

THE CHANGING PARADIGM OF STATE SOVEREIGNTY
IN THE INTERNATIONAL SYSTEM

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by
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University of Missouri-Kansas City, 2012

ABSTRACT

The system of state relations in the international system was established at the end of the Forty Years War, which culminated in the Peace of Westphalia in 1648. The treaty was based on sovereignty, which is rooted in the principle of non-intervention by other states in the internal affairs of members. This sovereignty, supposedly outlined in the Treaty of Westphalia, was originally defined as the absolute power of the king and later the state to reign over a population. However, in the three and a half centuries since the Treaty of Westphalia, the concept of sovereignty has undergone profound changes. Beginning with the French Revolution when the people overthrew their king and made themselves the repository of sovereignty, the definition of sovereignty has profoundly changed, giving rise to constitutional government. Since then, sovereignty has increasingly been defined in alignment with the people. The concept of sovereignty has also felt the weight of the various multi-national treaties enacted after World War II, with the United Nations (UN) taking center stage by prescribing the actions of their signatories. The result has been a redefinition of sovereignty whereby international peace, as defined by the UN, is prior to the sovereign rights of states, culminating in the subjugation of state sovereignty to their international obligations. Sovereignty is further redefined in light of the assault from globalization, which makes it impossible for a state to be truly independent. More recently, state sovereignty is

undergoing yet another reconceptualization, currently manifested through a state's obligation to its citizens based on the emerging norms of "the responsibility to protect" (R2P). The underlying logic of R2P is conditional sovereignty in exchange for responsible behavior of states. It maintains that sovereignty is not a privilege but instead, responsibility. Failure to fulfill this responsibility therefore gives others the right to intervene.

This work maintains that although R2P is currently applicable only to areas of gross human rights violations, it opens a Pandora's Box that will cover not only traditional security areas, but also economic and social as well all of which impinge on the physical security of citizens.

APPROVAL PAGE

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ABBREVIATIONS

ACHPR - African Charter on Human and People's Rights

APEC - Asian-Pacific Economic Cooperation

AU - African Union

BRICS - Brazil, Russia, India, China and South Africa

ECOSOC - UN Economic and Social Council

ECOWAS - Economic Community of West African States

GATT - General Agreement on Trade and Tariff

ICC – International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICJ - International Court of Justice

IGOs – International Governmental Organizations

INGOs - International Non-governmental Organizations

IOs - International organizations

LAS - League of Arab States

MERCOSUR - South American Common Market

MNCs – Multinational Corporations

NAFTA - North American Free Trade Agreement

NATO - North Atlantic Treaty Organization

NGOS - Non-Governmental Organizations

OAS - Organization of American States

OAU – Organization of African Unity

R2P – Responsibility To Protect

UDHR - Universal Declaration of Human Rights

UN – United Nations

UNCHR - UN Commission on Human Rights

UNGA - The UN General Assembly

UNSC - UN Security Council

USSR – Union of Soviet Socialist Republics

WTO - World Trade Organization

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CHAPTER 1

THE CHANGING PARADIGM OF SOVEREIGNTY

Introduction

Since the signing of the peace treaty of Westphalia, the idea of human rights and the protection of citizens on the one hand and a state's absolute right to determine its internal affairs including the fate of its citizens have come a long way since the peace treaty of Westphalia. Gone are the days when a state could treat its citizens with complete disregard and justify its actions by hiding behind the walls of so-called sovereignty and non-intervention. In this contemporary world, a state must justify its actions to both its citizens and the international community. This paper will attempt to trace the history and development of the tension between the idea of absolute sovereignty and the idea of sovereignty as the responsibility of a state towards its citizens as expressed in R2P.

The history of state sovereignty is characterized by a constant state of change. The inherent principles of sovereignty, such as non-intervention, territorial integrity, and absolute power within the confines of a state border, have been re-evaluated time and time again in light of new challenges to ensure that they remain relevant to the needs of any given time. For constructivists, the very notion of sovereignty is a social construct informed by amendable norms and values. Hence, the concept of sovereignty changes in reaction to the development of new norms in the international system: "Central to constructivist interpretations of sovereignty is the view that sovereignty itself comes from "someplace" and, in any age, is heavily influenced by other social norms and

practices.”¹ In light of this statement, the very essence of sovereignty has continually changed and adapted in the face of challenges, ranging from the fight for minority rights to variety of issues relating to the new buzz word of human rights and the responsibility to protect. Despite these challenges, sovereignty has found a way to remain relevant and robust by adapting to new realities. For sovereignty to remain flexible and fluid in a changing world, states have had to relinquish control where necessary and have been forced to assumed greater roles in other areas. With history as a guide, it is likely that the concept of sovereignty will continue to be made over either voluntarily or be forced to do so in order to remain relevant in a changing and dynamic world.

Sovereignty and the Myth of Westphalia

Defining the principle of state sovereignty is difficult, due to its wide range of meanings, varied applicability and the general lack of understanding towards what it actually entails. Alain de Benoist (1999) defined the term sovereignty in two ways: “The first definition applies to supreme public power, which has the right and, in theory, the capacity to impose its authority in the last instance. The second definition refers to the holder of legitimate power, who is recognized to have authority.”² The first definition applies to national sovereignty expressed in the independence of an entity to act on popular will, whereas the latter is associated with power and legitimacy.

¹ David A Lake, “Reflection, Evaluation, Integration: The New Sovereignty in International Relations,” *International Studies Review* 5, no.3 (2003): 309

²De Benoist, Alain, Translated by Julia Kostova, “What is Sovereignty? from “Qu’est-ce que la souveraineté?” *Éléments*, no. 96 (1999): 99

Nagan and Hammer (2004), on the other hand, have identified at least 13 different overlapping meanings of the term sovereignty. In any instance, sovereignty may refer to any of these various meanings or a combination of several:

Sovereignty as a personalized monarch (real or ritualized);
Sovereignty as a symbol for absolute, unlimited control or power;
Sovereignty as a symbol of political legitimacy;
Sovereignty as a symbol of political authority;
Sovereignty as a symbol of self-determined, national independence;
Sovereignty as a symbol of governance and constitutional order;
Sovereignty as a criterion of jurisprudential validation of all law (*grundnorm*, rule of recognition, sovereign);
Sovereignty as a symbol of the juridical personality of Sovereign Equality;
Sovereignty as a symbol of recognition;
Sovereignty as a formal unit of legal system;
Sovereignty as a symbol of powers, immunities, or privileges;
Sovereignty as a symbol of jurisdictional competence to make and/or apply law;
Sovereignty as a symbol of basic governance competencies (constitutive process).³

Krasner (1999) identified four categories of meanings associated with sovereignty. The first outlines domestic sovereignty, which was of primary concern to Hobbes and Bodin in their quest to articulate a treatise to justify social order. Domestic sovereignty is defined as the absolute authority of the sovereign to determine the affairs of a given jurisdiction. Another type of sovereignty described by Krasner, interdependence sovereignty, is essentially associated with globalization. Interdependence sovereignty is the ability of a state to effectively regulate what goes in and out of its borders. On the other hand, international legal sovereignty refers to the recognition conferred to a state by members of the international community, necessary for a state to enjoy the full benefits associated with statehood. This type of sovereignty

³ Winston P. Nagan, and Craig Hammer. "The Changing Character of Sovereignty in International Law and International Relations" *Columbia Journal of Transnational Law* 43, (2004): 3-5

allows for diplomatic privileges, juridical equality, membership in international organizations, and the right to enter treaties and secure sovereign loans. Lastly, Westphalian sovereignty, as described by Krasner, has to do with immunity from external interference in the domestic affairs of a state.⁴ In this regard, Westphalian and international legal sovereignty relate to the rights of a state against outsiders and involve issues of authority and legitimacy, but exclude control.⁵ On the other hand, domestic sovereignty involves both the recognition of authority structures inside the state and a state's control over its affairs.⁶ Interdependence sovereignty is instead solely concerned with a state's control over its borders.

The peace treaties of Münster and Osnabrück that marked the end of the Thirty Years War of Europe are usually regarded as the beginning of the current international system of state relations based on the notion of sovereignty. This system maintains that all states are autonomous and equal, regardless of differences in size, economy and military capability. Yet, this idea, which has become inherent to sovereignty, was only introduced by Vattel (1758) in his book "*Le Droit de Gen.*" Vattel concluded that if men were equals in the state of nature, then this principle should extend to states relations in the international system due to the lack of a sovereign.⁷ In light of this, the legal principle of sovereignty, upheld by both customary international law and treaties, has served as the

⁴ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*. (Princeton: Princeton University Press, 1999), 11-24

⁵ Ibid, 4

⁶ Ibid, 10

⁷ Emer de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), cited in John Alan Cohan, "Sovereignty in a Post Sovereign World," *Florida Journal Of International Law* 18, no. 3 (2006): 924

fundamental underlying principle of governance and economic exchange in the international system.

For instance, Article 1(1) of the UN Charters states that it is based on the principle of sovereign equality of member states. The UN affirmed this equality principle in 1970.⁸ Furthermore, the protocols of the International Court of Justice (ICJ) and various international treaties are rooted in this idea of state equality. But in reality, this is a difficult claim because differences in capabilities, whether socio-economic or military, make some states more “equal” than others. Throughout history, powerful states have influenced the domestic affairs of their weaker counterpart. In recent years this influence has been manifested through the influence of powerful states on the elections of less powerful states, through the linking of aid or bilateral agreements and relations to electoral processes and results. Furthermore, this power play is evident in some of the conditionalities made of less powerful countries when receiving financial loans from the International Monetary Fund financial.

Osiander (2001) asserts that the popular view held in regard to International Relation (IR) theory relating to Westphalia is a myth. For him, “Westphalia, shorthand for a narrative purportedly about the seventeenth century, is really a product of the nineteenth- and twentieth-century fixation on the concept of sovereignty.”⁹ Shinoda (2001) also takes a similar stance on the issues of the 1648 Westphalia peace treaties by

⁸ G.A. Res. 2625 (XXIV) (1970), in A.O. Enabulele “Humanitarian intervention and territorial sovereignty: the dilemma of two strange bedfellows,” *The International Journal of Human Rights* 14, no. 3 (2010): 409

⁹ Andreas Osiander, “Sovereignty, International Relations, and the Westphalian Myth,” *International Organization* 55, no. 2 (2001): 252

alleging that the peace of Westphalia had less to do with the conventional notions of sovereignty as understood by the current usage of the term. He opined that

“The Peace of Westphalia [only] validated the idea that international relations ought to be guided by considerations of balance of power and reason of state rather than some notion of a unified Christendom, but it did not legitimate state autonomy: the Holy Roman emperor accepted some elements of religious toleration within the empire. The peace reaffirmed but did not grant the right of the principalities of the empire to make treaties, which was a right that they already had according to the traditional rules of the empire and a right that they frequently exercised.”¹⁰ As long as such treaties were not detrimental to the position of the emperor or the empire.

In light of this, Shinoda maintains that the popular view of the peace treaties was actually anti-Habsburg propaganda utilized to create such an impression. However, it is silent on the issue of sovereignty.¹¹ In that regard, the treaties in question did not confer sovereignty on the states, nor did they grant any overwhelming absolute authority to the princes. Thus, Westphalia as we have come to know it is an arbitrary reflection of associating it with an event that serves as a milestone in the evolution of state sovereignty.

But on the contrary, “... the 1648 peace was the outcome of the breakdown of the Augsburg religious peace of 1555. Religious rights were the one area where the 1648 settlement substantially added to the constitution of the empire. The estates of the empire,

¹⁰ Hideaki Shinoda, “Sovereignty Redux Re-Examining Sovereignty: From Classical Theory to the Global Age,” Review by: Stephen D. Krasner *International Studies Review* 3, no. 1 (2001): 134

¹¹ Oslander, “Sovereignty, International Relations, and the Westphalian Myth,” 266

that is, its princes and free cities, did the actual governing within their territories. The Peace of Westphalia deprived the princes and free cities of the empire of the power to determine the religious affiliation of their lands.”¹²

Intellectual Precursors of Sovereignty

The ideas inherent to sovereignty trace their roots to various authorities ranging from Thomas Hobbes, who deemed sovereignty as a mechanism to escape a life that is “nasty, brutish and short,” to the other extreme where John Locke viewed sovereignty as an institution geared towards the advancement of the greater good of society. The political notion of sovereignty is often attributed with the leviathan doctrine of Hobbes. He maintained that the social contract is implicit in the grant of consent by the people to be governed by a ruler by the creation of “that Mortal God, to which we owe under the Immortal God our peace and . . . And he that carryeth this Person, is called SOVERAIGNE, and said to have Sovereign Power; and every one besides, his SUBJECT.”¹³ Under this perspective, “[I]t is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law.”¹⁴ Hence, the authority of the ruler acting in such a capacity is beyond reproach by the ruled since his actions are sanctioned by the ones who have selected him. Furthermore, he can only be held accountable to a divine power. Hobbes himself put this succinctly with his assertion:

”It is true that sovereigns are all subject to the laws of nature,
because such laws be divine and cannot by any man or
Commonwealth be abrogated. But to those laws which the

¹² , “Sovereignty, International Relations, and the Westphalian Myth, 272

¹³ Thomas Hobbes, *The Leviathan*, 227-28 (C.B. Macpherson ed.. Penguin Books 1968) (1651), cited in John Alan Cohan. “Sovereignty in a Post-sovereign World,” 911

¹⁴ Jean Bodin, 28. Cited in *ibid*, 917

sovereign himself—that is, which the Commonwealth—maketh he is not subject. For to be subject to laws is to be subject to the Commonwealth—that is, to the sovereign representative—that is, to himself, which is not subjection but freedom from the laws. Which error, because it setteth the laws above the sovereign, setteth also a judge above him and a power to punish him; which is to make a new sovereign; and again for the same reason a third to punish the second; and so continually without end, to the confusion and dissolution of the Commonwealth.”¹⁵

Bodin's adds to this by contending: “Majesty or sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth.”¹⁶

Locke takes the opposite view and sees government resulting from a deliberate action by the community to secure the good life together. Hence, sovereignty lies in the will of the people. To him, men live in absolute freedom in a “state of nature,” but willingly give this up by coming together to form political institutions, such as the state. In this scenario, men voluntarily give up some of their freedoms in exchange for the advancement of self-interest and for the guarantee of the community’s security. However, in forming this association, they only relinquish some rights, but still retain their most fundamental rights, which the state is supposed to protect.¹⁷ This therefore implies that final sovereignty lies with the people and the state governs on their behalf, and only with their consent. Hence, the state is directly accountable to the governed for its actions.

The Locus of Sovereign Power?

The history of sovereignty is rooted in a debate about where state power resides within the political system. With this in mind, a distinction can be made between constitutional sovereignty and national sovereignty. Constitutional sovereignty places

¹⁵ John Alan Cohan. “Sovereignty in a Post-sovereign World,”917

¹⁶ K.D. McRae, ed., *The six books of a commonweale: a facsimile reprint of the English translation of 1606, corrected and supplemented in the light of a new comparison with the French and Latin texts.* (Cambridge: Harvard University Press, 1962), 84

¹⁷ John Locke, *The Second Treatise of Government.*

constraints on the power and authority of the state, whereas national sovereignty assumes unconstrained authority of the state. Advocates of constitutional sovereignty take a Lockean approach to government, where sovereignty flows from and resides in the people. Constitutional sovereignty maintains that a contract between the ruled and the ruler limit power. Constitutionals see political authority as something that emanates from the people and hence, this authority is limited in nature and geared mainly towards the provision of the social good. The sources of these limitations on state power are therefore located in the state through the people or at the international level, as long as constraints are placed on the behavior of a state towards its nationals. In light of this, sovereignty is dispersed between the people, the legislature and the executive to allow for the protection of the people. Here, the people are protected from an individual or group becoming so powerful that the rights of the others in the community are endangered.¹⁸ The foundation of constitutional sovereignty was developed in the liberal and democratic revolutions that occurred in France and the United States at the end of the eighteenth century. These revolutions transferred political power to the people and asserted that the people were the only legitimate source of such powers. Thus, in this framework, any rule should be based on the general will of the people.

The values inherent in constitutional sovereignty are not only limited to the national level. At the international level, the Hague Conventions, the League of Nations, and the UN, including its various declarations and covenants, are based on the ideas of constitutional sovereignty, which seek to regulate and limit the choices and actions of individual states.

¹⁸ Shinoda, "Sovereignty Redux Re-Examining Sovereignty,"136

However, international human rights laws are the most prominent contemporary expression of constitutional sovereignty. These laws seek to regulate the behavior of states in relation to their own citizens. Instead of viewing human rights as a challenge to the idea of sovereignty, it can instead be seen as a reflection of a great deal of analysis that has always seen the state as constrained.¹⁹ Human rights laws fall within the purviews of a long-standing history of actions that have been employed over the centuries in limiting state autonomy at the international level. Absolute state sovereignty has always been challenged by one principle or another in the history of the modern state. Even though the focus of study in this area is currently on human rights in the contemporary world, the issue of minority rights in the nineteenth and early twentieth centuries coupled with the idea of religious toleration in prior years has been used as the basis for intervention in the erstwhile Ottoman Empire to protect religious minorities.

National sovereignists, on the other hand, see government as an institution whose sole purpose is the provision of security. This belief stems from a pessimistic viewpoint of nature in which life is nasty and short, hence forcing people to form a more powerful body to restrain the behavior of members of society. The idea of national sovereignty as the unrestrained power of the state is embodied in the works of Jean Bodin and Thomas Hobbes, both of who were fundamentally concerned with legitimating the idea that there was only one final source of authority. As they understood it, sovereignty was the only path to political order in a world characterized by divisive and bloody internecine religious struggles.²⁰

¹⁹ Shinoda, "Sovereignty Redux Re-Examining Sovereignty," 136-7

²⁰ Ibid

National sovereignty, as the unregulated powers of the ruler over his subject, found expression in the monarchical rule and imperialism that characterized many of the European states in the eighteenth to nineteenth and early twentieth centuries. In this case, “the state was the final authority - the final arbiter over its own actions, including occupying foreign lands and governing alien populations.”²¹ The idea of national sovereignty was also manifested in the twentieth century in the ideology of Nazi Germany and fascist Italy in the post-World War I era. Currently, the war against terrorism bears some striking resemblance to this very notion of sovereignty because it posits that in order to succeed, there could be no constraint on the state. Furthermore, national sovereignty in Africa and most of the Third World found expression in insistence on self-determination, which culminated in independence for these states.

