Protecting a Common Humanity: Re-thinking the Use of Force for Humanitarian Intervention in International Human Rights Law

By Mr. Merrick Ricardo Watson

Introduction

"Man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good."[121] These words echoed prophetically by one of the modern world's greatest personalities, Martin Luther King, Jr., renders assistance to one's understanding of the issue of humanitarian intervention. For, sadly the history of the world has been a history of violence in which the notion that every human life is endowed with sanctity has been mocked by indiscriminate mass murder. Harvard Professor Orlando Patterson likens this history of violence to a ritualistic process of bloodletting which becomes a feature of the psyche of the mass murderer, his raison d'être.[122] This reality has forced the emergence of a 'new global humanism' where, since 1945, the world has converged, through various international human rights instruments and the expansion of democracy, on a common consensus that human rights are the sine quo non of a state's obligations to its citizens. And so, as time moves and we progress farther away from the memories of world wars, slavery, Hitler, Amin, Pot and so on, there has been an attempt to create a normative shield that protects

[121] Martin Luther King, Jr. 1929 – 1968, quotation available at <http://thinkexist.com/quotation/man-s-inhumanity-to-man-is-not-only-perpetrated/347522.html> accessed on 8 April 2009

[122] Orlando Patterson, *Rituals of Blood: Consequences of Slavery in Two American Centuries*, (Basic Civitas Books, New York, 1998) 169-180

global citizens from genocide, rape, ethnic cleansing, torture and displacement.

How this norm has developed or whether there is even a norm is extremely litigious. That aside, there is now no question that UN Security Council sanctioned use-of-force to save people from mass atrocities, wherever they might occur, is firmly enshrined in our international legal regime. Even where Council approval is not given for the use of force it is accepted that such force though illegal, if used in extreme cases of bloodshed, may be endowed with legitimacy. The current position in the law, it is submitted, has come full circle evolving from a starting-point in ancient times where states reserved the right to use force almost unchecked, to a period where the use of force was proscribed in international law except in cases where it fell under the exceptions outlined in the UN charter, to the contemporary context where even if force used to save lives is not UN endorsed it may still acquire legitimacy. Perhaps this demonstrates the impetus of the global conscience wishing to create a new bloodless order. It could also be that there is an acute awareness that the 'banality of evil' of which Hannah Arendt[123] wrote is not easily expunged, so military force is reserved as the only means to deal with merchants of death who have no remorse for the tragedies they create. How else would we be able to deal with another Hitler, for argument sake, who intent on murder has at his disposal the resources of a powerful state?

Conspectus

The paper attempts to demonstrate that there is a norm of humanitarian intervention in international law which has evolved after a tumultuous history. Chapter 1 illustrates that though there were instances of humanitarian intervention in international society before the creation of the UN, there was no consensus whether

[123] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (ev. edn., Penguin Classics, New York 1992)

such practices embodied a norm in customary international law. In chapter 2 it is argued that the creation of the UN, if there was a customary norm of intervention, effectively stymied it progression. This was so because of the obstacles placed on state actions by articles 2(4) and 2(7) which allowed only limited exceptions. Towards the end of the chapter a case is made that these articles are not immutable and must be interpreted in a teleological manner to give effect to other imperatives in the UN Charter. Even so, the extent to which articles 2(4) and 2(7) could have been considered to be immutable, it is shown, remained debatable as a result of the widespread inter-state incidences of aggression.

Chapter 3 tracks the evolution of a norm of intervention for humanitarian purposes which crystallized after the end of the Cold War. There it is shown that even where there is debate about the motives behind intervention the UN Security Council essentially disposed of the argument by its endorsement of force in a number of instances. Caution is urged at the end of the chapter that the norm does not include unilateral force although various arguments have been submitted that in extreme cases unilateral use of force outside the UN regime may be legitimate even if illegal. The final chapter discusses the attempts of the global community to reframe the 'right to intervene' for humanitarian purposes into a 'responsibility to protect'. The responsibility to protect is a binary duty which rests primarily with the state and where the state is unable or unwilling falls upon the international community. It is argued that the response of the global community to the responsibility to protect at the World Summit 2005 demonstrates that it is now a potent emerging norm. To close the discussion, limitations to the responsibility to protect are discussed using Darfur as a case study. There, it is suggested that the UN Security Council will necessarily have to be reformed to give complete teeth to this concept.

Purpose and Objectives

The aim of the paper is to investigate and determine the status of the law as it concerns the use of force for humanitarian

purposes. To this end, the paper seeks to examine the development of the law and to identify the various phases of that process. A corollary to this is indentifying any obstacles that circumscribes the normative boundaries of the law and say how these may be maneuvered around in order that the law has effect.

The History and Development of Humanitarian Intervention: A Brief Overview

1.1 A Conceptual Framework

Humanitarian intervention is, as the literature demonstrates, a highly controversial concept. This is perhaps because in large part it is antithetical to the notion of sovereignty which emerged after the Peace of Westphalia in 1648.[124] Nevertheless, a conceptual delimitation is at once necessary in order to shed light on the doctrine. Adam Roberts lends some assistance with a very cogent definition of the concept as, 'coercive action by one or more states involving the use of armed force in another state without the consent of its authorities and with the purpose of preventing widespread suffering or death among inhabitants.'[125] Indeed, intervention may not in all instances be at the consent of the affected state or carried out with the endorsement of the UN Security Council, which since 1945 represents the legal authority concerning the use of force for humanitarian purposes.

The exact scope of humanitarian intervention, or for that matter, its legality and legitimacy, has been the centre of vigorous debate. Some factions registered their protest by declaring the concept to be a contradiction in terms while others contended that

[124] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C. 2008) 16

[125] Adam Roberts, "The So-Called 'Right' of Humanitarian Intervention," in Yearbook of International Law 2000, Vol. 3 (T.M.C. Asser, The Hague 2002) 2-51

it should be appreciated that incidences of humanitarian intervention may be accompanied by undesirable consequences but this fact makes them no less humanitarian in nature.[126] Taylor Seybolt attempts to settle the debate by arguing that humanitarian intervention may not in essence be humanitarian in character but may very well be humanitarian in its outcome.[127] In the same breath, Kofi Annan cautiously opines that military intervention may be undertaken for humanitarian motives but at the same time demonstrates his displeasure with the use of the term 'humanitarian' to describe military operations.[128] The commotion surrounding the meaning of humanitarian intervention may be purely semantic, as Thomas G. Weiss observes that even though authoritative sources such as the ICJ in the *Nicaragua Case* failed to say what it entailed, nevertheless scholars and jurists accepted the concept to involve the use of force to prevent acts which are so egregious in nature they shock the conscience of mankind.[129]

The global historical landscape, irrespective of how the scope of humanitarian intervention is finally delimited, is not profusely littered by clear cut examples of it. Apparently, the intractability which plagues the concept is not limited to definition alone but has also concerns questions such as when is an intervention warranted and what should be the rules of engagement pertaining to any action taken by a state, or group of states, which is so defined. As will be seen in the subsequent discussion, the major Achilles tendon afflicting the deployment of military force to save human beings from mass atrocities seem to be the narrow

[126] See, for instance, David Rieff, *At the Point of a Gun: Democratic Dreams and Armed Intervention* (Simon and Schuster, New York 2005)

[127] Taylor Seybolt, *Humanitarian Military Interventions: The Conditions for Success and Failure* (Oxford University Press, Oxford 2007) 259

[128] Kofi Annan, "Opening Remarks", Humanitarian Action: A Symposium, 20 Nov. 2000, in International Peace Academy Conference Report (International Peace Academy, New York 2001) II

[129] Thomas G. Weiss, *Humanitarian Intervention* (polity Press, Cambridge UK 2007) 11-12

concepts of sovereignty and non-intervention.[130] From their early origins in 1648 these concepts over the years have featured prominently in the customary law which governed state practice up until 1945. With the creation of the UN both concepts crystallized in the form of articles 2(4) and 2 (7) of the Charter.[131]

Sovereignty shielded the state hermetically from the scrutiny of the global community about how it treated its citizens or whether it was capable of protecting them from atrocities which shock the conscience of mankind. This inadvertently ensured that like the years prior to 1648, the period after, even more troublingly, the period following the UN Charter, was still exemplified by a litany of mass atrocities macabre enough to make even the strongest breakdown and weep.[132] States shirked their responsibilities to protect and became participants in, or eye-witnesses to, genocide and ethnic cleansing,[133] leaving one diplomat to assert that the essence of sovereignty seemed to be tantamount to the absence of responsibility.[134]

1.2 Early Origins of Humanitarian Intervention

Regrettably, sovereignty institutionalized indifference to the notion of a common humanity. Suffice it to say, this indifference was reflective of, on the one hand, the condemnation of acts of humanitarian intervention by former colonial territories in the developing world suspicious that military force used to save

[130] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C. 2008) 17-18

[131] Thomas G. Weiss, *Humanitarian Intervention* (polity Press, Cambridge UK 2007) 12-14

[132] Gareth Evans, 16

[133] See generally, Michael Barnett, *Eyewitness to A Genocide* (Cornell University Press, Ithaca, New York 2003) 1-21

[134] See the comment of the Secretary of State Robert Sansing in Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, London 2000) 210

lives had an ulterior motive invested with neo-imperialist designs.[135] On the other hand, states refused to act simply because massacre in distant lands of strangers did not affect their national interests.[136] Be that as it may, in the labyrinth that housed notions about the primacy of state sovereignty were sporadic growths of what amounted to be an international conscience. Illustrations of this growth manifested itself with respect to humanitarian intervention as early as 1840. References to the concept began to appear in this period based on two cases of intervention.[137] The first took place in Greece, where England, France and Russia intervened during 1827 to stop Turkish massacre and suppression of insurgents.[138] The second case was carried out in Syria where France intervened in 1860 to protect Maronite Christians, and this was subsequently approved by other European countries along with Turkey.[139]

The evidence illustrates that there were in fact at least five prominent episodes of intervention taken by European powers against the Ottoman Empire from 1827 – 1908.[140] Other episodes of intervention were undertaken by Austria, France, Italy, Prussia and Russia circa 1866 – 8 to protect the Christian population in Crete. Russia also intervened in the Balkans in 1875 – 8 in support

---

[135] Algerian President Adbelaziz Bouteflika, who was the president of the OAU, in addressing the UN General Assembly in 1999 demonstrated this cynicism when he declared, 'sovereignty is our final defence against the rules of an unjust world' quoted in Shashi Tharoor and Sam Daws, 'Humanitarian Intervention: Getting pass the Reefs', World Policy Journal 18, No.2 (2001), 25

[136] Gareth Evans, 20-22

[137] See, for example, Augustus Stapleton, *Intervention and Non-Intervention* (Murray, London 1866), and *The Foreign Policy of Great Britain from 1790 to 1805* (Murray, London 1866); see as well, Ellery Stowell, *Intervention in International Law* (J. Bryne, Washington DC 1921); and also Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963)

