

**Responsibility to Protect vis-à-vis State Sovereignty: The Emerging Doctrine**

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By

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# Declaration

I, NIRALI PATEL, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... *Nirali* .....

Date: 31 JANUARY 2018

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....  ..... *30/5/18* .....

ALLAN MUKUKI

# Abstract

The dilemma of how to deal with and respond to humanitarian disasters and large-scale human rights abuses has become more and more the forefront of political and academic debate over the last few decades. The fact is nowadays, due to globalisation, there is no longer such a thing as a humanitarian catastrophe occurring ‘in a faraway country of which we know little of’. As a result, the question of whether or not the international community should still obey the principle of non-intervention, thus allowing the use of sovereignty as an excuse or whether time has come to turn a new leaf to the idea and concept of sovereignty. The concept of ‘Responsibility to Protect’ is an international norm and has been subject to much debate recently amongst policy makers and academics alike. The international community is acutely aware of the consequences of not having an accepted norm of intervention. While many accept that the UN Security Council’s powers to intervene in matters involving horrendous human rights violations are limited, few are willing to recommend an expansion of these powers, predominantly because such a proposition will almost certainly be countered by reference to the inviolability of state sovereignty. State sovereignty has for too long played a starring role in the demise of many attempts to legitimise intervention. The thesis seeks to eliminate this convenience with which the concept of sovereignty is used as an affective legal and political justification for non-intervention by States and regional organisations, and rather turn to look at a new perspective with which the continuing evolution of the responsibility to protect can in fact keep territorial integrity and protect the true sovereignty, as well as provide a reminder to States that they cannot and must not be “innocent and impotent bystanders” of humanitarian disasters and war crimes in foreign countries, furthering that the responsibility to protect, if properly understood, implemented and enforced, provides both conceptual and practical avenues that could help fill the asymmetry between the magnitude of threats to human security and our ability to face them.

## List of cases

1. *The Netherlands v. Nuhanović*, Supreme Court of Netherlands, No. 12/03324, (2013).
2. *Kadi v. Council of the European Union and Commission of the European Communities*, Court of Justice of the European Union, 3 September 2008.
3. *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), International Court of Justice (ICJ), 5 February 1970.
4. *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), International Court of Justice (ICJ), 20 February 1969.
5. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America), International Court of Justice (ICJ), 27 June 1986.

# List of legal instruments

Charter of the Organization of African Unity

Charter of the United Nations

Constitutive Act of the African Union

Convention on the Prevention and Punishment of the Crime of Genocide

Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex:  
Regulations Concerning the Laws and Customs of War on Land

International Covenant on Civil and Political Rights

Protocol on Amendment to the Constitutive Act of the African Union

Protocol relating to the establishment of the Peace and Security Council of the African  
Union

Rome Statute of the International Criminal Court

The Constitution Act of India

The Constitution of Kenya (2010)

The Constitution of the United States of America

Universal Declaration of Human Rights

# List of Abbreviations

AU – African Union

ECOMIG - ECOWAS Mission in the Gambia

ECOWAS – Economic Community of Western African States

HLP – High Level Panel

ICCPR – International Covenant on Civil and Political Rights

ICISS - International Commission on Intervention and State Sovereignty

NATO – North Atlantic Treaty Organization

R2P – Responsibility to Protect

UN – United Nations

UNGA – United Nations General Assembly

UNOCI - UN Operation in Ivory Coast

UNSC – United Nations Security Council

# 1 Chapter 1: Introduction to Research

## 1.1 Introduction

One of the main controversies plaguing the international community over the last three decades, is the approach in civilian protection in non-international armed conflicts. The UN Charter provides that, "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state",<sup>1</sup> giving us the principle of non-intervention in domestic affairs. However this principle does not rule out the application of enforcement measures, in case of a threat to peace, a breach of peace, or acts of aggression on the part of the state.<sup>2</sup> The Genocide Convention also, overrules the non-intervention principle, in order to lay down the commitment of the world to prevent and punish those who commit the crime of genocide, violating the right to life.<sup>3</sup> Yet the inaction in response to the Rwandan genocide and failure to stop the Srebrenica massacre in Bosnia highlights the complexity of international law to respond to crimes against humanity.

Former UN Secretary-General Kofi Annan, remembering the failures in the 1990's, put forward a challenge to Member States: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?"<sup>4</sup>

In 2000, the Canadian government and several other actors announced the establishment of the International Commission on Intervention and State Sovereignty<sup>5</sup> to address the task the international community had for the responsibility to act in the face of the severest of human rights violations while respecting the sovereignty of the states. It sought to bridge these two

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<sup>1</sup> Article 2 (7), *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>2</sup> Chapter VII, *Charter of the United Nations*.

<sup>3</sup> Article 1 & 8, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78.

<sup>4</sup> *We the peoples: role of the United Nations in the 21<sup>st</sup> century*, Millennium Report of the Secretary General, 2000, UN Doc A/54/00.

<sup>5</sup> ICISS.

concepts with the Responsibility to Protect<sup>6</sup> report.<sup>7</sup> When the doctrine for R2P was incorporated into the UN, it was included as every state has the responsibility to protect its citizens from "genocide, war crimes, ethnic cleansing, and crimes against humanity." If a state fails to do so, it then becomes the responsibility of the international community to protect that state's population.<sup>8</sup>

At present, the international community has limited options for responding to humanitarian crises, as "the sovereignty, territorial integrity, and national unity of States must be fully respected in accordance with the Charter of the United Nations",<sup>9</sup> which makes it difficult to operate in situations where the affected state denies access.

As we step into the 18<sup>th</sup> year after the beginning of millennia, this problem still seems to persist, allowing the creation crisis situations such as those in Syria and Yemen, through conflict as well as Nepal, West Africa and Somalia, where natural disasters such as earth quakes, diseases like Ebola and droughts have created a greater need for help and assistance.

This dissertation explores when it is a requirement for the UN to fulfil its responsibility to protect, making it a justifiable cause. Through an examination of various missions under the R2P doctrine, including Libya, Afghanistan and Burundi, with a focus on two of these missions, which determine the true nature of interventions, under the R2P, in practicality and the legal process to proceed in theory, as well as the true nature of the doctrine of sovereignty, and when it can be established to be breached.

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<sup>6</sup> R2P.

<sup>7</sup> *The Responsibility to Protect Report*, International Commission on Intervention and State Sovereignty (ICISS), 2001.

<sup>8</sup> UNGA, *2005 World Summit Outcome: Follow-up to the outcome of the Millennium Summit*, UN A/RES/60/1 (24 October 2005).

<sup>9</sup> UNGA, *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, UN A/RES/46/182 (22 December 1992).

## 1.2 Background information

Following the tragedies in Rwanda and the Balkans in the 1990s, the international community began to seriously debate how to react efficiently when the human rights of many are blatantly violated. The controversy between States having absolute sovereignty over their affairs and the international community having the right to intervene in a country for humanitarian purposes.<sup>10</sup>

The report by ICISS<sup>11</sup> found that sovereignty not only gave a State the right to "control" its affairs, it also discussed on the State primary "responsibility" for protecting the people within its territory. It suggested that when a State fails to protect its people — either through lack of ability or a lack of willingness — the responsibility should shift to the international community.<sup>12</sup>

The High-level Panel on Threats, Challenges and Change, a panel set up by former UN Secretary-General Kofi Annan, recommended the emerging doctrine of R2P, in 2004, upholding that there is a collective international responsibility that is needed, which is, "exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing and serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent." The panel put forth a basic criteria that would help legitimise the authorisation of the use of force, which included the seriousness of the threat, that it must be a last resort, and that the proportionality of the response must be adequate.<sup>13</sup>

Further in 2005, the UN member states in a World Summit, accepted the responsibility of each State to protect its population from the crimes stated above, formally. World leaders also agreed that when a State fails to meet that responsibility, they as the "international community" are responsible for helping to protect the people. They also noted that should peaceful means — including diplomatic or humanitarian, be inadequate and national authorities "manifestly fail" to protect their civilians, they should act collectively in a "timely and decisive manner", through

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<sup>10</sup> UNGA, *United Nations Millennium Declaration*, UN A/RES/55/2 (18 September 2000).

<sup>11</sup> ICISS, *the Responsibility to Protect Report*.

<sup>12</sup> ICISS, *the Responsibility to Protect Report*.

<sup>13</sup> *A more secure world: our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, 2004, UN Doc A/59/565.

the UN Security Council and in accordance with the UN Charter, on a case-by-case basis and in cooperation with regional organisations as appropriate.<sup>14</sup>

The first time the Security Council made official reference to the R2P was in April 2006, in its resolution<sup>15</sup> on the protection of civilians in armed conflict. The Security Council referred to that resolution in August 2006, when passing another resolution<sup>16</sup> authorising the deployment of UN peacekeeping troops to Darfur, Sudan.

Furthermore, following widespread and systematic attacks against the civilian population by the regime in Libya, the UN Security Council, unanimously adopted a resolution<sup>17</sup>, making explicit reference to the R2P. Deploring what it called "the gross and systematic violation of human rights" in strife-torn Libya, the Security Council demanded an end to the violence, "recalling the Libyan authorities' responsibility to protect its population," and imposed a series of international sanctions.

This led to another response to the escalating, post-election violence against the population of Côte d'Ivoire in late 2010 and early 2011, by the UN Security Council, on 30 March 2011, adopting a resolution<sup>18</sup> condemning the gross human rights violations committed by supporters of both former President Laurent Gbagbo and President Ouattara. The resolution cited "the primary responsibility of each State to protect civilians," called for the immediate transfer of power to President Ouattara, the victor in the elections, and reaffirmed that the UN Operation in Côte d'Ivoire (UNOCI) could use "all necessary means to protect life and property."

Recently, the R2P has featured prominently in many resolutions by the Security Council. Primarily in the Syrian crisis, former UN Secretary-General Ban Ki-Moon has stressed the urgent need for a political solution to end the crisis, which over the past three years has claimed more than 100,000 lives. In his report on early warning, assessment and the R2P, he identifies gaps and proposes ways to improve the UN's ability to use early warnings more effectively, including information from field operations, and improve early, flexible and composed responses where there is risk of genocide, crimes against humanity, war crimes or ethnic

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<sup>14</sup> UNGA, *2005 World Summit Outcome: Follow-up to the outcome of the Millennium Summit*.

<sup>15</sup> UNSC S/RES/1674 (2006) the Protection of Civilians in Armed Conflict.

<sup>16</sup> UNSC S/RES/1706 (2006) the Situation in South Sudan.

<sup>17</sup> UNSC S/RES/1970 (2011) the Situation in Libya.

<sup>18</sup> UNSC S/RES/1975 (2011) the Situation in Côte d'Ivoire.

cleansing.<sup>19</sup> This report emphasised the need for “global-regional collaboration” to help implement the R2P, as well as recognising gaps and suggested ways for the UN to strengthen its cooperation.

The Secretary-General’s fourth report on the R2P, presented in September 2012, examined the idea of a “timely and decisive response” when a State failed to protect its people, including the variety of options and associates available, especially looking at the close connection between prevention and response.<sup>20</sup>

### 1.2.1 Statement of problem:

In the current times, a need for a quick and efficient response of internal crisis, be it natural or man-made conflict, is not only demanded but a necessity. There is a need, where all else fails, for humanity and the task to save lives to conquer all.

### 1.2.2 Justification of study

It seems that although Kofi Annan brought this problem to light almost 17 years ago, we still have no solution, that we allow to come close to solving the problem raised, yet the crisis keep growing out of proportion, endangering more lives and increasing the death toll, while we are left hearing ‘never again’ from the pinnacle of world peace, feeling as helpless as we did during the Rwandan and Srebrenica genocide.

The solution the General Assembly of the UN opted for was the emergence of R2P, however it still did not answer the age old question, of how the world can help without the impeachment of sovereignty. The General Assembly did not allow for the actors of R2P, to fully function as it should, limiting its rights in the 2009 resolution, to up keep sovereignty, yet in the same resolution’s debate, it was seen that with sovereignty came with the responsibility to protect citizens from mass atrocities and that the doctrine of R2P, thus aims to enhance sovereignty, and not to undermine it.

In August 2016, the former Secretary General, Ban Ki Moon, released his eighth and final report on R2P, entitled Mobilising Collective Action: The Next Decade of the R2P. The report

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<sup>19</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Early warning, assessment and the responsibility to protect*, 2010, UN Doc A/64/864.

<sup>20</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Responsibility to Protect: Timely and decisive response*, 2012, UN Doc A/66/874–S/2012/578.

reflects on both the successes and failures of the R2P and, in doing so, focuses on the current barriers to mobilising collective action, offering suggestions on how we might overcome these barriers in the future. The report also stresses the need to work collectively to ensure the protection of civilians from atrocities, especially by placing emphasis on the primacy of prevention.

With a need to assess the definition of sovereignty, and its holding in a crisis, be it a man-made conflict or a natural disaster, further defining where it lies during an act of war, it is imperative that the solution to protect humanity and human lives, i.e. R2P is fully understood as well as how it best applied, and at what cost and criteria.

This dissertation focuses on the doctrine of sovereignty and its application in international law, the concept of R2P and its current usage in the world, and how the gap between sovereignty and R2P can be bridged, with a substantial look at the true application of the R2P doctrine and how it can be truly efficient in this day and age.

## **1.3 Statement of objective**

### 1.3.1 Main objective:

To find an efficient solution to the preservation of human lives during natural disasters, internal and external conflict, without the impeachment of legal rights and obligations.

### 1.3.2 Specific objectives:

1. To expound on the definition of sovereignty, and its application in modern day.
2. To advance the doctrine of R2P, as a better alternative to the humanitarian intervention used prior.
3. To advocate for the allowance of the gap between sovereignty and the original application of R2P to be bridged in order to have a better preventive and responsive resolution for a safer and peaceful world.

## 1.4 Research question

- 1) What is the true definition of sovereignty, through history and when does it be apply in modern day?
- 2) What is the doctrine of R2P and how can we apply it efficiently, hence making it a better alternative to humanitarian intervention?
- 3) How can the gap between sovereignty and R2P be bridged, allowing for better working of the original concept?

## 1.5 Literature Review

### 1.5.1 Theme 1: Sovereignty

Sovereignty is assumed in jurisprudence as the absolute right and power of a governing body to administer itself without any interference from outside sources or bodies.<sup>21</sup> When looked at the French word *souveraineté*, its attainment and retention, in both Chinese and Western culture<sup>22</sup>, has traditionally been associated with certain moral imperatives upon any claimant. During the 1990s, there was a clear exception to ‘traditional sovereignty’ which was the ‘sovereignty as responsibility’ introduced by Francis Deng and Roberta Cohen in 1996.<sup>23</sup>

According to Dan Philpott<sup>24</sup>, Sovereignty has a core meaning of supreme authority within a territory. Even though history shows a variety of definitions, it has been come to be understood as a modern notion of political authority. Although historical variants may be understood along three elements— the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty, in that the State is the political institution in which sovereignty is embodied, and that an accumulation of states forms a sovereign states system. There are vastly differing views on the moral basis of sovereignty, fundamentally being

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<sup>21</sup> 'Sovereignty | Politics' *Encyclopaedia Britannica*, 2017, <https://www.britannica.com/topic/sovereignty> on 12 January 2017.