Changes and Erosion of State Sovereignty.

The ideas inherent in sovereignty have changed over time in phases²² and continue to do so up to today. These principles will continue to be reevaluated in light of new challenges and opportunities faced by individual states and the collective of states at the international level. The Treaty of Westphalia marks the first phase in the development of the modern notions of sovereignty. Interpretations of this document led to the establishment of the modern system of nation-states, in which the sovereign reigned supreme domestically, as well as in its relations with other states. In the classical Westphalian sense, the concept of sovereignty was expressed in the statement: “l’État, c’est moi — [which] was used by European monarchs to assert their authority over, and

²¹ Hideaki Shinoda, “*Sovereignty Redux Re-Examining Sovereignty*,” 135

²² Francis M. Deng, “From ‘Sovereignty as Responsibility’ to the ‘Responsibility to Protect,’” *Global Responsibility to Protect* 2, no.4 (2010):355-56

control of, feudal princes in the construction of modern territorial states.”²³ In this regard, the monarch who gives the law is considered to be above the edicts of his own commands.²⁴ Before the end of World War II, states were basically operating in an international system premised on the ideas inherent in classical Westphalian doctrine.

The second phase in the development of the principle of sovereignty was ushered in by World War II and its conclusion in 1945. In this phase, the absolute power claimed by sovereign states came tete-a-tete with the creation of the United Nations Organization and various Inter-governmental bodies that espoused the idea of collective actions and state accountability to an international community. The creation of these state-consented supranational organizations was geared toward predictability in the international system to potentially forestall another war on the global stage. This forms one aspect of the horizontal and vertical ceding of sovereign identified by Cohan (2006). Here, states move away from absolute rule and begin to share some of its functions with institutions above and below the national level.²⁵ This idea is manifested when states become members of international associations that are geared towards pooling resources for common benefits, which may be economic, political or security-based. When states undertake actions to cooperate with each other for mutual benefits, they cede some of their authorities in those areas on decisions that are dictated by such supranational bodies. A vivid example of this is the European Union (EU) and its various quasi-state functionaries that have the

²³ Deng, “From ‘Sovereignty as Responsibility’ to the ‘Responsibility to Protect,’” 356

²⁴ McRae, K.D., ed., *The six books of a commonweale: a facsimile reprint of the English translation of 1606, corrected and supplemented in the light of a new comparison with the French and Latin texts.* (Cambridge: Harvard University Press, 1962), 222

²⁵ Cohan, “Sovereignty in a Post-sovereign World,” 932

authority to make binding decisions that take precedent over the decisions of member states.

Following World War II, there was a proliferation of international organizations. Which included various inter-governmental organizations, such as the United Nations, the International Court of Justice (ICJ), the International Monetary Fund, the European Human Rights Convention, and the European Union. These cooperative international institutions were put into place to harmonize both economic and non-economic agendas of the world community. As a result of the overwhelming numbers of these institutions, the international system has now become a “tightly woven fabric of international agreements, organizations and institutions that shape [states'] relations with one another and penetrate deeply into their internal economics and politics.”²⁶

The norms of human rights are another area that has successfully made a push-back against sovereignty. Under current human right conventions, the sovereign state is no longer free to treat its citizens as it pleases. Under constitutional sovereignty, where the state serves the people who are seen as the source of state sovereignty, the state is held accountable to these citizens on that principle. Furthermore, sovereign states are increasingly held accountable to the international community for human right violations, especially under the new paradigm of conditional sovereignty expressed in the responsibility to protect. We are now at a juncture in the history of state sovereignty where a state’s admission into the international community is highly influenced by “good” conduct. Another area in which there is a vertical impact on sovereignty is through the influence of International Non-governmental Organizations on the ability of

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

states to exercise absolute rules in their territories. These organizations act as international lobbyists and pressure groups that seek to influence the policy options of international organizations and states.

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

It could be argued that organizations, such as the UN, have imposed international norms on their members through diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, through humanitarian intervention. In addition to the norms being imposed by state actors against other states, in recent years, non-governmental organizations (NGOs) have played an important role in vertically influencing the behavior of states.²⁷ In most instances, states cannot escape the diminishing of their sovereignties; once a state comes into existence, it automatically acquires external obligations based on customary international law. The very act of recognition by other states depends on whether the new member to the community has

²⁷ Cohan, "Sovereignty in a Post-sovereign World," 941

submitted itself to these establish norms. For example, a newly formed state such as South Sudan is obligated to become a member of a vast aerie of established rules, such as the Universal Declaration of Human Rights, the International Court of Justice, and the Nuclear Non-Proliferation Treaty in exchange for recognition.

The third phase of the development of state sovereignty is rooted in the wave of democratization that swept the world after the collapse of the Soviet Union and subsequent end to the Cold War, which saw an end to dictatorships around the world akin to the political order in the USSR. The challenges posed by ordinary citizens to absolute dictators, who could no longer count on their patrons for protection, saw the demands for democratic institutions, values, and practices necessary to make their government more attuned to their needs. In this phase, there was a renaissance of the idea of sovereignty as something that emanated from the people, rather than being something inherent in the state. After the Cold War, “it became increasingly recognised that the will of the people—democratically invested in leaders whom they had elected freely or otherwise voluntarily accepted as their representatives—entitled the authorities to value and uphold the nation’s sovereignty.”²⁸ The devolution of power to the people in this era occurred through elections and/or local councils in which the sovereign central government shared power with its population. The distribution of power resulting from this devolution helped to meet the peoples’ demand for the accountability of their governments to their needs, in effect reducing the states monopoly of exercise of absolute power. In this era, where the people are the sovereign, sovereignty derives from the degree of respect

²⁸ W. Michael Reisman, “Coercion and Self-Determination: Construing Charter Article 2(4),” *American Journal of International Law* 78 (1984);642–45 cited in Francis M. Deng “From ‘Sovereignty as Responsibility’ to the ‘Responsibility to Protect,’” 359

merited by an institution, the capacity to rule, and the recognition that authority is exercised for the benefit of the people.²⁹

Another phenomenon that has led to the erosion of sovereignty is globalization. Generally speaking, globalization is the intensive interaction between people and economic entities due to the ever-decreasing costs and time-efficient means of moving goods and services between the communities of the world. It also entails the increasing ability of people across the world to communicate with each other. In our current world, events in one corner of the world have the potential of affecting outcomes in the opposite corner. The recent YouTube video “Invisible Children,” highlighting the sufferings of adopted child soldiers at the hands of Joseph Kony’s Lord’s Resistance Army, and the subsequent international cry for action that ensued as a result of the video illustrate this point.

On the other hand, the speeds at which medical epidemics such as SARS, swine flu, and HIV/AIDs can disseminate around the world reflect the potential of modern technologies to cause havoc. The population centers of today’s world no longer live in separate cultural enclaves with limited communication and interaction among them. Cohan (1999) maintains: “Both the horizontal and vertical constraints on sovereignty would not have had much of a chance to develop had it not been for globalization.”³⁰ The spectacular ease with which information is collected and disseminated across borders has curtailed the ability of authoritarian states to control the flow of communication in and out of the state, hence the kind of information their citizens receive. In another way, the communication revolution has worked to enhance the interdependence of sovereignty by

²⁹ Nicholas Onuf, cited in Lyons and Mastaduno, ‘Beyond Westphalia?’, p. 10, *ibid*, 360

³⁰ Cohan. “Sovereignty in a Post-sovereign World,” 954

giving the state a greater capacity to keep tabs on those within its borders by deploying surveillance technologies.

The Robustness of Sovereignty

Detractors of sovereignty claim that states as absolute autonomous independent bodies are giving way under pressure from monetary regimes, CNN, the Internet, and NGOs. But according to Bartelson (2006), “those who proclaim the death of sovereignty misread history. The nation-state has a keen instinct for survival and has so far adapted to new challenges - even the challenge of globalization.”³¹ This case is most evident in the ability of states to institute measures to counter the global financial crisis of 2008. Globalization is a two-way street in regards to its impact on sovereignty. It enhances the role of the state in some areas, while at the same time reversing, pushing and challenging sovereignty in others. In most cases, however, the state analyzes the situation and determines whether its control will be effective through meddling or by scaling back the state and deregulating areas that cannot be efficiently resolved. For example, beginning with the Peace of Westphalia, sovereigns found it prudent to surrender their control by allowing their people to determine the religion of their populations. By doing this, rulers realized that keeping religious determination in hands of the people meant fewer challenges to the authority of the ruler.

It is premature to claim that sovereignty is dead. This supposed death of the sovereign state is informed by the inability of the state to control the flow of goods, information and services due to technological advances. But for Krasner (2001), “Globalization does not undermine state sovereignty. If anything at all, states are now

³¹ Stephen D. Krasner, (Reviewed) “Sovereignty,” *Foreign Policy*, no. 122 (2001), 20

more capable of responding to challenges that have come about due to the changing nature of the world brought about as a result of trade and technology now a day than ever before.”³² Governments take advantage of these new developments in order to remain more effective. Whatever the case maybe, the vitality of sovereignty in the modern era is the domain of great power: it is only such power that has the capacity to effectively safeguard the various aspects of their sovereignties against international encroachment. In this regard, sovereignty will continue to be highly regarded as the underlying principle of order in the international system, as long as it serves the national interest of these powerful states. “This is because the norm of sovereignty has been defined, sustained and interpretively changed by major powers.” State sovereignty is an ever-changing concept that is backed by power. Thus, major powers will continue to lend it credibility: “First, it is crucial for them to retain the highest authority to make decisions over the affairs of a country in order to survive in the anarchical international structure. In other words, it serves their material interest of survival. Second, sovereignty has already developed from a norm of powerful states to a global norm. This serves their ideational interest to preserve a norm that is already globally institutionalized.”³³

The European Union as a Post-sovereign State

With its highly integrated structure, the EU is often associated with a post-sovereign era that might represent the wave of the future. But, duplicating such an institution in other parts of the world is a rather daunting and tumultuous task. The

³² Stephen D. Krasner, (Reviewed) “Sovereignty,” 21

³³ Yuka Fujioka, “Does Sovereignty Help Us To Understand International Politics?: Its Change and Robustness from the Debate between Realism and Constructivism,” *Kobe University Law Review* no. 39 (2005): 23-24

European integration was fostered by the desire to integrate so as to avoid crisis in that war-pruned region. The common European culture and religion helped to ease this process. The common threat posed by the USSR played a major role by necessitating the need to work together. Another important aspect of this point on security was the umbrella security protection provided by the United States, which removed some of the immediate security concerns of each state and reduced the areas of distrust and disagreement and conflict. In light of this, duplicating such an institution in other regions of the world without similar preconditions in place is an incredibly challenging task. In this supposed “post-sovereign” and highly integrated world, democracy may suffer at the hands of collectivism since no particular state can imaginably be allowed to determine the fate of others engendered in interdependence through election. This is the reason why the world recently rebuffed the Greeks’ desire to vote on internationally imposed austerity measures: allowing them to do so could have unnerved the global markets and stall the already slow recovery from the so-called “great recession.”

We may never enter an era of post-sovereign statehood since the current arrangement of paying lip service to sovereignty successfully serves the interests of the world’s power actors. But whatever the case may be, we are in a state of new sovereignty in which interdependence will only grow deeper. This phenomenon calls for the need to work together through international organizations and regimes to tackle problems of the global commons. As the world becomes more integrated, each state will have less leverage in making decisions since most aspects of state behavior will be enshrined in international treaties. Even powerful states that jealously guard their sovereignty, such as China, will not escape this integration as long as they want to become active participants

in the common world and enjoy the benefits resulting from the pooling of resources. The recent collaboration among the United States, the EU, and Japan in referring China's restriction to the World Trade Organization (WTO) on the exportation of rare earth minerals used in high-tech gadgets is the wave of the future.

Limitations of Absolute Sovereignty in an Interdependent World

We are in the era of “new sovereignty,” which is defined as a state's capacity to participate in international and trans-governmental regimes, networks, and institutions that have increasingly become part and parcel of international interactions that enable individual governments to work together to achieve common goals that are nearly impossible or too costly for one state to achieve acting alone.³⁴ Chayes and Chayes (1995) opined that the positive conception of “the new sovereignty” is the capacity to participate in international institutions of all types. It involves the ability to cooperate with other states in dealing with global and regional problems. For them, the international system itself has moved beyond interdependence. It has become a “tightly woven fabric of international agreements, organizations and institutions that shape [states'] relations with one another and penetrate deeply into their internal economics and politics.”³⁵ In this context, where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership,

³⁴ Abram Chayes, and Antonia H Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, 26

and a “connection to the rest of the world and the political ability to be an actor within it.”³⁶

In the world of the twenty-first century, too much sovereignty is inherently a bad policy option. When a state in this era opts for absolute sovereignty, it will suffer from isolation and economic deprivation. Indeed, if sovereignty is the responsibility of a state to cater to the well-being of its nationals, then interdependence and international integration is the best course of action if doing so secures such an outcome. Take one the most sovereign states of our time, North Korea, as an example. The government of North Korea has consistently attempted to exercise complete control over both its internal and external affairs. These actions have resulted in devastation on its ability to adequately provide for the needs of its people.

The world we live in today is witnessing an unprecedented change in every sphere of society. As a result, the principles inherent to sovereignty have not escaped these changes unscathed. Indeed, one can maintain with confidence that the changes engendered in our current world begin by the gnawing away of the inherent principles of absolute state sovereignty. This therefore forces the state to either retreat, or become more assertive. The changes in sovereignty are not unidirectional, even though state retreat seems to generate more buzz than situations where the state is more capable and assertive, such as in the state’s increasing ability to monitor individual citizens due to advances in technologies. Whatever the case may be, the traditional Westphalian notion of sovereignty as non-interference and constraints on the powers of states have become

³⁵ Anne-Marie Slaughter, “Sovereignty and Power in a Networked World Order,” *Stanford Journal of International Law* 40 (2004): 286

³⁶ Ibid

virtually unrecognizable. This is at least the case in our contemporary view of sovereignty as a state having absolute control over its territory and maintaining the right to exercise domestic powers free from external concerns. This point buttresses the malleability of the concept of sovereignty. In the early centuries after the treaties following Westphalia, sovereignty was considered “un-Westphalian.” In the nineteenth and early twentieth century, sovereignty was then considered highly Westphalian. Later, in the post-World War II era, sovereignty again was viewed as being less Westphalian, especially with the advent of the UN. It again gained currency during the Cold War, but has become less so at the latter part of the twentieth and early twenty-first century. Whether this trend will continue depends on the endurance of the current international system in the face of new rising powers, such as China and their position within the system.

CHAPTER 2

GLOBALIZATION AND INTERDEPENDENCE

Introduction

In our contemporary world, states cooperate, collaborate and coordinate their actions with each other to reap benefits that none of them can effectively achieve by acting alone. This is fostered by the fact that the issues tackled by the modern state are becoming too large, complex and costly for any individual state to manage on its own. These issues include environmental degradation, terrorism, the control of criminal activities, and the control of disease epidemics. Rosenau (1990) writes that in recent years, new issues have emerged, such as: “atmospheric pollution, terrorism, the drug trade, currency crises, and AIDS that are a product of interdependence or new technologies and are transnational rather than national. States cannot provide solutions to these and other issues.”¹ In such an environment, “states can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states' affairs”² whenever certain events pose a threat to them collectively. Here, intervention not only implies military actions, but includes any act that imposes collective decisions made by multi-national organizations in areas such as environmental policies, financial regulations, and international trade on individual members. The aim of structures is to make the actions of each state more predictable. The increasing waves of interdependence among institutions can be best described as the states' response to new

¹ James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990), 13

² Slaughter, “Sovereignty and Power in a Networked World Order,” 285

developments that could potentially make independent sovereign states less relevant in the world of Facebook, high-speed rails and passenger jets.

Globalization and Linked Sovereignty/Destiny

The term globalization is another concept in International Relations that is difficult to define due to its applicability to many aspects of international interaction. Globalization “has been defined variously as universalism (the expansion of culture across the globe), internationalization (increase international and interdependence between peoples of different states), Westernization or Americanization (the homogenization of the world along Western US standards), and liberalization (the spread of deregulated forces of technology, production, trade and finance across borders).”³ Despite the many applications, the concept of globalization generally refers to the wider reach of the influence of economic forces due to a reduction in the cost and time required to transport goods and service between borders, as well as the ease and low cost of travel and communication across the globe. Both of these factors have helped to intensify interaction between citizens of different states across the world. In such a world, the impact of any event is immediately magnified by both the Internet and news media. The core of this concept is centered on the fact that the world has become increasingly interconnected: events in one part of the world can no longer be isolated and contained. Globalization is popularly expressed in the following maxim: “When China sneezes the USA catches a cold.” In such an interconnected world, the factors conditioning the lives

³Efem N Ubi, “Globalization and the Erosion of the Sovereignty of State in the 21st Century,” *Icfai Journal of International Relations* 2, no. 1 (2008): 13

of citizens in any particular state are largely determined, shaped and/or influenced by events occurring at the global level.

Interdependence as a concept relating to globalization sheds light on the need for states to work together in a changing world. This need is rooted in the fact that the actions of each state inevitably impact the other. At the center of this concept is the fact that no nation is an island and as such, must rely on others for some of the vital resources that makes modern life meaningful. Although the terms globalization and interdependence are increasingly used interchangeably, the latter is only another manifestation of the former. Globalization goes deeper than interdependence among states to include other aspects of interaction, such as civil society, the activities of multi-national corporations, NGOs and Intergovernmental Organizations, etc.