[138] Thomas G. Weiss, 32

[139] ibid

[140] ibid

of insurrectionist Christians.[141] That trend of intervention ended with European's interference between 1903 and 1908 to shield the oppressed Christian community in Macedonia.[142]

One scholar opines that in these early cases, 'intervention was invoked against a state's abuse of its sovereignty by the brutal and cruel treatment of those within its power both national and non-nationals.'[143] States which were despondent to the emerging international value placed on human rights were rendered amenable to the abhorrence of the international community via intervention.[144] These cases of intervention led some jurists to conclude that by the end of the 19th century a doctrine of humanitarian intervention existed as a matter of customary international law.[145] However, disputants pointed to the caveat that state-practice was not nearly consistent enough to sustain a conclusion that there was a customary rule of humanitarian intervention.[146] Moreover, intervention was looked at, and still is, cynically. Critics feared that 'humanitarian intervention' was a euphemism employed in the agenda of realist politics which embraced the use of military power disguised as humanitarian intervention to further self interest.[147]

---

[141] Gareth Evans, 19

[142] See Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Danish Institute of International Affairs, Copenhagen 1999),79

[143] Thomas G. Weiss, 32

[144] Ellery Stowell, *Intervention in International Law* (J. Bryne, Washington DC 1921),53

[145] Gareth Evans, 19

[146] See, for example, Nicholas J. *Wheeler, Saving Strangers: Humanitarian Intervention in International Society* (Oxford University press, Oxford 2000) 41; and also Ramesh Thakur, 'Humanitarian Intervention,' in the Oxford Handbook on the United Nations, by Thomas G. Weis and Sam Daw (eds) (Oxford University Press, Oxford 2007) 387-403

[147] Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention,' Michigan Journal of International Law 19(1998), 1005

As the debate developed on humanitarian intervention developing countries looked askance at its purported motives. Ramesh Thakur avers that developing countries were not amused at being lectured on the need to protect human life by countries which themselves, during the imperialists era, violated the very norms they were claiming to now uphold.[148]

The disagreement about whether there was a customary norm of humanitarian intervention did not wane. Professor Ian Brownlie doubted the potency of state practice necessary to establish such a norm. As such he declared in 1963 that, 'no genuine case of humanitarian intervention has occurred with the exception of the occupation of Syria in 1860 and 1861.'[149] Weiss adds his voice to the debate by contending that:

> By the end of the 19th century, many jurists argued that a doctrine of humanitarian intervention existed in international law, but a considerable number of legal scholars also disagreed. Contemporary analysts disagree about the significance of these writings with the most bullish positing that the doctrine was clearly established in state practice prior to the creation of the UN in1945.[150]

Notwithstanding, even after the prohibition on intervention established by the UN Charter, Hersch Lauterpacht purported in 1946 that intervention was legally permissible when a state committed acts of cruelty against its nationals in such a way that not only denied their fundamental human rights but also shocked the conscience of mankind.[151]

The period after the creation of the UN impacted the issue of humanitarian intervention substantively as the sporadic growth of the international conscience in favour of a doctrine of

---

[148] Ramesh Thakur, 'Global Norms and International Humanitarian Law: An Asian Perspective,' International Law Review of the Red Cross 83, No. 841 (2001), 31

[149] Ian Brownlie, 340

[150] Thomas G. Weiss, 33

[151] Hersch Lauterpacht, 'The Grotian Tradition in international Law,' British Year Book of International Law 23(1946)1

humanitarian intervention was retarded, at least up until the end of the Cold War. What is obvious is that humanitarian intervention was a relevant issue on the international law agenda before 1945. The only difficulty which obtained concerned the question of legality and even so many jurists and statesmen sought to frame the discussion in the context of legitimacy as a method of tempering the difficult arguments that attended the issue of legality.

The Law as of 1945: The UN Charter and the Legality of Humanitarian Intervention

2.1 The UN Charter

The anarchy that plagued the international world order since time immemorial manifested itself during the modern period in the atrocities of 1914 and 1938.[152] It was against this background that the global community of states in 1945 converged in San Francisco on 26 June to undertake the task of, inter alia, implementing a normative control on the use of force. Some 100 million military personnel and civilians[153] were killed in the two World Wars and the conscience of the global community closely approximated to these macabre events was determined to put an end to the indiscriminate use of force by states. To this end, the UN Charter was to define international law in the period after 1945. Importantly, three provisions in the Charter are of absolute

[152] For a discussion on the history and practice of mass atrocities from the pre-classical period to the modern period see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963) 3 -110; as well as Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, Washington D.C 2008)11-18; and also Thomas G. Weiss, *Humanitarian Intervention* (Polity Press, Cambridge, UK 2007) 40 – 58.

[153] Barraclough, Geoffrey, *The Times Atlas of World History* (Times Books, New York 1991)

significance to this discussion, these are articles 2(4)[154] and 2(7) as well as Chapter VII.

These provisions crystallised into the quintessential rule, both conventional and customary, in the years following 1945. The prohibition of force laid out in article 2(4) has universal validity. This means even the few states which are not members of the United Nations are bound by it because it represents not only a treaty rule, but also a norm of customary law.[155] Some commentators have even ventured as far as declaring article 2(4) a peremptory rule of customary international law which has acquired the status of *ius cogens*.[156]

Prohibition on the use of force is further buttressed by article 2(7)[157] of the Charter which conclusively establishes the principle of non-intervention. Previous to this, states argued for a right to conquest even after the Peace of Westphalia in 1648, which was at odds with the principle of sovereignty. As it were, that brand of thinking became a relic of the old regime as article 2(7) ushered in a new principle immunising state sovereignty against arbitrary and unlawful encroachment. The problem that emerged with the normative rules against intervention in the

---

[154] Article 2(4) of the Charter provides: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.' in Malcolm D. Evans, *Blackstone's International Law Documents* (8th edn, OUP, Oxford 2007) 10

[155] *Nicaraqua v USA*, ICJ Rep. 1986, 14, 98-101

[156] Ibid; see also Peter Malanczuk, *Akehurts's Modern Introduction to International Law* (7th edn, Routledge, New York 1997) 311.

[157] Article 2(7) stipulates: '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 or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.' The articles is carried in Malcolm D. Evans, *Blackstone's International Law Documents* (8th edn, OUP, Oxford 2007)11

Charter was that it barred intervention even in genuine cases where it was carried out to save people from mass atrocities. Although the two major wars of the Twentieth Century claimed close to 100 million lives, mass atrocity violence according to Steven Pinker, from antiquity up to the modern period, claimed close to 2 billion.[158] On this premise prohibition of the use of force to save lives appears extremely untenable.

Exceptions to the use of force are allowed in limited circumstances under Chapter VII of the Charter. Article 42 allows the UN, through the Security Council, to use force to maintain or restore international peace and security.[159] This article must be read in conjunction with article 43(1) which provides for member states to allocate armed forces if required for military procedures.[160] Finally, article 51 allows for the use of force in self-defence by an individual state or a collective unit of UN states if an armed attack is perpetuated against that member state.[161] The entire scheme of Chapter VII of the Charter has been used to allow humanitarian intervention under the authority of the Security Council, but this has generally been framed as actions against threats to international peace and security.[162] These kinds of

[158] Steven Pinker, 'The Decline of Violence,' *New Republic*, February 21, 2007, 20

[159] Malcolm D. Evans, 16; The text of the article reads as follows: 'should the Security Council consider that measures provided for in article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockades, and other operations by air, sea, or land forces by members of the United Nations.

[160] Ibid.; Article 43 provides: 'all members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with all special agreement or agreements, armed forces, assistance, and facilities including rights of passage necessary for the purpose of maintaining peace and security.'

[161] The text of article 51 is laid out below at page 18.

[162] Thomas G. Weiss, *Humanitarian Intervention* (Polity Press, Cambridge, UK 2007) 38

intervention endowed with the Security Council's blessings were few and far between until the decade of the 1990s.

It bears noting that article 2(4) is not without its own controversies. Professor Malanczuk discusses the Janus-face dilemma that seems to afflict the text of article 2(4). He contends that article 2(4), on the one hand, is well drafted insofar as it speaks to 'the threat or use of force', instead of 'war'. This allows no 'leg-room' for states to use hostility against one another while pleading a case that they are not at war. Article 2(4) is wide in scope as it applies to all use of force whether it is substantive enough to pass the technical test of 'war'. However, on the other hand, he makes the case that article 2(4) is not as cogently drafted in as far as it prohibits the threat or use of force only 'against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations'. This phraseology opens up the possibility that force used for a wide variety of purposes, such as for example, protecting human rights, is legal because it is not aimed 'against territorial the integrity or political independence of any state'.[163] Malanczuk continues:

> Reference to territorial integrity or political independence should not distract our attention from the words "or in any other manner inconsistent with the purposes of the United Nations". Although article 1 of the Charter, which deals with the purposes of the United Nations, makes a passing reference to justice and international law, which could be used to support the argument that force used in the interest of justice and international law is not illegal, the overriding purpose mentioned in article 1 is "to maintain international peace and security".[164]

But as will be seen in later discussions, an emerging norm of protecting human rights by the use of force seem to be pivoted precisely on this kind of interpretation of article 2(4). Nevertheless, the Charter is replete with admonitions against the

[163] See Peter Malanczuk, *Akehurts's Modern Introduction to International Law* (7th edn, Routledge, New York 1997) 308-309.

[164] Ibid 311

use of force. The preamble for instance says that 'the peoples of the United Nations are determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'.[165] Despite such admonitions, there has been a potent view that the Charter must be broadly and purposively interpreted so as to give effect not only to the prohibition on the use of force but to ensure other imperatives such as the global promotion and protection of human rights are achieved.[166] This broad approach to the Charter was endorsed by the United Kingdom in the *Corfu Channel Case* but, on the facts of the case, was ultimately not applied by the International Court of Justice.[167] In the main, it appears that since its inception the UN Charter has been plagued by this veritable battle of norms so to speak. It is by no means farfetched to suggest that the organisation has had a myopic focus on the prohibition of force which has perhaps inadvertently resulted in a stringent reinforcement of this norm at the expense of other arguably more pressing ones or at the very least other norms of equal stature.[168]

A confirmation of the wide normative scope on the prohibition of armed force in international law is to be found in the Friendly Relations Declaration adopted by consensus by the UN General Assembly in 1970[169] and in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of states

[165] Malcolm D. Evans, .9-10.

[166] Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention'," American Journal of International Law 93, no.4 (199), 824 - 8

[167] ICJ Rep. 1949, 4, 35; the facts of the Corfu Chanel Case were these: British warships had been struck by mines while exercising a right of innocent passage in Albanian territorial waters. The UK instituted a maneuver 'Operation Retail' in which it deployed additional warships to sweep for mines. Although mine sweeping is no subsumed under the right of innocent passage, the UK argued it had a right to intervene to ensure that the mines were produced as evidence before and international tribunal.