<sup>22</sup> Bateman CG, 'Nicaea and Sovereignty: Constantine's Council of Nicaea as an Important Crossroad in the Development of European State Sovereignty' *University of British Columbia* (2011) 54–91.

<sup>23</sup> Cohen R and Deng F, *Masses in Flight: the Global Crisis of Internal Displacement*, Brookings Institution Press, 2012.

<sup>24</sup> 'Daniel Philpott, 'Sovereignty'' *Plato.stanford.edu*, 2017 <https://plato.stanford.edu/entrie/sovereignty/> on 12 January 2017.

between theories that assert that sovereignty is vested directly in the sovereign by divine or natural right and theories that assert it originates from the people.

Matteo Laruffa noted that "sovereignty resides in every public action and policy as the exercise of executive powers by institutions open to the participation of citizens to the decision-making processes"<sup>25</sup>

Based on the history and current views of sovereignty, it is imperative to note where sovereignty lies and what it stands for, through the dissertation, a focus on the affirmation and ideology of 'sovereignty as responsibility' rather than the traditional definition, of sovereignty being the supreme power of the sovereign, which will prove to be an asset in the furthering of the objective to find a solution to the controversy between protection of human rights through intervention and the principle of non-interference.

### 1.5.2 Theme 2: Responsibility to Protect

The principle of the R2P is based on the underlying premise that sovereignty entails a responsibility to protect all populations from mass atrocity crimes and human rights violations. The principle is based on a respect for the norms and principles of international law, especially the underlying principles of law relating to sovereignty, peace and security, human rights, and armed conflict.

The R2P provides a framework for engaging measures that already exist (i.e., mediation, early warning mechanisms, economic sanctions, and chapter VII powers of the Security Council) to prevent crimes and to protect civilians from their occurrence. The authority to employ the use of force under the framework of the R2P, rests solely with UN Security Council and is considered a measure of last resort. The UN Secretary-General has published annual reports on the R2P since 2009 that expand on the measures available to governments, intergovernmental organisations, and civil society, as well as the private sector, to prevent atrocity crimes.

According to Ramesh Thakur, International humanitarian law is about protecting people. The UN originated to create and enforce international law which it did with some triumph. The largest being the prevention of World War III till now. Nevertheless, there were many conflicts

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<sup>25</sup> Matteo L, 'The European Integration and National Interests: from an intergovernmental model to a Constitutional Agreement', *Hungarian Academy of Social Sciences* (2014).

after World War II, with the increasing number until the early 1990s, where we saw a decline and a sudden jump in the late 2000's and 2010's.<sup>26</sup>

Mary O'Connell stated 'What we need more than R2P in the sense just mentioned is R2P understood as Responsibility to Peace. Peace is the greatest human right, upon which all others depend, and it is being challenged by a new militarism.'<sup>27</sup> With the concept of ideas matter, the idea of implementing peace is quite young. That non-violence should rule in international affairs is something philosophers always envisioned. But only in the last two centuries did political leaders begin to think in those terms. The disaster of World War II shocked the world into forming the UN and the use of force in international relations was proclaimed illegal with the only two exceptions: self-defence and when authorised by the Security Council.

In keeping with this line, Edward Luck raises a good point, that the doctrine of R2P, is in fact still quite young and determining its future would be reckless as we cannot possibly decide whether it is efficient or not, if we do not allow it to function as it should. The positive talks by UN member states on the application of R2P shows conceptual and political progress, which further shows that they understand the difference between principle and tactics used to implement the doctrine.<sup>28</sup>

Anne-Marie Slaughter from Princeton University has called it "...the most important shift in our conception of sovereignty since the Treaty of Westphalia in 1648."<sup>29</sup>

Susan Breau looked at R2P, as a radical and controversial new approach in international relations and international law, which provides a way out of the conflict between R2P and sovereignty.<sup>30</sup>

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<sup>26</sup> Thakur RC, *the Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics*, Routledge, New York, 2006.

<sup>27</sup> O'Connell ME, 'Responsibility to Peace: A Critique of R2P', 4 *Journal of Intervention and State-building*, 1 (2017) 39.

<sup>28</sup> Luck EC, 'the Responsibility to Protect: the First Decade' 3 *Global Responsibility to Protect* 4 (2011) 387-399.

<sup>29</sup> 'Ethics matter: A Conversation with Anne-Marie Slaughter', *Policyinnovations.org*, 2017 <http://www.policyinnovations.org/ideas/audio/data/000631> on 5 February 2017.

<sup>30</sup> Breau S, 'The Impact of the Responsibility to Protect on Peacekeeping' vol 11 *Journal of Conflict & Security Law* (2007) 429.

Advocates of R2P claim that the only occasions where the international community will intervene in a state without its consent is when the state has abdicated its responsibilities as a sovereign jurisdiction by allowing mass atrocities to occur, or is committing them. Interventions in Iraq and Afghanistan, though not primarily humanitarian, eroded public support for military action. Some Syrians who oppose President Bashar al-Assad's regime, remember Iraq and argue that the one thing worse than a cruel dictator is a sectarian civil war.

From the review above, it can be noted that R2P is a fairly new principle that still requires a lot of work and adjustment in order for it to truly be established as a successful method of prevention and protection. With a look at the application of R2P, through missions that have been completed, it is notably one of the better solutions in theory and yet it seemingly fails in practice. It is on this disconnect that the dissertation shall proceed in order to find the appropriate panacea that may help bridge the gap in international and human rights law.

## 1.6 Theoretical Framework

In looking at the theories that relate to sovereignty and the law, as well as the aspect of what sovereignty amounts to we can see that;

There is a separation in ideologies between those that claim that the people transfer their sovereignty to the sovereign (Hobbes)<sup>31</sup>, and those that claim that the people keep their sovereignty (Rousseau)<sup>32</sup>

Classical liberal theorists such as Stuart Mill<sup>33</sup> believe every individual as sovereign on oneself, which advocates for civil and political rights, giving individuals the freedom to 'control' themselves as well as providing the autonomy to decide on the help and aid they require when in a crisis, advancing a democratic front under the law.

Realists are of the opinion that sovereignty is being untouchable and is guaranteed to legitimate states<sup>34</sup>. Irrespective of the definition used, realism theories revolve around four key concepts:

- 1) That states are the dominant actors in international politics rather than individuals or international organisations,

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<sup>31</sup> Hobbes T, *Leviathan part 2: Commonwealth*, 1651, Chapter 18.

<sup>32</sup> Rousseau JJ, *the Social Contract (Book 2)*, 1762.

<sup>33</sup> Mill JS, *On Liberty*, 1859.

<sup>34</sup> Goodin RE, *the Oxford Handbook of International Relations*, Oxford University Press, Oxford, 2010.

- 2) That the international political system is anarchic as there is no international authority that can enforce rules over the states,
- 3) That the actors in the international political system are rational as their actions maximise their own self-interest, and
- 4) That all states desire power so that they can ensure their own self-preservation.

Rationalists also see sovereignty similarly. However, rationalism affirms that the sovereignty of a state may be violated in extreme situations, such as violations of human rights.<sup>35</sup>

Internationalists believe that sovereignty is obsolete and a needless hindrance to gaining peace, which in line with 'global community', believing that sovereignty in respect to the foundation of the UN charter is in fact an obstacle to humanitarian intervention.<sup>36</sup>

Anarchists reject the sovereignty of states, often arguing for an individual kind of sovereignty, such as the Anarch as a sovereign person. Salvador Dalí, spoke about "anarcho-monarchist", Antonin Artaud of the crowned anarchist, even Max Stirner talked of *The Ego and Its Own*. The unified consciousness is sovereignty over one's own body, as Nietzsche demonstrated, which is similar to the classical concept<sup>37</sup>

Imperialists believe sovereignty is where power justly exists, i.e. with those states that hold the utmost capability to enforce the will of said State, by force or threat of force, over the public or other states with weaker military or political will. They effectively deny the sovereignty of the individual in deference to either the 'good' of the whole, or to divine right.<sup>38</sup>

For this dissertation, I plan to adopt a mix of a realist and an internationalists as well as that of rationalists theories, in seeing that the law derives from social interest and public policy and not just abstract rules, that the law ties a form of leadership into the rationality and legitimacy

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<sup>35</sup> Beiser FC, *the Sovereignty of Reason, the Defence of Rationality in the Early English Enlightenment*, Princeton University Press, New Jersey, 1996.

<sup>36</sup> Franceschet A, 'Sovereignty and Freedom: Immanuel Kant's Liberal Internationalist 'Legacy'', *27 Review of International Studies* 2 (2001) 209–228.

<sup>37</sup> Mcconkey M, 'Anarchy, Sovereignty, and the State of Exception: Schmitt's Challenge' *17 The Independent Review* 3 (2013) 415 -428.

<sup>38</sup> Anghie A, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge, 2004.

of actions taken in order for the greater good and finally the concept of international customary law being binding although not codified.

## **1.7 Hypothesis**

The Intervention, when done through a set criteria, is not only justified but necessary for the protection of humanity in the world, especially during an emergency situation.

## **1.8 Assumptions**

During the process and proposition of this dissertation the following assumptions would be undertaken;

- 1) Sovereignty is an absolute right to each state, in that nothing can overpower it.
- 2) Responsibly to protect is a not undermining sovereignty but empowering it.
- 3) R2P is a better method of humanitarian intervention
- 4) The reason R2P cannot work is the overwhelming politics behind the Security Council and the General assembly of the UN, which does not allow it to be adapted fully.

## **1.9 Research design and methodology**

In researching this dissertation, the most beneficial design and method was qualitative.

Qualitative methods are probably the oldest of all scientific techniques. They are particularly useful when a theme or topic is too complicated to be answered by a simple yes or no hypothesis.

Another form was descriptive and explanatory research, allowing to answer the question of what is happening and why is it happening. A good description was essential to the research and added vastly to the understanding of nature of our society. Explanatory was used to describe the why, fundamentally finding the cause and giving a solution.

Methodology specifically used:

- Desktop research: this entailed the use of the internet to collect data, especially on the various missions taken place, through multiple journals, articles and websites related to the doctrines in question.

- Library resources: use of scholar texts, such as text books, journals, and academic material available in the Strathmore University Library<sup>39</sup> to further develop the dissertation and expound on the literature review.

## 1.10 Limitations

While working on this dissertation, the greatest limitation was that, all the information that was relied on was secondary, hence had the possibility of biased towards one side. Primary information was difficult to come by as the authors were not present to witness any of the crisis' taking place.

Interviewing people involved was also difficult, as the idea is still settling in in the international realm and does not have consistency so most have a variety of views as to what can be done. It was also difficult in obtaining information, as the entire dissertation was researched online and through the opinion of various academic authors.

## 1.11 Chapter breakdown

The final dissertation will consist of 5 main chapters. A chapter per research question:

### 1) Introduction:

The first chapter of the Dissertation served to introduce the problem and the purpose of the study. It acquits the reader with the research problem. The following areas of discussion are frequently included as subsections in the introduction chapter.<sup>40</sup>

- Background of the problem: where the doctrine rose from and where it has reached in development.
- Statement of the problem: brief proclamation of the issue that is being addressed in the dissertation
- Purpose of the study or general objective: the main goal of the dissertation.
- Research questions or specific objectives or hypotheses: a breakdown of the main goal, into sub goals, with each leading to a subtopic to discuss in the dissertation

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<sup>39</sup> <<https://www.library.strathmore.edu/>> on 6 February 2017.

<sup>40</sup> Strathmore University dissertation guidelines.

- Importance or justification or rationale of the study: an explanation into the necessity of the dissertation to be done.
- Scope and limitations of the study: features of the methodology of the study that influences or restricts the dissertation.
- Definition of terms: description of terminology used in the dissertation.
- Chapter summary: a brief statement outlining what each chapter talks about.

#### 2) Sovereignty: a brief history and in contemporary international law:

This chapter discusses, the various theories that build the doctrine of sovereignty, from historical times to modern era. Further looking into sovereignty in crisis and what the grounds for it are.

#### 3) Responsibility to protect: creation and efficiency:

This chapter looks at the birth of R2P and its development through the years with focuses on both successful and failed missions, to determine the most efficient way of applying the doctrine.

#### 4) Bridging the gap between the 2 doctrines for a better solution

This chapter links the 2 concepts, with a focus on the problems creating a gap between the rights and obligations of sovereignty and the solution of applying the original concept of R2P without breaching the duties and rights described.

#### 5) Recommendations and conclusions:

The objective was to present in a concise form the main findings of the research and the implications of this for the topic and discipline. Dissertation research projects provide recommendations for practice or improvement and for further studies. In applied research recommendations are provided for practice or improvement. In this case the researcher offers suggestions for improvement with justification. Research projects often pave way for further work. Consequently, the researcher provided suggestions for future research work based on the findings and conclusions generated from the study, as well as possible solution to the problem.

## 2 Chapter 2: An Analysis of Sovereignty

### 2.1 Introduction

Sovereignty is a political concept that refers to dominant power or supreme authority.<sup>41</sup> In a monarchy, supreme power resides in the "sovereign", or king. In modern democracies, sovereign power rests with the people and is exercised through representative bodies such as Congress or Parliament. The Sovereign is one who exercises power without limitation. The term carries implications of autonomy; to have sovereign power is to be beyond the power of others to interfere,<sup>42</sup> and thus Sovereignty is the power of a State to do everything necessary to govern itself, such as making, executing, and applying laws or making war and peace among many other functions, without the interference of outside sources or bodies.<sup>43</sup>

Dan Philpott<sup>44</sup> believes, Sovereignty has a core meaning of supreme authority within a territory. Even though history shows a variety of definitions, it has been come to be understood as a modern notion of political authority. Historical variants can be understood along 3 elements—the holder, the absoluteness, and the internal and external dimensions, of sovereignty in that the State is the political institution where sovereignty is embodied, and an accumulation of States forms a sovereign States' system. There are vastly differing views on the moral basis of sovereignty, fundamentally being between theories that assert that sovereignty is vested directly in the sovereign by divine or natural right and theories that assert it originates from the people.

Matteo Laruffa noted that:

*“Sovereignty resides in every public action and policy as the exercise of executive powers by institutions open to the participation of citizens to the decision-making processes”*<sup>45</sup>

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<sup>41</sup> ‘Jean Bodin, *Internet Encyclopaedia of Philosophy*, 2017 <http://www.iep.utm.edu/bodin/> on 5 August 2017.

<sup>42</sup> ‘Sovereignty’, *LII/ Legal Information Institute*, 2017 <https://www.law.cornell.edu/wex/sovereignty> on 16 August 2017.

<sup>43</sup> ‘Sovereignty | Politics’, *Encyclopaedia Britannica*, 2017 <https://www.britannica.com/topic/sovereignty> on 12 August 2017.

<sup>44</sup> ‘Daniel Philpott: Sovereignty’, *Plato.stanford.edu*, 2017 <https://plato.stanford.edu/entrie/sovereignty/> on 12 August 2017.

<sup>45</sup> Matteo L, ‘The European Integration and National Interests: from an intergovernmental model to a constitutional agreement’.

