Sovereignty and Armed Intervention in Libya 2011

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Abstract

This thesis will examine the implications the United Nations Security Council Resolution 1973 (2011) poses to sovereignty and its current understanding in relation to military intervention for the protection of civilians in an internal armed conflict. Resolution 1973 provides an opportunity to examine: the development of sovereignty from its earliest inception to its position within the modern international system of states; the challenge humanitarian intervention posed to accepted principles of sovereignty, non-interference and the use of force; the recent addition of the concept of the Responsibility to Protect which re-conceptualised sovereignty as responsibility; and the Security Council's established practice in relation to authorising armed intervention, which is integral to this thesis. Supporting this body of work is the Charter of the United Nations (1945) which articulates the body of rules that states are guided by in matters of international peace and security, and the protection of human rights, and which also determines the parameters of Security Council action.

This thesis aims to establish that Resolution 1973 is a substantial contribution to the incremental development of sovereignty and how it is currently understood within international law.

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Table of Contents

Title Page i

Abstract ii

Acknowledgements iii

Table of Contents iv

List of Abbreviations vii

1. Introduction 1

2. The Principle of Sovereignty Within International Law 7

2.1 Introduction 7

2.2 Sovereignty **7**

2.2.1 *Jean Bodin (1530-1596)* 9

2.2.2 *Hugo Grotius (1583-1645)* 11

2.2.3 *The Peace of Westphalia 1648* 13

2.2.4 *Thomas Hobbes (1588-1679)* 14

2.2.5 *Samuel von Pufendorf (1632-1694)* 16

2.2.6 *Emmerich de Vattel* 20

2.2.7 *Napoleonic Wars and World War I* 22

2.2.8 *The League of Nations* 23

2.2.9 *The United Nations* 25

2.3 Conclusion 29

3. Humanitarian Intervention 31

3.1 Introduction 31

3.2 A Brief History of the Concept of Humanitarian Intervention 31

3.3 Humanitarian Intervention: Defined in a Post-UN Charter World 33

3.4 Sovereignty and Humanitarian Intervention Within the Context of the Charter 40
3.4.1 *Article 2(1), 2(4) and 2(7)* 40
3.4.2 *The Threat or Use of Force, and Intervention* 41
3.5 Resolutions Authorising the Use of Force for Humanitarian Purposes 45
3.5.1 *Iraq* 46
3.5.2 *Somalia* 47
3.5.3 *Rwanda* 51
3.5.4 *Kosovo* 53
3.6 Conclusion 56

4. The Responsibility to Protect 58
4.1 Introduction 58
4.2 The International Commission on Intervention and State Sovereignty Report on the Responsibility to Protect 59
4.2.1 *The Responsibility to Prevent* 62
4.2.2 *The Responsibility to React* 64
4.3 Report of the High-Level Panel on Threats, Challenges and Change 69
4.4 In Larger Freedom: Towards Development, Security, and Human Rights for All 72
4.5 World Summit Outcome Document 74
4.6 The Report of the Secretary-General on Implementing the Responsibility to Protect (2009) 77
4.7 Conclusion 81

5. The United Nations Security Council 84
5.1 Introduction 84
5.2 The History of the Security Council 86
5.3 Sovereignty, Humanitarian Intervention and the Security Council 90
5.4 Security Council Authorised Military Intervention 94
5.4.1 *Authorisation During the Cold War* 95

5.5 Post-Cold War Era Authorisations 97
5.5.1 *Iraq* 97
5.5.2 *Bosnia and Herzegovina, Somalia, and Rwanda* 99
5.5.3 *The authorisation of force in unforeseen circumstances* 99
5.5.4 *Determining a threat in unforeseen circumstances* 101
5.5.5 *Haiti* 105
5.6 Security Council Authorisation for Military Intervention in the 21st Century 107
5.7 Conclusion 110

6. The Internal Conflict in Libya and the International Response 113
6.1 Introduction 113
6.2 From Uprising to Internal Armed Conflict in Libya 114
6.3 The Loss of Legitimacy 117
6.4 The Influence of Regional Organisations 119
6.5 The Imminent Threat of Large Scale Loss of Life 121
6.6 United Nations Security Council Resolution 1973 122
6.6.1 *The Threat to International Peace and Security* 122
6.6.2 *Protection of Civilians and the Responsibility to Protect* 123
6.6.3 The Responsibility to Protect...Or not? 125

7. Conclusion 128

Bibliography 133

List of Abbreviations

AU	African Union
EC	European Council
EU	European Union
GA	General Assembly
GCC	Gulf Cooperation Council
LAS	League of Arab States
League	League of Nations
SC	Security Council
TNC	Interim Transitional National Council
UN	United Nations

1. Introduction

In order to understand whether United Nations Security Council Resolution 1973 (2011) has substantially developed the contemporary notion of sovereignty within international law, a detailed examination of the concept of sovereignty from its earliest inception to its position within the United Nations system is required. The scope and breadth of this question requires careful analysis of the concept of sovereignty, the doctrine of humanitarian intervention, the recent concept of the Responsibility to Protect, and the role of the Security Council and its relationship with armed intervention for the protection of civilians. Tracing the evolution of the concept of sovereignty through time will help clarify whether or not the situation in Libya and the Security Council authorised armed intervention, has contributed to a developmental change in how sovereignty is currently understood.

The concept of sovereignty entered political legal theory in 1576 in Jean Bodin's innovative work *Les Six Livres de la Republique* (*The Six Books of the Commonwealth*).[1] By using Bodin as the starting point, we can see how sovereignty has initially been understood as an expression of centralised power within the state (internal sovereignty). The concept of sovereignty is then progressed by subsequent authors who develop the perception of sovereignty as not only a power that is expressed within the state, but also a functional quality that imbues relations between states (external sovereignty). The theoretical development of sovereignty is further progressed by practical application with the Peace of Westphalia in 1648, the establishment of the League of Nations in 1919, and the establishment of the United Nations in 1945. By traversing the landmark events in the life of the concept of sovereignty it will clarify whether the primary elements of the concept of sovereignty have departed radically from their first inception, or remain relatively unaltered.

The development of the doctrine of humanitarian intervention has followed a similar form of development as the concept of sovereignty, with its origins

[1] Jean Bodin, *Les Six Livres de la Republique* (translated ed. M.J Tooley (translator) Jean Bodin *Six Books of the Commonwealth* (Basil Blackwell, Oxford (1955)).

extending back to the Crusades.[2] The contemporary understanding of humanitarian intervention is drawn from the 19th century,[3] and involves the use of armed force for the protection of individuals or groups of individuals within a targeted state.[4] This has since been developed further by the establishment of the United Nations, and the Security Council. When undertaken without Security Council authorisation, humanitarian intervention is viewed by many as a violation of the principle of state sovereignty, and its associated principles of non-interference and the prohibition on the threat or use of force.

However, a strict interpretation of the Charter results in a prohibition on intervention for humanitarian purposes. Yet it appears that over time, specific instances where the Security Council has authorised armed intervention for humanitarian purposes is slowly bridging the divide between intervention for the protection of civilians with the inviolable principle of sovereignty. To illustrate this point further, instances where the Security Council has authorised forcible intervention for humanitarian purposes, and also when it has not authorised armed intervention will be discussed. These instances illustrate the development of the Security Council's approach to internal conflicts where gross human rights abuses are occurring, and also its inconsistency in responding to humanitarian catastrophes aggravated by conflict situations. Respect for sovereignty still restricted a uniform reaction from the Security Council and the doctrine of humanitarian intervention was not the cure for this.

The development of the concept of the Responsibility to Protect by the International Commission on Intervention and State Sovereignty (ICISS) was a concerted attempt to address the conflict between sovereignty and armed intervention for humanitarian purposes. The report[5] of the ICISS delivered in 2001 was a comprehensive document that contained; a definition of the concept,

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2 Jean-Pierre L. Fonteyne "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter" (1973-1974) Cal W Int'l J 203.

3 Francis Kobi Abiew *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, The Hague, 1999) at 33.

4 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, 2008) at 742.

5 Report of the International Commission on Intervention and State Sovereignty "The Responsibility to Protect" (International Development Research Centre, Canada, 2001) [ICISS Report].

the legal foundation for it, and the principles and processes that would support the successful implementation of it. It was a new way to view sovereignty and established that sovereignty was contingent upon state authorities upholding the responsibility to protect their population from serious harm resulting from internal war, repression, insurgency or state failure.[6]

The concept did not remain static, subsequent reports developed and refined (or restricted) the meaning and scope of the concept. The 2005 World Summit Outcome document contains the unanimously accepted definition of the concept. It condensed the lengthy original understanding of the concept contained in the ICISS report into two paragraphs. It limited the application of the concept to certain crimes under international law. Consistently as the concept was developed through each phase of reports, the Security Council was given the primary responsibility for determining whether to undertake forcible action under Chapter VII of the Charter. In contrast, with the gradual development of the concept of sovereignty, and the doctrine of humanitarian intervention, the swift and unanimous acceptance of the concept indicates a shift not only in how sovereignty is perceived, but how humanitarian situations should be addressed.

Under the Charter the Security Council holds the primary responsibility of maintaining international peace and security, and to this end, has been delegated the right to use force in or against states in situations that pose a threat to this peace and security. Security Council resolutions that authorise the use of force are perceived as necessary in order to carry out an armed intervention in a sovereign state with the proper legal basis. The forcible measures contained in Chapter VII of the Charter and the process required in order to utilise them does not contain specific reference to humanitarian crises. The issue then arises of how the Security Council can respond to situations of internal armed conflict that threaten the civilian population while still maintaining respect for a state's sovereignty, territorial integrity and political independence.

The Security Council is a political entity, the nature of its composition and the

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6 ICISS Report, above n 5, at XI.

construction of the Charter have often been detrimental to authorising armed intervention in internal conflicts for the protection of civilians. Security Council resolutions are the product of the political negotiations within the Security Council itself, but also contain decisions that carry legal force. A retrospective analysis of Security Council resolutions indicate that gradually, a pattern is emerging that indicates that authorisation of military intervention for humanitarian purposes is permissible. Whether this represents an evolution in international law, that state sovereignty can be compromised in order for armed intervention to be authorised for the protection of civilians is the key question of this thesis.

The events in Libya leading up to the authorisation of armed intervention, and Security Council Resolution 1973 (2011) provide the opportunity to examine the impact that the Security Council resolution, the concept of the Responsibility to Protect, and intervention carried out for a humanitarian purpose has had on the current understanding of sovereignty within international law. The spontaneous eruption of an internal armed conflict in Libya and the subsequent Security Council authorised armed intervention represent a landmark occasion, as it was the first time in the Security Council's history that it had authorised military intervention without the target state's consent for humanitarian purposes.

The events during the Libyan conflict: the excessive use of force, the threat of mass atrocity, the potential crimes against humanity, the formation of a political entity for the Libyan opposition forces, the resignation of diplomats from Gaddafi's government, and the persuasive response from multiple regional organisations, were contributing facts in the passing of Resolution 1973.
The passing of this resolution is as much a response to the events that took place during the conflict as it is a reflection of the political machinations within the Security Council.

The political motivations for passing the resolution are an important part of analysing the approach the Security Council took to authorise armed intervention. However, it is the legal consequences that the resolution carries that are of equal interest here. Does Resolution 1973 indicate that the Security Council's practice has evolved to include the authorisation of armed force for the protection of

civilians regardless of the respect for sovereignty? Are interventions for humanitarian purposes no longer contrary to the inviolable principle of state sovereignty? Has the concept of the Responsibility to Protect changed the international community of state's perception of sovereignty to the extent that it now influences state's behaviour? Are humanitarian considerations, and the concept of the Responsibility to Protect now influencing the methods of response by the Security Council to internal armed conflicts to such a degree that it can be asserted that there has been a significant shift in the current conception of sovereignty?

Analysis of sovereignty, humanitarian intervention, the Responsibility to Protect, and the Security Council all contribute to understanding whether or not Resolution 1973 represents this conceptual shift in the current understanding of sovereignty.

Supporting this body of work are the texts and journal articles of scholarly authorities. In particular: Bruno Simma (ed) *The Charter of the United Nations, A Commentary*[7] which draws together diverse scholarly analysis of the articles of the Charter relevant to this thesis. Nicholas J Wheeler *Saving Strangers, Humanitarian Intervention in International Society*[8] which contains a broad and authoritative analysis of humanitarian intervention, its history, and application following the Cold War; the 2005 World Summit Outcome Document,[9] for its authoritative and unanimously accepted description of the Responsibility to Protect Concept. Also supporting the analysis of the concept of the Responsibility to Protect is the Report of the International Commission on Intervention and State Sovereignty[10] for its detailed description of the legal foundation for the concept; and Alex J. Bellamy, Sara E. Davies, and Luke Glanville (eds) *The Responsibility to Protect and International Law*,[11] which draws together various scholarly authors analysis of the concept in a variety of contexts within international law.

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7 Bruno Simma (ed) *The Charter of the United Nations, A Commentary* (Oxford University Press, United Kingdom, 2012).

8 Nicholas J. Wheeler *Saving Strangers, Humanitarian Intervention in International Society* (Oxford University Press, United Kingdom, 2002).

9 *2005 World Summit Outcome Document* GA RES 60/1 A/RES/60/1 (2005).

10 ICISS Report, above n 5.

11 Alex J. Bellamy, Sara E. Davies, Luke Glanville (eds) *The Responsibility to Protect and International Law* (Martinus Nijhoff Publishers, The Netherlands, 2011).

Analysis of the role of the Security Council is supported by, inter alia, the edited text of Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (eds) *The United Nations Security Council and War*,[12] as well as Inger Osterdahl's informative article "The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council".[13] Also invaluable to this analysis are the resolutions passed by the Security Council, such as Resolution 678 (1990)[14] Resolution 794 (1993),[15] Resolution 940 (1994).[16] The inclusion of these resolutions is to establish the emerging pattern within the Security Council's practice of responding to humanitarian situations, and discovering the political motivations behind doing so, and the potential legal consequences.

Finally, in support of the analysis of Resolution 1973 and the events around the conflict in Libya, the text edited by Jared Genser and Bruno Stagno Ugarte *The United Nations Security Council in the Age of Human Rights*,[17] provides scholarly analysis of the Libyan conflict and the events leading to the passing of Resolution 1973. Also, Paul R Williams and Collen (Betsy) Popkent's journal article "Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity"[18] provides a useful analysis of the text of Resolution 1973 and its implications. This is just some of the literature relied upon which supports this thesis and its aim to establish an answer to the question of whether Resolution 1973 (2011) represents a shift in the current understanding of state sovereignty; or, whether it is an example of armed intervention been authorised for the protection of civilians at the expense of state sovereignty.

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12 Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (eds) *The United Nations Security Council and War* (Oxford University Press, New York, 2008).

13 Inger Osterdahl "The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council" (2005) J Conflict & Sec L 10(1) 1.

14 SC Res 678 S/RES/678 (1990).

15 SC Res 794 S/RES/794 (1993).

16 SC Res 940 S/RES/940 (1994).

17 Jared Genser and Bruno Stagno Ugarte *The United Nations Security Council in the Age of Human Rights* (Cambridge University Press, New York, 2014).

18 Paul R. Williams & Colleen (Betsy) Popkent "Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity" (2011) 44 Case W Res J Int'l L 225.

2. The Principle of Sovereignty Within International Law

2.1 Introduction

To answer the question of whether the United Nations Security Council authorised military intervention in Libya has substantially evolved the current conception of State sovereignty, an examination of how State sovereignty has evolved since its earliest inception is necessary. How the concept of sovereignty evolved over time should illuminate whether or not the events of Libya have substantially contributed to an evolution of sovereignty as it is currently understood. The concept of sovereignty was first introduced into political legal theory by Jean Bodin in 1576. Bodin's work focussed largely on how sovereignty was exercised internally within the realm of a nation, and later theorists, Hugo Grotius, Thomas Hobbes, Samuel von Puffendorf and Emmerich de Vattel, further expanded on the nature of external sovereignty,[19] and how it is exercised between states. Has sovereignty as it is understood in international law changed radically since it was first introduced by Jean Bodin in 1576, or have the primary elements of this concept remained relatively unchanged?

2.2 Sovereignty

It is widely understood that the nature of sovereignty exists in two distinct but related spheres, the domestic sphere, *internal* sovereignty, and the sphere of international relations between states, *external* sovereignty.

Within the state, a sovereign power exercises its internal sovereignty by making laws with the assurance that these laws are "supreme and ultimate" and that their "validity does not depend on the will of any other, or 'higher', authority."[20]

Internal sovereignty gave rise to a centralised power as a means of addressing and

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[19] Hugo Grotius *De Jure Belli Ac Pacis Libri Tres*, (translated ed: Louise R. Loomis (translator) Hugo Grotius *The Law of War and Peace* (Walter J. Black, INC., New York, 1949), Thomas Hobbes *Leviathan* (J. M. Dent & Sons LTD., London, 1914), Samuel Pufendorf *De Jure Naturae et Gentium Libri Octo* (translated ed: C. H. Oldfather and W. A. Oldfather (translator) Samuel Pufendorf *On the Law of Nature and Nations* (Clarendon Press, Oxford, 1934), Emmerich de Vattel *Le Droit de Gens* (translated ed: Joseph Chitty (translator) *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (R. Milliken & Son, Dublin, 1834).

[20] Bardo Fassbender "Article 2 (1) in Bruno Simma (ed) *The Charter of the United Nations, A Commentary* (3rd edition, Oxford University Press, United Kingsom, 2012) 133 at 136.

subjugating intermediary powers within a territory.[21] Sovereignty, and the exercise of sovereignty, is largely concerned with how power is situated and controlled within a state territory, which is determined by the constitutional frameworks established by the state.[22] Internal sovereignty encapsulates a state's freedom from outside interference by other states, it shields the internal authorities' decisions and actions from external forces or external authorities.[23] In the *Corfu Channel* case Judge Alvarez describes it as:

> By sovereignty, we understand the whole body of rights and attributes which a State possess in its territory, to the exclusion of all other States, and also in its relations with other States.[24]

The exercise of the internal sovereignty of a state can therefore be understood and described as: a state government's authority to exercise the functions of a state within its domestic jurisdiction over its people and territory, and to regulate the intrinsic matters of state free from external interference.

External sovereignty is manifested when states interact with each other as sovereign states. Externally a sovereign state bows to no higher authority, is not subject to the legal power of another state, and is in principle, equal to other states regardless of any economic, or military disparity.[25]

> It was the idea of *external sovereignty* which, together with the transformation of medieval feudal structures into the modern State, led to the development of modern international law. In the external relations of States, sovereignty was understood as legal independence of a prince or republic from all foreign powers, in particular the Pope and the Emperor of the Holy Roman Empire, and the impermeability protecting the respective territory against all outside interference.[26]

International law governs and guides relationships between states,[27] and in turn international law depends on the "will of the sovereign states".[28]

> International law govern relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States

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21 Fassbender, above n 20, at 136.

22 Christian Henderson, "The Arab Spring and the Notion of External State Sovereignty in International Law" (2014) 35 Liverpool L Rev 175 at 176.

23 Oyvind Osterud "Sovereign Statehood and National Self-Determination A World Order" in Marianne Heiberg (ed) *Subduing Sovereignty: Sovereignty and the Right to Intervene*, (1994) 18 at 19.

24 *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v Albania*) (Separate Opinion of Judge Alvarez) [1949] 39 at 43.

25 Robert Lansing "Notes on Sovereignty in a State" (1902) AJIL 105 at 124.

26 Fassbender, above n 20, at 137.

27 *S.S. "Lotus"* (*France v Turkey*) (Judgment) [1927] PCIJ (Series A) No.10 at 18.

28 Malcolm Shaw *International Law* (6th ed, Cambridge University Press, United Kingdom) at 29.

> cannot therefore be presumed.[29]

The state was then internally supreme, but also had to refine its relationships with other states to maintain its external sovereignty.

By acknowledging the external sovereignty of other states, states were recognising the rights and obligations that came attached to sovereignty, and they are also externally expressing the "supremacy of the state as a legal person". Sovereignty, both externally and internally is one of the earliest concepts of international law, and one of the most powerful. It is an abstract concept that has accumulated an "almost mythical quality".[30] It is a legal notion, but it is imbued and integrated with a political dimension. How it has been defined, and how it has evolved throughout history goes some way to understanding its significance historically, and in a contemporary world. The remainder of this chapter will outline this development through the work of theorists and historical events.

2.2.1 *Jean Bodin (1530-1596)*

Jean Bodin was a French jurist and political philosopher and is widely credited with introducing the term 'sovereignty' into legal theory, and elucidating its meaning, in his book *Les Six Livres de la Republique* (*The Six Books of the Commonwealth*) in 1576.[31] Bodin based his study of the State on his understanding of European politics, with particular emphasis on the necessity for a sovereign power within the state that would make the laws, without being bound by them. The sovereign would be subject to the laws of God and nature alone.[32]

> From all this it is clear that the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent.[33]

Bodin's presentation of sovereign power and the state is a study of the *internal* "structure of authority" within the nation state itself.[34]

For Bodin, it was a key attribute of sovereignty that, at least internally, there was no other greater power than the sovereign,

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29 *S.S "Lotus"*, above n 27, at 18.
30 Fassbender, above n 2, at 135.
31 Shaw, above n 28, at 21; Jackson Nyamuya Maogoto *State Sovereignty and International Criminal Law: Versailles to Rome* (Transnational Publishers, New York, 2003) at 8.
32 Shaw, at 21.
33 Bodin, above n 1, at 32.
34 Shaw, at 21.

> The first attribute of the sovereign prince therefore is the power to make law binding on all his subjects in general, and on each in particular. But to avoid ambiguity one must add that he does so without the consent of any superior, equal, or inferior necessary.[35]

The sovereigns power over all matters of state and subjects was absolute, and Bodin went to great lengths to describe the particularities of sovereignty. These attributes were numerous: the power to make laws, un-make laws, make peace and war with other states, hearing appeals from sentences of all courts; appointing and dismissing officers of state, raising taxes, granting privileges and exemptions to all subjects, appreciating and depreciating the value and weight of coinage, and receiving oaths of fidelity from subjects and his liege vassals.[36] These attributes of sovereignty were considered by Bodin to be indivisible,[37] and describe sovereignty as an absolute power, where the sovereign is the origin of the law, above the law, with no other superior to challenge his status. Sovereignty became a key characteristic in determining what constitutes a state.[38] A commonwealth (or state) without a sovereign power, could not be considered a commonwealth.[39]

Bodin sought to characterise sovereignty of state in such a way as to provide a state with the legal means to "secure itself against external enemies or internal disorders."[40] At a time when religious wars were rife, Bodin linked sovereign authority to territory by consolidating the sovereign and subject into "one body politic."[41] This consolidation was a remedy to the religious fracturing occurring in France at the time of Bodin's writing. The integration of ruler and ruled within territory, was an abstract concept. The unification between the power of the ruler, and the ruled provided the basis of the conception of the state. So complete was this unification between supreme authority, territory, and subjects, that to separate these ideas became unimaginable.[42] Bodin's theory was not a cure all for the religious warfare that dominated European politics. Hugo Grotius would expand on Bodin's work during the 30 Years War, and introduced, inter alia, his own

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35 Bodin, above n 1, at 43.
36 Bodin, above n 1, at 77-83.
37 Bodin, at 86.
38 Panu Minkkinen "The Ethos of Sovereignty: A Critical Appraisal", (2007) Human Rts Rev 33 at 33.
39 Bodin, at 41.
40 Bodin, at 109.
41 Jarat Chopra "The Obsolescence of Intervention under International Law" in Marianne Heiberg (ed) *Subduing Sovereignty* (Pinter Publishers, New York, 1994) 33 at 41.
42 Chopra, above n 42 at 42.

theories regarding a more externalised understanding of sovereignty.

2.2.2 *Hugo Grotius (1583-1645)*

Fifty-three years after Bodin's work, Hugo Grotius, a Dutch legal scholar, published his seminal work, *De Jure Belli Ac Pacis Libri Tres* (*On the Law of War and Peace*) in 1625. At the time of Grotius' writing, war was prevalent in Europe, the Thirty Years War began in 1615 and did not end until 1648. The Thirty Years War was an extension of the religious intolerance between Catholic and Protestant groups.[43] Grotius sought to remedy the power struggle between religion and sovereigns by excising theology from international law.[44] The primary aim of *De Jure Belli ac Pacis* was to develop rules of war and peace that existed apart from the theological and political controversy, and depended on only Natural law, or rather, human reason.[45]

Grotius moved beyond an internal conception of sovereignty, and balanced Bodin's internal conception with an external one.[46] Grotius considered the subject of sovereignty to be the state,[47] and sovereign power to be a legal power, the possession of which could not be under control of an external power or taken away by an external power.[48] The law of nations was, according to Grotius, derived from the authority and will of all or many nations.[49] Sovereignty could be divided geographically (territorial sovereignty), but was itself the unification of power within the state that could not be divided.[50] The emphasis within Grotius' work progresses from the divine law that influenced Bodin's writing and moves toward a more "human" rational approach.[51] International law was based upon custom[52] and while it was dependent upon the will of states it also served to limit

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43 Leo Gross "The Peace of Westphalia, 1648-1948" (1948) AJIL 20 at 21.
44 Shaw, above n 28, at 24.
45 Robert H Jackson *Quasi-states: sovereignty, international relations and the Third World* (Cambridge University Press, Great Britain, 1990) at 57.
46 Minkkinen, above n 39, at 38.
47 Hugo Grotius *De Jure Belli Ac Pacis Libri Tres*, (translated ed: Louise R. Loomis (translator) Hugo Grotius *The Law of War and Peace* (Walter J. Black, INC., New York, 1949) at 43.
48 Grotius, above n 48, at 53.
49 Grotius, at 23.
50 Grotius, at 53.
51 Gross, above n 44, at 35.
52 Grotius, at 23.

and bind states engaging with each other in their sovereign capacity.[53]

The principle that sovereign power was not under the legal control of another extended to the relationship between the sovereign authority and its people, internal sovereignty. Grotius rejected the idea that:

> There are others who imagine a kind of mutual subjection, in which the whole people are bound to obey a king who governs well, but a king who governs badly is subject to the people.[54]

For Grotius, the state possessed greater rights over the people, than the people possessed against the state. If the sovereign state was subjecting its people to harm or injury, then that harm should be borne rather than resisted.[55] However, Grotius did consider situations where a sovereign oppressed their people "in ways odious to every just man"[56] and when that occurred, going to war to help others was the "the most far reaching reason" based on the "common tie of humanity".[57] Sovereignty, according to Grotius, when engaged in war with other nations, or with its own people, becomes subject to both legal and moral considerations.[58] Grotius developed a "just war" doctrine which looked to answer the question of "who has the right to engage in war, what reasons may justify a war, and what rules and procedures must be respected in the inception, conduct and conclusion of a war."[59] Grotius based his work upon reason, and a foundation of law, as a means to remedy wanton destruction amongst nations.

> Hugo Grotius observed with despair some 350 years ago that there is "no lack of men" who make light of the international rules system "as if it were nothing but an empty name. … that for a kind or a free city nothing is wrong that is to their advantage.[60]

Grotius would not live to see the end of the Thirty Years War, and twenty-three years after Grotius published *On the Laws of War and Peace* the Thirty Years War was concluded through inter-state negotiations resulting in the Peace of Westphalia in 1648.[61] The Treaty of Westphalia was contained in two separate

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53 Franz Xaver Perrez *'Coperative Sovereignty' From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, Netherlands, 2000) at 37.

54 Grotius, at 48.

55 Grotius, above n 48, at 59.

56 Grotius, at 263.

57 Grotius, at 262.

58 Jackson, above n 46 at 171.

59 Perez, above n 54, at 36.

60 Thomas M Franck *The Power of Legitimacy Among Nations* (Oxford University Press, new York, 1990) at 4.

61 Peace Treaty between the Holy Roman Emperor and the King of France and their respective

treaties, the Treaty of Munster, concluded between the Catholic parties, and the Treaty of Osnabruck, concluded with the Protestant parties.[62]

The Peace that was negotiated through these two treaties signified the first major instance of organised international cooperation between sovereign states. It marked the end of bitter religious conflict throughout central Europe and essentially created the "modern secular nation state arrangement of European politics."

2.2.3 *The Peace of Westphalia 1648*

The Peace of Westphalia 1648 could be considered as the "starting point for the development of modern international law"[63] as Leo Gross wrote:

> The Peace of Westphalia, for better or worse, marks the end of an epoch and an opening of another.[64]

The Treaty of Westphalia represented the origin of the modern nation state where the sovereign had "supreme power" which was exercised internally (or domestically) and externally in its relations with other states.[65]

> In the political field it marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.[66]

State sovereigns came together to establish a lasting peace, but the reality was that while the Treaty of Westphalia represented an evolution in international law, it also created an era of "sovereign absolutist states which recognized no superior authority".[67] A new international system was formed, based on the sovereignty of nation states, which, externally coexisted with the plurality of nations and, internally, was personified as the unlimited power and authority held by the sovereign in the territories that they held by virtue of their sovereignty.[68] This system is often described as a Westphalian model of sovereignty, and as such it clearly delineated the bounds of sovereignty in a practical application, rather than

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Allies, 1648 <http://avalon.law.yale.edu/17th_century/westphal.asp>.

62 Perez, at 22, Sweden had refused to attend a meeting with representatives of the Papacy, so the Peace was negotiated in two treaties for the separate parties.

63 Gross, above n 44, at 22.

64 Gross, at 21.

65 Francis Deng "From 'Sovereignty as Responsibility to the 'Responsibility to Protect'"(2010) Global Responsibility to Protect 2 353 at 355.

66 Gross, at 29.

67 Gross, at 20 and 39.

68 Perez, above n 54, at 22.

theoretical as was the case with Bodin and Grotius, though legal and political theorists would continue to build and develop the notion of sovereignty.

The effect of the Peace of Westphalia also brought into being a more *positivist* approach to international law, where it had previously been based on Natural law, which is primarily based in theory and deductive reasoning.[69] Positivism based its approach on facts, what actually happened between states, agreements and customs that were adhered to by states, were deemed to be the essence of the law of nations.[70] So when states came together to negotiate the Treaty of Westphalia as sovereign states, it marked the factual (*positivist*) origin of a "modern" system based on the nation state. The Peace of Westphalia also correlated to the theories put forward by Bodin, and later by Thomas Hobbes, which embraced an absolute form of internal sovereignty, and the sovereignty of states.[71]

2.2.4 *Thomas Hobbes (1588-1679)*

Thomas Hobbes was an English philosopher and legal theorist, who published the *Leviathan* in 1651.[72] Hobbes' writings in the *Leviathan* would be coloured by the execution of the English King, Charles I, carried out by the King's own subjects after he was accused of being a tyrant, traitor, and murderer. Hobbes, a strict monarchist, fled England for France following the deposing of the King, and two years after Charles I was executed the *Leviathan* was published.

Hobbes asserted that the Sovereign was conferred by upon one man or an assembly of men for security against foreign powers so that all could live in peace.[73] This unification of the power of a multitude onto a person, or assembly of persons, was considered to be, by Hobbes, the formation of a commonwealth, or state. The power conferred was a sovereign power, and all those beneath it were considered subjects.[74]

> For by this authority, given him by every particular man in the Commonwealth, he hath

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69 Shaw, above n 28, at 25.
70 Shaw, at 26.
71 Shaw, above n 28, at 26.
72 Thomas Hobbes *Leviathan or Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (McMaster University Archive of the History of Economic Thought, ebook ed, 1999) at 109.
73 Hobbes, above n 74, at 106.
74 Hobbes, at 106.

> the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad.[75]

This protectorate state formed around the mutual relationship between ruler and ruled has been described as a social contract, whereby individuals united and surrendered their individual autonomy to another, who would then govern, for the benefit of personal security, and security of property.[76] Once a Commonwealth, or State had been constituted it could not be un-constituted by its people.

Hobbes described sovereignty in absolute terms, Hobbes declared the people to be the "authors" of all the sovereign did, and based on this logic Hobbes stated that:

> Fourthly, because every subject is by this institution author of all the actions and judgements the sovereign instituted, it follows that whatsoever he doth, can be no injury to any of his subjects, nor ought he to be by any of them accused of injustice.[77]

It would be a great injustice if the Sovereign's people were to put him to death, or punish him for how he treated his subjects, by Hobbes' logic, they would only be punishing themselves for actions they themselves had authorised the sovereign to do. Regardless of whether an individual consented to the conferring of sovereign power to one man, Hobbes asserted that the people were now the "authors" of all the sovereign's actions and judgements. The people could not "cast off" sovereignty and return to the state they occupied before sovereignty had been conferred, they could not be freed from the subjection that they had placed themselves under, and they could not depose of their sovereign.[78]

> And therefore, they that are subjects to a monarch cannot without his leave cast off monarchy and return to the confusion of a disunited multitude; nor transfer their person from him that beareth it to another man, other assembly of men; for they are bound, every man to every man, to own and be reputed author of all that already is their sovereign shall do and judge fit to be done; … and therefore if they depose him, they take from him that which is his own, and so again it is injustice.[79]

While the sovereign may have attained sovereignty via a social contract he was also separate from it,

> Secondly, because the right of bearing the person of them all is given to him they make sovereign, by covenant only of one to another, and not of him to any of them, there can

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75 Hobbes, at 106.

