

THE RESPONSIBILITY TO PROTECT AND THE USE OF FORCE

Candidate number: 525

Deadline for submission: April 25th 2008

Number of words: 17.121

21.04.2008

CONTENT

| | | |
|-----------------|---|------------------|
| <u>1</u> | <u>INTRODUCTION</u> | <u>1</u> |
| <u>2</u> | <u>THE LEGAL SOURCES OF PUBLIC INTERNATIONAL LAW</u> | <u>3</u> |
| 2.1 | INTRODUCTION | 3 |
| 2.2 | LEGAL SOURCES | 4 |
| 2.2.1 | Treaties | 4 |
| 2.2.2 | Customary international law | 5 |
| 2.2.3 | Judicial decisions | 9 |
| 2.2.4 | Resolutions and declarations | 10 |
| 2.3 | THE RELATIONSHIP BETWEEN TREATIES AND CUSTOMARY INTERNATIONAL LAW AND OTHER SOURCES OF LAW | 11 |
| 2.3.1 | Introduction | 11 |
| 2.3.2 | The main rule | 11 |
| <u>3</u> | <u>THE USE OF FORCE IN INTERNATIONAL LAW</u> | <u>13</u> |
| 3.1 | INTRODUCTION | 13 |
| 3.2 | STATE SOVEREIGNTY | 14 |
| 3.3 | THE PROHIBITION ON THE USE OF FORCE | 16 |
| 3.3.1 | The main rule | 16 |
| 3.3.2 | The written exceptions from the prohibition on the use of force | 17 |
| 3.3.3 | Are there any unwritten exceptions from the prohibition on the use of force? | 19 |
| 3.4 | THE WAY FORWARD | 21 |
| <u>4</u> | <u>THE RESPONSIBILITY TO PROTECT AND THE PILLAR OF THE RESPONSIBILITY TO REACT</u> | <u>22</u> |

| | | |
|------------|--|-----------|
| 4.1 | INTRODUCTION | 22 |
| 4.2 | THE RESPONSIBILITY TO PROTECT | 22 |
| 4.2.1 | How R2P got started | 22 |
| 4.2.2 | How R2P got acknowledged as an international doctrine | 24 |
| 4.3 | THE RESPONSIBILITY TO REACT | 27 |
| 4.3.1 | Introduction | 27 |
| 4.3.2 | Right authority | 28 |
| 4.3.3 | Just cause | 29 |
| 4.3.4 | Right intention | 29 |
| 4.3.5 | Last resort | 30 |
| 4.3.6 | Proportional means | 30 |
| 4.3.7 | Reasonable prospects | 30 |
| 4.4 | HAS THE PILLAR OF “RESPONSIBILITY TO REACT” BECOME CUSTOMARY INTERNATIONAL LAW? | 31 |
| 4.4.1 | Introduction | 31 |
| 4.4.2 | Has the pillar of “responsibility to react” become “general state practice accepted as law”? | 32 |
| 4.4.3 | State practice | 33 |
| 4.4.4 | Opinio juris | 35 |
| 4.4.5 | Legal scholars that acknowledge the right of unilateral intervention for human protection purposes | 35 |
| 4.4.6 | Part – conclusion | 38 |
| 4.5 | CRITICISM OF THE UN CHARTER ARTICLE 2(4) | 38 |
| 4.5.1 | Introduction | 38 |
| 4.5.2 | Has the UN Charter Article 2(4) become desuetude? | 38 |
| 4.5.3 | De lege ferenda | 41 |
| 4.6 | REINTERPREATION OF THE UN CHARTER AND INVOKING MORAL NORMS | 41 |
| 4.6.1 | Introduction | 41 |
| 4.6.2 | Is it possible to reinterpret the UN Charter Article 2(4)? | 41 |
| 4.6.3 | De lege ferenda | 43 |
| 4.6.4 | Part – conclusion | 43 |
| 4.7 | THE ROLE OF THE SECURITY COUNCIL | 44 |

| | |
|---|------------------|
| 4.7.1 Introduction | 44 |
| 4.7.2 The unrepresentative membership of the Security Council | 45 |
| 4.7.3 The veto right of the five permanent countries | 46 |
| 4.7.4 The responsibility of the Security Council | 47 |
| <u>5 CONCLUSION</u> | <u>48</u> |
| <u>6 DE LEGE FERENDA</u> | <u>50</u> |
| <u>7 REFERENCES</u> | <u>53</u> |

1 INTRODUCTION

Approximately 6.000.000 million Jews were murdered by the Hitler-regime in Europe during World War II. The international community said never again. An estimated 2.000.000 million people were killed by Pol Pots regime in Kampuchea between 1975 and 1979. The international community said never again. In spring 1994, an estimated 1.000.000 million individuals were slaughtered by two Hutu militias in Rwanda. The international community said never again. In July 1995, an estimated 8.000 Bosnian boys and men, in the region of Srebrenica in Bosnia and Herzegovina were killed by units of the Army of the Serbian Republic. The international community said never again. Now, in 2008, 400.000 thousand people have so far been massacred by the Janjaweed-militia in Sudan. How many times must the international community say never again?