Triangulation of Domestic Policies

The actions of a state in a globally interdependent world are highly intertwined with the rest of the world. In our current world, it is difficult for a single state to claim absolute authority over its affairs because one state's assertion of unlimited sovereignty would invariably infringe on the sovereignty of another state that engages in cooperative ventures with it.⁴ The nature of globalization and interdependence has allowed for a sovereign state's sphere of authority to transcend and have far-reaching consequences beyond its territories. In such a world, individual states cannot do as they please due to the possible impact that such action may have on other states in the international system. For instance, a state's policies on the regulation of resident MNCs could have a direct impact on the domestic affairs of other states where such corporations do business. The

⁴ Cohan, "Sovereignty in A Post-sovereign World," 960

United States' war on terror and drugs has had tremendous impact on world affairs, most especially the Middle East in the case of the former and in central and South America and the Caribbean in the case of the latter. Numerous criminal laws enacted by states also have jurisdictional reach outside the borders of a state, which requires other states to carry out extradition on their behalf, especially in cases involving its citizens residing abroad. On the other hand, financial decisions made in New York, London or Tokyo tend to have more impact on the national economy of a state than their internal financial policies.

This interconnectedness calls for the need to build common understandings among states so as to standardize actions to mitigate such effects. This phenomenon is at the heart of the rules and regimes instituted with global and regional intergovernmental organizations to coordinate the efforts of states in tackling common problems. Thus, interdependence can best be described as the pooling of sovereignty for the purpose of tackling common risks.

The Changing Nature of Globalization and Interdependence

Globalization became a buzzword in the 1990s, but the principles inherent in globalization are not new to the international system. For as long as states have existed, they have always operated in an interdependent international environment. In previous centuries, states commonly dealt with each other, most especially in continental Europe. In addition, there was a substantial flow of international capital between the states of Europe, and at the height of colonialism, between the colonial powers and their overseas possessions. In fact, Krasner (2001) maintains that the period before World War I saw net

capital flow on the largest scale in history.⁵ In the same era, there was a substantial amount of trade taking place between the colonies and the power centers of Europe. During this time, most colonies started off as trading posts, followed by small bands of settlements to protect trading interests in oversea lands. The result of this pattern of settlements was full-blown colonialism. The telegram, railroads and steamships of by-gone eras helped to increase globalization substantially.

These increased international transactions that started in the past centuries have only taken on new dimensions today due to the advent of more capable and person-to-person connections, which were previously prohibited by cost. In addition to this, the number of IGOs and NGOs has grown substantially in order to help manage and monitor such interaction, and in the process these organizations have taken over some of the functions of the state. Advances in transportation and communication technologies has helped to concertize people all over the world by making them aware of the challenges faced by others in remote parts of the world. In turn, this has prompted the implementation of measures to alleviate such sufferings through the works of IGOs and NGOs.

The end of colonization and the resulting equal status given to all people of the planet regardless of race, ethnicity, religion or culture have broken down barriers that enabled people to freely interact with each other and subsequently helped them find solutions to the problems plaguing their common humanity. The other face of globalization relating to the proliferation of trade took on an unprecedented level with the collapse of the USSR, which allowed all people of the world on either side of the

⁵ Stephen D. Krasner, "Abiding Sovereignty," *International Political Science Review* 22, no. 3 (2001): 248

capitalism/ socialism ideological divide to interact with each other without impediments. Indeed, the world is mostly operating within a single paradigm of liberalism, both on the economic and political fronts. American hegemony has been at the forefront of this development. The United States, acting together with other power brokers, have established the rules of the game that have given some amounts of stability and predictability to the international system, thereby allowing for increased interactions.

The process of globalization with its associated spread in communication technologies has resulted in increasing contacts between different societies. Furthermore, as a result of the emergence of powerful non-state actors on the global stage, states and non-state entities have completely altered and shifted the ways in which they function and relate to each other. It is becoming increasingly difficult for states to control information generated by its citizens critical of the government's. It is especially challenging to control the information as it is transmitted over the Internet, as Middle Eastern governments targeted by the "Arab Spring" belatedly came to realize.

Global Governance, the Need for IGOs and International Regimes

Globalization is such that technological advances, new operations of MNCs, policy triangulations, the communications revolution, the political activism of organized groups such as Invisible Children, both domestic and multinational terrorism, and organized crime organizations, all put stress on states' exercise of sovereignty authority.⁶ The need for states to collaborate, share information and work together to protect and adequately provide for the socio-economic well-being of their populations has led to the

⁶ Winston P. Nagan, and Craig Hammer, "The Changing Character of Sovereignty in International Law and International Relations," 14-15

creation of supra-national institutions at the international level to coordinate such efforts. These regimes, supra-national institutions and IGOs including the UNO, ICJ, NATO, General Agreement on Trade and Tariff (GATT), the Economic Community of West African States (ECOWAS), the Organization of American States (OAS), and the African Union (AU) have come together with NGOs, MNCs, regimes and other actors to form what is termed “global governance.” In light of this understanding, “global governance is commonly defined as a process that involves both public and private actors, the activities of which are coordinated through both formal and informal rules and guidelines in such a way that a common or public goal is advanced.”⁷ Global governance refers to rules, regimes, institutions and supporting groups that ensure coordination and cooperation among the various state actors as well as non-state actors. Broadly speaking, it has to do with “...the complex of institutions and processes that govern how things happen in the world.” For Lamy (2006), global governance is defined as: “The system that helps society achieve its common purpose in a sustainable manner, i.e. with equity and justice...[it demands that] family, education, culture, religion, to name only a few - be examined, understood and operated together as coherently as possible so as to ensure the basis of our effective sustainable development.”⁸

Global governance “includes international rules or laws, norms or soft laws, and structures such as formal international organizations (IGOs), as well as improvised arrangements that provides decision-making processes, information gathering and analytic functions, dispute settlement procedures, operational capabilities for managing

⁷ Ole Jacob, Sending and Iver B. Neuman, “Governance to Governmentality: Analyzing NGOs, States, and Power,” *International Studies Quarterly* 50, no. 3 (2006): 653

⁸ Pascal Lamy, “Towards Global Governance?” *The Tocqueville Review/La Revue Tocqueville* 27, no.1 – 2 (2006):8

technical and development assistance programs, relief aid and force deployments.”⁹ In essence, they touch on everything that directly relate to any form of international decisions, actions, and interactions between states.

The idea of governance on the global stage is markedly different from what is considered inherent in global government. Global governance, by definition, implies legitimate authority that comes into being through the consent of states and is subsequently organized for the governing of world affairs. In comparison to a global government, global governance deals more with structures that are less permanent and more fluid and that are continually being reconstructed to reflect challenges and new demands.

Governance and Inter-Governmental Organizations and Regimes

International governmental organizations, such as the UN, serve as the primary body for international governance. Some of these bodies are opened to all memberships in specific locations, or they might instead be selective based on certain criteria. The UN and various regional organizations such as ECOWAS, the League of Arab States, and AOS fall within the first category. The World Trade Organization (WTO), North Atlantic Treaty Organization (NATO), the G7, and Brazil, Russia, India, China and South Africa (the BRICS) nations fit into the latter. Global governance can embody other institutions that do not exist in physical locations. These bodies take the form of regimes. Regimes are comprised of global governance rules and norms linked together in a network. Regimes are concerned with governing problem areas that require globally coordinated efforts to be ultimately resolved. International regimes are institutional arrangements that

⁹ Margaret P Karns, and Karen A Mingst, *International organizations: The Politics and Processes of Global Governance* (London: Lynnee Rienner, 2004), 4

consists of both formal authority and informal norms. Here, international regimens are based on acceptable behaviors that have become codified and commonly accepted by members through prolonged usage relating to problem issue areas in the international system.¹⁰ Although they are not associated with physical structures and addresses, global regimes remain potent because they are internalized through acceptable practices that states agree to in advance.

Global governance in common usage highlights the global scale of many of the issues facing the world today, such as economic interdependence, migration, financial crises, drug trafficking, environmental degradation, etc. It emphasizes the important role and impact of non-state entities in world politics through making demands, framing goals, issuing directives, and pursuing policies, thus shaping how the world is governed. Sovereignty in this world of global governance implies the ability of a state to partake in international and trans-governmental bodies, regimes, networks, governance and institutions that are now necessary for enabling governments to cooperate with other states in discharging collective obligations, tasks, and gaining mutual benefits. In fact, in the twenty-first century, almost every area of governance that a state attempts to control potentially falls within a realm that requires interstate cooperation. Areas such as drugs control, arm trafficking, international terrorism, financial regulations, and criminal jurisdictions are all increasingly becoming internationalized. As a result, international cooperation is imperative. This has made it necessary for the establishment of super governments and international organizations to provide forums for the undertaking such actions.

¹⁰ Karns and Mingst, *International organization*, 42

A state's participation in international organizations and other institutions is conditioned on meeting obligations. It requires the acceptance of certain basic rules and responsibilities in exchange for rights and benefits in the international system. These rules require that states must submit themselves to international standards in both domestic and international affairs, as stipulated under global governance institutions in exchange for the enjoyment of any benefits accruing from such memberships. There are global regimes and institutions that regulate almost every activity in the interaction system. These rules cover a wide variety of areas, ranging from the declaration and conduct of wars, international financial transactions, the rules covering the emission of green house gases and other environmental issues, and now more importantly, human rights.

The UN and its umbrella institutions are the world's foremost international governance tools. The UN was set up in the aftermath of World War II as an institution for international deliberation aimed at fostering cooperation amongst the various states around the world. There are other institutions such as International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO) that are concerned with specific areas of international interaction. Cooperation in international institutions or regimes is a pragmatic way of achieving mutual benefits of economic, military, cultural, or political nature between sovereign states. Membership in these institutions requires that state gives up sovereignty in some areas when they join, and further allows for policies in such areas to be decided by external auspices. For example, during the recent European financial crisis, the Greeks were compelled by the rest of Europe to accept bail-

out loans and were forced to implement the austerity measures postulated by the loan giver, resulting from their membership in the European Union (EU).

Despite the constraints placed on sovereignty by integration, the trend toward the formation of regional economic groups like the EU are becoming increasingly appealing to the varying regions of the world. Various regions from sub-Saharan Africa to the Middle East, Asia and South America have implemented or are in the process of implementing organizations such as the North American Free Trade Agreement (NAFTA), the Forum of the Asian-Pacific Economic Cooperation (APEC), and the South American Common Market (MERCOSUR), and the Economic Community Of West African States (ECOWAS). The roles of such organizations are being expanded beyond economy to cover areas that are political, juridical, and socio-cultural. The EU is the most well-known example of regional integration efforts. “As it transfers to community entities the authorities that were part of the internal jurisdiction of nation states, this expansion clearly points toward a form of federalism which, at the same time, significantly affects the concept and duration of the traditional idea of national sovereignty.”¹¹

Non-Governmental Organizations

Another area in which sovereignty is undermined centers on the role of International Non-governmental Organizations (INGOs) on the ability of states to exercise absolute rule in their territories. These organizations act as international lobbyists and pressure groups that seek to influence the policy options of state and international organizations.

¹¹ Miguel de la Madrid H, “National Sovereignty and Globalization,” *Houston Journal of International Law* 19, no. 3 (1997): 555-6

Non-governmental Organizations (NGOs) are voluntary organizations made up of people who are concerned about issues impacting humanity and humanity's progress. They are associations of groups of people or other non-government institutions that come together for the purpose of taking on trans-border causes that affect mankind. By their nature, NGO's differ markedly from states' actors in that they do not represent any particular national interests, nor rely on coercive force but rather moral suasions in achieving their stated goals. They also differ from MNCs due to the lack of profit motives. In addition, "the self-actuated nature of NGOs distinguishes them from typical IOs, whose mandates are agreed to and limited by states. NGOs do not gain their influence from delegation by states. Rather, whatever influence they have is achieved through the attractiveness of their ideas and values."¹² Because of these differences and their stated purpose, they are better placed to serve as the mouthpiece of the world community.

NGOs are playing an increasing role at both the domestic and the international levels. Gone are the days when international diplomacy was solely the affair of sovereign states. In today's world, international NGOs are allowed and even called upon to voice their concerns at important international negotiation tables, ranging from nuclear to economic and environmental issues. Their prominent role on the world stage means that other primary players in the international system "are now accustomed (however reluctantly) to the presence of NGOs wherever diplomatic agendas are being set, foreign

¹² Steve Charnovitz, "Nongovernmental Organizations and International Law," *American Journal of International Law* 100, no. No. 2 (2006): 348

policies implemented, treaties negotiated, and compliance monitored.”¹³ As a result of their important role, “Nongovernmental organizations (NGOs) have exerted a profound influence on the scope and dictates of international law. NGOs have fostered treaties, promoted the creation of new international organizations (IOs), and lobbied in national capitals to gain consent to stronger international rules.”¹⁴ Their efforts in this regard have led to the adoption of various treaties to address issues on environmental protection, anti-personnel landmines, human trafficking and violence against women, international terms of trades, IMF and World Bank loan structures, and debt cancellations.

The roles played by NGOs at all levels of governance are rooted in the UN. Article 71 of the UN Charter serves as the de facto charter for NGOs in the international system in the absence of international NGO laws. This article states that: “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence. [and that] Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”¹⁵ This has generally been interpreted as giving NGOs legal capacities as consultative partners to international organizations. Despite the important role of Article 71, it only establishes consultative opportunities for the NGOs under the UN Economic and Social Council (ECOSOC), and does not mandate consultation in any particular situation. In spite of this, Article 71 has taken on a far broader role than

¹³ Daniel C Thomas, “International NGOs, state sovereignty, and democratic values,” *Chicago Journal of International Law* 2, no.2 (2001): 389

¹⁴ Charnovitz, “Nongovernmental Organizations and International Law,” 348

¹⁵ untreaty.un.org/cod/repertory/art71/.../rep_supp7_vol4-art_71_e.pdf

originally postulated. It has become the centerpiece of claims by NGOs to become of the institutional watchdogs for the world.

Influence and Importance of NGOs

NGOs perform various important tasks in the international system. As norm entrepreneurs, they contribute to the development of new international norms, such as for human rights as expressed in the drafting of the Universal Declaration of Human Rights (UDHR), the protection of indigenous groups, the creation of the International Criminal Court (ICC) and more recently, humanitarian interventions in the Responsibility to Protect. NGOs also aid in the interpretation of existing international laws by helping to develop the meaning and scope of such laws and the judicial application of these laws by making amicus curiae submissions to both local and international tribunals. Finally, they monitor the enforcement of international laws and try to help states comply through capacity building, through the highlighting of failures of commitments where they occur, and by bringing international attention and pressure to force recalcitrant members into compliance.¹⁶ NGOs are often at the forefront of the review and promotion of state compliance with international obligations. This effort prompted Chayes and Chayes (1995) to assert that, with regards to treaty compliance, “[i]n a real sense, [NGOs] supply the personnel and resources for managing compliance that states have become increasingly reluctant to provide.”¹⁷ Thus, by providing these services, NGOs helped to make states more responsive to the needs of the international community.

¹⁶ William Korey, “NGOS and the Universal Declaration of Human Right: A Curious Grapvine” (1998), 29-50, cited in Charnovitz, “Nongovernmental Organizations and International Law” 350

¹⁷ Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 250-1

Increasingly, NGOs have proven capable of influencing international organizations, laws, and other outcomes. This influence stems from the fact that as global institutions advocating on behalf of humanity and moral norms, they tend to shy away from aligning themselves with any particular states so as not to be seen as serving the national interests of a particular governmental. NGOs identify with and serve as the embodiment of the language and purposes of international organizations and laws and moral norms. They base their authorities on international treaties and other agreements and memoranda. For example, human rights watch organizations, such as Amnesty International, gain their privileged positions to the Universal Declaration of Human Rights. This marriage of their purposes with internationally acclaimed conventions enables them to pressure states into compliance.¹⁸

Another reason for their influence has to do with the fact that they are institution that embodies the very essence of certain international agreements. Hence, they automatically become indispensable in the administration of institutions that result from such agreements. Furthermore, as independent actors which represent humanity at the international level, they are better positioned to exert influences in the construction of new norms for an interdependent world. The knowledge possessed by NGOs in specific issue areas and their reputations for credibility and careful fact-checking gives them a commanding voice among governments, the media and international forums. This has made NGOs credible sources of information regarding compliance with international obligations. This prominent role of NGOs and the issues that they advocate sometimes

¹⁸ Thomas, "International NGOs, state sovereignty, and democratic values," 390

undermine state sovereignty. Thus, in such capacities, “NGOs act as a solvent against the strictures of sovereignty.”¹⁹

NGOs employ various tactics in the execution of their functions as international watchdogs. They rely on a mixture of moral and scientific arguments, as well as their vast wealth of knowledge and expertise on areas under discussion to influence international outcomes. They are noted for making use of popular mobilization strategies, including demonstrations and letter writing campaigns to bring attentions to their causes.²⁰ In order to be successful, they employ “(1) information politics, or the ability to quickly and credibly generate politically usable information and move it to where it will have the most impact; (2) symbolic politics, or the ability to call upon symbols, actions, or stories that make sense of a situation for an audience that is frequently far away; (3) leverage politics, or the ability to call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence; and (4) accountability politics, or the effort to hold powerful actors to their previously stated policies or principles.”²¹ All these help in making the role of the state less prominent in international relations. Although the role of NGOs challenges the state-centricity of international law, and together with IGOs lead the assault on states decline, they sometimes strengthen states when they promote legislation that expand a state’s regulatory agenda.²²

The Relationship Between IGOs and NGOs

¹⁹ Charnovitz, “Nongovernmental Organizations and International Law,” 348

²⁰ Thomas, “International NGOs, State Sovereignty, and Democratic Values,” Chicago *Journal of International Law* 2, no.389, (2001.) cited in Cohan. "Sovereignty in a Post-sovereign World." 945

²¹ Margaret E. Keck and Kathryn Sikkink, "*Activists Beyond Borders: Advocacy Networks in International Politics* (1998), 15 cited In Cohan, “Sovereignty in A Post-sovereign World,” 945

²² Charnovitz, “Nongovernmental Organizations and International Law,” 362

One of the most important roles played by NGOs in the international system is the legitimization of global governance processes. To this effect, Keohane and Nye conclude that: “Some form of NGO representation in the institutions involved in multilateral governance ... Could help to maintain their legitimacy.”²³ The contribution of NGOs to the legitimacy of the policies of global governance bodies result from their participation in forums that stem from their credibility as independent international agents that promote humanity and the progress of the human being. They also contribute to the output legitimacy of international institutions by specialized expertise, which aids in informed decision-making. By participating in debates, they “...raise the quality of policy deliberations so that the choices available are better understood.”²⁴

For Anderson (2001), the relationship between IGOs and NGOs is a symbiotic one: inter-governmental organizations who aspire to supra-national authority, but lack the authority inherent in democratic legitimacy relies on international NGOs to provide this connection with international society. In exchange, NGOs who seek to achieve certain goals, such as the promotion of human rights and other normative norms at the international level, are allowed participation in the global fora.²⁵ This has led to the view that world politics is increasingly shaped by processes and networks of governance where non-state actors play an increasingly powerful role on the world stage. In light of this, “global governance is commonly defined as a process that involves both public and

²³ Robert O . Keohane & Joseph S . Nye Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, cited in Charnovitz, Steve. “Nongovernmental Organizations and International Law,” 367

²⁴ Charnovitz, “Nongovernmental Organizations and International Law,” 367

²⁵ Kenneth Anderson, “The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Non-Governmental Organizations,” *Chicago Journal of International Law* 2 (2001): 382

private actors, the activities of which are coordinated through both formal and informal rules and guidelines in such a way that a common or public goal is advanced.”²⁶ This mutual relationship allows for decisions taken within IGOs with NGOs participation to pass as an international consensus.

