rights

[588] A Al-haj, *loc cit.*

[589] See generally Convention on the Prevention and Punishment of the Crime of Genocide, 1948 & Four Geneva Conventions, 1949 and the Additional Protocols.

[590] A Buchanan, 'Reforming the Law of Humanitarian Intervention', in Holzgreve&Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas (*Cambridge: Cambridge University Press, 2003) pp 130-141.

[591] *Ibid.*

[592] J Dunoff, *et al, International Law: Norms, Actors Process: A Problem-Oriented Approach* (3rd edn, USA: Wolters Kluwer, 2010) pp. 77-79.

conventions in international law.[593]In addition, an obligation *ergaomnes* has been created imposing duty on the states to safeguard certain fundamental rights, which entails the prohibition against genocide and crimes against humanity*inter alia.* Correspondingly, where these fundamental rights are violated protective action should be undertaken by states to halt the infringements.[594]

However, armed intervention has not been generally accepted as the relevant measure to prevent or halt human rights breaches within a target state. The non-acceptance is further manifested in the several stipulations relating to the prohibition against the use of force in international relations in preference to pacific settlement of disputes. Consequently, the *opiniojuris* support the *ergaomnes* obligation that imposes duty on state(s) to safeguard human rights but does not on the other hand support armed intervention as a means of protective action to restore the tenets of human rights in a target state.[595] On the requirement of state practice on the other hand, the contention here is whether states act according to their *opiniojuris.* Sequel to the above, it has been established that state accepts and endorse the significance of human rights protection but do not recognize armed intervention as a protective action against human rights violations.[596]What is paramount here is to ascertain whether there is a manifestation of this notion evinced in state practice. In the light of current humanitarian practices it appears that state practice is in conformity with prevalent *opiniojuris.*[597] It has been shown that although states undertake humanitarian intervention in conflict situations occurring in the target states, the motivation more often than not is camouflaged under humanitarian consideration to advance the political, economic and security strategic interests of the intervening states. The basis for armed intervention in most of the humanitarian intervention undertaken in the recent past is to the effect that the UNSC has

[593] For more detailed reading see generally the International Covenant on Civil and Political Rights & International Covenant on Economic and Social Rights 1966 respectively.
[594] For further detailed reading see also *The Four Geneva Conventions of 1949 and the additional Protocols, 1977; The Genocide Convention, 1948 & Rome Statute, 1998.*
[595] M Mendelson, *loc cit.*
[596] J Henckaerts, 'Study of Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *InternationalReviewofRedCross*, 175-180.
[597]Ib*id.*

passed a resolution that condemned the conflict situation as a threat, to international peace and security.[598]

The Kosovo, Somalia, Iraq and Libya conflict situations previously evaluated in this work are worthy illustrations in this regard. However, for a humanitarian intervention practice to attain the status of customary international law, it does not require a consistent state practice of numerous states as an illegal incident of a singular intervention can constitute a new rule of international customary law.[599]

Consequently, the potential of the Kosovo intervention for example becoming crystallized as rule of customary international law as a precedent establishing the legal basis of humanitarian intervention can perhaps not be ascertained until similar instance occurred in the future. It is therefore when similar scenario plays out on the international arena that the *opiniojuris* relating to the legal basis of the military campaign in Kosovo can be determined particularly in the consideration of the number of states that would support the existence of the right of humanitarian intervention.[600]

5.8 Preserving the Delicate Balance Between Humanitarian Intervention and Sovereignty of States

The requirement of humanitarian intervention and the recognition of the sanctity of state sovereignty can be reasonably preserved where the decision to undertake humanitarian intervention is carried out by a credible representative body imbued with a transparent decision-making process. This understanding is fundamental to ascribe legitimacy to armed intervention on humanitarian considerations within a target state. In the absence of a multilateral representative framework that endorses the right to intervene, controversy will continue to trail such intervention as advancing the strategic interests of the powerful state as the motivation for armed intervention in the guise of humanitarian intervention. It is this perceived double standard approach and lack of uniformity of humanitarian interventionpractices that raises genuine concerns about the

[598] The Charter regime contemplates that the UNSC is required to authorize the use of force in deserving instances when it considers it necessary. The UN Charter provides that the UNSC 'Shall determine the existence of any threat' and that it 'shall make recommendations or decide the measures that shall be taken.'

[599] A Bellamy, 'Global politics and the Responsibility to Protect: From Words to Deeds (London: Routledge, 2010) pp. 68-70.

[600] J Dunoff*et al, loc cit.*

true tenets and application of the doctrine of varied situations. Thus, it has been contended that it is the politically and militarily weaker states of Africa and the strategically important states of the Middle East that will likely face the threat of future humanitarian interventions.[601]What this portend is that to surmount this perception of the illegality, undertaking humanitarian intervention must be conducted within globally accepted framework which sets a clear distinction between humanitarian considerations from imperial actions or humanitarian action for imperial interest. Thus, the decision-making on the conduct of humanitarian intervention should be a product of a platform that is transparent, accountable and representative.[602]

Interestingly, the United Nations readily provides the multilateral platform with the requisite military and diplomatic framework to undertake humanitarian intervention, while preserving the sanctity of state sovereignty. It is the general consensus that multilateral intervention under the auspices of the United Nations enjoys global acceptance and mostly considered as legitimate and legal.This is based on the fact that the armed intervention proceeded from the authorization of globally recognized and accepted representative body. Hence, armed intervention undertaken without the authorization of the UNSC is considered illegal and lacking in legitimacy because ofthe perceived advancement of the strategic interest of the intervening state masqueraded as driven by humanitarian considerations.[603]

In seeking to preserve the delicate balance between the dictates of humanitarian intervention and state sovereignty, it is heart-warming that the United Nations is gradually endorsing a robust and progressive humanitarian intervention practice that takes into cognizance the sanctity of the doctrine of sovereignty of states.[604] Thus, we are beginning to experience the emergence of a new norm championed by the United Nations

[601] For more reading, see R Miller, *Interpretation of Conflicts, Ethics and the Just War Traditions* (Chicago: University of Chicago Press, 1991) pp. 13-15.

[602] This perhaps may have informed the recent clamor to expand the membership of the UNSC to accommodate wider representation with a truly global outlook to determine deserving cases of armed intervention.

[603]R Falk, 'Legality to Legitimacy' (2004) Vol 26, No. 1 *Harvard International Review*, 42.

[604]A Volsky, 'Reconciling Human Rights and State Sovereignty, Justice and the Law in Humanitarian Intervention' (2007) vol 3, No. 1, *International Public Policy Review*, 40-43.

that may eventually crystallized into a rule of customary international law with its attendant basic ethical significance and novelty in contemporary international relations.[605]

What this evolving new norm shows is that there is a movement away from the rejection of the right to undertake humanitarian intervention to accepting the new concept of responsibility to protect that is rapidly becoming an international instrument of bridging the gap between the two international law competing imperatives of human rights and state sovereignty protection.[606]

The ICISS Report has demonstrated the collective benchmark of the lawful criteria needed to administer humanitarian intervention in conflict situation without relegating to the background the core doctrine of state sovereignty. Thus, it has been opined that this multilateral framework arrangement would constitute a hindrance to unilateral intervention by powerful states in advancing their strategic and geo-political interests in the guise of intervention to prevent or halt gross human rights violations within a target state.[607]To further deepen the preservation of the delicate balance between human rights and state sovereignty, protection intervention should not be hurriedly undertaken as a first line option but after careful consideration on the platform of the UNSC that would authorize armed intervention when clear and unambiguous evidence of occurrence or threat of occurrence of grave human rights breaches is available.[608]

The emergence of the responsibility to protect doctrine on the international arena (which will be treated in detail in chapter six of this work) has been described as the most comprehensive and careful thought- well response to the dilema of traditional humanitarian intervention.[609] Furthermore, the creation of distinct requirements on the basis upon which humanitarian intervention should be undertaken pursuant to the UN Charter will enhance the credibility and clarity of the application of international humanitarian intervention.[610] It is our submission in this regard that where humanitarian

[605] World summit Outcome Document adopted by UN, 16 September, 2005. Available at http://www.un.org/apps/nows/story.asp?NewsID. Accessed 14 December 2015.
[606] E Gareth, *The Responsibility to Protect: Ending Mass Atrocity Crimes Onces and For All* (Washington DC: Brookings Institution, 2001).
[607] Ib*id.*
[608] Responsibility to Protect, ICISS Report: International Commission on Intervention and State sovereignty, 2001. Available at http://www.iciss.ca/report2-en.asp. Accessed 14 December, 2015.
[609] K Annan, *loccit*.
[610] ICISS Report, *opcit.*

intervention finds expression and attestation within the confines of the UN Charter, the unrelenting controversy surrounding the primacy of state sovereignty and that of human rights protection will be greatly reduced.

In the aftermath of the creation of United Nations, deliberations on armed intervention was dominated on the basis of multiple conception of state sovereignty. Similarly, during the Cold War Era, the primacy of state sovereignty founded on the Westphalian sovereignty of state doctrine dominated UNSC deliberations in response to conflict situations characterized by gross and systematic human rights violations.[611]

However, deliberations today at the level of the UNSC cannot be said to be dominated by the primacy of state sovereignty in its traditional control as the exercise of absolute control over domestic matters. Rather by the end of 2011 the discourse is now centred on sovereignty of state as responsibility which is rapidly gaining momentum and legitimacy in the deliberations of the United Nations.[612]

Inspite of this paradigm shift, what is regular in the number of humanitarian intervention practices evaluated in this work is that it was undertaken in circumstances when sovereignty is discursively constructed as consistent with and complementary to the protection of human rights. It follows, therefore that armed intervention on the basis of humanitarian consideration can be conducted where sovereign authority within the state sought to be intervened in is discursively constructed as absent or where consideration of state sovereignty would benefit from protection of human rights.[613]

It is important to emphasize here that matters relating to human rights concerns for the first time constituted the basics of deliberation at the UNSC when it discussed the measures to be undertaken to halt Iraq's territorial aggression against Kuwait.[614] In its deliberations the UNSC determined that the cross-border impacts of the Iraq's domestic

[611] It should be noted that human rights violations concern was for the first time deliberated upon at the level of the UNSC when the issue of Iraq conflict was discussed that eventually heralded Resolution 688.
[612] The UNSC armed intervention in Iraq in 1991 vide Resolution 688 presents a reference point in our considered opinion towards accommodating humanitarian intervention within the dictates of state sovereignty.
[613] See the Secretary-General, Report of the Secretary General, in Larger Freedom: Towards Development, Security and Human Rights for All. 'Delivered to the General Assembly, UN Doc A/59/2005 (21 March 2005). Available at http://www.un.org/largerfreedom/content.htm. Accessed 14 December 2015.
[614] See Resolution 688 of UNSC, 1991. This is otherwise termed the precursor to humanitarian intervention.

human rights breaches against its citizens constituted a threat to international peace and security.[615]

The UNSC no doubt in its resolution concerning Iraq's aggression against Kuwait redefined international security interests to embrace human rights protection.It however further re-affirmed the core principle of non-intervention in the internal affairs of a sovereign state notwithstanding the demand for an urgent and unimpeded access to Iraq's sovereign territory and a halt to the grave breaches of human rights against its nationals.[616]

Consequently, the UNSC harmonized the inherent competing imperatives of the protection of human rights and state sovereignty when it resolved that Iraq's domestic human rights violations snowballed beyond its territorial borders which transcends the otherwise domestic matter beyond Iraq's territorial frontiers with the attendant international implications attracting appropriate response by the international community. [617] In essence, this resolution of the UNSC revalidates the domestic jurisdiction of an independent state, while also affirming the protection of human rights particularly where it constitutes breach of international peace and security. It was the cross-border movement of massive refugees consequent upon gross human rights violation that posed serious security risks to the Iraq neighbouring states of Kuwait, Iran and Turkey and the world at large that necessitated the decision of the UNSC in its determination that the situation constituted a threat to international peace and security.[618]

The harmonization of human rights and state sovereignty protection was reached in the context of the Iraqi conflict where it was deemed that Iraq's sovereignty was temporarily suspended since Iraq itself breached the principle of state sovereignty by its singular act of unprovoked aggression against Kuwait. Thus, the UNSC apparently preserved the delicate balance between the normative imperatives in this case where on one hand it promoted the protection of human rights and on the other hand it protects the

---

[616]Stromseth, 'Iraq's Repression of its Civilian Populations: Collective Responses and Continuing Challenges in LJ *Domrosch* (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations, 1993) p.124.

[617]*Ibid.*

[618] UN Resolution 688, *loccit*.

principle of state sovereignty.[619] This attitude of the majority members of the UNSC in our considered view can be a reference point in creating the political and normative space for humanitarian ideals to define subsequent UNSC resolution on the subject of humanitarian intervention in deserving circumstances.

In order to remove humanitarian intervention from the seeming contraption of a politically motivated invasion masquerading as moral imperatives, the fundamental principles of *jus ad bellum*, and that of *jus in bello* around the necessity and justification of humanitarian intervention should be duly considered and adopted in undertaking humanitarian intervention in deserving cases.[620]

[619] *Ibid.*

[620] The Fundamental Principles of *jus ad bellum* entails last resort, right authority, just cause, and right intention. The principle of *jus in bello* revolves around the necessity and justification of humanitarian intervention.

CHAPTER SIX

THE CONCEPT OF RESPONSIBILITY TO PROTECT

6.1 Introduction

The responsibility to protect concept is a rapidly evolving norm that thrives on the dictate that state sovereignty is not absolute right and that states abandon portions of their sovereignty when they manifestly fail to safeguard their citizens from mass atrocity crimes, specifically genocide, war crimes, ethnic cleansing and crimes against humanity.[621]

Consequently, there has been a significant change in the understanding of the doctrine of state sovereignty over the years as enunciated in the previous chapters that led to the evolution and development of the concept of responsibility to protect as an emerging norm of international conduct gradually shaping states' behaviour and expectations in international relations. Notwithstanding that, the Responsibility to Protect (R2P) has not fully crystallized as a binding international law, it is fundamentally anchored on extant international law principles[622] on the basis upon which it has continuously shape international evaluation on state sovereignty, atrocity prevention and international intervention. In the course of this chapter analysis, the evolving concept of responsibility to protect will be evaluated in demonstration of the modification of humanitarian intervention, while taking into account the additional perspectives that have emerged with the R2P and the increasing development of the concept of R2P, contending that although the R2P principle has not attained the status of an independent rule of international law, the R2P concept possess fundamental normative authority and significant political consequences in shaping international relations. The chapter will further evaluate initial articulation of the concept of R2P in the International Commission on Intervention and State Sovereignty Report of 2001. The adoption of the R2P principle by the United Nations General Assembly (UNGA) in the wake of 2005 World Summit Outcome Document and the subsequent reaffirmation of the R2P doctrine by the United Nations Security Council (UNSC) will also be examined. Essentially, this chapter is both

[621] T Owen, 'Responsibility to Protect: More than a Slogan' (2011). Available at http://www.taylorowen.com. Accessed 12 December 2015.

[622] These principles are embedded in the Genocide Convention, the Four Geneva Conventions and the twin international human rights covenants together with the Rome Statute that established the International Criminal Court.

an evaluation of the processes of the emergence and development of the concept of R2P and an invitation for its legal codification to provide a fundamental framework for the harmonization of the humanitarian intervention and state sovereignty controversy.

6.1.1 The Evolution of the Concept of Responsibility to Protect

The R2P evolved in reaction to the failure of the international community to forestall and halt the genocidal killings and massacres in Rwanda and the Bulkans during the 1990s.[623] The concept of responsibility to protect stipulates that states have the primary responsibility to protect their populations against atrocity crimes and that when states fail in this responsibility, the international community can intervene to protect the populations through peaceful and diplomatic means or coercive measures.[624]

In espousing the thrust of the R2P doctrine, the United Nations Secretary General Ban Ki-moon described R2P as consisting of three conceptual pillars, that is, each state has the enduring responsibility to protect its populations, whether nationals or not from genocide, war crimes, ethnic cleansing and crimes against humanity and from their incitement. Secondly, the international community has the responsibility to assist states in meeting their obligations under the first pillar and thirdly, where a state manifestly fails to protect its population then the international community has the responsibility to respond in a timely and decisive manner, using Chapters VI, VII and VIII of the UN Charter to undertake peaceful and diplomatic or coercive measures.[625] The processes culminating in the emergence and development of the R2P principle have impacted tremendously on international relations and has shifted the hitherto comprehension of state sovereignty doctrine and raised the level of consciousness of the political and moral costs of inaction in the face of atrocities perpetrated within a sovereign domain.[626]It is explicit from the discussion and analysis in this work so far that the right to intervene in the domestic affairs of a sovereign state outside the precinct of the United Nations Charter is non-existent. It has also been established that the obligation to undertake

[623]ICISS, *The Responsibility to Protect*, in the Report of International Commission on Intervention and State Sovereignty (Ottawa, Canada: International Development Research Centre, 2001) p.1.
[624]T Owen, *loc cit.*
[625]For a comprehensive reading see further C Walling, *All Necessary Measures: The United Nations and Humanitarian Intervention* (Philadelphia: University of Philadelphia Press, 2013).
[626]*Ibid.*

intervention more often than not is anchored on the shaky foundation of morality and national interest or political will.[627] Although these humanitarian concerns sometime seem appropriate and desirable, it does not provide the legal basis for humanitarian intervention. Consequently, the legal right or the legal obligation to undertake humanitarian intervention does not exist outside the charter regime. However, there is a general consensus on the responsibility to protect the citizens of a sovereign state against gross human rights violations.[628]

Accordingly, in order to bridge the gap between the state sovereignty and humanitarian intervention debate, it has been opined that the legal right or legal obligation to intervene and humanitarian intervention should be replaced with the concept of responsibility to protect in international relations.[629]

Moreover, the global technological transformation over the years necessarily implies the consideration of intervention from the perspective of the casualties in the target state than that of the strategic interest of coalition of states seeking to undertake intervention. While recognizing the fundamental responsibility to safeguard human rights as squarely resting on the target state, the responsibility to protect doctrine in consideration of the technological transformation further expound this responsibility to embrace the responsibility to react, the responsibility to prevent and the responsibility to rebuild.[630]

Upon the basis of this interdependency of states, Francis Deng sought to re-conceptualize the state sovereignty as not necessarily the right to exercise absolute control but rather entails responsibility of the states towards their populations and the international community.[631] The views expressed by Francis Deng in this regard was that,there was a need for radical departure from the traditional Westphalian state

---

[627] A Bellamy, 'The Responsibility to Protect: Five Years on' (2010) 24 Ethics in International Affairs, 143-145.

[628] This view is the major position maintained by the Realists who are critical of humanitarian intervention and often emphasize the selective nature of its application.

[629] See Rapporteur's Report of Geneva Round Table Consultation of the International Commission on Intervention and State Sovereignty, 31 January 2001. Available at http://web.gc.cuny.edu/ICISSresearch/report/geneva/rapporteur.report.milliken.htm. Accessed 15 December 2015.

[630] N Wheeler, 'Legitimating Humanitarian Intervention: Principles and Procedures' (2001) 2 Melbourne JIL, 550-552. Available at http://www.law.unimelb.edu.au/mjil/issues/archive/2001.wheeler.pdf. Accessed on 15 December 2015.