76 Stevie Martin "Sovereignty and the Responsibility to Protect: Mutually Exclusive, or Codependent?" (2011) 20 Griffith Law Review (2011) 153, at 176, and Thomas M Franck *The Power of Legitimacy Among Nations*, above n 61, at 8.

77 Hobbes, above n 74, at 109.

78 Hobbes, at 107-108.

79 Hobbes, at 107.

> happen no breach of covenant on the part of the sovereign; and consequently none of his subjects, by any pretence of forfeiture, can be freed from his subjection.[80]

Hobbes' interpretation of sovereignty has often been interpreted as suggesting, due to the nature of the covenant, or social contract put forward, that the sovereign does not have any responsibility in regard to his subjects, or owe them any obligations.[81]

In this sense, the protectorate state created by the social contract theory is purely for the protection from external or foreign threats.
However, Hobbes also noted that according to Natural law, all men had a right to protect themselves when there was no other who could do so.

> The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished. The sovereignty is the soul of the Commonwealth; which, once departed from the body, the members do no more receive their motion from it. The end of obedience is protection; which, wheresoever a man seeth it, either in his own or in another's sword, nature applieth his obedience to it, and his endeavour to maintain it. And though sovereignty … be immortal: yet is it in its own nature, not only subject to violent death by foreign war, but also through the ignorance and passions of men it hath in it, from the very institution, many seeds of a natural mortality, by intestine discord.[82]

So, unlike Bodin and Grotius, Hobbes contemplated situations where, in spite of the "immortal" nature of sovereignty it can be subjected to a "violent death", by foreign war and no longer being able to protect its citizens, or more significantly, by internal or civil war.[83] This marks an advancement on previous legal theories on the nature of the sovereign state and sovereignty itself. It contemplates the idea that while sovereignty may be absolute both internally, and externally, it is by no means impervious.

Like Bodin and Grotius, Hobbes also agreed that the Sovereign had the power to make laws, war, and peace, appoint people to positions of power within government, and levy taxes. Hobbes also put forward that the Sovereign was the only power that could determine what doctrines, or beliefs, were appropriate for the masses. These were some of the hallmarks by which sovereignty could be recognised, and to Hobbes they were "incommunicable and inseparable".[84]

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80 Hobbes, at 108.
81 Martin, above n 78, at 176.
82 Hobbes, above n 74, at 136.
83 Hobbes, at 136.
84 Hobbes, 109-112

2.2.5 *Samuel von Pufendorf (1632-1694)*

Not long after Hobbes published the *Leviathan* Samuel von Pufendorf, a German political philosopher, entered his own work into the intellectual musings on the meaning of sovereignty when he published *De Jure Naturae et Gentium Libri Octo* (*On the Law of Nature and of Nations*) in 1672. Pufendorf endeavoured to align international law with Natural law, which he perceived as a moralistic system,[85] the moral aspect of Pufendorf's writing came through strongly in his approach to the relationship between sovereign and subject.

Like other theorists before him, Pufendorf concluded that men came together with other men, and formed a "common confederacy" (sovereign state) by "pooling resources, mutually intertwining their safety, and warding off perils" that they could not do as individuals.[86] Pufendorf opposed the notion that sovereignty was an extension of the divine (God), and proposed that it resided in the "association of men as a civil state."[87] Pufendorf did hold that sovereign power was "supreme" and no man could be superior to the sovereign.[88] Like preceding authors who advanced the theory that sovereignty was established for the protection and security of society, Pufendorf also agreed with this stance,

> Just as supreme civil sovereignty is established for the preservation of mankind, and in order to put an end to the infinite miseries of a state of nature, so it is to mankind's greatest interest that it be held sacrosanct and inviolable by all its members.[89]

This state would perform its functions through a "supreme sovereign" whether that sovereign was an individual or a council, whomever, or whatever held sovereignty would have supreme control over laws and property.[90] The "supreme sovereign" was vested with legislative power, judicial power, the right of war and peace, the power to appoint ministers and magistrates, and other state functions.[91]

As Pufendorf described sovereignty as supreme, his logic followed that the

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85 Shaw, above n 28, at 25.
86 Samuel Pufendorf *De Jure Naturae et Gentium Libri Octo* (translated ed: C. H. Oldfather and W. A. Oldfather (translator) Samuel Pufendorf *On the Law of Nature and Nations* (Clarendon Press, Oxford, 1934) at 968.
87 Minkkinen, above n 39, at 39.
88 Pufendorf, above n 88, at 1061.
89 Pufendorf, at 1103.
90 Pufendorf, at 968, and 983.
91 Pufendorf, at 1010.

sovereign could have no other superior, the acts of the sovereign could not be voided, and as such the sovereign could not, and would not be liable for his actions.[92] This can be understood as meaning that externally, the sovereign state would submit to no other foreign power, and internally, there was no higher authority than the sovereign power.

However, in the exercise of sovereign power within the state, Pufendorf had this to say:

> For in submitting his will to the will of his prince, a man is understood to have done so with the thought in mind that his sovereign would will nothing but what is just and for the advantage of the state. On this point it seems we must say, that an action which proceeds from an abuse and debasing of the public will, is still in itself a public action belonging to the state, because it is performed by the sovereign as such.[93]

This reflects Pufendorf's Natural law approach to sovereignty, as a more moralistic rather than explicitly legal theorem. It also illustrates that while sovereign authority may be supreme, it must also be just, and that deviation from 'just' behaviour by the sovereign is still considered to be a sovereign act. Internally, the sovereign will do as he sees fit, the ideal would be that his actions are conscionable, but if the acts do not fit that ideal, it does not render them void. While sovereignty was a supreme form of authority, Pufendorf also believed that there existed a "pact" between sovereign and citizen. This pact formed the basis of a sovereign's duty to their people, which Pufendorf described in the following way:

> The duty of a prince concerns his subjects either as a whole or individually. He owes them as a whole his care for the safety of the whole state, and this if he is absolute, according to his own judgement, if he is limited by certain laws, according as they define the manner of his government.[94]

While Pufendorf did assert that the sovereign was supreme, he disagreed that the nature of supreme sovereignty was absolute. For Pufendorf, absolute sovereignty existed in theory, but not always in practice.

> Therefore, it lies entirely within the will of free peoples, when they grant a king sovereignty, as to whether they wish it to be absolute or restricted by certain laws, provided, of course, such laws have in them nothing impious, and do not obstruct the end of sovereignty itself.[95]

So while sovereignty was, according to Pufendorf, the supreme power within a state, it was not an absolute power, its restriction and limitation existing in the

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92 Pufendorf, at 1055.
93 Pufendorf, at 985.
94 Pufendorf, at 1105.
95 Pufendorf, at 1068.

constitutional arrangements of the state.[96] Sovereignty was not only limited constitutionally, but also morally. Sovereigns were obligated upon taking the throne, to administer their sovereignty justly, to secure the state from threats justly, but what course of action he chose would be left to his own judgement. However, though the administration of sovereignty could be restricted according to laws, which if the sovereign broke signified a breach of faith between sovereign and subject, citizens had no form of recourse, and were powerless to disobey the sovereign, or to make his actions void:

> For if the king says that the safety of the people, or the real welfare of the state, demands that (and such a presumption always attends the acts of a king), the citizens have nothing to reply, since they have not the power to take cognizance as to whether or not the necessity of the state demands such measures.[97]

By describing the relationship between sovereign and citizen in this way, Pufendorf essentially placed a limitation on the exercise of an absolute power, morally at least, by the sovereign as he relates to his subjects.[98]

But this sovereign power, whether absolute or limited, was exercised in much the same way as imagined by previous authors. The different powers of sovereignty were; legislative, judicial, the power to make war and peace, and the power to appoint people to official positions of government.[99] These powers, according to Pufendorf, as all preceding authors have noted, are indivisible in nature, and their indivisibility is a necessity for maintaining state unity:

> … these parts of supreme sovereignty are naturally so united and bounded up with one another, that, if we should imagine some of them to be independently within the control of one man, and some within the control of others, the regular form of a state would be entirely destroyed.[100]

Sovereignty is then the primary force that binds together individuals within a state and maintains peace and unity within it. Essentially, Pufendorf's theory of sovereignty was somewhat of a compromise between Grotius' and Hobbes' own conceptions. He sought a more pragmatic foundation anchored in natural law, and introduced a supreme, but moral form of sovereignty. It was not essential to Pufendorf, for the sovereign to be absolute, and these ideas would dominate in

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96 Maogoto, above n 32, at 12.
97 Pufendorf, at 1069.
98 Maogoto, at 12.
99 Minkkinen above n 39, at 39.
100 Pufendorf, above n 88, at 1015.

Germany up until the French Revolution.[101]

2.2.6 *Emmerich de Vattel*

Following Pufendorf, the first explicit attempt that linked sovereignty with the international legal order was Emmerich de Vattel's *Le droit des Gens*, (The Law of Nations), in 1758. According to Vattel, a Nation, or State, was a political body, a unified society of men who came together to achieve mutual welfare and security.[102] To Vattel, internal sovereignty was how sovereignty was exercised within the state, through the "public political authority" that was intended to govern.[103] A public authority was established by the society of men coming together to form a State, it had a utilitarian existence, and its nature would not be changed whether it existed in a Monarchy, or a council of men.[104]

According to Vattel, every State that governed itself, and did not depend upon any other State, was a sovereign State. It was truly independent, governed by its own authority, and by its own laws.[105] To Vattel, the Law of Nations was "the law of sovereigns":[106]

> Of all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to cause for offense.[107]

The *Law of Nations* presented Vattel's ideal, that in a society of nations, the members of such a society enjoy equality as sovereign states.[108] Vattel used the nature of man as an analogy, men by nature were equal, and the rights and obligations they possessed were equal also, to describe the equality, and rights and obligations, of the Nation state. The equality of Nations was described by Vattel in the following way:

> A dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful kingdom. From this equality it necessarily follows that what is lawful

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101 John Hilla "The Literary Effect of Sovereignty in International Law" (2008) 14(1)Widener Law Review at 97-98.

102 Emmerich de Vattel *Le Droit de Gens* (translated ed: Charles G. Fenwick (translator) Emmerich de Vattel *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Carnegie Institution of Washington, Washington, 1916) at 11.

103 Minkkinen, at 41.

104 Vattel, at 20.

105 Vattel, at 11.

106 Vattel, above n 104,at 12.

107 Vattel, at 131.

108 Fassbender, above n 20, at 141.

> or unlawful for one Nation is equally lawful or unlawful for every other Nation.[109]

So internally, a State was free to govern its subjects as it saw fit to do without another State interfering, but externally, a State could not commit acts that would affect the external rights of another State.[110] The external rights that states possessed arose from their respect for each other as members of the society of Nations.[111] Vattel understood States were fully independent from each other, but were bound together by their mutual interests.[112]

Vattel's apprehension of sovereignty is akin to Westphalian sovereignty – that states should not intervene in the internal affairs of other states, that states are independent, and should determine their own form of governments.[113]

Internally, when the citizens of a state recognise one as a legitimate sovereign, they then owe their sovereign "faithful obedience" and by submitting to a sovereign citizens accept a diminishing of their own rights.[114] However, for Vattel, obedience and the diminishing of personal rights did not mean blind obedience in the face of grave injustice.

> But when it is a case of clear and glaring wrongs, when a prince for no apparent reason attempts to take away our life, or deprive us of things without which life would be miserable, who will question the right to resist him? The care of our existence is not only a matter of natural right but of natural obligation as well; not many may give it up entirely and absolutely; and even though he could give it up, is it to be thought that he has done so by the compact of civil society when he entered into it for the sole purpose of obtaining greater security for his personal safety?[115]

According to Vattel, the sovereign power can be limited by the fundamental laws of a state. It is then the responsibility of the sovereign to honour and adhere to these laws. They are part of the constitutional make up of the state. The constitutional purpose of these fundamental laws', is as a foundation for peace within society, and to support the sovereign's own authority.[116] However, if a sovereign violated these fundamental laws it would be an act of tyranny, his

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109 Vattel, at 7.
110 Vattel, at 7.
111 Minkkinen, abvoe n 39, at 41.
112 Harry G Gelber *Sovereignty Through Interdependence* (Kluwer Law International Ltd, United Kingdom, 1997) at 7.
113 Stephen D Krasner "Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law" (2003-2004) 25 Mich J Int'l L 1075 at 1077.
114 Vattel, at 25-26.
115 Vattel, above n 104, at 26.
116 Vattel, at 22.

subjects had a lawful cause for revolt, and resistance.[117] If a situation arose, where citizens revolted against a tyrannical sovereign, the principle of non-intervention no longer held true, and a foreign state could assist citizens in their plight with aid if it was asked for.[118] This was the only time that the shield of sovereignty and non-intervention could be pierced by a foreign nation, otherwise in all other aspects of government internal sovereignty was paramount.

2.2.7 *Napoleonic Wars and World War I*

Following the 17th and 18th centuries, which were an era of intellectualism and rational philosophy that contributed to the development of the concept of sovereignty and international law as a whole, the 19th century would be marked by an expansionist and positivist era, led by the Napoleonic wars.[119] During the French Revolution, and Napoleonic wars, between 1789-1814 international law seemed "non-existent".[120] Napoleon embraced expansionism (the expansion of state boundaries by military force) under the guise of liberty and self-determination, but really sought only to dominate western Europe through military force.[121] European States acted together collectively in an anti-Napoleonic coalition to defeat France, and ended the war with the signing of the Treaty of Paris.[122] Europe had almost been reconfigured by the Napoleonic wars, and following the conclusion of the war, the Congress of Vienna, an "assemblage of statesmen" came together to "reconstruct the States System of Europe".[123]

This marked the first time, since the Peace of Westphalia, that sovereign states endeavoured to form some kind of "world unity" known as the Concert of Europe.[124] This system was not rigidly formalised, but consisted of the Allied powers in a "loose system of consultation" exercising hegemonic control over

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117 Vattel, at 131.
118 Vattel, at 131.
119 Shaw, above n 28, at 27.
120 Maogoto, above n 32, at 21.
121 Mary Ellen O'Connell and B Welling Hall (eds) "Report from Columbus: Discussions on the Future Law and Institutions on the Use of Force in a One Superpower World" in M. Bothe, M.E O'Connell, N Ronzitti (eds) *Redefining Sovereignty: The Use of Force After the Cold War* (Transnational Publishers Inc, New York, 2005) 435, at 451.
122 First Peace of Paris 1814, and Second Peace of Paris 1815.
123 R. B Mowat *The European States System: A Study of International Relations* (Oxford University Press, London, 1923) at 51-52.
124 Gross, above n 44, at 20.

other European states.[125] It also embraced a notion of sovereignty that was Westphalian in nature, absolute, unlimited authority. While not a perfect state system, and not without challenges, it avoided an all out inter-state war until 1914, where the result of imperialism, militarism, and colonialism and "sovereign excesses"[126] led to the outbreak of World War I.[127]

World War I had a devastating effect, both for the excessive loss of life, but also the treatment of civilians by their own government (Turkey) and the aggression shown by Germany to other European states.[128] At the end of the First World War, the United States of America's President Wilson developed his Fourteen Points, these Points were principles that were a foundation for peace to be established. The Fourteen Points were brought into discussion at Versailles the Treaty of Versailles 1919 was written into the Covenant of the League of Nations,[129] it was signed in 1919, and came into effect in 1920.

2.2.8 *The League of Nations*

The League of Nations was the first attempt at collective security in an international society based on states. The Covenant of the League expressed its purpose as "international co-operation to achieve international peace and security" by accepting the obligation not to resort to war, and (inter alia) accepting international law as a rule of conduct amongst Governments.[130] Sovereignty was not explicitly recognised as a founding principle of the covenant, political independence was the focus rather than sovereignty.[131]

Membership of the League was not universal, Articles 1 and 2 of the Covenant specified the ways in which States became members. Article 1 covered "Original Members", States that were signatories to the Treaty of Peace (regardless of

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125 Bardo Fassbender "Sovereignty and Constitutionalism in International Law" in Neil Walker (ed) *Sovereignty in Transition* (Hart Publishing, Oxford, 2003) 115 at 122.
126 Maogoto, above n 32, at 33.
127 Perrez, above n 54, at 46.
128 Maogoto, above n 32, at 33.
129 Ruud van den Berg "Promising or Failing? League of Nations and United Nations Organisation" (1994-1995) 4(2) Tilburg Foreign L Rev 101, at 101.
130 Covenant of the League of Nations 1919.
131 Cezary Mik "State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context" in Neil Walker (ed) *Sovereignty in Transition* (2003) 367 at 372.

whether they had ratified it or not), and neutral States that were named in the Annex of the Covenant. Article 2 related to Membership by admission of any "self-governing State, Dominion or Colony".[132] States had no qualms leaving the League. Germany, as a former enemy State, was restrained from entering the League until 1926, it left shortly after when Hitler ascended to power in 1933. Japan's occupation of Manchuria in China, led the League to send a commission of inquiry, leading Japan to leave the League in 1933. Italy left the League in 1937 after the League declared Italy an aggressor for its invasion of Ethiopia in 1935. The League had ordered sanctions against Italy, but they were never enforced. The Soviet Union which had not become a member until 1934 was expelled in 1941 following its invasion of Finland.[133] The United States never became a member of the League, believing that the League would have too much influence upon its internal sovereignty.[134] Opponents in the United States asserted that the League impaired congressional, presidential, and federal authority, over internal issues, that would detrimentally limit the exercise of internal state sovereignty.[135]

The League formed a Council, which was composed of the five great powers, and four states elected from the remaining members. The Council of the League of Nations was responsible for issues that concerned collective security. The resolutions issued by the Council did not carry binding force, and required the unanimous consent of all members of the League.[136]

While sovereignty may not have been an explicit principle expounded by the Covenant, the League did take into account issues relating to state sovereignty, although, in a somewhat negative fashion. The League of Nations refused to admit Liechtenstein in 1920, and cited that Liechtenstein had passed over some of the attributes of sovereignty to another state, and in doing so would be unable to

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132 Clyde Eagleton, "The Problem of the Admission of the United States into the League of Nations" (1932) 10(1) New York University Law Quarterly Review 58, at 59.

133 Van den Berg, above n 130 at 102.

134 Antonio Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005), 36.

135 William G Ross "Constitutional Issues Involving the Controversy over American Membership in the League of Nations, 1918-1920" (2013) 53(1) American Journal of Legal History 1 at 1.

136 Mark W. Zacher "The Conundrums of International Power Sharing: The Politics of Security Council Reform" in Richard M. Price and Mark W. Zacher *The United Nations and Global Security* (Palgrave Macmillan, New York, 2004) 211 at 211.

carry out its obligations under the Covenant.[137]

The first foray into a system of collective security founded on the State in the form of the League of Nations collapsed. Germany had been militarily weakened substantially, but the inability of the League to perform resulted in Germany's transformation into a military power once again in 1939.[138]
The League's powers under the Covenant were revolutionary at the time of its inception, but their effectiveness was severely limited by States governments' unwillingness to use them.[139] When the Second Word War began, it was apparent that the League of Nations had failed the purpose for which it had been set up. The foundering of the League of Nations was the impetus for the international community to consider a new inter-governmental organisation.

2.2.9 *The United Nations*

The lesson that the international community learnt from the failure of the League, and the second outbreak of world war, was the need for collective action to prevent future threats to international peace and security, and prevent aggression by States towards other States.[140] Eric Engle described the repercussions of World War I and II in the following way:

> In the end the myth of the nation state proved itself to be a bloody nightmare. Rather than enabling humans to reach their maximum capacities, the nation state had become an idol which sought human sacrifices on the plains of Belgium in 1914 and throughout the European continent between 1939 and 1945.[141]

In order to prevent such a catastrophic war in the future, States took an active interest in developing an international organisation that would not falter. At a conference in Moscow held in 1943 the governments of the United States, the United Kingdom, the Soviet Union, and China made the declaration that an international organisation based on sovereign equality, with universal membership by all states, was a necessity for assured international peace and security.[142]

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137 Alan James *Sovereign Statehood: The Basis of International Society* (Allen & Unwin, Boston, 1986) at 114.
138 Maogoto above n 32, at 74.
139 van den Berg, above n 131, at 102.
140 Daniel Khan, "Drafting History" in Bruno Simma (ed) *The Charter of the United Nations, A Commentary* 1 at 3.
141 Eric Engle "Beyond Sovereignty? The State After the Failure of Sovereignty" (2008) 15(1) ILSA J Int'l & Comp L 33, at 38.
142 Hans Kelsen "The Principle of Sovereign Equality of States as a Basis for International Organization", Yale Law Journal (1944) 53(2) 207 at 207.

The new international organisation and its founding Charter went through phases of development. First, private individuals, and private groups put forward their proposals and ideas for how a lasting peace could be achieved.[143] Secondly, expert bodies, diplomats, bureaucrats, and government ministries began to frame up what such an organisation would look like.[144] Third, from 1943 on, heads of state, and ministers, addressed the establishment of a new international organisation in conferences and communiques.[145] The Dumbarton Oaks Conference in 1944 made significant progress, but not without difficulty, with two meetings between the UK, United States and Soviet Union, then the UK, United States and China taking place.[146] A measure of agreement was reached in principle regarding the establishment of an international organisation, and produced a paper 'Proposals for the Establishment of a General International Organisation', which became a key document in the subsequent Yalta and San Francisco conferences. The San Francisco conference concluded the efforts of a multitude of individuals working on behalf of their states, and state leaders themselves, the Charter of the United Nations was unanimously adopted on 25 June 1945, and the following day, the representatives of the fifty participating states signed the Charter without reservations.[147]

The Charter of the United Nations upheld the principles of sovereign equality, non-intervention, and refraining from the use of force, but it also provided for the establishment of a Security Council, that was charged with maintaining international peace and security, and determining threats to that peace and security.

The significance of the principle of sovereignty in international law was recognised when it was codified in Article 2 of the Charter of the United Nations. Article 2(1) of the Charter states that:

> The Organization is based on the principle of the sovereign equality of all its Members.[148]

Article 2 contains some of the elements that have defined the term 'sovereignty' since it was first introduced into political and legal discourse by Jean Bodin in his

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143 Khan, above n 142, at 4-5.
144 Khan, at 8.
145 Khan, at 10.
146 Khan, at 14.
147 Khan, above n 142, at 20.
148 Charter of the United Nations, art. 2(1).

work *The Six Books of the Commonwealth* (*Les Six Livres de la Republique*) in 1572.

Article 2(4) states that-

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.[149]

Article 2(7) states that-

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. [150]

Article 2(4) and 2(7) reflect the principle of internal sovereignty in relation to other States, that a State should be free from external interference in matters exclusively within its jurisdiction. Article 2(7) is the codification of the protection of state sovereignty. However, there is a progression in how sovereignty can be perceived, no longer can states be protected absolutely by their inherent internal sovereignty. Sovereignty no longer means "absolute power, or complete independence", but can now be interpreted as sovereign independence within the confines of international law, though this formal interpretation does not indicate whether there are substantive attributes of sovereignty,[151] as there were when it was first introduced into political legal theory.

The most significant aspect of the establishment of the United Nations, was the constitution of the United Nations Security Council. The Security Council's specific purpose is the maintenance of international peace and security (Article 24(1), and its powers are contained in Chapter VII of the Charter. The Security Council is composed of fifteen members, eleven made up of member states of the United Nations, the remaining five positions are held permanently by the Republic of China, France, Russia, the United Kingdom, and the United States of America. The permanent members of the Security Council possess the right to veto decisions on any procedural matters.[152] Formerly, an attribute of sovereignty was the right of any sovereign to make peace or war (as long as it was "just"), the

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149 Charter of the United Nations, art. 2(4).
150 Charter of the United Nations art. 2(7).
151 Georg Nolte "Article 2(7) in Bruno Simma (ed) *The Charter of the United Nations, A Commentary*, 280 at 283.
152 Andreas Zimmerman "Voting, Article 27" in Bruno Simma (ed) *Charter of the United Nations, A Commentary* 871 at 878.

Charter through Articles 2(4) and (7), has limited that right, and force can only be used in self-defence (Article 51 of the Charter),[153] or as authorised by the United Nations Security Council.

The Security Council in fulfilling its functions now determines under Article 39 whether a threat to peace and security exists. If it has been determined that a threat does exist, States are encouraged by the Security Council to settle the dispute via peaceful means (Article 33(2), and if this is not successful, the Security Council can authorise military, and non-military enforcement measures, under Chapter VII of the Charter, which are binding on member states. The effect of creating an organisation for the purpose of collective security has bound sovereign states together within an international legal forum, and has also created a tentative balance between international law, collective peace and security, and state sovereignty.

With the advent of the United Nations, and its subsidiary organ the Security Council, the power of sovereignty could no longer be considered absolute, sovereign states could no longer act with impunity towards their citizens, without fear of repercussion from the international community. However a new challenge to sovereignty and the effectiveness of the UNSC would begin when the Cold War began. It was an "ideological and military rivalry"[154] between "East" and "West", based on power politics that managed to limit some of the foreseen benefits from the previous strides that had been made after WWII in expanding the definition of state sovereignty.[155] During this time, the United Nations and the Security Council were somewhat incapacitated to deal with inter-state war, or, intra-state tyranny.[156] The ideological differences between Western, and Eastern nations rendered the Security Council ineffective in making decisions regarding inter-state disputes due to the exercise of the veto. It also brought to the forefront internal

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153 Charter of the United Nations, art.51 – the use of force in self defence must be reported to the Security Council.

154 John Mueller "Ordering the New World" in Bothe M, O'Connell M, and Ronzitti N (eds) *Redefining Sovereignty: The Use of Force After the Cold War* (Transnational Publishers, New York, 2005) 65 at 67.

155 Jackson Nyamuya Maogoto "Sovereignty in Transition: Human Rights and International Justice" (2005) 7 UNDALR 83, at 89.

156 Mariane Heiberg "Introduction" in Marian Heiberg (ed) *Subduing Sovereignty: Sovereignty and the Right to Intervene* (Pinter Publishers, London, 1994) 9 at 9.

state sovereignty, the relationship between a state government and its citizens were still the domestic domain of the state in question.[157]

The fall of the Berlin wall marked the end of the Cold War,[158] and inducted a time when states were able to settle old disputes, and inter-state conflicts declined. They were replaced however, by intra-state conflicts that offered up their own challenges for the international community in addressing and containing conflicts that were, by their very nature, under the sovereign state's internal jurisdiction.[159] Human rights, and humanitarian concerns became the focus within the international community. State sovereignty was viewed as a barrier to the effective implementation of human rights within states, and internal state sovereignty became the subject of international examination.[160] The "old ideas" regarding state sovereignty were being challenged by the international community, and citizens of states where unaccountable governments committed heinous atrocities against them.[161] Members of the international community would try to challenge the prohibition of intervention in a state's internal sovereignty by promoting the principle of intervention for humanitarian reasons.[162]

Intervention in a state's internal jurisdiction for humanitarian reasons has been described as the "greatest erosion of sovereignty",[163] but it is also described as an ambiguous theory.[164]

2.3 Conclusion

Examining how sovereignty has evolved since its earliest inception has indicated that evolution, in terms of expanding the understanding of the doctrine, takes place in several ways. From its earliest inception, sovereignty as a concept was expanded upon by legal theorists and jurisprudential thought based in a European

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157 Heiberg, above n 158, at 9.
158 Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (Hart Publishers, Oxford, 2004) at 1.
159 Max Hilaire *United Nations Law and the Security Council* (Ashgate Publishing Limited, England, 2005) at 1.
160 Deng, above n 67, at 359.
161 Deng, above n 67, at 359.
162 Albrecht Schnabel and Ramesh Thakur (eds) *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, 337.
163 Deng, at 361.
164 Schnabel and Thakur, above n 164, at 321.

context. The theory was and still is a reaction to conflict and warfare, and sovereignty is viewed as an answer, or remedy to mitigate the ill effects of armed conflict.

This was followed by practical application, the concept of sovereignty in action, with the negotiation of the Peace of Westphalia by sovereign states. Subsequently the development of sovereignty is theoretical, followed by engagement between sovereign states externally via expansionist actions, and then through the negotiation of peace treaties. This continues until multiple states observe that a collective form of peace and security would circumvent violations of state sovereignty. There is a lack of theoretical support for the development of the League of Nations, but not so for the United Nations. The effort put into developing a lasting international organisation for the purpose of peace and security has managed to sustain itself, even during times where dominant states diplomatic relationships have disintegrated. The 1990s saw a rise in states experiencing humanitarian crises that the international community found difficult to respond to, due to entrenched respect for sovereign equality, and state's own internal sovereignty. How sovereignty has evolved following a period where humanitarian intervention has become a significant consideration will be examined in the following section.

3. Humanitarian Intervention

3.1 Introduction

The military intervention that took place in Libya was authorised by the UN Security Council. The Security Council considered that the attacks carried out by the Libyan government could amount to crimes against humanity.[165] The military intervention was carried out, among other things, to "protect civilians" and ensure the "unimpeded passage of humanitarian assistance." Resolution 1973 is the first time the UN Security Council has authorised intervention in the affairs of another state, without that functioning state's consent.[166] Prior to the formation of the United Nations interventions have been carried out by states without the intervened state's consent[167], and the greatest example of a humanitarian intervention carried out without the intervened state's consent or the authorisation of the Security Council was the NATO intervention in Kosovo.

States argued that the Libyan government, by its reprehensible actions, had lost its legitimacy,[168] and that the Security Council had to act in order to protect the civilian population of Libya. Humanitarian intervention that has not been authorised by the UN Security Council has, by some authors,[169] been viewed as a violation of international law, and the inviolable principle of state sovereignty. Has the concept of sovereignty changed? Are humanitarian interventions now acceptable, if authorised by the Security Council, regardless of state consent as long as their purpose is for the protection of civilians, and, the government has lost legitimacy in the eyes of the international community? How has humanitarian intervention been addressed in international law in the past?

3.2 A Brief History of the Concept of Humanitarian Intervention

The origin of the concept of humanitarian intervention has been traced back as far as the Crusades by Fonteyne, and also during the religious wars of the 16th and

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165 SC Res 1973 S/RES/1973 (2011).

166 Alex J Bellamy "Libya and the Responsibility to Protect: The Exception and the Norm", (2011) 25 Ethics & International Affairs 263 at 263.

167 For example, the 1898 intervention carried out by the US in Cuba.

168 Lebanon S/PV.6498 at 3; United Kingdom S/PV.6498 at 4, Germany S/PV.6498 at 4, Colombia S/PV.6498 at 7, Portugal S/PV.6498 at 8.

169 Ian Brownlie, cited by Fernando Teson in "Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention: 1 Amsterdam L F 42 (2008-2009) 44.

17th centuries.[170] During the wars of the 16th and 17th century, a state would intervene in the affairs of another state for the protection of citizens who faced oppression from the ruling authority for their religious beliefs, but shared the same religious faith as the intervening state. It was "religious solidarity" rather than humanitarian motives that resulted in interventions.

Humanitarian intervention as it is understood today, was largely constructed in the 19th century.[171] While earlier humanitarian intervention relied on religious commonality, the 19th century saw the development of intervention for humanitarian reasons.[172] States began to explicitly refer to humanitarian reasons as justifications for interventions.[173] Ian Brownlie describes the late 19th century model of humanitarian intervention as one that is characterised by,

> A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself liable to action by any state which was prepared to intervene. The action was thus in the nature of a police measure, and no change of sovereignty could result.[174]

Brownlie was critical of interventions carried out in the late 19th century and described them as a "cloak for episodes of imperialism" citing the invasion of Cuba by the United States in 1898 as an example of such imperialism. Brownlie also declared that the doctrine of humanitarian intervention did not last beyond 1919.[175]

Following World War I, the humanitarian principles that underscored some of the reasons for state intervention in another state, were demonstrated in treaties for the protection of human rights. These guarantees were vested in the League of Nations, which at the time was the organ charged with ensuring the terms of treaties were adhered to. With the break down of the League of Nations in the face of the break out of another World War, States were no longer willing to intervene, individually, or collectively, for humanitarian purposes.[176]

During World War II, acts of aggression carried out by Germany toward Austria,

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170 Fonteyne above n 2, at 205-206.
171 Abiew, above n 3, at 33.
172 Fonteyne, above n 2, at 206.
173 Fonteyne, at 206.
174 Brownlie above n 4, at 742.
175 Brownlie, at 742.
176 Abiew, at 56.

Czechoslovakia, and Poland, and acts of oppression against minorities, and finally the genocide of Jews in the 1930s, the international community of States were unwilling to intervene.[177] Post-World War II and the United Nations system changed the perception of humanitarian intervention within international law, as this section will demonstrate. While Malcolm Shaw accepted that in the 19th century the doctrine of humanitarian intervention may have been accepted in international law, it would become difficult to reconcile the doctrine with the relevant provisions of the UN Charter in the 21st century.[178]

3.3 Humanitarian Intervention: Defined in a Post-UN Charter World

A strict interpretation of the provisions of the Charter results in a prohibition on humanitarian intervention. However, an observance of State practice, the practice of regional and mutual defence organisations, and the UN's subsidiary organs, lends itself to the conclusion that exceptions are being made on a case by case basis, and the gap between legality and legitimacy is becoming more and more fluid.[179] Humanitarian intervention is a concept distinct from humanitarian assistance, or aid. Humanitarian intervention, in this paper, is primarily concerned with military or forcible intervention for the purpose of preventing or stopping gross human rights abuses.

Defining the concept of humanitarian intervention can be difficult, some authors have defined humanitarian intervention according to their own personal views on its validity.[180] The myriad of definitions can produce a nuanced understanding of humanitarian intervention. The definitions presented are in essence alike, but also contain subtle differences.