Jellineck rejected the idea that sovereignty was essentially to the State and suggested that it is a characteristic of the State by virtue, of which it cannot be legally bound except by its own, or limited by any power other than itself.<sup>46</sup>

Duguit believed it was the common power of the State, that it is the will of the nation organised in the State, and it is the right to give unconditional orders to all individuals in the territory of the State, furthering it as the supreme will of the State.<sup>47</sup>

Oppenheim said,

*“There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon”*.<sup>48</sup>

H. V. Evatt of the High Court of Australia Stated,

*“Sovereignty is neither a question of fact, nor a question of law, but a question that does not arise at all”*.<sup>49</sup>

Sovereignty has taken on a different meaning with the development of the principle of self-determination and the prohibition against the threat or use of force as jus cogens norms of modern international law.<sup>50</sup> The UN Charter, the Draft Declaration on Rights and Duties of States, and charters of regional international organizations express the view that all States are juridically equal and enjoy the same rights and duties based upon the fact of their existence as persons under international law.<sup>51</sup> The right of nations to determine their own political status

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<sup>46</sup> Sabine G, ‘The Concept of the State as Power’ 29 *the Philosophical Review* 4 (1920).

<sup>47</sup> Duguit L, *Traité de droit constitutionnel*, Fontemoing, Paris, 1921, 113.

<sup>48</sup> Oppenheim L, *International Law: a treatise*, Sir Arnold D. McNair (4ed), Longmans Green, London, 1928.

<sup>49</sup> Evatt H, *the Royal Prerogative*, Law Book Company, Sydney, 1987.

<sup>50</sup> Akweenda S, *Sovereignty in cases of Mandated Territories’ International law and the protection of Namibia’s territorial integrity*, Martinus Nijhoff Publishers, Leiden, Netherlands, 1997, 40.

<sup>51</sup> UNGA, *Draft Declaration on Rights and Duties of States*, UN A/RES/375 (6 December 1949).

and exercise permanent sovereignty within the limits of their territorial jurisdictions is widely recognized.<sup>52</sup>

In political science, sovereignty is usually defined as the most essential attribute of the State in the form of its complete self-sufficiency in the frames of a certain territory that is its supremacy in the domestic policy and independence in the foreign one.<sup>53</sup>

However, sovereignty is a term that is frequently misused. Up until the 19th century, the radicalized concept of a "standard of civilization" was routinely deployed to determine that certain people in the world were "uncivilized", and lacking organised societies.<sup>54</sup> That position was reflected and constituted in the notion that their "sovereignty" was either completely lacking, or at least of an inferior character when compared to that of "civilized" people.<sup>55</sup>

By the 19<sup>th</sup> century, the concept of sovereignty had been perfected by John Austin as a legal concept rather than a political one. He brought out the "Legal-Monist Theory of Sovereignty", called such due to envision of a single sovereign in the State (which could be an individual or even a body of persons) and its link as a legal concept.<sup>56</sup>

He believed sovereignty must reside in a 'determinate' person or body which is the ultimate source of power in the State; this power is unlimited and absolute and it can extract obedience from others but never render it to any other; this obedience is given voluntarily, and is undisturbed and uninterrupted, which is not necessary for all to accept, but only requires a

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<sup>52</sup> UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.

<sup>53</sup> Grinin LE, 'Globalization and Sovereignty: Why do States Abandon their Sovereign Prerogatives?' *1 Age of Globalization* (2008), 22- 32.

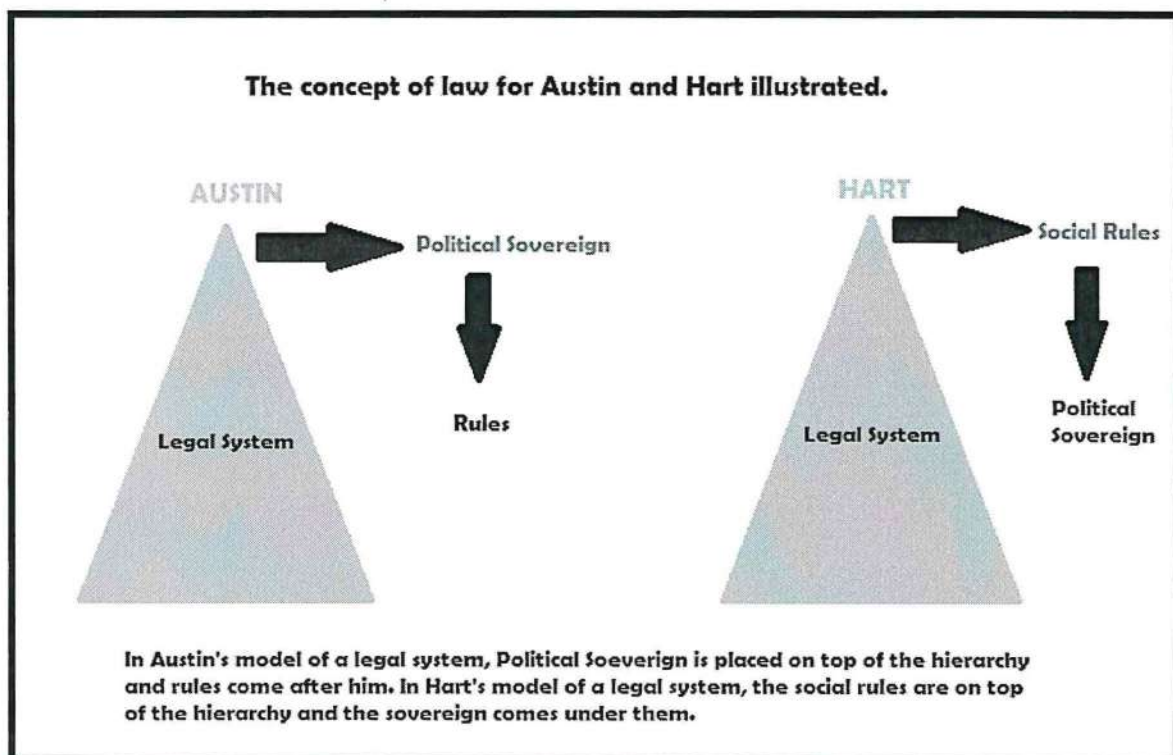
<sup>54</sup> Krasner SD, *Sovereignty: Organised Hypocrisy*, Princeton University Press, New Jersey, 1991.

<sup>55</sup> Wilde R, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, Loy L.A. Int'l & Comp. L. Rev, Los Angeles, 2009, 94.

<sup>56</sup> Dewey J, 'Austin's Theory of Sovereignty' *9 Political Science Quarterly* 1 (1894), 31-52.

majority, and that there is only one sovereign which is indivisible.<sup>57</sup> Austin also theorised, that laws are the commands of the Sovereign which is binding on all within the territory.<sup>58</sup>

A critic of Austin was H. L. A. Hart who brought out that Austin failed to distinguish between 'being obliged' to do something by a threat and 'having an obligation' to do it. The position of a person with legal obligations is different in kind than the position of someone faced with a gunman, but Austin runs the two together. In place of legal obligations consisting in threats of punishment, Hart proposed rules as a source of obligation, simply a rule tells you what you must do. The difference between Hart and Austin is that Austin identifies obligations with being threatened with sanctions while he believes an obligation is something that a rule requires you to do. As he sees it, what the law requires you to do is one thing while your motivation for complying with the law is something else.<sup>59</sup> As seen below



<sup>57</sup> Austin J, *The province of jurisprudence determined*, John Murray, London, 1861, "If a determinate human superior not in the habit of obedience to a like superior receives habitual obedience from the bulk of a given society that determinate superior is sovereign in that society and that society (including the superior) is a society political and independent".

<sup>58</sup> <https://plato.stanford.edu/entries/austin-john/> on 14 September 2017.

<sup>59</sup> Hart HLA, "Introduction" to *John Austin, The Province of Jurisprudence Determined*, H.L.A. Hart ed, Weidenfeld & Nicolson, London, 1954, vii-xxi.

Another point of criticism against Austin's theory is that it is inconsistent with the modern idea of popular sovereignty. In his fascination for the legal aspect, he loses sight of popular sovereignty which gives the ultimate source of authority to the people. Furthermore, while defining law as the command of the sovereign, he loses sight that in many countries, customary laws are supreme and they are not issued in the form of commands. But such laws influence the conduct of even despots to a great extent.<sup>60</sup>

Pluralism or the Pluralist theory of sovereignty emerged as a reaction against this Monist theory, rejecting and denying that sovereignty is the absolute and indivisible supreme power of the State. The Pluralist theory recognized the role of several associations in the society, formed by man in pursuance of varied interests. Such associations include religious organizations, cooperative societies and the like. At best, the State is one of these associations, standing side-by-side with them and not above them. The State is not distinct from these associations, but acts as mere coordinator in resolving conflicts, by not imposing its own will but harmonizing the interests of others so as to secure 'common good'.<sup>61</sup>

This is criticized by the thought that if sovereignty is divided among the various associations existing in the society, this division will lead to the destruction of sovereignty. As a result, there will be chaos and anarchy in the society. Furthermore, some groups in the society may be more organized and vocal than other groups and thus the interests of the dominant groups may prevail over the vulnerable sections of the society.<sup>62</sup>

In comparison, the Marxist view<sup>63</sup> is that it is intended to protect the interests of the dominant class of society; that the State shall wither away with the development of a classless society. Sovereignty of the State is limited by International Law which imposes a check on the absolute power of the State. They consider it as a "great stumbling block on the path of international progress." However, the accusation of a restraint of liberty and a lack of opportunity was derided by and opposed by John Rawls, who believed that a society in time develops on a

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<sup>60</sup> Laski HJ, *A Grammar of Politics*, Routledge, Abingdon, 2014.

<sup>61</sup> Ramp W, 'Paradoxes of sovereignty: Toward a Durkheimian analysis of monarchy' 14 *Journal of Classical Sociology* 2 (2014).

<sup>62</sup> Thompson K, *Emile Durkheim: Key Sociologists*, Psychology Press, 2002.

<sup>63</sup> Flower MR and Bunck JM, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, Penn State Press, Pennsylvania, 2010.

meritocratic model and asserted that the basic purpose of the society which is to assure its citizens of freedom and opportunity shall be sustained.<sup>64</sup>

## 2.2 History of Sovereignty

The term “*Sovereignty*” has been derived from the Latin word “*Superanus*” which means supreme or paramount. Although the term is modern concept, the idea goes back to Aristotle who spoke of the “*supreme power of the State*”.<sup>65</sup> Throughout the middle Ages, the Roman jurists and the civilians kept this idea in their mind and frequently used the terms “*Summa potestas*” and “*Plenitudo potestatis*” to designate the supreme power of the State.<sup>66</sup>

The terms “*Sovereign*” and “*Sovereignty*” were first used by the French jurists in the 15th century and later finding its way into English, Italian and German literature. The use of the actual term dates back to the publication of Bodin’s “*The Republic*” in 1576.<sup>67</sup>

This basic principle underlays the dominant Westphalian model of State foundation, which is said to be the 1<sup>st</sup> true act of sovereignty. Most western nations support the preferred term derived from Latin (through French *souveraineté*), but features, that are also embodied under the Chinese term *Tianxia*,<sup>68</sup> entail certain conditions traditionally seen, as moral imperatives for attainment and retention of sovereign rights and powers.

Westphalian sovereignty is the concept of nation-State sovereignty, based on territoriality and the absence of a role for external agents in domestic structures. It is an international system of States, multinational corporations, and organizations that began with the Peace of Westphalia in 1648.

According to Bryan Turner this system:

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<sup>64</sup> <http://www.iep.utm.edu/soc-cont/> on 17 September 2017.

<sup>65</sup> Aristotle, *Politics (Book IV Chapter II)*, Aeterna Press, London, 2015.

<sup>66</sup> Nootens G, *Popular Sovereignty in the West: Politics, Contention, and Ideas*, Routledge, Abingdon, 2013.

<sup>67</sup> Bodin J, *Les Six Livres de la République*, Du Puys, Paris, 1576, “Sovereignty...the supreme power of the State over citizens and subjects unrestrained by law”.

<sup>68</sup> Bateman CG, ‘Nicaea and Sovereignty: Constantine’s Council of Nicaea as an Important Crossroad in the Development of European State Sovereignty’, 54.

*"Made a more or less clear separation between religion and State, and recognised the right of princes 'to confessionalise' the State, that is, to determine the religious affiliation of their kingdoms on the pragmatic principle of cuius regio eius religio."*<sup>69</sup>

However this model, has increasingly been scrutinized from the "non-west" as a system imposed solely by Western Colonialism as the model made religion a subordinate to politics,<sup>70</sup> which caused dilemmas especially in the Islamic world. It does not fit in the Islamic world because concepts such as "separation of church and State" and "individual conscience" are not recognised in the Islamic religion as social systems.

The terms "country", "nation", and "State" are often used as if they were synonymous; but in stricter usage they can be distinguished; Country denotes a region of land defined by geographical features or political boundaries, nation denotes a people who are believed to or deemed to share common customs, religion, language, origins, ancestry or history. State refers to the set of governing and supportive institutions that have sovereignty over a definite territory and population, sovereign states are legal persons.<sup>71</sup>

However, the adjectives national and international are frequently used to refer to matters pertaining to what are strictly sovereign States, as in national capital and international law.

## 2.3 Types of Sovereignty

There are four elements or characteristics of a State i.e. population, territory, government and sovereignty, hence the State cannot be imagined without sovereignty. It is sovereignty, which not only distinguishes the State from other associations, but also gives it superiority over them. The precise and definite location of sovereignty, however, is not an easy matter. This problem has given rise to distinction between various types of sovereignty namely: legal and political sovereignty; titular and actual sovereignty; de jure and de facto sovereignty and popular sovereignty;<sup>72</sup>

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<sup>69</sup> Turner B, 'Islam, Religious Revival and the Sovereign State' 97 *the Muslim World* 3 (2007), 405–418.

<sup>70</sup> Turner B, 'Islam, Religious Revival and the Sovereign State' 410.

<sup>71</sup> <http://study.com/academy/lesson/the-difference-between-countries-nations-states-and-governments.html> on 9th August 2017.

<sup>72</sup> Biersteker T and Weber C 'State Sovereignty as Social Construct' *Cambridge Studies in International Relations*, Cambridge University Press (1996) 46.