[631] F Deng, et al '*Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institute Press, 1996) p.27.

sovereignty doctrine in which states enjoy absolute domestic jurisdiction in relation to matters within their territorial frontiers to the exclusion of external interference to a conceptualization of state sovereignty as constituting rights and responsibilities respectively. This paradigm shift in the conceptualization of sovereignty of states laid the foundational basis for the responsibility to protect principle. However, the contributions of Francis Deng were purely academic which led to subsequent development in the academic literature on the subject. This fundamental contribution though largely remained in the academic community eventually transcended into the political space through the work and report of the International Commission on Intervention and State Sovereignty (ICISS) in 2001.

6.2 The 2001 International Commission on Intervention and State Sovereignty Report

In the aftermath of the NATO's unilateral intervention in Kosovo in 1999, the Independent International Commission on Kosovo was established to review the situation and the Commission in its report concluded that "the Intervention was legitimate but not legal."[632] They acknowledged the necessity to bridge the divide between legitimacy and legality of humanitarian intervention. Consequently, the said report recommended the adoption of a principled framework by the UNGA for humanitarian intervention to serve as a model for subsequent responses to situations of supreme humanitarian emergencies.[633]Interestingly, the task of designing such a framework and responding to the challenge presented by Kofi Annan earlier mentioned fell upon the International Commission on Intervention and State Sovereignty (ICISS) largely sponsored by the Canadian government.[634]The ICISS released its report in 2001 titled, 'The Responsibility to Protect' and presented it to the UN Secretary General. Notably, the Report outlined four fundamental contributions to the International policy debate on the new approach to humanitarian intervention.

The first significant contribution of the ICISS Report was the creation of a fresh conceptualization of humanitarian intervention. The report sought to jettison the

[632] See Independent International Commission on Kosovo, *The Kosovo Report*(Oxford: Oxford University Press, 2000) pp.5-32.
[633]*Ibid.*
[634] E Gareth, 'From Humanitarian Intervention to Responsibility to Protect' (2002) vol 24, No. 3, *Wisconsin International Law Journal*, 707-708.

controversy surrounding the right to intervene in international law, instead it emphasizes that the contention should not be about right or obligation to undertake intervention but about responsibility to protect the victim of atrocities within a target state and not the strategic interest of the intervening states.[635]By so doing the ICISS redefined the heated debate that characterized the humanitarian intervention question requiring the injection of fresh ideas as to the real connotation of the concept. The ICISS, ultimately hoped for the reaching of a consensus between the proponents and opponents of the tenets of humanitarian intervention.

The second telling contribution of the ICISS was its effort in the re-characterization of the traditional Westphalian conception of state sovereignty. In this context, the contribution of the ICISS was significantly influenced by the idea and works of Francis Deng who opined that state sovereignty should not be taken as exclusive control but as a responsibility.[636] It is instructive to emphasize that the Westphalian conception of state sovereignty has been clearly enshrined and preserved by the UN Charter. However, current state practice has emerged in the seven decades since the UN Charter became operational with a renewed emphasis on human rights concerns placing a restraint on the application of state sovereignty doctrine. In this regard, the ICISS contended that sovereignty of states embraces rights and responsibilities respectively. In essence state sovereignty connotes states being responsible to their populations as well as the international community. Accordingly, it is the primary responsibility of every sovereign state to protect its own citizens but where such a state exhibits failure on its part as a result of being incapable or unwilling to exercise that responsibility, then a subsidiary responsibility to protect enures to the international community that undertake the responsibility to protect the victims of the humanitarian crisis under the auspices of the United Nations.[637]

Again the ICISS in its third contribution to the humanitarian intervention and state sovereignty debate explicitly stated that the responsibility to protect was beyond the

[635] *Ibid*

[636] For further reading, see International Commission on Intervention and State Sovereignty: 'The Responsibility to Protect' 2001, available at http://www.icissreport.en.asp. Accessed 14 December 2015. (Hereinafter called ICISS Report).

[637] The Contribution of ICISS Report here bears correlation with the innovative provision of the Rome Statute dealing with complementarity jurisdiction principle that has significantly assisted in curbing impunity.

scope of intervention, particularly armed intervention. It embraces obligations and responsibilities on the part of sovereign states.Taking into cognizance the work of the Kosovo Report, the ICISS sought to establish the requisite criteria to be satisfied before undertaking humanitarian intervention. This position constituted the fourth contribution of ICISS according to which it sought to bridge the gap between the legality and legitimacy question of humanitarian intervention setting the requirements of solid evidentiary grounds and the right reasons to be established to necessitate armed intervention.

This presented a radical reformation of the conception of state sovereignty in that in summary, the ICISS Report contended that state sovereignty embraced not only rights but also responsibilities, particularly, the responsibility of the state to protect individuals within its territorial domain from grave human rights breaches.Furthermore, the ICISS Report opined that any category of forceful intervention is, 'an exceptional and extraordinary measure and as such to be justified, it must meet certain criteria, including just cause, right intention, last resort, proportional means, reasonable prospects and right authority.[638]Thus, this fresh conceptual framework of humanitarian intervention that the ICISS Report symbolizes has been hailed as a fundamental step forward in response to Kofi Annan's foremost challenge to the international community. However, the ICISS Report did not lay claim to a consensus opinion but that the responsibility to protect principle is an evolving norm that has not attained the status of customary international law.However, the R2P has the potential ingredients based on uniform and consistent state practices to be consolidated into a new rule of customary international law.

The work and findings of ICISS was directed and restrained by the practical objective to galvanize consensual support among members of the United Nations. By so doing, the ICISS Report expanded the conception of sovereignty of states to embrace not only the responsibility to react but also, the responsibility to prevent and the responsibility to rebuild.[639]Essentially, the ICISS declared that sovereignty of state is not absolute and can yield to other norms of international conduct. This radical departure focused on the fact that human security can undermine the hallowed doctrine of state

[638] E Gareth, *loccit.*
[639] ICISS, *The Responsibility to Protect, op cit,* pp.19-45.

sovereignty, permitting international reaction a sovereign state's exercise of domestic jurisdiction contradicts its responsibility concerning its populations. The ICISS further re-characterize the prevalent controversy by going beyond the requirements of humanitarian intervention rather the ICISS Report encapsulates the responsibility to prevent mass atrocity crimes in the likes of genocide, war crimes and crimes against humanity.Perhaps, the most controversial aspect of the ICISS Report in its conceptualization of the R2P is its deliberation on the legal framework upon which multilateral intervention is undertaken and justified.

The ICISS Report opined that intervention should be undertaken with the UNSC authorization which accorded with the stipulation of the UN Charter.[640] However, the ICISSReport further declared that the UNSC has a responsibility to take action in the wake of mass atrocities occasioned by humanitarian crisis and must not repudiate that responsibility on the basis of political expediency. The ICISS also expressed the views that where the UNSC fails to take action due to the "Crippling" of the UNSC, the UNGA possesses the residual powers to take action pursuant to the "Uniting for Peace" process. However, the ICISS Report is quick to add that the UNGA is devoid of the requisite authority to mandate the UNSC to so take action appropriately.

Essentially, the ICISS Report is an important normative statement concerning the changing notion of sovereignty of states together with the legal duties of a sovereign state and the international community to checkmate atrocities. Thus, the innovative adoption of the responsibility to protect concept further expanded the prevalent academic and political debates from emphasis on humanitarian intervention to a wider discourse on the state's responsibility to safeguard their own citizens and of the international community to take action in the face of gross human rights violations.

However, it must be emphasized here that the ICISS Report does not constitute a source of international law or a principle of *opinio juris*supported by relevant state practices that have crystallized into the rule of customary international. In contrast, it is a politically sound statement of legal awakening that was the product of eminent coalition of individuals. The ICISS Report interestingly encompassed extant legal rules, particularly regarding the obligations to prevent war crimes, crimes against humanity,

[640] Articles 2(4) & 42.

genocide and international law principles regulating intervention in international relations as guaranteed by the UN Charter. But the goodnews is that since the conclusion of the work of ICISS and its subsequent report, the concept of R2P has attracted significant global attention and acceptance. Thus, it is reasonable to state here that the source of the R2P principle is derived from the ICISS Report of 2001 titled, 'A Responsibility to Protect.'

6.2.1 From 2001 International Commission on Intervention and State Sovereignty (ICISS) Report to 2005 World Summit Outcome Document

The conclusion of the contribution and work of the ICISS and the eventual adoption of its report and made public coincided with the period of the second gulf war. This development prompted the thinking in the international arena that the R2P as an emerging norm was dead on arrival. However, during the 2005 World Summit, the conception of R2P was overwhelmingly endorsed.[641]

In adopting the R2P concept, the World Summit in its deliberations made certain modification limiting the application of the R2P principles to atrocity crimes in the rank of genocide, war crimes, crimes against humanity and ethnic cleansing and not to the generality of human rights violations. However, the 2005 World Summit Outcome Document (WSOD) did not stipulate the basic requirements for intervention as prescribed by the ICISS Report.

The ICISS Report expanded the debate on humanitarian intervention to embrace the responsibility to protect which ultimately established fresh political openings to promote the prevention of atrocity crimes and safeguard human security. The contribution of the ICISS rapidly transformed the humanitarian debate from the realm of academics to the political stage that culminated in the concept of R2P constituting a significant agenda of the World Summit. The R2P concept was endorsed by the World Summit Outcome Document which was officially adopted by the United Nations General

[641] The 2005 World Summit was the largest gathering of members of heads of state and government since the creation of the United Nations Organization in 1945.

Assembly.[642] Thus, in paragraphs 138-139 of the World Summit Outcome Document, the United Nations General Assembly and heads of government respectively endorsed and affirmed the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The affirmation of the R2P as mentioned above is a fundamental achievement, though it had to navigate through the difficult terrain of the United Nations diplomatic corps to attain endorsement. In this context, a relentless fight was championed almost to the last moment by a coalition of developing states supported by Russia that rejected any form of restraint on the exclusive exercise of domestic jurisdiction of a sovereign state irrespective of the internal or external implications.

However what led to the eventual adoption of the R2P concept by the WSOD was the consistent support by sub-Saharan African States championed by South Africa for the realization of the application of the R2P principle. Although, the United States and European Union countries supported the application of the R2P concept, their support was generally viewed with suspicion especially with reference to the existing Post-Iraq environment in striking a balance between intervention and state sovereignty. These doubts notwithstanding, the World Summit Outcome Document significantly affirmed and embraced the R2P concept in paragraphs 138 and 139 thus:

138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes including their incitements, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability.[643]

139. The international community through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapter VI and VIII of the Charter to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we

[642] See United Nations General Assembly Resolution 60/1: UNGAOR, 60th Session UN Doc A/60/1, 24th October, 2005.

[643] See United Nations General Assembly, UN GAOR, 60th Session, agenda item 46 and 120, UN DOC A/Res/60/1, 2005, para 139.

are prepared to take collective action in a timely and decisive manner through the Security Council, in accordance with the Charter including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect population from genocide, war crimes, ethics cleansing and crimes against humanity and its implications, bearing in mind the principles of the charter and international law. We also intend to commit ourselves, as necessary and appropriate to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[644]

It is important to state here that it was consequent upon the 2004 United Nations High Level Panel on threats, challenges and change that acknowledged responsibility to protect as an evolving norm of international law that further paved the way for the endorsement of the responsibility to protect concept by the United Nations General Assembly in its 2005 World Summit Outcome Document aforementioned. Thus, the United Nations member states at the 2005 World Summit endorsed and incorporated the concept of responsibility to protect into the Outcome Document as agreed and espoused in paragraphs 138 and 139. Notably, these paragraphs of the World Summit Outcome Document expressly outlined the scope of the responsibility to protect principle. Its application is limited to four mass atrocity crimes earlier identified and in the application of the R2P principles, it should be undertaken by nations first and regional and international communities second.

In the aftermath of the endorsement of the concept of responsibility to protect by the World Summit Outcome Document, the United Nations has been actively involved in the development of the responsibility to protect concept and its application. It is not surprising therefore that a number of resolutions, reports and debates have emerged on the United Nations platform. Thus, the concept of responsibility to protect, subsequently has continued to evolve and attract global recognition.

[644] *Ibid.*

6.2.2 Subsequent Development and Evolving Trend of Responsibility to Protect

Sequel to the work and contribution of the ICISS, the discourse on the concept of responsibility to protect within the international arena rapidly gained momentum and attracted global support of the R2P concept as made manifest in the World Summit Outcome Document.Accordinglyevery state has a responsibility to protect its populations and to prevent genocide, war crimes, ethnic cleansing and crimes against humanity. In addition, where a state reneges on this obligation, the international community is saddled with the responsibility to employ appropriate diplomatic and peaceful means to protect the populations. However, where peaceful means prove insufficient, the United Nations Security Council should undertake timely and decisive action pursuant to its powers encapsulated in the United Nations Charter.[645] This adoption of the concept of R2P was subsequently reaffirmed by the United Nations Security Council in 2006 and by the United Nations General Assembly in 2009 respectively.[646]

In furtherance of the development of the concept of R2P, the current UN Secretary-General has also embraced the dictates of the responsibility to protect and in the process published three encouraging reports on its status and implementation.[647] In embracing the concept of R2P, the Secretary-General opined that the R2P entails three pillars that is similar to the three elements contemplated by ICISS, according to which the first is the responsibility of the state to protect its population, the second being the responsibility of the international community to help states fulfill their primary responsibility and the third relates to intervention in accordance with the UN Charter where a state is manifestly failing to protect its populations. Again, in similar proposition to that of the World Summit Outcome Document and ICISS Report, the UN Secretary-

[645] See generally Chapter VII.

[646] A Bellamy,*et all, The Responsibility to Protect and International Law* (UK: Martinus Nijhoff Publishers, 2010) pp. 81, 89.

[647] See UN Secretary, 'Early Warning, Assessment and the Responsibility to Protect' Report of the Secretary – General UN Doc A/64/864; 14 July, 2015; (hereinafter Early Warning Assessment) UN Secretary-General, 'Implementing the Responsibility to Protect Report of the Secretary-General UN Doc A/63/677, 12 January, 2009; UN Secretary-General, 'The Role of Regional and Sub-regional Arrangement in Implementing Responsibility', Report of the Secretary-General, UN Doc A/65/877, 28 January, 2011 (hereinafter the Role of Regional and sub-regional arrangement) quoted in C O' Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) vol 24 *Duke Journal of Comparative & International Law*, 562.

General Reports ascribed to the United Nations Security Council the sole prerogative to authorize intervention under the application of the R2P concept.

Consequently, the United Nations Security Council has reaffirmed its commitment to the application of the responsibility to protect principle in a number of resolutions. The first of this resolution was in April 2006 when the UNSC in its Resolution 1674 reaffirmed the stipulations of paragraphs 138 and 139 of the World Summit Outcome Document.[648] This landmark resolution presented an official support accorded the R2P concept by the UNSC. Again, the UNSC in 2009 in its Resolution 1894 recognized the primary responsibility of states to protect their populations and further reaffirmed paragraphs 138 and 139 of World Summit Outcome Document.[649] Expectedly, the UN Secretary-General Ban ki-moon in 2009, published the United Nations Secretariat first detailed report on the R2P tagged, 'Implementing the Responsibility to Protect.' This report galvanized debate in the United Nations General Assembly subsequently where some member states of the United Nations raised fundamental concerns about the implementation of the R2P, particularly in the wave of rising incidents of armed conflict globally. The debate emphasized the need for regional bodies such as the European Union and African Union to play a significant role in the implementation of R2P, the need for a firm early warning framework within the confines of the United Nations and the need to ascertain the roles United Nations organs would undertake in the implementation of R2P.[650]

The immediate impact of the debate was the first resolution referencing R2P endorsed by the UNGA that largely indicated that the international community still recognized the existence of the R2P. As earlier mentioned, the UN Secretary General published report further galvanized another debate in the UNGA.Thus, the UN Secretary General in 2010 released another fresh report called, *Early Warning Assessment and the*

[648] See UNSC Resolution 1674 available at http://www.un.org/en/ga/search/view_doc.asp/s/res/1674. Accessed 14 December 2015.
[649] See UNSC Resolution 1894 available at http://www.un.org/en/ga/search/search/view_doc.asp. Accessed on 14 December 2015.
[650] See generally Report on the General Assembly Plenary Debate on the Responsibility to Protect. Available at http://responsibilitytoprotect.org/ICRtoPGAdebate.pdf. Accessed 2 December, 2015.

Responsibility to Protect.[651] This report emphasized the need to prevent atrocities and reached a consensus that effective early warning is an important requirement for effective prevention and timely reaction. However, objections were raised to this consensus by a number of United Nations member states, namely: Nicaragua, Pakistan, Venezuela, Sudan and Iran. This objections and reservations on the efficacy of R2P notwithstanding, theconsideration of the application of the R2P concept continued. Hence the release again by the UN Secretary of another report in 2011 that focused on the Role of Regional and sub-regional Arrangements in implementing the Responsibility to Protect.[652] This Report emphasized the major obstacle to R2P implementation as the lack of cooperation and supports between the United Nations and regional organizations during conflict situations. UN member states in this report recognized the imperative of surmounting this obstacle through the strategic vantage position the regional bodies occupy in the prevention and reaction to mass atrocities.

In 2012, the focus of the consideration of the R2P concept was anchored on Responsibility to Protect: Timely and Decisive Response. The ensuing debate emphasized on intervention as it relates to the third pillar of the R2P and the range of pacific and forceful means at the disposal of the international community for a multilateral response to prevent or halt atrocity crimes during armed conflicts.

The development of the international norm of R2P continue to be in the ascendancy and in 2013, the UN Secretary General focused his consideration on Responsibility to Protect: State Responsibility and Prevention. [653] Essentially, these United Nations Resolutions and Reports considered so far expanded the text of the World Summit Outcome Document by the recognition of the requirement of the permanent members of the UNSC not to exercise their veto powers on matters concerning R2P and the responsibility of the UNGA within the contemplation of the Uniting for Peace Procedure to address matters including the R2P if the UNSC reneges to act when

[651] See Early Warning Assessment, loc cit. Available at http://www.globalr2p.org/media/file/2010. Accessed 12December 2015.

[652] See the Role of Regional and Sub-regional Arrangements, *loccit*. Available at http://www.globalr2p.org/media/files/2011. Accessed 12 December 2015.

[653] See UN Secretary General Report on R2P, 2013. Available at http://www.globalr2p.org/media/files.pdf. Accessed 12 December 2015.

required.[654] However, the proposition here does not suggest alternatives to the UNSC collective enforcement powers in reaction to atrocity crimes when they occur. Ultimately these subsequent endorsements and recognition of R2P provides a comprehensive consideration of the imperative norm of R2P in the official documents of the United Nations which presents a concrete indication of the advancement of R2P implementation.