[168] For example article 1(2) of the UN Charter which according to Weiss promotes equally important imperatives to those of sovereignty and not intervention; see Thomas G. Weiss, 17

[169] Excerpts of the Declaration can be seen in Peter Malanczuk, 310.

and the Protection of their Independence and Sovereignty.[170] A good measure of the controversy that attends the use of force is evident in the practice of states vis-à-vis article 2(4) of the UN Charter. The chasm in official rhetoric and the inconsistency of state practice manifested itself in a remarkable figure of some 160 incidences of aggression between 1945 and 1985.[171] The ineffectiveness of the UN collective security machinery during the Cold War period has given life to legitimate queries as to whether the norm of prohibition on the use of force is still valid in the modern context. As one scholar has rightly inquired, 'who killed article 2(4)?'[172] The problem is that while states were violating article 2(4) as it suited their interest during the Cold War, such violations were not being done in the name of humanitarian intervention to save lives. So, the plethora of human rights agreements which emerged immediately after 1945, among which were the 1948 UDHR, the 1949 Geneva Conventions and the 1966 ICCPR and ICESCR, according to one author, did not seem to garner much support for the use of force to prevent mass atrocities.[173] And so it was that where attempts were made to prevent acts which shocked the conscience of mankind, these were invariably weak or quasi-humanitarian in nature.[174]

---

[170] See 1965 Declaration in D. J Harris, *Cases and Materials on International Law* (6thedn, Sweet and Maxwell, London 2004) 916-917.

[171] Note that Borchardt uses the term 'wars' to describe these incidences of aggression. One submits on the contrary that not all of these incidences amounted to full blown war proper. To accept this as the case is absurd as it would render the period after the birth of the UN the most belligerent in the history of humankind. To accept any such proposition, would mean accepting that post-1945 there was no international law prohibiting the use of force. For a list of the 160'wars' fought in internal and international conflicts from 1945 to 1985, see U. Borchardt and others, Die Kreige der Nachkrieqszeit, VN (1986), 68 cited in D. J Harris ibid

[172] See Professor Tom Franck's, 'Who Killed Article 2(4)? Or: The Changing Norms Governing the Use of Force By States, AJIL 64 (1970). 809-37.

[173] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, Washington D.C 2008) 22

[174] ibid 23

A series of intervention occurred during the period which claimed frail humanitarian motives of protecting the nationals in the concerned states. Among these were: Belgium in the Congo during1960; Belgium and the US in the Congo rebel Stronghold of Stanleyville in 1964; the US in the Dominican Republic in 1965; France and Belgium in Zaire in 1978; The US in Grenada in 1983; and the US in Panama in 1989.[175] Resoundingly, the UN condemned these acts of intervention. And where there were cases of intervention which could be legitimately justified on a humanitarian basis, other less plausible justifications were used. Consider, for example, India' Invasion of East Pakistan in 1971 which liberated Bangladesh and save numerous lives but which was declared by India as an act of self-defence. Vietnam's intervention in Cambodia to stop Pol Pot's murderous regime which claimed 2 million lives did not initially plead humanitarian motives, but even when this was offered as a justification it was still condemned by the International Community.[176] When the psychopath Idi Amin in Uganda was overthrown by Tanzania in 1979, this was incredibly defended as an act of self-defence even as it stopped the heartless dictator from adding any more fatalities to the 100,000 he had already racked up. [177]

In light of the fact that instances such as these, (whatever they were called, and regardless of whether or not they attracted global support) effectively put an end to mass atrocities, it is no wonder that the putative establishment of an immutable norm in the form of article 2(4) is under intense scrutiny. In the current scheme of world affairs, there is an increasing call for the use of force to prevent humanitarian atrocities which shock the conscience of mankind.[178] Even more importantly, the expression of doubt regarding the extent to which article 2(4) represents an

---

[175] ibid

[176] ibid 24

[177] ibid

[178] Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford 1995) 7

immutable norm can be traced back to the genesis of the UN Charter. Professor Harris demonstrates that even in the drafting stage of the UN Charter article 2(4) was a source of disquiet among states. He contends that whilst article 2(4) purports to be clear on the use of armed force, whether amounting to war or not, it feigns no such clarity with respect to the use of political or economic pressure.[179] As it concerns the use of economic pressure, a proposal by Brazil during the drafting of article 2(4) requiring states to refrain from economic measures was rejected.[180] The issue was a sore point of contention between western states sitting on one side of the fence and the Soviet Union and developing states standing guard on the other.

From the foregoing discussion, one may conclude that article 2(4) represents a formidable prohibition in the modern period of the law on the use of force. However, prevailing state practice along with the many controversies surrounding the circumstances in which force can be used has created doubt about the extent to which article 2(4) represents an hindrance to the emergence of new norms on the use of force. This begs the question: are the current exceptions to article 2(4) stipulated in Chapter VII of the Charter fixed in time and absolute? To arrive at any meaningful answer, one is compelled to examine those exceptions in greater detail. As is submitted further on in the discussion, it cannot be a tenable position to insist that no emerging norm in favour of the use of force can arise in the face of article 2(4). Suffice it to say, at this juncture the dynamic change in the values and imperatives of the international society frowns at any suggestion about the immutability of the prohibition on the use of force. The publics in states around the world have progressively accepted that we are living in a global community and every human being is a global citizen. The insularity that was a feature of the ancient period has waned to emerging concepts of a common humanity. Common values such as the universal importance of

[179] D. J. Harris, 890.
[180] ibid.

human rights have replaced concerns with conquest. So important are some of these values that offenders are deemed to be the common enemy of humanity and the use of force is seen as an available avenue to prevent their indifference and uphold the avant-garde values of a generation the UN Charter itself promised to shield from the atrocities that attended the two World Wars.

The period since 1945 has not been plagued so much by interstate warfare, although there have been some instances such as Korea and Iraq, but the period has been marred more so by intra-state hostilities in the form of civil wars, dominant groups attempting to exterminate ethnic minorities for various absurd reasons, and national liberation movements predisposed to indiscriminate violence. True to the period, the world witnessed some macabre humanitarian disasters the likes of which had not been seen since 1914 and 1939. Not least among these the crises in Rwanda, Darfur, Kosovo and Bosnia stands out as troubling examples. The result is that states, led by western democracies, reinforced by jurists and writers began agitating for and claiming the right to use force to put an end to the carnage in order to save lives primarily and preserve global peace and security in the process. This new impetus it is submitted in chapter three of the paper flies in the face of any argument that article 2(4) is the immutable norm on the use of force in our time.

2.2 Exceptions to article 2(4)

2.2.1 The Right of Self-Defence

Self-defence is one clear exception to the rule laid out in article 2(4). The extent of self-defence is somewhat controversial as some states argue that it includes the right to pre-emptive strike. Article 51 of the Charter lays out the law as it pertains to self defence.[181] From the text of the article two rights are set out: (1)

[181] Article 51 states: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs

the right of individual self-defence and (2) the right of collective self-defence. The article however does not assist much where it concerns the scope or breadth of the right. Those who support the right to anticipatory self-defence contend that the right is inherent in article 51 because it does not expressly limit circumstances in which self-defence may be exercised. Professor Malanczuk argues persuasively that in the face of a manifestly imminent armed attack by another state, there is still a right to preventative self-defence under the Charter as a strictly limited exception; after all diplomatic means available under the circumstances have been exhausted.[182] The right of anticipatory self-defence is a part of customary international law and is illustrated in the classic *Caroline Case*.[183] It was not doubted in the case that the British government was entitled to anticipate further attacks from the vessel 'Caroline'.[184]

The classic formula for self-defence, anticipatory self-defence included, was outlined by the American representative Daniel Webster in a communiqué to the UK authorities. He pointed out that in deciding to use force in self-defence, a state must demonstrate a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation', and the action taken must not be 'unreasonable or

---

against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by the members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.' Cited in Peter Malanczuk, 311; see also Malcolm D. Evans, 18.

[182] Peter Malanczuk, 14.

[183] ibid.

[184] There, preparations for subversive action against British authorities were made in US territory. The vessel reinforced and supplied the rebels in Canada from US ports. A British legion from Canada crossed the border into the US, pounced upon the Caroline, seized it and set it ablaze. It was then run over the Niagara Falls to a watery grave; see D.J. Harris, 921-922

excessive', and it must be 'limited by that necessity and kept clearly within it'.[185] Today it is generally accepted, as the *Nicaragua Case*[186] confirms, in customary international law, actions taken in self-defence, remain subject to Caroline requirements of necessity and proportionality. Article 51 has not caused custom to change in this respect.[187] Although the Caroline case laid down a rule applicable to both anticipatory self-defence and self-defence proper, it is now accepted by both states and writers that the right to anticipatory self-defence is an extremely limited one. This is an important caveat because any overbroad approach to anticipatory self-defence could lead to wanton abuse of the use of force.[188]

---

[185] D. J. Harris ibid

[186] I.C.J Reports 1986, p.14; The Nicaragua Case is the locus classicus in the case law in respect of the use of force. The facts of the case were these: In 1979, the right-wing Somoza Government in Nicaragua was overthrown by revolution by the left-wing Sandinista Government. In 1981, President Reagan terminated economic aid to Nicaragua on the ground that it had aided guerrillas fighting against the El Salvador Government, which enjoyed good relations with the United States, by allowing USSR arms to pass through its ports and territory en route for El Salvador. Nicaragua claimed that the United States had (i) used direct armed force against it by laying mines in Nicaraguan internal and territorial waters which caused damage to their merchant ships, and attacking and damaging their ports, oil installations and a naval base and (ii) given assistance to the *contras*, who were rebels fighting to overthrow the Sandinista Government. They also claimed that the US was in breach of the US-Nicaraguan Treaty of Friendship, Commerce and Navigation. The court held that, inter alia, the use of force could not be a tenable means of ensuring protection for human rights. The court squandered an opportunity to dispel any doubts that in extreme cases military force is warranted to save lives and where it was used such acts would be legal.

[187] D. J. Harris, 922.

[188] Such an instance of abuse was illustrated in 1981 when Israel attacked and destroyed a nuclear reactor nearing completion in Iraq. Israel justified its conduct on the ground on anticipatory self-defence arguing that the reactor would be used to manufacture weapons that would be used against it. The Israeli action was unanimous condemn by the Security Council as a clear violation of article 2(4).