Importance of Global Governance Institutions

Global governance institutions, structures and regimes provide some important benefits to their members in exchange for the conditionalities placed on their sovereignties. IGOs and other international governance institutions are important venues for fostering cooperation, necessary for building common understanding for working towards common goals. They are also important for ironing out the fine points of decisions. They build trust and establish relationships among their participants, which create incentives for building a good reputation; they provide technical assistance and professional socialization to members from less developed nations with the intent of capacity building which facilitates long-term cooperation and serve as a foundation for more direct action, such as harmonizing law or collaborating in enforcement efforts.²⁷

Governance networks at the global level are classified into three broad categories, depending on the service they perform for their members. In light of this, these networks can either be classified as harmonization networks, enforcement networks, or information networks.²⁸ Each category performs important roles in making institutions work efficiently. For instance, harmonization networks make it possible for states to

²⁶ Sending and Neuman, “Governance to Governmentality: Analyzing NGOs, States, and Power,” 653

²⁷ Slaughter, “Sovereignty and Power in a Networked World Order,” 290

²⁸ Joseph S. Nye Jr, “The Paradox of American Power: Why The World Only Superpower Can’t Go It Alone?” (2002) cited in Slaughter “Sovereignty and Power in a Networked World Order, 291

standardize their laws and regulations in the advancement of common goals. On the other hand, enforcement networks make it possible for supranational bodies to enforce laws that are either individually or collectively agreed upon. Finally, information networks disseminate information or acceptable norms and practices to members to enable them to make better decisions.²⁹ In this regard, “harmonization networks exist primarily to create compliance. Enforcement networks encourage convergence to the extent that they facilitate cooperative enforcement. Information networks promote convergence through technical assistance and training, depending on how they are created and who their most powerful members are.”³⁰ Each type of network is better suited to solve specific problems arising on the global stage. Despite this categorization, networks overlap in practice. For instance, a process might start as informational and run through harmonization and finally end up as enforcement, or vice versa.

Apart from the harmonization of policies and the provisions of relevant information to members, most especially those capable that enable capacity building, government networks can be sources of status for their members. This, in turn, causes potential members to condition their behaviors in accordance with the requirement for inclusion in elite organizations such as the EU and NATO. The institution’s ability to control admission through the setting of criteria, such as the type of market regulation and/or deregulation and the protection of ethnic minorities and systems of safeguards for human rights, serves as powerful tool in exercising leverage over potential members, especially in such aforementioned organizations at the UN, EU and NATO. Additionally, all international organizations including the OECD, the Council of Europe, the

²⁹ Slaughter “Sovereignty and Power in a Networked World Order, 291

³⁰ Ibid, 293

Organization of American States and the Organization of African Unity impose criteria for membership requirements.

Another major advantage of global governance institutions, especially in the third world, is that the requirements for subjecting government institutions directly to international obligations could serve as a bulwark to corruption and promote transparent domestic institutions throughout these societies. A major benefit of governance networks is that they help in building governmental capacities in weaker countries by providing and sharing information and expertise that are in short supply in those parts of the world. The general purpose of such action is to make it possible for governments of weaker states to comply more readily with their international obligations.³¹ For instance, although the IMF, World Bank and other international donor conditionalities attached to loans given to Third World countries are usually decried as being unfair, these conditionalities nevertheless help build strong macro-economic foundations and physical infrastructures and provide the necessary expertise training to citizens. As a result, they lay the foundation for long-run economic growth and development.

Because a state's sovereignty forms the basis of international law and helps to build the bedrock of all treaties and international association between equal sovereigns, global governance networks must rely mostly on soft powers through information dissemination, expertise, persuasion, and socialization in shaping the preferences of member states and in illuminating the need and benefits of participation in such networking institutions. Although hard power in the form of military interventions and

³¹ Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks & the Future of International Law," *Virginia Journal of International Law* 43, no.1 (2002): 30

economic sanctions are allowed in some instances under extreme cases, mustering the needed resources to do so and the costliness of such actions makes the power of persuasion more appealing.

Global governance in today world takes place in IGOs and international regimes with supports from NGOs. Globalization phenomena such as technological advances and the new economic order of the world have impeded the ability of the state to exercise total control on its citizens. In addition to this, both IGOs and NGOs and the norms that they develop are leading a full assault on sovereignty, thereby forcing the world to reconceptualize and redefine what it means for a state to be considered “sovereign” in the twenty-first century. The scope of sovereignty in our contemporary world is determined in a top-down verticality, with international bodies sitting at the top of the hierarchy imposing norms on mostly smaller states. Even strong states like the United States and China find it difficult in such a world to completely disregard the edicts of these institutions.

In addition to norms being imposed by international state associations, NGOs have also played important roles in vertically influencing the behavior of states in recent years. Since the end of the World War II, NGOs have been vocal members of the international system serving as norm entrepreneurs and holding international actors accountable for their actions. The end of World War II saw the proliferation of IGOs and other international structures aimed at building understanding on the world stage. In addition to the IGOs, INGOs were ushered into the international arena alongside IGOs. In fact, NGOs were at the forefront of behind-the-scene discussions of the establishment of

many of the IGOs and international regimes at the global stage. Most importantly, these NGOs are responsible for highlighting areas of need and developing new norms.

CHAPTER 3

HUMAN RIGHTS AND HUMANITARIAN INTERVENTION

Introduction

Human rights and global governance institutions are leading the charge on rolling back the powers of sovereign states and bringing forth a new and realistic definition of sovereignty in the twenty-first century. Although there are governance structures in other areas of international interactions, such as economic and environmental regimes, none of these lead to a direct confrontation between the state's actors and global governance institutions in the same manner as those concerned with human rights. It is in the area of human rights in which the subjugation of states to supra-national institutions is most profound. These institutions have ushered in a new era of sovereignty, where the focus is on the human being, including everything that seeks to incapacitate and empower him. In this era of new sovereignty, a state's failure to protect and provide for the basic needs of its citizens is not tolerated by not only its own nationals, but also the international community. Thus, the idea of human rights is at the center of this redefinition of sovereignty.

“Human rights” refers to those rights enjoyed by an individual simply because s/he is part of the human community, or in religious terms, they were created in the image of God. According to Shestack (1998), “To speak of human rights requires a conception of what rights one possesses by virtue of being human.... the rights that human beings

have simply because they are human beings and independent of their varying social circumstances and degrees of merit.”¹

Contemporary human rights have had a long and storied journey. The history and development of human rights begins in an era when people had absolutely no claim on the rulers, to a period when some people were not considered human enough to enjoy the full rights bestowed on certain segments of society. However, following World War II, the notion of human rights as a universal phenomenon, regardless of a person’s race, culture, religion or creed, began to take root. In our contemporary world, this idea continues to grow and gain the support of people everywhere.

Theoretical Foundations of Human Rights

The earliest form of human rights was built on religious principles. In this perspective, the idea of human rights as a fundamental principle enjoyed by all humans is rooted in the equality of all men before God. The basis of human rights from a religious and theological point of view is of a right emanating from and guaranteed by a supreme being whose laws precede those of the state.² This line of reasoning posits that all men are sacred and equal because they were created in the image of God. As a result, everyone has equal moral worth and must enjoy equal rights. However, equality of all human beings before a supreme being does not imply that people are free to make any choices. The freedom and rights one has under a Supreme Being’s guarantee is limited to his/her relationship with their fellow human beings. Yet, their actions must be in accordance with the teachings of the religion. This reasoning makes it possible for

¹ Jerome J. Shestack, “The Philosophic Foundations of Human Rights,” *Human Rights Quarterly*, 20, no. 2 (1998): 203

² Debra L. Delaet, *The Global Struggle for Human Rights: Universal Principles in World Politics*. (Toronto: Thompson Wadsworth, 2006), 15

fundamentalists to place severe restrictions on people, which sometimes result in abuses. Additionally, despite talks of equality before a supreme being, religious institutions not only condoned the institution of slavery and other gross inequalities over the millennia, they also found textual justifications in their various holy books to lend God's blessings to the institution's very existence.

During the enlightenment, as feudalism declined in Europe and the rule of kings based on divine rights weakened, there were attempts to divorce rights from religion. These were attempts to present human rights as a naked force, based in natural rights, not necessarily subject to a divine being. In natural rights theory, an autonomous individual is viewed as being capable of reasoning and putting in place systems to enhance his human experience, which is grounded in natural laws. This natural law "embodie[s] those elementary principles of justice which [are] right reason, i.e., in accordance with nature, unalterable, and eternal."³ Natural law theories philosophically detached natural law from religion and in the process, laid the foundations for the rise of rationalistic and secular versions of modern natural laws.

According to Grotius, human beings have a natural instinct of a social impulse that makes them want to live in peace and in harmony with others. In that regard, "Whatever conformed to the nature of men and women as rational, social-beings was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust."⁴ In light of this, natural law is seen as a "dictate of right reason." This implies that action undertaken by man has a quality of necessity based in morality.⁵ Natural law

³ Shestack, "The Philosophic Foundations of Human Rights," 207

⁴ Ibid

⁵ Hugo Grotius, *De Jure Belli Et Pacis* (Book 1, 1689). In Ibid.

theory eventually led to the John Locke's theory of natural rights.⁶ This theory subsequently served as the springboard for the modern notions associated with the meanings of human rights.

Locke is among the most prominent of the natural right theorists. He saw the basis of human rights in a social contract between the ruled and the ruler. He opined that man existed in a state of nature where he lived freely and in equality among his fellow men without the existence of the authorities of a state to exercise control over him on behalf of others. But, man ultimately rejected this state of nature in favor of a union with others in a social contract, leading to the establishment of a community with the objective of providing for their basic needs and conveniences. In doing so, however, individuals retained their most fundamental natural rights of life, liberty, and property. In this regard, the primary purpose of government is to protect these rights or lose the mandate of the people when it fails to do so.⁷ The social contract theory has its foundation in free will, whereby people come together willing to establish institutions for common purposes. Subsequently, everyone must have fundamental rights, guaranteed by the state, in order to continue to exist.

Human rights can also be based on the value of their utility to society as a whole. Utilitarianism is a theory that seeks to maximize the total net benefit that accrues to society for any action that is to be undertaken by the state. Utilitarianism is associated with Jeremy Bentham, who believed that human decisions are motivated calculations of pleasure and pain. Hence, political decisions should also be based on such calculus. In

⁶ John Locke, *The Second Treatise of Government* (1690) cited in Shestack, "The Philosophic Foundations of Human Rights," 207

⁷ Jean-Jacques Rousseau, *On The Social Contract trans.*, Ouith R. Masters (St. Martin's Press 1978) (1762). In Shestack "The Philosophic Foundations of Human Rights," 208

that regard, the policy choices of governments are to be judged by whether a policy promotes the greatest good for the greatest number of people instead of an abstract notion of individual rights.⁸

The core of a utilitarian argument of human rights is that in granting rights, the benefits to society must outweigh the cost that is to be incurred by that society as a whole. Utilitarianism maintains that since all men count equally, anyone can be called upon to accept sacrifices, if doing so enhances society's benefits in such a way that such an action makes the decision optimal. In contrast to natural rights theory, which emphasizes the interest of individuals, utilitarianism places a premium on the collective rights of society. Thus, denying a few their rights if the benefits of this action outweigh the cost to society is absolutely acceptable.

Marxists tend to see everything from an economic deterministic perspective and within this framework, the concept of human rights does not escape this generality. Marxism does not see man as an autonomous individual with rights derived from either a divine source or from the inherent nature of man, but instead as a "species-being."⁹ This idea of a species-being favors an authoritarian political body to guide value choices thus negating the need for individualism and the choices associated with such a concept. To Marxists, there is nothing natural or inalienable about human rights. The very notion of rights is nothing but a bourgeois illusion, most especially in capitalist societies where a few monopolize the means of production. Therefore, marxists reason: "Concepts such as law, justice, morality, democracy, freedom, etc., were considered historical categories, whose content was determined by the material conditions and the social circumstances of

⁸ Shestack "The Philosophic Foundations of Human Rights," 213

⁹ Sir Isaiah Berlin, *Two Concepts of Liberty* (1958).in *ibid*, 210

a people. As the conditions of life change, so the content of notions and ideas may change.”¹⁰ Marxists see the essence of the individual and the rights inherent in humanity in the ability to develop and use ones potentials to their fullest in a quest to satisfy needs.¹¹ This focus has led Marxists and Marxist-leaning states in the direction of totalitarianism, which emphasizes social and economic rights over civil and political ones.

The foundations of human rights can also be found in positivism. Positivism is defined as the authority of the state in regard to the policies to which it has committed. Positivism in the classical sense denies an a priori source of rights and maintains that all authorities emanates from the edicts of the state. In a positivist view, the sole source of human rights is that which is stated in law and granted by the state to citizens.¹² If its constitution mandates human rights, the state is therefore obligated to adhere to them. Positivism separates the legal system and norms from ethical and moral ones by maintaining that laws must be obeyed, regardless of their nature and consequences.¹³ It maintains that the very existence of a law precludes all debates on whether they should be implemented or not. From this perspective, those who want human rights must do everything possible to have them included in the laws of the land, hence making them binding on the state. The ability to divorce the legal from moral realms means that human rights abuses such as the Nazi pogroms and Apartheid can be condoned. From this, one can reason that the existence of the Universal Declaration Of Human Rights (UDHR) and

¹⁰ Shestack “The Philosophic Foundations of Human Rights,” 210

¹¹ Karl Marx, *The Economic and Philosophic Manuscripts of 1844* (Martin Milligan trans., Dirk J. Struik ed., 1969). In *ibid*

¹² Shestack, “The Philosophic Foundations of Human Rights,” 209

¹³ *Ibid*

the panoplies of human right accords, covenants and treaties at the international level makes these documents and the rights therein binding with the states that sign them. Thus, these rights are guaranteed and must be granted.

Modern human rights theories such as those based on justice, reaction to injustice, dignity, and the equality of respect and concerns¹⁴ are reactions to the lack of morality inherent in positivism. These modern rights theories are based on Kantian ethics. Kantian ethics maintain that different people have different desires and ends therefore, any phenomenon that purports to represent collective human needs and/or morality can only, at best, be contingent.¹⁵ In this view, all human beings are deemed to be autonomous and capable of making rational decisions that serve their best interest. This should therefore serve as the basis of rights: “Kant's great imperative is that the central focus of morality is personhood, namely the capacity to take responsibility as a free and rational agent for one's system of ends.”¹⁶ In this regard, the people of the state must be seen as ends in themselves rather than means. The primary purpose of any given state should therefore be the freedom of the individual to flourish and realize his potentials free of unnecessary restrains. In light of this, basic human rights designed to empower people must be guaranteed.

At the core of these modern rights is a qualified natural law approach in which there is an attempt to identify rights that are eternal and universal. The central theme of these new right theories “is that a minimum absolute or core postulate of any just and

¹⁴ Shestack, “The Philosophic Foundations of Human Rights,” 215-28 for modern rights theories.

¹⁵ Ibid

¹⁶ Jules L. Coleman, *Markets, Morals And The Law* (1988) Shestack, “The Philosophic Foundations of Human Rights,” 216

universal system of rights must include some recognition of the value of individual freedom or autonomy.”¹⁷ By charting this course, modern human rights theories seek to advance a concept of natural necessity that allows people to enjoy minimum rights that are necessary for mankind to exist in a morally tolerable form of society.

The idea that all people possess rights simply by virtue of their humanness has made its way to the UN. The UN was founded after World War II to prevent future devastation and human suffering. It can be argued that the very foundation of the UN is the protection of the humans because, in the end, humans are the ones most affected by conflicts and their effects. This general idea of protecting humanity is succinctly expressed in the preamble of the UN Charters, which proclaims the desire to “reaffirm faith in fundamental human rights.” Furthermore, Article 1, states that its purpose is to “promote and encourage respect for human rights.” After the formation of UN in 1947, NGOs and other prominent international actors began pressuring the UN to adopt an international bill of rights, enumerating the rights of all people regardless of religion, culture, nationality or creed. These efforts paid off with the UDHR in 1948.