Consequently, the emergence of the concept of R2P resulting from the deliberations on the intervention-sovereignty debate by ICISS in 2001 to a globally recognized and a large extent acceptance international norm that has established a more effective response to conscience-shocking situations than the international community has put together since the creation of the United Nations. However, if the R2P concept is to constitute a fundamental framework of reference within which horrendous human rights breaches are to be evaluated with the attendant appropriate response, it has to clearly attract global recognition and acceptance. Perhaps, it is the greater need to sustain the global recognition and application of the R2P principle that concerted effort is galvanized to maintain and advance the universal acceptability of the rapidly evolving norm of R2P.Thus, the High-Level Panel on Threats, Challenges and Change in its report, titled: *A More Secure World, Our Shared Responsibility* that was submitted to the UN Secretary-General in December, 2004 explicitly adopted the concept of R2P in its entirety in the following words: 'We endorse the responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide or other large-scale killing, ethnic cleansing or serious violations of an international humanitarian law which sovereign governments have proved powerless or unwilling to protect.[655]

6.2.3 The Status of the 2005 World Summit Outcome Document and 2001 ICISS Report

The adoption and recognition of the concept of responsibility to protect by the World Summit Outcome Document is one thing but its application in reality is another.

[654] See Office of the President of General Assembly, 'Concept Note on Responsibility to Protect Population from Genocide, war Crimes, Ethnic Cleansing and Crimes Against Humanity (undated) available at http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf. Accessed 16December 2015.

[655] See the Secretary General Report of the High Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility 2003, delivered to the General Assembly, UN Doc A/59/565 (Dec 2, 2004), available at http://www.un.org.secureworld/report2.pdf. Accessed on 12 December 2015.

Therefore, inspite of the adoption of the Outcome Document by heads of government under the auspices of the UNGA, it is not an international treaty or other established legal framework and has not in any way crystallized into the rule of customary international law.[656]

The creation of international legal rule is generally a consequence of international treaties and customary international law. The 2005 Outcome Document is a product of the UNGA Resolution 60/1 which adopted the tenets of the R2P. However, the resolution of the UN General Assembly is not yet attained the status of a formal source of international law. It is pertinent to emphasize that the powers vested on the UNGA are explicitly prescribed by the UN Charter according to which the General Assembly is restricted to discussion on matters within the confine of the Charter and the maintenance of international peace and security, referring matters or making recommendations to the UN Security Council or to undertake studies so as to promote international cooperation.[657] Thus, inspite of the significance of the adoption of the World Summit Outcome Document by the UN General Assembly, it is devoid of any legal obligation in terms of its application.

The 2001 ICISS Report laid the ground work for the adoption and recognition of R2P by the World Summit Outcome Document. However, neither the ICISS Report nor the Outcome Document adopted by the UN General Assembly can create international legal obligation. Essentially, positive international law makes it explicit that the ICISS Report and the Outcome Document together with the R2P tenets adumbrated thereto do not constitute a fresh source of international law. On the contrary, the relevant stipulations of the Outcome Document relating to R2P are at best political statements by heads of government and the UN General Assembly re-asserting extant international legal rules, potentially laying the foundational framework for the creation of new legal obligation in the future. Going by the stipulations of the Outcome Document, it merely re-asserted extant legal rules of treaty and customary law prohibiting and requiring the prevention of war crimes, crimes against humanity and genocide.One thing is clear though, that the Outcome Document laid emphasis on the prevention rather than the

[656] The World Summit Outcome Document is not a source of international law as prescribed by the Statute of the International Court of Justice, Article 38.
[657] See generally Articles 10-14.

prosecution of the atrocity crimes. It is our submission that the Outcome Document by this approach built on existing legal rules of international law instead of the creation of new set of legal rules. However, the contribution of the ICISS Report together with the World Summit Outcome Document and the subsequent adoption of the tenets of R2P espoused in these documents has fundamentally redefined the discourse on the intervention-sovereignty dichotomy, changed expectations and affected state attitude. The R2P concept-encapsulated in the ICISS Report and World Summit Outcome Document is yet to satisfy the requirements of*opinio juris* backed by uniform state practice.[658]

The relevant portion of World Summit Outcome Document dedicated to the concept of R2P starts with an assertion of the extant legal rules. In particular, paragraph 138 stipulates that, 'Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'Essentially, this stipulation amounted to restating the existing legal rules contained in certain international legal instruments. This is illustrated in theConvention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions and Customary legal rules relating to crimes against humanity as articulated through the work and decision of the International Criminal Tribunal for the Former Yugoslavia and Rwanda. The only new addition to the Outcome Document is the inclusions of ethnic cleansing on the list of crimesthat states have responsibility to protect their citizens.

Furthermore, the second sentence of paragraph 138 of the Outcome Document is also a reflection of extant international law by asserting that 'this responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.' However, the international legal instrument creating international criminal responsibility for genocide and war crimes and the customary rules prohibiting crimes against humanity further incorporate the obligation to prevent crimes inclusive of the prevention of incitement.The Outcome Document also stipulated in paragraph 138 that, states 'accept that responsibility' which is not anything new in that the extant legal rules in relation to the prevention and punishment of atrocity crimes in context bind state parties thereto by virtue of *pacta sunt servanda* doctrine.However, the existing treaties and customary rules that seek to prevent and punish acts of genocide, war crimes and

[658] See *North Sea Continental Shelf Case (1968) ICJ Report* 1.

crimes against humanity place emphasis on the obligations of the sovereign states.The Outcome Document in its paragraph 138 affirms the obligation of the international community to employ peaceful measures. In essence the Outcome Document seeks to create a subsidiary level of prevention, complementary but subordinate to the protection exercised by the sovereign states. Thus, as made manifest in the complementarity jurisdictional principle of the International Criminal Court, the tendency of complementary international action can encourage sovereign states to undertake actions and present a viable alternative if the sovereign authority is unable or unwilling to take action.[659]

Despite its shortcomings, the Outcome Document marked a significant milestone in the development of the R2P Principle and represented a formidable political statement. It re-asserted the fundamental principles of international law, placing emphasis on prevention rather than reaction. It pointed out the responsibility on states to help each other in the prevention of atrocity crimes. The responsibilities encapsulated in the Outcome Document are anchored on extant international legal rules and the tools of multilateral response are also restricted to the prevailing measures at the disposal of the UNSC contemplated within the precinct of the UN Charter.All these, notwithstanding, the importance of the UN Security Council's re-affirmation of the relevant portion of the World Summit Outcome Document derived from the UN Charter, according to which, 'the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter.'[660] Consequently, from the legal dimension, the wording of UN Security Council in its Resolution 1674 fell short of an official decision necessitating member states to undertake the implementation of the R2P principle. However, it seems that this development will pave the way for the substantive codification of the concept of R2P.

6.3 Nature and Scope of Responsibility to Protect

[659] W Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo (2005) vol 18 *Leiden Journal of International Law*, 557.

[660]Charter of the United Nations 1945, Article 25.

The nature and scope of responsibility to protect is founded on the basic norm that sovereign states have a responsibility to protect their populations from atrocities that shock the conscience of mankind and that where such states are unwilling or unable to undertake this primary responsibility, then the larger community of states is saddled with the responsibility to undertake the protection of the populations from the existing or impending humanitarian catastrophe.[661]Essentially, the general idea of the concept of responsibility to protect symbolizes an attempt at galvanizing a consensus departure from the absolute control tenets of state sovereignty to emphasis on the rights of the casualties of gross human rights violations to protection. This, inherent in the responsibility to protect concept is the fundamental objective that, for intervention on the basis of humanitarian concerns to attain global acceptability, including the tendency of armed intervention, it becomes obligatory that the international community establish a uniform, credible and enforceable standards to guide state practice. The dictates of responsibility to protect concept thrives on the idea of responsibility to protect civilian populations within a target state in the face of situations of supreme humanitarian emergency. Thus, in copious reference to this inherent content of responsibility to protect, Kofi Annan opined that, the issue is not one of a right to intervene but rather of a responsibility of the whole human race to protect our fellow human beings from extreme abuse wherever and whenever it occurs.[662]

The dictates of the responsibility to protect postulates that state sovereignty embraces responsibility and the fundamental responsibility for the protection of the populations within a sovereign state primarily rest upon that state. Furthermore, where such a state exhibits manifest failure in terms of unwillingness or inability to prevent or stop situations of horrendous human sufferings in the face of armed conflicts, then the non-intervention doctrine surrenders to the international responsibility to protect.

It is submitted in this regard that responsibility to protect constitutes itself into more of a linking concept that bridges the divide between intervention and sovereignty of states. Further to this, responsibility to protect embraces not just the responsibility to react but also incorporates the twin pillars of responsibility to prevent and the

[661] See 2001 ICISS Report, *loccit.*
[662] K Annan, *opcit.*

responsibility to rebuild.[663] The necessary implication in this respect is that the conception of responsibility to protect embraces humanitarian aids and reconstruction as basic elements of intervention. By its very nature therefore, the responsibility to protect admits of strategic framework that extends beyond forceful intervention. For instance, the obligation to prevent or reconstruct extends beyond the idea of forceful intervention which is the hallmark of humanitarian intervention.

For the purpose of clarity it is important to state that the scope of the responsibility to protect concept is hinged on three pillars, namely; that a state has the primary responsibility to protect its own citizens against atrocity crimes, secondly, the international community has a responsibility to help the state achieve its primary responsibility and thirdly where the state is unwilling or unable to protect its populations from such atrocity crimes, the international community becomes saddled with the responsibility to protect the harpless populations within the target state by way of intervention through non-forceful means or forceful measures as a last resort.[664]

6.4 The Responsibility to Protect Framework and its Application

Under the responsibility to protect framework, the primary duty bearers are the states that should undertake the responsibility to protect their own populations within their domestic jurisdiction. The responsibility to protect framework further embraces states assisting other states to achieve their fundamental responsibility to protect their own citizens. According to Ban Ki moon, this level of assistance may be achieved in four ways, viz: encouraging states to meet their responsibility under pillar one, helping them to exercise this responsibility, helping them to build their capacity to protect and assisting states under stress before crises and conflicts break out.[665] Additionally, the international community under the auspices of the United Nations has the responsibility to employ requisite diplomatic humanitarian and other pacific measures to undertake the protection

[663]ICISS, *op cit,* pp.19-27, 39-45.

[664] C Badescu, 'Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights' (2010) Google ebook, p.110. Available at http://books.google.ca/threepillars/responsibilitytoprotect. Accessed 1 December 2015.

[665]Ban Ki-moon is the current United Nations Secretary-General who has contributed to the support of the application of responsibility to protect tenets in deserving cases of humanitarian crises.

of the concerned populations and may undertake military intervention as a last resort pursuant to the authorization of the UN Security Council.

Flowing from the above the international community in this perspective connotes coalition of states acting under the umbrella of the United Nations. However, there has been no acceptable definition of what constitute the international community. Although from all indications it point to community of states, it may also embody the measures undertaken by states to implement their responsibilities which include non-state actors, non-government organizations and civil society.

The four atrocity crimes enunciated under the concept of responsibility to protect does not require the threshold of armed conflict to be activated, in that for all intent and purposes the application of responsibility to protect extends to cover instances of armed conflict and peace time respectively.[666] The application of the tenets of responsibility to protect relates to instances where populations are susceptible to the threat and horrendous human sufferings resulting from any of the aforementioned atrocity crimes. Consequently, responsibility to protect principle is not applicable to civil strife or other violent instances that fall short of the threshold of these atrocity crimes.

In the event that any of these atrocity crimes is occurring within a target state, the state is obliged to apply the responsibility to protect principle to avert or halt the further commission of these crimes, but where the state do not exercise the responsibility to protect its own populations in such circumstances, the state in question has failed in its responsibility to protect. In consequence of the manifest failure or inability of the state to apply the responsibility to protect principle in protection of vulnerable populations, then the international community is enjoined to apply the principles of responsibility to protect towards the protection of the vulnerable populations.[667] Further to the above, when the commission of these atrocity crimes occurred within a target state, the state has the responsibility to impose punishment upon prosecution of the perpetrators vide its national legal system. However, where such prosecution and punishment is not forthcoming, the international community through the instrumentality of the International Criminal Court

[666] This is a major distinction between the application of responsibility to protect and international humanitarian law.

[667] This is the stipulation contemplated in Articles 138-139 of the World Summit Outcome Document, 2005 that was subsequently endorsed by the UN General Assembly and reaffirmed by the UN Security Council.

can undertake prosecution and impose punishment in appropriate cases. Accordingly, the application of the tenets of responsibility to protect is dependent on established and extant rules of international law.

However, the application of the responsibility to protect principle since its emergence on the international arena has been greatly hindered by the perception of its misuse, particularly in the context of the war in Iraq. Originally the basis of forceful intervention in Iraq was premised on the presumption that Iraq was in possession of weapons of mass destruction and not necessarily prompted by the tenets of responsibility to protect. However, when it turned out this reason was no longer valid, the international community championed by United Kingdom and United States reverted to the need to protect the vulnerable populations of Iraq against further genocidal killings as witnessed in the 1980s with the Kurds and the Shiites in the 1990s as the basis of armed intervention in Iraq.[668] It is clear that the application of the responsibility to protect did not necessitate the forceful intervention in Iraq. This is because, employing the last resort dictate of responsibility to protect by undertaking military intervention is not meantt to serve as punishment for previous sins, but to momentarily halt atrocity crimes actually happening or imminently about to happen. Thus, the application of the responsibility to protect principle does not admit of the attack of a state with horrendous past record of genocidal killings by another state or coalition of states.[669]

6.5 The Responsibility to Prevent, React and Rebuild

The postulations of responsibility to protect has established the benchmark for the responsibility to react which entails intervention vide military action where diplomatic and peaceful measures become inadequate to prevent or halt atrocities in a target state. To undertake military intervention basic minimum standards are required to be accomplished, namely, right authority, just cause, right intention, last resort, proportional means and reasonable prospects. All these are in an effort to set a benchmark to activate

[668] See UN Security Council Resolution 688 of 1991, the passage of which was the product of first ever deliberation on human rights issues in the annals of the UN Security Council deliberations.

[669] K Roth, 'War in Iraq: Not a Humanitarian Intervention in Human Rights World Report (2004) pp.13-22. Available at http://www.hrw/wr2k4/download/wr2k4.pdf. Accessed 15 December 2015.

military intervention in the face of unabating conscience shocking situations.[670]Under the contemplation of the responsibility to protect concept, the military intervention must have been authorized by the UN Security Council which symbolizes the right authority. Furthermore, other diplomatic and peaceful measures must have been exhausted leaving military intervention as a last resort. However, this does not invariably imply that every measurement must have been applied and shown to have failed. What is required in this circumstance is the reasonable belief that military intervention would prevent or halt the ensuing atrocities. Furthermore, the military intervention undertaken must not be in excess of that which is required to achieve the defined human protection purpose. Again,undertaking military intervention must necessarily show reasonable prospect of success.Thus, the tendency of success warranting the forceful intervention must be reasonably high and that the effect of such forceful reaction would not outweigh the consequences of inaction.[671]

The second ambit of the responsibility to protect which covers responsibility to prevent directs its focus on the fundamental causes and reasons necessitating armed conflicts within a sovereign state and other human-induced conflicts that endanger the citizens of a given state. The third ambit embraces responsibility to rebuild which entails the provision of complete recovery measures in the aftermath of the armed conflict and possible reconstruction and reconciliation taking into consideration the causes and impact of the humanitarian crises the armed intervention intended to prevent or stop.

It is further submitted and suggested by this work that of all these three dimensions to the responsibility to protect, the responsibility to prevent stands out as a potential tool of averting situations of supreme humanitarian emergency occurring in a target state.

6.6 Responsibility to Protect, Humanitarian Intervention and the Use of Force

The conceptualization of the responsibility to protect was a consequence of the need to bridge the gap between humanitarian intervention and state sovereignty dichotomy. The emergence of responsibility to protect is a result of persistent effort

[670] N Wheeler, *op cit, p.560.*
[671] See 2001 ICISS Report, *op cit.*

toresolve fundamental contradictions in relation to humanitarian concerns on one hand and state sovereignty doctrine that entails non-intervention in the domestic jurisdiction of state(s) on the other. Hence, responsibility to protect is often viewed as a modification to the concept of humanitarian intervention which entails armed intervention consequent upon humanitarian concerns intended to ensure the protection of vulnerable civilian populations. However, the concept of responsibility to protect is distinct from the concept of humanitarian intervention in that the dictates of responsibility to protect permit the use of force as a last resort where diplomatic and other peaceful means fail to achieve the human protection purpose. In essence under the concept of responsibility to protect military intervention is not a first line of action in the face of catastrophic humanitarian crisis and that military intervention is only activated where a state is unwilling or unable to protect its own citizens. The application of responsibility to protect unlike humanitarian intervention is limited to the four atrocity crimes articulated above and does not extend to cover situations of other humanitarian emergencies and disasters. Again, the concept of responsibility to protect places emphasis on the twin responsibility to prevent and rebuild after armed intervention.It further emphasizes on the need to build capacity of states to protect their own citizens from the atrocity crimes. However, humanitarian intervention principle does not focus on capacity building of the sovereign state rather it thrives on forceful intervention within a target state on humanitarian reasons.

Consequently, responsibility to protect is not humanitarian intervention in disguise but incorporates the use of force as a last resort where a state manifestly fail to protect its citizens against the atrocity crimes of genocide, war crimes, crimes against humanity and ethnic cleansing.The link between responsibility to protect, humanitarian intervention and the use of force is connected to the legitimacy and legality question of intervention. However, in the face of distinct principles, states invariably advance, those principles that are in tandem with their own domestic and strategic interests. Hence Badescu opined 'that the different approaches to undertake intervention that arise from giving weight to sovereignty emphasizing the inviolability of territorial domain and from giving weight on the other hand to human rights ultimately endorsing forcible border crossing to avert tremendous state violations.'[672]

[672] C Badescu, *loc cit.*

6.7 The Relationship Between International Humanitarian Law and the Concept of Responsibility to Protect

In evaluating the relationship between international humanitarian law and responsibility to protect, it is paramount to consider first and foremost two basic issues.

The first is the fact that responsibility to protect is not a legally binding principle of international law. However, it derives its tenets and contents from established principles of international law.[673]

Secondly, the scope of responsibility to protect is limited to the protection of vulnerable citizens against atrocity crimes of genocide war crimes, crimes against humanity and ethnic cleansing. Thus, by its nature and application, the concept of responsibility to protect is narrow in scope and cannot translate into a replacement for the substantive and established protections guaranteed under international humanitarian law.

Having said these, there are similarities and differences inherent in the principles of responsibility to protect and international humanitarian law. However, the principles of responsibility to protect and international humanitarian law in our considered opinion have a fundamental role to play in safeguarding harpless civilians within a target state. Thus, the understanding of the relationship between responsibility to protect and international humanitarian law would in our thinking galvanize global efforts towards the protection of vulnerable populations against conscience-shocking situations.

The similarities between the concept of responsibility to protect and international humanitarian law are inherent in their implementation and scope of application. This is so because, most of the activities required for states to accomplish their obligations to respect and ensure respect for laws of armed conflict are also the same activities needed to avert the commission of the four atrocity crimes under the responsibility to protect. Similarly, the several measures undertaken in this regard to ensure respect for international humanitarian law coincide with the stipulations under the Geneva

[673] For instance the Convention for the Prevention and Punishment of Genocide 1948; the four Geneva Conventions 1949 and their Additional Protocols and the Rome Statute, 1998 that established the International Criminal Court.