There are necessary conditions precedent required before a state can respond to armed attack under the right of self-defence. These can be listed as follows: (1) there must in fact be an armed attack; (2) the victim state must declare the attack; (3) the victim state is required to request assistance; (4) the necessity of the response must be established; (5) the victim state must report the attack to the Security Council; and (6) all actions taken in self-defence must cease after the Security Council has taken the necessary measures. These pre-requisites are in tandem with the principles of necessity and proportionality which emerged with the *Caroline case.* According to Professor Malanczuk, the most important limitations on the right to self-defence are the traditional requirements of necessity and proportionality.[189] In the *Nicaragua Case*, the International Court of Justice stated that, 'there is a specific rule (of customary international law[190]) whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it'.[191] The Court confirmed the requirement of necessity and proportionality applies to article 51 of the Charter in its Advisory Opinion in the *Legality of Nuclear Weapons Case.*[192]

2.2.2 Collective Security

Under Chapter VII of the UN Charter, the Security Council, which is the main enforcement arm of the organisation, is entrusted with maintaining international peace and security. With the failure of the League of Nations fresh at the back of their minds, the drafters of the UN Charter endeavoured to create a more advanced system of collective security for the enforcement of peace. This system is founded upon articles 2(4) and 2(7) with auxiliary support from the entire scheme of Chapter VII of the

[189] Peter Malanczuk, 317.
[190] My emphasis
[191] See (n66)
[192] ILM 35 (1996), 809, at p. 822, para. 41.

Charter. Chapter VII is entitled: 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression.'[193]

The UN system of collective security faced perilous times during the Cold War. The system in the view of one writer remained crippled because of the tensions in the Security Council among the five permanent members.[194] By and large, the source of the most disagreement in the Council was between the United States and the USSR. The resultant effect was that there was an excessive and frequent resort to the use of the veto power.

Invariably, this rendered the Security Council comatose as it was unable to act in many instances to address the occurrences of threats or breaches to international peace. The situation deteriorated to such an extent that between 1946 and 1986, there were only two determinations by the Security Council under article 39 that there was a breach to the peace. These were the cases of Korea in 1950 and the Falklands War in 1956. This was in light of the fact that around the same period there were, as mentioned earlier, some 160 instances of aggression globally.[195] According to Malanczuk the dearth of Security Council action was illustrated

[193] Peter Malanczuk,389; Article 39 opens Chapter VII by providing: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security.' Article 40 permits the Council to take provisional measures to restore the situation to calm. In the event of non-compliance to the provisional measures stipulated the Security Council is empowered to resort to measures short of military force under article 41 to deal with breaches to the peace. These include 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and severance of diplomatic relations.' Article 42 is the most serious of all the measures within the scheme of Chapter VII as it empowers the Security Council to employ force to diffuse threats or breaches to the peace and restore international order.

[194] ibid.

[195] ibid.

between 1945 and 1990 by the fact that the Council only authorised the use of force under Chapter VII in two cases, the cases of Korea and Southern Rhodesia.[196] Often other attempts to invoke Chapter VII of the Charter ran head on into the impervious wall that was the veto power. The veto power in this respect was a veritable Chinese-wall plaguing the system of collective security in the period after 1945.[197]

Much to the delight of the UN as a whole, the end of the Cold War ushered in a change in the relationship between the five permanent members of the Security Council. This was owing to Russia's diminished status as a superpower in stark opposition to the US after the break up of the Soviet Union. The United States became the only superpower in global politics and as such was able to shape the thinking at the Security Council. There was no longer the captious use of the veto power to defeat matters of grave importance. One author submits that after the end of the Cold War, there was a noticeable decline in the unilateral use of force by the US outside of the United Nations regime. There was substantial common interest among the five permanent members that paved the way for a new era of co-operation.[198] This new era of co-operation, was illustrated in the drastic shift from a hebetudinous state in the forty-five or so years of the Cold War to the accruement of collective measures taken under Chapter VII in the period between 1990 and 1995. In this short span, 8 instances of collective security were taken under Chapter VII (Iraq, Liberia, Yugoslavia, Somalia, Libya, Angola, Haiti and Rwanda) all of which entailed binding sanctions under article 41.

---

[196] One example of the reckless use of the veto power was in 1980 when an attempt was made to apply article 41 against Iran in an effort to compel Iran to release the United States diplomats being held as hostages in Tehran. This was defeated by a Soviet veto.

[197] See the arguments posited by Rosalyn Higgins and cited by Peter Malanczuk, 395.

[198] Peter Malanczuk, 396.

Evidently, the era after the Cold War brought with it renewed vigour to the Security Council and resulted in a strengthening of the law on use of force for the period after 1945. That is – the use of force in international law was prohibited under the Charter except for purposes of self-defence and collective security authorised by the Security Council (within which humanitarian intervention was often subsumed).

2.3 The Question of Use of Force in cases of Humanitarian Intervention

The issue of the use of force for humanitarian intervention came to the limelight in the period after 1945. However, its most visible period in the academic and legal debate was after the end of the Cold War and continuing into the decade of the 1990s. Generally speaking, whether or not there is a right to use force for humanitarian intervention, is touchy issue. The next chapter in the paper deals more fulsomely with that issue. To avoid pre-empting the discussion there, one is compelled to treat briefly, with a few issues of immediate relevance. The first of which is to note that there is clear law that there is a right of humanitarian intervention in extremely limited cases. That is to say, the right to intervene for human purposes is subject to Security Council authorisation. Unmistakably, the Security Council has demonstrated its willingness to authorise the use of force for humanitarian intervention under the general scheme of Chapter VII. Nevertheless, the issue of the veto power lurks in the background as an obstacle to Security Council authorisation of force to save lives. There are indeed catastrophic humanitarian crises which have been of such a scale that they have presented serious threats to the sanctity of international peace and security. In these cases whether force is qualified on the basis of a need to preserve peace and security or as a necessity to save lives is inconsequential so long as lives are saved.

The animosity regarding the use of force for humanitarian intervention surrounds the issue of the use of unilateral or multilateral force not authorised by the Security Council.

Advocates of the right to use force in these circumstances contend that in the event there is a failure of the Security Council to act because it is rendered otiose by the invocation of the veto by one of the permanent five, the world should not simply sit by as spectators to wanton genocide, horrific ethnic cleansing, indiscriminate rape, and mass displacement of populations. They advance the argument by insisting that in such cases there is an inherent duty on mankind to interpret the entire Charter purposively in order to give effect not only to article 2(4) but also to some of the other stated imperatives of advancing the welfare of a common humanity. Central among this is the imperative of promoting and protecting human rights. Critics however, argue that there should be no such lee-way to use force. This position is premised on a deep suspicion that to accept that there is any such right established on a purposive interpretation of the Charter opens a Pandora's Box which ultimately invites abuse. The fear of reverting to pre-1914 concepts of an unchecked right to use force is the main caveat against any acceptance of an emerging norm congruent to the use of force for humanitarian intervention.

What is clear in the discussion so far is that the question of use of force for the purposes of humanitarian intervention is a difficult area which requires any academic analysis to tread cautiously. Having said that one must point out that though an emerging norm seems to be developing in the practice of states aided by the authoritative writings of academics and jurists in support of the use of force in humanitarian intervention, it is vastly dissimilar in nature and form to the use of force that was a feature of ancient times. It is a limited right which is thought to be further limited by the rareness of the circumstances for which it will be called upon. An issue which cannot be avoided is whether article 2(4) is the Grundnorm of international law on the use of force. If answered affirmatively, an alternative argument could be submitted that it is not the only imperative of the UN Charter. And so the question then becomes: Is the Grundnorm changing especially in light of the situation in international society post 1989?

Toward an Evolving Norm: Humanitarian Intervention in the Post-Cold War period

3.1 A Plethora of Post-1989 Intervention Cases

At the end of the Cold War, the discourse on humanitarian intervention took a positive turn. Though the old habits about intervention died hard, the decade of the 1990s witnessed 9 significant military operations mounted on credible humanitarian grounds.[199] Five of these cases were greeted with far less opposition than the others. In 1991 the US and its allies successfully imposed a safe haven for the Kurds against the brutality of Sadam Hussein. The authority for this intervention hinged very precariously on an earlier UN Resolution.[200] In 1994, the Security Council authorized force to remove a military junta in Haiti that overthrew the democratically elected President.[201] ECOWAS intervened in Sierra Leone during 1997 to end wholesale bloodshed and the Security Council authorized an Australian regiment to use force in order to restore calm in East Timor.

The other cases of intervention were much more precarious. In Somalia President Siad Barre was overthrown in 1991 resulting in ensuing turmoil which displaced hundreds of thousands of Somalis. Even though a UN Peace keeping force was deployed there in 1992 it proved to be ineffective. The Security Council fearing the death of some 1.5 million Somalis dispatched a stronger contingent by the end of the year. The UN justified its intervention on humanitarian grounds and managed to keep fatalities down to 100,000. However, the entire intervention later

[199] Gareth Evans, *The Responsibility to protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington DC 2008), 24

[200] Resolution 688, it was argued, used language which justified intervention, See Thomas G. Weiss, *Humanitarian Intervention* (Polity press, Cambridge 2007) 41

[201] Gareth Evans, 26

collapsed when the US pulled out its troops after the 'Black Hawk Down' debacle, in which 18 US soldiers died.[202]

The death of US soldiers in Somalia contributed in its reluctance to respond to the crisis in Rwanda in 1994. Rwandan President Juvenal Habyarimana was killed on April 6th which triggered massive ethnic based violence.[203] Disappointingly, the UN's response to warnings of an impending slaughter was one of despondence. In the melee some 800,000 Tutsis and moderate Hutus were butchered.[204] This was unequivocally the worst case of genocide since the Jewish Holocaust. In its wake Kofi Annan declared (in an attempt to appease global hysteria) that another Rwanda would never happen again.[205] That was a commitment which came too late as Phillip Gourevitch's account hauntingly demonstrates that civilians were annihilated at whim while the rest of the world stood by as spectators.[206]

The failure of the UN Peace keeping forces in Bosnia during 1995 to protect 8000 men and boys from imminent death demonstrated the need for potent military might in the face of evil of a demonic caliber. Four hundred Dutch UN PROFOR troops were brushed aside to watch helplessly as the fiend Ratko Mladic

---

[202] Walter Clarke and Jeffrey Herbst, 'Somalia and the Future of Humanitarian Intervention,' Foreign Affairs 75 (march-April 1996), 70-85

[203] Arthur J. Klinghoffer, *The International Dimensions of Genocide in Rwanda* (New York University Press, New York 1998)

[204] William Shawcross, *Deliver us from Evil: Warlords and peacekeepers in a World of Endless Conflict* (Bloomsbury publishing, London 2000) 124-154

[205] Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, s/1999/1257 (United Nations, New York 1999)

[206] So riveting is this account that it would pull at the heart stings of every human being with a conscience, see, generally, Phillip Gourevitch, *We Wish To Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* (Picador, New York 1999); see also Romeo Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (Knopf, Canada 2003)

commanded Serbian forces to murder the victims.[207] This was later declared to be the largest incident of mass murder on European soil since WWII.[208]