These are some very few examples of how some governments have failed to protect their populations from atrocities in the 20th century. If the international community, especially the United Nations, had reacted before the conflict escalated into genocide, ethnic cleansing and crimes against humanity, the damages to the people and the country would be much less. If I was to write about all the genocides performed by governments and militias around the world in the past century, I would not be able to write about anything else, because the history unfortunately paints a dark picture of mankind. The consequences of these conflicts are astronomical. Not only do people get killed, they are also raped, displaced, starved and tortured. Wives become widows, children become orphans and the circle continues for years after the conflict has ended. The United Nations has not been able to prevent such atrocities from happening, even though they work for peace and mutual understanding and almost all countries in the world are members.

When a country's population faces atrocities such as genocide, ethnic cleansing or crimes against humanity and the country in question is unable or unwilling to stop the atrocities, it is not always enough for the international community to sanction or boycott that country. If all other means are tried, and the suffering is still going on, sometimes the only means possible to end human suffering is through armed intervention. According to the 1945 Charter of the United Nations (hereafter the UN Charter) Chapter VII, armed intervention is only legal if the Security Council authorizes it or if it is in self-defense. Unfortunately, the Security Council has not reacted promptly to some of the biggest genocides in the last century, and my question is therefore: what can the international community do when the Security Council fails to take action towards a country that commits atrocities such as genocide, ethnic cleansing and crimes against humanity to its own citizens? In other words, when all means have been tried, and the atrocities are still going on, can the international community take collective action and intervene unilaterally in that country if the Security Council fails to address this problem?

I will study a newly developed term called the "Responsibility to Protect" (hereafter R2P). R2P consists of three different pillars: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. This thesis will focus on the pillar regarding the responsibility to react (hereafter R2R).

The topic of this thesis is difficult, both legally and morally. The focus of this thesis is: Has the doctrine of R2P, and especially the pillar of R2R, lead to a change in how the international community views the prohibition on the use of force? In other words, has the development of R2P and especially R2R lead to a less absolute provision regarding the prohibition on the use of force? Is there a development in which interventions for human protection purposes has become legal? This is the core of this thesis. In this thesis I will examine four different problem sets:

1. Has the pillar of "responsibility to react" become customary international law?
2. Has the UN Charter's Article 2(4) become desuetude?

3. Is it possible to reinterpret the UN Charter's Article 2(4)?
4. Has the pillar of "responsibility to react" changed the way the Security Council view the prohibition on the use of force?

In the next chapter I will discuss the legal sources that I use in this thesis, such as treaties, judicial decisions, customary international law and declarations and resolutions. In chapter 3, I will examine the different legal aspects of this thesis such as state sovereignty, the prohibition on the use of force and the possible exceptions to this rule such as humanitarian intervention. Chapter 4 is the main part of this thesis and in this part I will examine the problems that I mentioned above. At last, in chapter 5, I will come to a conclusion and end the thesis with some *le lege ferenda* views.

2 THE LEGAL SOURCES OF PUBLIC INTERNATIONAL LAW

2.1 INTRODUCTION

The legal sources of public international law are mostly listed in the 1945 Statute of the International Court of Justice (hereafter the ICJ Statute) Article 38 (1). The sources that are listed in the ICJ Statute Article 38 (1) are: international conventions, international custom, general principles of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations. This list is not exhaustive, so other sources may be applied as well. In this chapter I will only examine the sources that I use in this thesis. The sources that I use according to the ICJ Statute Article 38 (1) are treaties, customary international law, judicial decisions and legal theory. I will also examine resolutions and declarations by the Security Council and the United Nations.

The ICJ Statute Article 38 (1) is an important provision because it is considered to be a general rule of what the legal sources are in public international law. It is not only applicable to the International Court of Justice, but also to all states. In other words, the rules put down in the ICJ Statute Article 38 (1) are considered customary international law.

2.2 LEGAL SOURCES

2.2.1 Treaties

According to the ICJ Statute Article 38 (1) (a), international conventions are a legal source in public international law. Conventions and treaties are the same name for the same thing, and I will use the term treaty in this thesis. A treaty¹ is a quasi-contractual written instrument entered into by two or more states and registered with a third party, usually the United Nations Secretary-General.