In 1948 Hersch Lauterpacht has defined humanitarian intervention as:

> … dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual conditions of things. Such intervention can take place by right or without right but it always concerns the external independence or territorial or personal supremacy of the States concerned.[181]

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177 Abiew, above n 3, at 56.
178 Shaw, above n 28, 1155-56.
179 Thomas Franck "Legality and Legitimacy in Humanitarian Intervention" in Terry Nardin, Melissa S. Williams *Humanitarian Intervention* (2006) 143 at 155.
180 Susan Breau *Humanitarian Intervention: the United Nations & Collective Responsibility* (Cameron May, London, 2005) at 26.
181 Hersch Lauterpacht *Oppenheim's International Law* (7th ed, Longmans Green & Co, London,

Lauterpacht's definition highlights some key elements and issues regarding an intervention, such as the impact that an intervention will have on the intervened state's external independence, and territorial integrity. The use of the words "dictatorial interference" is a reference to how intervention had been defined under classical international law, and is used to imply the necessity in intervention for the use of force or a similar form of "imperative pressure".[182]

The 1970 Declaration on the Friendly Relations among States[183] adopted by the UN General Assembly, provided its own definition concerning intervention in a state, The Declaration addresses relations between sovereign States, and gives expression to the consensus regarding the concept of intervention and its relationship with international law. The Declaration defined intervention as:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.[184]

States are obligated under this Declaration to refrain from using coercion in order to subordinate another State in its exercise of its sovereign rights.[185] The Declaration, as consensually decided, broadens the concept of intervention, it takes into account the nature of the act of intervention, and the effect that intervention will have on a State.[186]

In the 1986 judgment *Nicaragua* case[187] the ICJ confirmed the broad concept of intervention as it was described in the 1970 Declaration:

> In this respect it notes that, in view of the generally accepted formulations, the principle forbids al1 States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty. to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[188]

1948) at 272.

182 Nolte, above n 153, at 285.

183 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* A/RES/2625(XXV) (1970).

184 GA Res 2625(XXV), above n 186..

185 GA Res 2625(XXV).

186 Nolte, above n 153, at 285.

187 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 [*Nicaragua*].

188 *Nicaragua*, above n 190, at107 paragraph 205.

According to the Court, intervention that would affect a sovereign state's ability to freely decide its course of action on matters distinctly related to its nature as a sovereign state was prohibited. The Court did consider the impact that human rights and humanitarian considerations may have on the legality of the US intervention in Nicaragua. It determined that the use of force was not "the appropriate method" to ensure respect for human rights.[189] Nor did the Court consider that the methods used by the US (mining ports, destruction of oil installations, training, arming and equipping the *contras*) as in keeping with a humanitarian objective.[190] Two things can be surmised from this; one is that in the *Nicaragua* case the Court did not support the use of force as the means by which human rights should be protected, and secondly, that certain military activities are not compatible with a humanitarian objective,[191] and neither can be used as a justification for intervention.[192]

Scott H Fairley's definition in 1980 of humanitarian intervention included his views of the type of action that should be taken, his definition was:

> … humanitarian intervention occurs when a state or groups of states interferes, by the use of force in order to impose its will in the internal or external affairs of another state, sovereign and independent without its consent for the purpose of protection of individuals or groups of individuals from their own state or within the territory of a state where the governing authority permits gross abuses of human rights or itself maltreats its subjects in a manner which shocks the conscience of mankind.[193]

Fairley's definition also refers to consent. Lack of consent from a state engaging in gross human rights abuses warrants the imposition of an external state (or states') will in its internal, or external, affairs. The will of an external state is imposed for the purpose of protecting civilians from their own government. Fairley's definition is akin to Grotius's assertion that the most "far reaching reason" for going to war with another state is to "protect the subjects of another ruler".[194] For Grotius, the "common tie of humanity" was a sufficient reason for going to war with another state, although he did question the legality of such a war as "every ruler has claimed a special right over his own subjects."[195]

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189 *Nicaragua*, above n 190, at paragraph 268.
190 *Nicaragua*, at paragraph 268.
191 Christine Gray *International Law and the Use of Force* (2nd ed.) (2004), 33.
192 *Nicaragua*, at paragraph 268.
193 Scott H Fairley "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box", (1980) 10(1) GA J Int'l. & Comp L 32.
194 Grotius, above n 48, at 262.
195 Grotius, at 262.

Sir Robert Jennings and Sir Arthur Watts defined humanitarian intervention in 1992 in terms of its legal basis:

> … when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.[196]

Jenning's and Watts' definition introduces the idea that humanitarian intervention is legally permissible in situations where the denigration of human rights has reached such a level that humankind would be collectively appalled. Intervention carried out for the sake of humankind's very humanity is therefore legal and warranted. The implications of this definition is that there may be some kind of threshold required to warrant a humanitarian intervention. According to Jenning's and Watts' definition it would be a situation that would "shock the conscience of mankind" which indicates that the threshold would be a high one to meet in terms of shock value, and loss of human life.

Also in 1992, Wil Verwey defined humanitarian intervention as:

> The threat or use of force by a state or states abroad, for the sole purpose of preventing or putting a halt to a serious violation of fundamental human rights, in particular the right to life of persons, regardless of their nationality, with protection taking place neither upon authorisation by relevant organs of the United Nations nor with permission by the legitimate government of the target state.[197]

Verwey goes further than previous definitions; Verwey's definition does not require authorisation from the United Nations, or the consent of the government within the state.

In 2003, J. L Holzgrefe defined humanitarian intervention as:

> the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.[198]

In defining humanitarian intervention in this way, Holzgrefe excludes non-forcible intervention, and intervention for the protections of the intervening state's own nationals. The focus of this definition is directly related to the question of

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196 Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law 9th ed Volume 1 Peace,* (Harlow: Longman, London, 1992) at 442.

197 Wil Verwey "Legality of Humanitarian Intervention After the Cold War" in E. Ferris (ed) *The Challenge to Intervene: A New Role for the United Nations*, (Life and Peace Institute, Uppsala, 1992), 114.

198 J.L. Holzgrefe "The Humanitarian Intervention Debate" in J.L. Holzgrefe and Robert O. Keohane *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) at 18.

whether states can use force to protect the fundamental human rights of individuals within another state.[199]

Definitions of humanitarian intervention hve often been limited to unilateral action (action without Security Council authorisation) taken by states, this form of definition should be tempered by the debate surrounding the scope of the UN Charter to allow for humanitarian intervention. Susan Breau defines humanitarian intervention, in 2005, in terms of the Charter, and the legality of the doctrine of humanitarian intervention as follows:

> Actual or threatened military action by a state or group of states with or without authorisation from the Security Council of the United Nations on the territory of another state or groups of states without permission from that state.
> A major purpose of the intervention for the intervening state or states is for the protection of individuals or groups of individuals from their own state, where the governing authority of the state or group of states has permitted actual or threatened extreme violations of human rights.
>
> These violations of human rights could involve actual or threatened loss of life on a large scale, indiscriminate use of torture and sexual assault on a large scale and could result in the actual or potential massive displacement of the population.[200]

The purpose of undertaking humanitarian intervention can be for the protection of civilian citizens in the intervened state, or for the protection of a state's own nationals residing or located within a foreign state. Susan Breau describes the protection of a state's nationals within another state as an extension of the doctrine of self-defence, a type of self-help, not a form of humanitarian intervention.[201]

Terry Nardin's 2006 definition of humanitarian intervention supports Breau's assertion that protection of a state's own nationals by intervening in another state does not constitute a humanitarian intervention, and describes the concept of humanitarian intervention in the following way:

> Intervention is the exercise of authority by one state within the jurisdiction of another state, but without its permission. We speak of armed intervention when that exercise involves the use of military force. An armed intervention is humanitarian when its aim is to protect innocent people who are not nationals of the intervening state from violence perpetrated or permitted by the government of the target state.[202]

According to Nardin, intervention that is humanitarian in nature is for the purpose of protecting civilians (innocents) who are "not nationals" of the state intervening. The perspectives are divergent, according to some, the right of states to intervene

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199 Holzgrefe, above n 201, at 18.
200 Breau, above n 183, at 29.
201 Breau, at 28.
202 Terry Nardin and Melissa S Williams *Humanitarian Intervention* (New York University Press, New York, (2006) at 1.

to protect their own nationals in another state appears to have been relegated to history, or at least, to the period of time before United Nations Charter law, according to others, it has become customary law.[203]

There have been several examples of States transgressing the territorial integrity of other States in order to rescue their own nationals.[204] Based on the examples of States intervening to protect their own nationals, it has been argued that a customary law to rescue State nationals exists, or is at least unlawful, but in order to see that the prohibition of force is not undermined, rescue of nationals is only permitted in certain conditions.[205] Due to these divergent views, the protection of nationals abroad as an aspect of humanitarian intervention is still subject to some dispute.

Three years after Nardin's definition, Sean D Murphy offers this explanation of humanitarian intervention:

> The doctrine of humanitarian intervention essentially contemplates the use of military force by one state (or a group of states) against another state not in self-defence but, rather, to prevent the widespread deprivation of human rights. While such use of force might occur pursuant to authorization of the Security Council, the doctrine's principal relevance is to serve as potential legal justification for a state or states to act without Security Council authorization, conduct sometimes referred to as "unilateral" humanitarian intervention.[206]

Murphy defines humanitarian intervention, but also qualifies its application. The doctrine of humanitarian intervention, is in itself, sufficient legal justification for states to act individually, or collectively, without Security Council authorisation, to intervene in the internal jurisdiction of another state. It would seem that Murphy is advocating for a form of collective security that resides outside the purview of the Security Council, However, Murphy goes on to qualify this form of intervention by reference to "consent". In situations where states do not consent to intervention by another state, authorisation from the Security Council must be

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[203] Shaw, above n 28, at 1155.

[204] 1956 the UK entered Suez, 1960 Belgium took protective measures in the Congo, 1976 Israel freed hostages at Entebbe, 1989 the US landed in Panama for, inter alia, the protection of its nationals, 1990 US entered Liberia, and 2002/2003 France in Chad, just to name a few.

[205] Albrecht Randelzhofer Article 2(4)" in Simma, at 223. Describes these conditions as: that the lives of nationals in another State are in danger, the State they are in are unwilling or unable to provide for their security, and that the intervening State uses force in a proportionate manner and does not pursue any other objectives while intervening so the impact on the intervened State is minimal.

[206] Sean D Murphy "Criminalizing Humanitarian Intervention" Case Western Reserve Journal of International Law, Vol. 41, Issues 2-3, (2009), 341.

sought.[207] From this, it can be concluded that without consent from the intended State, or without Security Council authorisation, an intervention carried out for humanitarian purposes lacks sufficient legal justification.

From the preceding definitions some commonalities can be identified. Humanitarian intervention is undertaken by an external state using military force (armed intervention, or forcible intervention) against the "target" state. It crosses into the "target" state's territory, and into its internal jurisdiction, and in doing so, undermines the sovereignty of the "target" state. The purpose of humanitarian intervention is to protect civilians from gross human rights violations by the governing authority. Where these civilians are in fact nationals of the intervening state, then it may be considered an act of self-defence, not humanitarian intervention (though in certain circumstances, a case could be made for a customary right of intervention).

Some humanitarian interventions take place with the authorisation of the United Nations Security Council. Some humanitarian interventions do not have UN Security Council authorisation. Some authors believe the former is a requirement where consent has not been granted by the "target" state, other authors believe that neither consent, nor UN Security Council authorisation is a requirement for humanitarian intervention to take place.
There can then be two forms of humanitarian intervention, the first is UN authorised humanitarian intervention, and the second is a state, or states acting without UN authorisation, which is often described as "unilateralism".[208] This form of action is one where States choose to accomplish an intervention independent from other States or the United Nations. They can also act multi-laterally, where a group of States choose to act outside of the United Nations system.[209]

With these commonalities some issues arise regarding the legal basis of

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[207] Murphy, above n 209, at 341.
[208] Young Sok Kim "Responsibility to Protect, Humanitarian Intervention and North Korea" (2006) 5 J Int'l Bus & Law 74 at 75.
[209] Valerie Epps, "The Failure of Unilateralism as the Phoenix of Collective Security" (2003-2004) 27 Suffolk Transnat'l L Rev 25 at 29.

humanitarian intervention. Humanitarian intervention presents a challenge, not just to state sovereignty, but also to the provisions within the United Nations Charter. The prohibition on the threat, or use of force, is one challenging aspect of humanitarian intervention. The principle of non-intervention in the internal jurisdiction of another state is another challenge. Lastly, and most importantly, humanitarian intervention poses a challenge to sovereignty, which is the fundamental principle of international law.

3.4 Sovereignty and Humanitarian Intervention Within the Context of the Charter

The Charter of the United Nations upholds the principles of sovereign equality, non-intervention, and the prohibition on the threat or use of force. Articles 2(4) and 2(7) reflect the principles that sovereign states should be free from interference in their internal jurisdiction and free from the threat of force, or have force used against them. The drafting of the Charter in this way was intentional and considered to be a necessity to preserve and assure international peace and security. Sovereign independence and territorial integrity are now considered within the framework of the United Nations system and international law.

3.4.1 *Article 2(1), 2(4) and 2(7)*

Intervention in the internal jurisdiction of another state violates the fundamental principle of state sovereignty within international law. Sovereignty is the foundation on which international relations rests, and its significance has been recognised in the Charter of the United Nations in Article 2(1).

For States undertaking forcible intervention by military means in another state for humanitarian reasons, or otherwise, would appear to be a violation of the fundamental principle of sovereignty, the prohibition on the threat or use of force, and the principle against intervention in another state's internal jurisdiction. Humanitarian intervention, from the numerous definitions above, is intended to permit intervention in States by violating the territorial integrity of a State for the purpose of protecting civilians. If humanitarian intervention is a violation of these fundamental principles, and it is a sovereign right of States to determine its own social, political, economic, and cultural institutions, does it then follow that it is a

sovereign right of states to use excessive force, rape, ethnic cleansing, genocide, and other war crimes, as a means of determining its internal institutions? With the ascent of international human rights law, and international criminal law particularly the classification of crimes against humanity, genocide, and war crimes, as crimes (although it is individuals not states held responsible) under the Rome Statute,210 the inviolability of these principles is brought into question.

3.4.2 *The Threat or Use of Force, and Intervention*

> **Article 2(4)**
> *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.*[211]

An aspect of the principle of state sovereignty is that it is inviolable. Humanitarian intervention, in principle, if applied, pierces the inviolable nature of sovereignty, as provided for in Article 2(4), this inviolability prohibits the use of force against the "territorial integrity" or "political independence" of a state.[212] The purpose of the prohibition on the threat or use of force is as a preventive measure against war. Article 2(4) was also intended to prohibit States acting unilaterally by limiting control of the use of force within the Security Council, under Chapter VII of the Charter.[213] Up until the 20th century, States were free to wage war,[214] and it wasn't until the Hague Peace Conferences of 1899 and 1907 that the international community came together and began its effort to limit States' ability to resort to war so freely.[215]

After World War I, and the establishment of the League of Nations, greater efforts were made to restrain States in their freedom to resort to war. However, within the framework of the League of Nations system, the right to resort to war was decelerated by the League's processes, it was not prohibited completely, and it was only in certain cases that were States prohibited from resorting to war.[216] The

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210 Rome Statute 1998, art.5, art.6, art.7, and art. 8.
211 United Nations Charter, 1945.
212 Jasmeet Gulati, Ivan Khosa "Humanitarian Intervention: To Protect State Sovereignty" (2013) Denver Journal of International law and Policy 397 at 401.
213 Christine Gray, above n 194, at 195.
214 Randelzhofer and Dörr, above n 208, at 204.
215 Randelzhofer and Dörr, at 204.
216 Randelzhofer and Dörr, at 205.

Geneva Protocol for the Pacific Settlement of International Disputes (1924), and the Kellogg-Briand Pact (1928) both contained provisions restricting the right to resort to war for the purpose of self-defence. However, the Protocol, and the Pact, each had its own limitations, the former was not binding law upon States, and the latter was not supported by a robust system of sanctions.[217]

The short-comings of the earlier treaties regarding the freedom of States right to resort to war (in other words: use force against other States) was addressed by the Charter of the United Nations in Article 2(4). Article 2(4) prohibited the use of military force, and was also:

> ...characterized by a contextual relationship with the multilateral system of enforcement provided for in Chapter VII UN Charter.[218]

Article 2(4) specifically, prohibits the use of force, rather than the right to resort to war, and it also extends to the *threat* of force, unlike the attempts to limit the right to resort to war in previous treaty law. Article 2(4) is supported by the collective sanctions contained in Articles 39-51 of the UN Charter.[219] Now, Article 2(4) is integral to any discussions within international law regarding a State's threatened use, or use of, force.[220]

Under the Charter system, individual States are no longer able to include the use of force as an instrument of their foreign policy.[221] Within the UN Charter, there has been no provision made for the concept of humanitarian intervention. The judgment of the ICJ in the *Nicaragua* case is clear in its determination that there are no exceptions permitted under the Charter system to allow for humanitarian intervention.

> The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.[222]

As such, the prohibition on the use of force in Article 2(4) is a part of treaty and customary law, as well as being *ius cogens*. As there is no provision in the Charter for humanitarian intervention, some critics have argued, that since Article 2(4) is *ius cogens* that there is an absolute prohibition on the use of force in

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217 Randelzhofer and Dörr, at 205-206.
218 Randelzhofer and Dörr, at 207.
219 Randelzhofer and Dörr, at 208.
220 Randelzhofer and Dörr, above n 208, at 207.
221 Randelzhofer and Dorr, at 224.
222 *Nicaragua*, above n 190, at 109-110.

international law. However there is no definitive agreed statement as to the breadth of this prohibition.[223] The disagreement regarding the scope of the prohibition is predicated upon the words of Article 2(4) "against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations". Should these words be interpreted as a rigid prohibition on all and any use of force against another State, or is there room for an interpretation that allows for the use of force as long as it is not for the purpose of overthrowing a government, or seizing territory of another State, and the force is in keeping with the purposes of the UN?[224] This question regarding the interpretation of Article 2(4) is integral to the debate over the legality of humanitarian intervention.

Those who support establishing humanitarian intervention as a legitimate and legal intervention using force propose that Article 2(4) does not explicitly prohibit humanitarian intervention. The language of Article 2(4) states that force should not be used in a "manner inconsistent with the Purpose of the United Nations." When applying force to prevent genocide, war crimes, and crimes against humanity, it is argued, that the use of force is not entirely inconsistent with the Purposes of the Charter.[225] Others have been more critical of interpreting the Charter as permitting the use of force in certain situations. While humanitarian intervention may have had some basis in international law prior to the Charter, Article 2(4) has essentially removed any recourse to the use of force by one state against another.[226]

The General Assembly passed several resolutions on the use of force which outlaw any kind of forcible intervention, opposition to an interpretation that allows for humanitarian intervention as an exception to the prohibition in Article 2(4) relied on these General Assembly resolutions to support their position that the prohibition in Article 2(4) cannot be altered without universal agreement.[227] The 1974 General Assembly resolution on the 'Definition of Aggression' is an

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223 Gray, above n 194, at 29.
224 Gray, at 29.
225 Gulati and Khosa, above n 215, at 400.
226 Malvina Halberstam "The Legality of Humanitarian Intervention" (1995) 3 Cardozo J Int'l & Comp L 1 at 3.
227 Gray, above n 194, at 46.

example of how the use of force has been interpreted and outlawed, it states that -

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this Definition.[228]

Article 6 states that nothing in the Definition enlarges or diminishes the scope of the Charter, including the Charter provisions where the use of force is lawful. While this definition, and the resolutions of the General Assembly may be informative and contain a principled approach, they are not binding and have no controlling force.

The Security Council determines whether to resort to the use of force under Chapter VII of the Charter. This practice, arguably, creates "contextual" exceptions to Article 2(4) of the Charter.[229] In situations where the Security Council decides to forego the use of force for the purpose of intervention, then it is also arguable that it has protected the prohibition contained in Article 2(4), but also, that the SC treats each situation differently depending on certain factors.[230] These factors are:

> … whether alternative remedies had been exhausted and whether the consequences that were likely to have ensued had the violation not occurred would have exceeded in gravity the consequences of the violation. The differences in national law between exculpation and mitigation may be considerable; however, in international law, the differences are almost imperceptible.[231]

So when authorising the use of force, and potentially violating Article 2(4), the Security Council must consider whether the consequences of such a violation does not outweigh the consequences of not authorising the use of force. Is it too much to expect that an international organisation made up of a multitude of States, each with their own distinctive sovereign character, can be capable of such foresight?

Part of the consideration of authorising the use of force, is the correlating principle of non-intervention contained in Article 2(7). When the Security Council authorises the use of force, they are essentially authorising a forcible intervention in a sovereign State. Article 2(7) states:

> **Article 2(7)**
> *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but*

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228 *Resolution on the Definition of Aggression* GA Res. 3314 A/RES/3314 (1974) Article 1.
229 Franck, above n 182, at 150.
230 Franck, at 152.
231 Franck, above n 182, at 152.

> *this principle shall not prejudice the application of enforcement measures under Chapter Vll.*

The language of Article 2(7) provides protection from acts of intervention by the United Nations, but not, explicitly, acts of other states. However, Article 2(7) has often been interpreted as the embodiment of the principle of non-intervention.[232] It has been argued though, that a strictly rigid interpretation of Article 2(7) would prevent the principle from evolving to reflect the present day conundrum of how the international community should respond to internal conflicts.[233]

For international lawyers and scholars, (like Brownlie), every intervention is a violation of international law.

> To them, no amount of state practice can change the law, because each new instance of intervention is branded as a violation of the law. This is another example of the fundamental deficiencies of international law doctrine. Custom appears and disappears; sometimes practice creates law, sometimes it does not.[234]

When a situation arises within a State and the Security Council considers armed intervention, State representatives argue the validity of facts, the proportionality of the force that will be used, the necessity of the use of force, and any potential motives of the parties to the dispute. The Security Council will then decide whether to act, or not to act as the case may be.[235] Franck describes this process of the debates in the Security Council, both before and after recourse to the use force, as a form of "jurying".[236]

The instances in which the Security Council has acted to authorise the use of force, and in doing so authorised a forcible intervention, are just as illuminating as the instances when it has decided against authorising the use of force, and thereby limiting Member States ability to find recourse for intervention. Humanitarian considerations are often at the crux of Security Council deliberations regarding whether or not to authorise the use of force.

3.5 Resolutions Authorising the Use of Force for Humanitarian Purposes

The debate around humanitarian intervention and its place within the international

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232 Nolte, above n 153, at 284.
233 Nolte, at 301.
234 Fernando R Teson "Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention" (2008-2009) 1 Amsterdam L F 42 at 44.
235 Franck, at 150.
236 Franck, above n 182, at 150.

legal system of states is best illuminated in context. The following examples provide context for situations when humanitarian intervention has occurred, and when it hasn't. The contrast between authorised humanitarian intervention, and unauthorised humanitarian intervention help clarify some of the challenges around intervention for humanitarian purposes.

3.5.1 *Iraq*

Resolution 688 (1991) concerning the Iraqi government's treatment of the Kurdish people did not authorise the use of force, but the resolution was later relied on by France, the U.K, and the U.S.A in justifying their interventionist actions. The debate within the Security Council prior to adopting Resolution 688 (1991) contained direct reference to Article 2(7). State representatives response ranged from viewing the resolution as a "flagrant, illegitimate intervention",[237] "inconsistent"[238] with the provisions of the Charter, and that by adopting such a resolution the Council was acting outside its purview by intervening in Iraq's internal affairs,[239] and "contradicting" Article 2(7).[240] On the other hand, during the debates, other States were reassured that respect for Iraq's territorial integrity and sovereignty would not be impacted and was supported by preamble's reference to Article 2(7) in Resolution 688.[241] Ultimately, Resolution 688 was adopted by a vote of 10 in favour, 3 against,[242] and two abstentions.[243] When France, the U.K, and the U.S.A intervened in Iraq, they asserted that the authorisation of the use of force was "implied" under the resolution.[244] As this "legal" justification became more and more flimsy, the U.K attempted to rely on the doctrine of humanitarian intervention, and when wider State support could not be garnered for their actions, the illegality of their intervention was widely accepted.[245]

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237 Iraq S/PV.2982 at 17.
238 Yemen S/PV.2982 at 31.
239 Yemen S/PV.2982 at 27.
240 Cuba S/PV.2982 at 44-45.
241 Ecuador S/PV.2982 at 37, Romania S/PV.2982 at 23; and USSR S/PV.2982 at 61.
242 Cuba, Yemen, and Zimbabwe.
243 China, and India.
244 Gray, above n 194, at 264-265.
245 Gray, at 265.

3.5.2 *Somalia*

In Somalia, the peace-keeping force UNOSOM I (United Nations Operation in Somalia) established under Resolution 751 (1992)[246] was unable to carry out its functions under its mandate due to continued tensions and lack of cooperation between the warring factions in Somalia.[247] Initially, the Security Council was slow to respond to requests from aid agencies to intervene in Somalia to prevent a humanitarian crisis, it was held up by its concerns that intervening would be a violation of Article 2(7) of the Charter. The fear from states, like Russia and China, was that intervention would set a "dangerous precedent".[248] Later though, the Security Council, sought to address the continuing violence by passing Resolution 794 (1992)[249] by a unanimous vote, and authorising the deployment of a multi-national military force to use "establish … the necessary conditions for the delivery of humanitarian assistance" in Somalia.[250]

Within the resolution, the Security Council endorsed recommendations made by the Secretary-General in a letter[251] addressed to the President of the Security Council.[252] In this letter the Secretary-General referred to the "lack of government" in Somalia, that it was time to re-examine action under Chapter VII, and provided five options for the Security Council to consider.[253] The focus of these five options was the delivery of humanitarian relief, as well as the creation of "political conditions" that would aid Somalia in resolving its political and economic problems. The first option was to continue with the deployment of UNOSOM, which by the Secretary-General's own admission was untenable due to the deteriorating situation in Somalia, and resistance from the de-facto authorities operating in Somalia.

The second option was for military to no longer protect the delivery of humanitarian relief, and humanitarian agencies would be left to negotiate the

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246 SC Res 751 S/RES/751 (1992).
247 Gray, above n 194, at 222.
248 Hilaire, above n 161, at 48.
249 SC Res 794, above n 15,.
250 SC Res 794, at [2].
251 Letter Dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council S/24868 (1992) ["Secretary-General Letter S/24868].
252 Secretary-General Letter 254,S/24868, above n 254.
253 Secretary-General Letter S/24868, above n 254.

delivery of humanitarian aid with the Somali factions and clans, as best they could. Again, another untenable option, as the Secretary-General admitted that without the presence of military personnel, humanitarian aid would become a part of Somalia's lawless economy, and not serve the purpose for which it was intended. With these "options" clearly redundant, the Secretary-General put forward three more options that would, in some way, utilise force as provided for under Chapter VII of the UN Charter.

Of the three options that would fall under Chapter VII, only option four was presented in language that made it viable.[254] Option four, a country-wide operation carried out by Member States under the authorisation of the Security Council. The United States had already proposed to lead such an operation, and the Secretary-General outlined several possibilities for the Security Council to consider in drafting the enabling resolution. The intention behind a resolution authorising the use of force in this instance was, according to the Secretary-General's letter, "how to create conditions for the uninterrupted delivery of relief supplies to the starving people of Somalia",[255] and also, to create conditions that would resolve the political and economic problems in Somalia.[256]

Resolution 794 embraced the recommendation provided by the Secretary-General and acting under Chapter VII authorised Member States to "use all necessary means" to establish a secure environment in Somalia.[257] Within the Security Council debate regarding Resolution 794, State representatives were careful in their use of language in discussing the application of the use of force.

> … the question of Somalia is a unique situation that warrants a unique approach. However, any unique situation adopted create of necessity a precedent against which future, similar situations will be measured. Since the situation in Somalia is the first of its kind to be addressed by the Council, it is essential that it be handled correctly.[258]

The representative of Ecuador also referred to the exceptional nature of the

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254 Option 3, UNOSOM undertaking a show of force in Mogadishu was discounted by the Secretary-General as he felt a country-wide operation was required. Option 5, that a country-wide enforcement operation be carried out under UN control and command. This again was fraught with difficulty as the Secretariat did not at that time, have the capability to carry out an operation of the scale that would be required. The Secretary-General also recognised that an operation under UN control and command may be difficult for Member States to accept, due to the risk posed to the "many lives" and "valuable equipment".

255 Secretary-General Letter, above n 254.

256 The fifth option was an armed force operation under the command and control of the United Nations, led by the Secretary-General and authorised by the Security Council.

257 SC Res 794, above n 15, at 3 [10].

258 Zimbabwe S/PV.3145 at 7.

situation in Somalia, and the Security Council's response to it.

> … the Somali crisis is an exceptional one, so much so that it requires a fresh kind of analysis: political as well as legal.[259]

The Belgian representative described the situation in Somalia as "atypical",[260] and the Venezuelan representative described the measures of the Resolution 794, and the situation in Somalia as "extraordinary".[261] The situation in Somalia, and the Security Council's response to it was exceptional. It was an internal conflict, though it had an "international dimension",[262] the Security Council considered the "magnitude of the human tragedy caused by the conflict" and the obstacles to the delivery of humanitarian aid to be a "threat to international peace and security". The consideration that human tragedy was a threat to international peace and security indicated an expansion of the boundaries of what constituted a "threat", and that it now included human tragedy.[263] However, by describing the situation in Somalia as "unique", "extraordinary", and the Security Council's response as "exceptional",[264] the Security Council limited the application of an expanded concept of the use of force within this resolution, it would not apply to future resolutions and nor would the jurisprudence behind it.

The situation in Somalia was also unique as there was no functioning government, the intervention undertaken by the Security Council did not contravene the will of the Somali government, as there was no government present. When State representatives argued that the situation in Somali was "unique", "extraordinary", and "exceptional" due to the lack of government, they were ensuring that the principle of sovereignty was not diminished by the setting of a new precedent allowing for humanitarian intervention in an internal armed conflict.[265] Authorisation of the use of force resulting in a military intervention in Somalia was potentially a violation of the principle of non-intervention contained in Article 2(7) of the Charter. While a lack of government was a pertinent factor in the Security Council, and the Secretary-General's consideration of the situation in

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259 Ecuador S/PV.3145 at 12.
260 Belgium S/PV.3145 at 23.
261 Venezuela S/PV.3145 at 39-40.
262 Cape Verde S/PV.3145 at 19-20.
263 Jihan A. Kahssay "Lessons Learned from Somalia: Returning to a Humanitarian-Based Humanitarian Intervention" (2012) 19 UC Davis Journal of International Law & Policy 113 at 117.
264 SC Res 794, above n 252 at, 1.
265 Wheeler, above n 8, at 186.

Somalia, Wheeler makes the valid point that it is States that bear the rights and duties of sovereignty, under international law, not governments.[266]

> … this argument is predicated upon the claim that the non-intervention rule was not at stake because the state had ceased to exist. This identifies the correct subject of rights and duties, but, applied to the statements in the Security Council, it is tantamount to arguing that the state had collapsed because the government had collapsed. However, it is clear from the customary law relating to state recognition that government and state are not synonymous, with the former being a criterion for, but not wholly constitutive of, statehood. Consequently, it is by no means certain that the collapse of the Somali Government meant that the Somali state had ceased to exist in a juridical sense.[267]

Had the Security Council relied on the justification that the use of force was allowable due to Somalia being a failed State, it would have "exceeded its legal competence", the authorisation of the use of force was, therefore, required to be based upon the devastating effect of human suffering as a "threat to international peace and security".[268]

The response by the Security Council was extraordinary not only because it was guided by humanitarian concerns, but also because it authorised the use of force and military intervention in an internal conflict.[269] However, it was never explicitly stated that action under Chapter VII was legitimate due to the human rights abuses that were occurring. This again seems to indicate the cautious approach taken by the Security Council to ensure that the authorised use of force in Somalia would not be seen as a precedent of State practice that could be used as a justification for future military interventions in other States. The Member States of the Security Council recorded that their action regarding the situation in Somalia was a clear demonstration that the international community had the "intent and will to act decisively" in regard to "peace-keeping problems" that posed a threat to "international stability".[270]

While the Security Council's authorisation of the use of force under Chapter VII was intended as a reflection of the desire of the international community to ensure the delivery of much needed humanitarian assistance in Somalia, it was never explicitly described as a humanitarian intervention. While the representative of the United States of America believed that the "decisive" action by the Security

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[266] Wheeler, at 187.
[267] Wheeler, at 187.
[268] Wheeler, at 187.
[269] Gray, above n 194, at 222.
[270] United States of America S/PV.3145 at 38.