Three years subsequently, Serbian President Slobodan Milosevic began to act on his threat to crush ethnic Albanian separatists. NATO fearing that inaction could lead to a repeat of events in Rwanda waited anxiously as the Security Council tried time and time again without success to reach consensus on a resolution authorizing the use of force. China and Russia were impenetrable in there refusal to authorize force and in March 1999, after the murder of 45 Kosovo Albanians in Racak, NATO decided to act unilaterally. To that end a bombing campaign began which lasted for 78 days. Finally, when Milosevic was threatened with the possibility of a ground invasion he recanted from his murderous designs.[209]

NATO's action in Kosovo sparked a global debate about legality versus legitimacy. Many argued that the use of force for humanitarian intervention could be legitimated in extreme cases.[210]

In a bold declaration Shinya Murase opined that suggestions that military intervention in Kosovo was legitimate but illegal were counterintuitive. He posited the view that the intervention should be seen as legal on the premise that where the *lex specialis* (the UN treaty) ceased to be useful, as a result of the

---

[207] Sumantra Bose, 'The Bosnian State a Decade After Dayton,' International Peace Keeping 12 (Autumn 2005), 322-335

[208] Gareth Evans, 29

[209] ibid

[210] See Jennifer M. Welsh 'Taking Consequences Seriously: Objections to Humanitarian Intervention' in Jennifer M. Welsh (ed), *Humanitarian Intervention and International relations* (Oxford University Press, Oxford 2006) 51-68; see also Henry Shue 'Limiting Sovereignty' in Jennifer M. Welsh at 11-28; as well as Nicholas J Wheeler, 'The Humanitarian Responsibility of Sovereignty: Explaining the Development of a New Norm of military Intervention for Human purposes in International Society' in Jenifer M. Welsh at 29-51

Security Council's failure or inability to act, then the *lex generalis* (customary law) eclipses the treaty rule in order to provide a remedy and give effect to the holistic imperatives of the Charter regime.[211] In spite of the ingenuity of this argument it should be viewed with some amount of caution, especially in light of the disagreement among scholars on the existence of a consistent pattern of practice which supported the view that a norm of intervention in customary international law was in existence.

Notwithstanding, from the evidence it is clear that the 1990s stimulated a profusion of comment on whether there was a norm of military intervention, and if not, whether there was incontrovertible evidence that one was on its way to being crystallized. In the fray, it was argued that cases like Kosovo were not legal because of the absence of UN authorization as well as the lack of consent by the concerned state. Weiss argues that consent from despotic, blood hungry regimes or countries so politically fragmented that they are unable to protect their own citizens is of no moment.[212] The 1990s were also outstanding for the proliferation in the use of sanctions to keep state behaviour in check.[213] The austere effects of sanctions bolstered the claim that they were often as deadly as military intervention but unlike the latter did not halt mass atrocities.[214]

---

[211] Shinya Murase, 'The Relationship Between the UN Charter and General International Law Regarding the non-use of force: The case of NATO's Air Campaign in the Kosovo Crisis of 1999,' Lauterpacht Centre for International Law, Cambridge University, Lecture paper 2000 available at <http://www.lcil.cam.ac.uk/lectures/lecture_papers.php> accessed on 25 March 2009

[212] Thomas G. Weiss, 42-43

[213] George A. Lopez labels the 1990s the 'sanctions decade' because the UN Security Council imposed 12 sanctions regimes, several times more than in the previous 40 years combined, see David Cartright and Geaorge A. Lopez, *Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner, Boulder, Colorado 2000

[214] As a result of the effects of traditional sanctions, alternatives called smart sanctions were proposed as a means to spare populations from their undesirable consequences; see David Cartright and others, *Smart Sanctions:*

An additional tool that emerged in the 1990s was the creation of Criminal Tribunals and ultimately the International Criminal Court (ICC)[215] to punish the merchants of death who were the architects of crimes against humanity. To their credit the International Criminal Tribunal for Former Yugoslavia (ICTFY) and for Rwanda (ICTF) brought the likes of Slobodan Milosevic and Charles Taylor to justice. Although one cannot undermine the usefulness of these endeavors, they offered ex post facto remedies which were not prophylactic. As a result, military intervention to save lives remained a formidable policy option in the 1990s which continually and incrementally appeared norm creating.

The nature of mass atrocities also shifted in the period after 1945 but more so during the 1990s. One observer contends that the old practices of genocide, ethnic cleansing, and crimes against humanity were previously perpetrated almost exclusively by the state or in medieval times by Princes and Kings in conquest. However, he uses the term 'new wars' to describe a modern global political landscape where, in a weak or failed state, Non- State Actors (NSAs) battling for state control have become part of a death machine which murders relentlessly and without remorse.[216] Para-military groups, mafia organizations and criminal gangs indiscriminately target and kill civilians in an attempt to institutionalize their regimes of terror. The result is that 90 per cent of those killed in intra-state civil wars and conflicts have been civilians.[217] Aid workers and journalists have not been spared which was illustrated by the much publicized death of the Wall Street Journal's Daniel Pearl in Afghanistan and Margaret Hassan, the country director of CARE in Iraq. It is precisely because of

---

Restructuring UN policy in Iraq, Policy Brief Series (Fourth Freedom Forum, Goshen, Indiana 2001).

[215] The International Criminal Court was established by the 1998 Rome Statue

[216] Thomas G. Weiss, 63-68

[217] Carnegie Commission on Preventing Deadly Conflict: Final Report (Carnegie Commission on Preventing Deadly Conflict, Washington, DC 1998), 11

these realities that Weiss submits, 'military intervention in certain cases is not a first or last resort but the only resort.'[218]

Appreciation of the importance of force in extreme cases of mass atrocities is the driving force behind 'the new activism' of the 1990s. Nicholas J. Wheeler argues that this activism manifested at the UN in the Security Council's extension of its chapter VII powers into matters hitherto considered to be within the exclusive jurisdiction of the state.[219] The change in Security Council practice was largely influenced by Western States seeking to secure legitimacy for intervention to protect civilians in Iraq, Somalia, Haiti and the Balkans.[220] The degree to which this new norm can be said to occupy a place in international law is as of yet not clear. What is obvious, however, is that the UN's response to actions taken in cases like Kosovo, and generally speaking, the reaction of the global community to these episodes, revealed growing acquiesce to the emergence of a new norm.

3.2 A Chasm in the Theoretical Debate: How are Norms Created?

Constructivists define norms as the existence of shared understanding pertaining to the permissible limits of state action (or inaction) and an acceptance that conduct must be appraised by terms set by the norms.[221] Norms are complied with through means of coercion where a state is forced by the hegemony in the global community to conform.[222] They are also obeyed because of self-interest - that is to say - states comply because to do so

---

[218] Thomas G. Weiss, 90

[219] Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention For Humanitarian Purposes' in Jennifer M. Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford 2006) 29

[220]

[221] ibid

[222] ibid,30

benefits them.[223] But most importantly, norms are respected because of legitimacy. This is where states accept the norm to be valid and by that virtue comply with it.[224] Martha Finnemore contends that norms develop as particular states act as 'norm entrepreneurs' by working to convince other states to accept the validity of the norms.[225] By this token constructivists insist that where a state's behaviour cannot be legitimated then such behaviour must be constrained.

Realist and Marxist theorists object to this view of norm creation. In contrast, they argue that norms are determined by the states that possess international power through the use of their military and economic might. This anarchical approach to norm creating has proved less useful in the wake of the emergence of an era of co-operation at the Security Council which was ushered in during the 1990s.

Wheeler argues that a feature of co-operation at the Security Council was the emergence of a new norm of military intervention for humanitarian purposes. He claims that this new norm clears the way for a case to be made that in the most egregious and appalling cases of mass atrocities a state in violation temporarily forfeits protection under the norm of non-intervention.[226] The Security Council's authorization of force in Iraq and the claim of western states that Resolution 688 empowered them to act for humanitarian purposes is vivid illustration of the existence, at least at a residual level, of this norm. Resolution 794 signaled the Council's willingness to authorize force to save the lives of innocent civilians. According to one analyst Somalia represented an exceptional case of the failure of the state apparatus which demanded Security Council

[223] Alexander Wendt, *Social theory of International Politics* (Cambridge University Press, Cambridge 1999) 285-290
[224] Nicholas J. Wheeler, 31
[225] Martha Finnemore, *National Interest in International Society* (Cornell University Press, Ithaca, New York 1996)
[226] Nicholas J. Wheeler, 34

intervention to save lives.[227] It is clear that sovereignty, in the period after the Cold War, was no longer seen as an inherent right. States that claimed this entitlement were compelled to recognize concomitant responsibilities such as the duty to protect their citizens; as such, 'sovereignty' was reframed as 'responsibility' and to forfeit responsibilities and duties was analogous to forfeiting the shield of articles 2 (4) and 2 (7).[228]

The cynicism of the Marxists school of thought does not deny the emergence of a new norm of intervention. Their disagreement surrounds how and why this norm has actually been created and how it should be operationalised. Noted leftist intellectual Noam Chomsky claims that like the US hegemony that defined the Cold War, since 1990, humanitarian ideals have been pressed into service to fulfill a US lead agenda of hegemony and world dominance.[229] With respect, one submits that Professor Chomsky's thesis is simply absurd. The politics of power and domination has not featured as prominently in the contemporary world as it did in the past. Plainly, it has lost its sting to a new philosophy of a common humanity through which the right of every human being to inherent justice is seen as inalienable and cannot be severed from his person arbitrarily. What scholars like Chomsky choose to ignore is that in all the arenas of international law where the right to intervene in order to prevent humanitarian crises is promoted, it is so promoted in a limited scope and as an exceptional response.

Moreover to accept the Realist and Marxist positions would be to dismiss the effect of other critical factors which are determinative on the issue. Take for example the growing awareness of citizens in western countries to the plight of distant

---

[227] ibid

[228] Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights' (1993), International Affairs, 69/3, 440

[229] Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Common Courage Press, Monroe 1999) 11

strangers. This is crucial to explaining US intervention in Iraq and Somalia, where the American media through its coverage of the crisis prompted a social outcry which forced the state to act.[230] Concordantly, humanitarian norms have taken on a kind of 'shaming power'[231] which is derived from the force of global humanitarian values.

It appears from international response to some of these crises that not only is there support for a new norm of military intervention, pivoted on the endorsement of the UN Security Council, but some even suggest that in cases of unadulterated conscious shocking suffering unilateral intervention is permissible and legitimate. This is a very difficult area. Recall for the moment Shinya Murase's novel argument above that where the Security Council is rendered comatose, by the veto power, states are allowed to act in the interest of preserving life. NATO's intervention in Kosovo has been at the center of the question of whether unilateral humanitarian intervention is legal. Some scholars argue that there were compelling moral justifications for the intervention.[232] Others who were once opposed to the use of military force to save lives made an about-turn after research into the malevolence that reigned supreme elsewhere.[233] Many more seemed resistant or uncertain.