Conventions.[674] However, a wide-range of differences exist between the scope and application of the concept of responsibility to protect and international humanitarian law.

Firstly, international humanitarian law is wider in scope and application compared to the concept of responsibility to protect. International humanitarian law embraces several rules and regulations that regulate the conduct of armed conflict which may not necessarily be war crimes. However, the responsibility to protect concept on its part focuses essentially on genocide and crimes against humanity which sometimes are crimes that can be committed within or outside the purview of armed conflict, thus excluding the application of international humanitarian law.

It is important to emphasize here that the application of international humanitarian law and the established international law principles prohibiting atrocity crimes embedded in the concept of responsibility to protect cannot be placed on suspension at anytime unlike certain human rights protection that can be placed on suspension during period of public emergency. Similarly, the principles of international humanitarian law permits undertaking multilateral action in collaboration with the United Nations and in consonance with the stipulations of the UN Charter in the event of grave breaches of the provisions of the Geneva Conventions or Additional Protocol 1. In the same vein, the principles of responsibility to protect also permit multilateral action in the face of the commission of genocidal killings, war crimes, crimes against humanity and ethnic cleansing albeit under the auspices of the UN Security Council.

International humanitarian law creates rules for the conduct of armed conflict and is not concerned with the rationale behind the commencement of hostilities. But the concept of responsibility to protect posit that the international community has a responsibility to protect populations from atrocity crimes according to which it establishes the criteria for undertaking military intervention.Furthermore, international humanitarian law concerns itself with elaborate protection mechanisms regulating the conduct of hostilities, particularly matters dealing with targeting decisions and precautions in armed conflict. On its part, the concept of responsibility to protect narrowly focuses on prevention and protection against the atrocity crimes enunciated under it. Most importantly, there is no established guideline on how this prevention and

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

protection is to be undertaken, although the UN Secretary General sometime in the year 2009 in its report to the UN General Assembly seemed to suggest an implementation framework for responsibility to protest under his three pillar evaluation of the content of responsibility to protect.[675]

Under the tenets of international humanitarian law, states are required to search for and prosecute the perpetrators of war crimes. However, the concept of responsibility to protect is yet to attain the status of a legally binding principle of international law andthere is no stipulation as to the prosecution and punishment of perpetrators of heinous crimes. Rather, responsibility to protect depends on established international law as encompassed in the Genocide Convention, Geneva Conventions, the Rome Statute and international humanitarian law as the legal basis to undertake the prevention and punishment of perpetrators of responsibility to protect crimes.

The distinction between international humanitarian law and responsibility to protect further shows that the former stipulates numerous responsibilities and guidelines on the conduct of state and non-state actors during belligerency while the latter does not make provision on how states and international community should undertake their responsibility to protect vulnerable civilians other than within the framework of the UN Charter.Overall, international humanitarian law is wider in scope and application compared to the responsibility to protect. Moreso, international humanitarian law seek to impose limitations on the consequences of armed conflict upon humanity and objects, and further protect civilians and those no longer involved in the conduct of hostilities by restrictions on the means and methods of warfare.[676] Thus, irrespective of the similarities and differences between international humanitarian law and the responsibility to protect concept, both ultimately seek the limitation of human sufferings and protection of vulnerable populations, in the advancement of human rights promotion and protection.

6.8 The Position of the Permanent Members of United Nations Security Council on the Concept of Responsibility to Protect

[675] See UN Secretary General, 'Implementing the Responsibility to Protect Report, 2009; UN Doc A/63/671, para. 22.

[676] International Humanitarian Law is also referred to as the law of armed conflict or law of war.

As earlier identified, the concept of responsibility to protect does not constitute a legally binding principle of international law. Although the recent developments regarding it since its emergence in 2001 seems to be showing potentials of a globally recognized norm attaining the force of law in the nearest future. The eventual crystallization of responsibility to protect principle into a binding rule of international law would to a large extent depend on the disposition and concurrence of the five permanent members of the UN Security Council,hence a consideration of the position of the five permanent members of the UNSecurity Council in relation to the application of the tenets of responsibility to protect.

6.8.1 United States of America

The United States of America does not have a fixed position in relation to the application of the tenets of responsibility to protect as its response to the responsibility to protect was dependent on the particular administration in place.[677] The Bill Clinton led administration was the first to articulate the United States of America's official response concerning the responsibility to protect principle to the effect that the United States of America cannot possibly react to all humanitarian catastrophe and gross human rights violations, except that it will deploy its power and good offices where doing so would make a difference and the costs are acceptable.[678]

On the contrary, the subsequent George Bush administration expressed doubts as to the application of the responsibility to protect principle even though it did not explicitly reject the concept but in all demonstrated reluctance to the implementation of the responsibility to protect when the occasion demands.[679]To further demonstrate the inconsistent response of the United States of America to the application of the responsibility to protect, the Barack Obama led administration has not clearly established its position regarding the application of the responsibility to protect. For instance, in a

[677]This is unlike France and United kingdom that explicitly maintain affirmative support for application of responsibility to protect in deserving cases.
[678] C O' Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) 24 *Duke Journal of Comparative International Law,* 583.
[679]*Ibid.*

UN speech, President Obama contended that the international community must meaningfully enforce a prohibition whose organs are older than the United Nations itself. The US government called for collective action by the international community against Assad's regime for the alleged use of chemical weapons on its vulnerable populations which incidentally was frustrated by other states, particularly Russia and China. It was this manifest failure on the part of the Syrian State and lack of consensus on the international response to the horrendous humanitarian crisis in Syria that prompted the US government seeking to react to the Syrian worsening humanitarian disaster even without the authorization of the UN Security Council.Accordingly, President Obama expressed the view that given Security Council paralysis on this issue, if we are serious about upholding a ban on chemical weapon use, then an international response is required and that will not come through Security Council action.[680]However, it is worthy of note that the United States government championing intervention by the international community to halt the massive killings and gross human rights violations occurring in Syria did not anchor such efforts on the basis of the responsibility to protect principle.[681]Therefore, as it stands today, there is no clear cut support or opposition of the responsibility to protect principle by the United States of America and this, to our mind, is not helpful to the substantive development of the responsibility to protect tenets.

6.8.2 The United Kingdom

Unlike the United States of America, the United Kingdom maintains a clear-cut support for the application of the responsibility to protect vulnerable populations in the face of humanitarian emergences as a legal basis for armed intervention in deserving situations whether undertaken with or without the authorization of the UN Security Council.[682] The position of the United Kingdom concerning responsibility to protect principle was manifested even before its emergence in 2001, when the UK stoutly defended NATO's intervention in Kosovo as a legal humanitarian intervention. The UK in its contribution to intervention opined that the action being taken was legal and it was

[680] See the President's News Conference in St. Petersburg, Russia (2013) Daily Comp. Pres. Doc 606, delivered 6 September, 2013.
[681] C O' Donnell, *op cit,* p.574.
[682]This position is clearly demonstrated in the official support for international community intervention in Syria on the basis of humanitarian concerns according to the tenets of responsibility to protect.

justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. There was convincing evidence that such a catastrophe was imminent.[683] In a clear demonstration of its support for the application of the tenets of responsibility to protect in cases of supreme humanitarian emergency, the United Kingdom vigorously called for the international community's response to protect the Syrian populations in the wake of chemical weapon attack that occurred there. Unfortunately, the needed reaction to the worsening situation in Syria never came till this very moment. However, what is significant is the standpoint of the British government in relation to the responsibility to protect. For instance, the basis of the armed intervention canvassed by the British government in Syria completely reflected the tenets and dictates of responsibility to protect. To this end, the British government enumerated the basis of the intervention in Syria to include convincing evidence, generally acceptable to the international community for a supreme humanitarian emergency that required immediate and urgent relief and that it was manifestly clear that there was no practicable alternative to forceful intervention to protect and save the vulnerable populations of Syria.[684] Such position of support for the application of the responsibility to protect in deserving cases as in Syria would impact tremendously in our considered opinion to substantive legalization of the principle of responsibility to protect.

6.8.3 Russia

Generally Russia has been a strong advocate of the non-intervention doctrine as guaranteed by the UN Charter. Thus, Russia has often acted as a bulwark of the traditional Westphalian order anchored on the Charter regime. Clearly, since the emergence of the concept of responsibility to protect, Russia does not seem to give its backing to the concept albeit sometimes support humanitarian intervention grounded on the authorization of the UN Security Council.[685] Perhaps, that necessitated Russia's rejection of the call by the United States of America to undertake armed intervention in Syria without UN Security Council authorization. The Russian government contended that any intervention in Syria as canvassed would amount to act of aggression that is

[683] C O' Donnell, *opcit*, p.574.
[684] *Ibid*, p.575.
[685] C O' Donnell, *opcit*, pp. 574-576.

prohibited by the UN Charter. The lack of support by Russia for application of the responsibility to protect was made manifest when the UN Security Council re-affirmed the responsibility to protect concept through resolution 1674. Although in most of the deliberations leading to the subsequent adoption and re-affirmation of the application of the responsibility to protect in deserving cases of humanitarian crises, Russia did not exercise its veto to frustrate its application. However, it is hoped that in the nearest future Russia as a major player in the UN Security Council decision making process would clearly state its support for the responsibility to protect to enhance the possibility of its substantive codification.

6.8.4 China

The position of China on the application of the concept of responsibility to protect is very explicit. China does not support the tenets of responsibility to protect and clearly rejected its conceptualization to derogate from the absolute control dictate of state sovereignty preserved by the United Nations Charter.[686] Accordingly, during the deliberations of the United Nations General Assembly in 2009 on the concept of responsibility to protect, China reiterated its official position thus, 'the implementation of responsibility to protect should not contravene the principle of state sovereignty and the principle of non-interference of internal affairs.'[687] In further rejection of the concept of responsibility to protect, China maintained that the basis of the application of the concept is unclear. For instance, sequel to the call for application of responsibility to protect in Syria by the international community, China posited that such action would attract dire implications for regional security and constitute a breach on the governing norms of international relations. Therefore, clearly, China is not in support of the application of the responsibility to protect even in very glaring and deserving cases as the instant situation in Syria indicates.

6.8.5 France

[686] *Ibid*, p.576.

[687] Liu Zhenmin, Chinese Ambassador to the United Nations Statement at the Plenary Session of the General Assembly on the Question of Responsibility to Protect delivered on 24 July 2005.

The position of France in relation to the application of the responsibility to protect concept is manifestly explicit. France is a major proponent of a robust and concrete application of the tenets of responsibility to protect in deserving cases of humanitarian crisis.[688] The supports of France for the concept is rooted on the fact that the concept of responsibility to protect does not only call for intervention during the worsening period of humanitarian catastrophe to halt atrocity crimes, it also embraces preventive measures to avert the occurrence of humanitarian crisis and its attendant commission of atrocity crimes of genocide, war crimes, crimes against humanity and ethnic cleansing. It is in furtherance of its solid support for the concept in context that France is one of the advocates calling for international community intervention in Syria pursuant to the tenets of responsibility to protect. To further demonstrate its support for the application of the responsibility to protect principles in deserving cases, France championed a UN-sanctioned military intervention in Central African Republic to avert the worsening retaliatory attacks between Christian and Moslem populations. Being also a key player in the UN Security Council decision making process, the formidable backing shown by France in the application of the responsibility to protect concept would further in no small measure galvanize efforts towards substantive codification of the concept of responsibility to protect.

However, it is instructive to note that the conceptualization and application of responsibility to protect remains controversial among the permanent members of the UN Security Council. Correspondingly, the developing countries are also sharply divided along the line of states that support the Westphalian notion of state sovereignty and those states advocating for humanitarian intervention by the international community when the situation requires it.[689]

6.9 Responsibility to Protect in Practice

The inability of the United Nations Security Council to undertake intervention in the face of humanitarian disasters that greeted Rwanda, Srebrenica and Kosovo have

[688] C O' Donnell, *opcit*, pp. 574-576.

[689] For further reading on States position in relation to responsibility to protect see World Federalist Movement, Institute for Global Policy, State-by-State Position on the Responsibility to Protect (2005).Available at http://www.responsibilitytoprotect.org/files/charts_R2P_11August.pdf. Accessed on 10 November 2015.

been largely described as a failure on the part of the United Nations to uphold its fundamental objective of the promotion and protection of human rights. Consequently, Kofi Annan, the erstwhile UN Secretary-General Challenged the membership of the United Nations to consider the horrendous human rights violations that would have been averted if humanitarian intervention was undertaken in the circumstances, but also to consider the instability that would be occasioned where more interventions were undertaken without UNSecurity Council authorization as illustrated in the military intervention in Kosovo. It was the rapid response of the international community to this daunting challenge to reconcile human rights protection with the Charter-preserved doctrine of state sovereignty that consequently led to the birth of the concept of responsibility to protect according to which it defined the conceptualization of state sovereignty to embrace state responsibility for the protection of its vulnerable populations.[690] In furtherance of the practice of responsibility to protect in contemporary international relations, the UN Security Council endorsed and re-affirmed the implementation of responsibility to protect inspite of reservations in 2006 and 2009 respectively.[691] We shall now consider the practical implementation of responsibility to protect in a number of conflict situations within the target states.

6.9.1 Responsibility to Protect Practice in Darfur, Sudan

The worsening internal armed conflict in Darfur persisted which eventually attracted the UN Security Council involvement in 2004. In the deliberations of the UN Security Council regarding the humanitarian crisis in Darfur, members stressed Sudan's responsibility to protect its own citizens thereby making Darfur in Sudan the first sovereign state where the UN Security Council specifically adopted the language of responsibility to protect. However, the Security Council remained sharply divided on whether it had a subsidiary responsibility to protect the Sudanese vulnerable populations where the Sudanese government was manifestly unwilling or unable to undertake such responsibility. Thus, for the first time in the annals of the UN Security Council responsibility to protect language was utilized in the preamble to the UN Security

[690] The evolution and development of the concept of responsibility to protect have been exhaustively considered previously in the course of this work, we therefore say no more on it at this stage.
[691] See United Nations Security Council Resolutions 1674 and 1894.

Council twin resolutions that reflected reasonable agreement with the concept as redefining sovereignty of states to embrace a responsibility to protect their own citizens.[692] Thus, the UN Security Council Resolution states that: 'Recalling that the Sudanese government bears the responsibility to protect its population within its territory, to respect human rights and to maintain law and order and that all parties are obliged to respect international humanitarian law.'[693]

It is important to emphasize that prior to adoption of Resolution 1564 during the UN Security Council deliberations,France and Germany were emphatic on the fact that Sudanese government's responsibility to protect its own populations is both a primary responsibility and a sacred obligation. The passage of Resolution 1564 underscores the Security Council resolve to commit sovereign states to accomplish their fundamental responsibility to their own populations.Responsibility to protect was activated in practice regarding the Darfur conflict when UN Security Council mandated for the first time, a United Nations peacekeeping operation in which it clearly stated the responsibility of each United Nations member state to protect its citizens and the International community's responsibility to assist in this if the state could not provide for such protection alone.[694]Thus, the United Nations had a moral obligation and a responsibility to undertake intervention in Darfur to safeguard its vulnerable populations. Remarkable as this resolution of the UN Security Council in redefining state sovereignty to embrace responsibility to protect may seem, it is however on record that Russia, China and Qatar abstained from voting in favour of this resolution 1706 to register their objection to the use of responsibility to protect language in the said resolution. On their part, Russia and China emphasized the preservation of the Westphalian doctrine of state sovereignty by the UN Charter which in context prohibited UN Security Council intervention in the internal matters of Sudan. Interestingly, both Russia and China did not exercise their veto powers to frustrate the passage of the resolution which significantly underlines the global recognition of the evolving norm of responsibility to protect.

Regrettably however, inspite of the reflection of responsibility to protect language in UN Security Council resolutions earlier identified, the UN Security Council has not

[692] See United Nations Security Council Resolutions 1666 and 1566.
[693] *Ibid*, Resolution 1564.
[694] United Nations Security Council Resolution 1706.

categorically authorized humanitarian intervention in Darfur. This is against the backdrop that Security Council members could not reach a consensus on bridging the dichotomy between state sovereignty preservation and human rights protection.

6.9.2 Responsibility to Protect Practice in Kenya

The aftermath of the presidential election held in Kenya on 27th December, 2007 resulted into an orgy of ethnic violence occasioned by disputed election results that saw the declaration of Mwai Kibaki as the winner of the presidential election and subsequently sworn in.[695] This development activated large scale violence with the attendant mass killings and displacement of large number of vulnerable civilians. More disturbing in the ensuing conflict was the ethnically targeted killings of the supporters of the two main political parties. In the face of the worsening humanitarian crisis prevalent in Kenya at the time, the need for international community response became inevitable. Thus, France in January, 2008 appealed to the UN Security Council to undertake intervention in Kenya on the basis of responsibility to protect to avert a repeat of the unfortunate Rwandan massacre and ethnic cleansing.[696]The consequence of this appeal was the mediation by the erstwhile UN Secretary General, Kofi Annan that led to the power-sharing agreement signed on 28th February, 2008 according to which Mwai Kibaki was named President and Raila Odinga named Prime Minister respectively.

Thus, the application of the true tenets of responsibility to protect was effectively marshaled in relation to the Kenya situation in the immediate response of the international community that halted the dangerous dimension the conflict in Kenya was beginning to assume.

6.9.3 Responsibility to Protect Practice in Libya

Sequel to the large-scale and systematic attack by the Libyan government against its vulnerable citizens and in the wake of the avowed determination of the Muammar Gaddafi led administration to subject the Libyan populations to conscience-shocking catastrophe, the UN Security Council for the first time authorized forceful intervention on

[695]See Global Centre for the Responsibility to Protect Report, December, 2013.
[696]*Ibid.*

the basis of the concept of responsibility to protect.[697] Thus, the UN Security Council without reservations anchored its authorization to undertake armed intervention in Libya pursuant to the tenets of responsibility to protect.[698] Accordingly, the UN Security Council declared that, the atrocities perpetrated by the government of strife – turn Libya constitutes gross and systematic violations of human rights of its population and demanded an end to the violence, recalling the Libyan authorities responsibility to protect its population.

In another resolution, the UN Security Council further demanded an immediate ceasefire in Libya inclusive of the continuing attacks on vulnerable populations which it warned may be tantamount to crimes against humanity.[699] The UN Security Council in furtherance of its express authorization of military intervention in Libya mandated member states of the United Nations to take all necessary measures to protect Libyan populations against ceaseless attack masterminded by the Libyan regime. Following the UN Security Council authorization, the North Atlantic Treaty Organization (NATO) began military intervention in Libya that eventually led to a regime change. However, NATO was criticized from several quarters on the basis of the regime change of its operation which is not within the contemplation of the concept of responsibility to protect. Perhaps that explains why inspite of numerous efforts on the part of United States of America and United Kingdom to urge the UN Security Council to pass a resolution in order to invoke the principle of responsibility to protect as a justification for military intervention in Syrian civil war have been frustrated by Russia and China in the exercise of their veto powers to reject any forceful intervention in Syria. In this context both Russian and Chinese governments stated that the concept of responsibility to protect had been abused by the United States of America as a guise for regime change, specifically in relation to Libya hence, it would be doubtful whether they would give their support to any UN Security Council resolution invoking responsibility to protect.