Council was an indication of how the Security Council would behave in future, this was sadly not the case.[271]

3.5.3 *Rwanda*

The situation in Somalia was characterised by the massive human rights violations occurring, and the civilians of Somalia's desperate need for humanitarian assistance, the same can be said of the internal crisis that affected Rwanda. In Rwanda, the slaughter of Tutsis and moderate Hutu were triggered by the death of the President of Rwanda when his plane was shot down by a missile as it was coming in to land in Kigali (Rwanda's capital) on April 6 1994.[272] Over the course of the first 100 days following the President's death, over one million Tutsis and moderate Hutus were murdered in an act of genocide.[273] A peace-keeping force was already stationed in Rwanda at this time, but were helpless to stop the mass killing.[274] The Security Council's initial response was to condemn the violence, but also to urge Rwandan security forces to "cooperate fully" with the peace-keeping force (UNAMIR) sent in by the UN to protect civilians.[275]

There was much deliberation and discussion in the Security Council regarding the situation in Rwanda,[276] but States were largely unwilling to undertake the risk of

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271 For more on Somalia see: Jihan A. Kahssay "Lessons Learned from Somalia: Returning to a Humanitarian-Based Humanitarian Intervention" (2012) 19 U.C. Davis J Int'l L & Pol'y 113; Ruth E. Gordon "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti" (1996) 31 Tex Int'l L J 43; Roderic Alley *Internal Conflict and the International Community, Wars Without End?* (2004); Susan M. Crawford "U.N. Humanitarian Intervention in Somalia" (1993) 3 Transnat'l L & Contemp Problems 273.

272 Fernando R. Teson *Humanitarian Intervention, An Inquiry Into Law and Morality*, (2nd ed, Transnational Publishers, new York, 1997) at 258.

273 Jeremy Sarkin "The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and the media during the Rwandan Genocide and the Conflict in Former Yugoslavia" (2010) 33 Suffolk Transnat'l L Rev 35 at 40.

274 Teson, above n 275, at 258.

275 Security Council Meeting on Rwanda S/PV.3361 7 April 1994.

276 For more see also: Donatella Lorch *Rwanda Forces Shell Stadium Full of Refugees,* N.Y. Times, Apr. 20, 1994, at A8; Julia Preston & Thomas W. Lippman *Refugee Flood Overwhelms Relief Efforts; U.N. Appeals for Supplies to Aid 2 Million Refugees,* Wash. Post, July 21, 1994, at A1; Julia Prewston *Rwandans Confound U.N. Security Council; Humanitarian Impulse as Mission Impossible*, Wash. Post, May 8 1994, at A25; Jeremy Sarkin "The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to Be Learned from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in Former Yugoslavia" (2010) 33 Suffolk Transnat'l L Rev 35; Kimberely D. Barnes "International Law, the United Nations, and Intervention in Civil Conflicts" (1995-1996) 19 Suffolk Transnat'l L Rev 117.

leading, organising, and conducting a military intervention in Rwanda.[277] On 20 June 1994, France proposed to intervene unilaterally,[278] and on 22 June 1994 the Security Council in Resolution 929 (1994) authorised a:

> … temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda...[279]

This authorisation was given under Chapter VII and included the phrasing: "using all necessary means to achieve the humanitarian objectives", these objectives had been set out in Resolution 925 (1994).[280] Acting under this resolution, the French government took it upon themselves to intervene in Rwanda. The French government intervened with humanitarian goals as its impetus, and proclaimed that it had acted without any self-interest, and that its humanitarian goal had been "largely attained":[281]

> Should we have refrained from taking action, since no economic or strategic interest appeared to warrant such intervention, thereby justifying those who criticize the international community for acting only when powerful interests are at issue?[282]

Critics of the French intervention observed that the French forces did not assist government troops, and allowed more casualties, and strategic losses to take place.[283] After only two months in Rwanda, French forces pulled out and the French government urged the UN to send in replacements.

The French intervention in Rwanda is supported by Resolution 929, and is therefore, legal as there was no violation of Article 2(4) or 2(7). It was legally justified, but it was a case of 'too little too late', the damage in Rwanda had been done leaving one million dead, and many more displaced. The lack of political will that had been so optimistically declared when intervention was authorised in Somalia in 1993 had fizzled out only two years later.[284] The lacklustre behaviour by the Security Council, the slow reaction, and then the ineffective use of military

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277 John Janzekovic *The Use of Force in Humanitarian Intervention, Morality and Practicalitites*, (Ashgate Publishing, England, 2006) 133.

278 Letter Dated 20 June 1994 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General S/1994/734 (1994) ["Letter from the Permanent Representative of France"].

279 SC Res 929 S/RES/929 (1994) at 2 [2].

280 SC Res 929, above n 282, at 2 [3].

281 Security Council Meeting on Rwanda S/PV.3402 at 3.

282 Security Council Meeting on Rwanda S/PV.3402 at 3.

283 Teson, above n 275, at 261.

284 The disastrous events on October 3 1993 where United States helicopters were downed by Somali fighters leaving 18 U.S soldiers dead is largely blamed for the reticence of the international community to act in Rwanda.

force during the intervention stage, rendered the Security Council actions, and the intervention itself ineffective.

3.5.4 *Kosovo*

In 1999, NATO decided to intervene in Kosovo[285] even though there was no authorisation from the Security Council to do so.[286] The Security Council had determined that the situation in Yugoslavia was a threat to international peace and security.[287]

When NATO began bombing Kosovo the Security Council met, following the Permanent Representative of the Russian Federation's letter to the President of the Security Council.[288] The representative of the Russian Federation expressed their position regarding the NATO intervention, and its use of force.

> The Russian Federation is profoundly outraged at the use by the North Atlantic Treaty Organization (NATO) of military force against the Federal Republic of Yugoslavia. In recent weeks, when we were constantly hearing threats – detrimental to the negotiating process – that there would be missile strikes against Serbian positions in Kosovo and other parts of Serbia, the Russian Government strongly proclaimed its categorical rejection of the use of force in contravention of decisions of the Security Council and issued repeated warnings about the long-term harmful consequences of this action not only for the prospects of a settlement of the Kosovo situation and for safeguarding security in the Balkans, but also for the stability of the entire modern multi-polar system of international relations.[289]

The Russian Federation did not accept that prevention of a "humanitarian catastrophe" was sufficient justification for NATO's use of force, and that the consequences of such intervention would only be more harmful.

The representative of the United States responded to Russia's concerns:

> We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in

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285 For more on Kosovo see also: Albrecht Schnabel and Ramesh Thakur *Kosovo and the Challenge of Humanitarian Intervention, Selective Indignation, Collective Action, and International Citizenship*, (2000); Louis Henkin, Ruth Wedgwood, Jonathan Charney, "NATO's Kosovo Intervention" (1999) Am J Int'l L 93; Paul Latawski *The Kosovo crisis and the evolution of post-Cold War European Security* (Manchester University Press, Manchester, 2003).

286 Janzekovic, above n 280, at 142.

287 SC Res 1199 S/RES/1199 (1998).

288 Letter Dated 24 March 1999 From the Permanent Representative of The Russian Federation to the United Nations Addressed to the President of the Security Council S/1999/320 (1999) [Letter From the Permanent Representative of Russia (1999)"].

289 Security Council Meeting on Kosovo S/PV.3988, (1999) at 2.

> Kosovo – all of which foreshadow a humanitarian catastrophe of immense proportions.[290]

The United States position, and the military intervention undertaken my NATO was expressly supported by Canada, France, the Netherlands, and the United Kingdom during the meeting.[291]

Other States supported returning to diplomatic means to resolve the conflict, while Russia was supported by some States, who relied on arguments based on the prohibition of the use of force under Article 2(4) to attack NATO's actions.

> It has always been our position that under the Charter is its the Security Council that bears primary responsibility for the maintenance of international peace and security. And it is only the Security Council that can determine whether a given situation threatens international peace and security and can take appropriate action. We are firmly opposed to any act that violates this principle and that challenges the authority of the Security Council.[292]

The United Kingdom's representative stated simply: "The action being taken is legal."[293] The U.K based its position on the premise that NATO's action was an "exceptional measure" and was been conducted to prevent a "humanitarian catastrophe".

There are only two exceptions to the prohibition contained in Article 2(4) under the Charter, the first is where it is mandated by the Security Council, and the second is the principle of self-defence. NATO's intervention, and use of force clearly had no mandate from the Security Council, and as such, it would seem obvious that its actions would be deemed illegal and a violation of Articles 2(4) and (7),[294] nor was it an act of self-defence as there was no threat from the government of Yugoslavia.[295] Brownlie contends, that often overlooked is the political dimension to the intervention, that NATO member States, and UN Member States may have supported the intervention on humanitarian grounds, this was undermined by the threat of force based upon political demands regarding the political status of Kosovo.[296] Disagreement with the legality of this intervention is based on the fundamental principle of Article 2(4).

Two days after NATO began its campaign on March 26 1999, Russia sponsored a

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290 Security Council Meeting on Kosovo S/PV.3988 (1999) at 4.
291 S/PV.3988 (1999).
292 China, above n 292, S/PV.3988 at 12.
293 United Kingdom of Great Britain and Northern Ireland, above n 292, S/PV.3988 at 12.
294 De Wet, above n 160, at 307.
295 Holzgrefe and Keohane, above n 201, at 181-182.
296 Brownlie, above n 4, at 743.

draft resolution demanding the cessation of the use of force against the Federal Republic of Yugoslavia.[297]

The draft resolution submitted by the Russian Federation was never adopted due to the exercise of the veto by three permanent members of the Security Council.[298] In all 12 members of the Security Council voted against Russia's draft Resolution, however, China and Namibia supported it.

The vote on the draft resolution is viewed as a historic occasion, seven members of the Security Council "excused or acquiesced" to the use of force outside of a Security Council mandate on humanitarian grounds.[299] Also, of these twelve to vote against the draft resolution, only eight made public speeches, each referring to humanitarian considerations as the reason for their negative vote.[300]

It has been argued that for the intervention in Kosovo by NATO to be considered legal, was if unilateral intervention had somehow achieved the status of *jus cogens*.[301] However, looking back at the jurisprudence contained in the 1986 *Nicaragua* case the Court made this relevant statement to the development of customary rules:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[302]

Following this line of thought, the intervention in Kosovo by NATO, and the subsequent discussions in the Security Council have not established a new rule regarding humanitarian intervention. Rather, by utilising arguments around the use of force, and intervention for humanitarian purposes, States have only reinforced the fact that the rule regarding the prohibition on the use of force, and

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297 Kosovo (Federal Republic of Yugoslavia) Draft Resolution S/1999/328.

298 France, the United Kingdom, and the United States of America.

299 Wheeler, above n 8, at 281.

300 Security Council Meeting on the Draft Resolution for Kosovo S/PV.3989, Argentina, Bahrain, Canada, France, Malaysia, the Netherlands, United Kingdom of Great Britain and Northern Ireland, and United States of America.

301 Michael Byers and Simon Chesterman "Changing the Rules about Rules" in J.L Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, (2003), 183.

302 *Nicaragua*, above n 190, at 98.

non-intervention retains potent force.

3.6 Conclusion

Each of the previous situations, Iraq, Somalia, Rwanda, and Kosovo, present examples of when the international community has acted with humanitarian principles in mind. Each situation though, is unique and offers a sample of the arguments used by States to support, or not support, contravening the prohibition on the use of force contained in Article 2(4), or to intervene, either in accord or not, with Article 2(7). Each example supports in some way, that humanitarian principles are inextricably linked to States, and the Security Council's decisions to use force against a State perpetrating massive human rights violations. Each situation also lends support to the premise that when considering the use of force in an intervention in a States internal affairs, the consideration of Articles 2(4) and (7) become enmeshed within each other. They are closely linked, and action taken under Article 2(4) inevitably impacts upon a States internal jurisdiction, territorial integrity, and sovereignty. However, it cannot be definitively stated here, that a doctrine of humanitarian intervention is supported by international law as it currently stands.

While States must rely on settled principles of international law, achieving consensus to address humanitarian catastrophes is difficult and uncertain. The consequences of States acting unilaterally, as they did in Kosovo, does not necessarily broaden the understanding on the settled principles on non-intervention, and the use of force, but serve to stifle consensus within the Security Council. The effectiveness of intervention in Somalia served as a deterrent for swift and measure action in Rwanda, leading to an ineffective intervention that lacked complete support form Member States of the United Nations.
These instances are a reflection of State practice, and as the ICJ stated in the *Nicaragua* case, serve to reinforce the rules regarding the prohibition on the threat and use of force, and non-intervention.

Sovereignty, non-intervention, and the prohibition on the threat or use of force, are fundamental principles of State relations in international law. In themselves they are unchallenged by the effects of a humanitarian crisis in a States internal

jurisdiction. The challenge exists in *how* the international community, and international organisations choose to address humanitarian catastrophes, genocide, crimes against humanity, and other war crimes that are perpetrated by State governments. At the turn of the 21st century, Kofi Annan, in his capacity as Secretary-General of the United Nations posed this question:

> Still others noted that there is little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests – except that weak states are far more likely to be subjected to it than strong ones. I recognize both the force and importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: 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?[303]

This question was viewed as a challenge, and the Government of Canada along with a group of major foundations announced the establishment of the International Commission on Intervention and State Sovereignty which sought to address the "legal, moral, operational and political issues"[304] around this question. The result of its work was the development of a new principle dubbed the 'Responsibility to Protect', a new way of perceiving sovereignty that would address the legal challenges and pitfalls posed by humanitarian intervention, and gross human rights abuses perpetrated by sovereign state governments. This principle will be examined in the following section.

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[303] Kofi Annan, 'We the Peoples: The Role of the United Nations in the 21st Century' Millenium Report of the Secretary General (2000) [Millennium Report].

[304] ICISS Report, above n 5, at VII.

4. The Responsibility to Protect

4.1 Introduction

Sovereignty as a concept, and as the foundation of the international legal system of States has had a few hundred years to develop since it was first introduced by Bodin in 1572. Since then, the development of sovereignty as a concept has been incremental, taking time to synthesise academic legal thought (from the likes of Bodin, Grotius, Pufendorf etc) into its conceptual nature and eventually becoming part of its fabric as a legal norm.

The doctrine of Humanitarian Intervention has often been viewed (when carried out with or without Security Council authorisation) as a violation of State sovereignty. But these "violations" have not invalidated[305] the legal norm of State sovereignty. Humanitarian interventions have created political and legal tension which has had unfortunate consequences both when interventions have been carried out, and when they have not.

When Kofi Annan assumed office as the UN Secretary-General in 1997, he proposed extensive institutional reforms to the inter-governmental system in order to "do better" and to "maximise the institutional effectiveness" of the United Nations.[306] The proposals for reform were considered to be a "process" not an "event" and the Secretary-General utilised his position to initiate dialogue for change in certain areas of the United Nations system. One such area was the considerable tension between State sovereignty and the doctrine of humanitarian intervention. In his Millennium Report at the start of a new century, Annan would broach the subject of intervention, and how it could be reconciled with State sovereignty.

Annan acknowledged that armed intervention must "remain the option of last resort", but also acknowledged the notorious tension between sovereignty and the protection of the humanity of suffering State populations.

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[305] Ramesh Thakur *The Responsibility to Protect, Norms, Laws and the Use of Force in International Law* (Routledge, Abingdon Oxon, 2011) at 6.

[306] Kofi Annan, "Renewing the United Nations: A Programme for Reform" A/51/950 (1997) at 10 [6].

> Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.[307]

While he acknowledged the validity of the tension between the principle of state sovereignty and the option of resorting to the use of force in an intervention, he also asked the question -

> But to the critics I would pose this question: 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?[308]

Annan stated that the United Nations could not shoulder the burden of addressing the challenges posed by states that commit these violations, that states shared the responsibility of acting together to ensure, and maintain international peace and security in accordance with the UN Charter, and that the threats posed must be managed multilaterally.[309]

As a direct response to the question Annan asked, the Canadian government in tandem with major foundations,[310] and the British and Swiss governments, established the International Commission on Intervention and State Sovereignty (ICISS). This report brought forth the "new" concept of the Responsibility to Protect. Subsequent reports followed, and together, the ICISS Report, the Report of the High-Level Panel on Threats (2004), Challenges and Change, the Secretary-General Report – In Larger Freedom (2005), and the Report of the Secretary-General on Implementing the Responsibility to Protect (2009) have all developed, and then refined the meaning of the Responsibility to Protect.

4.2 The International Commission on Intervention and State Sovereignty Report on the Responsibility to Protect

The choice of name for the Commission was carefully considered. In initial proposals the Commission had been named "commission on humanitarian intervention" but this was considered too "politically controversial" and changed to the International Commission on Intervention and State Sovereignty.[311] The

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307 Millennium Report, above n 306, at 48.
308 Millennium Report, at 48.
309 Millennium Report, at 77.
310 Carnegie Corporation, the Hewlett Foundation, the MacArthur Foundation and the Rockefeller Foundation.
311 Alex J. Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge (UK), 2009) at 36.

Commission was made up of 12 members, from different nations,[312] and in their position as commissioners they were not acting as direct representatives of their respective States. There has been criticism of the composition of the 12 members, the lack of representation for other parts of the world,[313] and the fact that of all members of the commission there was only one female.[314]

This Commission had as its primary goal, the objective of reaching some sort of common understanding that would reconcile the principle of State Sovereignty with the diametric doctrine of humanitarian intervention for human protection.[315]

> Millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse. This is a stark and undeniable reality, and it is at the heart of all the issues with which this Commission has been wrestling.[316]

This work was carried out over a year, in many countries (including those of the five permanent members of the Security Council), involving wide consultation with a multitude of states, intergovernmental and non-governmental agencies, affected parties and civil society representatives.[317] This process was also supported by an advisory board for the purpose of grounding the Commission's work in a contemporary political reality and finding broad international consensus.[318] The work of the Commission was also supported by a research directorate.

In 2001 the following year after the Commission was established, the Commission delivered a comprehensive report on a brand new concept they hoped to introduce successfully into international law. Intervention was understood in the context of the Report as:

> … action taken against a state or its states leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective.[319]

The primary focus was military intervention carried out for human protection purposes, as well as also considering alternatives to military intervention. The

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312 Australia, Algeria, Canada, USA, Germany, Switzerland, South Africa, Philippines, India, Guatemala and Russia.
313 Bellamy, above n 314, at 37.
314 Hilary Charlesworth "Feminist Reflections on the Responsibility to Protect" in Alex J. Bellamy, Sara E. Davies and Luke Glanville (eds) *The Responsibility to Protect and International Law*, (2011) 139 at 147.
315 ICISS Report, above n 5, at 2.
316 ICISS Report at 11.
317 ICISS Report at 2-3.
318 Bellamy, above n 314, at 37.
319 ICISS Report, at 8.

Commission consciously refers to "intervention" or "military intervention" rather than humanitarian intervention in order to address concerns held by humanitarian agencies and organisations that; using the term 'humanitarian intervention' as interchangeable with 'military intervention', would essentially militarise the term 'humanitarian'. As indicated in the previous section, the concept of humanitarian intervention has often been defined as forcible, or military intervention carried out against a targeted state, or state government for human protection purposes.[320] In order to not only address the concerns of humanitarian organisations and agencies by utilising the terms 'intervention' or 'military intervention', the Commission sought to progress the debate around military intervention by re-framing the language used to describe it.

Gareth Evans, former Australian Foreign Minister and co-Chair of the Commission first brought forth the idea of changing the terms of the debate regarding intervention and State sovereignty. After spending "a few mornings under the shower … toying with a score or more of different word combinations" he arrived at the phrase "the responsibility to protect".[321] After submitting his phrase to the Commission there was initial reluctance to accept it, but later, it became the defining catchphrase to describe the re-conceptualisiation of sovereignty in relation to intervention. This re-conceptualisation that the primary element of sovereignty was the 'responsibility to protect' was in order to combat some of the barriers to intervention associated with sovereignty, such as non-intervention, and the prohibition on the threat or use of force against another state.

> Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to

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320 Scott H Fairley "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box", (1980) 10(1) GA. J. Int'l. & Comp, L., 32; Wil Vevrey "Legality of Humanitarian Intervention After the Cold War" in E. Ferris (ed) *The Challenge to Intervention: A New Role for the United Nations*, (1992), 114; J.L. Holzgrefe "The Humanitarian Intervention Debate" in J.L. Holzgrefe and Robert O. Keohane *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, (2003) 18; Susan Breau *Humanitarian Intervention: the United Nations & Collective Responsibility*, 29; Terry Nardin and Melissa S Williams *Humanitarian Intervention* (New York University Press, New York, (2006),1; Sean D Murphy "Criminalizing Humanitarian Intervention" (2009) 41 Case Western Reserve Journal of International Law, at 341.

321 Gareth Evans *The Responsibility to Protect, Ending Mass Atrocity Crimes Once and For All*, (Brookings, Washington, 2008) at 5.

> say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.[322]

The effect of re-framing intervention linguistically as a responsibility to protect, draws the two spheres of internal and external sovereignty closer together.
The focus has then shifted from a debate surrounding military intervention for humanitarian purposes, to understanding the principles that underscore the new concept of the 'responsibility to protect'. This shift has been described as a "rhetorical trick",[323] but the intention behind it was to move legal thought away from the political and legal quagmire of humanitarian intervention to the "less confrontational" concept of the Responsibility to Protect.[324]

The Commission contended that by shifting the terms of the debate, the result would be a three-fold change in perspective. Firstly, this new perspective would mean that the focus would shift from the states considering intervention, to those who needed or sought support. Secondly, that the envisioned 'responsibility' was first and foremost with the state in question, but in situations where that state perpetrated violations of this responsibility, or was unwilling, or unable to meet this responsibility, it would then fall on the "international community" to uphold it. This then creates a complementary responsibility between the nation state and the wider international community of states.[325]
Lastly, the 'responsibility' entailed not just reacting to situations, but also a "responsibility to prevent" and a "responsibility to rebuild".[326] This expands the notion of intervention considerably. The Responsibility to Protect passes through phases of execution – to prevent, react, and rebuild, and these are the three essential elements to understanding the overall concept of the responsibility to protect.

4.2.1 *The Responsibility to Prevent*

The "responsibility to prevent" internal conflict is firstly the responsibility of the

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322 ICISS Report, above n 5, at 13.
323 Carsten Stahn "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 Am J Int'l L 99 at 102.
324 Stahn, above n 326, at 102.
325 Stahn, at 103.
326 ICISS Report, above n 5, at 17, for the purposes of this part, only the Responsibility to Prevent and React will be discussed as they relate directly to consideration of military intervention.

state and its internal government, but also the responsibility of the international community.

> By showing a commitment to helping local efforts to address both the root causes of problems and their more immediate triggers, broader international efforts gain added credibility – domestically, regionally, and globally.[327]

The ICISS described the "responsibility to prevent" as the most important aspect of the Responsibility to Protect.

> For the effective prevention of conflict, and the related sources of human misery with which this report is concerned, three essential conditions have to be met. First, there has to be knowledge of the fragility of the situation and the risks associated with it – so called "early warning." Second, there has to be understanding of the policy measures available that are capable of making a difference – the so called "preventive toolbox." And third, there has to be, as always, the willingness to apply those measures – the issue of "political will."[328]

Early warning and analysis requires, under the Responsibility to Prevent, resources to be expended on the collection of accurate information, analysing that information and transforming it into policy, this in turn is intended to result in the accurate prediction of events in order to prevent them.[329] Under the Responsibility to Prevent, looking at the "root causes" of conflict, such as poverty, political repression, and the uneven distribution of resources, and finding solutions for them would greatly enhance conflict prevention.[330] The solutions proposed by the ICISS to address the root causes of conflict included:

> … addressing *political* needs and deficiencies, and this might involve democratic institution and capacity building; constitutional power sharing, power-alternating and redistribution arrangements; confidence building measures between different communities or groups; support for press freedom and the rule of law; the promotion of civil society; and other types of similar initiatives that broadly fit within the human security framework.[331]

The final element of prevention in the Report is 'direct prevention efforts' which entail political and diplomatic measures, economic, and legal prevention measures. Political and diplomatic measures included: fact-finding missions, friends groups, eminent persons commissions, dialogue and mediation, international appeals, and dialogue and problem solving workshops. Economic prevention included: positive and negative inducements such as funding or investment, and advantageous trade terms. Legal measures could include offers of mediation, arbitration, or in some cases adjudication.[332]

The stated purpose of these measures is that they will make it "unnecessary" for

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[327] ICISS Report, at 19.
[328] ICISS Report, above n 5, at 20.
[329] ICISS Report, at 21.
[330] ICISS Report, at 22.
[331] ICISS Report, at 23.
[332] ICISS Report, at 24.

coercive military force to be used in an intervention, even in situations where a state may be reluctant to consent to such measures taking place in its internal jurisdiction.

From a critical perspective, it appears as if the measures proposed under the "responsibility to prevent" strike at the heart of a Sate's internal sovereignty, especially if they were to be carried out without that State's consent. The principle of state sovereignty as it has been enunciated by the International Court of Justice in the *Nicaragua*[333] case that:

> A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty. to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones[334]

Prevention of conflict would be integral to the decision for a military intervention, but at the same time, the measures proposed would no doubt inhibit a State's freedom to choose its own political, economic, social and cultural systems. The extent of the obligation that the international community bears in relation to prevention is unclear, and the language used by the Report frames the responsibility to prevent as a "policy suggestion" rather than a legal obligation. It is left unclear as to what degree the international community is responsible for the prevention of mass atrocities, or what the potential legal consequences there could be if this responsibility goes unfulfilled.[335]

4.2.2 *The Responsibility to React*

When efforts to prevent are ineffective, and a state is unwilling or unable to address a situation where there is a need for human protection, then intervention from the broader community of states is required. This intervention falls under the Responsibility to React, and the Commission considered military as well as non-military forms of reaction.[336] Under the Responsibility to React, military intervention would only be considered in "extreme and exceptional cases".[337] The

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333 *Nicaragua,* above n 190.
334 *Nicaragua,* above n 190, at 14.
335 Hitoshi Nasu "The Responsibility to Prevent: Could the UN Have Prevented the Atrocities in East Timor and Kosovo?" in Charles Sampford and Ramesh Thakur (eds) *Responsibility to Protect and Sovereignty* (2013) 105 at 106.
336 For the purposes of this thesis, only military intervention will be considered.
337 ICISS Report, above n 5, at 31.

report acknowledges the principle of non-intervention, and that intervention in some circumstances can actually have a destabilising effect. The exceptional case, where intervention can be contemplated, is one where:

> … all order within a state has broken down or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale.[338]

In exceptional cases, the violence within the internal conflict must be so great as to "shock the conscience of mankind" and pose a danger to international security, and only then could military intervention be contemplated.[339] The Report went on to provide six criteria, these are: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects. Each of these criteria form a component in the decision as to whether or not to proceed with a military intervention. The elements of just cause, and right authority are treated more expansively and separately, while the remaining four elements are treated somewhat collectively.

The element of just cause is made up of two points:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale "ethnic cleansing," actual or apprehended whether carried out by killing, forced expulsion, acts of terror or rape.[340]

For the 'just cause' requirement to be met, then either one or both of these elements must be present.

The report was clear in what these two elements included or excluded. Included are: actions defined by the Genocide Convention; the threat, or occurrence, of large scale loss of life as a product of genocidal intent or not – or as a product of state action or not; ethnic cleansing which may include systematic killing of members of a particular group, or systematic removal of members of a particular group from a particular area, acts of terror, systematic rape for political purposes; crimes against humanity, violations of the laws of war including those defined in the Geneva Conventions and the Additional Protocols; the collapse of a state which results in exposing the population to mass starvation and/or civil war;

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338 ICISS Report, at 31.
339 ICISS Report, at 31.
340 ICISS Report, above n 5, at 32.

natural or environmental catastrophes.[341] These events which are included in the two elements of 'just cause' are described as "conscience-shocking" situations. These principles make no attempt to distinguish between internal or international, and the Report clearly states, that its authors are confident that where such situations exist, they will no doubt be determined under Chapter VII of the UN Charter, that a threat to international peace and security exists.[342]

The element "just cause" then becomes a threshold which requires -

> … either large-scale loss of life, actual or apprehended, carried out by killing, forced expulsion, acts of terror, or rape.[343]

The principles associated with the criterion of "just cause" are clearly influenced from events that have taken place in past conflicts, like Rwanda, Srbrenica, Somalia, and Kosovo. But it is not enough to satisfy the just cause threshold to warrant an intervention, according to the ICISS report, the four remaining criteria that provide for a legitimate intervention are also just as important.[344]

Humanitarian intervention has often been criticised for acting as a shield for states to hide behind in order to exercise a less altruistic agenda. The principle of "right intention" under the Responsibility to Protect seeks to address this anomaly. The Report proposes three ways to ensure that intervention is carried out with the "right intention". The first is for states to act multilaterally or collectively, rather than unilaterally. The second is to determine whether the people for whom intervention is intended to help actually support the intervention, and to what extent it is supported. Last, have countries in the region of the state targeted for intervention, expressed opinions supporting that intervention, and to what extent have their opinions been taken into account? These three principles are considered as "sub-components" of the principle of "right intention", not principles in their own right.[345]

The principle of "Last Resort" expresses the idea that once all diplomatic and non-military measures have been exhausted, only then can military action be

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341 ICISS Report, at 33.
342 ICISS Report, at 33-34.
343 Evans, above n 324, at 59.
344 Evans, above n 324, at 59-60.
345 ICISS Report, above n 5, at 36.

justified. The Responsibility to React can only be activated once all the responsibilities under the Responsibility to Prevent have been fulfilled.[346] The principle of "Proportional Means" entails that all aspects of the military intervention (scale, duration, intensity) must be the lowest level required in order to achieve the humanitarian purpose of the intervention, while at the same time observing all international humanitarian laws.[347] "Reasonable Prospects" under the Responsibility to React requires that the military action has a "reasonable chance of success" of abating the atrocities or humanitarian crisis that initially triggered the intervention. In situations where protection of individuals requires greater military action that would only cause more harm to the region, then military intervention can no longer be considered viable.[348]
"Right Authority" concerns *who* can authorise military intervention. Even though the Security Council has a chequered history regarding its political willingness to intervene, and its generally inconsistent approach to intervention, the Commission considered the Security Council to be the most "appropriate body" to "deal" with military intervention.[349]

The Commission recognised that military intervention was a violation of state sovereignty, although the Commission used the word "overriding", and that in building consensus to intervene, the Security Council should be the central force in that discussion.[350] The Commission also proposed a "code of conduct" in relation to the five permanent members exercising the use of their veto. This code of conduct encapsulated the idea that in situations where intervention was contemplated in a state where a permanent member had no "vital national interests" then the veto would not be used.[351]

In instances where the Security Council fails to act, the Report considered that the General Assembly could be the appropriate forum for building consent through endorsement from a majority of states, and that may provide legitimacy for action taken outside of Security Council authorisation. In the alternative, it proposed

[346] ICISS Report, at 36.
[347] ICISS Report, at 37.
[348] ICISS Report, at 37.
[349] ICISS Report, above n 5, at 49.
[350] ICISS Report, at 49.
[351] ICISS Report, at 51.

that regional, or sub-regional organisations may have a legitimate role in undertaking collective military intervention.[352] The Report acknowledged that under Chapter VIII of the UN Charter provision was made for regional organisations to settle disputes, but regional organisations under this Chapter could only intervene with Security Council authorisation.[353]

The principles for military intervention, 'Just Cause', supported by the precautionary principles of 'Right Intention', 'Last Resort', 'Proportional Means' and 'Reasonable Prospects' followed by regard for the principle of 'Right Authority' make up the criteria for intervention under the concept of the Responsibility to Protect. The Report had two messages for the Security Council, the first was that in situations where it fails to address "conscience-shocking" events within a state, it is unrealistic for it to expect that other states would rule out intervention. The second message was that if states acted collectively outside of Security Council authorisation, but met the six criteria outlined under the Responsibility to Protect, and was successful both in outcome and in finding favour with public opinion, then it could have serious implications for the credibility of the United Nations.[354] These messages could also be read as implying that intervention carried out collectively by states without Security Council authorisation, but fulfilling the requirements of the Responsibility to Protects criteria, could be considered as legitimate and not a violation of international law or state sovereignty.

The ICISS introduced the Responsibility to Protect in its comprehensive and instructional report, and managed to shift the terms of the debate surrounding humanitarian intervention, to a more palatable Responsibility to Protect. In doing so, the rhetoric around sovereignty has marginally shifted from sovereignty as control, to sovereignty as responsibility, and the spheres of internal and external sovereignty have become tangibly linked due to the parallel responsibility of a State to protect its population, and the international community's responsibility to fulfil that function if a State becomes unwilling or unable to do so. The new

[352] ICISS Report, at 53.
[353] Charter of the United Nations, art. 52, art. 53, and art. 54.
[354] ICISS Report, above n 5, at 55.

concept of the Responsibility to Protect found further development in 2003 in the High-Level Panel Report, where it was directly linked to United Nations institutional reforms.[355]

4.3 Report of the High-Level Panel on Threats, Challenges and Change[356]

The High-level Panel was convened by Kofi Annan, in November 2003, the impetus behind establishing the High-level Panel was his alarm at the lack of consensus among Member States on what the appropriate role of the United Nations was in the collective security system, and the lack of consensus concerning some of the "most compelling threats" faced by the international community.[357] The High-level Panel's Report was far broader in scope than the ICISS Report, linking poverty, disease, environmental degradation with international and intra-national conflict, terrorism, the proliferation of weapons of mass destruction, as well as transnational crime.[358] In its report, the Panel considered 'Collective security and the use of force' asking the question "What happens if peaceful prevention fails?"[359.] It drew much of its conclusions from the content of the ICISS Report.