### 2.3.1 Titular vs Actual sovereignty:

When sovereign powers are vested theoretically, apparently, or in black and white in an individual or State institution, it is titular or nominal sovereignty. In such cases real State powers belongs to some other person or institution, this type appeared because of the parliamentary form of government. When the State sovereignty is practically exercised by an individual or institution, it is called actual sovereignty. The best example of this is England where the King or Queen is the Titular sovereign and parliament is the actual sovereign, i.e. although the State powers are theoretically in the hands of the British Queen, in practice these powers are exercised by the British parliament. Another example of this type is Prime Minister of India and Prime Minister of Pakistan under original Constitution of 1973.<sup>73</sup>

### 2.3.2 Legal vs Political sovereignty;

Sovereign powers of law making vested in an individual or institution by the constitution or fundamental law of the land is legal sovereignty. This type of sovereign is provided constitutional safeguards and all must obey his laws. The laws made by this type of sovereign are final and cannot be question by any one. For example, in Great Britain Parliament is constitutionally empowered to exercise State sovereign powers. Many political thinkers, scientists and writers reject, the legal concept of sovereignty as too narrow and misleading. Dicey, one of them, has said, "Behind the legal sovereignty there is a political sovereignty before whom the legal sovereignty must bow."<sup>74</sup> This is the political sovereign. In democracies, the legal sovereign receives its authority from the electorate, whatever be the basis of the right of vote, and is answerable to it for the exercise of its powers. Legal sovereign is subject to be changed by the mandate of the electorate at regular intervals.<sup>75</sup> Even during the term of Parliament, in the cabinet system of government, legislature may be dissolved and fresh mandate from the electorate sought. For example, in a State where the electorates elect political institutions, their electorates are sovereignty. In Kenya, the idea of separation of powers and tripartite government along with the constitution shows that the citizens are the sovereign<sup>76</sup> and they who elect the president, Members of Parliament<sup>77</sup> etc. will be. It can be noted then that

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<sup>73</sup> The Constitution (Thirty-First Amendment) Act, Laws of India, 1973.

<sup>74</sup> Dicey AV, *Introduction to the Study of the Law of the Constitution*, Macmillan and Co., Limited, London, 1982.

<sup>75</sup> Article 101 & 136, *Constitution of Kenya* (2010).

<sup>76</sup> Article 1, *Constitution of Kenya* (2010).

<sup>77</sup> Preamble, Article 97 & 101, *Constitution of Kenya* (2010).

parliament's task when legislating and making new laws is to do so, while keeping in view the demands and needs of the people of the country.

### 2.3.3 Dejure vs De-Facto sovereignty;

The dejure sovereign is the lawful or constitutional sovereign of the State and recognized by the courts. If an individual or institutions exercise the State supreme powers completely and permanently, it is dejure sovereignty. States that have dejure sovereignty are recognized by the international law. The State power that is temporarily exercised by the individuals or institutions is de-facto sovereignty. States where governments are instable or unable to conduct international affairs are never permanently recognized by the other States internationally. Such a State has de-facto sovereignty. For example, General Pervaiz Musharraf got powers through military coup. His government was initially de-facto, but through constitutional amendment and restoration of the Constitution, he became the President of Pakistan and hence dejure sovereign.<sup>78</sup>

### 2.3.4 Popular sovereignty:

If only the voters are sovereign, it is political sovereignty. If all the citizens irrespective of any discrimination, are given equal opportunities to play their role in State activities, it is known as popular sovereignty. A good example of this, is the direct democracy in the Greek City State of 5th century B.C. There, all citizens were given equal opportunities, in order to play a due role in the political activities.

## 2.4 Characteristics of sovereignty<sup>79</sup>

### 2.4.1 Permanence:

Permanence is the chief characteristic of sovereignty. Sovereignty lasts as long as an independent State lasts. The death of the king, the overthrow of the government and the addition of power does not lead to the destruction of sovereignty. It should be kept in mind the basic fact that the king or the ruler exercises sovereign power on behalf of the State and, therefore, sovereignty will remain as long as there is a State.

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<sup>78</sup> <https://www.britannica.com/biography/Pervez-Musharraf> on 12th August 2017.

<sup>79</sup> Kapur AC, *Principles of Political Science*, S Chand & Company, India, 1987.

Sovereignty does not cease with the death or temporary dispossession of a particular bearer or the re-organisation of the State but shifts, immediately to a new bearer, as the centre of gravity shifts from one part of physical body to another when it undergoes external change.

#### 2.4.2 Exclusiveness:

There cannot be two sovereigns, in one independent State and if the two sovereigns exist in a State, the unity of that State will be destroyed. This also applies to a sovereign State within an existing sovereign State, it cannot exist.

#### 2.4.3 All Comprehensiveness:

The State is all comprehensive and the sovereign power is universally applicable. Every individual and every association of individual is subject to the sovereignty of the State. No association or group of individuals, however, rich or powerful it may be, can resist or disobey the sovereign authority.

Sovereignty makes no exception and grants no exemption to anyone, except exemptions granted in the case of foreign embassies and diplomatic representatives of foreign countries on the reciprocal basis. This does not in any way restrict the sovereignty of the State in the legal sense. The State can abolish and withdraw the diplomatic privileges granted to foreigners.

#### 2.4.4 Inalienability:

Inalienability is another characteristic of sovereignty, in that the State cannot part with its sovereignty. In other words, the sovereign does not remain the sovereign or the sovereign State, if he, she or the State transfers his, hers or its sovereignty to any other person or any other State.

Sovereignty is the life and soul of the State and it cannot be alienated without destroying the State itself. As Lieber has very aptly remarked in this connection: "Sovereignty can no more be alienated than a tree can alienate its right to sprout or a man can transfer his life or personality to another without self-destruction".<sup>80</sup>

#### 2.4.5 Imperscriptibility:

That is, if the sovereign does not exercise his sovereignty for a certain period of time, it does not lead to the destruction of sovereignty. This implies that sovereignty can neither be destroyed nor lost if it has not been exercised for a long period. People may not have exercised

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<sup>80</sup> Lieber F, *Legal and Political Hermeneutics*, Nabu Press, Charleston, 1839.

sovereignty for some time due to control by a foreign power, but non-exercise of sovereign power does not put an end to sovereignty itself.

#### 2.4.6 Indivisibility:

Indivisibility is the life-blood of sovereignty. Sovereignty cannot be divided, American Statesman Calhoun has declared, “Sovereignty is an entire thing; to divide it is to destroy it. It is the supreme power in a State and we might just well divide it is to destroy it. It is the supreme power in a State and we might just well speak of half square or half a triangle as half a sovereignty”.<sup>81</sup>

#### 2.4.7 Absoluteness:

Sovereignty is absolute and unlimited. The sovereign is entitled to do whatsoever he likes, and sovereignty is subject to none. This means that neither within the State nor outside it, is there any power which is superior to the sovereign. The will of the sovereign reigns supreme in the State, his, hers or its obedience to customs of the State or international law is based on his, hers or its own free will.

#### 2.4.8 Originality:

The sovereign wields power by virtue of his own right and not by virtue of anybody’s mercy. Sovereignty cannot be manufactured, and the dependence on another for supreme power cannot make a State a sovereign one.

### 2.5 Two Aspects of Sovereignty:

There are two aspects of sovereignty: internal sovereignty and external sovereignty.

Internal Sovereignty means some persons, assembly of group of persons in every independent State have the final legal authority to command and enforce obedience. This sovereignty exercises its absolute authority over all individuals or associations of the individuals within the State. Professor Harold Laski has remarked that “*It issues orders to all men and all associations*

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<sup>81</sup> Calhoun JC, *A Discourse on the Constitution and Government of the United States, in Union and Liberty*, Steam Press, South Carolina, 1851, 105.

*within that area; it receives orders from none of them. It will be subject to no legal limitation of any kind. What it proposes is right by mere announcement of intention”.*<sup>82</sup>

External sovereignty that the State is subject to no other authority and is independent of any compulsion on the part of other States. Every independent State reserves the authority to renounce trade treaties and to enter into military agreements. Each State is independent of other States and every independent State is at liberty to determine its foreign policy and to join any bloc of power it likes. Any other State does not reserve any right to interfere with the external matter of an independent State. Thus, by external sovereignty it would mean that every State is independent of other States.

In other words, external sovereignty means national freedom. Professor Laski has observed that, *“The modern State is a sovereign State. It is, therefore, independent in the face of other communities. It may infuse its will towards them with a substance which need not be affected by the will of any external power”.*<sup>83</sup>

This Statement makes it very clear that the State possesses both external and internal sovereignty.

State sovereignty is sometimes viewed synonymously with independence, however, sovereignty can be transferred as a legal right whereas independence cannot. A State can achieve de facto independence long after acquiring sovereignty, such as in the case of Cambodia, Laos and Vietnam.<sup>84</sup> Additionally, independence can also be suspended when an entire region becomes subject to an occupation such as when Iraq had been overrun by the forces who took part in the Iraq War of 2003.

Iraq had not been annexed by any country, so its sovereignty during this period has not and is not been contested by any State including those present on the territory. Alternatively, independence can be lost completely when sovereignty itself becomes the subject of dispute. The pre-World War II administrations of Latvia, Lithuania and Estonia maintained an exile existence (and considerable international recognition) whilst the entities were annexed by the

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<sup>82</sup> Morefield J, ‘States Are Not People: Harold Laski on Unsettling Sovereignty, Rediscovering Democracy’ 58 *Political Research Quarterly*, (2005), 659-699.

<sup>83</sup> Morefield J, ‘States Are Not People: Harold Laski on Unsettling Sovereignty, Rediscovering Democracy’ 665.

<sup>84</sup> Talmon S, *Recognition of Governments in International Law*, Oxford Monographs in International Law Series, Oxford University Press, London, 1998, 50.

Soviet Union and governed locally by their pro-Soviet functionaries. When in 1991 Latvia, Lithuania and Estonia re-enacted independence, it was done so on the basis of continuity directly from the pre-Soviet republics.<sup>85</sup> Another complicated sovereignty scenario can arise when regime itself is the subject of dispute. In the case of Poland, the People's Republic of Poland which governed Poland from 1945 to 1989 is now seen to have been an illegal entity by the modern Polish administration. The post-1989 Polish State claims direct continuity from the Second Polish Republic which ended in 1939. For other reasons however, Poland maintains its communist-era outline as opposed to its pre-World War II shape which included areas now in Belarus, Czech Republic, Lithuania, Slovakia and Ukraine but did not include some of its western regions that were then in Germany.<sup>86</sup>

At the opposite end of the scale, there is no dispute regarding the self-governance of certain self-proclaimed States such as Republic of Abkhazia, Republic of South Ossetia or the Republic of Kosovo since their governments neither answer to a bigger State, nor is their governance subjected to supervision. The sovereignty (i.e. legal right to govern) however, is disputed in all three cases as the first two entities are claimed by Georgia and the third by Serbia.<sup>87</sup>

## 2.6 Conclusion

The concept of sovereignty, once relatively uncontested, has recently become a major bone of contention within international law and international relations theory. Rather than presupposing that the concept of sovereignty has a timeless or universal meaning, more recent scholars have focused on the changing the meaning of this concept across a variety of historical and political contexts.

Often, however, the term sovereignty is invoked in a context or manner designed to avoid and prevent analysis, sometimes with an advocate's intent to fend off criticism or justifications for

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<sup>85</sup> Mälksoo L, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR*, M. Nijhoff Publishers, Leiden, Netherlands, 2003, 193.

<sup>86</sup> Matteo L, 'The European Integration and National Interests: from an intergovernmental model to a constitutional agreement'.

<sup>87</sup> Heuser B, 'Sovereignty, self-determination and security: new world orders in the 20th century', in Hashmi S, *State Sovereignty: Change and Persistence in International Relations*, Pennsylvania University Press, Philadelphia, 1997.

international infringements on the activities of a State or its internal stakeholders. In addition to the 'power monopoly' function, sovereignty also plays other important roles. For example, the concept is central to the idea of 'equality of nations', which can be abused and, at times, is dysfunctional and unrealistic, such as in inducing consensus as a way to avoid the 'one nation, one vote' approach to decision making in international institutions.

This approach can sometimes seriously misdirect actions of those institutions and, can often lead to paralysis, damaging appropriate coordination and other decision making at the international level. The concept of equality of nations is linked to sovereignty because it has fostered the idea that there is no higher power than the State, so its 'sovereignty' negates the idea that there is a higher power, whether foreign or international (unless consented to by the State).

Sovereignty also plays a role in defining the status and rights of States and their officials. Thus, we recognize sovereign immunity and the consequential immunity for various purposes of the officials of a State. Similarly, sovereignty implies a right against interference or intervention by any foreign (or international) power, this can also play an antidemocratic role in enforcing extravagant concepts of special privilege of government officials. Therefore, one can easily see the logical connection between the sovereignty concepts and the very foundations and sources of international law. If sovereignty implies that there is no higher power than the State, then it is argued that no international law norm is valid unless the State has somehow consented to it, which it would seem that they do so in treaties. This almost always implies, the legitimate consent of the States that accepted them, yet there is no form of persecution or punishment when treaties are breached.

National government leaders and politicians, as well as special interest representatives, too often invoke the term sovereignty to forestall needed debate. Likewise, international elites often assume that "international is better" (thus downplaying the importance of sovereignty) and this is not always the better approach.

## 3 Chapter 3: Responsibility to Protect

### 3.1 Introduction

The tragic events in the 1990s and the first decade of the 21<sup>st</sup> century in Darfur, Kosovo, Rwanda, Liberia, Srebrenica and Sierra Leone among many others have triggered a fundamental rethinking of the role and responsibility of the international community in times of a crisis. In these and many other cases the international community, and for mostly the security council, failed to uphold their promise and aspiration set after WWII, to prevent genocide, war crimes, crimes against humanity and other mass atrocities. With the over the head truth, the simple lack of a strong action and response in the time of need, led to the failure of humanity as a whole, in various parts of the world.

Without the strong political will and support, plausible actions simply did not take place on time and thus millions of lives were lost, due to either no response or one that was simply just too late.

The 1990s was the decade of truth for the international community in confronting genocide, ethnic cleansing, and major crimes against humanity and war crimes. After decades of political leaders and policymakers saying “never again” to another Holocaust or Cambodia, they failed the test miserably when it came to a series of unfolding catastrophes in Africa and the Balkans: responding either not at all, with too little too late, or with insufficient UN authority. The debate was always about the pros and cons of coercive military intervention – and an apparently unbridgeable gulf opened up between those, mainly from the global North, arguing for a “right of humanitarian intervention”, and those, mainly from the global South, insisting that, whatever the nature or scale of human rights horrors occurring behind state walls, national sovereignty was sacrosanct and coercive intervention impermissible.<sup>88</sup>

This was the climate that led UN Secretary-General Kofi Annan, in his 2000 Millennium Report, to make his famous challenge: “If humanitarian intervention is indeed an unacceptable assault on state 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

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<sup>88</sup> Tharoor S and Daws S, ‘Humanitarian Intervention: Getting Past the Reefs’ 18 *World Policy Journal* (2001).

humanity?”<sup>89</sup> And it was this challenge that stimulated the Canadian Government to establish the ICISS, which initiated in 2001, the new concept of “the responsibility to protect” (R2P).<sup>90</sup>

### 3.2 The Responsibility to Protect conceptualization

The R2P, at first glance, encompasses a radical and controversial new approach in international relations and international law. The basic definition of the concept embodies two interlinking elements. The first of these is that sovereignty implies responsibility in the state apparatus to ensure the protection of all persons residing within the territory of the state from genocide, crimes against humanity, ethnic cleansing and war crimes. The second element of the doctrine asserts an international responsibility upon all states to act when the population of another state is suffering serious harm from the international crimes outlined above – as a result of internal war, insurgency, repression or state failure – and the sovereign state concerned is unwilling or unable to halt or avert the suffering.