In the aftermath of Kosovo, Thomas Franck argued that though the intervention was contrary to the requirement of the UN

---

[230] Nicholas J. Wheeler, Saving *Strangers: Huamanitarian Intervention in International Society* (Oxford University Press, Oxford 2000) 147-153

[231] Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention For Humanitarian Purposes' in Jennifer M. Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford 2006) 39

[232] John Janzekovic, *The Use of Force In Humanitarian Intervention: Morality and Practicalities* (Ashgate Publishing Ltd, Hampshire 2006) 159-189

[233] Anne Orford, Reading *Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge 2003) 14-15

Charter, it could be framed within the domestic law principle of mitigation. He asserted that:

> The essence of mitigation is that the law recognizes the continuing force of the rule in general, while also accepting that in extra-ordinary circumstances, condoning a carefully calibrated and justifiable violation may do more to rescue the law's legitimacy than would its rigorous implementation.[234]

NATO's plea that it acted to prevent a humanitarian catastrophe presents itself as a plea in mitigation and according to Franck, where such pleas are made, the role of the Security Council is to act as a 'global jury' by balancing the text of the Charter with the moral necessities of the peculiar case.[235]

On this premise, one submits that NATO's actions were endorsed, albeit ex post facto, by the Security Council. The Council stamped its seal of approval by passing resolution 1244 which certified the termination of hostilities. The body most representative of the global community, the General Assembly, and the World's top civil servant in the form of the Secretary-General, also refrained from condemning the intervention. In addition, countries like the UK launched a publicity campaign to defend the intervention vigorously. This perhaps reveals that in extreme cases unilateral actions may be illegal but can be legitimated by moral justifications. The silence at the UN must also be viewed in the context of the emergence of a new norm of intervention in the 1990s, at least where there is Security Council endorsement. For, clearly if Kosovo had occurred during the Cold War period this would have resulted in scathing condemnation. Nevertheless, Kosovo serves to remind us of the most important issue facing the UN in this period, that is, the pressing need for meaningful reform.

---

[234] Thomas Franck, *Recourse to force: State Action Against threats and Armed Attacks* (Cambridge University Press, Cambridge 2002) 185

[235] ibid

The ICJ opted out of a golden opportunity to definitively declare what the law was concerning unilateral use of force to stop mass atrocities without the Security Council's approval. The opportunity arose in the *Legality of the Use of Force Case*[236] where Yugoslavia petitioned the court to declare that the acts of NATO in Kosovo were contrary to the rules of international law. Yugoslavia insisted that there was no right of humanitarian intervention in international law. It argued that even if it were to be accepted that there was such a right, the actions of NATO in Kosovo could not be considered 'humanitarian' as it led to grave suffering. In response Belgium dismissed Yugoslavia's pleadings as based on too narrow an interpretation of article 2(4). Belgium assisted by the US contended the actions were taken to stop a humanitarian catastrophe and by extension prevent the destabilization of peace and security in the region. In its decision the ICJ refused provisional measures in all the ten cases brought by Yugoslavia and avoided any judgment on the legality of NATO's use of force.[237]

It could be said that the Court's refusal of Yugoslavia's provisional measures and it's avoidance of the question is indicative of empathy towards the measures taken. The world will simply have to wait to see if the Court will ever give a more definitive judgment on the issue.

Is There A Responsibility to Protect?

5. Origins of the Responsibility to Protect

Martha Finnemore demonstrates that intervention in modern times exuded a genuine focus on saving human lives

[236] Legality of the Threat Nuclear or Use of Weapons Case (United Nations), I.C.J. Rep. 1996, p.226; (1997) 35 I.L.M. 809

[237] For a detailed discussion on the case see Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 44-46

regardless of the race, gender, creed or faith of the rescued.[238] This fact reveals an important shift in the legal regulations that governs the interaction between states and their populations. Notably, states are imposed with a duty to protect their citizens. This responsibility to protect according to one thinker emanates from the fact that human beings enjoy rights which are conferred upon them because of their humanity.[239] The 'responsibility to protect' has been on the UN agenda in more recent times and is offered as a more appropriate method of dealing with protecting the victims of mass atrocities than the bare concept of 'humanitarian intervention.'

The concept of a responsibility to protect was the subject of the International Commission on Intervention and State Sovereignty (ICISS) Report in 2001.[240] The Commission was convened in response to the failure of the Security Council to act in Rwanda in 1994 and then later in Kosovo in 1999. The Council's failure to act expeditiously caused untold massacre of civilians and cried out for a full and frank look at the use of force in urgent cases vis-à-vis the Security Council mechanism to respond. Even before the ICISS Report the notion of the responsibility to protect derived from the early discussions of Bernard Kouchner, Tony Blair, and Francis M. Deng.

Kouchner co-founded the organization *Medecins Sans Frontieres* and was a vocal humanitarian activist. In 1987, in order to stimulate discussion among the French elite, he championed the

---

[238] Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about Use of Force* (Cornell University Press, Ithaca, New York 2003), 3

[239] Fernando R. Teson, 'A liberal Case for Humanitarian Intervention' in J.L. Holzgrefe and Robert O. Keohene (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge 2003), 93-94

[240] Internationals Commission on Intervention Into State Sovereignty, The Responsibility to Protect (International Development Research Centre, Ottawa 2001), available at < http://www.iciss-ciise.gc.ca > accessed 15 on March, 2009

concept of *droit d'ingerence,* or the right to intervene.[241] The right to intervene came to more prominence in France with the intervention of the US in Somalia circa 1992. By the end of the 1990s, the concept became problematic as it caused developing countries great unease.[242] As such, it eventually took a backseat to the 'Blair Doctrine' which originated in a speech delivered by UK Prime Minister Tony Blair at the Chicago Economic Club in 1999, during which he touted a 'doctrine of international community' in defense of NATO's intervention into Kosovo.[243] There, he outlined five guidelines which must be considered when intervention is in question: (1) 'are we sure of our case?'; (2) 'have we exhausted all diplomatic channels?; (3) 'are there military operations we can sensibly and prudently undertake?'; (4) 'are we prepared for the long term?'; and (5) 'do we have national interests involved?'. In spite of Blair's rallying calls in the North his doctrine fell on deaf ears.[244]

The two most important contributions to the development of a norm on the responsibility to protect were those of Francis M. Deng and subsequently Kofi Annan. Deng and his counterpart Roberta Cohen invented the concept of 'sovereignty as responsibility' which became the core of the doctrine of a 'responsibility to protect.'[245] He served as Representative of the UN Secretary- General on Internally Displaced Persons (IDPs) from 1992 to 2004 during which time he developed and articulated

---

[241] Gareth Evans, *The Responsibility to protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington DC 2008), 32

[242] ibid, 33

[243] Tony Blair, 'Doctrine of Internal Community', Speech delivered at the Chicago Economic Club, 24 April 1999 available at <http://www.number-10.gov.uk/output/page1297.asp. >accessed 15 March 2009

[244] Gareth Evans, 34

[245] Thomas G. Weiss, *Humanitarian Intervention* (Polity press, Cambridge 2007) 88

the concept.[246] Upon realizing that IDPs was a matter internal to the state Deng began to implore states to accept that a central component of sovereignty was not merely protection from outside interference, but more importantly, a positive responsibility for the welfare of their citizens.[247] Roberta Cohen, for her part, reinforced the idea that sovereignty imposes a responsibility on governments to protect their citizens.[248] Together, Deng and Cohen published an authoritative series of books on IDPs and sovereignty as responsibility that later became the basis of the concept of a responsibility to protect (commonly called R2P).[249]

Thomas Weiss contends that Deng and Cohen's sovereignty as responsibility was the precursor to the ICISS R2P Report 2001.[250] The notion of sovereignty as responsibility clashed head on with traditional views of sovereignty which claimed that states could do whatever they wanted. It provided a way to navigate around the firewall of sovereignty in order to further the agenda of human rights in international law.[251]

Taking the baton, Kofi Annan used his position as Secretary-General of the UN to advance the notion of sovereignty as responsibility. He attempted to dispose of the contention between the intervention to protect human rights, on the one hand,

---

[246] See, for instance, the seminal work Francis M. Deng, Sovereignty as Responsibility: Conflict Management in Africa (Brookings Institution Press, Washington D.C 1996)

[247] See Gareth Evans, 36

[248] Roberta Cohen, Human Rights Protection for Internally Displaced Persons (Refugee Policy Group, Washington D.C 1991)

[249] See Francis M. Deng, *Protecting the Dispossessed: A Challenge for the International Community* (Brookings Institution Press, Washington D.C 1993); and Roberta Cohen and Francis M. Deng, Masses in Flight: The Global Crisis of Internal Displacement (Brookings Institution Press, Washington D.C 1998); and as well Roberta Cohen and Francis M. Deng, (eds.), The Forsaken People: Case Studies of the Internally Displaced (Brookings Institution Press, Washington D.C 1998);

[250] Thomas G. Weiss, 94

[251] ibid, 95

and sovereignty, on the other, by arguing that in the contemporary context the global imperatives of human rights, which emerged after 1945, demanded the recognition of two streams of sovereignty. In his seminal piece in The Economist, entitled 'Two Concepts of Sovereignty', he declared:

> State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice-versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of human rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.[252]

Many advocates endorsed Annan's views by concurring that on a scale of values, the sovereignty of states is secondary to the rights of its peoples.[253] One writer remarked that the fact that this line of argument came from the world's top civil servant resonated loudly.[254]

4.2 The ICISS Report

And so it was that it reverberated all the way to the ICISS. The R2P Report laid down two normative markers – one concerned with altering the consensus about the use of deadly force to help victims in harms way and the other emphasizing that the responsibility to protect victims from mass atrocities is located in the UN Security Council. The Report made noteworthy contributions to the international human rights debate. As it were, it invented a new way of talking about humanitarian intervention. This was achieved by moving the issue from its contentious

[252] Kofi Annan, 'Two Concepts of Sovereignty' The Economist, 18 September 1999 at 49 – 50; also cited in Gareth Evan, 37 and Thomas G. Weiss, 96 - 97

[253] Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention' ", (1999) American Journal of International Law 93, No.4, 824 - 828

[254] Thomas G. Weiss, 98

position, predicated on a notion of the right to intervene, into a new realm re-characterized by human rights imperatives as a responsibility of the state, specifically, and more generally the entire international community.[255] Additionally, the R2P built on Francis M. Deng's proposition of sovereignty as responsibility thereby removing the foundation from beneath the traditional Westphalian approach to sovereignty.[256] To avoid confusion ICISS laid down clearly that the responsibility to protect lay with the sovereign state itself but if it could not meet this responsibility (or was unwilling or unable to) then it was transferred to the international society. In totality, the responsibility to protect entailed: (1) the responsibility to prevent mass atrocity situations from arising; (2) the responsibility to react to them when they did arise; and (3) the responsibility to rebuild after any intrusive intervention.[257]

ICISS sets a just cause threshold which requires that acts be of a magnitude that shocks the conscience of mankind in order to elicit military intervention. Bullish interventionists argue that waiting for conditions to deteriorate to such an extent may be too late.[258] Weiss argues that from a pragmatist perspective, intervention outside of the framework of the Security Council will continue, if or where, the responsibility to protect is undermined to such an extent as to allow merchants of death to ply their trade.[259] Importantly, the ICISS report while identifying the Security Council as the appropriate authority to approve military force for humanitarian purposes, does not exclude extra- Security Council action if the Council fails to act.