The foundation of the current international human rights laws and treaties are rooted in the atrocities committed by the Nazi in World War II against the Jews. In the West, the sovereignty of Germany was faulted for permitting these atrocities while at the same time preventing humanitarian intervention on behalf of those trapped within her borders. During that time, throughout the rest of the world where colonialism was prevalent, the case was the opposite. In those parts of the world, it was the lack of sovereignty that was called out for gross human rights violations. Thus, while sovereignty

¹⁷ Shestack, “The Philosophic Foundations of Human Rights,” 216

shielded the Nazis in Germany and allowed the occurrence of human rights violations as played out in the Holocaust, in rest of the world, the denial of sovereignty was seen as the root cause of blatant human rights violations under colonialism.¹⁸ This lack of sovereignty, the desire for self-determination in colonies, and the desire to curb the power of the state in the West all served as the foundation for the international guarantee of human rights under the UN.

Whatever the case may be, the agitation for human rights protection found expression in the Universal Declaration of Human Rights (UDHR) adopted at the Paris conference in 1948. The UDHR stipulated that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹⁹ The UDHR outlines such basic human rights as the right to life, the right to vote, freedom of speech, and prohibition against the use of torture. This list of enumerated rights was expanded in the 1960s with the independence of states in the global South, especially in Africa, where collective rights were emphasized. Following the UDHR, the world saw the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economics, Social and Cultural Rights (ICESCR) in 1966.²⁰ To further expand the range of right, treaties and conventions were adopted on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery in 1956, the Convention on the

¹⁸ Karima Bennoune, ‘Sovereignty vs. Suffering’? Re-examining Sovereignty and Human Rights through the Lens of Iraq,’ *European Journal of International Law* 13, no.243 (2002): 249

¹⁹ UDHR Art 1. <http://www.un.org/en/documents/udhr/>

²⁰ United Nations, General Assembly, ‘Universal Declaration of Human Rights’, A/810, 1948; ‘International Covenant on Economic, Social, and Cultural Rights’, A/6316, 1966; ‘International Covenant on Civil and Political Rights’, A/6316, 1966.

Elimination of All forms of Racial Discriminations in 1965, Conventions on the Rights of a Child in 1989 and a host of other issue-specific areas. Despite the sheer number of such treaties, they did not carry weight, and only served as international statements of aspirations²¹ until fairly recently with the emergence of the “responsibility to protect” paradigm.

Legal positivists have however argued that the presence of these treaties in the international system confers international customary law status on them and makes them legally binding. Indeed, since the founding of the UN and the adoption of the Universal Declaration of Human Rights, states have increasingly come under international scrutiny for the treatment of people living within their boundaries. The vast range of human rights treaties and conventions signed by UN member states require them to meet their international obligations by protecting the human rights and welfare of their citizens and other persons living within their jurisdiction.

The debate involving rights as an individual phenomenon as advocated by Western society, or as a collective as practiced in the Global South is at the heart of the argument between universalistic views of rights. In this view, certain fundamental human rights, such as the right to life, free exercise of conscience, and prohibition against torture are seen as inherent in all human societies, irrespective of culture, religion, or region. Universalists maintain that human rights transcend all social classifications, whereas cultural relativists counter that human rights are manifested differently around the world. For instance, human rights are a collective phenomenon in most non-Western traditions. Hence, they hold that the very notion of universal human rights amounts to nothing short

²¹ Delaet, *The Global Struggle for Human Rights*, 31

of cultural imperialism. They are keen to point out that colonialism and, even in some cases, human rights abuses, were attributable to the very notion of universalism. This made others see themselves as being of superior culture, and thus, as having the right to rule. The primary question of cultural relativists is, whose notion of right is to be internationalized and universalized? To them, humans are social beings who are conditioned by such things as culture and religion. Therefore, human rights are determined by, and vary from, one society to the other based on these variables.

Promoting and Protecting Human Rights

The promotion, protection and implementation of human rights policies involve all players in the international system. This process involves with the states, IGOs, INGOs and local NGOs, regional organizations, and individuals. These human rights protections can be implemented either in a top-down fashion with supra-national organizations at the top guaranteeing the rights of all people, or from the bottom up through the pressure placed on states by individuals and NGOs.

The UN and affiliate organizations, such as the Commission on Human Rights, various regional bodies, states and other domestic institutions are at the center of efforts to promote human rights at all levels of the international system. The existence of the UDHR, ICCPR, ICESCR and other specialized human rights treaties at the international level put that body at the center of international human rights. The UN has been at the forefront of the protection and promotion of human rights since its inception. The entire foundation of the UN is rooted in the ultimate desire to eliminate all human suffering around the world. Even though this is yet to be achieved, there is a slow but steady movement towards its realization. The promotion and protection of human rights from

the top-down is non-confrontational, but rather involves engagement of states and capacity building. This is due to the fact that although international human rights norms and laws are gaining currency at the international fora, the underlying principle of international interaction is still state sovereignty.

The UN General Assembly (UNGA) and the UN Security Council (UNSC) are at the forefront of international human rights protections. With the UNGA acting as the chamber under pressure from NGOs, it is usually responsible for the creation of international human rights norms. The UNGA initiates human rights treaties and submits them to member states for ratification. In addition to this, the UNGA has the power to adopt resolutions that condemn human rights violations by member states. Even though these resolutions are non-binding under international law, they serve to embarrass states that fail to meet their international human rights obligations. These condemnations often later serve as the springboard for UNSC resolutions.

Acting as the executive arm of the UN, the UNSC often weighs in on human rights issues, especially where interventions for the protection of civilian populations becomes necessary and in cases where human rights abuses are deemed to be a threat to international peace. Unlike the UNGA, UNSC resolutions are binding and carry the full force of consequences. These consequences range from sanctions to military actions. The UNSC can authorize actions under chapter 7 if it believes that human rights abuses constitute a threat to international peace.

However, both of these bodies have their shortcomings as protection organs of human rights. The political nature of UNGA, which maintains a one state and one vote structure, has allowed for inconsistencies in its resolutions that condemn human rights

violations. In this set up, Israel has borne most of the brunt of their resolutions. On the other hand, the UNSC suffers from power politics, resulting in inconsistencies in reaction to human rights abuses.

The main UN human rights body is the UN Commission on Human Rights (UNCHR), which was created by the Economic and Social Council. Under ECOSOC Resolution 1235, the commission is allowed to publicly investigate allegations of gross and persistent human rights violations and make appropriate recommendations on actions to be taken where necessary.²² The workings of the UNCHR was not considered effective until the adoption of Resolution 1503 in 1970, which allowed the commission to receive complains from individuals, NGOS and other organizations who felt that gross human rights violations were taking place. Despite this important role, the UNCHR is often hindered by infighting among its members: its members carry the baggage of state interest into the commission's functions, rendering it often unproductive in the face of looming human rights catastrophe.

Regional human rights systems also play important roles in the promotion of human rights. The most prominent of these institutions are found in the EU and are comprised of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter. In certain aspects, the European Human Rights Commission and the European Court of Human Rights have been granted power over individual states. On the other side of the world the Organization of American States (OAS) has the Inter-American Commission on Human Rights. The OAS aims at raising awareness on human rights norms, while the Inter-American Court of

²² ECOSOC Res. 1235 (XLII) (1967).

Human Rights makes binding decisions that can in turn be used by the OAS General Assembly to impose sanctions on recalcitrant members.

Finally, the former Organization of African Unity (OAU), now known as the African Union (AU), instituted the African Charter on Human and People's Rights (ACHPR) in 1981 to incorporate the African idea of human rights, which is rooted in collective rights. The primary duty of the ACHPR is to promote human rights through education, investigate human rights abuses, settle disputes among member states, and make non-binding recommendations to member states where appropriate.

The core of most regional human right systems is the upholding of the sovereignty of member states. Hence, these bodies tend to focus more on norm promotion and education in helping members meet their obligations rather than resulting to the use of coercive mechanisms. However, regional organizations are now beginning to play greater roles by serving as gate keepers in determining whether humanitarian intervention should be undertaken.²³ This is because as neighbors of trouble spots, they are the ones most affected by both spillovers from human rights abuses and subsequent interventions. For instance, the AU and ECOWAS both played significant roles in the post-election Côte d'Ivoire crisis and the decision to oust Laurent Gbagbo and jostle with the Arab League (AL) over that role in Libya. The latter resulted in the call for humanitarian intervention in that conflict, which eventually saw the birth of UNSC resolution 1973.

Finally, states are the first line of defense in promoting and protecting human rights. The way states use their foreign policies can be an effective means of enforcing

²³ Alex J. Bellamy and Paul D. Williams, "The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect," *International Affairs* 87, no.4 (2011):826

human rights, especially where the national interest of the state coincides with the purpose of human rights. States can use a range of carrots and sticks, ranging from economic and diplomatic incentives to humanitarian interventions that impact human rights in other states. In fact, any international human rights enforcement mechanism must involve all states acting in tandem in order to have the desired result, whether in economic or military terms. The United States is a prime example of a state making effective use of its foreign policies to promote human rights where desired.

Enforcing Human Rights

There are several mechanisms available to the international community, states, NGOs and individuals in the enforcement of human rights norms apart from engagement and promotion. When states fail to meet their human rights obligations, the shifting paradigm of sovereignty as a people-focused phenomenon calls for intervention in order to protect the basic rights of those suffering at the hands of their own government. The world community can then take actions to punish the perpetrators either through a variety of means, including international diplomatic isolations, arm embargos, financial and economic sanctions, travel bans, shaming, or indictment of the individuals responsible for carrying out gross human rights violations. Other mechanisms used to address human rights violations could be manifested in form of truth and reconciliation commissions, apologies, and in some cases, reparations to the victims of human rights crimes.

Humanitarian Intervention

When a population is faced with gross human rights abuses and other crimes against humanity, the international community may find it prudent to take military action to protect human rights. Before this, however, efforts at prevention and other non-military means must have already failed to gain compliance from perpetrators of abuse. Humanitarian intervention is the use of military force to either prevent or stop atrocities against human beings. For Holzgrefe, “The term [humanitarian intervention] refers to the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.”²⁴ Murphy, on the other hand, sees it as: “The threat or use of force by a State, group of States, or international organization primarily for the purpose of protecting the nationals of the target State from widespread deprivations of internationally recognized human rights, whether or not the intervention is authorized by the target State or the international community.”²⁵ Thus, inherent in the phenomenon of humanitarian intervention is military response. This response is specifically targeted at those carrying out gross human rights violations that fall within the perimeters of genocide, ethnic cleansing, war crimes, or crimes against humanity. The primary purpose and objective of military response is to therefore provide protection to those who are enduring such abuses.

²⁴ J. L. Holzgrefe, ‘The Humanitarian Intervention Debate’, in J. L. Holzgrefe and R. O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. (Cambridge: Cambridge University Press, 2003), 15–52., 15

²⁵ Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), 11–12.

During the Cold War period, humanitarian intervention was invoked by states to rescue their citizens trapped in trouble hotspots around the globe when they were facing extreme human rights abuses in locations where the government was either unable or unwilling to provide them with adequate protections. When such a situation did arise, the legality of military intervention on humanitarian grounds was conditional in that any military objective was confined to rescuing only the citizens in danger and could not extend to the protection of the citizens of the state in which the intervention took place.²⁶ With the end of the Cold War and the bridging of the gaps between East and West, humanitarian intervention was increasingly defined away from this narrow focus toward a broader perspective that encompassed the national of the target state as well if not primary on their behalf.

In our contemporary world, most atrocity crimes are carried out by either the state or state militias and other armed groups associated with or sponsored by the state. For example, the Rwandan genocide was carried out primarily by the Hutu domination military in conjunction with the government-backed militia Interahamwe. In the case of Sudan's Darfur region, the Sudanese army and the government-affiliated militia Janjaweed worked together to carry out their genocide. These are shocking examples demonstrating that it is still possible for a government in this century to target its own people directly either through quasi-military bands or by refusing to provide them protection in the face of atrocities. In some cases, especially in sub-Saharan Africa, the weakness of the state and its inability to exercise effective control over its internal affairs is the primary cause for humanitarian interventions. In such instances, the state is so

²⁶Manuela Aguilar, "Who Should Determine The Just Cause of Humanitarian Intervention?" *Journal of Social Alternatives* 24, no. 3 (2005): 18

fragile that it is being challenged by internal arms groups in what can best be described as “uncivil wars” for control of state apparatuses. Some examples include the ECOWAS and UN missions in Liberia, Sierra Leone, the Democratic Republic of Congo (DRC), and Cote D’Ivoire. Each of these missions were geared towards restoring order and providing protecting for civilian populations from rebel groups in the absence of a recognized or capable central government, or in some instances, from government soldiers.

The weakness of the states in the South and subsequent human rights abuses can be attributed to the end of the Cold War. During the Cold War, weak states often exploited the capitalist/communist divide to strengthen their domestic sovereignty. The United States and USSR played along because they did not want certain states falling under the influence of the other side. This phenomenon allowed local strongmen to entrench themselves in power. Because of the military backing, these powers decided to rule on mere brute force without addressing the underlying social economic problems facing their states.

With the end of the Cold War and as the great powers withdrew their patronages from these states, the phenomenon of the “failed state” through the process of rebellion took roots across the South. The failure of these states threatened to spread to their more stable neighbors which was made easier in Third World countries as a result of the continual existence of primordial lineages between people on adjacent sides of state borders. For instance, the Rwandan genocide of 1994 can reasonably be identified as the root cause of the destabilization of much of central African over the last two decades. In these events, the primary threat both to the security of ordinary people and world order

was the chaos from state implosion. This was different than in years past, where wars of aggression took center stage in threatening world peace. This change resulted in a reassessment of threats by the international community. The result of this was a paradigm shift to the domestic sphere of sovereignty to mitigate conflicts. Thus, the protection of civilians found itself at play as one of the major areas of attention. In this regard, the state either guaranteed the rights of citizens, or the international community stepped in to ensure that these rights were protected. This is the root of sovereignty as a state's responsibility to protect failure in which the onus falls on the international community to execute such functions.

Expansion of the Definition of Humanitarian Intervention

With the end of the Cold War and the subsequent unity between East and West, the UN embarked on ambitious projects and peacekeeping missions around the world to provide humanitarian protection and relief. The so-called "decade of unity" the 1990s began with intervention on behalf of Kuwait and sanctions against Iraq for human rights violations, UN mission in Haiti, etc. Humanitarian intervention for the protection of people other than that state's nationals is not a new phenomenon in the international system. The Ottoman Empire, for example, endured various actions against her by Western states in order to protect people of European descent, and Christians living within the empire. In the post-UN era, India intervened in Pakistan in 1971, Tanzania in Uganda in 1979, and Vietnam in Cambodia in 1978. Although all of these interventions might qualify in one way or another as humanitarian interventions, the immediate rationale for undertaking them was mired in the national interests of the interveners. As such, the protection of those affected were only a byproducts of these actions.

Since this time, humanitarian intervention has changed dramatically. Human rights protection has expanded to include all who can lay claim to humanity. This protection is carried out by multi-lateral action undertaken by the international community and is therefore subject to the rules and dictates of internationally acceptable norms. The expanded definition of humanity, the abolition of slavery and decolonization have all worked in tandem to broaden the scope of those who deserve protection.

Finnemore, argues that in order to understand fully this new expanded norm of humanitarian intervention, it is necessary to consider the changing social normative contexts that shape the concept of interests and have broadened the applicability of humanitarian intervention to make it increasingly acceptable. These norms create an understanding that in turn, shapes the values and expectations of states, which subsequently determine the very definition of national interests and the actions taken by the state in such pursuits.²⁷ In this regard, the changing norm of humanity has pushed humanitarianism to the forefront of international debate. In turn, this humanitarianism influences the perception of states on which humans deserve protection from abuses.

²⁷ Martha Finnemore, "Constructing Norms of Humanitarian Intervention" in Paul R Viotti and Mark V Kauppi 4th ed, *International Relations Theory* (New York: Pearson, 2010), 319-321

CHAPTER 4

THE RESPONSIBILITY TO PROTECT (R2P)

The Transition from Humanitarian Intervention to the Responsibility to Protect

Humanitarian intervention as actions undertaken by outsiders to protect the fundamental rights of those who are in need of such protection from their own governments. This type of intervention is controversial because it violates the basic tenets of internal sovereignty as the supreme authority of a state over matters that are completely internal and within its jurisdiction. In the past, violating sovereignty under the guise humanitarian intervention on behalf of the nationals of other states was frowned upon in international circles. But, the changing paradigm of sovereignty as a people-centered phenomenon implies that such actions are increasingly being welcomed by the community of states, as long as they take place within acceptable rules. The shift from humanitarian intervention to that of the responsibility to protect is one of change in the locus of attention from those carrying out these acts to those for whom it is being undertaken.

In the past, outsider groups which sought to alleviate the suffering of innocent people in conflict situations and provide them with humanitarian assistance, most especially in civil wars in the South, laid claims to the idea of a duty to intervene in crisis. To them, if the situation in a state was so bad that it shocked the human conscience, then those with the necessary resources to make a change had a moral obligation to extend a hand to those in need. To these people, humanitarianism in all its forms is an answer to a higher call, which gives them the right and authority necessary for such actions. However, many people around the world oppose humanitarian intervention based on this

very notion. They maintain that the focus should be on those suffering the abuse. To them, changing this relationship takes away from the legitimacy of such actions. What's more, the ideas privileging the rights of the intervener over the beneficiary strike a raw nerve in most of the global South. Here, the yoke of colonialism has only been recently lifted. In this area, the Europeans justified colonialism on similar "humanitarian" grounds. Thus, the language of human humanitarian intervention is seen as a different shade of colonialism, but with a similar purpose of control over people of non-European descent.