There is one type of treaty that can be regarded as a source of international law²: the law-making treaty. The law-making treaty is defined as a treaty concluded among a number of countries acting in their best interest, intended to create a new rule and adherent to later by other states, either through formal action in accordance with the provisions of the treaty or by tacit acquiescence in and observance of the new rule. This thesis will focus on the UN Charter due to its provisions regarding the prohibition on the use of force.

Treaties are considered a major source of international law, and it is usually regarded as the most important of all the legal sources. When states ratify a treaty, the

¹ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 179 (2003)

² “Law among nations 7th Edition” by Gerhard Von Glahn pg. 10 (1996)

treaty creates rights and duties upon the signing state. If a state breaches some of the provisions put down in the ratified treaty, consequences such as economic sanctions, boycotts and the use of military force may occur.

2.2.2 Customary international law

2.2.2.1 The traditional definition of customary international law

Customary international law³ is based on natural law, in the belief that the principles contained therein are universal and undisputable. The vast majority of the world's governments accept in principle the existence of customary international law, although there are many differing opinions as to what rules are contained in it. There are also some scholars who claim that customary international law is not even a binding legal source. This discussion will be further analyzed below in part 2.2.2.3.

According to the ICJ Statute Article 38 (1) (b), customary international law is a legal source in public international law. The traditional definition⁴ of customary international law is strictly doctrinal, in the sense that a particular norm is said to be a rule of customary international law if it satisfies a two-part doctrinal test. The most commonly cited version of this definition is provided by ICJ Article 38 (1) (b), which defines customary international law as “international custom, as evidence of a general practice accepted as law”.

Customary international law⁵ consists of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. The principle element of customary law is the actual conduct of the states. If there is a widespread acceptance of the view that such conduct is in conformity with the law and is

³ http://en.wikipedia.org/wiki/Customary_international_law

⁴ “How International Law Works” by Andrew T. Guzman pg. 184-185 (2008)

⁵ “Practice and Methods of International Law” by Shabtai Rosenne pg. 55-56 (1984)

required by the law, it will be considered to be a “general practice accepted as law”. A legal custom⁶ has come into being when it can be demonstrated that states act or fail to act in a certain way because a sense of legally binding obligation has developed.

2.2.2.2 The conditions for customary international law

In order for a principle to become customary international law, the ICJ Statute Article 38 (1) (b) requires two conditions to be fulfilled. First, the principle needs to be a *general state practice*. Second, the principle needs to be *accepted as law by states* (also called *opinio juris*).

I will first analyze the condition called *general state practice*⁷. Every state has a right to start a general state practice, whether it starts as national legislation, judicial decisions, protests against other states etc. In order for a principle to become customary international law, it needs widespread acceptance by many states. It also needs to have been developed over some time, but it is not a strict condition. The result is that when many states have the same general practice regarding a principle, it will become general state practice. When a principle has reached such status states can be bound either through its actions (estoppel) or its non-actions (acquiescence).

A good example⁸ of such general state practice is that of Belgium’s argument during the Kosovo War in 1999. During NATO’s bombing of Yugoslavia in 1999, Belgium stated that the bombing was a case of humanitarian intervention. This argument is an example of general state practice that helps build a customary right. Throughout its argument Belgium acknowledges the developing nature of the idea of humanitarian intervention. Belgium’s argument is in itself general state practice, and it would have been

⁶ “Law among nations 7th Edition” by Gerhard Von Glahn pg. 14 (1996)

⁷ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 179 (2003)

⁸ “Customary international law on the use of force” by Cannizzaro and Palchetti pg. 15 (2005)

even though it did not participate in the bombings. If Belgium's argument was acknowledged by many other states, it would become customary international law.

The second condition is that the principle needs to be *accepted as law* by states (*opinio juris*)⁹. *Opinio juris* is a belief in a legal obligation. If the general state practice has become so widespread that most states agree upon it, the other states that do not practice this principle would feel obligated to conduct in accordance with that principle. In other words, the other states act in a certain way because they feel required to do so. When the general state practice has achieved this status, it will also be accepted by law (*opinio juris*).

Opinio juris is a belief in a legal obligation. Some controversy¹⁰ prevails among international lawyers regarding what types of evidence are appropriate for demonstrating such a belief. Those who wish to emphasize the weaknesses of international law can easily look to this controversy over custom to demonstrate the level of uncertainty that exists among international law scholars on such vital questions. These critics, however, seems to loose sight of the reality that courts and nations are well able to take positions on customary law. The reality is that international judges and government officials find and evaluate evidence of practice and *opinio juris* with regularity and little theoretical difficulty. This is stated by the International Court of Justice both in the North Sea Continental Shelf Cases¹¹ and the Nicaragua Case¹².