---

255 Gareth Evans, 39

256 ibid, 42

257 ibid, 43; see also Thomas G. Weiss, 101

258 See these counter arguments in Thomas G. Weiss, 104 - 105

259 Emphasis added

4.3 The World Summit

The ICISS R2P Report marked a critical development on the question of whether there is a responsibility to protect but it was not a UN sanctioned report. Nevertheless, the international community got an opportunity to consider the issue at the 2005 World Summit. There, Kofi Annan pleaded for a sweeping overall of the UN system that was not ultimately achieved.[260] Notwithstanding, there were two major developments at the Summit in respect of humanitarian intervention. The first was the creation of the Human Rights Council to replace to the Commission on Human Rights. The failure of the Commission in forwarding a global human rights agenda became intolerable. States used their membership on the Commission as a means of warding off criticisms about their human rights performance.[261] The second development directly pertained to the R2P; the Summit Outcome Document propelled, even if tacitly, normative progress on the use of force to confront conscience shocking events by its outright endorsement of the responsibility to protect.[262]

The R2P concept was embraced by the African Union long before the World Summit and became enshrined in s. 4 of its Constitutive Act 2002, which authorizes the Union to intervene in member states where there were practices of genocide and other crimes against humanity.[263] The rest of the world, perhaps

[260] Kofi Annan, 'In Larger Freedom: Decision Time at the UN', (2005) Foreign Affairs 84, No. 3, 66

[261] High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility (United Nations, New York 2004) Paras. 283, 285

[262] Thomas G. Weiss, 112

[263] Ben Kioko, 'The Right of Interference under the African Union's Constitutive Act: From Non-interference to Non-intervention', (December 2003) International Review of the Red Cross 85, 807 – 825; see also Michael Byers and Simon Chesterman, 'Challenges the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law', in J.L. Holzgrefe and Robert O. Keohene (eds.), *Humanitarian Intervention:*

mindful of the need to catch up, accepted that the R2P was a feature of modern international law by declaring:

> The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort in the event of genocide or other large scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent.[264]

A call was also made for the ICISS Report to be embodied in both UN Security Council and General Assembly resolutions. To its credit the Security Council responded by passing resolution 1674 in April 2006 which endorsed the responsibility to protect and stated the Council's commitment to the principle. Furthermore, recommendations were made to strengthen the office of the UN High Commissioner of Human Rights by doubling the Commissioner's budget.[265] So compelling was the norm of the responsibility to protect that it was endorsed by the likes of China and the US almost immediately after the conference.[266] The Summit's deliberate change from the divisive language of 'humanitarian intervention' to the 'responsibility to protect' was critical to the global reception of the concept.

However, despite its success Weiss submits that it failed to go as far as the ICISS Report in that the Report left open the possibility of unilateral extra-Security Council use of force in imminent cases.

Ethical, Legal and Political Dilemmas (Cambridge University Press, Cambridge 2003, 190 - 191

[264] High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility (United Nations, New York 2004), annex 1, recommendation 55, at 106

[265] Thomas G. Weiss, 166

[266] See Position Paper of the People's Republic of China on the United Nations Reforms (Beijing, 7 June 2005) available at < http://news.xinhuanet.com/English/2005-06/08/content_3056817-3.htm> accessed on 13 March 2009; see also American Interests and UN Reform: Report of the Task Force on the United Nations (US Institute of Peace, Washington D.C 2005) 15

On this note, he remarks:

> The proverbial bottom line is clear. When a state is incapable or unwilling to safeguard its own citizens and peaceful means fail, the resort to outside intervention, including military force (preferably with the Security Council approval), remains a policy option.[267]

All of that said one fact remains clear - this is - the global community when asked the deliberate question of whether there is a responsibility to protect the dignity and inviolability of the human person from ignominious acts resoundingly responded in the affirmative.

4.4 Darfur: Illustration of the Limitations to the Responsibility to Protect?

Even with the emergence of the concept of the responsibility to protect as an alternative nomenclature to the right of humanitarian intervention, the problem which attends the UN Security Council's ability to discharge its functions expeditiously to save lives was shamefully illustrated by the crisis in Darfur. One eminent scholar characterizes the issue in candid terms, when in reference to the Security Council's handling of Darfur she lamented:

> This failure to prevent a major humanitarian crisis demonstrates that the universal acceptance in principle of a 'responsibility to protect' in the World Summit Outcome Document cannot guarantee action. There was no question of the Security Council imposing humanitarian intervention by force. The AU was not willing to intervene in the absence of consent by the government of Sudan. It may be that the World Summit's acceptance of the 'responsibility to protect' has created expectations which will not be fulfilled in practice.[268]

---

[267] Thomas G. Weiss, 80

[268] Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 55

It is reasonable to assume that the norm of a responsibility to protect will be rendered otiose if the operational response of the UN Security Council is not significantly reformed.[269]

The crisis in Darfur crystallized in February 2003 between Janjaweed forces, backed by the government, and anti-government factions.[270] Clear numbers on the death toll caused by the crisis have not been easy to come by but estimates ranges the total number of fatalities between 200,000 and 400,000 Black Africans.[271] Shockingly, the International community instead of denying the existence of the crisis - as was done while 800,000 Rwandans were slaughtered - simply ignored the situation for a long time while it deteriorated.[272] Even as the UN Human Rights Coordinator for Sudan Mukesh Kapila declared Darfur, 'the world greatest humanitarian crisis' this did not evoke any strong reaction from the international community.[273]

By the time the crisis caught the attention of the global media the situation was desperate. One New York Times columnist decried that the publishing industry seemed to respond more quickly to genocide than does the UN.[274] Eventually, the US Congress in a unanimous vote of 422 to 0 during July 2004 accepted that genocide was being committed in Sudan.[275] The EU

---

[269] Nicholas J. Wheeler, *Saving Stranger: Humanitarian Intervention in International Society* (Oxford University Press, Oxford 2000) 304 - 305

[270] Christine Gray, 53

[271] Thomas G. Weiss, 54

[272] Gerard Prunier, *Darfur: A 21st Century Genocide* (3rd edn, Cornell University Press, Ithaca, New York 2008) 139 - 149

[273] ibid, 127

[274] See Nicolas D Kristof, 'Genocide in Slow Motion', (9 February 2006)New York Review of Books 53, No. 2, at 14

[275] UN OCHA, "Sudan: US Congress Unanimously Defines Darfur Violence as 'Genocide', " available at < http://www.globalsecurity .org/military/library/news/2004/07/mil-040723-irino3.htm.> accessed 6 March 2009

also urged Sudan to desist from its genocidal practices.[276] However, regardless of the late acknowledgement that genocide was being perpetrated there was an absence of urgency to stop its continuance. The Security Council itself did not address the crisis until July 2004 when it expressed grave concern at the ongoing atrocities. It stressed that the primary 'responsibility to protect' lay with the government of Sudan and requested that the government facilitate humanitarian relief and disarm the Janjaweed.[277]

The AU deployed a brigade of 7000 troops to Sudan in the midst of the crisis but the numbers were simply too small to have any meaningful effect. In February 2006, the Security Council decided to absorb the AU troops in a UN force numbering 12 to 20 thousand troops. However, implementation of this policy was not immediate as the Council remained very indecisive. In the meantime, adding to an already disgraceful death toll of 200,000, some 2 million civilians were displaced creating a refugee crisis of epic proportions. Finally, in August 2006 the Security Council approved a battalion.[278] During this period it continued to court the consent of the Sudan government before troops were actually deployed. Kofi Annan contemplated whether the U.N would fail yet another test just one year after international consensus that there was a responsibility to protect.[279] The R2P perhaps, paradoxically, facilitated the Security Council Vote of 12 to 0 in favor of intervention but appeared to not be potent enough to compel the Council to follow through promptly on what was agreed. To the dismay of the world, while Annan pondered rhetoric and the Security Council fruitlessly tried to woe Sudan's consent to intervention, the innocent were sacrificed.

---

[276] See Agence France Presse, "EU Law Makers Call Darfur Crisis 'Genocide'," (16 September 2004), available at < http://www.middle-east-online.com/english/sudan/?id=11287> accessed on 6 February 2009

[277] Christine Gray, 10

[278] Thomas G. Weiss, 56

[279] "Strongly Condemning Escalation of Violence in Sudan, Secretary General tells Council 'it is time to act'," Press Release SG/SM/10628, 11 September 2006

An agreement was signed in May 2006 between the Sudan government and the rebels, which was not worth the paper it was written on. Underneath the formalism, it was evident that the government's complicity in the atrocity was a slap in the face of the responsibility to protect. The fundamental principle agreed on at the World Summit that where states reneged on their R2P they automatically forfeited sovereignty allowing the international community to act, was not easily put into operation. This led Weiss to remark that the defiance of the murderous Sudanese regime appended to the prosaic response of the Security Council weakened the normative value of the responsibility to protect.[280] Eventually, after the government gave consent UN forces were deployed.

Using the Sudan case as a marker, the future of humanitarian intervention, within the context of the requirement for Security Council endorsement of intervention, appears tenuous. If the body which is suppose to function as the guardian of a common humanity has the power of the law to take positive action but vacillilates then we must look beyond it. On a brighter note, there is now no debate, as in the pass, on whether there is a norm of military intervention for humanitarian purposes. Though rebranded under the terminology 'responsibility to protect', there is no widespread disagreement about the legality of such acts of intervention where there is Security Council Approval. The only component of intervention which is not as yet generally agreed on is unilateral intervention without Security Council endorsement. At the same time, bullish pro-intervention scholars, jurists and statesmen insist that unilateral intervention where the Security Council is comatose may acquire legitimacy even where it does not meet the threshold of legality. The extent to which the thrust of the responsibility to protect may force the hand of the reform process at the UN is at this juncture not exactly clear.