The novel feature of this concept is in the second element: the idea of an obligation of a state not only to protect the welfare and human rights of persons within its borders but as a member of the international community of states, to protect humanity as a whole.

The concept of R2P was comprehensively formulated in 2001. Forceful intervention for humanitarian purposes has been problematic due to the principles of State sovereignty and non-intervention. The traditional conceptualisation of sovereignty was an effective shield for a State in respect of its domestic affairs, despite its misconduct or atrocities towards its citizenry.<sup>91</sup> As a way of resolving intervention difficulties associated with the traditional approach, the Commission used a rhetorical strategy by conceiving sovereignty as a responsibility rather than control.<sup>92</sup> The Commission also sought to address the dilemmas and undesirability of intervention for humanitarian purposes by changing the perspective of action from that of a right to intervene to the more acceptable and less controversial responsibility to

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<sup>89</sup> Millennium Report of the Secretary General, *We the peoples: role of the United Nations in the 21<sup>st</sup> century*.

<sup>90</sup> ICISS, *the Responsibility to Protect Report*.

<sup>91</sup> Sarkin J, ‘The Role of the United Nations, the African Union and Africa’s Sub-Regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect’ 53 *Journal of African Law* (2009) 4.

<sup>92</sup> Stahn C, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ 101 *American Journal of International Law* 99 (2007) 102.

protect.<sup>93</sup> Intervention for humanitarian purposes under the ICISS Report was premised on a continuum of obligations that extend beyond coercive action. It included responsibility to prevent and responsibility to rebuild.<sup>94</sup>

The concept was a political commitment unanimously adopted by all members of the UNGA at the 2005 World Summit and articulated in paragraphs 138-139 of the 2005 World Summit Outcome Document:

*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.*

*139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to 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.*

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<sup>93</sup> ICISS, *the Responsibility to Protect Report*.

<sup>94</sup> McClean E, 'The Responsibility to Protect: The Role of International Human Rights Law' 13 *Journal of Conflict and Security Law* (2008) 123, 139.

The above paragraphs serve as the basis for the inter-governmental agreement to the R2P. The UNGA further adopted this into resolution 60/1 of 2005.<sup>95</sup> The body subsequently committed to continue consideration of the R2P with its Resolution 308.<sup>96</sup> The UN Security Council first reaffirmed the R2P in Resolution 1674 on the protection of civilians in armed conflict, recalling in particular paragraphs of the Summit Outcome regarding the R2P populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>97</sup>

The original report and conceptualization of the concept, included various intervention reasons such as natural disasters, however Heads of State and Government at the 2005 World Summit refined the scope to the four crimes mentioned, namely *genocide, war crimes, ethnic cleansing and crimes against humanity*, commonly referred to as 'atrocities crimes' or 'mass atrocities crimes'.

Although much has been done for this concept to become a reality, it is important to note it is still a political idea and not legally binding, and as such the UN cannot implement or act on such a doctrine without the consent of the States it serves. The failings thus, are not the UNs but the States in the Security Council who do not implement R2P in its truest form and within reasonable time. These failings have also been blamed on peacekeepers unable or unwilling to act,<sup>98</sup> as well as different organisations not working well together.<sup>99</sup>

As per the Secretary-General's 2009 Report, *Implementing the Responsibility to Protect*,<sup>100</sup>

*"The responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity...To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility."*

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<sup>95</sup> UNGA, *2005 World Summit Outcome: Follow-up to the outcome of the Millennium Summit*.

<sup>96</sup> UNGA, *The responsibility to protect*, UN A/Res/63/308 (7 October 2009).

<sup>97</sup> UNSC 1674 (2006).

<sup>98</sup> *The Netherlands v. Nuhanović*, Supreme Court of Netherlands, No. 12/03324, [2013].

<sup>99</sup> *Kadi v. Council of the European Union and Commission of the European Communities*, Court of Justice of the European Union, 3 September 2008, C-402/05 P and C-415/05 P.

<sup>100</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Implementing the Responsibility to Protect*, 2009, UN Doc A/63/677.

The focused scope is part of what the UN Secretary-General, Ban Ki-Moon, has termed a "narrow but deep approach" to R2P: A narrow application to four crimes, but a deep approach to response, employing the wide array of prevention and protection instruments available to Member States, the UN system, regional and sub-regional organizations and civil society.

In the same report, he further emphasizes the three important pillars that R2P is based on:

- i) Pillar I: The protection responsibilities of the state;
- ii) Pillar II: International assistance and capacity-building;
- iii) Pillar III: Timely and decisive response.

Further reminding that the 3 are not sequential but of equal importance and thus;

*"Without all three, the concept would be incomplete. All three pillars must be implemented in a manner fully consistent with the purposes, principles, and provisions of the Charter."<sup>101</sup>*

### **3.3 How does it differ from Humanitarian Intervention?**

R2P is a new concept that gives an entirely new dimension to the protection of human lives and dignity. It has a much larger view than simple intervention, primarily the 1<sup>st</sup> step being prevention of atrocities. It is more sensible to say that intervention is a part of R2P, however it is only a small part. R2P is a larger, it recognises the need to prevent before protect and thus furthers provides for a large array of tools and policies that can stop mass crimes before they even occur.

The R2P differs from humanitarian intervention in four ways.

- 1) Humanitarian intervention only refers to the use of military force, whereas R2P is first and foremost a preventive principle that emphasizes a range of measures to stem the risk of genocide, war crimes, ethnic cleansing or crimes against humanity before the crimes are threatened or occur. The use of force may only be carried out as a measure last resort, when all other non-coercive measures have failed, and only when it is authorized by the UN Security Council. This is in contrast to the principle of 'humanitarian intervention', which allows for the use of force as a humanitarian imperative without the authorization of such bodies like the Security Council.<sup>102</sup>

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<sup>101</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Responsibility to Protect: Timely and decisive response*, 2012, UN Doc A/66/874-S/2012/578.

<sup>102</sup> Adams S, Global Centre for the Responsibility to Protect, *Libya and the Responsibility to Protect*, 2012.

- 2) As a principle, and although it is a political concept, the R2P is rooted firmly in existing international resolutions provided by the UNGA and the UNSC as well as the AU's constitutive act, especially in resolutions dealing with the law relating to sovereignty, peace and security, human rights, and armed conflict.<sup>103</sup>
- 3) While humanitarian interventions have in the past been justified in the context of varying situations, R2P focuses only on the four mass atrocity crimes: genocide,<sup>104</sup> war crimes,<sup>105</sup> crimes against humanity<sup>106</sup> and ethnic cleansing. The first three crimes are clearly defined in international law and codified in the Rome Statute that established the International Criminal Court. Ethnic cleansing is not a crime defined under international law, but has been defined by the UN as "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas".<sup>107</sup> This isn't a right served to just the nationals of the State but also foreigners living within the territory of the State. Protection from these crimes is *erga omnes*, i.e. rights owed to all.<sup>108</sup>
- 4) Humanitarian intervention assumes a "right to intervene", the R2P is based on a "responsibility to protect". Humanitarian intervention and the R2P both agree on the fact that sovereignty is not absolute. However, the R2P doctrine shifts away from state-centred motivations to the interests of victims by focusing not on the right of states to intervene but on a responsibility to protect populations at risk.<sup>109</sup>

### 3.4 R2P in practice

The international community and the UN in particular, as deemed by the Charter of the UN, is deemed to have a residual responsibility to intervene, through collective action to protect the

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<sup>103</sup> Bellamy A, Davis S and Glanville L, *The responsibility to Protect and International Law*, Brill, Netherlands, 2010.

<sup>104</sup> Article 6, *Rome Statute of the International Criminal Court*, UNTS 2187.

<sup>105</sup> Article 8, *Rome Statute of the International Criminal Court*.

<sup>106</sup> Article 7, *Rome Statute of the International Criminal Court*.

<sup>107</sup> *Letter to the President of the Security Council*, UNSC, 1994, UN doc S/1994/674.

<sup>108</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, para. 33.

<sup>109</sup> Haider H, UK: GSDRC, University of Birmingham, *International legal frameworks for humanitarian action: Topic guide*, 2013.

populations, where a State is either the author of such atrocities or is manifestly unable to protect its own population.<sup>110</sup> Although it should be noted that the UN is not mandated to succeed in complete prevention of the atrocities, it is however tasked to use all means necessary to prevent the beginning or continuation of the crimes. Although peaceful means of intervention may be involved, it includes enforcement action in a timely and decisive manner where other means fail or are inadequate.<sup>111</sup> In the R2P discourse, execution of enforcement action is preserved within the UN collective security, meaning authorization by the Security Council.<sup>112</sup> In addition, intervention may be undertaken by regional organisations such as the African Union (AU), including enforcement action where necessary.<sup>113</sup>

#### 3.4.1 Kenya 2007/08

Kenya was swept by a wave of ethnic violence that left thousands dead and even more displaced, triggered by the disputed elections in 2007, between December 2007 and January 2008. External intervention was instant with the French Foreign and European Affairs Minister Bernard Kouchner making a plea to the UN Security Council in January 2008 to react "in the name of the responsibility to protect" before Kenya plunged into a lethal ethnic conflict. The former UN Secretary-General Ban Ki-moon also issued a statement expressing concern for the violence, calling for the population to remain calm and for Kenyan security forces to show restraint. On 10 January 2008, Kofi Annan was accepted by both sides of the conflict as the AU Chief Mediator. Mediation efforts led to the signing of a power-sharing agreement between both parties in February 2008.<sup>114</sup>

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<sup>110</sup> HLP, *A More Secure World, Our Scared Responsibility*, supra note. 8, para. 203.

<sup>111</sup> UNGA, *2005 World Summit Outcome Document: Follow-up to the outcome of the Millennium Summit*, supra note 10, para. 139.

<sup>112</sup> HLP, *A More Secure World, Our Scared Responsibility*, supra note 9, para. 203.

<sup>113</sup> UNGA, *2005 World Summit Outcome Document: Follow-up to the outcome of the Millennium Summit*; "Regional organization's role in the maintenance of international peace and security is recognized in Chapter VIII of the UN Charter. Under Article 53(1) of the Charter, regional organizations may undertake enforcement action but with the authorization of the Security Council."

<sup>114</sup> 'Ballots to Bullets: Organized Political Violence and Kenya's Crisis of governance: The Response of International Actors' *Human Rights Watch* <https://www.hrw.org/reports/2008/kenya0308/10.htm> on 20 September 2017.

### 3.4.2 Ivory Coast 2011

In March 2011, in response to the escalating post-election violence against the population of Ivory Coast, the Security Council unanimously adopted resolution 1975 condemning the gross human rights violations committed by supporters of both ex-President Laurent Gbagbo and President Ouattara. The resolution cited "the primary responsibility of each State to protect civilians", called for the immediate transfer of power to President Ouattara, the victor in the elections, and reaffirmed that the UN Operation in Ivory Coast (UNOCI) could use "all necessary means to protect life and property." On 4 April 2011, in an effort to protect the people of Ivory Coast from further atrocities, UNOCI began a military operation, and President Gbagbo's hold on power ended on 11 April when he was arrested by President Ouattara's forces.<sup>115</sup>

### 3.4.3 Libya 2011

Following widespread and systematic attacks against the civilian population by the Libyan regime, and language used by Muammar Gaddafi that reminded the international community of the genocide in Rwanda, the Security Council unanimously adopted resolution 1970, making explicit reference to the R2P. Deploring what it called "the gross and systematic violation of human rights" in strife-torn Libya, the Security Council demanded an end to the violence, "recalling the Libyan authorities' responsibility to protect its population", and imposed a series of international sanctions, further adopting resolution 1973, which declared use of all necessary measures in order to stop the regime, making it the first time military intervention was cited with R2P.<sup>116</sup>

## 3.5 The African Union & Article 4(h) of the Constitutive Act.

Although many believe that the implementation of R2P began with the UN and is a western conceptualization, it was, in fact, African countries and the AU that pioneered it into reality, not only in the four mass atrocity crimes but other disasters and crises as well.

In 2003 the AU lead peacekeeping mission in Burundi which was successfully implemented before the formal endorsement of the R2P concept by the UNGA in 2005. Despite this not

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<sup>115</sup> <https://www.un.org/en/peacekeeping/missions/unoci/elections.html> on 21 September 2017.

<sup>116</sup> 'Crisis in Libya' *Responsibility to protect Website* <http://responsibilitytoprotect.org/index.php/crises/crisis-in-libya#violence> on 21 September 2017.

being a direct case of implementation of the emerging norm by the AU, it is a significant example in examining the AU's following practice, especially in demonstrating the Union's intervention capacity. It is an important case that is considered while making a balanced analysis on whether the AU has effectively institutionalized the concept of responsible sovereignty, which is the central concern. Thus, as Evans observes, the Burundi intervention is a perfect example of how the responsibility to protect concept can function.<sup>117</sup>

The African Union, in 2000, sat down to include, Article 4H, to the Union's constitutive act, otherwise known as the right to intervene which declares

*"the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".<sup>118</sup>*

Article 4(h), provides for a right to intervene in grave circumstances or 'a serious threat to legitimate order' in a member state 'to restore peace and stability to the member state upon recommendation of the Peace and Security Council',<sup>119</sup> leading to the departure of the OAU's basic principle of non-intervention in internal affairs of states.<sup>120</sup>

It was against a background of a number of failures of member states to solve disputes peacefully, amicably, and amongst themselves such as in Somalia, DRC, Rwanda, Liberia and Sierra Leone as well as Ivory Coast and Burundi that led to African leader including the right to intervene in the new constitutive act, it could also be attributed to the paralysis of states due to the strict adherence to the principle of non-intervention.<sup>121</sup> The principle has now been reformulated so that it does not apply to actions applied collectively by member states, but not to sole interference by a single state in the internal affairs of another member state.<sup>122</sup>

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<sup>117</sup> Evans G, 'The Responsibility to Protect: An Idea Whose Time Has Come...and Gone?' 22 *International Relations* (2008).

<sup>118</sup> Article 4 (h), *Constitutive act of the African Union*, 11 July 2000.

<sup>119</sup> Article 4, *Protocol on Amendment to the Constitutive Act of the African Union*, 11 July 2003.

<sup>120</sup> Article 3 (2), *Charter of the Organization of African Unity*, 25 May 1963.

<sup>121</sup> 'Ben Kioko: The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' *International committee of the Red Cross*, 31 December 2003 <https://www.icrc.org/eng/resources/documents/article/other/5wnjdl.htm> on 30 September 2017.

<sup>122</sup> Article 4 (g), *Constitutive act of the African Union*.

The conceptual problem of this is the ‘legitimate order’, which is not easily defined in a continent, that since independence has a large number of coups, civil wars, and dictatorships, thus being too elusive and fragile to actually be used to exercise the right to intervene. It required to be further developed and crystallised, before being fully implemented.