The issue that is the most controversial¹³ among scholars today is if only physical acts count as state practice in the formation of custom or if also verbal acts counts as well. In the 1980s the vast majority of scholars, governments and the ICJ included both types of acts when determining evidence of practice. Today it still remains as the dominant view, but there have been some scholars to advocate otherwise. Anthea Roberts revived the traditional point of this view in an article in the American Journal of International Law. She wrote that the traditional view had the better argument in part because of the difficulty of assessing verbal acts for evidence of *opinio juris*. Roberts rejects the right to find *opinio juris* in practice derived from statements rather than physical acts. She says the statements themselves may contain *opinio juris* that is reflective of both *de lege lata* and *de lege ferenda*. Her concern is that a government statement of "this is the law" could be an attempt

⁹ "Humanitarian Intervention" by Holzgrefe and Keohane pg. 179 (2003)

¹⁰ "Customary international law on the use of force" by Cannizzaro and Palchetti pg. 14 (2005)

¹¹ Federal Republic of Germany v. the Netherlands, Judgment of February 20th 1969

¹² Nicaragua v. United States of America, Judgment of June 27th 1986

¹³ "Customary international law on the use of force" by Cannizzaro and Palchetti pg. 14-15 (2005)

by a government to create new law, rather than a statement about of belief about existing law. She argues that physical acts will reflect what the state actually believes is the law. According to Mary Ellen O'Connell¹⁴ who wrote an article in the book "Customary international law on the use of force", physical acts without any verbal statement give only an implicit indication of the states opinio juris. It cannot be assumed that the implication of states physical acts is a belief that the act is unlawful. Whether verbal or physical acts, all indications of a states opinio juris must be carefully assessed to develop a new rule. O'Connell furthermore states that if a country takes a clear stand on an issue, it will constitute state practice. One example she mentions is when Belgium argued before the International Court of Justice during NATO's bombing of Yugoslavia in 1999 that the bombing was a case of humanitarian intervention.

The reason why this is relevant is because it is necessary to find out exactly what opinio juris is. That is why it is important to discuss the different opinions about this condition. It is also important in the sense that I will later in the thesis discuss if the pillar of R2R has become customary international law and I therefore need the best definition on opinio juris.

The judge, official or scholar must analyze all practice, verbal or physical, for indications of opinio juris. However, verbal acts generally provide explicit evidence of opinio juris unlike physical acts¹⁵. Actors often express as part of the verbal act their beliefs regarding what the law is. Physical acts can only give an implicit indication of opinio juris. This is also stated in the Lotus Case and the North Sea Continental Shelf Case. These decisions required explicit evidence of opinio juris to find if a rule of custom had in fact crystallized in the place of a prior rule. Therefore, explicit evidence of opinio juris is essential in some cases and will typically be found in verbal acts.

¹⁴ "Customary international law on the use of force" by Cannizzaro and Palchetti pg. 14-15 (2005)

¹⁵ "Customary international law on the use of force" by Cannizzaro and Palchetti pg. 16 (2005)

2.2.2.3 Criticism of customary international law

There are some scholars that claim that customary international law is not considered a legal source. The reasoning¹⁶ behind this is that some scholars seem to argue that customary international law can be overridden due to extreme circumstances such as the interventions in Yugoslavia and Iraq. There is a widespread misperception that the law governing the prohibition on the use of force is weak or non-existent. Several scholars, in particular American scholars, have pointed out that the United States and other NATO members were free to use force against Yugoslavia and Iraq because no viable rules exists to prohibit such force and the institutions to implement the rules do not function properly.

Some scholars argue¹⁷ that the use of force against such as Yugoslavia and Iraq should be judged by a higher standard than the law, in particular, by morality. This argument ignores the fact that the rules on the use of force reflect the moral beliefs of the community that formed them. In addition to breaching the morality inherent in law compliance, when a national leader decides to violate the international law rules against the use of force, he or she has decided that his or hers personal moral beliefs are superior to those of the community. Accepting such violations has the potential to break down rules because of their dependence on *opinio juris*. Scholars who care about viable rules against the use of force also play a role in the preservation or destruction of rules to the extent their characterizations of violations influence governments. Care in characterizing an act as a violation by looking to the standards of law can help preserve legal rules.