[280] Thomas G. Weiss, 58

Conclusion

The foregoing discussion points to the emergence of a norm of humanitarian intervention which has been rebranded into a responsibility to protect. This paper has achieved what it set out to do in so far as it tracked the history of the use of force for humanitarian intervention and elucidates what the law is in the present context. From this, it may be reiterated that in one sense the law is back to where it started, that is to say, it is back at the point where use of force for humanitarian intervention is debatable but not impermissible. After having been put under intense scrutiny between 1945 and 1989, the concept has undergone a virtual rebirth since the end of the Cold War and is today considered under the nomenclature responsibility to protect.

In parting, it appears that the norm of 'the responsibility to protect' hinges delicately on the ability of the Security Council to give effect to it. That being the case, it seems the urgency for reform at the UN is even now more pressing that it has ever been. How that reform will be carried out is not an easy matter to decipher. This is because the major problem surrounding the use of military intervention to save lives is the indecisiveness at the Security Council. Even in clear cut cases such as Darfur where it was agreed that mass atrocities were taking place the Security Council was unwilling to deploy troops unless the government of Sudan consented. To a prudent observer this defies logic as it was evident that the government was complicit in the crisis and would not readily endorse the Council's intervention.

To insist in such cases on the consent of the state concerned is akin to asking the fox if the chickens are to be spared. In order to ensure the lives of innocent civilians are not gambled away by indecisiveness it may be appropriate for the veto power to be restrained in cases where there is global agreement that there is a crisis. It is foreseeable that the General Assembly could be endowed with the power to authorize force in cases of dire humanitarian emergencies only on the basis of a simple majority vote. Admittedly, these options will require serious thought and

analysis. However, having managed to garner consensus on the responsibility to protect the UN cannot afford to squander it. Until such reforms are carried out the General Assembly may reinforce the importance of the responsibility to protect by passing resolutions intermittently to remind the global community of the obligations.

The responsibility to protect cannot be placed on a lower rung than the protections guaranteed to states in articles 2(4) and 2(7), not least because it speaks directly to the rights of the individual. International law, in order to remain relevant, is required to move at pace with the values of the global community. In today's world human rights is the buzz word on the tongues of all peoples in every corner of the globe. The Charter is akin to a global constitution and by that token must be interpreted purposively and generously to give effect to citizens rights. Where rights are thus limited in the global constitution without just cause the provisions which limits these rights must be construed so as to allow full enjoyment. The right to life of every human being on this planet is without question far more important than the rights of murderous states - or states which sit back and allow merchants of death within their borders to kill in discriminately - to sovereignty and non-intervention. It would be offensive to our basic humanity to allow states to plead sovereignty in defense to genocide or ethnic cleansing!

An important development which cannot go unnoticed is the impact the writings of authoritative sources have had on the development of the law in this area. The repository of writings by learned jurists, scholars, and statesmen has impacted positively on the development of the jurisprudence on the use of force for humanitarian purposes. Against this background, it may be argued strongly that these contributions have managed to create a relevant area of 'soft law'. Evidently, from the repository of opinions on the use of force for humanitarian purposes, most of the discussants agree on the fact that force authorized by the UN Security Council is permissible. They also concur on the emergence of the norm of the responsibility to protect. To the extent that there is any

divergence of views, it is limited to concerns about the use of force for humanitarian intervention outside the framework of the Security Council. This being the case, it would be interesting to see where the law goes from here if the Security is able to get its house in order and perform its function as guardians of the imperatives of the UN Charter.

Bibliography

Agence France Presse, "EU Law Makers Call Darfur Crisis 'Genocide'," (16 September 2004), available at < http://www.middle-east-online.com/english/sudan/?id=11287> accessed on 6 February 2000

Kofi Annan, 'In Larger Freedom: Decision Time at the UN', (2005) Foreign Affairs 84, No. 3, 66

Kofi Annan, 'Two Concepts of Sovereignty' The Economist, 18 September 1999 at 49 – 50

Kofi Annan, "Opening Remarks", Humanitarian Action: A Symposium, 20 Nov. 2000, in International Peace Academy Conference Report (International Peace Academy, New York 2001) II

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Rev. edn., Penguin Classics, New York 1992)

Geoffrey Barraclough, *The Times Atlas of World History* (Times Books, New York 1991)

Michael Barnett, *Eyewitness to a Genocide* (Cornell University Press, Ithaca, New York 2003)

Tony Blair, 'Doctrine of Internal Community', Speech delivered at the Chicago Economic Club, 24 April 1999 available at <http://www.number-10.gov.uk/output/page1297.asp. >accessed 15 March 2009

Sumantra Bose, 'The Bosnian State a Decade after Dayton,' International Peace Keeping 12 (Autumn 2005), 322-335

Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963)

Michael Byers and Simon Chesterman, 'Challenges the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law', in J.L. Holzgrefe and Robert O. Keohene (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge 2003, 190 - 191

David Cartright and Geaorge A. Lopez, *Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner, Boulder, Colorado 2000)

Carnegie Commission on Preventing Deadly Conflict: Final Report (Carnegie Commission on Preventing Deadly Conflict, Washington, DC 1998)

Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Common Courage Press, Monroe 1999)
Walter Clarke and Jeffrey Herbst, 'Somalia and the Future of Humanitarian Intervention,' Foreign Affairs 75 (march-April 1996), 70-85
Roberta Cohen and Francis M. Deng, Masses in Flight: The Global Crisis of Internal Displacement (Brookings Institution Press, Washington D.C 1998)
Roberta Cohen and Francis M. Deng, (eds.), The Forsaken People: Case Studies of the Internally Displaced (Brookings Institution Press, Washington D.C 1998);
Romeo Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (Knopf, Canada 2003)
Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Danish Institute of International Affairs, Copenhagen 1999),79
Francis M. Deng, Sovereignty as Responsibility: Conflict Management in Africa (Brookings Institution Press, Washington D.C 1996)
Francis M. Deng, *Protecting the Dispossessed: A Challenge for the International Community* (Brookings Institution Press, Washington D.C 1993)
Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C. 2008)

Malcolm D. Evans, *Blackstone's International Law Documents* (8th edn, OUP, Oxford 2007
Tom Franck's, 'Who Killed Article 2(4)? Or: The Changing Norms Governing the Use of Force By States, AJIL 64 (1970). 809-37.
Thomas Franck, *Recourse to force: State Action Against threats and Armed Attacks* (Cambridge University Press, Cambridge 2002).
Martha Finnemore, *National Interest in International Society* (Cornell University Press, Ithaca, New York 1996).
Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about Use of Force* (Cornell University Press, Ithaca, New York 2003).
Phillip Gourevitch, *We Wish To Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* (Picador, New York 1999).
Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008)
Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention' ", (1999) American Journal of International Law 93, No.4, 824 – 828.
Internationals Commission on Intervention into State Sovereignty, The Responsibility to Protect (International Development Research Centre, Ottawa 2001), available at < http://www.iciss-ciise.gc.ca > accessed 15 on March, 2009.
John Janzekovic, *The Use of Force In Humanitarian Intervention: Morality and Practicalities* (Ashgate Publishing Ltd, Hampshire 2006).
Arthur J. Klinghoffer, *The International Dimensions of Genocide in Rwanda* (New York University Press, New York 1998).
Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention,' Michigan Journal of International Law 19(1998), 1005

Nicolas D Kristof, 'Genocide in Slow Motion', (9 February 2006)New York Review of Books 53, No. 2, at 14.
Ben Kioko, 'The Right of Interference under the African Union's Constitutive Act: From Non-interference to Non-intervention', (December 2003) International Review of the Red Cross 85, 807 – 825.
Hersch Lauterpacht, 'The Grotian Tradition in international Law,' British Year Book of International Law 23(1946)1.
Peter Malanczuk, *Akehurts's Modern Introduction to International Law* (7th edn, Routledge, New York 1997).
Shinya Murase, 'The Relationship Between the UN Charter and General International Law Regarding the non-use of force: The case of NATO's Air Campaign in the Kosovo Crisis of 1999,' Lauterpacht Centre for International Law, Cambridge University, Lecture paper 2000 available at <http://www.lcil.cam.ac.uk/lectures/lecture_papers.php> accessed on 25 march 2009
Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law (Cambridge University Press, Cambridge 2003).
Orlando Patterson, Rituals of Blood: Consequences of Slavery in Two American Centuries, (Basic Civitas Books, New York, 1998).
Steven Pinker, 'The Decline of Violence,' *New Republic*, February 21, 2007, 20
Gerard Prunier, *Darfur: A 21st Century Genocide* (3rd edn, Cornell University Press, Ithaca, New York 2008).
Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, s/1999/1257
Adam Roberts, "The So-Called 'Right' of Humanitarian Intervention," in Yearbook of International Law 2000, Vol. 3 (T.M.C. Asser, The Hague 2002) 2-51
Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights' (1993), International Affairs, 69/3, 440
Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, London 2000).
David Rieff, *At the Point of a Gun: Democratic Dreams and Armed Intervention* (Simon and Schuster, New York 2005).
William Shawcross, *Deliver us from Evil: Warlords and peacekeepers in a World of Endless Conflict* (Bloomsbury publishing, London 2000).
Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford 1995).
Taylor Seybolt, *Humanitarian Military Interventions: The Conditions for Success and Failure* (Oxford University Press, Oxford 2007).
Augustus Stapleton, *Intervention and Non-Intervention* (Murray, London 1866) and *The Foreign Policy of Great Britain from 1790 to 1805* (Murray, London 1866);
Ellery Stowell, *Intervention in International Law* (J. Bryne, Washington DC 1921)

Thomas G. Weiss, *Humanitarian Intervention* (polity Press, Cambridge UK 2007)
Shashi Tharoor and Sam Daws, 'Humanitarian Intervention: Getting pass the Reefs', World Policy Journal 18, No.2 (2001), 25
Ramesh Thakur, 'Global Norms and International Humanitarian Law: An Asian Perspective,' International Law Review of the Red Cross 83, No. 841 (2001), 31

Fernando R. Teson, 'A liberal Case for Humanitarian Intervention' in J.L. Holzgrefe and Robert O. Keohene (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge 2003)
United Nations Office for the Coordination of Humanitarian Affairs, "Sudan: US Congress Unanimously Defines Darfur Violence as 'Genocide'," available at <http://www.globalsecurity.org/military/library/news/2004/07/mil-040723-irino3.htm.> accessed 6 March 2009
Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University press, Oxford 2000).
Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention For Humanitarian Purposes' in Jennifer M. Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford 2006) 39
Thomas G. Weis and Sam Daw (eds) Oxford Handbook on the United Nations, (Oxford University Press, Oxford 2007).
Jennifer M. Welsh (ed), *Humanitarian Intervention and International relations* (Oxford University Press, Oxford 2006).
Alexander Wendt, *Social theory of International Politics* (Cambridge University Press, Cambridge 1999).