These various shortcomings of humanitarian intervention have made it necessary to develop a new paradigm with those benefiting from such actions at the center of focus. Surprisingly, potential targets overwhelmingly rejected humanitarian intervention, while its replacement R2P received the opposite reaction. What's interesting is that the replacement R2P is more intrusive due to the conditionality placed on sovereignty. The only impact R2P had on humanitarian intervention was to reverse the focus of attention, emphasize a pre-conflict prevention and add a post-conflict rebuilding, all of which were an inherent part of humanitarian intervention, although they were not necessarily at the forefront of that debate. In this view, R2P is simply humanitarian intervention repackaged.¹

At its core, the move from humanitarian intervention to R2P contains the desire to "shift the focus of the debate away from the claim of the interveners back to where it

¹ "World fears for plight of Myanmar cyclone victims", *New York Times*, 13 May 2008. In Bellamy "The Responsibility to Protect and the problem of military intervention," 617

should be: on the requirements of those who need or seek assistance.”² Thus, R2P is a shift in focus to those seeking or needing support the most, instead of on those who invoke the duty or the obligation to intervene: “The adoption of [this] language focusing on the rights of endangered populations rather than the rights of interveners helped illuminate a broad constituency of states and civil society actors prepared to acknowledge that sovereignty entailed responsibilities and that international engagement might be legitimate in certain circumstances.”³

Despite this paradigm shift, R2P has come under renewed scrutiny and criticism in the wake of its selective application, especially manifested by the Libyan fiasco. As a result of this event and others, R2P is still viewed as a predominantly Western means of exercising control over the South, as well as a vehicle for punishing those states that fail to do the biddings of the West. The differences in reactions to the crackdown on pro-democracy demonstrators by the various state apparatuses in countries such as Libya, Syria, and Bahrain succinctly illustrate this point. Hence, R2P has been accused of being a platform that, in essence, legitimizes bullying by the most powerful states. Others have also opined that no matter how it is expressed, the very idea of one state intervening in the internal affairs of another violates the inherent principles of sovereignty as the underlying basis of international interaction sanctioned by the UN Charter. Furthermore, the South maintains that there is a double standard applied by the international community to Israeli actions in the occupied Palestinian territories and the rest of the world. In cases of both humanitarian intervention and R2P, each has been accused of

² International Commission on Intervention and State Sovereignty, *The responsibility to protect* (Ottawa: International Development Research Centre, 2001), 17 and 11.

³ Bellamy, “The Responsibility to Protect and the problem of military intervention,” 622

being used as tools to further the parochial national interests of the great powers on the world stage under the guise of providing protection for vulnerable populations.

The Roots of the Responsibility to Protect

The very idea of providing protection to vulnerable segments of society goes back to the Nazi pogroms of World War II. After the end of the war, the international community vowed never to allow another genocide to occur under its watch. Yet, this promise was derailed by the East-West rivalry that ensued during the Cold War. After the demise of the USSR and the end of the Cold War, there were renewed efforts to revitalize the promise made in memory of those who had been abandoned and who suffered in the German concentration camps.

In its present form, R2P is strongly grounded in memories of the 1994 Rwandan genocide. Here, the Hutus turned against the Tutsis and moderate Hutus in an effort to ethnically cleanse their society of people they considered to be “undesirable.” The international community’s failure in the face of the Rwandan debacle brought back memories of the Holocaust and the collective promise of the international community to never allow such actions again. The unauthorized Kosovo humanitarian intervention carried out by NATO against Milosevic of the former Yugoslavia also gave an impetus to the need to develop a standard for intervention. Thus, the groundwork for R2P was laid in the wake of these events.

In order to unmask the humble beginnings of R2P, one needs to go back to the proposals for protecting Internally Displaced People (IDP). The ideas inherent in sovereignty as a responsibility is rooted in the need for the state’s protection of IDP. From there, this need blossoms into a full-blown humanitarian tool, assuring protection

for everyone against gross human rights violations anywhere in the world. The history of the current manifestation of R2P began with the appointment of Francis Deng, a Sudanese diplomat, as then UN Secretary-General Boutros Boutros-Ghali's Special Representative on IDPs in 1993. This appointment was made in recognition of a new and developing phenomenon of post-Cold War conflicts characterized by infighting within states culminating in an increasing number of IDPs. The situation of these IDPs was dire and continued to deteriorate. This was primarily due to the fact that they were not afforded any special international protections because they remained within their national borders. Yet, these IDPs nonetheless remained vulnerable to the threat of diseases and poverty that would have plagued those fleeing the country had they not receive any help from the international community. In addition to this, IDPs remained exposed to violence from both the government and other armed elements of society. Deng summarized this by stating that: "The internally displaced are paradoxically assumed to be under the care of their own governments despite the fact that their displacement is often caused by the same state authorities."⁴

In order to address this situation at both international and national levels, the notion of sovereignty as a responsibility was developed to confer status and afford protection to IDPs. It is argued that the starting point for the concept of sovereignty as a responsibility was in the "recognition that the primary responsibility for protecting and assisting IDPs lay with the host government"⁵ and passed to a higher body in the face of a

⁴ Francis M. Deng, "Divided nations: the paradox of national protection," *Annals of the American Academy of Political and Social Science* 603, (2006): 218

⁵ Roberta Cohen and Francis M. Deng, *Masses in flight: the global crisis of internal displacement* (Washington DC: Brookings Institution, 1998), 275

state's failure or inability to act. The ideas inherent in R2P was that no legitimate state can argue against the assertion that that its primary responsibility was to safeguard and provide for the well-being of its nationals. This idea of sovereignty as a state's responsibility to provide protection for IDPs was allegedly grounded in the rights sanctioned by the UDHR and through other conventions/covenants guaranteed by the UN.⁶ This protection for IDPs served as the primary foundation of R2P, which was expanded by the International Commission on Intervention and State Sovereignty (ICISS) to cover all humanity and human rights in their entirety.

The second source of R2P's roots, which is especially ascribed to its existence, lies in the ICISS Report of 2001. The ICISS was a Canadian initiative in response to the UN Secretary-General's request for the world to look beyond the confines of sovereignty in a quest to ensure that all humans could have a dignified life. The primary purpose of the ICISS report's, "Responsibility to Protect" is a reconceptualization of humanitarian intervention so as to resolve the tension between sovereignty and fundamental human rights.⁷ This was made urgent after the international community failed to halt the genocide in Rwanda in 1994, as well as after NATO's intervened in Kosovo without UN authorization. Building on the ideas postulated in the protection for IDPs, the commission's recommendations were premised on the idea that whenever states are unwilling or unable to protect their citizens from gross human rights violations, their assertion to absolute sovereignty devoid of external interference gives way to the

⁶ Roberta Cohen, "The guiding principles on internal displacement: an innovation in international standard setting," *Global Governance* 10, no.3, (2004): 459–80; in Alex J. Bellamy "The Responsibility to Protect and the problem of military intervention," 619

⁷ International Commission on Intervention and State Sovereignty, *The responsibility to protect*, 9

responsibility of the international community to protect its own citizens from either government actions or the actions of other armed groups within the society. The report is geared towards resolving the conflicting dilemma between the principles of state sovereignty and human rights protections, both of which are upheld by the UN Charters. This is accomplished by “focusing not on what interveners are entitled to do (‘a right of intervention’) but on what is necessary to protect people in dire need and the responsibilities of various actors to afford such protection.”⁸ In taking this approach, the commission successfully linked sovereignty and human rights by subjugating the former to the latter, making human rights the basis of sovereignty. Hence, sovereignty as a principle is built around a state’s responsibility to provide for the fundamental rights of its people.

The ICISS successfully reframed the humanitarian intervention and human rights protection debate by illuminating and emphasizing the primary responsibilities of the state as institutions of the people that are geared towards ensuring their well-being. The commission’s report cleverly sets out humanitarian intervention within a larger pool of measures available for human right protections, starting with state capacity building and prevention, reaction, and finally, rebuilding in cases involving interventions.

The issues relating to intervention in the commission’s report also aimed to throw more lights on questions regarding the circumstances that call for legitimate intervention and the institutions with the authority to authorize such actions. And in enforcing the norms of R2P, the commission provide a tentative plate of hierarchy of responsibility that begins with the host state through to the UN Security Council, the UN General Assembly,

⁸ Bellamy, “The Responsibility to Protect and the Problem of Military Intervention,” *International Affairs* 84 n.4 (2008): 622

then regional organizations to coalitions of the willing, and finally to individual states who might take humanitarian actions under international auspices for the purpose of providing protection to those being abused. The scope of R2P in the ICISS report is narrowed to acts involving gross human rights violations that can be attributable to deliberate individual or state actions. This ensures that it is not haphazardly broadened to other areas like natural disasters. At least, not yet, due to the fact that any expansion of R2P to cover non-traditional security areas might open it to abuse by states seeking to further their narrow national interests, Additionally, it might also trivialize it in the process, opening it to intense criticism and causing it to lose its very meaning.

The ICISS and the Responsibility to Protect

The version of humanitarian intervention developed by the ICISS not only attempts to place the focus of such actions on those in need, but also developed a classification of the stages of the new paradigm of R2P into pre-conflict, conflict and post-conflict actions. In making this progress from humanitarian intervention to conditional sovereignty, the ICISS realized that it was treading on so-called “holy ground” by asking states to abandon the organizing principles of the international system, sovereignty. This set-up allowed them to function independently in exchange for one that could expose them to constant harassment from the international community, which was more of the case for weaker states. In a successful attempt to reconcile the differences inherent in conflicts between state sovereignty and international human rights protections within a state’s domestic jurisdiction, the ICISS R2P inverted the principle of absolute sovereignty by making it conditional on responsibilities accepted by all states, such as the general welfare of the people. The ICISS was held in this regard by changing the

paradigm of sovereignty away from the ruler to the people. Thus, even before the ICISS report, state sovereignty was increasingly seen not as an absolute, but a people-oriented principle.

For Peters (2009), “The principle of sovereignty is being ousted from its position as a *Letztbegründung* (first principle) of international law.” This idea is long overdue because “sovereignty must and can be justified” in such a way that “the normative value of sovereignty is derived from and geared towards humanity that is the legal principle that human rights, interests, needs, and security must be respected and promoted. State sovereignty is not merely limited by human rights, but should be seen to exist only in function of humanity.”⁹ Therefore, sovereignty must be humanized in such a way that its very essence is contingent on the promotion and protection of human rights instead of treating human rights and state sovereignty as two equal opposing principles. In this view, when sovereignty is humanized towards the needs of human rights and welfare, it is easy to redirect the focus from states rights to obligations towards citizens. This recharacterization then allows for intervention whenever a state fails to meet such obligations.

The ICISS maintains that the principles inherent in R2P are not new, but have foundations in the internationally established “obligations inherent in the concept of sovereignty; the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security; specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law; the developing practice of states,

⁹ Anne Peters, “Humanity as the A and Ω of Sovereignty,” *The European Journal of International Law* 20 no. 3 (2009): 513

regional organizations and the Security Council itself.”¹⁰ It maintained that in all of these various places, R2P is already squarely established in international norms.

The ICISS report splits R2P into three interconnected categories that begin in the pre-conflict society. It covers a gamut of policy options that can be implemented in order to avert the conflict, and outlines how to authorize and provide protection in cases where the international community decided to react militarily in the face of gross human rights violations. Lastly, the report recommends policy options that should be adopted in the aftermath of interventions to help the battered society heal and rebuild.

Preventative R2P

The foundation of any attempt to protect human rights lies in ensuring that human rights violation acts do not come to fruition. Even a minimal occurrence in this area is completely unacceptable as it can spiral out of control in an action/reaction tug-of-war until it escalates into full-blown mass atrocity. The responsibility to prevent lies, for the most part, in mitigating the root cause of conflicts and other social phenomena that can possibly lead to gross human rights violations. The responsibility to prevent seeks to “address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.”¹¹ In tackling the problems before they arise, all stakeholders to conflict resolution can save more resources that can be applied to other areas of human development. Prevention is the core and the basis of any efforts to avert humanitarian crises that will serve as a drain on international resources.

Like other fundamental aspects of R2P, the prevention of factors that could lead to disastrous human catastrophe rests with the involved sovereign state. The state is

¹⁰ ICISS, XII

¹¹ Ibid, XI

supposed to take actions to ensure equality for all citizens as a mitigating remedy to conflict by weathering some of the frustrations that serve as a basis for power struggles over scarce resources. It is the state's duty to ensure accountability and good governance, provide equal protection to all citizens, and undertake social and economic development in order to promote human welfare and social order. Prevention entails looking out for potential conflict and taking the appropriate action to effectively manage such crises.

The international community of states also plays an important role in helping the state to succeed in its effort to ensure social order. The most likely event that brings about gross human rights violation in our contemporary world is an internal arms struggle between the state and other sections of society. The international community can have a huge impact on such areas by regulating the sales and proliferation of arms to non-traditional militaries and curbing the sales of natural resources by such groups, which is channel towards their struggles. These groups should not be the sole targets of the international community. Pressure should be brought on states that have shown tendencies of carrying out violence against their own people and marginalize sectors of society that can serve as an excuse for armed rebellions. In other instances, arms embargoes can be placed on states that use such weapons to intimidate and abuse their own citizens.

In other cases, the international community can help mitigate conflicts by providing "...development assistance and other efforts to help address the root cause of potential conflict; or efforts to provide support for local initiatives to advance good governance, human rights, or the rule of law; or good offices missions, mediation efforts

and other efforts to promote dialogue or reconciliation.”¹² Other efforts can take the form of debt cancelations, capacity building, and training to strengthen the institutions managing the affairs of the state. There is a need to rethink the trade policies that favor industrialized countries. This might entail granting more access to the markets of the developed North and improving the terms of trade between developed and less developed countries. The World Bank, the IMF and other international financial and donor agencies recommendations and the strings attached to loans such as economic liberalization, privatization, and shrinking of public sectors have been decried as factors that sometimes cause discord in communities eventually culminating in tension, conflict and mass atrocities. This being the case, there is the need for more sensitive policies that take into account their impact on the communities that they proposed to help.

Tackling the root cause of gross atrocities might require addressing the underlying political causes, which may entail democratization. Furthermore, other such actions might be required to adequately address the inherent political causes of potential conflicts. On the economic front, there is a need for development assistance, specifically in the promotion of economic development with the purpose of increasing the pie and ensuring that everyone shares in these gains. Conflict prevention also entails giving supports to institutions that strengthen the rule of law, judicial independence, accountability and reforms of the security sector. Additionally, economic and diplomatic pressure can be exercised on those in positions of power. They can also be given incentives when necessary in order to alter their behavior.¹³

¹² ICISS, 18

¹³ Ibid, 23-4

Unfortunately, the resources committed by the international community to conflict interventions and post-conflict events are significantly higher than those committed to prevention. This is because the international community only becomes involved in conflicts when they have deteriorated and become headline news. In order to correct this, there is a need for a major redirection of the world community so that it can focus on pre-conflict mitigation as a means of safeguarding human rights, which is more cost-efficient in the long run.

The major policy tool that the international community needs to adopt in mitigating human rights abuses resulting from conflict must center on their relationships with resource-rich states and how these resources are managed and used for the well-being of their populations. The international community can drastically cut its conflict prevention bill by forcing states to adhere to certain standards in order to have access to the world market. This can be implemented through various regimes with well-regulated codes to govern how resource rich states expend the rents obtained from sales of the country's mineral resources on the world market. This new system of regimes can simply be one of many that must be adhered to by all states in the international system in exchange for certain rights and privileges.

Although this could potentially be seen as a form of colonialism, the international community might argue that since it will be forced to expend resources when conflicts arise, this subsequently places it in a position of authority to do what is necessary to avert such conflicts from materializing. This position of authority allows for the promotion of peace, not only in the said state, but also internationally: most conflicts in these weak states have a tendency of spreading to neighboring states and have destabilizing effects

across the region as a whole. Moreover, the international community can take solace in the fact that it is acting in the best interests of local citizens who do not have the means to challenge their own governments and bring them to task for their policies. This is exacerbated by the fact that the leadership in resource-rich Third World countries has access to revenues from raw-materials exports and foreign aid, which greatly reduce the need for prudent policies requiring the support of their citizens that could lead to better institutions for improving the general well-being of nationals.¹⁴ As the final arbiter of the relationship between citizens and their states as inferred from R2P, the international community is better placed to pressure these local leaders into compliance when the need arises. By doing this, the international community can ensure that despots do not enrich themselves at the expenses of their citizens.

Although bringing all states onboard such a plan might be difficult, the international community can impose punitive sanctions against the states that violate its edicts. These sanctions can range from imposing tariffs on the products of states that defile this norm to blacklisting businesses that deal with such states. Doing this is not as difficult as it may sound. It simply requires international will. If anything at all, the tough regulations on the financial flow to Al-Qaeda and the sanctions imposed on Iran and other states that have failed to comply with UN policies show that such policies are possible in the face of sufficient international will and coordination. These mechanisms can also be used as pre-conditions for aid to third world countries. The Millennium Development Goal (MDG) funds serves as a template for such regimes and must be applauded for linking eligibility to receive benefits to good governance.

¹⁴ Stephen D. Krasner, "The Case for Shared Sovereignty," *Journal of Democracy* 16, no.1 (2005): 69

The need for international resource management for Third World states makes it necessary to create shared sovereignty regimes: “Shared sovereignty involves the creation of institutions for governing specific issue areas within a state— area over which external and internal actors voluntarily share authority. Such structures are born of a compact between national authorities and some external entity.”¹⁵ Shared sovereignty regimes are best applied in areas where exploitation of the natural resource requires huge initial capital outlays. In such instances, foreign investors, such as the World Bank, will require a trust jointly administered by its representatives and local officials and members of civil society. In this arrangement, the local government will be allowed to determine its own budget, pending approval of the trust managers to ensure that all funds are employed towards the intended purposes. This is possible because only the international community has the leverage and clout to persuade national governments and other concerned actors to discharge certain functions, or otherwise face punitive consequences.