Even though some scholars argue that customary international law cannot be considered a legal source, it is clear that such a source do exist. First of all, it is stated in the ICJ Statute Article 38 (1) (b), which most states in the world have ratified, that customary international law is considered a legal source. Secondly, the United Nations acknowledges customary international law to be a legal source. And at last, decisions carried out by the International Court of Justice are being followed which again shows that states feel obligated to respond to the verdict. With that said, customary international law remains as the most difficult of the legal sources due its uncertainty. When examining a principle who is starting to become customary international law, one need to both take governments physical and verbal acts into account and to revive how many governments that actually do practice this principle accepted as law.

2.2.3 Judicial decisions

According to the ICJ Article 38 (1) (d), decisions made by courts and tribunals are the fourth source of public international law. It is considered¹⁸ to be an indirect and subsidiary source since the decisions of domestic courts do not even bind their own governments in their international relations: yet a given decision not only reflects the interpretation of other courts as to the existence or meaning of a rule of international law but also indicates what that rule is held to mean in the country in question at the time the decision is drafted.

¹⁶ “Customary international law on the use of force” by Cannizzaro and Palchetti pg. 10-11 (2005)

¹⁷ “Customary international law on the use of force” by Cannizzaro and Palchetti pg. 11-12 (2005)

¹⁸ “Law among nations 7th Edition” by Gerhard Von Glahn pg. 18 (1996)

The decisions I use in this thesis are the ones relating to how customary international law has emerged, and what the conditions are for a principle to become customary international law. Those decisions are the Nicaragua Case and the North Sea Continental Shelf Cases.

2.2.4 Resolutions and declarations

Since no ratification is required, resolutions and declarations do not correspond to treaties in an orthodox sense¹⁹. Some states have regarded these resolutions as creating binding legal obligations. If such an interpretation can be shown to have been accepted by the participating states through their subsequent actions, then it has to be admitted that in the instances in question, regional law has been created.

The types of resolutions that I use in this thesis are the ones issued by the Security Council in regards to the UN Charter Chapter VII and they relate to the conflict in Darfur. The reason why I chose to use these resolutions is because they refer to the doctrine of R2P.

The types of declarations that I use in this thesis are the ones issued by the United Nations such as the report “A more secure world: Our shared responsibility” and the 2005 World Summit Outcome Document. The reason why I chose to use these documents is because they also refer to the doctrine of R2P.

¹⁹ “Law among nations 7th Edition” by Gerhard Von Glahn pg. 12 (1996)

2.3 THE RELATIONSHIP BETWEEN TREATIES AND CUSTOMARY INTERNATIONAL LAW AND OTHER SOURCES OF LAW

2.3.1 Introduction

This thesis contains many different legal sources and in this part I will discuss the relationship between them. The legal sources that I use the most are: treaties such as the UN Charter, customary international law, documents by the United Nations such as Security Council resolutions and last reports and articles written by legal scholars. It is necessary to examine the relationship between these sources of law since they all have different ranks. In order for me to find out if unilateral intervention, without Security Council authorization is legal, I need to figure out which of these legal sources that will prevail in times of a conflict.

2.3.2 The main rule

The main rule in international law is that treaties are preemptory to all other sources of law. The relationship²⁰ between the two principal sources of international law; treaties and customary international law, is similar to the relationship between domestic statutes and the common law. As between the parties to a treaty, an unambiguous provision of the treaty prevails over a conflicting rule of customary international law. One treaty, the UN Charter Article 103, even states explicitly that it prevails over all other treaties. This quasi-constitutional instrument has since been ratified by 189 states. It is clear that treaties will always prevail over all other sources of law.

²⁰ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 180 (2003)

One of the problems that I will examine in this thesis, is if other actors than the Security Council can unilaterally intervene in another country for human protection purposes. Since treaties will prevail when it conflicts with other sources of law, how can then customary international law outrank the UN Charter? This leads me to the question of *jus cogens*.

Some non-treaty rules have a “peremptory” character²¹ and they have the ability to override conflicting, non-peremptory rules. According to the 1969 Vienna Convention of the Law of Treaties Article 53:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Peremptory rules include the prohibitions on genocide, torture and the aggressive use of force. Referred to as *jus cogens*, they are considered by most international lawyers to be customary in origin and thus a result of a process of development similar to that of customary international law. They therefore require the support of most, if not all, states, as expressed through their active or passive support, coupled with a sense of legal obligation. Given the public policy and peremptory character of these rules, the threshold for their development is necessary very high, higher than that for other customary rules.