In justifying the implementation of responsibility to protect in the face of Gaddafi's regime use of overwhelming force against its vulnerable populations and armed opposition alike, the UN Secretary General, Ban Ki moon framed the situation as

[697] World Summit Outcome Document (UN/A/RES/60/1, October 2005).
[698] See UN Security Council Resolution 1970 adopted on 26 February, 2011.
[699] See also UN Security Council Resolution 1973 adopted on 17 March, 2011.

requiring responsibility to protect thus, 'when a state manifestly fails to protect its population from serious international crimes, the international community has the responsibility to step in and take protective action in a collective, timely and decisivemanner… the heads of state and government at the 2005 World Summit pledged to protect populations by preventing genocide, war crimes, ethnic cleansing and crimes against humanity as well as their incitement. The challenge for us now is how to provide real protection and do all we can to halt the ongoing violence.

To further demonstrate the responsibility to protect in practice, France unequivocally stated that the unanimous adoption of Resolution 1970 emphasized the responsibility of each state to protect its own citizens and when the state reneges on this responsibility then the international community undertake the responsibility to protect the vulnerable populations as clearly illustrated by the military intervention in Libya pursuant to the authorization by the UN Security Council, notwithstanding the criticisms that trailed the intervention thereafter.

In essence both Resolutions 1970 and 1973 of the UN Security Council centred on the responsibility of the Libyan government to protect its own populations. However, it must be reiterated that while adopting both resolutions emphasis was not placed on the second ambit of the responsibility of the international community to undertake such responsibility where the state fails.

6.9.4 Responsibility to Protect Practice in Cote d'Ivoire

The post-election violence in Cote d'Ivoire that resulted in widespread and systematic human rights violations attracted international attention. Both supporters of the formerPresident, Laurent Gbagbo and President Quattara committed gross human rights violations against the vulnerable populations of Cote d'Ivoire which spanned through late 2010 to early 2011. In response to the deteriorating humanitarian crisis prevailing at the time in Cote d'Ivoire, the UN Security Council in condemning the grave breaches of human rights that occurred adopted Resolution 1975 according to which it clearly stated 'the primary responsibility of each state to protect civilians and called for the immediate transfer of power to President Quattarra, the winner of the Presidential election in Cote d'Ivoire. The UN Security Council further reiterated that the United

Nations Operations in Cote d'Ivoire could deploy, all necessary means to protect life and property. In further support of commitment by the international community, the United Nations Operation in Cote d'Ivoire commenced military action to protect the citizens of Cote d'Ivoire against continued atrocities.[700] The undertaking of this military operation aided the dislodgment of President Gbagbo from power and his subsequent arrest and onward transmission to the International Criminal Court to face charges of crimes against humanity.

6.9.5 Responsibility to Protect in Practice in Central African Republic

The aftermath of the *Coupd'état*in CAR resulted in the commission of atrocity crimes by both sides of the warring faction that eventually deteriorated into serious orgy of violence and the continued widespread and systematic human rights violations. It was in response to the worsening situation in Central African Republic (CAR) that the UN Security Council adopted Resolution 2127 according to which it articulated that the National Transitional Council (NTC) has the primary responsibility to protect the vulnerable populations in CAR.[701] Consequently the said Resolution conferred the combination of the African Union and French forces with the powers under Chapter VII of the UN Charter to protect the CAR's populations and restore Security in the war-turn state.

Initially, the international community response to the crisis in CAR was essentially diplomatic. The failure of this diplomatic moves and the African Union intervention necessitated the adoption of Resolution 2121 by the United Nations.[702] It is instructive to state here that France was directly involved in the international response to CAR conflict situation in which it sought and obtained UN Security Council authorization vide Resolution 2127 which authorized French troops in collaboration with others to undertake all necessary measures to protect civilians and restore security in CAR. The responsibility to protect in practice analyzed above seems to suggest that it has

[700] See UNSC Resolution 1975, available at http://www.un.org/en/peacekeeping/missions/unoci/elections.shtml. Accessed 12 November 2015.

[701] See UNSC Resolution 2127 adopted on 5th December, 2013, available at http://www.un.org/en/ga/search/view_doc.asp.symbol?S/RES/2127. Accessed 12 Novembe 2015.

[702] Adopted 10 October 2013, Available at http://www.un.org/en/ga/search/view_doc.asp.symbol_S/RES/2121. Accessed 12 November 2015.

attained some level of legal efficacy when considered against the authorization of its implementation through the instrumentality of the UN Security Council Resolutions. However, the application of responsibility to protect continues to generate criticisms. For instance, it has been contended that the proponents of the responsibility to protect have never advocated for its application in Gaza to protect the Palestinians against Israel missiles.

6.10 The Potential Emergence of Responsibility to Protect as a Rule of Customary International Law

Fundamentally, international law is anchored on treaties and customary international law. The evolution and development of the concept of responsibility to protect has not in any way been established as a treaty, convention or rule of customary international law. However, the content and tenets of the concept of responsibility to protect embraced established principles of international law founded mostly on covenants and conventions of international character.[703]

Since the emergence of the concept in context in 2001 on the international arena, it has attracted widespread acceptance and global recognition notwithstanding the reservation to its implementation procedures. But what is clear regarding the concept of responsibility to protect is in the nature of its rapid development and the acceptance of its application in situations of humanitarian crises previously considered. What this portends, following its endorsement and subsequent re-affirmation by the United Nations, is indicative of its potential to becoming a rule of customary international law.[704] However, for an evolving norm such as the responsibility to protect to attain the status of customary international law, it must satisfy the requirements constituting the two

[703] The tenets of responsibility to protect seeks protection against atrocity crimes and gross human rights violations which is the hallmark Genocide Convention and Geneva Conventions respectively.

[704] The Concept of responsibility to protect in the aftermath of the 2005 World Summit Outcome Document was endorsed by the United Nations General Assembly and re-affirmed by the United Nations Security council in 2006 and 2009 respectively.

components of customary international law, namely state practice and *opnio juris.*[705] Consequently, a norm is shown to have attained the status of customary international law by a general and consistent practice of states followed by them from a sense of legal obligation.[706] In the determination of state practice, the conduct of states with the passage of time becomes relevant.Such conduct of states may be their voting patterns over the years in international organizations, like the UN, their official statements and positions regarding the application of such norms. Furthermore, such state practice must manifest patterns of uniformity and consistency. However for the duration of such state practice to crystalize into custom would be dependent on the circumstances. On the other hand *opinio juris* element of customary international law is a reflection of what informed the basis of such conduct of the states. It is generally a consequence of a sense of legal obligation and not merely one of convenience and courtesy.[707] But it is not in all circumstances that states by their conduct expressly manifest their position concerning the application of an international norm. Thus, a legal sense of obligation imposed on the states can be inferred from the surrounding circumstances of their conduct in approval or disapproval of the norm in question.

Under the responsibility to protect principle, the sole authority for approving military action as a last resort effort to prevent or halt massive human rights violations and commission of atrocity crimes is the UN Security Council. For instance, the recent trends so far have shown UN Security Council-sanctioned application of responsibility to protect in conflict situations in Darfur, Kenya, Libya, Cote d'Ivoire and Central African Republic notwithstanding the fact that UN Security Council intervention is limited to threats to international peace and security. In authorizing the interventions in the conflict situations referred, UN Security Council was explicit in its reference to the concept of responsibility to protect as the basis of intervention. These developments are indicative of the potential emergence of responsibility to protect as a rule of customary international law.

[705] C O'Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) Vol 24 *Duke Journal of Comparative and International Law*, 557.
[706] *Ibid.*
[707] *Ibid.*

Thus, very limited number of states currently challenged the competence of the UN Security Council to undertake military action within a target state on humanitarian grounds. Interestingly, several states that hitherto object to the application of humanitarian intervention are now inclined and supportive of armed interventions championed by the UN Security Council in consideration of humanitarian concerns. To illustrate this point, it is important to emphasize that Russia and China who are the key opponents of the application of responsibility to protect since its emergence on the global scene were part of the states that endorsed the concept in the World Summit Outcome Document and subsequently abstaining from voting in its favour or exercise their veto powers in rejection of its application in the conflict situations that have been considered in this work. Although Russia appears to be in support of a UN Security Council-sanctioned intervention in the face of horrendous humanitarian crises, same is not true of China that strenuously cling to the old Westphalian doctrine of state sovereignty that is expressly preserved by the UN Charter.

In all these and following the rapid emerging practices of society of states manifesting a sense of responsibility to respond to the commission of atrocities, it is our firm believe that the responsibility to protect will slowly but surely crystallize into customary international law in the nearest future.[708]

6.11 Responsibility to Protect as a Potential Instrument to Harmonize Humanitarian Intervention and State Sovereignty Dichotomy

The proper articulation of the tenets of responsibility to protect can provide the needed framework for states to avert horrendous atrocities. Thus, the last resort tenet of military intervention should be incorporated into the UN Security Council's capacity for the authorization of humanitarian intervention in deserving cases. This would ultimately provide a legal instrument to avert or halt atrocity crimes instead of the convenient justification of non-compliance with the established principles of international law.The establishment of the United Nations Organization was necessitated by the recoils of war and the horrors of genocidal massacres. As a result of this horrendous experience, the

[708] For further reading see A Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London: Routledge, 2010) pp. 68-70.

international community vowed to avert the occurrence of these atrocities vide the instrumentality of multilateral cooperation.[709]Consequently, the UN Security Council is the arrow-head of this avowed commitment to prevent the atrocities that occurred prior to the creation of the UN from happening again. Thus, the implementation of the responsibility to protect principle that succinctly articulates these objectives should take the centre stage in the decision making process of the UN Security Council. Although, the application of the concept of responsibility to protect continues to generate criticisms according to which the UN Charter guaranteed state sovereignty doctrine does not admit of unwarranted incursion into internal matters of a state notwithstanding the atrocities committed within its territorial domain, it must be emphasized that absolute state sovereignty has never existed in its true sense.Under the dictates of responsibility to protect, undertaking humanitarian intervention becomes activated where a state has shown manifest failure to protect its own population. It is only logical that, a state that has failed to undertake the fundamental obligation cannot be heard to complain of unwarranted incursion into its domestic jurisdiction.

Again, the application of the responsibility to protect has been criticized to be easily manipulated presenting a platform for states to advance and promote their strategic interests and a disguise for western colonialism. However, these doubts and suspicions are further mitigated by the robust criteria required to be satisfied in order to undertake humanitarian intervention under the platform of the responsibility to protect concept.Essentially, the eventual substantive legalization of the concept of responsibility to protect would present a veritable tool to harmonize the application and practice of state sovereignty vis-a-vis humanitarian intervention.

6.12 The Search for Consensus

The UN Charter was issued in the name of the peoples and not the governments of sovereign states that constitute the United Nations. The States are not at liberty to trample on their peoples' human rights and dignity in the name of the exercise of

[709] Charter of the United Nations Preamble & Article 1.

sovereign authority.[710] Thus, state sovereignty necessarily encompasses responsibility and not just absolute control.

The responsibility of the state to protect its populations from senseless killings and grave human right breaches was the most fundamental of all the responsibilities imposed on a state by virtue of the doctrine of state sovereignty. It necessarily follows that if state sovereignty is to be less sacrosanct creating clear requirements for justifiable interventions become imperative.Thus, where the UNSC or the state fails to discharge its responsibility to protect vulnerable populations within a target state in a conscience-shocking situation crying out for action, then forceful intervention for human protection purposes by the international community may be desired and warranted.

In the search for consensus to reconcile the application of humanitarian intervention within the practice of state sovereignty doctrine, the poser here is to ask where lies the most harm? Is it in the destruction to the international order where the authorization of the UNSC is not sought in accordance with the Charter stipulation or in the destruction to that order of human beings that are massacred in the face of inaction by the UNSC? We find some explanations to this poser in the opinion of ICISS to the effect that, we need to do better, we still too often do too little to prevent or limit mass killings, too little genuinely humanitarian intervention and too much of inhumanitarian non-intervention.[711]Consequently, there is a general consensus on the UN as the preferred global platform to authorize humanitarian intervention. However, the limitations of the UN cannot be ruled out in addressing conflicts that snowball into emergencies and timely intervention in the face of obvious humanitarian crises.

Therefore, to attain consensus there is the ultimate need to strengthen the norm of responsibility to protect as a legal and legitimate basis to undertake humanitarian intervention in intra-state conflicts. It is important to emphasize that majority of contemporary armed conflicts are intra-state. Thus, a paradigm shift from the strict adherence to the non-intervention doctrine is fundamental to the sustenance of international peace and security.

[710] UN Charter, Article 3, 55 & 56. The UN is enjoined by these stipulations to promote the universal respect and protection of human rights.

[711] International Commission on Intervention and State Sovereignty 'The Responsibility to Protect Report' 2001, pp. 54-55. Available at http://www.ICISS.ca/commissionreport.pdf. Accessed on 8 June 2015.

Again, the collateral damage occasioned by the risks of inaction need to be juxtaposed against taking action in the face of extreme humanitarian emergencies. Hence, coercive intervention may not necessarily constitute a last resort measures but may be an early resort measure for human protection purposes. The significant impact of inaction by the UNSC in situations of intra-state conflicts with the attendant humanitarian crises have a telling effect on economies, international relations and societal institutions as demonstrated by the aftermath of the Somalian and Rwandan conflicts previously considered.

In addition, the UNSC acting on the tenets of responsibility to protect is to be the preferred authorizing body but not the exclusive depository of authorization over undertaking humanitarian intervention. Consequently, regional organizations provide a viable alternative with stronger claims to legitimacy to undertake humanitarian intervention instead of unilateral action or *adhoc* multilateral actions of the willing states. Humanitarian intervention is clearly a reflection of the interest of great powers, legal and moral principles. Thus, creating policies, minimum standards and learning from previous practices are significant in the harmonization of both the defence of humanity and the defence of sovereignty. These policy framework and requisite standards find expression and attestation in the tenets of responsibility to protect.

Although pervious humanitarian interventions were undertaken devoid of identifiable guidelines, it is hoped that subsequent humanitarian interventions could, where the international community decide to take action would utilize the responsibility to protect tenets as the clear and enforceable benchmarks for armed intervention. This, in our considered view would considerably limit the double standard approach and manipulation on the part of the intervening states.

Therefore, if humanitarian intervention is to attain general recognition and acceptance, such intervention of necessity must be conducted within internationally accepted framework that draws a clear distinction between intervention on purely humanitarian considerations and the promotion of national strategic interest of the intervener in the guise of humanitarian intervention. Consequently, the decision leading to the conduct of humanitarian intervention in deserving cases must be taken by a globally recognized body that is transparent, representative and acceptable.

The UN fits into this category of a globally recognized institution with the requisite military, economic and diplomatic resources at its disposal to handle international security and human rights protection issues. That is why UN Security Council-sanctioned humanitarian intervention is considered legitimate and legal having been undertaken pursuant to the approval of a representative international institution. In contrast, humanitarian intervention undertaken in contravention of the UN Security Council authorization is generally considered as illegal and the advancement of the national strategic interest of the intervening individual state or coalition of states, generally considered as an unwarranted assault on the application and practice of state sovereignty.

The search for consensus was actually triggered by the erstwhile UN Secretary-General Kofi Annan when he made a passionate appeal to the international community in the aftermath of the genocidal killings and gross human rights violations in Rwanda and Srebrenica respectively which subsequently culminated into the works and contributions of the International Commission on Intervention and State Sovereignty that resulted in the emergence of the concept of responsibility to protect according to which humanitarian intervention was modified that embraced multilateral intervention sanctioned by the UNSC and jettisoned unilateral humanitarian intervention. Thus, the tenets of responsibility to protect presents a robust and progressive doctrine of humanitarian intervention which when keyed into the UN systems would provide at least an internationally recognized and acceptable mechanism for armed intervention on the basis of pure humanitarian concerns.

The moral consensus prevalent in the international community presently dictates that the application of sovereignty of states cannot shield domestic infringements of human rights that contravenes international obligations.[712] It must be emphasized that although human rights protection and state sovereignty constitute fundamental components of the international system, the doctrines of sovereignty of states and non-intervention seem to be fast loosing its grip on its absolute control content in the face of increased international sensibility and expansion of human rights protection under the current international system. In the search for a consensus between both compelling

[712] T Weiss, *Humanitarian Intervention: Ideals in Action* (Cambridge: Policy Press, 2007) p.17.

imperatives, we adopt the fundamental contention of the ICISS report to the effect that with state sovereignty comes the responsibility to protect the state's populations and that the international community has a responsibility to protect these populations when states are unwilling or unable to do so. This work further adopts the basic precautionary principles enunciated by ICISS previously considered to be satisfied before the authorization of the UNSC to approve the conduct of forceful intervention.

Accordingly, the conduct of forceful intervention should be undertaken upon the authorization of the UN Security Council only in the face of clear evidence of happening or threat of happening of grave human rights breaches and atrocities.Admittedly, the emergence and subsequent development of the concept of responsibility to protect has tremendously contributed to building a globally recognized consensus on the subject in context. Thus, in all our analysis so far and the search for consensus, the tenets of responsibility to protect provides a connecting tool that bridges the divide between humanitarian intervention and sovereignty of states.

6.13 Conclusion

The concept of responsibility to protect has evolved with rapid progression, attaining global recognition and acceptance to a large extent in the process. Since its emergence on the international arena following the publication of the ICISS Report in 2001, the responsibility to protect concept has received reasonable consideration by the United Nations. It has been endorsed by the UN General Assembly and subsequently re-affirmed by the UN Security Council. It is noteworthy to emphasize that in a world of global politics and promotion of strategic interests of states in international relations, the process of substantive codification is increasingly difficult. It becomes somewhat remarkable to witness the tremendous transformation of responsibility to protect from an idea to a norm of international recognition. What this development indicates is that a lot more effort is required to prevent and halt the commission of atrocities. Thus, the traditional Westphalian concept of sovereignty of states can no longer hold sway in the face of international protection against gross and systematic human rights violations. Hence the notion that state can use non-intervention doctrine as a shield against external interference in its domestic affairs, it would seem, is now an obsolete preoccupation of

international law. Thus, the trend in contemporary international law suggests that states and the international community respectively have both moral and legal responsibility to prevent the occurrence of atrocities within a target state or react to the occurring atrocities. Although the evolution and development of the concept of responsibility to protect has been remarkable, it must be reiterated that it is not a legal rule of international law. It does not have ascribed to it the requisite state practice and adequate *opinio juris* to crystallize into customary international law. However, the responsibility to protect must be understood to also constitute a norm of international conduct which, with the passage of time, may crystallize into legal rule of international law by the instrumentality of legal codification of its tenets into treaties or ascribed the status of customary international law. The recently endorsed application of the responsibility to protect principle in conflict situations evaluated above indicates the development of responsibility to protect towards a rule of international law.