For the High-level Panel, the United Nations collective security system under the United Nations Charter became the context through which the Responsibility to Protect could be implemented, integral to this implementation was the role of the Security Council.[360] The Panel went so far as to call the recently developed concept of the Responsibility to Protect an "emerging norm". Describing the Responsibility to Protect as an "emerging norm" implies that it is well on its way to becoming binding law.[361]

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious

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355 Stahn, above n 326, at 105.
356 Report of the High-level Panel on Threats, Challenges and Change "A More Secure World: Our Shared Responsibility" A/59/565 (2004) [High-level Panel Report].
357 Kofi Annan Report of the Secretary-General "In Larger Freedom: Towards Development, Security and Human Rights for All" A/59/2005 (2005) [In Larger Freedom] at 24 [76].
358 Evans, above n 324, at 44.
359 High-level Panel Report, above n 359, at 61.
360 Vindia Vashakmadze "Responsibility to Protect in Bruno Simma *The United Nations a Commentary*, at 1207.
361 James Pattison *Humanitarian Intervention and the Responsibility to Protect* (Oxford University Press, Oxford, 2010) at 47.

> violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[362]

Only three years after the ICISS Report on the Responsibility to Protect, the Panel acknowledged that acceptance was increasing for the notion that; in situations where Governments are unable or unwilling to uphold their primary responsibility to protect their citizens from those "avoidable catastrophes" it will then fall on the broader international community to uphold that responsibility, and if required, rebuild the society of the affected state.[363]

The Report went on to consider Chapter VII of the United Nations Charter in relation to internal threats and the Responsibility to Protect, in a statement that reflected the language of the Responsibility to Protect report.

> There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.[364]

The Report also considered the Charter, and the Security Council to be fundamental to the implementation of the Responsibility to Protect.

> In all cases, we believe that the Charter of the United Nations, properly understood and applied, is equal to the task: Article 51 needs neither extension nor restriction of its long-understood scope, and Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront. The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has.[365]

The High-level Panel recommended that for the Security Council to become more adept at preventing and responding to threats to international peace and security, it would need to utilise the provisions found under Chapter VIII of the UN Charter. Complementary to this, the UN was advised that it should encourage the establishment of regional and sub-regional organisations, as they could offer valuable contributions to international peace and security.[366] The contributions that regional and sub-regional organisations could add to international peace and security would not supervene the United Nations role as the primary force for the maintenance of international peace and security, nor would they contradict the United Nation's activities in maintaining peace and security. Rather, regional and

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362 High-level Panel Report, above n 359, at 66 [203].
363 High-level Panel Report, at 65-66, [201].
364 High-level Panel Report, at 65 [201].
365 High-level Panel Report, above n 359, at 61.
366 High-level Panel Report, at [270-273].

sub-regional organisations should be well established within the framework of the United Nations, integrated within the infrastructure of the United Nations, and in doing so be able to work in accordance with the purposes and principles of the UN Charter.[367]

The High-level Panel Report felt that by maintaining the Security Council as the centralised force behind decision making regarding intervention, building a lasting consensus could be achieved. The Panel considered that for the Security Council to achieve consensus then some form of criteria regarding when the use of force for military intervention should be used would be beneficial. These criteria were: the seriousness of the threat, proper purpose, last resort, proportional means, and balance of consequences. These criteria reflect principles that originate from just war theory,[368] and the report went on to say that these criteria should be "embodied in declaratory resolutions of the Security Council and General Assembly."[369]

The greatest emphasis, therefore, is placed on the Security Council and its role in the authorisation on the use of military force in interventions. By restricting its focus to the Security Council and not some of the broader measures proposed by the ICISS Report, the High-level Panel has narrowed the approach to intervention, that the Responsibility to Protect Report had initially envisioned,[370] while at the same time declaring it to be an "emerging norm". Declaring that the relatively new concept of the Responsibility to Protect is a "norm" even an emerging one, is quite radical. It could be supposed that if the Responsibility to Protect is becoming a norm of international law, then there has been a shift away from the norm of non-intervention.[371] However, an international norm implies that there is a pattern of behaviour amongst States, and depending on States actions/inactions, a norm will appear to have been adhered to, or violated.[372] It would appear that the High-Level Panel Report may be a little premature in classifying the

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367 High-level Panel Report, at [270-273].
368 Jutta Brunnée and Stephen J. Toope "The Responsibility to Protect and the Use of Force: Building Legality?" (2010) Global Responsibility to Protect 2 191 at 195, fn.25.
369 High-level Panel Report, at 67 [208].
370 Vashakmadze, above n 363, at 1208.
371 Thakur, above n 308, at 178.
372 Thakur, above n 308, at 178.

Responsibility to Protect as an "emerging norm", and the subsequent reports concerning the Responsibility to Protect take a more conservative formulation in enunciating their views on the Responsibility to Protect.

4.4 In Larger Freedom: Towards Development, Security, and Human Rights for All[373]

The 2005 Secretary-General's report is an extension of Kofi Annan's commitment to the reform of the United Nations system. His report focussed on four main areas[374] which he believed were of the highest priority, and which would also benefit from reforms in order to resolve ongoing conflicts that were a threat to regional and global security.

In this report the Secretary-General built on the approach to the use of force formed by the High-level Panel, and the ICISS Report and stressed that there must be consensus among states as to when and how force should be used to defend international peace and security, and also, whether States have a right, or obligation, to use military force in a protective capacity to "rescue citizens of other States from genocide or comparable crimes."[375] Like the High-level Panel, the Secretary-General also believed, that the starting point for answering these questions and building consensus among sovereign States, the UN Charter would be the foundation on which mutual understanding regarding these issues could be built.[376]

While the Secretary-General concurred with the approach taken by the High-level Panel, he did not go as far as to say that the Responsibility to Protect had reached the stage where it could be considered an emerging norm.

The Secretary-General, like the ICISS Report and the High-level Panel Report, did uphold finding a mutually agreeable criteria for authorising the use of force, and recommended that the Security Council adopt a resolution that would embody the Security Council's intention to be guided by principles regarding whether to

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373 In Larger Freedom, above n 360.

374 In Larger Freedom, above n 360, Freedom from Want at [25-73], Freedom from Fear at [74-126], Freedom to live in dignity at [127-152], and Strengthening the United Nations at [153-219].

375 In Larger Freedom, at 33 [122].

376 In Larger Freedom, above n 360, at 33 [123].

authorise the use of force.[377] However, the Secretary-General did not refer to the Responsibility to Protect in the section of the Report that dealt with the use of force, rather it was mentioned within the section regarding the 'Freedom to Live in Dignity'.[378] This was intentionally done to disassociate the concept of the Responsibility to Protect with the use of force. Therefore the perception of the Responsibility to Protect would become less about the intervention, and more about "a strategy to promote the commitment of all nations to the rule of law and human security."[379]

The Secretary-General agreed with the High-level Panel's endorsement of the Responsibility to Protect.

> While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. **I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it.**[380]

The Secretary-General reiterated that the State's primary responsibility, and duty, was to protect its population, and in situations where a State was unable or unwilling to do so, then it was up to the international community to use diplomatic, humanitarian, and other methods to do so. The Secretary-General placed emphasis on exercising the more peaceful means available under the Responsibility to Protect. When these methods became ineffective, the Security Council should take appropriate action in accordance with the UN Charter, and follow the criteria that the High-level Panel had set out for authorising the use of force.[381]

The Responsibility to Protect has re-framed sovereignty as responsibility, but it also provides for the use of force by outsiders for the protection of populations experiencing mass atrocities. The prohibition on the use, or threat, of force against States has long been an aspect of sovereignty which has also found codification within the United Nations Charter.[382] Which is why, in this report and those preceding it, the authorisation of the use of force has been centred on

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377 In Larger Freedom, at 33 [126].
378 In Larger Freedom, "Freedom to Live in Dignity", under the sub-heading the Rule of Law at 35.
379 Stahn, above n 326, at 107.
380 In Larger Freedom, at 35 [135].
381 In Larger Freedom, at 35 [135] and [126].
382 Charter of the United Nations, art. 2(4).

the Security Council and the United Nations as the appropriate forum for consensus regarding the implementation of the Responsibility to Protect. This consensus building would find greater traction at the 2005 General Assembly World Summit.

4.5 World Summit Outcome Document[383]

The General Assembly World Summit 2005, adopted the essence of the concept of the Responsibility to Protect, and the statement made regarding the concept is viewed as the most authoritative[384] statement on the Responsibility to Protect.[385] Following the Secretary-General's recommendations, heads of state and government spent months negotiating each one. The negotiated result of how the concept of Responsibility to Protect should be included in the Outcome Document is found in the content of paragraphs 138 and 139 of the Document. While these paragraphs reflect the essence of the Secretary-General's recommendations regarding the Responsibility to Protect, the criteria proposed for the use of force did not survive the negotiations.[386]

The inclusion of paragraphs 138 and 139 in this Document indicate a clear acceptance by all UN member states that there exists on all sovereign States, a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[387]

In the World Summit Outcome Document, the General Assembly reaffirmed the position taken by the High-level Panel, and the Secretary-General, that the provisions of the UN Charter were "sufficient" to address threats to international peace and security.[388] It also reaffirmed that the Security Council had the primary responsibility to maintain international peace and security, as well as the authority

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383 *2005 World Summit Outcome Document* GA Res 60/1 A/RES/60/1 [World Summit Outcome Document] (2005).
384 Pattison, above n 364, at 3, Over 160 heads of state and governments were in attendance.
385 Vashakmadze, above n 363, at 1209.
386 Evans, above n 324, at 47.
387 Ramesh Thakur "The Responsibility to Protect: Retrospect and Prospect" in Charles Sampford and Ramesh Thakur *Responsibility to Protect and Sovereignty*, (Ashgate Publishing, England, 2013) 189 at 192.
388 World Summit Outcome Document, above n 386, at 22 [79].

to authorise "coercive action" to do so.[389]

With regard to the Responsibility to Protect, the General Assembly appeared to endorse the "emerging norm", and delivered their perception of what the responsibility entailed, but also limited its application to four crimes – genocide, war crimes, ethnic cleansing, and crimes against humanity.

> 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 incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.[390]

The original ICISS Report did not specifically limit the application of the Responsibility to Protect to four crimes. It had a broader approach to the types of situations in which the Responsibility could be invoked under the principle of 'Just Cause'. The Report's broad approach to "conscience shocking" situations included large scale loss of life, and large scale ethnic cleansing, neither of which needed genocidal intent from the perpetrators to be present.

The Outcome document is the most authoritative statement on the Responsibility to Protect to date,[391] but it has also effectively limited the application of the Responsibility by narrowing the scope of the type of situations it can apply to. Gareth Evans does not see refining the Responsibility to Protect within the parameters of those four crimes as a limitation, or even significant,[392] rather, the unanimous agreement regarding the use of the language of the Responsibility to Protect within the Outcome Document, was an achievement and cause for "celebration", not disappointment.

Evans also agreed with the emphasis placed on prevention in paragraph 138, and assistance given to states under stress by the international community in paragraph 139.[393] Paragraph 139 states that in the context of protecting populations from genocide, war crimes, ethnic cleansing and crimes against

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389 World Summit Outcome Document, at 22 [79] and [80].
390 World Summit Outcome Document, at 30 [138].
391 Vashakmadze, above n 363, at 1209.
392 Evans, above n 324, at 47.
393 Evans, above n 324, at 47.

humanity, the international community is:

> 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 populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their 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.[394]

This statement is seen as "vague", the passage as a whole does not specify any particular legal obligations associated with the responsibility to protect, or any particular duty on the Security Council to intervene. In particular following the difficult negotiations regarding these passages, the refrain that the Responsibility to Protect would fall on the international community in situations where States became "unwilling" or "unable" to uphold their duty to protect their population, was not included in the final product of paragraph 139. Instead, the phrasing became "manifestly failing to protect" which could be perceived as a "significantly higher threshold" to establish when trying to determine if a State has abandoned their responsibility to protect their population from genocide, war crimes, ethnic cleansing or crimes against humanity.[395]

While the inclusion of the Responsibility to Protect in the World Summit Outcome Document was seen as a great achievement, there was also disappointment that the content was radically reduced from what had originally been contemplated in the initial draft of the Outcome Document.[396] However, paragraphs 138 and 139 can be viewed as a unanimous declaration by States that they accept that their State sovereignty entails a responsibility to protect their populations from the four crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.[397] The World Summit Outcome Document did much to clarify the principles of the Responsibility to Protect. Each of the four crimes are grounded in international

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394 World Summit Outcome Document, above n 386, at 30 [139].
395 Bellamy, above n 314, at 90.
396 Bellamy, at 92.
397 Alex J. Bellamy and Ruben Reike "The Responsibility to Protect and International Law" in Alex Bellamy, Sara E Davies and Luke Glanvill (eds) *Responsibility to Protect and International Law* (Martinus Nijhoff, The Netherlands, 2011) 81 at 81.

law already, with their own legal meaning.[398]

State's roles under the Responsibility to Protect, in relation to their internal population, and in relation to other States was also clarified by the Outcome Document. The defining paragraphs that emerged from the World Summit concerning the Responsibility to Protect are quite different from its original genesis, however, the consensus produced within the World Summit Outcome document "carries immense political weight".[399] The dialogue around the Responsibility to Protect then shifted in 2009, from the meaning and parameters of its principles to its possible implementation.

4.6 The Report of the Secretary-General on Implementing the Responsibility to Protect (2009)

This Report was Ban Ki-Moon's first on the implementation of the Responsibility to Protect. Secretary-General Ban Ki-Moon's Report encapsulated the principles of the Responsibility to Protect, and also emphasised the concept's institutional implications within the UN system. It confirms that the concept is "firmly anchored in well-established principles of international law and enjoys wide support of States."[400]

The Report drew from the ICISS Report, but also comprised an approach to implementation based on "three pillars", the meaning of each Pillar is drawn directly from interpreting the definition of the Responsibility to Protect, from paragraphs 138 and 139 of the World Summit Outcome Document.
Pillar one is the "protection responsibilities of the State", States have an enduring responsibility to protect their populations from the four crimes (genocide, war crimes, crimes against humanity, and ethnic cleansing).[401] Pillar two is - "International assistance and capacity building", this Pillar is quite broad. It entails "encouraging" States to meet the responsibilities under Pillar One, encourage States to exercise those responsibilities, help States to build capacity in

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398 Bellamy and Reike, above n 400, at 87.
399 Bellamy and Reike, at 87.
400 Vashakmadze, above n 363, at 1211.
401 Ban ki-Moon Report of the Secretary-General "Implementing the Responsibility to Protect" A/63/677 (2009) at 10 [13] ["Implementing the Responsibility to Protect"].

order to protect their populations, and assist States that may be experiencing situations that are precursors to the outbreak of conflict.[402]

Pillar two relies, initially, on persuasion between States, and "mutual commitment" between the State and the international community to act in tandem to fulfil their responsibility.[403] Pillar three - "Timely and decisive response" requires that when a State is unable or unwilling to uphold their responsibility member States must take collective action in a timely and decisive manner" only when peaceful means have proven to be inadequate, and where a State's national authorities have failed to protect its population.[404] These three pillars are not dissimilar to the element of the Responsibility to Prevent contained in the ICISS Report.[405]

The Secretary-General made a recommendation to the General Assembly to explore ways that the Responsibility to Protect could be implemented. He also made several moves that had more far reaching institutional implications. The first was to reinforce the Office of the Special Adviser on the Prevention of Genocide,[406] which would also strengthen the early warning capacity of the UN.[407] Secondly, the Secretary-General asked his Special Adviser[408] to work closely with the Special Adviser on the Prevention of Genocide for the Responsibility to Protect, and consult with Member States and the President of the General Assembly, on how best to proceed with a strategy for implementing the Responsibility to Protect.[409] The first step towards considering the strategy for implementation was a debate in the General Assembly on the proposals of the Secretary-General's report.

Following the Secretary-General's report, the General Assembly of states met informally to discuss the report, and the implications of Responsibility to Protect. State's appreciated the three pillar approach that the Secretary-General provided as

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402 Implementing the Responsibility to Protect, above n 404, at 15 [28].
403 Implementing the Responsibility to Protect, at 15 [28].
404 Implementing the Responsibility to Protect, at 22 [49].
405 ICISS Report, above n 5, at 20.
406 A position held by Francis Deng.
407 Implementing the Responsibility to Protect, at 29 [69].
408 A position held by Edward Luck.
409 Implementing the Responsibility to Protect, at 29 [71].

a means of interpreting the definition of the Responsibility to Protect in the World Summit Outcome document and essentially endorsed that the four crimes of genocide, war crimes, crimes against humanity, and ethnic cleansing should be prevented.[410] However, States raised concerns that intervention under the Responsibility to Protect could simply be a smokescreen for unjustified interference in a States internal affairs.[411]

> Nevertheless, further clarification may perhaps be necessary to mitigate apprehensions relating to the risk that some actors, individually or collectively, may abuse the responsibility to protect to further aims that are incompatible with the noble objectives of that doctrine.[412]

Ecuador referred to the first pillar of the Secretary-General's report in relation to settled principles of international law:

> As to pillar one, the concept of sovereignty and the implications of any form of intervention can be subject to no interpretation that differs from that established under international law.[413]

China was also concerned that the concept of the Responsibility to Protect and its implementation should not contravene the settled principle of state sovereignty.

> Although the world has undergone conflicts and deep changes, the basic status of the

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[410] Sweden A/63/PV.97, 4; Egypt A/63/PV.97, 5; Indonesia A/63/PV.97, 8; France A/63/PV.97, 10; Philippines A/63/PV.97, 11; Brazil A/63/PV.97, 14; Guatemala A/63/PV.97, 14; Bosnia and Herzegovina A/63/PV.97, 17; United States of America A/63/PV.97, 17; Belgium A/63/PV.97, 18; Republic of Korea A/63/PV.97, 19; Australia A/63/PV.97, 21; Liechtenstein A/63/PV.97, 22; Costa Rica A/63/PV.97, 23; New Zealand A/63/PV.97, 25; Netherlands A/63/PV.97, 26; Italy A/63/PV.97, 27. Austria A/63/PV.98, 1; Pakistan A/63/PV.98, 3; Switzerland A/63/PV.98, 5; Algeria A/63/PV.98, 6; Singapore A/63/PV.98, 7; Ecuador A/63/PV.98, 9; Chile A/63/PV.98, 10; Morocco A/63/PV.98, 13; Colombia A/63/PV.98, 14; Israel A/63/PV.98, 15; South Africa A/63/PV.98, 17; Uruguay A/63/PV.98, 18; Ghana A/63/PV.98, 19; Japan A/63/PV.98, 21; Czech Republic A/63/PV.98, 22; China A/63/PV.98, 23; Mali A/63/PV.98, 24; Canada A/63/PV.98, 25; Nigeria A/63/PV.98, 26; Viet Nam A/63/PV.98, 28; Guinea-Bissau A/63/PV.98, 29. Ireland A/63/PV.99, 1; Venezuela A/63/PV.99, 3; Norway A/63/PV.99, 7; Germany A/63/PV.99, 7; Bolivia A/63/PV.99, 8; Romania A/63/PV.99, 9; Slovenia A/63/PV.99, 11; Monaco A/63/PV.99, 11; Qatar A/63/PV.99, 12; Solomon Islands A/63/PV.99, 14; Croatia A/63/PV.99, 15; Jordan A/63/PV.99, 16; Luxembourg A/63/PV.99, 17; Mexico A/63/PV.99, 18; Rwanda A/63/PV.99, 20; Turkey A/63/PV.99, 21; Cuba A/63/PV.99, 22; Hungary A/63/PV.99, 24; India A/63/PV.99, 25; Andorra A/63/PV.99, 26; San Marino A/63/PV.99, 26. Sierra Leone A/63/PV.100, 4; Jamaica A/63/PV.100, 6; Myanmar A/63/PV.100, 7; Macedonia A/63/PV.100, 8; Slovakia A/63/PV.100, 9; Iran A/63/PV.100, 10; Russian Federation A/63/PV.100, 12; Nicaragua A/63/PV.100, 13; Iceland A/63/PV.100, 13; Armenia A/63/PV.100, 14; Timor-Leste A/63/PV.100, 15; Panama A/63/PV.100, 16; Botswana A/63/PV.100, 18; Kazakhstan A/63/PV.100, 19; Bangladesh A/63/PV.100, 21; Papua New Guinea A/63/PV.100, 23; Benin A/63/PV.100, 24; United Republic of Tanzania A/63/PV.100, 27.

[411] Guatemala A/63/PV.97, 15; Pakistan A/63/PV.98, 3-4; Ecuador A/62/PV.98,9; China A/63/PV.98, 23; Venezuela A/63/PV.99, 5; Bolivia A/63/PV.99, 9; Qatar A/63/PV.99, 13; Cuba A/63/PV.99, 22; Sri Lanka A/63/PV.100, 3-4; Iran A/63/PV.100, 10-11; Nicaragua A/63/PV.100, 13; Democratic People's Republic of Korea A/63/PV.100, 17-18; Kazakhstan A/63/PV.100, 19; Sudan A/63/PV.101, 10-11, also Serbia A/63/PV.101, 13-14.

[412] Guatemala A/63/PV.97, 15.

[413] Ecuador A/63/PV.98,9.

> purposes and principles of the Charter remains unchanged. There must be no wavering with regard to the principles of respect for State sovereignty and non-interference in the internal affairs of States.[414]

China also expressed concern that the application of the Responsibility to Protect should not go beyond the four crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.[415]

Regarding the concern that States had that interference in internal affairs may be carried out as subterfuge for a hidden agenda, States "emphasized" that the scope of the Responsibility to Protect should not be broadened (or revert to its original form one could say) -

> The World Summit agreement on R2P is clearly based on four crimes and three pillars. Its scope is specifically limited to those four crimes and violations.[416]

Also, many States believed that there should be guidelines that establish what constitutes a Responsibility to Protect situation, especially with regard to the use of force in interventions.[417]

> Further clarity is required, for example, on the threshold for intervention and on who determines that the threshold has been met;[418]

It would seem that the criteria that the ICISS, the High-Level Panel, developed as a guide for how and when the use of force should be applied, has fallen by the wayside, as each subsequent Report has developed the understanding of the Responsibility to Protect.

There was also suspicion regarding "right authority" - who should be in control of implementing the Responsibility to Protect? Could the Security Council be considered to be impartial? How would the issue of the veto be addressed?[419]

> Hence, if we, the General Assembly, imbue the Security Council with the power to invoke R2P to justify action, the Council must also commit to exercising fully that grave responsibility. And it must do so without fear or favour. At the very least, that would entail the permanent five refraining from using the veto in relation to the four crimes.[420]

The representative of the Bolivarian Republic of Venezuela disagreed with the continual assertion that the Security Council should be the central force behind

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414 China A/63/PV.98, 23.
415 China A/63/PV.98, 23.
416 New Zealand A/63/PV.97, 25.
417 Mexico A/63/PV.99, 19; Rwanda A/63/PV.99, 20; Swaziland A/63/PV.100, 21; Morocco A/63/PV/98, 12; Vietnam A/63/PV.98, 28; Singapore A/63//PV.98, 8; Republic of Korea A/63/PV.97, 19; New Zealand A/63/PV.97, 25; Timor-Leste A/63/PV.100, 16; Serbia A/63/PV.101, 13014; Switzerland A/63/PV.98, 5; Israel A/63/PV.98, 15.
418 Rwanda A/PV.99, 20.
419 Ecuador A/63/PV.98, 9; South Africa A/63/PV.98, 17; Venezuela A/63/PV.99, 5; Bolivia A/63/PV.99,9; Guinea-Bissau A/63/PV.98, 30; Qatar A/63/PV.99, 13;
420 Singapore A/63/PV.98, 8.

decisions regarding intervention.

> There are those who argue that the Security Council would be the appropriate organ to authorize armed or coercive action when the responsibility to protect must be enforced as a last resort. On this point, I sincerely assert our delegation's firm and consistent rejection of such an approach. We agree that trust is at the heart of the discussion of the responsibility to protect. Who can guarantee, however, that this approach will not be implemented selectively?[421]

These questions seem to be traversing the same issues that the initial Report by the ICISS actually addressed. Each of these issues were considered in depth and principles devised in order to address them, or at the very least, provide a framework that States and international organisations could use to work though them. As each Report has developed and in some ways changed the Responsibility to Protect, the ICISS Report and its recommendations seem to have been overlooked by States, either conveniently, or unintentionally.

The World Summit Outcome Document's definition of the Responsibility to Protect contained in paragraphs 138 and 139 have become the most authoritative definition of the Responsibility to Protect. Following Ban Ki-Moon's Report on Implementation of the Responsibility to Protect, his three pillared approach has provided further interpretation on these significant paragraphs, which has been the focus of the subsequent General Assembly debates.

Following the debates on the Secretary-General's report on implementation of the Responsibility to Protect, the General Assembly adopted a unanimous resolution that took note of the Secretary-General's report, and decided to continue its consideration of the Responsibility to Protect.

4.7 Conclusion

The Responsibility to Protect represents an attempt to shift the traditional notion of sovereignty as a manifestation of control, to sovereignty that embodies certain responsibilities. These responsibilities are held both internally and externally. A State is responsible when exercising its internal sovereignty to ensure that its population is not subjected to genocide, war crimes, ethnically cleansing or crimes against humanity. Externally, States in the wider international community also

[421] Venezuela A/63/PV.99, 5.

have a responsibility to the population of another State, when that State is unable or unwilling to protect its population from the four crimes, but there is also a broader responsibility where States have to support States "build capacity" and provide assistance to States that may be struggling in situations considered to be precursors to an outbreak of conflict, genocide, war crimes, ethnic cleansing, and crimes against humanity.

The understanding that a sovereign state bears certain responsibilities towards its population is not a new one.[422] However, the extension of that responsibility to the wider international community of States is. The International Commission on Intervention and State Sovereignty outlined in great detail the various elements of what *was* the Responsibility to Protect. Since the High-level Panel Report, the Secretary-General's "In Larger Freedom" Report, the World Summit Outcome Document, and the Secretary-General's report on implementation, the original parameters of the Responsibility to Protect have been altered.

Coercive military intervention was considered a "just cause" under the ICISS Report in situations where there was large scale loss of life, large scale ethnic cleansing, forced expulsion, acts of terror or rape, carried out by deliberate state action, state neglect, or in a failed state situation. This language was subsequently refined to the four crimes of genocide, war crimes, ethnic cleansing and crimes against humanity, and States have been emphatic in limiting the application of the Responsibility to Protect to these four crimes alone, which is not necessarily a negative step.

While States have intimated that they wish to confine the Responsibility to Protect to the four crimes, it is also clear that States have acknowledged that there is a responsibility to protect populations from these crimes, to take measures to prevent them, and to respond to them in a decisive manner. With regard to the use of force in a coercive intervention in order to protect populations, States are less comfortable with contravening the traditionally held notions regarding non-intervention and the prohibition on the use of force.

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422 Stahn, above n 326, at 111; Luke Glanville "The International Community's Responsibility to Protect", 2 Global Resp. Protect 287 (2010), 288.

In terms of “right authority” - who should determine that military intervention should take place under the Responsibility to Protect? The various reports have supported focussing this decision making role in the Security Council, but there are serious issues regarding the use of the five permanent members of the Security Council's veto power. The General Assembly debates following the Secretary-General's 2009 Implementation report reflect that not all States agree with making the Security Council the primary decision maker in situations where genocide, war crimes, ethnic cleansing, and crimes against humanity may be occurring. States have also been reticent in embracing the proposal for regional and sub-regional organisations to take up legitimate authorisation of the use of force in place of the Security Council.

The consistent approach by the aforementioned reports regarding the centralised role of the Security Council in authorising the use of force for interventions indicate that the Security Council is still very much considered the appropriate forum for such authorisation to take place. The Security Council can then be considered crucial to the development of the Responsibility to Protect in international law, if it remains an active consideration in its approach to maintenance of international peace and security. The role of the Security Council in the authorisation of the use of force, military intervention and the Responsibility to Protect will be considered in the following section.

5. The United Nations Security Council

5.1 Introduction

Under the Charter system, States have the right to use force against another state in self-defence only.[423] The use of force, for any other purpose that is not self-defence has been delegated to the Security Council, which has the primary role of maintaining international peace and security. The former sovereign right to use force in disputes or otherwise has been restricted to self defence, and the prohibition on the threat or use of force has become a norm (*jus cogens*) of international law.[424] The Security Council is the centralised body, by which, its authorisation is seen as both authoritative and necessary to carry out an armed intervention in a sovereign state that has the necessary legal basis.

The Charter itself does not include specific reference to humanitarian crises in terms of maintenance of international peace and security.[425]
It was not until the late 1990s, in the Post-Cold War era, that the Security Council began to actively expand civilian protection norms.[426] During the Cold War era, the Security Council did pass resolutions that were concerned with "non-conflict related" protection of civilians,[427] but did not authorise the use of force for military intervention purposes. However, there have been glaring instances during the Cold War, when the Security Council has remained silent and inactive while large scale killings of civilians, violent repression, and genocide took place in multiple sovereign states.[428] The advancement of the significance of protecting civilians during armed conflict, whether intra-state or inter-state, has been

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423 Charter of the United Nations, Article 51 – however it any individual or collective self-defence must be reported to the Security Council, and is only undertaken until the Security Council takes measures to maintain international peace and security.

424 Constantine Antonopolous "The Legitimacy to Legitimise: The Security Council Action in Libya Under Resolution 1973 (2011) 14 Int'l Comm. L. Rev. 359, at 365.

425 However, the promotion and protection of human rights is one of the Charter's core Principles and Purposes.

426 Rosa Brooks "Civilians in Armed Conflict" in Genser, Ugart (eds) *The United Nations Security Council in the Age of Human Rights*, (2014) 35 at 39.

427 For example: SC/RES/134 (1960) South Africa, regarded the mass killing of protesters against racial discrimination; SC/RES/161 (1961) Congo, concerned with avoiding repercussions after the murder of Congolese leader Patrice Lumumba; SC/RES/237 (1967), sought to address concerns for civilian persons following Israel's Six Day War against Egypt, Syria and Jordan.

428 For example: Stalin's purges, the death toll of the Chinese Cultural Revolution, South African governments violent repression and killings during apartheid, the Khmer Rouge genocide in Cambodia, and the ethnic based killings in Uganda, Biafra, Burundi, Laos, East Timor, and Sudan. - From: Brooks, above n 429, at 39-40.

evolving steadily within Security Council practice, more recently, Resolution 1674 (2006) is directly concerned with the protection of civilians in armed conflict.[429]

Member States respect for state sovereignty is often blamed for the lack of action by the Security Council and Member States in addressing the protection of civilians in internal armed conflicts, and it does represent a complicating factor in the ability to protect civilians. However, the Security Council's own practice and the political nature of its composition have also, at times, played a detrimental role in the protection of civilians. What is of significance, to this paper, is the evolution that has occurred within Security Council practice. It has gradually changed its approach to situations that constitute a threat or breach of international peace and security, to include the protection of civilians, and in "exceptional" situations, authorised the use of force for military intervention purposes to do so.

How has such a change occurred? The end of the Cold War ushered in a new era of positive activity for the Security Council. During the Cold War period, there were two instances[430] where the use of force was authorised, following the end of the Cold War, from the 1990's onward there have been many instances,[431] where the use of force has been authorised, recommended, or delegated by the Security Council,[432] with each operation either as a stand alone operation, or acting concurrently with a peacekeeping operation. From this, it can be surmised that there has been some form of evolution within Security Council practice, at least, regarding the readiness to intervene militarily in internal armed conflicts, and for the purpose of protecting civilians. However, whether this represents an evolution in international law, or that state sovereignty has been compromised in some way is a different matter. Has Security Council practice challenged the settled principles of sovereign equality, territorial integrity, non-interference in another states domestic affairs, or the prohibition on the use of force?

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429 SC Res 1674 SC/RES/1674 (2006).

430 Korea 1950, Southern Rhodesia 1966.

431 Lowe, Roberts, Welsh and Zaum (eds) *The United Nations Security Council and War* (Oxford University Press, UK, 2008), Appendix 3.

432 Benedetto Conforti *The Law and Practice of the United Nations* (3rd ed, Leiden, The Netherlands, 2005) at 204.

In order to reach some form of answer to the above question, some relevant discussion regarding the history of the Security Council and the intention behind its establishment will be undertaken. Following this, discussion regarding the role of the Security Council in the maintenance of international peace and security, and how its powers impact sovereignty and the armed intervention for humanitarian purposes. Also, an overview of some of the resolutions adopted by the Security Council that authorise the use of force, and their changing nature, will also be undertaken.

5.2 The History of the Security Council

The Second World War had not yet finished when world leaders were discussing the formation of a new international system of collective security. It was this unique circumstance that brought together the powerful nations of Great Britain, the Soviet Union, and the United States of America, who were traditionally very different ideologically, but became allied against a common enemy. These three states would essentially become the "architects" of the new collective security organisation, and they had the distinct advantage of hindsight. Being able to learn from the flawed but idealistic shortcomings of the League of Nations is evident, nowhere more so than in the creation of a new and improved United Nations, and its subsidiary organ the Security Council.[433]

War time conferences were held between Britain's Prime Minister Winston Churchill, American President Theodore Roosevelt, and Soviet leader Joseph Stalin. These conferences provided a foundation for building consensus between these world powers. At Dumbarton Oaks, a private estate in Washington DC, a series of "conversations" were held where more detailed proposals were put forward for consideration. The proposals that were formulated in this series of discussions, that also included representation from the Chinese Chiang Kia-Shek regime, were the starting point for broader discussion at the San Francisco conference which would also include States that had declared war on the Axis powers during World War II.[434] The proposals that came out of Dumbarton Oaks supplied a detailed overview of a new global organisation's "purposes, principles,

[433] Luck, above n 436, at 68.
[434] Luck, at 12.

procedures and structure."[435]

During the San Francisco conference, France became involved in the deliberations of the four big powers – Great Britain, United States of America, Russia, and China – and as a result would become the fifth power in what would be known as the "Big Five".