The legitimacy of such regimes would depend on voluntary participation by nation states at the initial stages in exchange for world market access. It would also depend on the position of the international community as custodian of the will of citizens vis-à-vis their states. As time goes on, such institutions will gain greater legitimacy and become part and parcel of the panoply of the global regime system that is currently in place. Shared sovereignty could have several benefits for the states that it governs. For instance, it could “gird new political structures with more expertise, better-crafted policies, and guarantees against abuses of power. In illiberal democracies, endorsing shared-sovereignty institutions could be a way for political candidates to commit

¹⁵ Krasner, “The Case for Shared Sovereignty,” 76-78

themselves credibly to better governance.” More importantly, “shared sovereignty could make predation by national and local public officials harder by moving certain resources beyond their sole control. This will ensure that accumulation of wealth no longer be quite so sharp a spur to those vying for political power. Once all relevant players recognized that breaking the deal would rouse the wrath of actors foreign and domestic, shared sovereignty could create a beneficial self-sustaining equilibrium that would not otherwise be possible.”¹⁶ All these mechanisms are necessary for tackling potential future socio-economic problems that could spillover from poor countries, especially in Africa, into the larger international system. The oil rich African nation of Chad is illustrative of the benefits of shared sovereignty international regimes and how they can be put into place.

The prominent members of the international community need to be concerned about the failure of local leaders to meet the demands of their populations because, ultimately, “the disease, criminality, humanitarian crises, and terrorist threats that such countries tend to breed will not remain within their borders forever.”¹⁷ The anger of disadvantaged citizens will not stop with the leaders. Some disadvantaged segments of society might take it upon themselves to direct their frustrations at those accused of imposing the international regimes.

In particular, Africa is a potential trouble spot for the West, simply because of the West’s dominant position in the world. As traditional social control mechanisms continue to break down and as new systems fail to adequately take their place, the unemployed youths with little future prospects might take to violence to vent their frustrations against domestic or external authority. This is made plausible by the fact that most African

¹⁶ Krasner, “The Case for Shared Sovereignty,” 70

¹⁷ Ibid, 69

leaders and academics are seemingly always blaming the West for their failures as a means of diverting attention from their incompetence, corruptions, and economic mismanagement. These leaders never pass a chance to assert that they are doing everything within their limited capacities to meet local needs, yet blame Western influence for their shortcomings. The danger lies in the fact that when this logic becomes internalized, the West will increasingly become a fair target for angry youths when the means of doing so and inflicting casualties are made available. This is where militant Islam comes into play. Despite the dire economic substances of Sub-Saharan Africa, terrorism is currently not a large concern. However, this might change in the future. The continent is under assault from Al-Shabazz in Somalia, which is becoming worryingly effective at establishing links with other disgruntled groups in the larger horn of African and central African regions. Furthermore, there is Boko-Haram in Northern Nigeria, which serves as the cultural hub of West-African Islam. Northern Nigeria exercises vast influence throughout the sub-region through the use of Hausa as the lingua franca of Islam. There are also other fringe groups in the regions bordering Arab-Africa that are beginning to establish stronger ties with al-Qaida. The provision of dangerous technologies to these groups that might result from a marriage of convenience in exchange for attacks against Western interests is highly possible and must be treated with utmost urgency.

With these threats in mind, it should be noted that most African states are weak and lack the means to crackdown on these groups. The over-handiness of doing so in the few cases where possible may create sympathy for these groups. The underlying rationales will not be limited to Muslim populations of such states since anti-Western

rhetoric is being preached by all and its results apply equally to all segments of society. This is the reason why establishing regimes that curb the behavior of locally corrupted leaders are crucial for the West to clearly distance themselves from such actions whilst at the same times helping the locals hold their leadership accountable.

Reactionary R2P

When the prevention mechanisms fail to deter states or other elements from carrying out atrocities, the international community might then be forced as a last resort to undertake military interventions in order to provide protection to vulnerable populations. The “responsibility to react” runs the gamut of coercive tools available to the international community, ranging from diplomatic isolation to military intervention.¹⁸ The right to authorize R2P in the ICISS rests squarely on the shoulders of the UNSC. Here, the UNSC acts as guardians for the maintenance of international peace and security as prescribed under Article 24 of the UN Charters. This gives the Security Council the “primary responsibility for the maintenance of international peace and security” in order “to ensure prompt and effective action by the United Nations.”¹⁹ This power of the UNSC is consummated under Chapter VII, which gives that body to right to take all means necessary, including military force, for the purpose of maintaining world peace. The ICISS report states that R2P can only be activated in extreme cases and can only be justified “where large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale “ethnic cleansing,” actual or apprehended,

¹⁸ ICISS, 30-1

¹⁹ UN Charter, Art, 24

whether carried out by killing, forced expulsion, acts of terror or rape.”²⁰ By limiting R2P to such crimes of atrocity, “the outcome tied the responsibility to protect to norms that are widely considered to have both erga omnes effect and jus cogens status....By virtue of [this] erga omnes effect, states already owe the human rights obligations underlying the responsibility to protect not only to persons under their jurisdiction, but also to all states. By the same token, all states already have a legal interest in the protection of individual states’ populations against these grave human rights abuses. In the face of such abuses, all states could invoke the responsibility of the perpetrating state, and could demand that the abuses stop. If the state perpetrating the abuses refuses to comply, all states are further entitled to take ‘lawful measures’ to compel compliance.”²¹

Punishing Perpetrators of Human Rights Violations

Persuasions and Embargoes

Usually, when the international community ascertains that gross human rights violations are imminent or taking place, the first step is for the international community to try to persuade the states or parties involved to desist and refrain from such actions. In some cases, incentives are offered in exchange for compliance. The international community may provide help in cases where the state is incapable of exercising control over perpetrators as is most common in civil war situations. When persuasion fails, the international community may escalate to more coercive actions, such as arms embargoes, to prevent the sale of military hardware to the groups accused of human rights violations.

²⁰ ICISS, XII, and 32

²¹ Ekkehard Strauss, “A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect,” *Global Responsibility to Protect* no.1 (2009): 291-323, cited in Jutta Brunnée and Stephen J. Toope, “The Responsibility to Protect and the Use of Force: Building Legality?” *Global Responsibility to Protect* 2, no.3 (2010): 206

This specifically was the case against the Saddam Hussein's regime of Iraq, Charles Taylor of Liberia and in the civil crisis of Sierra Leone.

Economic Sanctions

In addition to arm embargoes, economic sanctions might be imposed on the regime as a means of forcing it to reconsider its decisions. The use of this tool, however, is controversial because economic sanctions by their very nature affect every sector of society and tend to cause more harm to the population than what the actual violation of human rights may be causing. In a utilitarian sense, economic sanctions can hardly be justified since it leaves more people worse off than if they were not imposed. Furthermore, those suffering abuses are the one most affected by economic sanctions. If the rationale of the economic sanction is to impact regime or policy change, sanctions can be self-defeating by weakening the population's resolve. In the process, the regime might be made stronger, especially where limited commodities are being distributed to regime loyalists. Besides, although sanctions result from elite policies, it is unlikely that the elites in charge will feel the sanction's effects. These elites still continue to live lavishly while common citizens scrape by on a daily basis. In light of this, economic sanctions are only justified if the purpose is general punishment for the entire population without discrimination amongst those being abused.

The use of sanctions has the worst impact on those who are already suffering and not taking any parts in carrying out atrocities. As a tool for addressing human rights abuses, economic sanctions falls short in complying with an important criteria of R2P: international action must not make the population worse off than the abuse being suffered.

The international community's economic sanctions against Iraq in the aftermath of its 1990 Kuwait annexation serves as the poster child for everything that is wrong with the use of economic sanctions as a tool for humanitarianism. UN Security Council Resolution 661 first imposed economic sanctions on Iraq in August 1990 in the wake of Iraq's illegal invasion of Kuwait after failing to honor UNSC Resolution 660, which asked Iraq to withdraw from Kuwaiti territories. The subsequent UNSC Resolution 661 banned member states from importing any commodity or product from Iraq and from selling or supplying Iraq commodities or products, except those geared exclusively to humanitarian purposes such as food and medicine.²² The aftermath effect of this resolution was devastating for the Iraqi economy, infrastructure, and general population. The effect of this sanction on the Iraqi population was highlighted by the UN Sub-Commission on the Promotion and Protection of Human Rights report on the Human Rights Impact of Economic Sanctions on Iraq. The Sub-Commission noted that economic sanctions created a "catastrophic health situation [which] is leading to about 6,000 deaths a month among children under the age of five' and 'a return to illiteracy' caused by 'the embargo.'²³ The sanctions on Iraq resulted in a significant rise in infant mortality unemployment, and crippled industries and the basic infrastructures needed for the enjoyment of modern life.

Aside from these humanitarian concerns, the sanctions negatively impacted the human rights of ordinary Iraqi citizens. It robbed citizens of their most basic human right, namely, the right to life, by impeding the ability of the government to adequately provide

²² S/RES/0661 (1990)

²³ Sub-Commission decision 1999/110, 26 August 1999, UN Doc.E/CN.4/SUB.2/DEC/1999/110.

essential basics such as medical care or drugs, clean water, and adequate nutrition. Sanctions also undermined the Iraqis' enjoyment of the full panoply of economic, social and cultural rights as outlined in the universal bill of rights: the right to education, the right to food, the right to social security, the right to the highest attainable standard of health, and the right to an adequate standard of living, which includes food, clothing and housing and the right to work. All of these rights are guaranteed by the UN.²⁴ In effect, the sanctions took Iraq from a position of envy in terms of economic and social achievement in the region to a backwards Third World country within the span of a decade all in the name of humanitarianism. This prompted Muller (1999) to term the Iraqi sanctions as "weapons of mass destruction"²⁵ due to their negative effects on the general populace. This result also prompted Bennoune (2002) to state that the "citizens of a state must not lose the benefits they may receive from sovereignty because their government commits crimes against humanity."²⁶ Despite the long duration of the sanctions, it was relatively ineffective in undermining the power of the Iraqi regime until the US invasion in 2003, which toppled the Hussein government.

Personal Sanctions: Asset Freezes, Travel Bans

The international community may also impose financial sanctions and travel bans on individual members of the regime. These sanctions and bans are especially placed on those who have links with crimes of mass atrocity and in some instances, other member

²⁴ Bennoune, "Sovereignty vs. Suffering'? Re-examining Sovereignty and Human Rights through the Lens of Iraq," 253-254

²⁵ Mueller *et al.*, 'Sanctions of Mass Destruction', *Foreign Affairs*, 78, no.3(1999): 43

²⁶ Bennoune, "Sovereignty vs. Suffering'? Re-examining Sovereignty and Human Rights through the Lens of Iraq," 261

states and their financial institutions are asked to freeze their assets. All these actions are targeted at individual perpetrators or highly placed elites with the purpose of making them reconsider their actions. Unlike sanctions, these actions seek to punish those involved instead of imposing punishment on the general population which although not the intents of economic sanctions tend to be their general outcomes.

Criminal Indictments Through the ICC

In additions to these actions, the international community can bring legal actions against individuals who fail to meet their international obligation by aiding and abetting those carrying out or participating directly in crimes of atrocity. The states in which such crimes are occurring usually come under international pressure as the first line of defense against human rights violations to prosecute those who are involved in heinous crimes. When the state fails or in most instances, cannot fulfill such obligations, the international community is forced to bring criminal charges against such persons in an international court.

There are basically two internationally recognized courts with jurisdictions in the area of human rights. The International Court of Justice (ICJ), established in 1945, serves as the principal judicial organ of the UN. But despite this preeminent position and jurisdiction to address any state issues relating to international legal norms, it plays very little role in the UN human rights regimes systems because only states have legal standing before the court. Because of this, sovereign states that are bent on protecting their autonomy have looked less favorably on bringing human rights issues before the court. This very phenomenon means that the ICJ cannot take center stage in the UN human rights enforcement mechanisms. Perhaps the shortcoming of the ICJ in this regard

gave rise to the impetus for the establishment of the International Criminal Court (ICC). The ICC is a legal international institution established in 1998 under the Rome Protocol with jurisdiction over individuals to prosecute those responsible for genocides, war crimes, crimes against humanity and other atrocity crimes that shocked human sensibilities.²⁷ This makes it extremely effective as a legal institution for addressing the grievances of those whose fundamental human rights have been violated, as well as their sympathizers.

The ICC as an institution has its foundation rooted in the tribunals set up by the victorious allies in World War II to prosecute their axis power foes for their actions during that war. The Nuremberg and Tokyo Tribunals after World War II served as the blueprint for an international tribunal with a jurisdiction to prosecute individuals for atrocity crimes. In line with this, special tribunals have been set up to deal with gross human rights violations in areas ranging from former Yugoslavia, Rwanda and Sierra Leone.

Efforts aimed at establishing such a permanent body at the world level goes back several decades to the very founding of the UN. After the Holocaust and the Nuremberg Trials in December 1948, the UN General Assembly adopted a resolution: the Convention on the Prevention and Punishment of the Crime of Genocide. This called for an international tribunal to prosecute people guilty of genocide. After this resolution, the International Law Commission drafted several statutes for an international criminal court from 1949 to 1954. However, the Cold War tensions that flared up between the United States and the USSR ultimately undermined these efforts. With the demise of the USSR

²⁷ The Rome Statute of the International Criminal Court, A/CONF.183/9 article 5

and the end of the Cold War in sight, Trinidad and Tobago revived the idea in 1989 to redouble efforts at making the court a reality. To this effect, the UNGA requested that the International Law Commission (ILC) prepare a new ICC statute, which eventually resulted in the Rome Protocol.²⁸

The ICC and R2P Activation

Despite the praise regarding the ICC and its capacity to bring justice to victims of gross human rights abuses, it does not have a role in determining when a violation of human rights has occurred under the new sovereignty as a responsibility-embodied paradigm. It is instead limited to prosecuting and punishing those responsible for human rights violations. The determination of the violations of R2P principles in that regard is placed squarely on the UN Security Council. The ICC link to R2P is expressed in the fact that “R2P obligates governments to protect people from gross human rights abuses, and the Rome Protocol of the ICC similarly obligates them to prosecute individuals who commit such abuses.” On the other hand, “both R2P and the International Criminal Court also affirm that when governments fail to protect people, the responsibility to do so befalls the international community.”²⁹ This places the ICC in a better position to determine whether a government has failed in its Responsibility to Protect. Granting such powers to the ICC could help to make the budding principles of R2P more effective,

²⁸ See <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> for an overview of the ICC history

²⁹ The Responsibility to Protect and the International Criminal Court: America’s New Priorities, Conference Report, Center for International Human Rights at NorthWestern University, December 2007.
http://www.cfr.org/publication/15802/northWestern_university_school_of_law.html, accessed 3 August 2009

predictable, impartial and legitimate when enforcement mechanisms are employed.³⁰ The ICC could be empowered beyond its current jurisdiction of prosecuting human rights violations to include investigative functions of possible R2P violations and when necessary, issue a formal declaration on the occurrence of violations.

The ICC can also serve as an interpretative body for UNSC resolutions under R2P to avoid scenarios similar to the Libyan fiasco, where the UNSC made the law and later interpreted it as they saw fit. A judicial body would be better placed to safeguard R2P because the UNSC “as an executive body, motivations and concerns are very different from that of a judicial body. It is neither neutral nor impartial, nor is it concerned with vital legal elements such as evidence, due process, and natural justice. Rather, its decisions are outcomes of the membership, voting structure, and political interests of the Council, dominated by the P5.”³¹ The haphazard way in which the Libyan mission was authorized and executed coupled with the fact that Russia and China maintain that NATO members overstepped their limit by expanding the meaning of the resolution under pretense for regime change makes the need for an independent interpretative body for resolutions relating to R2P imperative. The aftershocks of the Libyan fiasco are already being felt in Syria, where China and Russia have vehemently refused to back any strongly worded resolutions due to fears that, as in the Libya scenario, it could be expanded to allow for an authorized NATO war on the Assad regime. This is not to say that the ICC is completely impartial in the eye of the South where it has been accused of

³⁰ Michael Contarino, and Selena Lucent, “Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect,” *Global Responsibility to Protect* 1, no.4 (2009): 560

³¹ Jane Verbitsky, “What should be the relationship between the International Criminal Court and the United Nations Security Council in the crime of aggression?” *Uluslararası Hukuk ve Politika* 4, no.14 (2008) :155

being the pawn of Western states due to its incensed focus on rights abuses in that region. But it is better positioned to act independently. That is why the ICC like internal judicial organs must strive to disassociate itself from the dominant powers less it loses credibility which is already under stress.

R2P as Military Action.

The most controversial application of R2P is its manifestation in humanitarian wars, that is, wars undertaken with the sole purpose of providing protection for the nationals of another state. Although all R2P categories serve as an affront on sovereignty by placing conditions on a state's claims to absolute authority over its affairs, none is as confrontational as military actions against the state. This is because it requires placing those considered enemies or oppressors on a state's territory and targeting its sovereign guarantor, the military. This is why R2P makes military action the last resort to be employed. It is used only in dire circumstances of human rights violations and is utilized when all other strategies have failed to prevent or stop atrocities. This action must also be called by the UNSC, acting as guardians of international peace.³² The unease about military actions for human rights protection is the reason why stringent criteria have been developed for militaristic R2P. These include that the intention for intervention must be solely for protecting vulnerable populations; all other means for resolving the crisis must have been exhausted before military action is undertaken; the bare minimum force for preventing abuses must be employed; and finally, there must be reasonable prospects of military action succeeding in providing protections. Thus, intervention should not

³² ICISS, XII, 47-9

exacerbate the conditions of those whom it seeks to protect.³³ Furthermore, one very important condition in this regards is that those for whom the intervention is to take place must want such actions on their behalf to ensure that its sole purpose is indeed for the protection of those suffering from abuses. Most of all, intervention must be guarded by international conventions on the use of force under the auspices of an international body most preferably the UN.