It would be more sound for the delimitation of the scope into specific crimes, such as genocide, war crimes etc. which are defined and established in international law. This is further established by the Peace and Security Council under article 7(e) giving them the power to,<sup>123</sup>

*“recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instrument”*

The wording of 4 (h) limits the circumstances that can justify the intervention by member states to 3 specific situation, thus if those 3 did not exist or in the opinion of the Peace and Security Council were not considered, then the union cannot intervene, unless asked to do so as seen in article 4 (j).<sup>124</sup>

This was seen in the Gambia in early 2017, where the ECOWAS Mission in The Gambia (ECOMIG), saw the intervention of a number of West African states in the Gambia to resolve a breakdown of internal order in the government of the Gambia due to a constitutional crisis in a dispute over the country's presidency. The intervention was based upon the newly elected president of Gambia Adama Barrow's request.<sup>125</sup>

Otherwise under article 13 of the Peace and Security Council Protocol:<sup>126</sup>

*"In order to enable the Peace and Security Council to perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to Article 4(h) and (G) of the Constitutive Act, an African standby force shall be established."*

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<sup>123</sup> Article 7 (e), *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002

<sup>124</sup> Article 4 (j), *Constitutive Act of the African Union*.

<sup>125</sup> ‘Paul Williams: A New African Model of Coercion? Assessing the ECOWAS Mission in the Gambia’ *IPI Global Observatory* <https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union/> on 30 September 2017.

<sup>126</sup> Article 13, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

This implies that intervention is used in the context of the AU in the sense of coercive action involving armed force in a Member State without the consent of the government of that State, which can be either;<sup>127</sup>

- 1) Political, Economic or other sanctions
- 2) International criminal prosecution
- 3) Military intervention for humanitarian ends

Although the AU focuses mainly on the latter, leaving the upper 2 aside, in so far as article 4(h) is concerned. This contravenes the UN charters principles.

The UN Charter prohibits the threat or use of force by States individually or collectively against the territorial integrity or political independence of other States.<sup>128</sup> There are only two exceptions to this rule.

- 1) The right of individual or collective self-defence in case of an armed attack against a Member of the United Nations.<sup>129</sup>
- 2) The system of collective security, under which the Security Council may take military enforcement action to maintain or restore international peace and security. In the exercise of this prerogative, the Security Council may utilize regional organizations for enforcement action under its authority. However, the Charter prohibits such regional organization from undertaking enforcement action at their own initiative and without the authorization of the Security Council.<sup>130</sup>

The authority and competence of regional arrangements for dealing with matters relating to the maintenance of international peace and security are clearly recognized in article 52(1)<sup>131</sup> but is subject to two conditions.

- 1) Matters dealt with by the regional arrangements with regard to the maintenance of peace and security must be “appropriate for regional action”, and
- 2) Such arrangements themselves as well as their activities must be “consistent with the purposes and principles of the United Nations”.

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<sup>127</sup> ICISS, *the Responsibility to Protect Report*.

<sup>128</sup> Article 2 (4), *Charter of the United Nations*.

<sup>129</sup> Article 51, *Charter of the United Nations*.

<sup>130</sup> Article 53 (1), *Charter of the United Nations*.

<sup>131</sup> Article 52 (1), *Charter of the United Nations*.

This concept has evolved over the years with the UN, as it further considers mass atrocity crimes within borders as a threat to international peace and security, as well as the need to protect human security within states.<sup>132</sup> As well as its use of regional organizations and coalitions of states to implement Chapter VII<sup>133</sup> enforcement measures.<sup>134</sup> Thus it can be argued that this shows the UN's willingness and approval of regional actions, including those undertaken by the AU, for dealing with internal wars and crimes.

The willingness of the AU to work with the UN and the Security Council as well as stay within the principles and purposes of the UN Charter can be seen in Article 17 of the Peace and Security Protocol, which established the AU's inclination to not only cooperate but recognize that the primary responsibility of maintenance of peace on the African continent is theirs and the rest of the worlds being the Security Council's.<sup>135</sup> The AU will not embark on an enforcement action without the blessing or the support of the UN organs, although upon failure of action from the UN or the Security Council, the AU still empowers itself to meet its obligations to save human lives and protect Humanity.

Further supporting this, the UN Secretary General, Kofi Annan stated:<sup>136</sup>

*"To those for whom the greatest threat to the future of international order is the use of force in the absence of Security Council mandate, one might ask -not in the context of Kosovo- but in the context of Rwanda: If in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold."*

This led to an ambitious reform to the security council being asked by the African states, known as the 'Ezulwini Consensus' and the Sirte Declaration, which calls for the change in the

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<sup>132</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Fulfilling our collective responsibility: International assistance and the Responsibility to Protect*, 2014, A/68/947-S/2014/449.

<sup>133</sup> Chapter VII, *Charter of the United Nations*.

<sup>134</sup> Ki-Moon B, United Nations, Office of the Secretary General, *The role of regional and sub-regional arrangements in implementing the responsibility to protect*, 2011, UN Doc A/65/877-S/2011/393.

<sup>135</sup> Article 17, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

<sup>136</sup> 'Kofi Annan: Secretary-General Presents his Annual Report to General Assembly', *UN Press Release*, 20 September 1999 <https://www.un.org/press/en/1999/19990920.sgsin7136.html> on 30 September 2017.

Security Council from its current standing to include two permanent seats and five non-permanent seats for African State.<sup>137</sup>

In his speech to the 62nd session of the UNGA, President Mbeki of South Africa captures the Ezulwini Consensus convincingly when he says: "*Although the concepts of freedom and equality are universal and fully embraced by the United Nations, this global organization has not itself transformed and designed the necessary institutions of governance consistent with the noble ideals that drive modern democratic societies.*"<sup>138</sup> He believes that when almost 70% of the decisions made affect the African States it is their right to be involved in every decision made for them.

### 3.6 The Legal and Political Value of R2P

There have been significant commendations of the concept, especially within the UNGA.<sup>139</sup> Although UNGA resolutions are not binding as such upon States, they constitute an important part of State practice and international principles.<sup>140</sup> State practice and *opinio juris sive necessitates* are vital in the development of customary international law.<sup>141</sup> <sup>142</sup> R2P has been recommended in the High-Level Panel Report (HLP),<sup>143</sup> the World Summit Outcome Document,<sup>144</sup> among many other documents and in September 2009, the UNGA resolved that

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<sup>137</sup> African Union, *the Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus*, Ext/EX.CL/2 (VII) 8 March 2005.

<sup>138</sup> <http://www.anc.org.za/content/un-speech-address-president-thabo-mbeki-62nd-session-united-nations-general-assembly> on 3 October 2017.

<sup>139</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Responsible Sovereignty: International Cooperation for a Changed World* speech, 2008.

<sup>140</sup> Higgins R, 'The Attitude of Western States towards Legal Aspects of the Use of Force', in Cassese A (Ed), *the Current Legal Regulation of the Use of Force*, Martinus Nijhoff Publishers, 1986, 435.

<sup>141</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14.

<sup>142</sup> "In respect of *opinio juris*, the International Court of Justice pointed out that it infers a belief that certain conduct has become obligatory due to "the existence of a rule of law requiring it ... States concerned must therefore feel that they are conforming to what amounts to a legal obligation." *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, 3.

<sup>143</sup> HLP, *A More Secure World, Our Shared Responsibility*.

<sup>144</sup> UNGA, *2005 World Summit Outcome Document: Follow-up to the outcome of the Millennium Summit*, para. 138-139.

States would continue discussions on the matter.<sup>145</sup> There have been annual deliberations on the concept under the support of the UNGA, such as the July 2011 informal thematic debate.<sup>146</sup> In addition, the concept has also been endorsed by the Security Council.<sup>147</sup> The R2P concept is based on existing law and institutions, in addition to some of the past experiences within the international community.<sup>148</sup> An example is the Genocide Convention, which in Article VIII obligates States to prevent the occurrence of genocide.<sup>149</sup> The concept “pulls pre-existing norms together and places them in a novel framework”.<sup>150</sup> The normative element and value of the concept has however been questioned by some scholars, it has been alleged that there lacks any clear consequences for the failure to implement the R2P concept, in addition, a lack of will to implement it, and it is, therefore, inappropriate to classify the concept as an emerging norm.<sup>151</sup> Anne Orford acknowledges that some scholars are of the erroneous view that the concept lacks any normative value or significance due to the assumption that it does not impose any new binding obligations on States or regional organizations.<sup>152</sup> Orford instructively points out that the R2P concept raises significant legal issues, even if it does not translate into binding legal obligations.<sup>153</sup> She observes that the concept represents a form of law that grants powers and provides jurisdiction to the international community for intervention purposes.<sup>154</sup> Although it is still doubtful that the concept can be classified as a proper norm of international law, it has previously been endorsed by the UNGA and the Security Council,<sup>155</sup> and thus qualifies to be

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<sup>145</sup> ‘General Assembly Agrees to Hold More Talks on Responsibility to Protect’ *UN News Centre*, 14 September 2009 <http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+proteCt&Cr1> on 3 October 2017.

<sup>146</sup> “‘For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers No Relief’, Secretary-General Cautions in General Assembly Debate’ *UNGA*, 12 July 2011 on <http://www.un.org/News/Press/docs/2011/ga11112.doc.htm> on 3 October 2017.

<sup>147</sup> UNSC 1674 (2006).

<sup>148</sup> Arbour L, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’, 34 *Review of International Studies* (2008) 447- 448.

<sup>149</sup> Article VIII, *Convention on the Prevention and Punishment of the Crime of Genocide*.

<sup>150</sup> Peters A, ‘The Security Council’s Responsibility to Protect’ 8 *International Organizations Law Review* (2011).

<sup>151</sup> Kapur A, ‘Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters’ 20 *European Journal of International Law* (2009) 560-562.

<sup>152</sup> Orford A, *International Authority and the Responsibility to Protect*, Cambridge Press, Cambridge, 2011, 22-23.

<sup>153</sup> Orford, *International Authority and the Responsibility to Protect*.

<sup>154</sup> Orford, *International Authority and the Responsibility to Protect*.

<sup>155</sup> HLP, *A More Secure World, Our Scared Responsibility*;

regarded as an emerging norm. The legal and political value of the concept may also be discerned from the fact that the concept establishes a framework for complementarity between State sovereignty and intervention for humanitarian purposes, thereby eliminating the problematic tension between the two fundamental principles. The former UN Secretary General Ban Ki-Moon acknowledges the normative value of the concept, stating that it “is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect.”<sup>156</sup>

### 3.7 Pro and Cons of R2P

There is a considerable number of thinkers and decision makers backing R2P which is also a powerful and effective political lobby group. Various think-tanks, research institutes, and international organizations are advocating the growth and adoption of R2P principles.

Jennifer Welsh, the current UN Special Adviser on R2P, has emphasized that the focus of her tenure is mainstreaming the R2P norm while simultaneously turning an emphasis towards Pillar II, namely the International Community's responsibility to protect states in growing capacity to better protect their citizens from crimes.<sup>157</sup>

Louise Arbour, of the International Crisis Group, said that R2P is the most important and imaginative doctrine to emerge on the international scene for decades.<sup>158</sup>

Anne-Marie Slaughter from Princeton University has called it the most important shift in our conception of sovereignty since the Treaty of Westphalia in 1648.<sup>159</sup>

On the opposite side, many critics have focused on the risk that it creates a “moral outrage and hysteria”, a dangerous Western “right to intervene” through humanitarian interventions often concealing the true strategic aim, thus becoming another name for the proxy war. They argue it is either too ambitious, a new form of colonialism with a fancy name, or it has been

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UNGA, *2005 World Summit Outcome Document: Follow-up to the outcome of the Millennium Summit*.

<sup>156</sup> Ki-Moon B, United Nations, Office of the Secretary General, *Implementing the Responsibility to Protect*.

<sup>157</sup> Welsh J, Thematic Panel Convened by the President of the General Assembly, *From Commitment to Implementation: Ten Years of the Responsibility to Protect* (2016).

<sup>158</sup> Arbour L, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’, 445.

<sup>159</sup> Evans G, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 78-79.

significantly watered down as it was evident during the Libyan crisis in 2011, when regime change, rather than civilian protection and moral principles, was a priority.<sup>160</sup>

In particular, India's UN Ambassador Singh Puri stated that the Libyan case gave R2P a bad name. "Arms were supplied to civilians without any consideration of its consequences, a no-fly zone was established only for flights in and out Tripoli and targeted measures were implemented insofar as they suited the objective of regime change".<sup>161</sup>

Russia and China both issued statements to the effect that in their opinion R2P had been abused by the US as a pretext for regime change and that experience would make them extremely suspicious of any future Security Council Resolution invoking R2P.<sup>162</sup>

Advocates of R2P, in contrast, find in the Libyan episode a vindication, signalling that humanitarian intervention does not require state consent and asserted the central role of the UNSC.

### 3.8 Conclusion

The R2P concept is still very much a developing norm and its acceptance varies according to the needs of each organization.

Being a norm and not a law, it is nevertheless firmly grounded in international law, especially the laws relating to sovereignty, peace and security, human rights and armed conflict. R2P may be considered an expression of a widespread *opinio juris*, relevant to the creation of an international custom; the other element of custom, *diuturnitas*, that is to say, a general practice, however, is still lacking.

After the resort in Libya, in 2011, of the R2P doctrine, its wavering over Syria may offer several valuable lessons learned which may help facilitate the development of a more realistic approach to protecting international human rights:

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<sup>160</sup> Nunn F, 'Yesterday's Soldiers: European Military Professionalism in South America, 1890-1940' 64 *the Hispanic American Historical Review* (1984) 166.

<sup>161</sup> Ganguly S, 'India and the Responsibility to Protect' 30 *International relations* (2016).

<sup>162</sup> Kuhrt N, 'Russia, the Responsibility to Protect and Intervention' in Fiott D and Koops J *The Responsibility to Protect and the Third Pillar*, Palgrave Macmillan, 2015.

- 1) That states still react differently to violations of humanitarian norms than they do to violations of security-related norms: they are much more likely to assume an aggressive and possibly interventionist posture when it comes to security norms.
- 2) That many states (including Russia and China, permanent UNSC members) are against intervention into the territory of sovereign states (which could lead to regime change): this is why Russia and China, feeling cheated by the Libya intervention, only approved the most narrow disarmament agreement, completely ignoring the underlying humanitarian crisis in Syria.
- 3) That civilians can still be killed: simply putting a new humanitarian or moral doctrine like R2P in place cannot solve the problem of parochial world politics.

These clearly show that expectations regarding humanitarian intervention need to be significantly tempered, but they also point to practical steps that can be taken to help revitalize the world's desire and ability to protect human rights.

Most importantly, the damage caused by the over-zealous Libya intervention must be addressed by the adoption of “baby steps”. Russia and China willingness to be open to some limited form of humanitarian intervention may be achieved once trust is restored and clear mechanisms to keep interventions limited and transparent are developed. The UN can help by more clearly categorizing various types of global norms.

Beyond operational and political questions, military intervention involves international law and legal issues. As countries like Russia, China and India are particularly worried that it could create a precedent for the International Community to have a say in how they treat their own minorities, on the other hand, countries like the US are limiting their action to aerial bombing. With no ground troops being sent especially after the backlash in Afghanistan and Iraq and the consequent heavy death toll, the US now prefer to resort to diplomatic pressure, stressing the role of regional actors and neighbours.

The willingness to use armed forces is also inevitably influenced not only by the desperation of the affected population but also by geopolitical factors, including the relevance of the country to the world community, regional stability, and the attitudes of other major players.