Four themes had been identified as particular issues that contributed to the eventual "failure" of the League of Nations and these four themes have been absorbed into the features of the United Nations Security Council.[436]

> One, the new Council included all of the major powers and, in particular, would serve to embed American power and dynamism in the new structure. Two, the most powerful states were given special rights and responsibilities concerning the maintenance of international peace and security. Three, the new Council was to be of limited size, without what the Dutch delegate labeled the "exaggerated equality between great and small Powers" that characterized the consensus rule in the League's Council. … And four, the new Council had the authority to enforce its decisions, while its members had the capacity – and experience – to crush aggressors through the collective use of force if necessary. The Council, in short, was to be the centrepiece of the boldest attempt yet to institutionalize collective security.[437]

The League of Nations was always hampered by inconsistent membership. While the United States had played a pivotal role in the League's establishment under President Woodrow Wilson, the United States was never a member, along with the Soviet Union. Other major state powers that joined did not feel bound to stay when their individual state interests conflicted with the League's aims and purpose.[438]

The eventual failure of the League can be viewed as a learning experience for the drafting of the United Nations Charter, the articles contained in the Charter are "based upon the terms of the Covenant of the League of Nations" though revised with the benefit of hindsight.[439] The League had been largely concerned with preventing and combating acts of aggression, while in contrast, the Security Council is empowered to address wider international security concerns, which include acts of aggression, but also threats to, and breaches of, international peace

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435 Luck, at 13.
436 Luck, above n 436, at 10.
437 Luck, at 10.
438 Both Germany and Japan joined the League, but subsequently left the League.
439 Shaw, above n 28, at 884.

and security.[440] The League was perceived as a failure in a system designed for collective security, and part of its weakness was related to it been unable to garner "major economic, military, and political" support from the major powers.[441]

The composition of the Security Council is made up of the five permanent members (United States, China, Russia, France, and the United Kingdom) with ten elected non-permanent members.[442] The League of Nations was formed in a time when European "homogeneity" was prevalent the United Nations has become more universal and inclusive. This inclusiveness is reflected by an arrangement that five of the non-permanent seats are allocated to Afro-Asian states, two are allocated to Latin American states, with no specific geographical arrangement for the remaining two.[443]

The need for binding coercive measures in the form of armed force or non-forceful sanctions was apparent. So, unlike the League, the Security Council is entitled to resort to the use of military force without first having to apply pacific sanctions. States are prohibited from using force against another state in Article 2(4), giving the Security Council, virtually total control over the use of armed force.[444] The military measures available to the Security Council move beyond "advising or recommending" action to member states.[445]

Universal membership in the League was yet another of its flaws, in order to create a collective security system that carried binding decisions, and had powerful political support the permanent five were given the power of a veto. The veto ensured that the permanent five could disagree with proposed decisions that affected the permanent five member's political or national interests.[446] In so many ways this gives the permanent five members an unfair degree of power,

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440 Charter of the United Nations, art. 39.
441 Saira Mohamed "Shame in the Security Council" (2013) Washington Law Review 1191, at 1210.
442 Charter of the United Nations, art.23.
443 Shaw, above n 28, at 39.
444 Mohamed, above n 444, at 1210.
445 It was envisioned that a standing army would be available to the UN Security Council, as a means to resort to the use of force to maintain international peace and security, but this has not been the case.
446 Mohamed, above n 444, at 1211.

particularly when considering the authorisation of force against a state for civilian protection purposes. However, it did guarantee that the major political powers would support the institution of the United Nations, which as seen in the case of the League, would have floundered without them. While the power of the veto can strike down a resolution, under Article 27 resolutions require an affirmative vote of nine members, permanent and non-permanent need to work together in order to create consensus in their decision making.

Decisions to authorise the use of force are made under Chapter VII of the Charter, and in accordance with Article 39,

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[447]

and Article 42,

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[448]

The enforcement measures contained in Article 42 require a determination to be made under Article 39 in order for the Security Council to be able to enforce its decisions.[449] Chapter VII decisions are the product of a voting system conducted by sovereign states, there are no standards or guidelines for how these decisions are to be made, and as such they are purely political.[450]

The broad phrasing of Article 39 and Article 42 gives the Security Council broad scope in how responds to situations, the method of its response and the time frame it chooses to respond in.[451] This in turn allows member states of the Security Council to act according to their own national interests, which often supports the notion that the authorisation of the use of force in or against a sovereign state is unacceptable. Over time though, as the remainder of this section will show, member states within the Security Council are becoming more willing to authorise armed intervention for humanitarian purposes, indicating that the protection of

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447 Charter of the United Nations, art.39.
448 Charter of the United Nations, art.42.
449 Sydney D. Bailey and Sam Daws "The Procedure of the UN Security Council (3rd ed, Clarendon Press, Oxford, 1998) at 269.
450 Luck, above n 436, at 23.
451 Luck, at 23.

civilians is a growing aspect of the international collective security system.

5.3 Sovereignty, Humanitarian Intervention and the Security Council

As previously stated, the nature of sovereignty exists in two distinct but related spheres. Internal sovereignty exists within the domestic affairs of state, while external sovereignty denotes the form of international relations between states. Since its earliest conception, sovereignty has been described as absolute and supreme. In many ways, depending on the constitutional arrangements of various states, this is arguably, still very much the case. However, the establishment of the United Nations, and with it, its subsidiary organ the Security Council, the impenetrable veil that sovereignty provided to states externally, has often been disturbed by the Security Council's exercise of its powers under Chapter VII of the Charter of the United Nations.

Through the previous sections of this paper, it has been demonstrated that sovereignty as it relates to states in international law, has not so much undergone drastic change, but incrementally over time, it has shed its absolutist nature externally, in order to promote greater international collective security. This incremental change has been influenced primarily by the rise of human rights and humanitarian concerns regarding the treatment of civilians in times of conflict and war. In contemporary international law, the United Nations, and in particular the Security Council, is at the forefront of change. Whether this change has substantially affected international law as it relates to sovereignty and the protection of civilians, is of significant consideration for this paper.

The Security Council occupies a central role in the maintenance and restoration of international peace and security. It is a creature of Charter law, and as previously noted, during the discussions that took place between States at each pivotal stage in the development and acceptance of the new concept of the Responsibility to Protect, States unanimously agreed that the Security Council should remain central to any decisions relating to the authorisation of the use of force.[452] This

[452] ICISS Report (2001), Report of the High-Level Panel on Threats, Challenges and Change (2004), World Summit Outcome Document (2005), Report of the Secretary-General on Implementing the Responsibility to Protect (2009) and associated Member Representative

indicates that the broader international community still regards the Security Council as the lynch pin of collective security and the most authoritative decision maker regarding the use of force and military intervention.

In order to fulfil its primary responsibility to maintain and restore international peace and security under the Charter, the Security Council is able to transgress the traditional prohibitions on the threat, or use of force, and the principle of non-intervention.[453] This in itself suggests that, as Members of the United Nations, States have submitted an aspect of their sovereignty in order to become members of the organisation. The powers under Chapter VII of the Charter clearly indicate that any State (or situation) that poses a threat to the peace, breaches the peace, or commits an act of aggression would be subjecting themselves to the potential use of the powers under either Article 41 or 42 of the Charter, under Chapter VII.[454] Although the use of the veto by any member of the Permanent 5 ensures that this provision can never be used against any one of them.

Under Article 42, the Security Council can authorise the use of force, as part of the measures available to it under the Charter, in order to maintain or restore international peace and security.

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations[455].

Authorisations of the use of force by the Security Council are contained within its resolutions, which are considered decisions, and as such, are binding on Member States.[456]

Even in instances where States may have concluded obligations with other states under other international agreements, Article 103 of the Charter states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement,

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Statements.

453 Charter of the United Nations, art. 2(4) and 2(7).

454 It should be noted that the Permanent Five members of the Security Council would not, due to the power of the veto which ensures these enforcement powers will not be used against any of them.

455 Charter of the United Nations, art. 42.

456 Charter of the United Nations, art. 25.

> their obligations under the present Charter shall prevail.[457]

When the Security Council passes a resolution containing the authorisation for the use of force, irrespective of any obligations upon a Member of the United Nations, they are required to uphold their obligation to the Charter first and foremost. The Security Council is very much a political organism, guided by each member of the Security Council's particular foreign policy and political qualities, however, it is also a legal organism, producing resolutions containing decisions that have a "legally controlling" force.[458]

This suggests that states have, in terms of the exercise of their external sovereignty, deference for the Charter, and to Security Council decisions. However, does it mean that Security Council decisions make or evolve international law?

> Where the vast majority of states consistently vote for resolutions and declarations on a topic, that amounts to a state practice and a binding rule may very well emerge provided that the requisite *opinio juris* can be proved.[459]

To consider whether the resolutions passed by the Security Council evolve international law, that some new or evolved form of customary law has arisen, evidence of state practice over time, in conjunction with *opinio juris* – the extent of the belief that the state is bound to act – must be present.[460] Is it possible to determine an evolving custom – that military intervention for the protection of civilians will occur irrespective of respect for state sovereignty – from a pattern, though inconsistent, of Security Council practice, when the passing of resolutions may not be unanimous due to abstentions, and the attitudes of individual states are distinctly varying?

The Security Council has been careful, when authorising military intervention for humanitarian reasons, not to create precedents that would create future obligations to which it could be bound to act in similar situations. Though the Security Council has treated each response that has authorised military intervention as unique or exceptional, there is no provision within the Charter that either

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457 Charter of the United Nations, art. 103.

458 David P. Forsythe "The UN Security Council and Responses to Atrocities: International Criminal Law and the P-5" (2012) 34 Hum Rts Q 840 at 841.

459 Malcolm Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014) at 82.

460 Shaw, above n 462, at 654.

prohibits, or allows, the Security Council to legally bind itself.[461] The "inconsistency" in Security Council practice is an example of the Security Council's ability to choose a new course of action for each situation as it arises, and that there is no duty to behave in a conform manner when internal conflicts arise, but rather, to treat each conflict as singular unto itself.

While the Security Council has been careful in its construction of resolutions that authorise the use of force, there have been gradual changes in the language used that may indicate that while the Security Council may not be binding itself to act in a particular way in regard to future situations, it may be incrementally changing how military intervention in a sovereign state for the protection of civilians is viewed within international law. The challenge to legal intervention in a sovereign state, under the Charter system, has been Article 2(7). It clearly states 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...[462]

James Pattison makes the point that in order to gain legal authority it has been the case, until the intervention in Libya, that target states have given their consent for an intervention to take place, and in doing so, the Security Council has gained "legal authority" for such an intervention, without compromising state sovereignty.[463] However there is no requirement under Chapter VII of the Charter for the target state to give consent to the Security Council for intervention to take place. The giving of consent or the request for assistance has been a part of the Security Council's practice in authorising military intervention. So while it may have been conventional for consent to be present it is not actually a necessity under the Charter provisions. It does indicate that there has been a consistent practice of acquiring consent which reinforces the notion that the authorisation of military intervention against a target state is tempered by the respect for sovereignty, territorial integrity and political independence of all states.

In reality, States that do commit gross human rights abuses, crimes against humanity, war crimes, genocide, or ethnic cleansing, or permit these crimes to be

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461 Osterdahl above n 13, at 13.
462 Charter of the United Nations, art. 2(7).
463 Pattison, above n 364, at 52.

committed, still cleave to the principle of sovereignty to protect their actions. The Security Council has (with the exception of Libya in 2011, and Somalia which had no functioning government to give consent) never militarily intervened in a Sate without that functioning states consent.[464] There has been a definite shift in the Security Council's approach to situations which are internal armed conflicts in the Post-Cold War era by determining that they constitute a threat to international peace and security, as per Article 39. This represents a clear departure, or a "constitutional evolution" from what state governments had envisioned when they signed the Charter in 1945.[465] This shift has been furthered by the universal acceptance by all states of the concept of the Responsibility to Protect in the 2005 World Summit Outcome Document. In 2006 the Security Council passed Resolution 1674 (2006) which concerned the protection of civilians in armed conflict and which stated that it:

> *Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity;

The acknowledgement of paragraphs 138 and 139 of the 2005 World Summit Outcome Document indicate that the Security Council views "peace and security and human rights" as interlinked and mutually reinforcing".

In the Post-Cold War era of the 90s, there was also a definite shift in the language used in resolutions, which included reference to humanitarian considerations. Security Council resolutions are by nature binding, and as they are binding create law, and even though the Security Council seeks to avoid creating precedents which they themselves would be bound to follow, the pattern of authorisation of military intervention for the protection of human rights and humanitarian values, at the very least "establishes a practice based on a certain interpretation of the UN Charter".[466] It has been stated that change is incremental, but what effect do the resolutions of the Security Council have on international law? This question is best answered by examining some of the significant occasions where the Security Council has authorised the use of force.

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464 Paul D. Williams "The Road to Humanitarian War in Libya"(2011) 3 Global Resp Protect 248 at 249.

465 Richard B. Lillich, "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post Cold-War World", (1995) 3 Tul J Int'l & Comp L 1 at 8.

466 Osterdahl, above n 13, at 12.

5.4 Security Council Authorised Military Intervention

If the Security Council produces resolutions that are legally binding, regardless of its inconsistent practice through repetition establish a "norm-creating pattern",[467] what law is evidenced by the resolutions authorising military intervention, and what sort of norm creating pattern is established by these resolutions? During the Cold War period the two instances are hardly indicative of any sort of consistent practice, but post-Cold War era Security Council practice, the language used becomes more consistent in its application.

5.4.1 *Authorisation During the Cold War*

In the Cold War period Security Council authorisation for military intervention was rare, and on its first occasion, took advantage of the rift in the Council between the former Soviet Union and the United States, when the use of force was authorised under Resolution 83 (1950). Resolution 83 (1950) provided the mandate for a United States led military coalition to aid Korea in repelling armed attacks made against it by North Korea. Resolution 83 first determined that a breach of the peace had occurred,[468] and that North Korea had failed to comply with Resolution 82 (1950)[469] which now meant that "urgent military measures" were required.[470] The use of force was then authorised without reference to Chapter VII, or Article 42, the phrasing used by the Security Council was that it:

> *Recommends* that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.[471]

One possible explanation for the exclusion of Chapter VII or Article 42 in the text of Resolution 83 is that this resolution was not intended to be a binding decision.[472] The exact meaning and scope of the phrase "furnish such assistance" is unclear, it is also unclear whether the recommended action was enforcement under Chapter VII, or whether its legal basis was founded under Article 51.[473]

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467 Osterdahl, at 2 and 12.
468 SC Res 83 SC/RES/83 (1950), preamble [1].
469 SC Res 83, above n 471, at preamble [4].
470 SC Res 83, above n 471, preamble at [4].
471 SC Res 83, preamble [6].
472 Jon E. Fink "From Peacemaking to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security" (1995) 19 Md J Int'l L & Trade 1 at 16.
473 Thilo Rensmann "Reform" in Simma *The Charter of the United Nations, A Commentary*

The language is not mandatory, and an obligation is not created as the language used to create a "binding formulation" has not been used.[474] Regardless of the lack of clarity, and the doubtful nature of the obligation created by Resolution 83, a United States led military coalition operation was carried out in order to "restore international peace and security".[475]

Sixteen years later, the use of force was again authorised in Southern Rhodesia under Resolution 221 (1966).[476] This resolution established that the situation was determined to be a "threat to the peace", an oblique reference to Article 39, and as such, brought the resolution within the purview of Chapter VII. Resolution 221 authorised a specific Member State, the United Kingdom of Great Britain and Northern Ireland, to use force if necessary to prevent the arrival of vessels in Beira. It also created a negative obligation on the Portuguese government, and other Member States generally, to *not* provide assistance to Southern Rhodesia. The language authorising the United Kingdom of Great Britain and Northern Ireland is more specific than that used in Resolution 82:

> *Calls upon* the Government of the United Kingdom of Great Britain and Northern Ireland to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia and empowers the United Kingdom to arrest and detain the tanker known as the *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there.[477]

Even though force was authorised, the naval blockade used to enforce Resolution 221, ultimately failed as force was never employed to support it.[478]

Both Resolution 83 (1950) and Resolution 221 (1966) authorise the use of force, but in each situation the use of force is authorised to prevent either further acts of aggression, or the prevention of supplies reaching an illegal regime. The protection of civilians in these situations was not the primary consideration for the authorisation of the use of force. This position was reinforced by the International

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(2012) 25 at 37.

474 Helmut P. Aust "Article 2(5) in Simma *The Charter of the United Nations, A Commentary* (2012) 235 at 239 – cites SC/RES/1484, [7] as an example of a binding formulation, the Security Council "*Demands* that all Congolese parties and all States in the Great Lakes region respect human rights, cooperate with the Interim Emergency Multinational Force and with MONUC in the stabilization of the situation in Buni and provide assistance as appropriate...".

475 SC Res 83, above n 471, preamble at [4].

476 SC Res 221 SC/RES/221 (1966).

477 SC Res 221, above n 479 at [5].

478 David M. Malone "Introduction" in David M. Malone (ed) *The UN Security Council, From the Cold War to the 21st Century*, (Lynne Rienner Publishers, United States of America, 2004) 1 at 10.

Court of Justice in its judgment in the *Nicaragua* case. In the court's view, the use of force was not appropriate to ensure respect for human rights, nor was it in keeping with a humanitarian objective.[479] The ICJ, as previously mentioned, also made the point of stating that a prohibited intervention was one that had a direct bearing on a sovereign states ability to freely choose its political, economic, social and cultural systems, and its formation of foreign policy. However, following the end of the Cold War, Security Council decision making was no longer stagnated, and as the following examples will show, Security Council practice has evolved over time to include and respond to humanitarian crises with authorised military intervention.

5.5 Post-Cold War Era Authorisations

5.5.1 *Iraq*

The first example of military authorisation following the end of the Cold War, against Iraq in 1990, set the pattern for subsequent authorisations. Resolution 678 (1990) explicitly states that it is

> *Acting* under Chapter VII of the Charter,[480]

and as such, clearly places the sanctions contained in the resolution under the legal authority of Chapter VII.[481] Resolution 678 (1990) also used obligatory language in its authorisation of military force, stating that it:

> *Demands* that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions,[482]

This created an obligation on Iraq to comply, and if it did not within the "pause of goodwill" offered by the Security Council, it then-

> *Authorizes* Member States co-operating with the Government of Kuwait unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.[483]

Resolution 678, similar to Resolution 83 (1950) is aimed at a situation that involves an act of aggression by one sovereign state (Iraq) against another (Kuwait). It is specific in its authorisation, by clearly stating that it is acting under

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479 *Nicaragua*, above n 190 at 107 [268].
480 SC Res 678, above n 14, preamble at [5].
481 David Cortright, George A. Lopez, and Linda Gerber-Stellingwerf "The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990" in Lowe, Roberts, Welsh and Zaum (eds) *The United Nations Security Council and War* (Oxford University Press, Oxford, 2008) 205 at 206.
482 SC Res 678, above n 14, preamble at [5].
483 SC/RES/678 (1990), paragraph 2.

Chapter VII, and it is also the first instance where the phrase "all necessary means" is utilised, which sets a pattern for future resolutions.

Resolution 678 did not refer to humanitarian concerns or the protection of civilians in any direct way. There is no direct authorisation for military intervention based on humanitarian considerations, and the reason for this is largely political. Western states did not seek a specific mandate from the council to militarily intervene for the protection of the Iraqi civilian population due to the staunch position of the Soviet Union and China who would exercise their veto power to preserve Article 2(7).[484] During the Security Council meeting regarding the adoption of the resolution, states took issue with the language used to frame the resolution, in particular the lack of reference to a specific Chapter VII article, as well as the broad description of the use of force,[485] while Cuba described the resolution as a "virtual declaration of war" and a violation of the Charter itself.[486] The majority of states though were concerned with the breaches of international law committed by Iraq when it invaded Kuwait, violating its territorial integrity, political independence, and state sovereignty.

Resolution 678 (1990), as stated, did not include specific reference to a particular article under Chapter VII as the basis under which it was authorising the use of force. However, neither Resolution 83 (1950) or Resolution 221 (1966) contained direct reference to either Chapter VII or its relevant articles. The argument that resolutions that authorise force without direct reference to Chapter VII or its articles lack legal basis is not a reflection of Security Council practice, but perhaps political rhetoric.[487] Another aspect of these three resolutions is the nature of the obligation upon Member States to participate in military intervention action. In Resolution 83 (1950) States were generally called upon to provide assistance, as was the case in Resolution 678 (1990). In Resolution 221 (1966) the United Kingdom of Great Britain and Northern Ireland was specifically called upon to provide naval assistance. The more generalised form of calling upon

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484 Jennifer M. Welsh "The Council and Humanitarian Intervention", in Lowe, Roberts, Welsh and Zaum (eds) *The United Nations Security Council and War* (2008) 535 at 539.

485 Yemen, S/PV.2963, at 33.

486 Cuba S/PV.2963 at 58.

487 Frank Berman "The Authorization Model: Resolution 678 and its Effects" in David M. Malone (ed) *The UN Security Council in the 21st Century* (2004) 153 at 156.

Member States has become the pattern since Resolution 678 (1990), and it indicates that Member States are empowered, if they choose to do so in their sovereign capacity, to act, but not obliged to act,[488] even though decisions made by the Security Council are binding on all Member States.[489]

5.5.2 *Bosnia and Herzegovina, Somalia, and Rwanda*

Following on from Iraq and Resolution 678, three situations presented new challenges to the Security Council's approach to the maintenance and restoration of international peace and security. Humanitarian crises that featured the devastating consequences of ethnic cleansing and genocide, did not so much galvanise the Security Council into action, but did gradually widen the interpretation of what constituted a threat to international peace and security, and in some ways formed the basis for the authorisation of military force under Chapter VII.

Resolution 787 (1992) concerned the situation in Bosnia-Herzegovina, in particular the shipping of essential resources to the former Federal Republic of Yugoslavia, but was also the first in a number of resolutions to authorise the use of force for humanitarian purposes.[490] Resolution 794 (1993) established the mandate for the use of force in order to create a secure environment for the delivery of humanitarian aid in Somalia, and Resolution 929 (1994), concerning the situation in Rwanda, was a direct response to France volunteering to coordinate an operation in Rwanda to provide security for refugees and civilians.

5.5.3 *The authorisation of force in unforeseen circumstances*

Each of the resolutions from this period of activity follows similar phrasing as that used in Resolution 678 when authorising the use of force, and it has become a pattern not just in Post-Cold War resolutions concerning the use of force to use this phrasing, but also resolutions passed in the twenty-first century. The phrase "all necessary means" or "all necessary measures" and its variations within the

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[488] Berman, above n 490, at 157.
[489] The Charter of the United Nations, art. 25.
[490] Osterdahl, above n 13, at 3.

text of resolutions, have become a "code phrase"[491] for the authorisation of the use of force. Some authors are critical of the language used in resolutions and that it must be clear so that the scope of the mandate within the resolutions directly reflect the intention of the Security Council's decision.[492] The danger of ambiguity is that resolutions may be used as a legal basis for the use of force in situations where it was not the Security Council's intent, however, the omission of the phrase "use of force" when force is been authorised is a diplomatic tactic to obtain support from states that are not in favour of the use of force in the internal jurisdiction of sovereign states.[493]

The following resolutions present a pattern where the use of force has been authorised by the Security Council utilising the same, or similar language as that used in Resolution 678. This emerging pattern an emerging practice, where the Security Council has consistently applied the same, or similar phrasing with which to authorise the use of force for military intervention. Resolution 787 (1992) "acting under Chapters VII and VIII" called upon States to:

> … use *such measures* commensurate with the specific circumstances *as may be necessary* under the authority of the Security Council …[494]

It also reaffirmed the responsibility of riparian States to "take necessary measures"[495] to ensure compliance with previous resolutions regarding shipping.

Again, in Resolution 794 (1992), regarding the situation in Somalia, the Security Council states that it is acting under Chapter VII, and authorised Member States who were cooperating to implement the resolution, to

> use *all necessary means* to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.[496]

Resolution 929 (1994) varied the language slightly in its authorisation, again acting under Chapter VII, the Security Council again authorised Member States to,

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491 Lillich, above n 468, at 10.
492 Alexander Orakhelashvili "Unilateral Interpretaion of Security Council Resolutions: UK Practice" (2010) 2 Goettingen J Int'l L 823 at 824.
493 Gary Wilson "The Legal, Military and Political Consequences of the Coalition of the Willing Approach to UN Military Enforcement Action", (2007) 12 J Conflict & Sec L 295 at 304.
494 SC Res 787 SC/RES/787 (1992) at [12] emphasis added.
495 SC Res 787, above n 497, at [13].
496 SC Res 794, above n 15, at [10] emphasis added.

> … conduct the operation referred to in paragraph 2 above using *all necessary means* to achieve the humanitarian objectives ...[497]

While these resolutions present a consistent practice by the Security Council in terms of the language used to authorise military force, these resolutions are also examples of the emergence of humanitarian considerations, and the significance that they play in determining a threat to international peace and security.

5.5.4 *Determining a threat in unforeseen circumstances*

The situation in Bosnia and Herzegovina was a result of the disintegration of the Federal Republic of Yugoslavia. The European Community (the EC, which later transformed into the European Union) attempted to use diplomatic political tools to reach some form of peace, but was ill equipped for the task.[498] The escalation of the conflict in the former Yugoslavia, particularly between three parties – Bosnian-Serbs, Bosnian-Muslims, and Bosnian-Croats – in Bosnia and Herzegovina remained unresolved after various "peacemaking initiatives", and the international community turned to the UN to provide assistance in terms of humanitarian relief.

Resolution 752 (1992) called on parties to allow for the delivery of humanitarian aid.[499] Despite this the number of displaced persons (many becoming refugees from the war) in Bosnia and Herzegovina reached over 2 million, and mass atrocities were committed following a referendum held on February 29 1992. Bosnian-Serbs boycotted the referendum and refused to accept the independence of Bosnia-Herzegovina, what followed was a systematic military campaign of ethnic cleansing, "removing" non-Serbian civilians from Serb-designated territories.[500] Resolution 787 acknowledged the practice of ethnic cleansing, taking territory by force, and forcible removal of citizens, it:

> Reaffirms that any taking of territory by force or any practice of "ethnic cleansing" is unlawful and unacceptable, and will not be permitted to affect the outcome of the negotiation on constitutional arrangements for the Republic of Bosnia and Herzegovina,

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497 SC Res 929, above n 282, at [3] emphasis added.

498 Geoffrey Nice and Nena Tromp "Bosnia-Herzegovina", in Jared Genser, Bruno Stagno Ugarte (eds) *The United Nations Security Council in the Age of Human Rights*, (2014) 288 at 288 and 294.

499 SC/RES/752 (1992) May 15 1992, paragraph 8.

500 Nice and Tromp, above n 501, at 293.

> and insists that all displaced person be enabled to return in peace to their former homes;[501]

However, the resolution did little to clarify the meaning of "ethnic cleansing" nor did it make specific reference to which groups were the targets, and which group were the perpetrators of the crime.[502]

In Resolution 787 (1992) the Security Council reaffirmed that the situation in Bosnia and Herzegovina constituted a threat to the peace, and also reaffirmed that the,

> provision of humanitarian assistance in the Republic of Bosnia and Herzegovina is an important element in the Security Council's effort to restore peace and security in the region.[503]

The resolution went on to "note with grave concern" the systematic violations of human rights, and grave violations of international humanitarian law,[504] and also,

> Condemns all violations of international humanitarian law, including in particular the practice of "ethnic cleansing" and the deliberate impeding of the delivery of food and medical supplies to the civilian population of the Republic of Bosnia and Herzegovina ...[505]

While Resolution 787 (1992) was the first instance where the Security Council authorised the use of force, or "all necessary means" for humanitarian purposes.[506]

In many ways, while Resolution 787 acknowledged the ethnic cleansing and humanitarian concerns in Bosnia and Herzegovina, its construction was more substantially concerned with strengthening the guidelines of the sanctions. Also, unlike subsequent resolutions, the Security Council did not qualify the situation in Bosnia and Herzegovina as "exceptional" or "unique", which perhaps suggests that it did not perceive its actions to be radical, or, as an expansion of what constituted a threat to international peace and security, despite explicit reference to what was a humanitarian crisis.

Seventeen days after Resolution 787, the Security Council passed another significant resolution concerning the situation in Somalia. The Security Council under Resolution 794 (1992) determined,

> that the magnitude of the human tragedy caused by the conflict in Somalia, further

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501 SC Res 787, above n 497, at [2].
502 Nice and Tromp, above n 501, at 300.
503 SC Res 787, above n 497, preamble at [2].
504 SC Res 787, preamble at [9].
505 SC Res 787, at [7].
506 Michael P. Scharf "Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committeee" (1993) 19 Brook J Int'l L 771 at 795.

> exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security,[507]

Somalia presented yet another humanitarian crisis for the Security Council to deal with, however unlike the situation in Bosnia and Herzegovina, "exceptional" and "unique" became the buzz word for authorisation of military intervention by the Security Council in Somalia, both in the text of the resolution, and in the debates of the Security Council. The "exceptional" nature of the situation in Somalia, not just the military intervention in an internal armed conflict, but also the first instance of the authorisation of the use of force without a functioning government's consent, which for the Security Council became an "exceptional response".[508] The political view was that since there was no functioning government to consent to the proposed intervention, then the relevant considerations regarding the principle of non-intervention appeared to become moot.[509]

The humanitarian imperative behind Resolution 794 was a combination of the number of civilian casualties from the conflict, and famine caused by drought, but also the "CNN" effect, the "CNN" effect resulted in pressure on political representatives to address the humanitarian crisis unfolding, and readily accessible to media.[510] Resolution 794 does not mention the impact that refugee flow was having on Somalia's neighbouring states, which would bring an international character to the conflict.

The focus of Security Council debates centred on the internal violence and destruction of Somalia, the external impact was recognised, but the subsequent military intervention was primarily due to the determination that the internal conflict required action.[511] However, this does not necessarily indicate that there has been a widening of the Security Council's understanding of Article 39. The Security Council's circumspection, (by describing the situation in Somali as "unique" and "exceptional"), of creating any kind of precedent for interference in

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[507] SC Res 794, above n 15, preamble at [3].
[508] SC Res 794, preamble [2].
[509] Jennifer M. Welsh, above n 487, at 541.
[510] Thakur and Schnabel, above n 164, at 43.
[511] Lillich, above n 468, at 7.

the domestic jurisdiction of a sovereign state during an armed conflict,[512] did not alter its interpretation of Article 39, or create an obligation that would be binding in future for the Security Council to act in the domestic affairs of a sovereign state.[513]

The interim government of Rwanda had given its consent for military intervention to take place and the Security Council passed Resolution 929, for the protection of of civilians suffering from the effects of the genocide taking place. Resolution 929 stressed that the military operation was "strictly humanitarian"[514] in character, and, expressed deep concern "at the continuation of systematic and widespread killings of the civilian population in Rwanda," in this regard, the Security Council determined,

> that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region,[515]

but also stated that the situation in Rwanda

> constitutes a unique case which demands an urgent response by the international community,[516]

The Security Council resolution appears to give great consideration to the human tragedy that was the genocide in Rwanda. But in reality it had been a difficult task to even get the situation in Rwanda onto the Security Council's agenda.[517] The mandate for intervention in Rwanda is as much an example of the political dynamics at work in the Security Council as it is an intervention with humanitarian purpose. Resolution 929 was only passed after civil conflict had resumed and the genocide was in full flight. Though the use of force was not employed strategically, and the resulting casualties of the Rwandan genocide saw little assistance from the resolution, it is still an instance where, humanitarian language has been used to justify the use of force for a military intervention.