Thus, further legalization of responsibility to protect as a legal rule of international law would raise the costs on states that perpetrate atrocity crimes or permit their occurrence and facilitate elaborate protection of vulnerable populations against gross and systematic human rights violations. The legal codification of the tenets of responsibility to protect becomes increasingly relevant to provide the needed framework for the protection of vulnerable population who are continually becoming victims of atrocity crimes. Furthermore, the emergence of responsibility to protect made it imperative for states to undertake the protection of their own citizens on the basis of existing principles of international law.Such innovative development of the responsibility to protect concept should re-enforce extant legal instruments, particularly international humanitarian law. Consequently, a better understanding of the relationship between the application of responsibility to protect and international humanitarian law in terms of their similarities and differences would significantly entrench global efforts towards the protection of civilians who are victims of widespread and systematic human rights violations. Undoubtedly, the potentiality of responsibility to protect developing into a more precise legal rule is evident particularly with the increasing attention and endorsement the application of the concept of responsibility to protect is getting under the auspices of the UN Security Council. However, as the development of the normative

imperative of responsibility to protect is unfolding, it would continue to redefine the application of state sovereignty doctrine in international relations.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

Adopting the legal regime of the UN Charter and the resolutions of the UNSC, this dissertation examines the implication of international humanitarian intervention on the application and practice of sovereignty of states in international law.

Firstly, the work examined the general introduction on the subject of discourse which included: the background to the study, statement of the problem, object of the research, scope and research methodology, literature review and organizational layout of the work. Its focus here was on the general overview of the research work, and a consideration and evaluation of the opinions of learned authors and writers on the humanitarian intervention and sovereignty of states dichotomy.

This work essentially focusing on forceful intervention evaluated the UN Charter prohibition against the use of force in international relations enshrined in Article 2(4) and the permissible exceptions, particularly forceful intervention authorized by the UN Security Council under its enforcement powers contained in Chapter VII of the UN Charter to maintain and restore international peace and security. Instances of humanitarian interventions were considered and their implications on the state sovereignty doctrine, whether or not it constituted a violation of the UN Charter preserved doctrine of sovereignty of states that embraced the principle of non-intervention. The apparent dichotomy between humanitarian intervention and state sovereignty reached its crescendo within the context of the North Atlantic Treaty Organization (NATO) forceful intervention in Kosovo. This brought to the fore the legality and legitimacy question of humanitarian intervention. It is explicit from the provisions of the UN Charter that it does not encapsulate the application of humanitarian intervention. What the Charter clearly provides is for the UN Security Council to undertake armed intervention where a conflict situation in the estimation of the UN Security Council amounted to a threat to international peace and security. In most of the instances of humanitarian intervention considered, they were undertaken without the authorization of the UN Security Council-sanctioned intervention following a finding on the basis of Chapter VII of the Charter. The armed intervention in Iraq and Kosovo are

worthy illustration of this. However, criticism often trailed these interventions whether with or without the authorization of the UN Security Council. Perhaps, this is the case because it seemed that pure humanitarian concerns were often not the sole rationale for these armed interventions in context. Furthermore, it must be reiterated that the commission of atrocity crimes and grave breaches of human rights within a target state that resulted in massive cross-border refugee flows can constitute a threat to international peace and security and a major destabilizing factor to the territorial integrity of neighbouring states. One must be reminded here that, it was in contemplation of these factors that necessitated the UN Security Council led intervention in Iraq in 1991 championed by the United States of America and the United Kingdom respectfully.

The dissertation further examined a number of non-forceful interventions by individual states or coalition of states, multilateral agencies and non-governmental organizations (NGOS) and specific emphasis was laid on creating humanitarian corridors within a target state for undertaking humanitarian aid and other emergency relief activities by these entities. These undertakings most often, without the consent of the sovereign state, are not generally considered an affront on the application of state sovereignty. This serves to show that the conception of state sovereignty as an absolute doctrine of non-intervention is descriptively incorrect. Therefore, an increasing acceptance of humanitarian intervention would not also derogate from the application of state sovereignty, rather it would shift the focus on expected and permitted conduct of states. This, non-fulfillment of expected state protection of its own populations, particularly resulting in cross borders refugee flows may necessitate a justifiable self-defence involving forceful intervention by the neighboring state(s) who are saddled with the burden and the attendant threats of the refugee overflows. Although forceful intervention on the basis of humanitarian concerns at least has arguably altered and may continue to alter the doctrine of sovereignty of states, its application cannot be considered as an unwarranted incursion and violation of state sovereignty especially in the face of genocide, war crimes, crimes against humanity, ethnic cleansing and gross human rights violations occurring within a sovereign state that callously cling to the principle of non-intervention preserved by the UN Charter as a shield.

It must be pointed out that since the creation of the UN Charter, international humanitarian intervention has significantly impacted in reshaping the application of the doctrine of sovereignty of states in contemporary international law particularly in the post-cold war era. Hence the conceptualization and emergence of the responsibility to protect in the aftermath of the NATO military intervention in Kosovo spear-headed principally by the International Commission on Intervention and State Sovereignty. The evolution and rapid development of the concept of responsibility to protect since 2001, its endorsement by the United Nations General Assembly (UNGA) consequent upon the 2005 World Summit Outcome Document and its subsequent re-affirmation by the United Nations Security Council (UNSC) has further redefined the application of state sovereignty doctrine. The traditional Westphalian conception of state sovereignty is gradually loosing its water-tight postulations of absolute control regarding matters within domestic jurisdiction. In this connect, the concept of responsibility to protect is seen as a modification of the application of humanitarian intervention with emphasis on forceful intervention as a last resort and abhorred unilateral humanitarian intervention and further focuses on three of its vital components of responsibility to prevent, responsibility to react and responsibility to rebuild. It further expanded state sovereignty to embrace responsibility in contrast to the old order of the exercise of absolute control. It placed emphasis on primary responsibility of states to protect their own citizens and where state exhibit manifest failure to undertake this responsibility, then the international community in exercise of its secondary responsibility can undertake to protect such vulnerable populations within the sovereign state(s).

The global recognition accorded the concept of responsibility to protect and the acceptance of its application by the UN Security Council in conflict situations as illustrated in the cases of Darfur, Kenya, Libya, Cote d'Ivoire and Central African Republic notwithstanding certain reservations has led to the questioning of the Charter provision concerning the prohibition against the use of force and the non-intervention doctrine. This evolving norm of international character predicated on the responsibility to protect vulnerable populations has immensely redefined the application and practice of state sovereignty in current international relations. This development together with non-forceful interventions by individual state or coalition of states, transnational agencies and

non-governmental organizations have contributed tremendously to the prevailing changes in meaning and practical expression of the application and practice of state sovereignty.

Evidently, humanitarian intervention, especially the kind undertaken during the post-cold war era eroded the legal basis of a sovereign states and had the tendency of creating the floodgates for internal disorder which in turn could adversely impact on international order together with the fundamental requirements of individuals for a civilized existence. However, it is not in doubt that the global sensibility concerning human rights and their infringements have radically transformed in the past six decades since the establishment of the United Nations Organization and this is a factual development in international relations that cannot be readily dismissed. Hence, the need for making a moral case for the justification of humanitarian intervention in pursuit of justice in contrast to strict application of law bringing into context the legitimacy of humanitarian intervention as distinct from its legality. The moral justification of humanitarian intervention has its necessary corollary in the violation of state sovereignty. Thus, it has been opined that, 'it would be extreme to suggest that sovereignty is absolute to the point of protecting the rights of a state to carry out genocide, massive human rights violations and generally terrorizing the populations.[713]

Notwithstanding this transformed normative context, one cannot completely relegate the sovereign equality of states and non-intervention principle to the background as this constitutes the foundational basis of international relations governed by international law. Therefore, seeking to preserve the delicate balance between these two competing imperatives would require a serious consideration of the decision to undertake intervention in a target state whenever conflict situation arises or is imminent. The mechanism for bridging the gap between humanitarian intervention and sovereignty of state was made readily available in the application of the tenets of responsibility to protect. The dictates of responsibility to protect following the evaluation of its application in deserving cases earlier considered in this work presented a transparent and legitimate framework through which forceful interventions are undertaken on an impartial basis devoid of admixtures of the advancement of the strategic interest of the intervening

[713] C Navar, 'The Origins of the Nation – State' in L Tivey (ed), *The Nations-State: The Formation of Modern Politics* (Oxford: Martin Robertson, 1981) pp. 13-36.

state(s). Hence, the call from several quarters for the reforms and subsequent amendment of the UN Charter to expressly incorporate and stipulate the clear requirements for undertaking humanitarian intervention. However, any reform agenda of the present Charter regime must surely gain the backing of the five permanent members of the UN Security Council to attain realization. This is because any amendment of the UN Charter requires the ratification from the legislatures of all the five permanent members of the UN Security Council[714]. The express provision of humanitarian intervention in the UN Charter pursuant to its amendment would go a long way to bridging the gap between the two normative imperatives in context for the implementation of humanitarian intervention on the basis of the tenets of responsibility to protect in accordance with the just war theory principles.Therefore, the basis of intervention on the ground of humanitarian concerns seem to proceed from this background to the effect that, there must exist gross human rights abuses in the target state, the target state must be unwilling and unable to halt the atrocities and that the intervening states on the basis of multilateral action must have exhausted all pacific remedies commensurate to the urgency of the situation before undertaking forceful intervention of proportionate measures with a reasonable prospect of success.

The United Nations was established following the devastating impact of World War II on humanity and consequent upon the collapse of the League of Nations. With the creation of the United Nations, came the United Nations Charter which proclaimed the sovereign equality of states as the basis for international relations. It preserved the traditional Westphalian doctrine of sovereignty of states according to which states exercise absolute control over matters within their domestic jurisdictions devoid of external interference. Hence, the principle of non-intervention and the prohibition against the use of force were the fundamental principles of international law governing international relations.[715]

However, the increased global sensitivity and recognition of human rights protection saw a gradual shift in the conceptualization of doctrine of state sovereignty. This rapid international recognition of human rights protection against abuses started

[714] ICISS Report, *loccit*.

[715] Corfu Channels (1949) ICJ Reports 35.

with the Universal Declaration of Human Rights in 1948, followed closely by the establishment of the Genocide Convention in 1948 and the Geneva Conventions of 1949 and the subsequent twin human covenants, namely, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Right in 1966 respectively coupled with the subsequent creation of other group and specific human rights instruments of international and regional nomenclature. All these developments served to create an evolving international standard that sought a radical departure from the doctrine of state sovereignty being used as a shield to perpetrate atrocities and gross human rights abuses.

However, the use of forceful intervention on the basis of humanitarian concerns gained momentum in the 1990s. Thus, the post-cold war era experienced a paradigm shift from state centrism to human security and unacceptability of atrocity crimes in the form of genocide, war crimes, crimes against humanity and gross human rights abuses creating the leeway for the state's primary responsibility to protect. Thus, the future of international relations may be determined by the manner in which the controversy between humanitarian intervention and state sovereignty is harmonized. A more transparent, representative and participatory mechanism must be adopted to balance the demand of humanitarian intervention within the context of the application and practice of sovereignty of state. These standards are very significant to ascribe international legitimacy to humanitarian intervention undertaken in the interest and on behalf of the international community. Where such elaborate mechanism for armed intervention is lacking, it raises the suspicion that national strategic interest of the individual state or coalition of states is being advanced in the guise of humanitarian considerations as the basis for intervention.

It is against this background that forceful intervention on the basis of humanitarian concerns must be considered with serious caution. However, the international community cannot afford to remain helpless in the face of conscience-shocking occurrences within a sovereign state and situations of supreme humanitarian emergency as played out in the Rwandan genocide is one deserving international intervention promptly. However, this was not prevented or halted by the concerted effort of the international community in collaboration with the UN Security Council having

failed to respond accordingly. Paradoxically, it is in circumstances like this that the UN Security Council is mandated to protect the causalities of the atrocities and grave human rights breaches, but sadly, the UN Security Council decision making process to sanction armed intervention is often paralyzed by the political exercise of the veto power to blockade any authorized forceful intervention. This often results in inaction on the part of the UN Security Council, thereby further leading to the undertaking of forceful intervention by regional organization as depicted in the NATO military intervention in Kosovo, which brought to the front burner of the international arena, the legality and legitimacy question of humanitarian intervention.

Fortunately, in our considered view, the evolution and subsequent rapid development of the concept of responsibility to protect has presented a veritable framework as a linking tool to bridge the gap and ultimately harmonize the legality and legitimacy connotation of humanitarian intervention. The recent endorsement and affirmation of the tenets of responsibility to protect by the United Nations is a major indication of possibility of the concept evolving into a rule of customary international law in future. The United Nations-sanctioned forceful intervention in Libya, Central African Republic, Cote d'Ivoire *inter alia* on the basis of clear application of the dictates of the responsibility to protect further underscore this point. Essentially, the concept of responsibility to protect when fully enshrined in the UN Charter presents a valuable mechanism for averting gross human rights abuses. Hence, in the event of the occurrence of atrocity crimes and massive human rights violations, the legitimacy and purposes of the United Nations and International law are best achieved when coalition of states undertake humanitarian intervention vide the instrumentality of the United Nations System. Thus, creating a mechanism for action on the reformed United Nations platform would facilitate the responsibility to protect principle to bridge the gap between legitimacy and legality in humanitarian interventions. Harmonizing this extant dichotomy is not only significant for international law and the United Nations System but also for the protection of vulnerable populations against the commission of atrocities and gross human rights abuses.

Consequently, to see to the harmonization of legality and legitimacy of humanitarian intervention, the entire Chapter VII of the present UN Charter requires

amendment to encapsulate stipulation that expressly authorize humanitarian interventions on the basis of the ground-breaking tenets of responsibility to protect. This would render the controversy on the dichotomy between human rights protection and state sovereignty preservation meaningless in recognition of the fact that humanitarian intervention would be morally legitimate and legal according to international law.

7.1.1 Findings

This research work has shown that while attempting to demonstrate the changing notion of state sovereignty from absolute control of matters within domestic jurisdiction to embracing relative sovereignty of states together with state's responsibility to protect its own citizens following the increased global recognition of human rights protection, sovereigntyof state has not in any way lost its relevance as the foundational basis for international relations in contemporary international law. Accordingly, our investigation revealed the followings findings:

This dissertation found out that the right of armed intervention on the basis of humanitarian considerations has not yet crystallized into a rule of customary international law taking into cognizance state practice and *opinio juris* requirements.

Again, our findings specifically revealed that although the state sovereignty principle is no longer absolute but it still remains sacrosanct. Further findings also showed that the UN Security Council has in certain instances determined humanitarian crises as amounting to a threat to international peace and security warranting forceful intervention in the target state pursuant to provisions of the UN Charter.[716]

Following our analysis so far, it is clear that only the UN Security Council possesses the legal grounding to authorize forceful intervention and that right of an individual state or coalition of states to undertake military intervention under whatever guise does not exist in either, substantive international law or as a rule of customary international law even though there is an increased possibility of such a custom emerging.

Speaking of an emerging custom, the World Summit Outcome Document adoption of the tenets of responsibility to protect and its subsequent endorsement and re-affirmation by the UN General Assembly and the UN Security Council respectively

[716] See generally Chapter VII & Article 39 of the UN Charter.

indicated a rapid development of the possible crystallization of responsibility to protect as the new rule of customary international law. Specifically, this development from our findings indicated that most states currently recognize the changing dynamics of sovereignty of states embracing not just absolute control but also responsibility. But curiously, the same states remain firmly rooted to the charter-preserved rules governing international relations in the face of the commission of atrocities in the form of genocide, war crimes, crimes against humanity, ethnic cleansing and horrendous human rights abuses requiring international intervention to avert or halt such humanitarian crises coupled with the standpoint of UN Security Council authorization of such humanitarian intervention.

Our findings also showed that following international trends and development so far, the conceptualization of state sovereignty has manifested a paradigm shift from its absolute connotation to its relative connotation where it becomes a means rather than an end to work for the accomplishment of domestic and international common good and the ultimate objective which is the preservation and protection of the sanctity of the lives of human being. Accordingly, we observed that sovereignty of states is no longer a shield in defence of gross human rights abuses as vividly illustrated in the course of our analysis in this work according to which states have the primary responsibility to protect their own population against atrocities and gross human rights violations manifest failure of which oblige the international community to undertake the protection of these vulnerable population.

We also discovered in the course of our analysis so far that the UN Security Council still retains the sole prerogative to approve the use of force in international relations under the dictates of the responsibility to protect and as such the paralysis dilemma of the UN Security Council decision-making process remains unresolved, particularly in difficult cases as presented in the military intervention in Kosovo previously considered and the current Syrian conflict situation.

Further findings in this investigation also showed that the aggregation of opinion of legal scholars depicted that the UN Security Council has the sole prerogative to approve the authorization of forceful intervention to avert or halt massive violations of internationally recognized human rights. In this context, the consensus among scholars

and writers on the subject examined herein rejected humanitarian intervention undertaken unilaterally by individual state in circumvention of UN Security Council authorization or undertaken by a coalition of states. Of significant note is the agreement among scholars of the possible emergence of customary rule authorizing humanitarian intervention in the nearest future.

Furthermore, it was observed that in reality, considering the United Nations-sanctioned humanitarian interventions,that such interventions are often championed by the powerful states with the requisite military and economic resources. Thus, inspite of lack of legal basis for humanitarian interventions within the contemplation of international law, a number of states have on many instances applied it as a tool of universal governance by undertaking intervention in the domestic jurisdiction of other sovereign states. We have considered some of these instances of humanitarian intervention in the course of this work which revealed that such interventions lacked express legal grounding in the UN Charter.

On the contrary, it was discovered generally that where humanitarian intervention is undertaking with the consent of the target state, it is considered legal and legitimate, in that it does not constitute a sovereignty of state violation. Similarly, our discovery also showed that where humanitarian intervention is undertaken pursuant to the authorization of the UN Security Council, it is also considered legal and legitimate according to which it is not tantamount to sovereignty of states violation.

Again, findings from the evaluation of various instances of humanitarian crisis considered in which armed intervention on humanitarian grounds was put forward as the motive necessitating such intervention turned out ultimately to place humanitarian concerns on a secondary level as the basis for intervention as shown from this investigation has not been even handed. It has been tinkered with by strategic national interests and geopolitics, so much so that there is no clear cut benchmark for determining deserving cases in need of humanitarian intervention.

7.2 Recommendations

It is now clear that humanitarian intervention in circumvention of the UN Security Council authorization does not accord with the stipulations of international law. However, it is doubtful realistically that states would restrain themselves from undertaking armed intervention where there are cogent and compelling moral and political imperatives in the foreseeable future,hence, the necessity for recommendations.We therefore recommend as follows:

1. We recommend to the United Nations General Assembly as did the ICISS the adoption of a declaratory resolution embodying the basic principles of the responsibility to protect and containing four basic elements, namely: an affirmation of the idea of sovereignty as responsibility, an ascertain of the threefold responsibility of the international community of states to prevent, to react and to rebuild when faced with human protection claims in states that are either unable or unwilling to discharge that responsibility to protect.
2. The members of the UN Security Council should consider and seek to reach agreement on a set of guidelines embracing the principles for military intervention to govern their responses to claims for military intervention for human protection purposes. Thus, non-state actors in the rank of civil societies and non-government organization should promptly report situations of extreme humanitarian emergency to the proposed Global Humanitarian Council (GHC) for consideration and decisive action. Upon receipt of such report, the GHC should commenced investigation within fourteen days under the auspices of a 10-man High Level Panel. Where the veracity of the report is ascertained, the GHC by vote of 7 out ofits 10 permanent members should authorize intervention to halt the atrocities being committed within the target state. However, when the validity of the atrocities have been confirmed and established, the use of veto power should not be entertained to circumvent the authorization of humanitarian intervention. This suggested guideline can be carefully worded into the suggested reforms of the UN Charter.
3. That regional and sub-regional organization be seen as having legitimacy both to authorize and organize with the proviso that the authorization of the UN be sought subsequently where necessary.