It is necessary to prevent unrealistic expectations of R2P, rebuilding trust among the great powers, and permitting a greater understanding of options for dealing with humanitarian crises: there are no silver-bullet solutions to the complex reality of intrastate violence. A response

must be tailored to each individual case. Prevention is always the better policy: timing is everything and often, the earlier the International Community acts decisively, the better.

Those who point to a global deadlock between “Western” interventionists and “non-Western” stalwarts of sovereignty as a cause of lack of progress fail to cope with the real challenges of R2P which is both a national and international responsibility.

To implement R2P is necessary to protect both responsibly (by preventing abuses by great powers) and effectively (by developing policy instruments, assessing risks, and identifying the least of evils in every particular situation). Responsible policy-making requires all the stakeholders to design policies based on evolving knowledge, risk assessment, reflection, and learning.

Many cite the famous Edmund Burke quote “The only thing necessary for the triumph of evil is for good men to do nothing”.

For too long the world has stood by in the face of atrocities. R2P urges an end to impunity, inaction, and amnesia regarding atrocities, so that there may be fewer moments when the world looks back and asks “how could this have happened?”

## 4 Chapter 4: Bridging the gap between Sovereignty and R2P.

### 4.1 Introduction

As the idea of R2P develops and is debated through legal and moral discussions through the last two decades, it is pertinent to go back to the creation of the concept, more specifically the primary link it provides between sovereignty and R2P. It also provides another kind of example: of the effort given to positive expression in international law to basic standards understood historically as universal moral standards. The original report of ICISS described the first pillar of R2P as a direct link to sovereignty being the responsibility of a state to protect its own.<sup>163</sup>

Human rights considerations introduce so many more variables into the determination of justice and place an even heavier burden of deliberation devolving upon international community in assessing the lawfulness and rightness of actions. Matters become more complex and uncertain than they were in an international system that was composed of a few binary rules applied to a handful of States and, particularly, that lacked an international code of human rights. One cannot simply condemn externally motivated actions aimed at removing an unpopular government and permitting the consultation and implementation of the popular Will inherently violating sovereignty without analysing whether or not and under what conditions was that Will being suppressed, and how the external action will affect the expression and implementation of popular sovereignty.<sup>164</sup> The cases no longer belong on a simple checkboard of black and white but are transitioning to a complete coverage of grey within the society that exists in colour.

The identification of what is clearly "externally motivated action" is itself an increasingly difficult task. No one is entitled to complain that things are getting too complicated. If the complexity of decision is the price for increased human dignity on the planet, it is worth it. Those who yearn for "the good old days" and continue to trumpet terms like "sovereignty"

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<sup>163</sup> ICISS, *the Responsibility to Protect Report*.

<sup>164</sup> Stacy H, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture*, Stanford University Press, 2009.

without relating them to the human rights conditions within the states under discussion do more than committing an anachronism, they undermine human rights.

Foreign policy attention to child soldiers, children and women as war victims, and child poverty represent another element of a shift from “national security” to “human security”.

This shift presents a great challenge to national diplomats, nongovernmental organizations and the UN to work in partnership. All three sets of actors are being challenged to reinterpret and use the UN Charter in pursuit of security for the peoples of the world, if necessary against the member governments of the world body.

Prolonged civil wars and failed states undermine the concept of national security. When rape, biological weapons, and children are used as an instrument of war, or when thousands are killed by their own security forces, then the concept of national security is immaterial and of zero use.

## 4.2 Re-defining sovereignty

This argument has thus raised the question of the true definition of sovereignty and where it resides. Upon the understanding of sovereignty, in modern times, and not the pre-modern conceptualization of Aristotle, Hart, and Austin, it ought to be noted that the emerging definition of sovereignty, as a result of evolving international law, is, in fact, a responsibility to those you serve. The concept of democracy, in modern times, has shifted sovereignty from the singular and powerful, to the masses who elect and are in control.<sup>165</sup> It continues to be defined as not the claim of the unlimited power of a state to do what it wants to its own people, even by the strongest of supporters, but rather implies a dual responsibility:<sup>166</sup> externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.<sup>167</sup>

The ICISS report on R2P described the breach of sovereignty as the inability to protect the citizens of one’s State.<sup>168</sup> Yet the serious failures of States to exercise this responsibility in a number of cases has left the world at many times in shock, and dismay. Accordingly, the initial

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<sup>165</sup> Hobbes T and Gaskin J, *Leviathan*, Oxford University Press, Oxford, 1998.

<sup>166</sup> Wissenburg M, *Political Pluralism and the State: Beyond Sovereignty; Routledge Innovations in Political Theory*, Routledge, 2008.

<sup>167</sup> ICISS, *the Responsibility to Protect Report*.

<sup>168</sup> ICISS, *the Responsibility to Protect Report*.

linking of sovereignty to state responsibility was followed by the assertion that in cases in which a state, for whatever reason, fails to discharge this responsibility “the principle of non-intervention yields to the international responsibility to protect.”<sup>169</sup> And thus the core of the ICISS Report justifies the argument that R2P doesn’t breach sovereignty, as it is the norm that comes into action when sovereignty has already been breached by States and then further lays out the conditions for military intervention in order to restore sovereignty as well as peace and stability.

In practice this accounts for the idea that sovereignty no longer an excuse to abuse power within borders but in fact lies with the responsibility for the good of each state’s populace, for positive international law is currently understood as the product of formal agreement among states, although earlier positive law was understood as reflecting an underlying value consensus, as in the evocation of the “interests of humanity” and the “needs of civilization” in the preamble to 1907 Hague Convention IV.<sup>170</sup>

Hans Kelsen attempted to explain this concept as the idea that sovereign Will of State often manifests limits. In one well-reasoned example, Kelsen notes that newly created States enter international life with some rights and duties already specified, without the necessity of adoption or ratification.<sup>171</sup>

*“Just as the individual does not submit [himself] voluntarily to the domestic law of [his] state which is binding upon him without and even against his will, a state does not submit voluntarily to international law, which is binding upon it whether it does recognize international law or does not recognize it.”*<sup>172</sup>

The concept limits the convenience by which sovereignty may be used as a convenient justification for non-intervention by the international community, or as a shield from external action by a territorial State. As Richard Falk observes, extra sensitivity to the traditional concept of sovereignty provides States within the international community with an effective mechanism to avoid the problems associated with the intervention, even where it involves a

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<sup>169</sup> ICISS, *the Responsibility to Protect Report*.

<sup>170</sup> Preamble, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, 539.

<sup>171</sup> Kelsen H, *Principles of International law*, 2ed, Rhinehart & Company Inc., New York, 1953.

<sup>172</sup> Bederman D, *the Spirit of International Law*, University of Georgia Press, 2002.

collapsed government within the subject State.<sup>173</sup> In addition, Anthony Carty perceptively notes that sovereignty provides an effective veil for articulating State interests and security concerns in a manner that is legally acceptable. He cites the case of the 1990s peace-enforcement in Bosnia, where States contributing troops argued that forceful action would amount to an intervention, thereby actively undermining the mandate that had been issued by the Security Council.<sup>174</sup>

What ICISS called the external dimension of sovereignty is, in fact, the conception of sovereignty first defined by Hugo Grotius<sup>175</sup> and operationalized in the Westphalian system. So far as other sovereign entities are concerned, it is fundamentally territorial in character, and one sovereign entity may not reach across the borders of another to try to influence its internal affairs. This leads to both the norm of non-intervention and the conception of such action as aggression. There remains a very basic and serious tension between this understanding of sovereignty and that defined in terms of internal responsibility, and to simply lay them side by side as “dual” responsibilities, does not resolve the inherent tension. The problem expressed in this tension is that each of these conceptions of sovereignty serves different fundamental values. An ultimate resolution of the tension would involve finding a frame in which these different values are reconciled. This is the big difference between the pre-modern idea of sovereignty and the definition of sovereignty in terms of the modern day International outlook. For the focus of the first was a moral responsibility of the person or persons exercising ruling authority. If they ignored or failed in their responsibility for the common good, they were no longer, in moral terms, worthy to be called rulers; they became tyrants. While the focus of the second shifts the paradigm to the populace and its protection, sovereignty being vested in the people and not the land.

By modern political theory, only the populace of a state can choose its rulers, and this means that other states, as individual actors or up to and including the international community as a whole, have no right to insert themselves into the matter. How this works out in practice is another matter. The pre-modern conception of sovereignty rooted the rights of sovereignty

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<sup>173</sup> Falk R, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*, Taylor & Francis, 2000, 78.

<sup>174</sup> Carty A, ‘Sovereignty in International Law: A Concept of Eternal Return’ in Brace L & Hoffman J (Eds), *Reclaiming Sovereignty*, 1997, at 101, 116.

<sup>175</sup> ‘Grotius, Hugo’, *Internet Encyclopaedia of Philosophy* <http://www.iep.utm.edu/grotius/> on 15 October 2017.

elsewhere, and so it made it possible to reach a different judgment on who might or might not have the right to exercise ruling authority and to act accordingly.<sup>176</sup>

This is also seen in World Summit Outcome document,<sup>177</sup> which states directly the responsibility of each individual state—and thus the governing responsibility—is, in fact, to protect its population from the named kinds of harm. So far as the fundamental concern remains to protect vulnerable populations from harm these cultural conceptions should be explored and their implications examined.

To have responsibility for the common good of the society governed, as the pre-modern conception of sovereignty provided, is quite a broad responsibility. The common good here is shorthand for the three interlocked ends of political life as they were then conceived: order, justice, and peace. In order to serve this, it was not only to implement this in one's own state but to look out for the neighbouring states as well. Therefore those in power who faithfully discharged their duty and responsibility cannot turn a blind eye to humanity suffering at the hands of another next to them.

#### 4.2.1 Hobbes and sovereign responsibility

Thomas Hobbes has been known to describe the State of Nature<sup>178</sup> as a 'miserable condition' defined by 'continual fear, danger of violent death',<sup>179</sup> he believes that in the absence of a 'common judge' in the state of nature leads to uncertainty that is indeed dangerous in that 'there is no one to decide who is and is not acting in a reasonable fashion'<sup>180</sup> or as he called it 'a condition of Warre of everyone against everyone'<sup>181</sup>. Thus giving us the ideology that although everyone is allowed to do as they please in order to survive, we would all fall into anarchy if there was no overseeing authority, and the State of Nature will always be a little more than a daily battle between individuals to protect the rights that are not recognised by anyone but themselves, giving us the primary reason for a civil society, to protect ones' rights, providing

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<sup>176</sup> Lee D, *Popular Sovereignty in Early Modern Constitutional Thought Oxford constitutional theory*, Oxford University Press, 2016.

<sup>177</sup> UNGA, *2005 World Summit Outcome: Follow-up to the outcome of the Millennium Summit*.

<sup>178</sup> McClelland J, *A History of Western Political Thought*, Routledge, 1996.

<sup>179</sup> Gauthier D 'Hobbes on International Relations', in Gauthier D (Ed) *the Logic of Leviathan*, Oxford University Press, 1969.

<sup>180</sup> Van Mill D, 'Hobbes's Theories of Freedom' 57, *the Journal of Politics* (1995) 454.

<sup>181</sup> Hobbes T, 'The Elements of Law Natural and Politic', in Gatin J (ed) *Human Nature and De Corpore Politico*, Oxford University Press, 1994 at 194.

a 'social contract'. Hobbes described this social contract, as an agreement reached between individuals in the State of Nature that they would unite in relative harmony and cede the power to govern themselves to 'the Leviathan' or higher authority, whom he believes is above the contract<sup>182</sup>. Yet, he goes on to say that although they enjoy 'absolute monopoly on the legitimate of force'<sup>183</sup>, they owe certain responsibilities to the citizens, who by virtue of ceding their unlimited freedom, created that very sovereign. Ergo in Hobbes theory, the social contract is void 'if the sovereign threatened the individual with death' or 'could no longer fulfil the function for which he or she was given power'<sup>184</sup>. In the Leviathan, Hobbes states that:<sup>185</sup>

*'The obligation of the subjects to the sovereign lasts just as long, and no longer, than his power lasts to protect them. For no covenant can relinquish the right men have by nature to protect themselves when no one else can protect them.'*

When the sovereign could not or cannot fulfil the function for which it was created – predominantly the protection of its citizens – the sovereign 'is no longer owed obedience, is no longer indeed a sovereign'.<sup>186</sup>

#### 4.2.2 Locke's theory on state responsibility

John Locke also speaks of a State of Nature, however, it differs from Hobbes in that, in Locke's the State of nature is, in fact, a state of perfect freedom in which power and jurisdiction are reciprocal.<sup>187</sup> People are born with subordination or rejection i.e. equal and therefore no one can exercise domain over another. The only way to have these rights recognized is for everyone to recognizes everyone else rights, thus he states that the reason to enter a civil society is for rational people to solve their disputes with the impartial person.<sup>188</sup> He believes that uncertainty is the reason behind entering a social contract thus asserting that the 'Sovereign' is not above the contract, but part of the society just as everyone else, giving us the theory that the rights available to the citizens in the State of Nature are still applicable in a Civil society, which, in

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<sup>182</sup> McClelland, *a History of Western Political Thought*.

<sup>183</sup> Peters R, *Hobbes*, Penguin Books Ltd, 1967.

<sup>184</sup> MacFarlane S and Khong Y, *Human Security and the UN: A Critical History*, Indiana University Press, 2006, 39.

<sup>185</sup> Hobbes T, *Leviathan*, Oxford University Press, 1955, 151.

<sup>186</sup> Hobbes, *Leviathan*, 151.

<sup>187</sup> Huhne T, *the State of Nature in John Locke, Thomas Hobbes and Jean- Jacques Rousseau*, GRIN Verlag, 2013.

<sup>188</sup> <https://plato.stanford.edu/entries/locke-political/> on 20 October 2017.

fact, constrict the sovereign's powers<sup>189</sup>. Thus the people retain the authority to judge the acts of their sovereign, and this implies a responsibility on the part of the sovereign to act according to the trust placed in it, once again placing the people above the Sovereigns acts.<sup>190</sup>

This assertion is undeniably helpful in terms of reinvigorating the debate surrounding the R2P, given that it does not rely on notions of individual human rights as a challenge to sovereignty, but rather attempts to ensure the legitimate exercise of sovereignty by states through its emphasis on a state's responsibility to protect 'the rights of individual citizens to life, liberty, and property'.<sup>191</sup>

#### 4.2.3 Rousseau: States must protect their own.

Jean- Jacques Rousseau's State of Nature is described as:<sup>192</sup>

*Men would have been unequal in strength and cunning in the state of nature, but that would not have led some men to dominate others because the motive for that domination would have been lacking. Naturally unequal men in the state of nature would simply be unequal men with nothing much to quarrel about. It is only in society that inequality matters.*

This resembles a perpetual State of Apathy in which each person lacking the ability to communicate, keeps to themselves, in order to survive. He believes that the existence of the social contract is for the purpose of furthering one's mental faculties, which replaces man's instinct with Justice as a rule of conduct:

*in civil society man[s] ... faculties are so exercised and developed, his mind is so enlarged, his sentiments so ennobled, and his whole spirit so elevated that ... he should constantly bless the happy hours that lifted him for ever from the state of nature and from a stupid, limited animal ...*<sup>193</sup>

In the Social contract, Rousseau furthers:

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<sup>189</sup> Dienstag J, 'Between History and Nature: Social Contract in Locke and the Founders' 58 *the Journal of Politics* (1996) 985.