The creation of any form of binding precedent is actively avoided, in Resolution 929, as it was in Resolution 794. But each of these examples represent a

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512 Reflected both in the resolution itself and in the Security Council debate.
513 Welsh, above n 487, at 541.
514 SC Res 929, above n 282, preamble at [6].
515 SC Res 929, preamble [10].
516 SC Res 929, preamble at [9].
517 Howard Adelman and Astri Suhrke "Rwanda" in David M. Malone (ed) *The UN Security Council, From the Cold War to the 21st Century*, (2004) 483 at 486-7.

previously unseen level of military intervention in sovereign states. Somalia is unique in that it did not have a functioning or legitimate government at the time. However, under customary international law, the state is not synonymous with government, a legitimate government is merely an aspect of the criteria which forms statehood. The lack of government in Somalia, arguably did not equate to a lack of statehood "in a juridical sense."[518] If the lack of functioning government had been relied on by the Security Council as its legal basis, it would have, according to Wheeler, "exceeded its legal competence". But by coupling the lack of government with the extreme level of human suffering and loss of life experienced in the internal conflict in Somalia, this provided the Security Council with sufficient grounds to determine that there was a threat to the peace, and therefore was well within its legal competence to authorise military intervention.[519]

5.5.5 *Haiti*

In 1991 the first democratically elected President of Haiti, Jean-Bertrand Aristide was overthrown by the Armed Forces of Haiti, an "illegal de facto"[520] military authority. Security Council Resolution 940 (1994) authorised Member States to form a multinational force in order to create the necessary conditions for the departure of an "illegal de facto regime" and the reinstatement of the democratically elected regime. This is a notable resolution as it was the first time the authorisation for military intervention was made in the Western hemisphere, but even more significantly, was the Security Council's willingness to authorise force to:

> facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti.[521]

The language is cautious, it is not authorising the armed intervention for the purposes of a regime change, but to restore democracy and the "legitimately elected" Presisdent.[522]

Several factors came in to play with regard to the adoption of this resolution. The

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[518] Wheeler, above n 8, at 187.
[519] Wheeler, at 187.
[520] SC Res 940, above n 16.
[521] SC Res 940, at [4].
[522] SC Res 940, preamble at [8].

first is the Governors Island Agreement which was intended to end the Armed Forces of Haiti's control, and reinstate President Aristide; the humanitarian situation and the systematic violations of civil liberties; the restoration of democracy; and the commitment to assisting and supporting the economic, social and institutional development of Haiti.[523] Each of these factors played a part in the Security Council's determination that the situation in Haiti was a threat to "peace and security in the region."[524]

Some states argued that the crisis in Haiti remained within its internal jurisdiction, the Czech Republic was the only State to assert that the situation was a "real and growing threat to peace, security and stability in the region".[525] Significantly though, the Haitian representative used the Haitian constitution which declared that "national sovereignty resides in the entirety of the citizens". The premise that sovereignty was held by the people was also supported by the United States[526] and Argentina.[527]

Similar to the Resolution 794, Resolution 940 recognised the,

> unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response;[528]

This paragraph is another indicator that the Security Council consistently avoids the creation of precedent. The authorisation of the use of force contained reference to Chapter VII, and the phrase "all necessary means."

> Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States;[529]

These examples of Security Council authorisation provide evidence of a pattern, not just of the terms and language used to authorise force, but also, that the barrier that the wording of Article 39 seemed to impose when authorising force in

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523 SC Res 940, preamble at [8].
524 SC Res 940, above n 16, preamble at [10].
525 S/PV.3413, at 24.
526 United States, S/PV.3413 at 13.
527 Argentina S/PV.3413 at 17 and 18.
528 SC Res 940, above n 16, at [2].
529 SC Res 940, at [4].

internal conflicts, is no longer an obstacle.[530]

The change in approach to internal conflicts represents a departure in the practice of the Security Council. The inviolability of the principles of non-intervention in a sovereign state, and the prohibition on the use of force against or within a sovereign state are no longer unbreakable under Charter law. However, post-1994, following the disastrous outcomes in Somalia and Rwanda, the Security Council authorised military operations and measures in a more restricted way, targeted sanctions, if they were applied, were limited to specific people and sectors of the State's economy. The intention behind this was to reduce the harmful effects that such sanctions could have on the civilian population.[531] However, as the example of Haiti provides in certain situations the Security Council would still authorise armed intervention. Which only reinforces the inconsistency of its practice.

5.6 Security Council Authorisation for Military Intervention in the 21st Century

As the end of one century neared, and the beginning of another approached, the authority of the Security Council was brought into question when it failed to act in relation to Kosovo, and its authority was undermined further when Western States carried out unauthorised military interventions in Kosovo in 1999, and in Iraq in 2003.[532] Nevertheless, the Security Council continued to develop its practice under Chapter VII of the Charter from the late 1990s and into the 21st century.[533] Many of its resolutions that authorised military intervention for the protection of human rights, and humanitarian principles, indicate that the practice of the Security Council depends on a "certain" interpretation of the Charter, and this in turn affects the "scope and import" of Charter law in Security Council practice.[534]

The Security Council continued to make resolutions that contain reference to

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530 Nico Krisch "Introduction to Chapter VII: The General Framework" in Bruno Simma (ed) *The Charter of the United Nations, A Commentary* (2012)1237 at 1241-1242.

531 Krisch, above n 533, at 1242.

532 Krisch, at 1242.

533 For example: S/RES/1511 (2003) at paragraph 13 authorised a multinational force to take all necessary measures to contribute to the maintenance of security and stability in Iraq; S/RES/1497 (2003) at paragraph 5, authorised a multinational force in Liberia to take all necessary measures.

534 Osterdahl, above n 13, at 12.

human rights, or humanitarian crises exceptional occurrences in order to avoid any precedential or future obligation. Internal armed conflicts where there are gross human rights abuses, can be determined to be a threat to, or breach of international peace and security. It is contended that the powers available to the Security Council under Article 42, to authorise the use of force or military intervention in order to restore or maintain the peace, have evolved to include human rights issues especially in areas where genocide, crimes against humanity, ethnic cleansing or war crimes are occurring. Although the Security Council continues to avoid creating any form of future obligations under which it could have a duty to act in similar situations highlights the discretionary nature of the Security Council's enforcement powers.[535]

There is inconsistency in the Security Councils approach to different situations, considering its inaction in Kosovo, and more recently in Syria. This inconsistency would suggest that there is no settled practice when it comes to military intervention in states experiencing internal conflict accompanied by human rights abuses. However, what is consistent is the pattern that situations of internal conflict where humanitarian crises occur are considered to be a threat to, or breach of international peace and security under Article 39, and, that the Security Council has the legal authority to intervene militarily within or against a sovereign state, if it has the political will and determination to do so.

In order to advance, and address, the concern that the wider international community had following the genocide in Rwanda, the ethnic cleansing in Bosnia and Herzegovina, and in regard to the detrimental political discord within the Security Council, the concept of the Responsibility to Protect was introduced into international legal discourse. It was (and is) seen as a way forward from the often limiting traditional concept of state sovereignty, and progressed the understanding of state sovereignty as the responsibility of the sovereign state to protect its civilians from the horrors of genocide, ethnic cleansing, war crimes and crimes against humanity. The approach taken by the Security Council to the concept of the Responsibility to Protect has been a cautious one.

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[535] Emma McClean "The Responsibility to Protect: The Role of International Human Rights Law" (2008) 13 J Conflict & Sec L 123 at 136.

In the 2006 Security Council Resolution concerning the Protection of Civilians in Armed Conflict, Resolution 1674 made direct reference to paragraphs 138 and 139 of the World Summit Outcome Document, reaffirming their provisions.[536] However, this affirmation was restricted to the responsibility on states to protect their civilian populations. The secondary responsibility contained in the concept, that in situations where states are manifestly failing to uphold their responsibility, that responsibility then falls to the international community, has not been included. The Security Council is acknowledged within the concept of the Responsibility to Protect as the most appropriate body to authorise force for the protection of civilian populations which are at risk or suffering from genocide, ethnic cleansing, crimes against humanity and war crimes. The Security Council has made implicit reference was then made in the preamble of subsequent resolutions, resolutions 1706,[537] 1755,[538] and 1769,[539] concerning the situation in Darfur, each of which recalled Resolution 1674.

Security Council resolution 1894 (2009)[540] reaffirmed resolution 1674 (2006), and also reaffirmed the provisions of the World Summit Outcome Document contained within paragraphs 138 and 139 regarding the protection of populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The recognition of the principles contained within paragraphs 138 and 139 of the World Summit Outcome Document within Security Council resolutions does not necessarily indicate that the Responsibility to Protect has gained significant legal substance.

> It cannot be argued that the concept of the responsibility to protect has gained certain new characteristics and legal substance through this resolution practice. However, a regular invocation of the responsibility to protect through the Security Council may have raised the pressure on the SC members to take action.[541]

The resolutions that have included reference to humanitarian crises, coupled with the regular inclusion of the concept of the Responsibility to Protect in resolutions that do not authorise the use of force have significant implications. However the

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536 SC Res 1674, above n 432.
537 SC Res 1706 S/RES/1706 (2006).
538 SC Res 1755 S/RES/1755 (2007).
539 SC Res 1769 S/RES/1769 (2007).
540 SC Res 1894 S/RES/1894 (2009).
541 Vashakmadze, above n 363, at 1210.

cautious approach taken by the Security Council somewhat tempers the role that the concept plays in Security Council decisions authorising armed intervention, and the maintenance of collective security that includes human security. The Security Council has established a pattern of behaviour where human rights, the protection of civilians, and human security can influence their decisions and the content of resolutions. With regard to Libya, Resolution 1973 (2011) presents a confluence of these principles with the authorisation of military intervention.

5.7 Conclusion

What is the relationship then, between the practice of the Security Council, the United Nations Charter law and the principle of state sovereignty in international law? Article 2(4) of the Charter contains the prohibition on the threat or use of force against the territorial integrity or political independence of a sovereign state *in a manner inconsistent with the Charter*, by United Nations Member States. Article 2(7) is the embodiment within the Charter of the principle of non-intervention in the domestic affairs of a sovereign state by the United Nations itself, but Article 2(7) does not "prejudice the application of enforcement measures under Chapter VII." The prohibition on the threat or use of force, and the principle of non-intervention in the domestic affairs of a sovereign state, are fundamental tenets of the principle of sovereignty in international law, and exist to protect the territorial integrity and political independence of the State.

Both Article 2(7) and 2(4), within the framework of the Charter regime, no longer reflect or defend an "absolute conception of state sovereignty,"[542] and this deterioration or derogation from the absolute principle on non-intervention, or the use of force within or against a sovereign state (military intervention) is evidenced by the Security Council's continued practice of intervening militarily in sovereign states under its powers contained in Chapter VII of the Charter. However, it is Member States themselves that have conferred the responsibility of the authorisation of the use of force for the purposes of intervention within another state on to the Security Council. The Security Council becomes the forum for determining when a situation in a sovereign state becomes a threat, or breaches,

[542] Cameron R. Hume "The Security Council in the Twenty-First Century" in David M. Malone *The UN Security Council, From the Cold War to the 21st Century* (2004) 607 at 613.

international peace and security. It also becomes the forum in which state sovereignty is either protected, or rejected in favour of collective security.

The ground breaking resolutions of the 1990s, have led to an evolution of the approach to collective security that the Security Council takes in its function to maintain and restore international peace and security under the United Nations Charter. Greater consideration for the plight of civilians within armed conflict has resulted in the growing importance of the individual within international law, which reflects a shift in the changing values of the United Nations system and the international community in general.

> This leads to an emphasis on an individually oriented rather than state-oriented, international law, which has led, *inter alia*, to the concept of human security and justice, a link which was deliberately set aside when article I(I) was drafted in San Francisco; and to the growing importance of international law as a guiding framework for collective security and the resulting transposition of the rule of law concept to international relations.[543]

The authorisation of military intervention in sovereign states for humanitarian purposes establishes a pattern, that the wider effects of conflict on civilians, the threat to human security, is now considered to be as much a threat to, or breach of, international peace and security – or rather, state security – as the conflict itself.

In this regard, the decisions produced by the Security Council may be politically motivated, but they also have significant "legal consequences that affect the rights of states and individuals."[544] However, the political motivation of States should not be dismissed. Criticism is often levelled at the Security Council for its failure to act, or the lack of forceful action used when force has been authorised.[545] The lack of action, or failure to take more aggressive action, is often a direct result of the political dynamics within the Permanent Five members of the Council, but also, the responsibility must fall on the ten non-permanent members who partake in the decision making process in authorising a military intervention.

It is not just hypothesis to say that international peace and security goes beyond considerations for state sovereignty, territorial integrity, or political independence, but that it now includes consideration for human security in situations where

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543 Vera Gowlland-Debbas "Security Council Change" (2009-2010) 65 Int'l J 119 at 121.
544 Gowlland-Debbas, above n 546, at 122.
545 Bosnia and Herzegovina – the Adriatic Sea in 1992, and in Rwanda in 1994.

genocide, ethnic cleansing, crimes against humanity, and gross human rights violations are being committed. It is proven by Security Council practice, it is not precedential case law, it does not give rise to future obligation or create a formula with which to predict the Security Council's future behaviour, however it is a pattern, which has been building over time, and it cannot be overlooked.

The recognition by the Security Council in resolutions, that states bear the primary responsibility of protecting their civilian population, coupled with the pattern contained in Security Council resolutions authorising military intervention in internal armed conflicts for humanitarian purposes, supports the premise that human security is now a part of the collective security system within the United Nations. This is reinforced by Resolution 1973, which had as its primary goal the protection of civilians, which will be discussed in the following section.

6. The Internal Conflict in Libya and the International Response

6.1 Introduction

September 1 1969, Muammar Al-Gaddafi (Colonel Gaddafi) a 27 year old revolutionary led a "bloodless coup" while the King of Libya, King Idris, was out of the country.[546] Under Gaddafi's regime, an interim constitution was installed which curtailed certain human rights such as the freedom of expression, and the formation of new political parties was banned.[547] In 1973 Gaddafi's theories and ideologies were contained within the "Green Book" which became the philosophical guidelines of the new "revolutionary system."[548]

In 1977, the Libyan government declared the establishment of the Libayn Arab Jamahiriya, "Jamahiriya" was a term invented by Gaddafi to describe the new Libyan state, and combined the Arab words for "state" and "masses" - Libya was now the state of the people.[549] Externally, relationships between Libya and other states were strained, with Gaddafi considered be "erratic" and "inconsistent" and his support of international terrorism was contentious to say the least.[550] Internally, the revolutionary regime created a practice of gross human rights abuses against its own citizens that prevailed for decades:

> The legacy of gross human rights violations committed in the past, particularly during the 1970s, 1980s and 1990s, continues to cast a long shadow on Libya's human rights record.[551]

The history of the Libyan regime's committal of gross human rights violations helps to illuminate the historical impetus behind what appears to be a spontaneous outbreak of mass demonstrations.

The eruption of civil war in Libya, and the response from the international community and the United Nations Security Council contains many remarkable aspects. The conflict, initially a reaction to the arbitrary arrest of the well-known human rights activist Fathi Terbil, then later spurred on by the government

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546 M. Cherif Bassiouni (ed) *Libya: From Repression to Revolution, A Record of Armed Conflict and International Law Violations 2011-2013* (Leiden, The Netherlands, 2013) at 49.
547 Bassiouni, above n 549, at 51.
548 Bassiouni, at 59.
549 Bassiouni, at 64.
550 Bassiouni, at 80-81.
551 Amnesty International "Libyan Arab Jamhiriya: Briefing to the Human Rights Committee" (June 2007) <www.amnesty.org/en/documents/MDE19/008/2007/en/>.

regime's violent response, founded a centralised political body – the Interim Transitional National Council – to give the uprising a legitimate political voice. Also remarkable was the broad support from regional organisations,[552] which exerted pressure upon the United Nations Security Council to address the situation in Libya. The Human Rights Council established a commission of inquiry to investigate the human rights violations, the Security Council passed Resolution 1970 (2011) on February 26 2011 only nine days after the first protest and referred the situation to the International Criminal Court. This referral to the International Criminal Court is only the second time in the history of the Security Council for this to happen.[553] More importantly, the rapid response from the Security Council to authorise military intervention in a sovereign state without that state's consent, the first time that this has happened in the history of the Security Council's practice, is the most significant event in what is a very unique situation.

There are political motivations behind the passing of a resolution, which reflect both, a member of the Security Council's perception of what action should be taken in response to a situation, and also the contextual elements of the conflict that have brought it to the attention of the Security Council. These political motivations are important, and will be explored, but what results from the passing of a resolution is a document with legal force, and it is the legal nature of this document that is relevant in assessing whether the Security Council's response to the conflict in Libya was an exceptional occurrence or whether there are deeper implications for the international law as it relates to sovereignty and the authorisation of military intervention.

6.2 From Uprising to Internal Armed Conflict in Libya

The catalyst for the outbreak of mass demonstrations across Libya was the arrest of a human rights lawyer Fathi Terbil in Benghazi on February 15th 2011.[554] Fathi Terbil represented the families of those killed in the Abu Salim prison massacre,

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552 The Gulf Cooperation Council - Gulf News "GCC Backs No-fly Zone to Protect Civilians in Libya" (March 9 2011) <www.gulfnews.com>; the League of Arab States *Communiqué No. 136 Issued by the Council of the League of Arab States (*February 22 2011), and the African Union, African Union Peace and Security Council, *Communiqué of the 261st Meeting of the Peace and Security Council,* PSC/PR/COMM(CCLXI), (February 23 2011).

553 The first being Darfur, SC Res 1593 S/RES/1593 (2005).

554 Al Jazeera "Libyan Police Stations Torched" (February 16 2011) <http://www.aljazeera.com/news/africa/2011/02/20112167051422444.html>.

and his detention in Benghazi angered the relatives who then took to the streets and gathered outside the Benghazi Internal Security Office.[555] Hundreds more joined them including writers and activists chanting slogans like "No God but Allah, Muammar is the enemy of Allah" and "corrupt rulers of the country".[556] Protests, especially one as spontaneous as this, were rare in a country that has radically curtailed freedom of speech, freedom of association, and peaceful assembly.[557] The Libyan government under Gaddafi's rule has a history of intolerance of dissent,[558] and this initial protest was no exception.

Internal security forces responded with tear gas, batons, and water canons, and rubber coated steel bullets.[559] The spontaneous protest in Benghazi sparked mass demonstrations across Libya the following day. As the number of protesters grew, the government bureaus and security offices were ransacked, and many military officers defected and joined the protesters.[560]

The death toll rose and by February 17th 24 people had been killed,[561] by February 20th that number had risen dramatically to at least 233 people.[562]

The first warnings from the Gaddafi regime that mass violence against civilians would take place came from Gaddafi's son Saif Al-Islam"

> Libya is at a crossroads. If we do not agree today on reforms, we will not be mourning 84 people, but thousands of deaths, and rivers of blood will run through Libya,[563]

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555 Amnesty International, News, "Libya Urged to End Protest Crackdown" (February 16 2011) <http://www.amnesty.org.nz/news/libya-urged-end-protest-crackdown>; Human Rights Watch "Libya: Arrests, Assaults in Advance of Planned Protests" (February16 2011) <http://www.hrw.org/news/2011/02/16/libya-arrests-assaults-advance-planned-protests >.

556 Al Jazeera, above n 557.

557 Human Rights Council "Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya" A/HRC/17/44 (2011) at 21[Report of the International Commission].

558 In 2006 Internal Security forces killed several protesters protesting outside the Italian consulate, cited in: Al Jazeera "Day of Rage Kicks Off in Libya" (February 17 2011) <http://www.aljazeera.com/news/africa/2011/02/201121755057219793.html>.

559 Al Jazeera, above n 557; Human Rights Watch, Human Rights Watch "Libya: Security Forces Fire on 'Day of Anger' Demonstrations" (February 17 2011) <http://www.hrw.org/news/2011/02/17/libya-security-forces-fire-day-anger-demonstrations>; BBC News "Libya Protests: Second City Benghazi Hit By Violence" (February 16 2011) <http://www.bbc.co.uk/news/world-africa-12477275>.

560 The Guardian "Libyan City Dubbed 'Free Benghazi" as Anti-Gaddafi Troops Take Control" (23 February 2011) <http://www.theguardian.com/world/2011/feb/23/libya-free-benghazi-anti-gaddafi-troops>.

561 Human Rights Watch, above n 562.

562 Human Rights Watch "Libya Governments Should Demand End to Unlawful Killings" (February 20 2011) <http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>.

563 Al Arabiya "Gaddafi's Son Warns of "Rivers of Blood" in Libya (21 February 2011) <http://www.alarabiya.net/articles/2011/02/21/138515.html>.

The protests became increasingly violent when security forces and mercenaries used live ammunition on unarmed peaceful demonstrators.[564] Mass protests took place across Libya, with tens of thousands gathering on the streets of Benghazi.[565] Protesters were killed, many more were injured and widespread arbitrary arrests also took place.[566]

> The hospitals in Tripoli ran out of blood yesterday evening. … Men wearing civilian clothing in the square were shooting at us. We heard later that Abu Salim hospital was broken into. I saw guys taking off their shirts and exposing their chests to the snipers. I've never seen anything like it, I was very ashamed to hide under a tree but I am human.[567]

The Libyan government attempted to squash the protests using brutal means to punish and deter demonstrators, Gaddafi deployed his air force, issuing orders to bomb Benghazi and other cities experiencing mass protests.[568] Triggered by the escalation of violence, senior military officers defected,[569] and Libyan foreign diplomats around the world resigned in protest at the regime's treatment of Libyan civilians.[570]

Towards the end of February protesters began to organise themselves into an opposition force and take offensive action against Libyan security forces, and seizing parts of Libyan territory.[571] With the increasingly violent clashes between government forces and opposition forces, and consistent calls for action from human rights groups and regional organisations, as well as the broader international community, the UN Security Council unanimously adopted Resolution 1970 (2011)[572] on February 26th, only 6 days after the rebels seized control of Benghazi, and only 11 days after the demonstrations began.

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564 BBC News "Libya Protests: Al-Bayda Security Chief 'Sacked'" (February 17 2011) <http://www.bbc.co.uk/news/world-africa-12490504>.

565 Human Rights Watch, above n 565.

566 Amnesty International News "Libyan Protester Shot Dead by Security Forces" (February 17 2011) <http://www.amnesty.org.nz/news/libyan-protester-shot-dead-security-forces>.

567 Human Rights Watch, above n 565.

568 The Telegraph "Muammar Gaddafi Fires on His Own People" (21 February 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8339347/Libya-Muammar-Gaddafi-fires-on-his-own-people.html>.

569 Al Jazeera "Libyan Diplomats Defect En Masse" (22 February 2011) <http://www.aljazeera.com/news/africa/2011/02/201122275739377867.html>.

570 The Guardian "Gaddafi's Defectors Denounce 'Government of Mussolini and Hitler'" (February 26 2011), <http://www.theguardian.com/world/2011/feb/26/gaddafi-defectors>.

571 Report of the International Commission, above n 560, at 30; Chris De Cock "Operation Unified Protector and the Protection of Civilians in Libya" (2011) 14 Yearbook of International and Humanitarian Law 213, at 221.

572 SC Res 1970 (2011) S/RES/1970 (2011).

The violence only intensified following the passing of Resolution 1970, and the political pressure from regional organisations and United Nations officials became more prominent. The landmark events of the Libyan conflict have influenced the political motivations behind the adoption of Resolution 1973. The relationship between the events, the position of regional organisations require consideration, particularly as the events were used to reinforce regional organisations, and Member states position that Gaddafi's government had lost its legitimacy. The loss of legitimacy is the key factor in the authorisation of armed intervention under Resolution 1973.

6.3 The Loss of Legitimacy

In the Security Council meeting regarding the passing of Resolution 1973, states regularly referred to the Libyan government's loss of legitimacy.[573] There were several contributing factors to the assessment by some states that the Libyan government was no longer a legitimate political interlocutor for the Libyan state.

A major contributing factor in the loss of the Libyan government's legitimate authority was the establishment of the Interim Transitional National Council which issued its founding statement on March 5 2011. It declared that it was the "sole representative of all Libya" and that its own legitimacy was derived from city councils established after February 17 2011, and now running "liberated cities".[574]

It also sought to establish international recognition of the Interim Transitional Council and created delegates that would meet and negotiate with "international communities".[575] The European Union stated that it would treat the Interim Transitional National Council as the political interlocutor for Libya:

> The European Union welcomes and encourages the interim transitional national council based in Benghazi, which it considers a political interlocutor.[576]

Germany also stated within the Security Council meeting for Resolution 1973

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[573] Lebanon S/PV.6498 at 3; United Kingdom of Great Britain and Northern Ireland S/PV.6498 at 4; Germany S/PV.6498 at 4; Colombia S/PV.6498 at 7; and Portugal S/PV.6498 at 8.

[574] Founding Statement of the Interim Transitional National Council (TNC), March 5 2011, <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_12_Founding_Statement_TNC.pdf> [TNC Founding Statement].

[575] TNC Founding Statement.

[576] European Council Declaration (March 11 2011) at 3 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119780.pdf>.

that:

> In this process, the people of Libya, who have so clearly expressed their aspirations to freedom and democracy, need to succeed. With this aim in mind, we regard the Interim Transitional National Council as an important interlocutor.[577]

The Transitional Council's primary aim was to create a sense of cohesion to what was primarily, a popular uprising.[578] It provided a political face for the opposition, and provided states with an alternative political body which it could engage with.

Another primary factor in establishing the loss of legitimacy of the Libyan regime was the failure by the Libyan government to uphold its responsibility to protect its civilian population from acts of violence, and for carrying out acts of violence against the civilian population. Members of Libya's own government had resigned from their roles as foreign diplomats in protest of the violence committed by the Libyan authorities against the civilian population.[579]

States clearly connected the violence perpetrated by the Libyan government against its people with the loss of its legitimacy. The representative for Lebanon stated:

> Today's resolution essentially takes into account the calls by the people of Libya and the demands by the League of Arab States for an end to the violent acts and atrocious crimes being carried out by Libyan authorities against their people. As indicated in the Arab League's statement, those authorities have lost all legitimacy.[580]

Portugal stated that the Libyan government had lost its legitimacy both with its own population, and within the international community.

> Since the outset of the Libyan popular uprising, Portugal has consistently condemned the indiscriminate violence against civilians and the gross and systematic violation of human rights and of humanitarian law perpetrated by a regime that has lost all its credibility and legitimacy vis-à-vis its own population and the international community.[581]

Even Germany, which abstained from voting on the resolution recognised that the Libyan government's use of force against its own people had damaged its legitimacy.

> Our intention is to stop the violence in the country and to send clear messages to Al-Qadhafi and his regime that their time is over. Muammar Al-Qadhafi must relinquish power immediately. His regime has lost all legitimacy and can no longer be an

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577 SC Res 1973 S/RES/1973 (2011) at 5.

578 Phillipe Kirsch and Mohamed S. Helal "Libya" in Jared Genser and Bruno Stagno Ugarte *The United Nations Security Council in the Age of Human Rights* (2014) 396 at 400.

579 Al Jazeera, above n 572.

580 Lebanon, S/PV.6498, at 3.

581 Portugal S/PV.6498 at 8.

interlocutor for us.[582]

As previously noted, legitimate government is only one aspect of sovereignty, however, with each of these factors undermining the Libyan government's legitimacy, regional organisations and Member States within the Security Council were more willing to intervene without consent, and used their collective power to push for military measures authorised by the Security Council.

6.4 The Influence of Regional Organisations

One of the more influential political aspects of the passing of Resolution 1973 was the vocal support for intervention from regional organisations. This is reflected within the text of the resolution, as multiple references are made to these organisations in three separate paragraphs.[583]

Each regional organisation added to a collective regional dialogue that represented a multitude of states. The Gulf Cooperation Council and the League of Arab States demanded a no fly zone,[584] and the European Union stated that the Gaddafi led Libyan government had lost all legitimacy and would be treating the Interim Transitional National Council as the new political interlocutor for Libya. The African Union was more cautious in its support for the people of Libya, it acknowledged the "legitimacy of the aspirations of the Libyan people" but wanted an approach that did not include recourse to the use of force, but rather diplomatic measures.[585]

The influence of regional organisations was immense, but the political dynamics shifted within the Security Council towards military intervention once the League of Arab states passed a resolution[586] deciding -

To call on the Security Council to bear its responsibilities towards the deteriorating

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582 Germany S/PV.6498 at 4.

583 S/RES/1973, above n 580, at preamble [10], [11], [12], and at paragraph [5].

584 Gulf News "GCC Backs No-fly Zone to Protect Civilians in Libya" (March 9 2011) <http://gulfnews.com/news/gulf/uae/government/gcc-backs-no-fly-zone-to-protect-civilians-in-libya-1.773448>; New York Times "Arab League Endorses No-Flight Zone Over Libya" (March 12 2011) <http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all>.

585 African Union Peace and Security Council, *Communiqué of the 261st Meeting of the Peace and Security Council,* PSC/PR/COMM(CCLXI), (February 23 2011).

586 Kirsch and Helal, above n 581, at 412.

> situation in Libya, and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States,[587]

The response from these regional institutions represent over 60 states.[588] It would have been difficult for the Security Council to ignore such a large proportion of states advocating for strong measures in response to the Libyan crisis.

The combination of regional support, the overt threat of mass violence against civilians, and the establishment of the Interim Transitional National Council, all factored into a collective understanding that the Gaddafi led Libyan government was no longer a legitimate government from the perspective of other states. For the members states of the Security Council that voted in favour of the resolution, the factors that led to a loss of legitimacy allowed for military intervention to be authorised. For the states that abstained[589] from the vote, they had deep reservations about the use of force used against a sovereign state, the breach of its sovereignty and territorial integrity, and advocated for the resumption of diplomatic measures. India stated:

> It is of course very important that there be full respect for the sovereignty, unity and territorial integrity of Libya.[590]

The representative of Brazil stated that:

> We are not convinced that the use of force as provided for in paragraph 4 of the resolution will lead to the realization of our common objective – the immediate end to violence and the protection of civilians.[591]

The Chinese representative maintained that -

> China has always emphasized that, in its relevant actions, the Security Council should follow the United Nations Charter and the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis in Libya through peaceful means.[592]

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[587] The Council of the League of Arab States Meeting at the Ministerial Level on the Implications of the Current Events in Libya and the Arab Position (March 12 2011) <http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english%281%29.pdf>.

[588] It should be noted that at the passing of these resolutions in the Arab regional organisations, not all States were present, and not all states agreed – Luke Glanville "Intervention in Libya: From Sovereign Consent to Regional Consent" (2013) 14 International Studies Perspectives 325 at 334.

[589] Brazil, China, Germany, India and the Russian Federation.

[590] India S/PV.6498 at 6.

[591] Brazil S/PV.6498 at 6.

[592] China S/PV.6498 at 10.

The states that abstained from voting had real concerns about the content of the resolution and the scope of the authorisation it provided, and in the case of China and Russia, preserved the position their states hold concerning intervention and the use of force against or within another states territory.[593] However, not one state voted against the resolution, and Russia, China, and Brazil all noted the request from the League of Arab States in their statements during the Security Council meeting, with the Chinese representative stating that China attached "great importance to the relevant position by the 22-member Arab League".[594] It is likely that the widespread regional support for the establishment of a no-fly zone over Libya prevented the use of the veto, and any negative votes from the states that abstained from voting.

6.5 The Imminent Threat of Large Scale Loss of Life

The final factor that prompted the swift reaction from the Security Council to authorise military intervention was the very real and imminent threat of mass violence made by Colonel Gadaffi against the Libyan people. The belief that Gaddafi intended a mass atrocity is supported by the fact that only hours before the Security Council passed Resolution 1973 Gaddafi addressed the Libyan people and informed them:

> It's over ... We are coming tonight," he said. "You will come out from inside. Prepare yourselves from tonight. We will find you in your closets.[595]

The threat to the civilian population was made via radio address, there was no mistaking his intention, mass atrocities would be committed against the Libyan people.[596]

The resulting resolution was detailed in its construction with an emphasis on the protection of civilians rather than the responsibility of the Libyan government to

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593 Paul D. Williams and Alex J. Bellamy "Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force" (2012) Global Governance 273, at 279.

594 China S/PV.6498 at 10.

595 Reuters UK "Gaddafi tells Benghazi his army is coming tonight" (March 17 2011) <http://uk.reuters.com/article/2011/03/17/libya-gaddafi-address-idUKLDE72G2E920110317>.

596 Kirsch and Helal, above n 581, at 412.

protect its civilian population. It was targeted at both the Libyan authorities as well as individuals and institutions. The threat of mass atrocities that could amount to crimes against humanity was acknowledged within the text, as were the political influences that motivated the swift passage of the resolution in the Security Council.

6.6 United Nations Security Council Resolution 1973

Significant to the premise of this thesis is the effect that Resolution 1973 has had on international law, with respect to sovereignty, or whether it represents an exceptional instance of the authorisation of the use of force for the protection of civilians. Resolution 1973 provides a mandate for Member States to specifically use military force for the protection of civilians during the Libyan conflict. Does the mandate for military intervention stretch the contours of sovereignty as it is currently understood? Or does it embrace the concept of the Responsibility to Protect which provides that a state holds the responsibility to protect its civilian population from crimes against humanity, genocide, ethnic cleansing and war crimes, and if a state cannot, or will not uphold its responsibility, then a secondary responsibility arises, in which states of the United Nations must step in if a state is exposing its population to any of those four crimes. The Security Council has tacitly accepted the concept of the Responsibility to Protect. It first referred to the concept in its resolution on the protection of civilians – Resolution 1674 (2006), however it is parties to a conflict that bear the primary responsibility of protecting civilians, not the broader spectrum of states.[597]

6.6.1 *The Threat to International Peace and Security*

The Security Council determined in Resolution 1973 that the situation in Libya constituted a threat to peace and security in the following way:

> *Determining* that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,[598]

The use of the word "continues" suggests that the situation in Libya had previously been determined to be a threat by the Security Council. However Resolution 1970 (2011) contains no reference to such a determination. The threat that the situation can be inferred from the preamble of the resolution itself. The

[597] SC Res 1674, above n 432, preamble at [9].
[598] SC Res 1973, above n 580, preamble at [22].

extreme violence, systematic human rights abuses, and the potential for crimes against humanity, could be the trigger for the determination that the situation was indeed a threat to international peace and security.[599]

This inference suggests that the systematic abuse of human rights, crimes against humanity, and extreme violence perpetrated by the regime are intrinsically connected with the maintenance of international peace and security. This notion is supported by the history of the Security Council's practice where it has considered situations involving internal armed conflicts that attack civilian populations or groups as threats to international peace and security, and authorised armed intervention.[600]

6.6.2 *Protection of Civilians and the Responsibility to Protect*

Authorisation for military measures was given for three different situations, two of which were specifically for the protection of civilians.[601] The first authorisation was contained under the sub-heading 'Protection of civilians' and the second was contained under the sub-heading 'No Fly Zone'.[602] Authorisation under the 'Protection of civilians' stated that the Security Council:

> *Authorizes* Member States … to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on part of Libyan territory, …[603]

Authorisation takes place using the familiar "code phrase" of 'all necessary measures', significantly though, these measures authorised are for the protection of civilians, and civilian populated areas including Benghazi "under threat of attack". The inclusion of Benghazi within the parameters of authorisation indicate two possible factors behind the intention of this inclusion.