The prohibition on the use of force is, as mentioned, considered to be both customary international law and *jus cogens*. In the Nicaragua Case²², the International Court of Justice found that the UN Charter Article 2(4) had passed into customary

²¹ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 180 (2003)

²² Nicaragua v. United States of America, Judgment of 27 June 1986, paras. 187 to 201

international law and also referred to it as jus cogens. That means that the prohibition on the use of force is not only illegal and unlawful according to the UN Charter, it is also prohibited according to customary international law.

So, in order for other actors than the Security Council to unilaterally intervene in a country for human protection purposes, any such right²³ could have effect only if it achieved the status of both customary international law and jus cogens. I will analyze this problem later in this thesis.

3 THE USE OF FORCE IN INTERNATIONAL LAW

3.1 INTRODUCTION

According to the UN Charter Article 2(4), the main rule in international law is that no state can use force against another state. Later in this chapter I will analyze this prohibition closer.

Since this thesis regards a state's intervention in another state, I think it is highly relevant to shortly write about what state sovereignty is and if states have an absolute sovereignty over their domestic affairs. Then I will discuss the prohibition on the use of force as it is put down in the UN Charter Article 2(4) and the exceptions that follow.

²³ "War Law" by Michael Byers pg. 100 (2005)

3.2 STATE SOVEREIGNTY

The main rule in international law is that each state is sovereign. This is also expressively stated in the UN Charter Article 2(1):

“The Organization is based on the principle of the sovereign equality of all its Members.”

The term “state sovereignty”²⁴ is put together by two separate terms: “territorial state” and “sovereignty”. A “territorial state” is considered as a geographically contained structure whose agents claim ultimate political authority within their domain.

“Sovereignty” is regarded as a political entity whose agents have externally been recognized the right to exercise final authority over its affairs. State sovereignty is an inherently social construct. The modern state system is not based on some timeless principle of sovereignty, but on the production of a normative conception which links authority, territory, population and recognition in a unique way and in a particular state.

Since the Peace of Westphalia sovereignty has been the main rule in international law, but is “absolute sovereignty” the main rule, or are we moving towards “conditional sovereignty”? It is argued by scholars²⁵ that the idea of sovereign power has been eroded by the economic and informational processes known as “globalization” and by the development of cosmopolitan political processes associated with bodies such as the United Nations and the various global NGOs. Moreover, the concept has always been flawed insofar as it left citizens at the mercy of their governments, with frequently alarming consequences.

The defense of state sovereignty²⁶, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people.

²⁴ “State Sovereignty as Social Construct” by Thomas J. Biersteker and Cynthia Weber pg. 2 (2006)

²⁵ “The ethics of armed humanitarian intervention” by Tony Coady pg. 21

²⁶ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 8 (2001)

The International Commission on Intervention and State Sovereignty (hereafter the ICISS) found no such claim at any stage during their worldwide consultations for their report “Responsibility to Protect”. It is acknowledged that sovereignty implies a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship. This modern understanding of the meaning of sovereignty is of central importance in the ICISS’s approach to the question of intervention for human protection purposes, and in particular in the development of their core theme, “the responsibility to protect”.

To support this argument, Kofi Annan stated that:²⁷

“...States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty - by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties - has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them”.

In today’s society, where human rights have become so important, one can claim that a state has only the inherent right of “conditional sovereignty”. In other words, the safebeing of individuals are more important than an absolute sovereignty for governments. The state must therefore be regarded as having “conditional sovereignty,” that is, sovereignty that is conditional on some minimal level of discharge of obligations to respect the human rights of its citizens.

²⁷ “Two Concepts of Sovereignty” by Kofi Annan in the Economist, Sept. 18, 1999.

3.3 THE PROHIBITION ON THE USE OF FORCE

3.3.1 The main rule

Adopted in the wake of World War II and proclaiming the determination “to save succeeding generations from the scourge of war,” the UN Charter established a prohibition on the use of force to resolve disputes among states. The main rule in international law is therefore that no state can intervene in another state. This is explicitly spelled out in the UN Charter Article 2(4):

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

According to the 1969 Vienna Convention on the law of Treaties Article 31(1), treaties shall be interpreted in accordance with the ordinary meaning of the treaty and in the light of its object and purpose. The ordinary meaning of the UN Charter Article 2(4) is clear: the use of force across state borders is simply not permitted. This meaning is furthermore supported by the UN Charter’s context, objective and purpose.

The prohibition on the use of force is also considered to be both customary international law and jus cogens. In the Nicaragua Case²⁸, the International Court of Justice found that the UN Charter Article 2(4) had passed into customary international law and also referred to it as jus cogens. That means that the prohibition on the use of force is not only illegal and unlawful according to the UN Charter, it is also prohibited according to customary international law.