<sup>190</sup> Lamprecht S, *the Moral and Political Philosophy of John Locke*, Russell and Russell, 1962.

<sup>191</sup> Scott J, 'The Sovereignless State and Locke's Language of Obligation' 94 *American Political Science Review* (2000) 547.

<sup>192</sup> McClelland, *a History of Western Political Thought*.

<sup>193</sup> Rousseau JJ, *the Social Contract*.

*“They have exchanged natural interdependence for freedom, the power to injure others for the enjoyment of their own security ... Their very lives, which they have pledged to the state are always protected by it”*<sup>194</sup>

In this, Rousseau agrees with Locke, that the sovereign owes its being to the Social Contract and hence it cannot act contrary to it. Thus where a State fails to uphold its own responsibilities conferred upon it by the virtue of its social contract it undermines its own existence: or as put by Rousseau ‘to violate the act which has given it existence would be to annihilate itself’.<sup>195</sup>

He further insists on this, suggesting that the State retains unlimited power to the extent that it legitimately exercises the very same power. Therefore, for a sovereign to legitimately exercise its absolute power, it must do so in order to protect the liberty of its citizens and like Hobbes and Locke, Rousseau also believed that it is impossible for a sovereign to harm its citizens without a Just cause, basing it on the nature of the civil society, once it is untied it acts as a whole and hence harming one would harm the whole.<sup>196</sup> A sovereign cannot have interests that are contrary to the citizens.

In this way, Rousseau brings forth that the states possess sovereignty in so far as the state protects and advances the interests of the citizens, all of them.

In the era of new economic, social and political challenges, where globalization is more than a mere phrase, the definition of sovereignty seems to flow along a different path from that of Kelsen and Aristotle to Rousseau and Locke with the Social Contract theory. It would be more appropriate to describe sovereignty as a power given by many to one for their own wellbeing and stability of the society. This does not mean that the one has power rather the ‘many’ have it, as they are the ones to place you with that power they can take it away. Although Kelsen points on the fact that we enter into the international world with obligations that we have no choice but to accept, makes it clear that there exists a clear line of *erga omnes*. States do not live in a vacuum but when looked in the broader picture, we all live in the same world, with imaginary boundaries that cannot be used to violate the fundamental rights given to all of us for the mere reason that we are human.

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<sup>194</sup> Merriam C, *History of the Theory of Sovereignty since Rousseau*, Batoche Books, 1900.

<sup>195</sup> Rousseau JJ, *Social Contract and Discourses*, Everyman, 1993.

<sup>196</sup> Ritchie D, ‘Contributions to the History of the Social Contract Theory’ 6 *Political Science Quarterly* (1981), 656.

### 4.3 R2P and sovereignty

The responsibility to protect concept is actually an endorsement of the principle of sovereignty, rather than its opposition.<sup>197</sup> The protection of State sovereignty and prohibition of intervention within the international community has the purpose of safeguarding international stability and therefore protecting natural persons from catastrophes.<sup>198</sup> This is due to the fact that interventions and imperialist wars may lead to global instability and humanitarian catastrophes.<sup>199</sup> The emerging norm is not a justification for forceful intervention in any situation, but only in circumstances of stopping or pre-empting genocide, crimes against humanity, war crimes, and ethnic cleansing.<sup>200</sup> The concept only seeks to ensure that the protective purpose of sovereignty is maintained by the international community when a State is unable or unwilling to provide it. The State is endowed with both international and domestic responsibilities by the principle of sovereignty, which includes the duty to protect populations within its territory.<sup>201</sup> The international community is continually attaching important value to the protection of populations from such gross violations of human rights and humanitarian law, which are also international crimes.<sup>202</sup> In addition, in order to avoid subjectivity and unregulated forceful interventions, the concept advocates that such action be maintained within the collective security system of the UN, with the Security Council providing authorization.<sup>203</sup> The concept is a mechanism of ensuring that sovereignty serves its purpose, that of protecting the citizens of the State, and is not abused to provide a justification for subjecting them to avoidable humanitarian catastrophes.

It will be, in any case, the task of individual states and/or regional organizations to carry out any future humanitarian interventions, and this suggests the need for more legal room for such

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<sup>197</sup> Kuwali D, *the Responsibility to Protect: Implementation of Article 4(h) Intervention*, Martinus Nijhoff Publishers, 2011, 97.

<sup>198</sup> Peters A, 'Membership in the Global Constitutional Community', in Klabbbers J (eds), *The Constitutionalization of International Law* 2009, at 153, 186.

<sup>199</sup> Peters, 'Membership in the Global Constitutional Community', 153, 186.

<sup>200</sup> UNGA, *2005 World Summit Outcome: Follow-up to the outcome of the Millennium Summit*, supra note 10, para. 139.

<sup>201</sup> United Nations, Office of the Secretary General, *Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, 27 June 2011, para. 10.

<sup>202</sup> Articles 6-8, *Rome Statute of the International Criminal Court*.

<sup>203</sup> UNGA, *2005 World Summit Outcome: Follow-up to the outcome of the Millennium Summit*, supra note 10, para. 139.

actions.<sup>204</sup> This would also be more in accord with the conception of sovereignty as responsibility for the national and international common good, and so far as protection of basic human rights is defined as a core responsibility of the governments of states today, the door is opened toward more robust involvement by states and regional organizations in responding to depredations by neighbours.<sup>205</sup>

In practice, since the end of the cold war, the UN has been intervening more often in conflicts within (as opposed to between) States. Sometimes it has happened with, and at times without, the consent of the governments concerned.<sup>206</sup>

In 1999 Tony Blair became one of the first leader to assert a moral right to “get actively involved in other people's conflicts”—even without leave from the Security Council—if it was the only way to stop dire suffering. Speaking in Chicago after NATO's war over Kosovo, which the Security Council had declined to endorse, the former British prime minister made the case for “just war, based not on territorial ambitions, but on values”.<sup>207</sup>

Political, diplomatic, legal and economic measures should be tried before any resort to arms. Not every conflict, potential conflict, or gross abuse of rights should prompt application of the rule—only the worst cases. And even when all non-military means have failed, armed intervention may still not be the right answer. The consequences must be weighed to ensure that it will not do more harm than good to the people it seeks to protect.<sup>208</sup>

## 4.4 Conclusion

The conservative meaning of State sovereignty is related to States' power over their territories, governance, law, and citizens. The debate among realist and liberal independence about the concept of sovereignty has rescued the concept from something abstract onto something practical. State sovereignty, for liberal independence theorists, is defined as State's power to control activities and populations within their territory, whereas for realists, the very meaning

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<sup>204</sup> <https://www.un.org/press/en/2013/sc11087.doc.htm> on 20 October 2017.

<sup>205</sup> <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1174&context=ilr> on 20 October 2017.

<sup>206</sup> <https://www.un.org/en/peacekeeping/documents/operationslist.pdf> on 20 October 2017.

<sup>207</sup> The Blair Doctrine <https://www.globalpolicy.org/component/content/article/154-general/26026.html> on 20 October 2017.

<sup>208</sup> <https://www.un.org/sc/suborg/en/sanctions/information> on 20 October 2017.

of sovereignty is the State's ability to make authoritative decisions and it necessarily entails non-intervention as a logical precondition for the existence of a multiple State system.

In the context of international relations, the old meaning of sovereignty has changed and State's borders have become blurred. Globalisation and the rise of international laws and treaties, as well as regional organisations, have made the conservative definition of State sovereignty is no longer the only definition available. In addition, within the framework of international law, the doctrine of sovereignty cannot be separated from the relationship between the sovereignty of a State and the sovereignty of peoples. Therefore, the ability of people to exercise their sovereignty – such as basic human rights – within a State is crucial.

Moreover, when it comes to R2P, State sovereignty has completely different meaning. Instead of being a virtue, sovereignty becomes a responsibility of a State to protect their people. ICISS argues that re-characterisation of sovereignty as a control to sovereignty as responsibility is needed in both internal and external duties. The UN defines sovereignty as a charge of responsibility that holds states accountable for the welfare of their people and it's no longer exclusively protects states from external interference. Therefore, the duty and responsibility to protect populations from genocide and mass atrocities lie first with the State, but the international community has a role in preventing genocide and mass atrocities that cannot be blocked by the invocation of sovereignty.

As a concept which ranges from national responsibility and international community assistance to the use of military force, R2P should be understood in a comprehensive approach. There are view criticisms addressed to the pillar and principles of R2P. Criticism appears as a response to narrow understanding and applications of R2P which focus on the use of military force as it breaches State sovereignty. The narrow application will lead to the misuse of the concept and create uncertainty in the future. The next step that should be considered is to have an agreement on how to apply the pillars and principles in a very complex crisis including the possibility to reform the structure and governance within the UN Security Council to engage UN member states in a more inclusive way.

## **5 Chapter 5: Conclusions and Recommendation**

For the paradigm of Responsibility to protect to work, it is pertinent that it upholds its pillars. The concept of R2P is based on a tripod of its pillars, without the implementation of all three pillars, the concept shall 'fall' and is useless. Be it the 1<sup>st</sup> pillar of responsibility of protection of a States own or the 3<sup>rd</sup> pillar, where we must take to take appropriate collective action, in that not leave them in a worse of state. If we further look at R2P, the concept is not the force of violence or military action, it is the embracement of the globalization of the protection of humanity. The idea is not only to intervene and take away the disturbance to the peace and sanctity but to also rebuild and stabilize the environment of the State in order for the people to be given a chance to exercise their rights and sovereignty in full.

A basic principle of international law, states that States may limit their sovereignty through treaties. The African States have done so in the Constitutive Act of the AU,<sup>209</sup> they collectively have decided that sovereignty should no longer trump human rights should the latter be abused by the governments whose basic obligation it is to protect them. They have consequently conferred a right of intervention on their regional organization in respect of grave circumstances specified in the AU Constitutive Act. It must be recognized that the incorporation of the principle in the basic law of the AU constitutes a pioneering act in international law. A right to intervene in cases of grave circumstances regarding human rights violations now exists in Africa.

This right also represents a paradigm shift in enforcement action by regional organizations under the UN Charter.<sup>210</sup> The African Union no longer needs to seek a determination by the UN Security Council that a humanitarian crisis in an African State constitutes a threat to the peace or a breach of the peace, although it still requires a formal endorsement and support from the Security Council. The AU itself recognizes the need for such endorsement not only to respect the law of the Charter and further endorses a change within the Security Council in order to prevent violations of the Charter.

Consensual intervention, based on the sovereign right of the territorial State to invite or consent to intervention, is inadequate or inappropriate where the government is the perpetrator of the atrocities, or fails to grant the consent.

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<sup>209</sup> Article 4 (h), *Constitutive Act of the African Union*.

<sup>210</sup> Chapter VIII, *Charter of the UN*.

This being said, until States do not begin to see the evolution of sovereignty instead of the traditional territorial concept, it can be hard to address whether or not R2P is, in fact, a failed dream or a norm for a better future for human dignity and humanity as a whole.

The African Union has demonstrated the capacity to implement some of the responsibility to protect concepts in some situations where peaceful negotiations or consensual interventions are adequate, like the case of Kenya and Burundi. However, it has also failed in situations where timely and decisive forceful intervention is necessary and may be the only viable option to protect civilians, like in the Darfur and Libyan conflicts. In the case of Libya, the AU expressly opposed any form of military intervention. Therefore, despite the AU's right of forcible intervention to stop genocide and crimes against humanity within its legal framework, traditional concepts of sovereignty and non-intervention continue to prevail within the Union's subsequent practice.

This does not take away from the situation that has been created in Libya where with the intervention through a military action by NATO left them without the presence of a stable government and without the concept of rebuilding and stabilization of the State has left Libya in a worse of state, then it was under the reign of Gaddafi. This is similar to the situation of Iraq, and what might become of Syria if the world does not intervene and stop the atrocities as well as stabilize and assist it in that, provide a stable government that can help rebuild the country. Without this, the only result of the military intervention will be what can only be called a shadow of a country, with the shambles of buildings and bodies littering the streets and the final goal of R2P being the protection of humanity and human lives failing immensely. This is seen in Libya, which has become a State enthralled in slavery almost 7 decades after the UDHR<sup>211</sup> came into effect and more than a century since the largest practice of slavery was eradicated<sup>212</sup> (USA 13<sup>th</sup> amendment of the constitution).

The changes in international diplomacy would offer new opportunities to move beyond the nationalism of the past century, to a new century of peace based on the welfare of people and not States.

In short, while the responsibility to protect now has been given legal formulation, there remain questions as to whether this formulation is the best that can be reached. In considering this question and how possibly to move toward a more adequate one, the implications of the pre-

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<sup>211</sup> Article 4, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>212</sup> 13<sup>th</sup> Amendment, *United States of America Constitution*, 17 September 1787, USA-010.

modern idea of sovereignty as responsibility for the common good provides an important perspective that is lacking in the conception of sovereignty now generally accepted.

As it states right now R2P is focused on mass atrocious crimes, but it is important to note, that these are not the only reasons thousands of lives are taken away,

*“It would only take half an hour for the French boats and French helicopters to reach the disaster area.”<sup>213</sup>*

This was the plea Bernard Kouchner, France's foreign minister, made as his country's diplomats at the UN vainly argued that aid might have to be “imposed” on Myanmar if the military regime refused to co-operate, in its time of need when the North Indian cyclone hit in 2003 and 2009.<sup>214</sup>

If applied correctly, wars and conflicts will not be the only reason to activate the concept, famine, natural disasters, viral outbreaks and many other crises would be easily manageable as well as humans lives protected. If governments begin to see R2P as not a breach of sovereignty but rather a helping hand to the people there swore to protect in the time of dire need, many civilizations would not be lost and countries will no longer stand on rubble rather than prosperity and livelihood. This can further be achieved on the basis of the general assembly taking over the issuing of R2P and with the allowance of regional blocks to administer the timely response it may achieve a greater and faster solution then waiting on the Security Council. Other complications such as over congestion of refugees and internally displaced persons, as well as the extinction of cultures, would cease to exist.

It seems clear that the privileges enjoyed by sovereign States, including non-intervention, are contingent upon the state exercising responsible sovereignty. The R2P doctrine provides the clearest description of what States need to do in order to exercise their sovereignty responsibly, and what can and must be done by the international community when States can or will not fulfil their responsibilities.

If the international community is to learn from its past and have in place the mechanisms necessary to legitimately and effectively respond to gross and systematic violations of human rights that offend every precept of our common humanity, the R2P must be implemented, and sovereignty and non-intervention can no longer be relied upon to excuse mass atrocities.

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<sup>213</sup> <https://www.theguardian.com/commentisfree/2008/may/12/facinguptoourresponsibilities> on 14 January 2018.

<sup>214</sup> <https://www.theguardian.com/world/2009/feb/27/regime-blocked-aid-to-burma-cyclone-victims> on 14 January 2018.

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