The first, is that it had been reported that Gaddafi's forces were poised and ready to take back Benghazi on the day that Resolution 1973 was passed,[604] and the

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599 De Cock, above n 574, at 216.
600 De Cock, at 216.
601 The third was for inspection purposes relating to the arms embargo contained in the resolution.
602 SC Res 1973, above n 580, at [6] – "*Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians;"
603 SC Res 1973, above n 580, at [4].
604 The Guardian "Libyan Forces Predict Fall of Rebel-held Benghazi 'within 48 Hours'" <http://www.theguardian.com/world/2011/mar/16/libya-benghazi-gaddafi-48-hours>.

specific inclusion of Benghazi within authorisation would focus military assistance in this area. The second, is that including Benghazi as a particular area that required protection, the Security Council recognised that Benghazi was the centre point of "command and control" for the rebel forces, but also that civilians may be actively engaging in self-defence.[605] It could be argued that by providing protection to civilians in Benghazi support was being provided to the rebel forces. However, by providing military assistance to the civilian population in order to prevent a potential crime against humanity, or rather, providing any military assistance to the civilian population in Libya would simultaneously weaken Gaddafi's own forces and strengthen the opposition's stance.[606] Should authorisation for military intervention have been with-held from the civilian population in case it became advantageous to the opposition forces?

The military measures provided for the protection of civilians would not doubt have benefited the opposition. In some ways this would suggest that a change in regime would have been a foreseeable consequence of the intervention. Resolution 1973 aimed to protect the civilian population, and respond in a way that addressed the legitimate demands of the people.[607] There no doubt as to whether the legitimate demands of the people of Libya could have been met without the overthrow of Gaddafi and his regime.[608] The arms sanctions and the authorisation of the use of force were intended to halt the Libyan government's attacks against the civilian population. They would have severely weakened the government's economic and military power. No doubt this would have been advantageous to the opposition. Security Council resolutions have far reaching legal consequences, and one of these is the potential for a regime change when military force is used for the protection of civilians and their human rights. However, this could be tempered by targeted government's exercising restraint when using force against its civilian population.

The use of the words "under threat of attack" when authorising military measures

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605 Williams and Popkent, above n 18, at 239-240; Christian Henderson above n 22, at 238.
606 Mehrad Payandeh "The United Nations Military Intervention and Regime Change in Libya" (2011-2012) 52 Va J Int'l L 355 at 386.
607 SC Res 1973, above n 580, at [2].
608 Payandeh above n 609, at 387.

for the protection of civilians and civilian populated areas seems to provide flexibility those who commit to providing military support to the Security Council resolution.[609] Force has rarely been authorised before an attack has occurred, in this instance though, the threat of violence made by Gaddafi the same day this resolution was passed, was an unusually candid display of violent intent which could not go unrecognised by the Security Council.

6.6.3 *The Responsibility to Protect...Or not?*

The Security Council had demanded an end to the violence under Resolution 1970 (2011)[610] and the Libyan governments continual resort to force against its own population would be a violation of that decision which it is bound to uphold. The flexibility arises in the interpretation of "under threat of attack". Depending on how it is interpreted, force could be employed against "objects, facilities, actions, and people"[611] that were less direct threats to the civilian population than intended depending on how the risk was determined.[612] The authorisation provided in paragraph 4 can be construed as a more "open ended" military intervention for the protection of civilians.[613]

The Security Council response to the conflict in Libya has been described as the "proving ground"[614] for the concept of the Responsibility to Protect, and that Resolution 1973 "explicitly invoked" the concept as the prime motivator for the authorisation of military intervention.[615] Resolution 1973 is often seen as further acceptance of the Responsibility to Protect by the international community of states and further evidence of its growing normative status. However, reference to the concept only occurs in the preamble of the text, and not as part of the

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609 Williams and Popkent above n 18, at 239-240; Christian Henderson, above n 22, at 773.
610 SC Res 1970, above n 575, at [1] - "*Demands* an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population".
611 Williams and Popkent above n 18, at 240.
612 Henderson, above n 22, at 773.
613 Thomas H. Lee "The Law of War and the Responsibility to Protect Civilians: A Reinterpretation" (2014) 55 Harv Int'l L J 251 at 295.
614 Rosa Brooks "Lessons for International Law From the Arab Spring" (2013) 28 Am U Int'l L Rev 713 at 730.
615 Pierre Thielborger "The Status and Future of International Law after the Libya Intervention" (2012) 4 Goettingen J Int'l L 11 at 25; Thomas H. Lee, above n 616, at 294.

operative paragraphs that provide the legal basis for military intervention.[616] The reference within Resolution 1973 to the "Libyan authorities to protect the Libyan population" is in keeping with previous resolutions that contain reference to the Responsibility to Protect, but limits its application to the First Pillar – the national responsibility of protection.[617]

This leans towards an interpretation that the Security Council has not wanted to go too far beyond its prior practice on the occasions that it has referred to the Responsibility to Protect in previous resolutions.[618] It also leads to a conclusion that the Security Council and its Member States did not want its actions, or Resolution 1973 to be perceived as founded on the secondary responsibility under the Responsibility to Protect: that where a state is manifestly failing in its duty to protect its population this responsibility will then fall to the international community to uphold. Instead the language of Resolution 1973 is predominantly termed in human rights and humanitarian language, which has been a cautious, and political approach.[619]

The response from regional organisations could be read as the fulfilment of the secondary responsibility under the Responsibility to Protect. Yet reference to the responsibility to protect was only made by two states in the Security Council meeting for the resolution.[620] When the regional organisations issued official documents regarding their position on the Libyan conflict, no mention was made to the Responsibility to Protect. The behaviour of states and regional organisations appears to support an analysis that the Responsibility to Protect was influential in their decision making behaviour. However, it is more likely that the isolation that Gaddafi had created for his government in Libya, his government and leadership was viewed as a pariah within the Arab community.[621] This isolation only made it easier for regional organisations to advocate for the

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616 Andrew Garwood-Gowers "The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?" (2013) 36 UNSW L J 594 at 605.
617 Simon Chesterman "Leading From Behind" The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya" (2011) Ethics & International Affairs 279, at 280.
618 Thielborger, above n 618, at 44.
619 Thielborger, at 44.
620 France S/PV.6498 at 2; Colombia S/PV.6498 at 7.
621 Thomas H. Lee, above n 616, at 298.

establishment of a 'no fly zone' and for the Security Council to break with its tradition of not authorising military intervention without the target states consent.

Resolution 1973 creates a positive affirmation for the protection of civilians in internal armed conflicts. It was a swift and forceful response to a situation that could have resulted in a large scale crime against humanity. It is a legal document that has authorised an armed intervention for the protection of civilians. It is an armed intervention for humanitarian purposes and draws upon the Responsibility to Protect and the past practice of the Security Council. But what does it mean for the principle of state sovereignty within international law?

7. Conclusion

The concept of sovereignty has evolved over time in an incremental fashion. The evolution took place in two ways. The first was the introduction, and then expansion of its meaning by legal theorists and jurisprudential thought based in a European context. The second is through its practical use in the international relations between states. The concept of sovereignty began as a reaction to war fare, and it remains a key consideration in the maintenance of international peace and security. It is a theoretical concept that has been refined by its practical use.

The establishment of the United Nations, and the Security Council provide a forum for collective security based on the principle of sovereign equality. The concept of sovereignty has often acted as a shield for the violent actions of repressive governments. As the collective security system within the United Nations developed, respect for sovereign equality has become more and more entrenched. However, the destructive nature of internal armed conflicts that have posed a lethal risk to civilian populations have caused states, international lawyers and scholars, to query how to respond to these humanitarian crises.

Interventions carried out for humanitarian purposes since the establishment of the United Nations have been responses to internal armed conflicts where wide spread violence, gross human rights breaches, genocide, and mass atrocities have been present. The instances where the Security Council has carried out an intervention for humanitarian purposes, such as in Iraq, Somalia, and Rwanda, provides an example of State's positions regarding contravening the prohibition on the use of force contained in Article 2(4) of the Charter, and the principle of non-interference contained in Article 2(7).

When considering to use force against a sovereign state perpetrating gross human rights abuses consideration of Articles 2(4) and 2(7) become enmeshed. They are both closely linked when the Security Council considers to authorise military intervention within or against a sovereign state. Armed intervention inevitably impacts upon a State's internal jurisdiction, its territorial integrity, political independence and of course its right of sovereign equality, which is why achieving consensus in authorising the use of force within the Security Council is never

assured.

The need for consensus in authorisation (by majority at least) is a necessity in addressing humanitarian catastrophes within the Charter system. When States act unilaterally and carry out armed intervention without Security Council authorisation, as they did in Kosovo in 1999, consensus within the Security Council becomes stifled and its effectiveness is severely limited due to the political repercussions. A lack of support for armed intervention, as was the case in Rwanda, leads to an ineffective intervention that can have been devastating effects.

However, sovereignty, non-intervention and the prohibition on the use of force remain fundamental principles in international law, and continue to guide the approach taken to internal conflicts experiencing humanitarian crises. The inconsistent approach and response to humanitarian crises has led to the development of the Responsibility to Protect which has provided a new term, and re-conceptualised the mode by which states hold their sovereignty. Sovereignty remains as a manifestation of state power and state control internally, but the protection it provides – according to the concept – is contingent upon states protecting their populations from the genocide, ethnic cleansing, crimes against humanity and war crimes. With regard to the exercise of external sovereignty, the Responsibility to Protect requires states to step in and protect civilians within another state's internal jurisdiction if it is manifestly failing to uphold its responsibility.

The Security Council is pivotal, both in terms of authorising intervention for humanitarian purposes, and the implementation of the Responsibility to Protect. The practice that it has developed over time regarding the authorisation of armed intervention for humanitarian purposes is inconsistent, but it is in keeping with the rules of the Charter. It has proved, even through its inconsistent practice, that the principle of sovereignty, territorial integrity, and political independence does not prevent the Security Council from authorising military intervention against a state and within its internal jurisdiction. The absolute conception of state sovereignty, as it was first imagined by Bodin, has given way to a context specific form of armed intervention. In situations where there is internal armed conflict, the

Security Council will, if there is political consensus, intervene with armed force.

Decisions of the Security Council are political ones, but the resolutions that contain them bear legal consequences that affect the rights and obligations of states, and the rights of individuals within those states. Collective international peace and security now goes beyond considerations for state sovereignty, territorial integrity, or political independence. It must now consider the plight and harm visited on civilians by their own governments – particularly where the threat of mass atrocity is present. Human security, the security of individuals and groups, has now become a part of the collective security system within the United Nations.

Whether Resolution 1973 has substantially developed the principle of sovereignty to the extent that armed intervention for the protection of civilians is permissible without regard for sovereignty is unconvincing. It appears to be a miraculous incident where principle and political will coincided and armed intervention for the protection of civilians was considered to be the appropriate course of action. The aim of the armed intervention was to protect civilians, not to compromise Libyan sovereignty. It was an authorised humanitarian intervention, but it is not a direct reflection of the concept of the Responsibility to Protect.

Considering the ponderous development of the principle of sovereignty from its earliest entry into political legal discourse, the unconventional development of humanitarian intervention, the impact that Resolution 1973 will have on sovereignty within international law will take time to measure. Each time the Security Council authorises armed intervention contributes to the development of its practice, and in turn the development of perceptions around sovereignty and intervention for the protection of civilians.

The response from the Security Council to the excessive use of force, and the widespread systematic attacks against the civilian population by the Libyan government indicates that the protection provided by the principle of state sovereignty and sovereign equality under the Charter is undergoing a period of change. This is in part influenced by the concept of the Responsibility to Protect,

and the Security Council's practice. The violent and systematic attacks by the Libyan government, and the imminent threat of a widespread massacre, destabilised the legitimacy of the Gaddafi led government, as perceived by regional organisations, and Member States of the United Nations, and Security Council. The repetitive refrain that Gaddafi's regime had lost all legitimacy through its violent actions, is compatible with the element of the Responsibility to Protect that requires state governments to protect their population from such violence that may constitute one of the four specified crimes. The loss of the Libyan government's legitimacy would have made it difficult for Libya to exercise its external sovereignty without an internationally recognised political interlocutor, but not its internal sovereignty.

However, sovereignty cannot exist in an internal form alone. The purpose of the formation of the United Nations is collective peace and security, which requires states to behave in accordance with certain customary laws and recognised principles, such as respect for sovereign equality, territorial integrity, and political independence. Respect or regard for internal sovereignty no longer seems to extend to situations where an excessive level of systematic violence is committed by a state authority, at least, not in the context of the Libyan conflict.

It would appear, based on the examination of the situation in Libya, that the Security Council is prepared to intervene militarily in a sovereign state in order to protect civilians from its own government's actions. However, like resolutions before it that were passed based on humanitarian concerns, Resolution 1973 (2011) is one more example in a long line of inconsistency. Post-Resolution 1973, the Security Council has failed to act in a similar fashion with regard to the ongoing internal conflict in Syria.

Resolution 1973 makes a substantial contribution to a growing and developing practice within the Security Council, that the authorisation of military intervention for the purposes of protecting civilians will not always be hampered by the principle of sovereignty. Sovereignty itself is becoming imbued with the notion that power is not wielded in an unlimited and violent fashion but is contingent upon respect for humanity. The original purpose of sovereignty was to protect a

nation's people from harm from external forces. Now it is slowly becoming the power in which a nations people are protected not just from external forces, but from unlimited violent sovereign power.

Bibliography

Primary Sources

Charter of the United Nations 1945.

Covenenant of the League of Nations 1919.

Geneva Protocol for the Pacific Settlement of International Disputes 1924.

Kellogg-Briand Pact 1928.

Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, 1648.

Treaty of Paris 1815.

Treaty of Versailles 1919.

Cases

Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v Albania*) (Separate Opinion of Judge Alvarez) [1949].

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.

S.S. "Lotus" (*France v Turkey*) (Judgment) [1927] PCIJ (Series A) No.10.

United Nations Security Council Resolutions

United Nations Security Council Resolution 83 (1950).

United Nations Security Council Resolution 221 (1966).

United Nations Security Council Resolution 678 (1990) S/RES/678 (1990).

United Nations Security Council Resolution 751 (1992).

United Nations Security Council Resolution 787 (1992).

United Nations Security Council Resolution 794 (1993) S/RES/7994 (1993).

United Nations Security Council Resolution 929 (1994).

United Nations Security Council Resolution 940 (1994).

United Nations Security Council Resolution 1199 (1998).

United Nations Security Council Resolution 1593 (2005).

United Nations Security Council Resolution 1674 (2006).

United Nations Security Council Resolution 1706 (2006).

United Nations Security Council Resolution 1755 (2007).

United Nations Security Council Resolution 1769 (2007).

United Nations Security Council Resolution 1894 (2009).

United Nations Security Council Resolution 1970 (2011).

United Nations Security Council Resolution 1973 (2011).

Security Council Draft Resolution Kosovo (Federal Republic of Yugoslavia) S/1999/328.

General Assembly Resolutions

2005 World Summit Outcome Document GA Res 60/1, A/RES/60/1 (2005).

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United

Nations A/RES/2625(XXV) (1970).

Resolution on the Definition of Aggression GA Res 3314 A/RES/3314 (1974).

Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council GA Res 65/265 A/RES/65/265 (2011).

2005 World Summit Outcome Document GA Res 60/1 A/RES/60/1 (2005).

Texts

Francis Kofi Abiew *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, The Netherlands,1999).

Roderic Alley *Internal Conflict and the International Community, Wars Without End?* (Ashgate Publishing, England, 2004).

Sydney D Bailey and Sam Dawes *The Procedure of the UN Security Council* (3rd ed, Clarendon Press, Oxford, 1998).

M. Cherif Bassiouni (ed) *Libya: From Repression to Revolution, A Record of Armed Conflict and International Law Violations 2011-2013* (Leiden, The Netherlands, 2013).

Alex J Bellamy, Sara E Davies and Luke Glanville (eds) *The Responsibility to Protect and International Law* (Martinus Nijhoff, The Netherlands, 2011).

Alex J Bellamy *Responsibility To Protect: The Global Effort To End Mass Atrocities* (Polity Press, Cambridge (UK), 2009).

Jean Bodin, *Les Six Livres de la Republique* (translated ed. M.J Tooley (translator) Jean Bodin *Six Books of the Commonwealth* (Basil Blackwell, Oxford (1955)

Michael Bothe, Mary Ellen O'Connell and Natalino Ronzitti (eds) *Redefining Sovereignity: The Use of Force After The Cold War* (Transnational Publishers Ardsley, (NY) 2005).

Dimitris Bourantonis *The History and Politics of UN Security Council Reform* (Routledge, Oxon Great Britain, 2005).

Susan Breau *Humanitarian Intervention: The United Nations & Collective Responsibility* (Cameron May, London, United Kingdom, 2005).

Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, New York (USA), 2008).

Nina Caspersen *Unrecognised States* (Polity Press Cambridge, (UK), 2012).

Antonio Cassese (ed) Realizing Utopia: The Future of International Law (Oxford University Press, Oxford (United Kingdom) 2012).

Benedetto Conforti *The Law and Practice of the United Nations* (3rd rev. ed, Koninklijke Brill, The Netherlands, 2005).
Alex Conte *Security in the 21st Century: The United Nations, Afghanistan and Iraq* (Ashgate, Aldershot (United Kingdom), 2005).

Anthony Cullen *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, New York, 2010).

Gareth Evans *The Responsibility To Protect: Ending Mass Atrocity Crimes Once and for all* (Brookings, Washington, 2008).

Thomas M Franck *The Power of Legitimacy Among Nations* (Oxford University Press, New York, 1990).

Harry G Gelber *Sovereignty Through Interdependence* (Kluwer Law International, UK, 1997).

Jared Genser and Bruno Stagno Ugarte (eds) *The United Nations Security Council in the Age of Human Rights* (Cambridge University Press (New York) USA, 2014).

Christine Gray *International Law and the Use of Force* (2nd ed, Oxford University Press, New York, 2004).

Hugo Grotius *De Jure Belli ac Pacis* (translated ed: Louise R. Loomis (translator) Hugo Grotius *The Law of War and Peace* (Walter J. Black, INC., New York, 1949).

Mariane Heiberg *Subduing Sovereignty: Sovereignty and the Right to Intervene* (Printer Publishers, London (UK), 1994).

Max Hilaire *United Nations Law and the Security Council* (Ashgate Publishing, England, 2005).

Hobbes *Leviathan* (J M Dent & Sons, London, 1962).

JL Holzgrefe and Robert O Keohane (eds) *Human Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, UK, 2003).

Robert H Jackson *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge University Press, Great Britain, 1990).

Alan James *Sovereign Statehood: The Basis of International Society* (Allen & Unwin, London, 1986).

Jon Janzekovic *The Use of Force in Humanitarian Intervention*: *Morality and Practicalities* (Ashgate Publishing, England, 2006).

Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law 9th ed, Volume 1* (Oxford University Press, Oxford, 1992).

Hersch Lauterpacht *Oppenheim's International Law* (7th ed, 1948).

Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds) *The United Nations Security Council And War: The Evolution of Thought and Practice since 1945* (Oxford University Press, (UK), 2008)

Edward C Luck *UN Security Council: Practice and Promise* (Routledge, London, 2006).

Jackson Nyamuya Maogoto *States Sovereignty and Internationl Criminal Law: Versailles to Rome* (Transnational Publishers, New York, 2003).

David M Malone (ed) *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, USA, 2004).

Kenneth Manusama *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Koninklijke Brill, The Netherlands, 2006).

Panu Minkinnen *Sovereignty, Knowledge, Law* (Routledge, Oxfordshire, 2009).

Terry Nardin and Melissa S Williams (eds) *Humanitarian Intervention* (New York University Press, United States of America, 2006).

James Pattison *Humanitarian Intervention & the Responsibility To Protect: Who Should Intervene?* (Oxford University Press, Oxford, 2010).

Franz Xaver Perrez *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, Netherlands, 2000).

Samuel Pufendorf *De Jure Naturae et Gentium Libri Octo* (translated ed: C. H. Oldfather and W. A. Oldfather (translator) Samuel Pufendorf *On the Law of Nature and Nations* (Clarendon Press, Oxford, 1934).

M Pugh, AJ Bellamy, P Williams and S Griffin (eds) *Peace Enforcement And Human Intervention* (Polity Press, Cambridge, 2004).

Charles Sampford and Ramesh Thakur (eds) *Responsibility to Protect and Sovereignty* (Ashgate Publishing, England, 2013).

Albrecht Schnabel and Ramesh Thakur (eds) *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (United Nations University Press, Tokyo, Japan, 2000).

Malcolm Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008).

Malcolm Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014).

Bruno Simma, Daniel Erasmus Khan, George Nolte, Andreas Paulus and Nikolai Wessendorf (eds) *The Charter of the United Nations: A Commentary* (3rd ed, Oxford University Press, UK, 2012).

Ramesh Thakur *The Responsibility To Protect: Norms, Laws and the Use of Force in International Politics* (Routledge, Abingdon Oxon, 2011).

Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd ed, Transnational Publishers, New York, 1997).

Emmerich de Vattel *Le Droit de Gens* (translated ed: Charles G. Fenwick (translator) Emmerich de Vattel *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Carnegie Institution of Washington, Washington, 1916).

Neil Walker (ed) *Sovereignty in Transition* (Hart Publishing, Oregon (USA), 2003).

Colin Warbrick and Vaughan Lowe (eds) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge, Great Britain, 1994).

Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oregon (USA), 2004).

Thomas G Weiss *Humanitarian Crisis And The Responsibility To Protect* (2nd ed, Rowman & Littlefield, USA, 2005).

Nicholas J Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Great Britain, 2002).

Journal Articles

Alex J Bellamy "Libya and the Responsibility to Protect: The Exception and the Norm" (2011) 25 Ethics & International Affairs 263.

Ruud van den Berg "Promising or Failing? League of Nations and United Nations Organisation" (1994-1995) 4(2) Tilburg Foreign Law Review 101.

Rosa Brooks "Lessons for International Law from the Arab Spring" (2013) 28(3) Am U Int'l L Rev 713.

Jutta Brunnee and Stephen J Toope "The Responsibility to Protect and the use of Force: Building Legality?" (2010) GL2P 191

Y Frank Chiang "State Sovereignty and Taiwan" (2000) 23 Fordham Int'l L J 959.

Francis M Deng "From 'Sovereignty as Responsibility' to the 'Responsibility to Protect" (2010) Global Responsibility to Protect 2 353.

Clyde Eagleton "The Problem of the admission of the United Nations into the League of Nations" (1932) 10 New York University Law Quarterly Review 58.

Eric Engle "Beyond Sovereignty? The State after the Failure of Sovereignty" (2008) 15 ILSA J Int'l & Comp L 33.

Valerie Epps "The failure of Unilateralism as the Phoenix of collective security" (2003-2004) Suffolk Transnat'l L Rev 25.

Scott H Fairley “State actors, Humanitarian intervention and international law: Reopening Pandora’s Box” (1980)10 GA J Iint’l & Comp L 32.

Jon E. Fink “From Peacemaking to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security” (1995) 19 Md J Int'l L & Trade 1.

Jean-Pierre L. Fonteyne “The customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter” (1974) 4 Cal W Int'l L J 203.

David P Forsythe “The UN Security Council and Responses to Atrocities: International Criminal Law and the P-5” (2012) 34 Hum Rts Q 840.

Bruce P Frohnen “A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective” (0000) 20 TL&CP 599

Andrew Garwood-Gowers “The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?” (2013) 36(2) UNSW 594.

Luke Glanville “The International Community’s Responsibility to Protect” (2010) Global Resp Protect 287.

Luke Glanville “Intervention in Libya: from Sovereign Consent to Regional Consent” (2013) 14 International Studies Perspective 235.

Ruth E. Gordon “Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti” (1996) 31 Tex Int'l L J 43.

Vera Gowlland-Debbas “Security Council Change (2009-2010) 65 Int'l J 119.

Leo Gross “The Peace of Westphalia, 1648-1948” (1948) 42 Am J Int’l L 20.

Malvina Halberstam “The Legality of Humanitarian Intervention” (1995) 3 Cardozo J Int’l & Comp L 3.

Hurst Hannum “The Responsibility to Protect: Paradigm or Pastiche?” (2009) 60 NILQ 135.

John Hilla “The Literary Effect of Sovereignty in International Law” (2008) 14 Widener Law Review, 77.

Christine Henderson “The Arab Spring and the Notion of external State Sovereignty in international law” (2014) 35 Liverpool Law Review175.

Katie A Johnston “Transformations of Conflict Status in Libya” (2012) 17 JCSL (1) 81.

Hans Kelsen “The Principle of Sovereign Equality of States as a Basis for International Organization” (1944) 53 YLJ (2) 207
Hans Kelsen “Sovereignty and International Law” (1960) 48 Geo L J 627.

Robert Lansing “Notes on Sovereignty in a State” (1902) Am J Int’l L 105

Jihan A Kahssay “Lessons learned from Somalia: returning to a humanitarian-based Humanitarian intervention” (2012) 19 UC Davis Journal Int'l Law & Policy 117.

Stephen D Krasner “Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law” (2003-2004) 25 Mich J Int’l L 1077.

Young Sok Kim “Responsibility to Protect, Humanitarian Intervention and North Korea” (2006) 5 J Int’l Bus Law 74.

Thomas H Lee “The Law of War and the Responsibility to Protect Civilians: A Reinterpretation” (2014) 55 Harv Int'l L J 251.

Richard B. Lillich “The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post Cold-War World” (1995) 3 Tul J Int'l & Comp L 1.
Edward C Luck “How Not to Reform the United Nations” (2005) Global

Governance (11) 407.

Stevie Martin “Sovereignty and the Responsibility to Protect: Mutually Exclusive or Codependent?” (2011) 20(1) Griffith Law Rev 153.

Jackson Nyamuya Maogoto “Sovereignty in Transition: Human Rights and International Justice” (2005) 7 UNDALR 83.

Panu Minkinnen “The Ethos of Sovereignty: A Critical Appraisal” (2007) Human Rts Rev 33.

Saira Mohamed “Taking Stock of the Responsibility to Protect” (2012) 48 StanJInt’l L (2) 319
Saira Mohamed “Shame in the Security Council” (2013) Washington L Rev 1191.

Sean D Murphy “Criminalizing Humanitarian intervention” (2009) 41 Case W Res J Int'l L 34.

Alexander Orakhelashvili “Unilateral Interpretation of Security Council Resolutions: UK Practice” (2010) 2 Goettingen J Int'l L 823.

Inger Osterdahl “The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council” (2005) 10 J Conflict & Sec L 1.

Emma McClean “The Responsibility to Protect: The Role of International Human Rights Law” (2008) 13 J Conflict & Sec L 123.

William G Ross “Constitutional Issues Involving the Controversy Over American Membership in the League of Nations, 1918-1920” (2013) 53 Am J Leg Hist 1.

Jeremy Sarkin “The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the role of the International Community during the Rwandan Genocide and the Conflict in Former Yugoslavia” (2010) 33 Suffolk Transnat’l L Rev 35.

Michael P. Scharf "Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee" (1993) Brook J Int'l L 771.

Ivan Simonovic "Relative Sovereignty of the Twenty First Century" (2002) 25 Hastings Int'l & Comp L Rev 371.

Carsten Stahn "Notes And Comments: Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101(1) Am J Int'l L 99.

Paul D. Williams and Alex J. Bellamy "Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force" (2012) Global Governance 273.

Paul R. Williams & Colleen (Betsy) Popkent "Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity" (2011) 44 Case W Res J Int'l L 225.

Gary Wilson "The Legal, Military and Political Consequences of the Coalition of the Willing Approach to UN Military Enforcement Action", (2007) 12 J Conflict & Sec L 295.

International Materials

Security Council Meetings

UN Security Council Provisional Verbatim Record of the 2963rd Meeting S/PV.2963 (29 November 1990).

UN Security Council Provisional Verbatim Record of the 2982nd Meeting S/PV.2982 (5 April 1991).

UN Security Council Provisional Verbatim Record of the 3145th Meeting S/PV.3145 (3 December 1992).

UN Security Council Provisional Verbatim Record of the 3361st Meeting S/PV.3361 (7 April 1994).

UN Security Council Provisional Verbatim Record of the 3402nd Meeting S/PV.3402 (11 July 1994).

UN Security Council Provisional Verbatim Record of the 3431st Meeting S/PV.3431 (29 September 1994).

UN Security Council Provisional Verbatim Record of the 3988th Meeting S/PV.3988 (24 March 1999)

UN Security Council Provisional Verbatim Record of the 3989th Meeting S/PV.3989 (26 March 1999).

UN Security Council Provisional Verbatim Record of the 6498th Meeting S/PV.6498 (17 March 2011).

General Assembly Meetings

General Assembly 97th Plenary Meeting Record A/63/PV.97 (23 July 2009).

General Assembly 98th Plenary Meeting Record A/63/PV.98 (24 July 2009).

General Assembly 99th Plenary Meeting Record A/63/PV.99 (24 July 2009).

General Assembly 100th Meeting Record A/63/PV.100 (28 July 2009).

General Assembly 101st Meeting Record A/63/PV.101 (28 July 2009).

International Organisations Documents

African Union *Communiqué of the 261st Meeting of the Peace and Security Council* (February 23 2011).

Ban ki-Moon 'Statement by the Secretary-General on Libya' (17 March 2011), <http://www.un.org/sg/STATEMENTS/index.asp?nid=5145>.

European Council Declaration (March 11 2011) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119780.pdf>.

Founding Statement of the Interim Transitional National Council (TNC), March 5 2011, <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_12_Founding_Statement_TNC.pdf>.

Kofi Annan "We the Peoples: The Role of the United Nations in the 21st Century" Millennium Report of the Secretary General (2000).

Kofi Annan "Renewing the United Nations: A Programme for Reform" A/51/950

Kofi Annan Report of the Secretary General "In Larger Freedom: Towards Development, Security and Human Rights For All" A/59/2005 (2005).

League of Arab States "The implications of the current events in Libya and the Arab position" (Cairo, 12 March 2011).

Letter Dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council S/24868 (1992).

Letter Dated 24 March 1999 From the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council S/1999/320 (1999).

Report of the International Commission on Intervention and State Sovereignty "The Responsibility to Protect" (International Development Research Centre, Canada, 2001).

United Nations Press Release "UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya" (February 22 2011).

United Nations Human Rights Office of the High Commissioner "Pillay calls for international inquiry into Libyan violence and justice for victims" (February 22 2011).

Report of the High-level Panel on Threats, Challenges and Change "A More Secure World: Our Shared Responsibility" A/59/565 (2004).

Report of the International Commission on Intervention and State Sovereignty "The Responsibility to Protect" (International Development Research Centre, Canada, 2001).

Internet Materials

Al Jazeera "Libyan police stations torched"(16 February 2011) <http://www.aljazeera.com/news/africa/2011/02/20112167051422444.html>.

Al Jazeera "'Day of Rage' kicks off in Libya" (17 February 2011) <http://www.aljazeera.com/news/africa/2011/02/201121755057219793.html>.

Amnesty International "Libyan Protester Shot Dead by Security Forces" (17 February 2011) News <<http://www.amnesty.org.nz/news/libyan-protester-shot-dead-security-forces>.

Amnesty International, "Libya Urged to End Protest Crackdown" (February 16 2011) < http://www.amnesty.org.nz/news/libya-urged-end-protest-crackdown>.

Amnesty International "Libyan Arab Jamhiriya: Briefing to the Human Rights Committee" (June 2007) <www.amnesty.org/en/documents/MDE19/008/2007/en/>.

BBC News "Libya protests: Second city Benghazi hit by violence" (16 February 2011) <<http://www.bbc.co.uk/news/world-africa-12477275>.

BBC News "Libya protests: Al-Bayda security chief 'sacked" (17 February 2011) <http://www.bbc.co.uk/news/world-africa-12490504>.

The Guardian "Gaddafi's Defectors Denounce 'Government of Mussolini and Hitler' (February 26 2011)

<http://www.theguardian.com/world/2011/feb/26/gaddafi-defectors>.

The Guardian “Libyan Forces Predict Fall of Rebel-held Benghazi Within 48 Hours” (March 16 2011) <http://www.theguardian.com/world/2011/mar/16/libya-benghazi-gaddafi-48-hours>.

Gulf News “GCC backs no-fly zone to protect civilians in Libya” (9 March 2011) <http://gulfnews.com/news/gulf/uae/government/gcc-backs-no-fly-zone-to-protect-civilians-in-libya-1.773448>.

New York Times “Arab League Endorse No-Flight Zone Over Libya” (March 12 2011) <http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all>.

Reuters UK “Gaddafi tells Benghazi his army is coming tonight” (March 17 2011) <http://uk.reuters.com/article/2011/03/17/libya-gaddafi-address-idUKLDE72G2E920110317>.

The Telegraph “Muammar Gaddafi Fires on His Own People” (21 February 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8339347/Libya-Muammar-Gaddafi-fires-on-his-own-people.html>.