²⁸ Nicaragua v. United States of America, Judgment of 27 June 1986, paras. 187 to 201

3.3.2 The written exceptions from the prohibition on the use of force

The UN Charter sets out, however, two exceptions to the Article 2(4) prohibition on the use of force. The first exception to the UN Charter Article 2(4) prohibition is that the Security Council may authorize the use of force if it does so explicitly through a resolution adopted under the UN Charter Chapter VII. According to the UN Charter Article 39:

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

The UN Charter Article 42 clearly states that if a state breaches the prohibitions mentioned in Article 39:

“...the Security Council may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security...”

No such authorization²⁹ by the Security Council has been made for humanitarian reasons. The few interventions that might have been justified on humanitarian grounds - Bangladesh, Cambodia and Uganda - were all justified on other terms, while the interventions in Liberia, Somalia, Bosnia, Haiti and Rwanda were conducted on the basis of Security Council authorizations, and in some cases also at the invitation of the targeted state.

The second exception to the UN Charter Article 2(4) prohibition is the right of independent or collective self-defense. According to the UN Charter Article 51:

²⁹ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 183 (2003)

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

This right³⁰ is contingent upon an armed attack on the state asserting the right, and limited to acts taken in self-defense that are both necessary and proportionate. Examples of such self-defense are the 1991 Gulf War, and more recently, the 2001 Afghanistan War. In the first example Iraq invaded Kuwait, and when Kuwait asked the international community for help, the United Nations responded. Allied forces got together, helped Kuwait and ended the illegal occupation. In the second example, the United States was the victim of a terror attack, and according to their intelligence, the terrorist group which conducted the atrocity were stationed in Afghanistan, and so the United States went to war against Afghanistan as a pre-emptive self-defense. This doctrine however is highly disputed and it is still unclear in the legal environment if the war in Afghanistan was lawful or not.

Other regional coalitions than the United Nations forces, such as NATO and the African Union, may also intervene in a country that is a danger to world peace, but again such a regional coalition needs authorization by the Security Council. According to the UN Charter Article 53:

“...no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...”

³⁰ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 182-183 (2003)

With that said, the UN Charter leaves no room for an exception to the prohibition on the use of force, other than the ones I mentioned. The key element is that all interventions must have the authorization by the Security Council. If they do not, they are considered illegal and unlawful. But is it possible that other exceptions have emerged in customary international law? I will write about that in the next part.

3.3.3 Are there any unwritten exceptions from the prohibition on the use of force?

3.3.3.1 Pro-democratic intervention

The first exception that may have developed in recent time³¹ is called pro-democratic intervention, and it is a right to intervene militarily in another state to promote or restore democracy. There are however, no credible precedents for the claim of pro-democratic intervention. In the absence of precedents, there is no supporting state practice or *opinio juris* and, therefore, no possible rule of customary law. The UN Security Council could authorize an intervention for the purposes of supporting or restoring democracy, since that is their legal right after the UN Charter Chapter VII, but individual countries cannot legally take such action on their own.

3.3.3.2 Humanitarian intervention

Humanitarian intervention is a principle which consists of three different terms: intervention, armed intervention and humanitarian intervention. The general term intervention is usually defined³² as the exercise of authority by one state within the jurisdiction of another state, but without its permission. If the state uses force against

³¹ “War Law” by Michael Byers pg. 85 (2005)

³² “Humanitarian Intervention” by Nardin and Williams pg. 1 (2006)

another state, it is called an armed intervention. An armed intervention is humanitarian when it aims to protect innocent people who are not nationals of the intervening state from violence perpetrated or permitted by the government of the target state. In other words, a humanitarian intervention³³ is 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.

There are two types of humanitarian interventions³⁴: unilateral humanitarian intervention and multilateral humanitarian intervention. Unilateral humanitarian intervention is when the intervention is not authorized by the Security Council, and multilateral humanitarian intervention is when the intervention is authorized by the Security Council. In modern times there have been no multilateral interventions, only unilateral interventions such as the Kosovo War in 1999.

Legal scholars have disagreed about the term humanitarian intervention since its origin³⁵. Some people regard humanitarian intervention as an oxymoron. How can military intervention ever be humanitarian? Others are so suspicious of the intentions of powerful governments that they reach the same conclusion: that humanitarian intervention should be outlawed. Then you have those who advocate that it is an ethical responsibility to protect individuals from massive human rights breaches, and humanitarian intervention is therefore the only measure possible to end it. To this day, the right of humanitarian intervention is highly controversial.