Bellamy (2008) posits that the ICISS criteria of “just cause thresholds and precautionary principles” about decisions regarding military intervention were put in place to fulfill three primary functions: “First, in an attempt to avoid any future cases like that of Rwanda, where the world stood aside as 800,000 people were butchered in genocidal violence, the just cause thresholds were intended to create expectations about the circumstances in which the international community—primarily the UN Security Council— should become engaged in major humanitarian catastrophes, consider intervening with force and constrain permanent members from casting pernicious vetoes for selfish reasons. Second, responding to a need to avoid future situations like that of Kosovo, where the Security Council was blocked by veto, the criteria provided a pathway for legitimizing intervention not authorized by the Security Council.” Finally, these criteria serve as a mechanism that limits individual state’s ability to abuse R2P while at the same time demarcating the limits of potential Security Council interventionism.³⁴

Nonetheless, there is disagreement on the criteria for R2P, especially between the larger world powers and the rest of the states. For instance, the African states and most Third World countries maintain the view that such criteria are necessary for making the

³³ ICISS, XII and 35-7

³⁴ Bellamy, “The Responsibility to Protect and the problem of military intervention,” 618

Security Council's decisions more transparent, more accountable to the UN, and hence, legitimate. But, the great powers such as United States, Russia, and China see it as either a limit to their freedom of action, or fear its potential deployment as a tool to circumvent the Council.

Despite accusations of the UNSC being undemocratic and bound to the interests of the great powers, especially to the Permanent Five members, which allows for selectivity in the application of R2P, the report maintains that “there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty. And it is the Security Council which should be making the often even harder decisions to mobilize effective resources, including military resources, to rescue populations at risk when there is no serious opposition on sovereignty grounds”³⁵ because it acts as the executive arm of UN, which functions as the world's foremost political body in guaranteeing both sovereignty and human rights. With the acknowledgement of the power politics in the UNSC, the report attempts to minimize the potential of the great powers using the body for narrow national interests, most especially in the face of dire human suffering by stating: “The Permanent Five members of the Security Council should agree not to apply their veto power in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.”³⁶

³⁵ ICISS, XIII

³⁶ ICISS, XIII

The UNSC is not the only body with the power to authorize reactionary R2P. Where the UNSC fails to come to an agreement in the face of gross human rights violations, the UNGA can act in the Emergency Special Session under the “Uniting for Peace” and provide legitimacy to humanitarian interventions by a two-third majority. A resolution under the uniting for peace principle, although non-authoritative, will also force the UNSC to rethink its position. Failure to do so would go against the will of an overwhelming majority of states in the international system. Furthermore, Article 52 of the UN Charters allows regional or sub-regional organizations under Chapter VIII of the Charter to undertake collective intervention if human rights abuses will have negative effects on other states in the region through mass movement of refugees fleeing for their lives. Under this charter, interventions can also be carried out when there is reasonable prospect of one state being used to mount rebel incursion into others in the region.³⁷ Such actions must however seek the blessings of the Security Council.

The UNSC’s prominent position in the authorization of R2P is controversial. The situation is such that R2P is tainted by power politics. This has resulted in calls for either the democratizing of the UNSC, if not permanently, at least in matters relating to humanitarian intervention, or placing determination of R2P in a more representative body such as the UNGA. Another suggestion is to set up another body altogether with its sole purpose being the tackling of issues relating to humanitarian interventions. However, Chimni (2002) holds the view that “while the problem of selectivity and the possibility of the abuse of Security Council authority are real, the answer to it is not a new body such as... Humanitarian Council but the greater democratization of the UN Security Council.

³⁷ ICISS, 53 and 54

It will help ensure that its decisions reflect a wider consensus in the international community.”³⁸ Even though democratization of R2P might sound like the best method to adopt in order to consider opinions around the world, this will make the body more political hence and in turn, less effective while at the same time undermining its authority.³⁹ Furthermore, even if more countries take a decision on the just cause of humanitarian intervention, more national interests would be at stake in the decision-making process.⁴⁰

If political considerations are to be at the center of R2P, then democratization is the means by which to move forward. But if legitimacy and consistency are the primary aims of R2P, then there is a need to explore other options that removes the politics from R2P activation. The key to making R2P determination on the basis of common rather than national interests lies in an independent body.

In order to wrestle control of R2P from the parochial interest of the great powers and to make it more legitimate, it is necessary to set up an independence body staffed by experts and/or delegates from internationally acclaimed human rights institutions. In an even more ideal scenario, R2P should be turned over to a judicial body, such as the ICC. An independent body could be set up with the authority to recommend to when to activate R2P in cases of human rights violations. Such a body must be independent of either the UNGA or the UNSC to ensure that it is not tainted by the interests of any states, whether individual powerful states or a collective of weaker ones. This will allow for consistency and uniform in determining R2P, which is lacking in the current system.

³⁸ B.S. Chimni, “A New Humanitarian Council for Humanitarian Interventions?” *The International Journal of Human Rights* 6, no. 1 (2002): 104

³⁹ Ibid, 105

⁴⁰ Aguilar, “Who Should Determine The Just Cause of Humanitarian Intervention?” 19

Such an independent body will “possess sufficient moral power, and possibly support from the General Assembly, to exert pressure on the Security Council to overcome the inertia and indecision that has characterized its decision-making process”⁴¹ and when the UNSC fails to act on its recommendations, that body will be forced to justify its decisions to the world. As stated earlier, R2P determination could also be placed in a judicial authority such as the ICC.

Restorative R2P

The last recommendation of the ICISS R2P asks that military intervention not be the last of the actions undertaken by the international community in the face of gross human rights abuses. R2P demands that the international community help the societies that have witnessed reactive R2P get back on their feet and become a full functioning member of the international association of states. This implies that after the fact, states in the international community must provide “assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”⁴² In this regard, states that intervened must remain on the ground to help with reestablishing institutions, capacity-building and post-conflict management to ensure that such states do not immediately slide back into chaos. This is especially pressing because states that have endured conflicts or some form of social strife will most likely return to their old ways if the post-conflict environment is not managed properly.

Rebuilding entails the provision of security which might take the form of disarmament, demobilization, rehabilitation and reintegration of former adversaries into

⁴¹ Aguilar, “Who Should Determine The Just Cause of Humanitarian Intervention?” 20

⁴² ICISS, XI and 39

society, building a national army, reconstructing the civil society and judicial systems, and most importantly, putting in place structures that will ensure sustainable growth and development so as to increase the national wealth and give citizens of such societies hope for the future.⁴³ A follow-up after humanitarian intervention will go a long way in providing the conducive physical and socioeconomic security environment that is necessary for mending the wounds of society.

Indemnifying and Appeasing the Wrong doings

In some cases, although the victims and other stakeholders might advocate the punishment of the perpetrators of gross human rights violations, prudence demands that the situation on the ground should be assessed and the appropriate choices between punishment and indemnification are made. In post-conflict states where the wounds of suffering and animosity between the various groups are still fresh, where a vast number of people participated in the act of human rights violations, or where those who carried out gross violations are still entrenched in political power and hold sway over a huge chunk of the military or civilian population, punishment as a means of correcting for these events becomes practically impossible. In such situations, restorative justice based in truth and reconciliation commissions, such as that in post-apartheid South Africa, can be established in an attempt to uncover the truth in the events that occurred with the purpose of bringing closure and repairing social connections.

In other cases, reparations can be paid by states to victims of human rights abuses or their survivors to make amends for their suffering and loss of property. The most noted examples of this include the German government's reparations to the Holocaust victims

⁴³ ICISS, 41-3

and the reparations made by the United States to Native Americans and Japanese-American victims of World War II. Public apologies by those who carried out the human rights abuse to victims is another tool that can be utilized in the restorative justice system. An act of apology in this regard is an acknowledgement of wrong doing and an attempt to seek forgiveness from victims of mass atrocities. Australia's apology to the Aborigines, and Clinton's apology for the United States' role in the transatlantic slave trade are some examples of public apologies. The purpose of any form that addresses human rights abuse is to foster social cohesion and heal the society, which is necessary to allow former foes to live together as neighbors. All these methods might heal some wounds of the community but in some cases, they must be accompanied by punishment of individuals who played major roles in making these crimes a reality.

Prosecuting Offenders

The international community can also prosecute those individuals who participated in carrying out atrocity crimes. These people can be held accountable for their actions as a means of bringing closure to their victims. This tool has been frequently utilized by the international community in the aftermath of gross human rights violations in such places as Rwanda through the use of a special tribunal. Furthermore, perpetrators can be made to stand trial in the ICC, as was the case for Milosevic, Charles Taylor, and a host of others.

R2P in its authoritative application lies in the adoption of the principles relating to it and endorsed by world leaders at the 2005 World Summit and reaffirmed by the Security Council in 2006.⁴⁴ In that summit, states endorsed most of the recommendations

⁴⁴ UN Security Council Resolution 1674 (2007).

made by the ICISS and transformed them into binding principles on themselves. The resolutions adopted by world leaders in that summit regarding R2P states that:

[138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with

Chapters VI and VIII of the Charter of the United Nations, to help protect populations from war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.

We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.]⁴⁵

The underlying themes of these two points relate to each state accepting its obligation to protect its nationals from atrocity crimes. In order to do so effectively, each state is to provide or accept assistance for capacity building where appropriate so as to ensure that they can fully discharge this responsibility. Also, where a state is unable to judiciously execute these functions, the first step is the use of non-violent mechanisms to address such failures. Finally, if and when peaceful means fails, the international community acting through the Security Council is authorized to use all necessary means in providing protections.⁴⁶

The conditionality place on sovereignty inherent in R2P has been received differently around the world. Each region of the world, including the West, Asia, Latin American and Africa has various major concerns about the potential of the R2P adopted at the 2005 world leader conference. Although R2P rests first and foremost on the state of impact and then makes it way to the international community of states in the face of the inability of the affected country to provide protection to those in need of it, at the end of the day, the mere fact that the West dominates the current international system due to its advanced capabilities and resources means that the notion of R2P actuality rests on its shoulders. The predominant position of Western states positions them at the helm of any

⁴⁵ United Nations General Assembly, “2005 summit outcome,” A/60/L.1, 20 Sept. 2005, 138–9.

⁴⁶ Bellamy, “The Responsibility to Protect and the problem of military intervention,” 623

effort to provide protection to vulnerable people around the world. However, the West is not enthused about the idea of expending its scarce resources on any situation, most especially the ones that are not of any significant value to its members respective national interests. They want to ensure that intervention is expected in only extreme human rights abuse instances, and also ensure that the range of issues that R2P can employ remain solely focused on traditional security issues. Thus, other areas are excluded from covering natural disasters, pandemics, famine, etc.

Unlike the West where R2P is most unlikely to be employed, Third World countries, which comprise most of the world and who are at the mercy of humanitarian interventions, are rather skeptical of the motives behind R2P. This is especially due to the fact that R2P is not uniformly applied to all states in the international system. These countries see double standards in West's application of R2P, which play out in the obstruction of humanitarian action when it does not suit Western interests, while at the same time promoting it in the opposite cases. These states are also most likely to view intervention outside UN mandate, such as NATO in Kosovo, as illegitimate and unacceptable.

Despite this underlying commonly held concern about humanitarian interventions, there are differences within third world states with regard to how they relate to humanitarian interventions. For instance, Sub-Saharan African states are more receptive to R2P due to their inherent weaknesses. In fact, these states had incorporated the very idea of sovereignty as a responsibility into the continental body, the AU, long before it was adopted by the UN. People in this region express their frustration about the lack of intervention by claiming that: "Africa has been marginalized by the Security Council, as

indicated by an unwillingness to provide adequate resources for intervention in the continent”⁴⁷ due to its lack of strategic interest to the great powers.⁴⁸ To buttress this point, they contrast the differences between the UN response in the Balkans to other trouble spots in Africa around the same time. This lack of international attention has prompted the region to take the initiative to intervene in places like Liberia and Sierra Leone, after realizing that the international community is not keen on spending resources in conflicts that do not have strategic interest to them, such as in Rwanda. Sub-Saharan Africa’s warm reception of R2P and humanitarian intervention in general is a reflection of the erosion of political authority and the weakness of states in the region when faced with challenges from armed elements within the society. This implies, however, that as these states become more consolidated, this view will invariably change. Africa, in general, views humanitarian intervention as a means of restoring state sovereignty in the face of internal rebellion.

Unlike weak African states, those in Asia and Latin America are more reserved in issues relating to R2P. This is as a result of the fact that “states in Asia and Latin America have been able by and large to consolidate themselves to a greater degree than those in Africa. This means that while some of them may violate the human rights of segments of their populations, they are in far less danger of state collapse than are states in Africa

⁴⁷ *International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Research, Bibliography and Background* (Ottawa: International Development Research Centre, 2001), 363-364.

⁴⁸ Mohammed Ayoob, “Third World Perspectives on Humanitarian Intervention and International Administration,” *Global Governance*, 10, no.1(2004) :105

where state failure appears to be endemic.”⁴⁹ This has greatly influenced their view on humanitarian intervention. Asian states hold firm to the view that humanitarian intervention, as a concept, is absolutely incompatible with state sovereignty, which they maintain must be upheld at all costs.⁵⁰

Like their Asian counterparts, Latin America is suspicious of R2P. its view on humanitarian intervention is highly influenced by the historical domination of the United States in the region. These regions make a distinction between predatory state behavior for the sustenance of a regime and state consolidation. Humanitarian intervention is somewhat acceptable in the former, but is frowned upon in cases relating to the latter. But if intervention is to be carried out on behalf of citizens, these states hold that “a multilateral intervention by the UN, or authorized by the UN, is preferable to a direct intervention by a regional organization, but the latter is preferable to one undertaken by a group of states or an individual state...the primary goal of [which] must be to remedy humanitarian crises and restore the rule of law, and not the pursuit of self-interest by intervening states.”⁵¹ For both of these regions, UN authorization is the backbone of legitimacy in matters relating to humanitarian intervention.

The Middle East, a region that has seen many humanitarian interventions by the West since the time of the decline of the Ottoman Empire, is perhaps the most wary about any form of humanitarian intervention and curbs on state power. This viewpoint has only started to change recently in the case of the Libyan debacle and currently, in the case of

⁴⁹ Ayoob, “Third World Perspectives on Humanitarian Intervention and International Administration,” 105

⁵⁰ *International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Research, Bibliography and Background*, 392

⁵¹ *Ibid*, 387-9

Syria. The reaction of the Middle Eastern states to humanitarian intervention is highly influenced by perceived notions of the double standards employed by the West's reaction in regard to incident in other Middle Eastern states involving Israel and the Palestinians. The UNSC refusal and/or inability to impose sanctions for Israeli actions against the Palestinians makes all humanitarian decisions suspect in the region. This supposed double standard has forever tainted R2P in Arab League states. The relative strength of most Middle Eastern states and the fact that regimes are equated with the states even in the non-monarchical nations make it impossible to distinguish between mere regime predatory actions and those relating to state consolidations.

Although UN authorization is required and/or desirable for undertaking humanitarian interventions, such actions can still be carried out in the face of deadlock among the P-5 when doing so will ultimately save lives. Thus, until a more independent body is set up to govern R2P, the UNSC will continue to determine R2P based on national interests. This implies that some members might threaten to veto R2P in order to stall debate. In the face of such occurrences, it is possible to bypass the UNSC in providing intervention based on moral imperatives instead of political calculation and justifying this action in the court of world opinion.

CHAPTER 5

CONCLUSION

In a changing world, where sovereign states must adapt in order to remain relevant, we will continue to reinterpret and redefine what it means for a state to be sovereign in an increasingly interdependent and dynamic world. In such a world, the very idea of an independent state is an oxymoron: it is perhaps more accurate to describe a state as interdependent. As we move away from the idea of the ruler as the ultimate source of sovereignty to the ruled, this helps to ensure a more people-oriented definition of sovereignty. In this paradigm, the idea of state sovereignty as a responsibility toward the betterment of citizens does not seem at all strange. This paradigm allows for states to treat their citizens with decency, or at least allows for the international community to intervene in order to provide such protection. This is not a radical change when considering the fact that states acting as representative of their citizens at international fora have frequently signed human rights treaties calling for the protection of citizens. Thus, the sovereignties of individual citizens deposited in the national government to ensure their safety simply move to a higher body when the former fails to fulfill its obligations to both its citizens and the spirit of international laws. In a world society where sovereignty rests with the people, one can reason that the people give up part of their individual sovereignties to the state to safeguard their interests. These states, acting as agents of the citizens, then transfer some of that sovereignty up the chain to multinational organizations and regimes in the way that people did at the domestic level with the purpose of safeguarding their common interests. This reasoning maintains that

these institutions get their sovereignty from the people through the delegation of sovereignty.

We are gradually moving into a new world where the international community and the vast institutions of governance take it upon themselves to provide protection directly to members of its constituent states when and if necessary. However, the continuation of this redefinition of sovereignty depends on how a new rising power will be incorporated into the present world order.

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VITA

Fassue Kelleh was born to the union of Thomas Fassue Kelleh and Musucula Balloh on October 28, in the little town of Voinjama Lofa County, Liberia. He moved to Guinea from 1990 to 1996 during the Liberia Civil War, and later to Ghana in 1998 where he had his Junior and Senior Secondary level education. After high school, he went to the University of Ghana before transferring to Kean University in 2008, located in Union New Jersey where he completed his BA in Political Science.

He moved to Olathe, Kansas and pursued his MA in Political Science at the University of Missouri-Kansas City in Spring 2011. After completion, he will attend Kansas University as a Doctoral Candidate in International Relationships and Comparative Politics.