4. It is further recommended that emphasis should be placed more upon the prevention of the situations of supreme humanitarian emergency from occurring. Thus, rapid and radical effort should be galvanized towards international responsibility to prevent commission of atrocities and responsibility to rebuild in the aftermath of conflict situations by tackling significantly the basic root causes of conflict taking into consideration issues of poverty and human insecurity.
5. The establishment of a United Nations standing military force as a permanent international force recruited, trained and deployed directly by the United Nations in a timely and decisive manner to immediately respond to authorization of the UN Security Council to conduct forceful intervention in a target state where atrocities and gross human rights abuses are occurring or about to occur.
6. In view of the need for a truly global representative institution to champion humanitarian intervention in accordance with the tenets of responsibility to protect, we recommend the reform of the constitution of the United Nations Security Council taking into account current universal strategic balance to include Germany, Japan, Brazil, Nigeria and India as permanent members of the United Nations Security Council. This in our view would create a more robust framework and a geographically balanced representation in the decision making process of undertaking armed intervention.
7. Again, we recommend that where humanitarian intervention is authorized in a target state effective mechanism must be put in place to checkmate the tendency for abuse in the context of a pre-determined motive.Exist strategy must be adopted which does not automatically translate to fixed exist date, rather the smooth withdrawal of the multilateral forces upon achieving the targeted plan of preventing or halting the occurrence of atrocities or gross human rights violations and ultimately restoring the sovereignty of the hitherto conflict – ridden state.
8. In deserving cases of humanitarian intervention, what is required to undertake military intervention should be the votes of 7 permanent members of the hitherto suggested 10 permanent member of the United Nations Security Council. The wielding of veto power by any permanent member should be obliterated in the Charter system relative to UN Security Council resolutions on humanitarian intervention. These threshold criteria are essential to provide the basic framework for the determination of deserving cases of

humanitarian intervention. Furthermore it would put the UN Security Council in check if eventually reformed to undertake humanitarian intervention in deserving cases and avoid a repeat of the Rwandan humanitarian disaster.

9. It is suggested that the proposed reforms of the UN Charter to incorporate the tenets of responsibility to protect would provide the required tool to eliminate the gap between the legality and legitimacy question of humanitarian intervention. This innovative reform would further eradicate circumstances where intervention was morally necessary but legally impossible as vividly illustrated in the NATO military intervention in Kosovo previously considered.

In a bid, however relative, to address the fundamental issue of harmonizing the application and practice of sovereignty of states with the requirement for humanitarian intervention in the face of explicit manifestation of continued and systematic human rights abuses, the following significant contributions to the body of knowledge on this subject of discourse are articulated here hopefully for the use of the academic and policy framers communities.

It is our contention that the conduct of forceful intervention on the basis of humanitarian considerations should not be contemplated within the stipulations of Chapter VII of the UN Charter as presently constituted. The situation warranting humanitarian intervention does not necessarily come within the meaning of threat to international peace and security so envisaged by the intendment of the UN Charter under this specific provision. Most of the horrendous violations of human rights and commission of atrocities are often a product of intrastate conflict even though sometimes it has cross border implications of refugees over flow. However, what in our considered opinion was intended by the stipulation of Chapter VII of the UN Charter was a guide against interstate conflict that snowballs into threat to international peace and security. It is surely not a basis for incursion into the domestic affairs of a sovereign state but a complementary provision to reinforce the doctrine of state sovereignty. Thus, undertaking humanitarian intervention on the basis of this provision in context runs contrary to the intendment and purpose of the Chapter VII of the UN Charter. Interestingly, reliance on the provisions of Chapter VII of the UN Charter has often frustrated the conduct of humanitarian intervention in deserving cases under the auspices of the UN Security

Council due to the political exercise of veto power of any of the five permanent members. This further demonstrates the lacuna inherent in Chapter VII of the UN Charter as a means of harmonizing humanitarian intervention and the application of the doctrine of state sovereignty.

In view of the foregoing, it is explicit more than ever before that the provisions of Chapter VII of the UN Charter do not present an effective framework to authorize the conduct of humanitarian intervention. Consequently, there is the urgent need for a reform and subsequent amendment of the UN Charter to clearly enact the requirements on the basis of which humanitarian intervention can be conducted. Thus, to avoid the paralysis of decision to undertake humanitarian intervention under the current United Nations System, there is the further needed reform to remove the authorization of forceful intervention anchored on humanitarian concerns from the exclusive domain of the UN Security Council. Such power should be vested on a new truly representative international body to be called 'Global Humanitarian Council'. This suggested Council would constitute of members showing a reflection of adequate representation for all the continents. Most importantly, no member of such proposed 'Global Humanitarian Council' under the auspices of the United Nations should reserve the right of the exercise of veto power where decision to undertake humanitarian intervention is sanctioned by two-thirds majority of the membership of the proposed Council.

In further contribution to the body of knowledge already in existence on this subject, we contend that since intervention to provide humanitarian aid/reliefs occasioned by humanitarian disasters is often readily accepted even without the consent or request of the target state.Similarly, it is generally not considered an affront on the application and practice of state sovereignty.Where this is the situation, armed intervention in deserving cases should also not be considered a violation of national sovereignty. This contention is grounded on the fact that the ultimate purposes of both international humanitarian assistance and international humanitarian intervention are essentially for the protection and preservation of human lives within the target state. Most often, sovereign states are mandated by the international community to create a humanitarian corridor to undertake the humanitarian assistance with or without the consent of the sovereign state as illustrated recently in the Syrian Conflict situation.

In our view, both intervention on the basis of humanitarian aid/reliefs and humanitarian concerns constitutes an incursion into the domestic jurisdiction of a sovereign state with the view to save human lives and entrench human security. The pertinent question to ask here is why is intervention to provide humanitarian assistance not often challenged as an unwarranted assault on the doctrine of sovereignty of states but armed intervention is often challenged and criticized as a violation of state sovereignty? Our position in this respect is that since humanitarian corridors that channel humanitarian aids to vulnerable populations within a sovereign state is considered normal, armed intervention on humanitarian consideration, the ultimate purpose of which is to also protect vulnerable populations and preserve human security should supersede the application and practice of state sovereignty. Moreover sovereignty of states doctrine cannot be continually used as a shield to perpetrate atrocities and widespread human rights violations laced with international implications.

Additionally, we also consider the implications of domestic actions of a sovereign state on its neighboring state as illustrated in the ongoing conflict in Syria and its implications on its neighboring state of Turkey. Thus, where a sovereign state lay claims to the doctrine of state sovereignty according to which a state exercises absolute control concerning matters within its domestic jurisdiction without any external interference, but neighbouring states who are affected by the consequences of the domestic actions of a sovereign state are precluded from interference on the basis of non-intervention principle of international law enshrined in the UN Charter even where such state(s) are the first line of impact in consequence of the atrocities and grave human rights breaches of the target state. In such situation the neighbouring state should not be mandated to accommodate the consequential massive refugee inflows into its territorial domain, as currently enjoined by the international community. For example, the senseless killings and gross human rights violations in the Syrian conflict and its attendant refugee challenges continue to pose a threat to the territorial integrity of Turkey today. We maintain that such neighbouring countries that are likely to be the first line of impact in consequence of the domestic action of the conflict-ridden state should have cause to interfere in the domestic affairs that is occasioning the refugee cross-border massive

movement and other consequential activities posing a threat to the corporate existence of such a neighbouring sovereign state.

Again, in our humble contribution, we contend that a cursory look at the aspects of the various categories of law, namely: eternal law, divine law, natural law and to an extent positive law, the common feature in these formulation of laws is the preservation of human lives. Hence, the ultimate objective of any law is not to promote senseless killings and massacres as the UN Charter sanctioned non-intervention provision is construed to be. We rather think that a community consideration of the UN Charter seeks to protect and promote human rights. Ultimately, the demands of justice further elevates the protection and preservation of human lives to a pedestal higher than the dictates of non-intervention in the face of senseless killings in the name of strict adherence to the Charter-preserved sovereignty of states doctrine.

BIBLIOGRAPHY

Books

Abbas, A, *Sovereignty* (1st edn, Damascus: Harvest House Publication, 1994).

Abiew, F, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Hague: Kluwer Law International, 1999).

Alston, P & Macdonald, E (eds), *Human Rights Intervention and the Use of Force* (Oxford: Oxford University Press, 2008).

Andrew, W (ed), *Ethics in International Affairs* (Oxford: Rowman & Little Field, 2000).

Annan, K, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations, 2000).

Arrend, A & Beck, R,*International Law and the Use of Force (*New York: Routledge Publishers, 1993).

Arthur, N,*A Concise history of the Law of Nations* (New York: The Macmillan Company, 1954).

Baylics, J & Smith, S, *The Globalization of World Politics* (2nd edn, Oxford: Oxford University Press, 2001).

Bellamy, A, *Global Politics and the Responsibility to Protect From Words to Deeds* (London: Routledge Taylor & French Group, 2011).

Boerefijn, I & Goldschmdt, J (eds), *Changing Perceptions of Sovereignty and International Intervention* (Baltimore: John Hopkins University Press, 1995).

Brownlie, I, *Principles of Public International Law* (5th edn, Oxford: Clarendon Press, 1998)

Bull, H, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1997).

Cassese, A, *The Current Legal Regulation of the Use of Force* (Boston: Martinus Nijhoffi, 1988).

……., *International Law in a Divided World* (Oxford: Clarendon Press, 1986)

Chesterman, S, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001).

Damrasch, LJ (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations, 1993).

Deng, F, *Sovereignty as Responsibility, Conflict Management in Africa* (Washington DC: Brookings Institution, 1996).

Dinstein, Y, *War, Aggression and Self-Defence* (3rd edn, Cambridge: Cambridge University Press, 2001).

Dixon, R & McCorquodale, R, *Cases and Materials on International Law* (4th edn, Oxford: Oxford University Press, 2003).

Dugard, J, *International Law: A South African Perspective:* (2nd, edn, Sandton: Juta and Company Ltd, 2001).

Dunoff, J, *et al, International Law: Norms, Action Process: A Problem-Oriented Approach* (3rdedn, USA: Wolters Kluwer, 2010).

Ferris, E (ed), *The Challenge to Intervene: A New Role for the United Nations* (Upsalla: Life and Peace Institute, 1992).

Finnemore, M, *The Purposes of Intervention: Changing Beliefs About the Use of Force* (New York: Cornell University Press, 2003).

Fishbarch, O, *Toria General del Estado* (Barcelona: Editorial Labor, 1915).

Frank, T, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002).

Gareth, E, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington DC: Brooking Institution, 2001).

Goodhart, M. *Human Rights, Politics and Practice* (Oxford: Oxford University Press, 2009)

Gordon, P. *The Evolution of International Human Rights: Vision Seen (*2nd edn, Philadelphia: University of Pennsylvania Press, 2003)

Graw, W, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2000).

Grotius, H, *Rights of War and Peace Including the Law of Nature and Nations* (London: Walter Dunne, 1901).

Harris, D, *Case and Materials on International Law* (7th edn, London: Sweet & Maxwell, 2010).

Hedley, B, *International in World Politics* (Oxford: Clarendon Press, 1984).

Hehir, A & Murray, R (eds), *Responsibility to Protect and the Future of Humanitarian* (UK: Palgrave Macmillan Ltd, 2013).

Held, D& Pieterse, J (eds), *World Orders in the Making: Humanitarian Intervention and Beyond* (London: Macmillan Press Limited, 1998).

Holzgreve, JL & Keohane, R O (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemas* (Cambridge: Cambridge University Press, 2003).

Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*(New York: Human Rights Watch Publishers, 1999).

Hurrell, A& Woods, N (eds), *Inequality, Globalization and World Politics* (New York: Oxford University Press, 1999).

Jackson, R, *The Global Covenant, Human Conduct in a World of States* (New York: Oxford University Press, 2000).

Jennings, R & Watts, A (eds), *Oppenheim's International Law* (9th edn, London: Longman

Publishers, 1992).

Judah, T, *Kosovo: War and Revenge* (Yale: Yale University Press, 2000).

Katzenstein, P (ed), *The Culture of National Security: Norms and Identities in World Politics* (New York: Columbia University Press, 1996).

Kelson, K, *The Law of the United Nations: A Critical Examination of its Fundamental Problems* (USA: The Lawbook Exchange Ltd, 2011).

Keren, M & Sylvan D(eds), *International Intervention Sovereignty Versus Responsibility* (London: Frank Cass, 2000).

Kerton-Johnson, N, *Justifying America's Wars: The Conduct and Practice of US Military Intervention* (USA: Contemporary Security Studies, 2011).

Koddenbrock, K, *The Practice of Humanitarian Intervention: Aid Workers, Agencies and Institutions in the Democratic Republic of Congo*(London: Routledge, 2015).

Koji, W (ed), *Humanitarian Intervention: The EVolving Asian Debate* (Tokyo: Japan Centre for International Exchange, 2003).

Krasner, S, *Sovereignty*: *OrganizedHypocrisy* (Princeton: Princeton University Press, 1999).

Lauterpacht, H, *International Law and Human Rights* (Charlottes: University of Virginia Press, 1973).

Lillch, R (ed), *Humanitarian Intervention and the United Nations*(Charlottes: University of Virginia Press, 1973).

Locke, J . *Two treaties of Government* (Newyork: Hafner Library of Congress, 1947)

Luban, D, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War in Global Justice and Transnational Politics* (Cambridge: MLT Press, 2000).

Lyons, G & Mastanduno, M (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore: John Hopkins University Press, 1995).

Melanczuk, P, *Akehurst's Modern Introduction to International Law*(7th edn, London: Routledge, 2006).

Meredith, M, *The State of Africa: A History of Fifty Years of Independence (*London: Free Press, 2005).

Mettraux, G, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008).

Miller, R, *Interpretation of Conflicts, Ethics and the Just War Traditions* (Chicago: University of Chicago Press, 1991).

Misha, G, *The Balkans 1804-1999: Nationalism, War and the Great Powers*(London: Granta Books, 1999).

Moore, J, *Moral Dilemas in Humanitarian Intervention* (New York: Rowman & Littlefield Publishers Incorporated, 1998).

Mulgrew, R, *Towards the Development of the International Penal System* (Cambridge: Cambridge University Press, 2013).

Murphy, S,*Humanitarian Intervention: The United Nations in an EVolving World Order* (Philadelphia: University of Pennsylvania Press, 1996).

Nijman, E,*The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Cambridge: Cambridge University Press, 2008).

Nuamah, K & Zartman, W, *Case Study: Intervention in Sierra Leone* (Maryland: Centre for International Security Studies, 2000).

Nweze, C C, (ed) , Contemporary Issues on Public International and Comparative Law Essay: inHonour of Professor Christian Nwachukwu Okeke (USA: Vandeplas Publishing, 2009).

Oji, E A, *Responsibility for Crimes Under International Law* (Lagos: Odade Publishers, 2013).

Okeke, G, *Aspects of International Law* (Enugu: Joen Printing & Publishing Company, 2007).

Omonuwa, O & Omoruyi I (eds), *On Judicial Integrity: Legal Essays and Materials in Honour of His Lordship, the Honourable Justice S. O. Uwaifo* (Benin City: Mindex Publishing Company Limited, 2014).

Oppenheim, L& Lauterpacht H,*International Law: A Treatise* (8th edn, London: Longman Green & Co., 1965).

Orford, A, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

……, *Reading Humanitarian Intervention: Human Rights and Use of Force in International Law*(Cambridge: Cambridge University Press, 2003).

Parekh, B, *Humanitarian Intervention: Legal and Political Aspects* (Denmark: Danish Institute of International Affairs, 1999).

Pattison, J, *Humanitarian Intervention and the Responsibility to Protect* (Oxford: Oxford University Press, 2010).

Picciotto, R. *etal, Global Development and Human Security* (London: Transactions Publishers, 2010).

Pugh, M, *The United Nations, Peace and Force* (London: Frank Cass, 1977).

Ramsbothum, O & Woodhouse, T, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Mass Polity Press, 1996).

Rawls, R, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

Rehman, J,*International Human Rights Law* (2nd edn, Longman Publishers, 2010).

Robertson, G, *Crimes Against Humanity: The Struggle for Global Justice* (London: Pengium Books Ltd, 2012).

Rodley, S (ed),*To Loose the Bands of Wickedness* (London: Brasseys Limited, 1992).

Schachter, O, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991).

Schnabel, A & Thakur, R (eds), *Kosovo and the Challenges of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (Tokyo: UNU Press, 2000).

Shaw, MN, *International Law* (6th edn, Cambridge: Cambridge University Press, 2008).

……., *International Law* (5th edn, Cambridge: Cambridge University Press, 2005).

Smith, S & Baykis, J, *The Globalization of World Politics: An Introduction to International Relations* (6th edn, Oxford: Oxford University Press, 2011).

Starke, J,*Introductionto International Law* (9th edn, London: Butterworths, 2001).

Teson, F,*Humanitarian Intervention: An Inquiry into Law and Morality (*New York: Transnational Publishers, 1997).

Thakur, R,*The United Nations Peace and Security: From Collective Security to the Responsibility to Protect* (UK: Cambridge University Press, 2006).

Tivey, L (ed), *The Nations-State: The Formation of Modern Politics* (Oxford: Martin Robertson, 1981).

Umozurike, U,*Introduction to International Law* (3rd edn, Ibadan: Spectrum Books, 2005).

……., *Introduction to International Law (*1st ed, Ibadan, Nigeria: Spectrum Law Publishing, 1993).

United Nations Development Programme, *Human Development Report*, (Newyork: Oxford University Press, 1994)

Vaughan, L, *et al* (eds), *The United Nations Security Council and War: The EVolution of Thought and Practice Since 1943* (Oxford: Oxford University Press, 2008).

Vincent, R,*Non-intervention and International Order* (Princeton: Princeton University Press, 1999).

Walling, C, *All Necessary Measures: The United Nations and Humanitarian Intervention* (Philadelphia: University Pennsylvania Press, 2013).

Walzer, M,*Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, New York: Basic Books, 2006).

……..., *Arguing About War* (New Haven: Yale University Press, 2004).

Weiss, T G, *Humanitarian Intervention: Ideals in Action* (Cambridge, UK: Polity Press, 2007).

Welsh, J (ed), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004).

Ziring, L,*etal*, '*The United Nations: International Organizations and World Politics*, (4th edn, London: Wadsworth Publishing, 2005).

Journal Articles

Aiken, N. 'The Reconstruction of a Culture of Human Rights: Transnational Justice and Human Security *Human Security Journal* (2009) vol 8, 16-18.

Al-Omari, A, 'The Legal Concept of War: A study in Christianity and Islam (1995) *Social Affairs Journal*, 148-165.

Al-Haj, A, 'Principles of the State Sovereignty and the Phenomenon of Humanitarian Intervention Under Current International Law' (2013) 9, *Canadian Social Science Journal.*

Akande, D, 'The Jurisdiction of the ICC Over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice, 618-620.*

Ayoob, M, 'Humanitarian Intervention and State Sovereignty' (2002) 6, *The International Journal of Human Rights*, 81-102.

Barrie, G, 'Humanitarian Intervention in the Post-Cold War Era' (2001) 118, *South African Law Journal*, 152-165.

Batra, T, 'Veto Power of the Security Council' (1998) 18 *Indian Journal of International Law*, 76-88.

Bazyler, M, 'Re-examining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia' (1987) 23 *StanfordJournal of International Law*, 547-608.

Beco, G . 'Human rights Indicators: From Theoretical Debate to Practical Application' *Journal of Human Rights*
Practice (2013) vol. 5, No. 2, 380-397.

Beeson, M, 'Sovereignty Under Siege: Globalization and the State in Southeast Asia' (2003) Vol 24 *Third World Quarterly*, 357-374.

Bellamy, A J, 'The Responsibility to Protect: Five Years on' (2010) 24 *Ethics in International Affairs Journal*, 133-145.

……, 'Ethics and Intervention: The Humanitarian Exception and the Problem of Abuse in the case of Iraq' (2004) 2 *Journal of Peace Research*, 131-147.

Bennounce, K, 'Sovereignty Versus Suffering? Re-examining Sovereignty and Human Rights Through the Lens of Iraq'(2002) Vol 13, No. 1, *European Journal of*

International Law, 247-258.

Burke-White, W, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' (2005) 15*LeidenJournal of International Law,* 553-568.

Cassese, A, 'A Follow-up: Force Humanitarian Counter-Measures and *Opinio Necessitates'* (2000) 10 *European Journal of International Law,* 791-800.

……,'*Ex iniura ius oritur:* We Moving Towards International Legitimation of Forcible Humanitarian Counter Measures in the World Community' (1999) 10 *European Journal of International Law,* 23-30.

Charney, J, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 32, *Vanderbilt Journal of Transnational Law,* 1224-1235.

Charvet, J, 'The Idea of State Sovereignty and the Right of Humanitarian Intervention' (1997) 18*International Political Science Review,* 39-48.

Chopra, J & Weiss, TG, 'Sovereignty is no Longer Sacrosanct: Codifying Humanitarian Intervention' (1992) 6 *Ethics and International Affairs Journal,* 95-117.

Delbrock, J, 'A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations' (1991-1992) 6 *Indiana Law Journal,* 887-897.

De Sousa, M, 'Humanitarian Intervention and the Responsibility to Protect: Bridging the Moral/Legal Divide' (2010) 16 *University College LondonJurisprudence Review,* 51-54.

Donnelly, N,'Intervention to Protect Human Rights' (1969) 5*McGilLawJournal,* 205-2010.

Duke, S, 'The State and Human Rights: Sovereignty versus Humanitarian Intervention' (

El-Zeidy, M, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2001-2002) *Journal of International Law,* 870-955.

Emilio, J, 'About the Impossibility of Absolute State Sovereignty' (2014) 27 *International Journal for Semiotics of Law,* 645-664.

Evans, G, 'From Humanitarian Intervention to Responsibility to Protect' (2006-2007) 24 *Wisconsin International Law Journal,* 1-20.

Evans,G& Sahnoun, M, 'The Responsibility to Protect' (2002) 81*Foreign Affairs,* 99-110.

Falk, R, 'Legality to Legitimacy' (2004) 26, *Harvard International Law Review,* 40-42.

……, 'Kosovo,World Order and the Future of International Law' (1999) 93, *American Journal of International Law,* 847-857.

Fixdal, M & Smith, D, 'Humanitarian Intervention and Just War' (1998) 22, *The Mershon International Studies Review,* 283-312.

Fonteyne, J, 'Customary International Law Doctrine of Humanitarian Intervention: Its

Current Validity under the UN Charter' (1973-1974) 4*California Western International Law Journal,* 203-215.

Gareth, E, 'From Humanitarian Intervention to Responsibility to Protect' (2002) 24, *Wisconsin International Law Journal,* 707-718.

Gegout, C, 'Cases and Consequences of the European Union's Military Intervention in the Democratic Republic of Congo: A Realist Explanation' (2005) 10 *European Foreign Affairs Review,* 427-443.

Greaves, W, 'The Intervention Imperative: Contradictions Between Liberalism, Democracy and Humanitarian Intervention' (2008) 8*Innovation Journal of Politics,* 59-70.

Heyden, R, 'Eastern Europe After Kosovo: Humanitarian Hypocrisy' (1999)8, *Eastern European Constitutional Review,* 91-96.

Held, D, 'Law of states, Law of Peoples: Three Modes of Sovereignty'(2002) 8 *Journal of Legal Theory,*1-44.

Henckaerts, J, 'Study of Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of theRedCross,* 175-212.

Henkin, L, 'Kosovo and the Law of Humanitarian Intervention' (1999) *The American Journal of International Law,* 824-828.

Hilpod, P,'Humanitarian Intervention: Is there a Need for Legal Reappraisal?' (2001) 12 *European Journal of International Law,* 437-468.

Himes, K R, 'The Morality of Humanitarian Intervention' (1994) 55 *Theological Studies,* 79-86.

Jones, P W, 'Globalization and Internationalism: Democratic Prospects for World Education' (1998) Vol 34 *Journal of Comparative Education,* 143-155.

Kak, K, 'Reconciling Humanitarian Intervention and Sovereignty: An Indian Perspective (2002) *Indian Journal of International Law,*1-17.

Kioko, B, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' (2003) 85*International Review of the Red Cross,* 800-818.

Kritsiotis, D, 'NATO's Armed Force Against Yugoslavia' (2000) 49 *International ComparativeLawQuarterly,* 320-337.

Lake, D A, 'The New Sovereignty in International Relations' (2003) 5 International Studies Review, 303-323.

Levith, M, 'The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention' (1986) 27 *Harvard International law Journal,* 621-657.

Lillich, R, 'The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World (1994) 3 *Tulane Journal of International& Comparative Law, 52-65.*

Macrae, J, 'Humanitarian Aid and Intervention: The Challenges of Integration, Understanding Integration from Rwanda to Iraq (2004) 18 *Ethics and International Affairs Journal,* 29-35.

May, R & Wierda, M, 'Trends in International Criminal Evidence, Nuremberg, Tokyo, the Hague and Arusha' (1998-1999) 37 *Columbia Journal of International Law,* 727-739.

Mayali, J, 'The New Interventionism, 1991-1994, United Nations Experience in Cambodia, Former Yugoslavia and Somalia' (1999) Vol XIX, No. 1 *Journal of Conflict Studies,* 6-9.

Mendelson, M, 'The Subjective Elements of Customary International Law' (1996) 66 *Britain Year Book of International Law,* 177-208.

Nwangc, W, 'Developments in International Criminal Justice in Africa During 2010' (2011) Vol II, No. 1, *African Human Rights Law Journal.* 251-281.

O' Donnell, C, 'The Development of the Responsibility to Protect: An Examination of the debate over the Legality of Humanitarian Intervention' (2014) 24 *Duke Journal of Comparative & International Law, 588-583.*

Oji, E A & Ozioko, MVC, 'Duty of State to Enforce International Humanitarian Law vis-à-vis Duty to Protect Interest of its Nationals' (2015) Vol 6 No. 6, *Journal of Emerging Trends in Education and Policy Studies,* 452-459.

……, 'Effect of Globalization on Sovereignty of States' (2011) Vol 2, *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,*257-270.

Orford, A, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10*European Journal of International Law,* 679-711.

Oslander, A, 'Sovereignty, International Relations and Westphalia Myth' (2001) 56 *International Organization Journal,* 251-258.

Padelford, N, 'The Use of the Veto' (1948) 2*International Organisation Journal,* 227-246.

Peterson, F,'The Facade of Humanitarian Intervention for Human Rights in a Community of Sovereign States' (1998) 15 *Arizona Journal of International and Comparative Law,* 870-889.

Philippe, X, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh' (2006) 88 *International Review of the Red Cross,* 375-398.

Ramsbotham, O, 'Humanitarian Intervention: A Need to Reconceptualize' (1997) 23 *Review of International Studies,* 445-468.

Reisman, W M, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) 11 *European Journal of International Law,* 3-18.

……,'Sovereignty and Human Rights in Contemporary International'(1990) Vol 84, No. 4, *the American Journal of International Law,* 866-876.

Roberts, A, 'Humanitarian War: Military Intervention and Human Rights' (1993) 60, *Royal*

Institute of International Affairs, 429-449.

……., 'The Road to Hell: A Critique of Humanitarian Intervention' (1993) 16*Harvard International Review,* 44-64.

Rocha, R M, 'Does Sovereignty Remain as the Foundational Principle of the International System?' (2013)Vol 4, No. 2, *Law International Review,* 185-199.

Rostow, E, 'In search of a Major Premise: What is Foreign Policy For?' (1971) 61 *The Commonwealth Journal of International Affairs,* 240-254.

Ruddock, E, 'The Continuing Constraint of Sovereignty: International Law, International Protection and Internally Displaced' (1997) 77 *Boston University Law Review,* 429-439.

Scheffer, D, 'Use of Force After the Cold war: Panama, Iraq and the New World Order' (1991) *International Law Perspective,* 109-144.

Simma, B, 'NATO, the UN and the Use of Force: Legal Aspect' (1999) 10 *European Journal of International Law,* 1-22.

Slater, J, 'Crimes Against Humanity: The Struggle for Global Justice' (2008) 20 *The Denning Law journal,* 151-171.

Smith, M J, 'Humanitarian Intervention: An Overview of the Ethical Issues' (1998) 2 *Annual Journal of Cornegie Council on Ethics and International Affairs,* 63-79.

Tanguy, J, 'Redefining Sovereignty and Intervention' (2003) 17 *Ethics and International Affairs Journal,* 144-148.

Thompson, J, 'State Sovereignty in International Relations: Bridging the Gap Between Theoryand Empirical Research' (1995) 39 *International Studies Quarterly,* 203-215.

Tickell, C, 'The Role of the Security Council in World Affairs' (1988) 18 *Journal of International& Comparative Law,* 307-318.

Verwey,W D, 'Humanitarian Intervention under International Law' (1985) 32 *Netherlands International Law Review,* 257-418.

Vockel, G, 'Humanitarian Intervention in Cases of Overwhelming Humanitarian Necessity' (2005) *CoventryLawJournal,* 28-38.

Volsky, A, 'Reconciling Human Rights and State Sovereignty, Justice and the Law in Humanitarian Intervention' (2007) 3 *International Public Policy Review,* 40-43.

Weiss, T G, 'Triage: Humanitarian Intervention in a New Era', (1994) 11 *World Policy Journal,* 59-68.

Welsh, J, 'The Responsibility to Protect: Where Expectations Meet Reality' *Ethics and International AffairsJournal,* 12-26.

Wheeler, N, 'Legitimating Humanitarian Intervention: Principles and Procedures' (2001) Vol 2, *MelbourneJournalofInternationalLaw,* 550-566.

William, M, 'Hobbes and International Relations: Reconsideration' (1996) 50*International*

Organization Journal, 213-216.

Wilson-Roberts, G, 'Humanitarian Intervention: Definition and Criteria' (2000) 3, *CSS,* 1-4.

Internet (Electronic Materials)

Alhaj, A, 'Principle of the State Sovereignty and the Phenomenon of Humanitarian Intervention Under Current International Law' (2013) Vol.9 No.1 *CSC Canada,* Available @ http://www.cscanada.org.Accessed on 13September 2015.

Annan, K,'*InLarger Freedom: Towards Development, Security and Human Rights for All*

Report of the Secretary General,2005. A/59/2005.Available at URL http://www.un.org/largerfreedom/contents.htm. Accessed on 25 February 2015.

……., *We the people: The Role of the United Nations in the 21st Century*(Millennium Report of the UN Secretary General, 2000). Available at http://www.un.org/millenium//sg/report. Accessed on 25February 2015.

……..., 'Two Concepts of Sovereignty' *TheEconomist*18 September 1999.Available at http://www.un.org/overview/sg/koacom.htm. Accessed on 15 May 2015.

Badescu, C, 'Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights' (2010) Google ebook, Available at http://books.google.ca/threepillars/responsibilitytoprotect. Accessed on 15 December, 2015.

Convention on the Prevention and Punishment of the Crime of Genocide: UN Doc A/Res/260. Available at http://www.ods-dds-ny.un.org/doc/resolution/gen/nro/img/pdf. Accessed 16 August 2015.

Corrigan, C, 'The Hard Choice: To Intervene or Not?' Available at http://www.riml.org/index.php/actiondisplaydoc/corrigan.pdf. Accessed on 14 August 2015.

El-Shafie, O, 'Intervention and State Sovereignty at Cairo Round Table Consultation of the ICISS, 21 May 2001 Discussion Paper.Available at http://web.gc.cuny.edu/ICISSresearch/Reports/cairo.discussionpaper.omran.shafei.htm. Accessed on 26 July, 2015.

Gladstone, R, 'Friction at the UN as Russia and China Veto Another Resolution on Syria Sanctions' *New York Times*, 12 July 2012. Available at http://www.nytimes.com/2012/07/media/Russiaandchinavetoonsyria.html. Accessed on 26 August 2015.

Groves, S, 'Obama Wrongly Adopts UN Responsibility to Protect to Justify Libya Intervention, in *Heritage* 31 March, 2011. Available at http://www.heritage.org/research/reports/2011/03/Libya-intervention-obama-wrongly-

adopted-un-responsibilitytoprotect.Accessed 18 August 2015.

Heywood, A, 'Political Theory:An Introduction' in Palgrave Macmillan.Available at http://www.scribd.com/doc/internalsovereignty/92.Accessed on 25 August 2015.

International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' 2001. Available at http://www.ICISS.ca/pdf/commissionreport.pdf. Accessed on 8 June 2015.

Internal Criminal Court Chambers Web, 10 December 2012. Available at http://www.iccpi.int/en_menus/icc/structure/courtchambers/pages/chambers.asp. Accessed on 16 August 2015.

Jossup, P, *A Modern Law of Nations*. Available at http://www.ejil.org.journal/Vol.10/com.html. Accessed on 4 August 2015.

Kissinger, H, 'Cambodia: Pol Pot's Shadow Chronicle of Survival' *Frontline World Magazine*, October 2002. Available at http://www.pbs.org/cambodia/tt02.html. Accessed on 14 February 2016.
Kouchner, B, 'Establish a Right to Intervene Against War and Oppression' *Los Angeles Times*, 18 October 1997. Available at http://www.latimes.com/1999/10/media/righttointerveneagainstwar.html. Accessed 12 August 2015.

Mills, K, 'Sovereignty Eclipsed? The Legitimacy of Humanitarian Assistance? Available at http://www.jha.ac/articles/a0/9.htm. Accessed on 12 September 2015.

Office of the President of UN General Assembly, Concept Note on Responsibility to Protect Population from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity? Available at http://web.gc.cung.edu/icissresearch/ottawa/rapporteursreport.htm. Accessed on 15 August 2015.

Ottawa Round Table Consultation of the ICISS, 15 January 2001 Rapporteur's Report. Available at http://web.gc.cung.edu/icissresearch/ottawa/rapporteursreport.htm. Accessed on 15 August 2015.

Owen, T, 'Responsibility to Protect: More Than a Slogan' 2001. Available at http://www.taylorowen.com. Accessed on 12 December 2015.

Rapporteur's Report of Geneva Round Table Consultation of the International Commission on Intervention and State Sovereignty 31 January 2001. Available at http://web.gc.cung.edu//icissresearch/report/geneva/rapporteur.report.milliken.htm. 15 December 2015.

Responsibility to Protect: *Report of the International Commission on Intervention and State*

Sovereignty (Ottawa: International Development Research Centre for ICISS, 2011). Available at http://www.gc.ca. accessed on 25 August 2015.

Rider, W, 'War, Peace and Internal Sovereignty.' Available at http://www.spot.colorado.edu/wolfordm/implementation2.pdf. Accessed on 23 August 2015.

Roth, K, 'War in Iraq: Not a Humanitarian Intervention *Human Rights World Report* (2004). Available at http://www.hrw/wr2k4/download/wr2k4.pdf. Accessed on 15 December 2015.

Shelter,B,'Assad Denies Chemical Attack in Interview for US Viewer's *New York' Times*, 8 September, 2013.Available at http://www.nytimes.con/2013/09/09/business/media/assad-denies-attack-in-interveiw-with-charlierose.html. Accessed on 24 August 2015.

Tharoor, S,'Humanitarian Intervention, Principles, Problems and Prospects.' Speech Delivered at the Wilton Park Conference, Wilton Park, UK, February 19-23, 2001. Available at http//:www.wab.gc.cung.edu//icissresearch//wiltonpark.tharoor.htm. Accessed 16 August 2015.

Tisdell, S, 'The Consensus on Intervention in Libya has Shattered'*TheGuardian,* 23 March 2011,p.11.Available at http://www.theguardian.com/commentisfree/2011/mar/23/libya-ceasefire-consensus. Accessed on 20 August 2015.
UNGA, 'Plenary Debate Report on the Responsibility to Protect.' Available at http://www.responsibilitytoprotect.org/ICRtoPGAdebate.pdf. Accessed on 2 December 2015.

……., 'World Summit Outcome Document', 16 September 2005. Available http://www.un.org/apps/nows/story.asp?newsID. Accessed on 14 December 2015.
UN Secretary General 'Report on Responsibility to Protect 2013.' Available http://www.globalr2p.org/media/file/pdf. Accessed 12 December 2015.

……, 'Report of the High Level Panel on Threats, Challenges and Change: A More Secure World, Our Shared Responsibility 2003.' Available at http://www.un.org.secureworld/report2.pdf. Accessed on 12 December 2015.

UNSC, 'Resolution 2127 adopted on 5 December 2013.' Available at http://www.un.org/en/ga/search/view.doc.asp.symbol?/s/RES/2127/.pdf. Accessed on 12 December 2015.

……., 'Resolution 1975 adopted on ' Available at http://www.un.org/en/peacekeeping/missions/unoci/elections.shtml. Accessed on 12 November 2015.

……,'Resolution 1894 adopted on' Available at

http://www.un.org/en/ga/search/view.doc.asp. Accessed on 14 December 2015.

……, 'Resolution 1674 adopted on ' Available at http://www.un.org/en/ga/search/view.doc.asp/s/res/1674. Accessed 14 December 2015.

Widner, B, 'Can Panetics Help Humanitarian Interventions Do More Good Than Harm?' Available at http://www.panetics.org/displayonevent/cfm. Accessed on 13 August 2015.

World Federalist Movement Institute for Global Policy, 'State-by-State Position on Responsibility to Protect 2003? Available at http://www.rtop.org/files/chartsrtop.pdf. Accessed 10 November 2015.