³³ “Humanitarian Intervention” by Holzgrefe and Keohane pg. 18 (2003)

³⁴ “War Law” by Michael Byers pg. 9 (2005)

³⁵ “Humanitarian Intervention” Holzgrefe and Keohane pg. 1 (2003)

3.4 THE WAY FORWARD

The next chapter is divided into five different parts. I will start by introducing the doctrine R2P as it is set out in the report “Responsibility to Protect” by the ICISS. There are two reasons why I want to start to write about this report. The first reason is that this report launched a new idea, an idea that a state has the primary responsibility to protect its citizens from massive human rights violations, and if that state is unwilling or unable to stop it, the international community can, as a last resort, intervene in that state with armed forces. The other reason is that the main principles of this report were acknowledged by the United Nations in the 2005 World Summit Outcome Document and by the Security Council in recent resolutions regarding the conflict in Sudan. In part 4.3, I will examine the pillar of R2R and the principles contained therein. I will also analyze the different criteria in order for an armed intervention to be legal.

In part 4.3, I will determine if the pillar of R2R has become customary international law. I want to find out if R2R has become a doctrine which legalizes the use of unilateral intervention for human protection purposes. I will mainly take into consideration state practice and *opinio juris* of governments, but I will also write about what legal scholars have uttered about this topic. In part 4.4, I will discuss if the UN Charter Article 2(4) prohibition on the use of force has become desuetude. This is due to the many breaches of this prohibition. My task is to find out if the prohibition on the use of force is absolute or if there is a tendency of a more moderate prohibition on the use of force.

In part 4.5, I will also discuss if it is possible to reinterpret the UN Charter Article 2(4) and if it is possible to invoke moral norms when considering intervening in a country for human protection purposes. At last, in part 4.6, I will discuss the role of the Security Council. I will focus on the composition of the Security Council, the veto right enjoyed by the five permanent member states and the Security Council’s responsibility to react to grave human crisis.

4 THE RESPONSIBILITY TO PROTECT AND THE PILLAR OF THE RESPONSIBILITY TO REACT

4.1 INTRODUCTION

This chapter is divided into five different parts. First, I will introduce the doctrine of R2P and discuss the development of R2P. Second, I will introduce the pillar of R2R and analyze when it is appropriate to use force across borders. Third, I will discuss if the pillar of R2R has become customary international law. I need to examine if both conditions regarding state practice and opinio juris are fulfilled. Fourth, I will investigate if the prohibition on the use of force as it is put down in the UN Charter Article 2 (4) has become desuetude or if it is possible to reinterpret it. At last, I will discuss the role of the Security Council.

4.2 THE RESPONSIBILITY TO PROTECT

4.2.1 How R2P got started

The doctrine of R2P developed after the Kosovo war in 1999. After a decade with massive human rights violations on both sides, the North Atlantic Treaty Organization (NATO) intervened. This intervention was considered to be a unilateral humanitarian intervention, and since the intervention did not have the authorization of the Security Council it was considered to be unlawful. Since the international community witnessed so many devastating wars after the formation of the United Nations, and since it seemed difficult for the Security Council to authorize interventions based on humanitarian grounds,

the international community wanted to investigate what they could do about this matter to prevent future human suffering.

It was in response to this challenge that the Canadian government, together with a group of major foundations, announced at the United Nations General Assembly in September 2000 the establishment of the ICISS. The Commission was asked to deal with the whole range of questions regarding humanitarian intervention – legal, moral, operational and political – and to bring back a report that would help the Secretary-General and everyone else find some new common ground. The resulting report “Responsibility to Protect” concluded that³⁶:

“...state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect...”

This statement is the core of the doctrine of R2P. The ICISS claims that human rights have achieved such high status in international law that the human rights charters will prevail over state sovereignty in case of conflict. The report furthermore states that:

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

³⁶ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty (2001)

of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.”

According to the report, military intervention from external actors may therefore be legitimate, as a last resort, even though the Security Council has not authorized the intervention. The interventions the report is mentioning, is the unilateral interventions for humanitarian purposes. The doctrine of R2P³⁷ embraces three specific responsibilities:

“...First the responsibility to prevent: to address both the root causes and direct causes of internal conflicts and other man-made crises putting populations at risk. Second, the responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention. Third, the responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert...”

4.2.2 How R2P got acknowledged as an international doctrine

The report met massive criticism from actors in the international community, but three years later, in 2004, the UN Secretary-General’s High Level Panel on Threats, Challenges and Change confirmed this report in their document “A More Secure World: Our Shared Responsibility”. This document stated that³⁸:

³⁷ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty (2001)

³⁸ “A More Secure World: Our Shared Responsibility” by the Secretary-General’s High-Level Panel on Threats, Challenges and Change (2004)

“...The concept of state sovereignty clearly carries with it the obligation of a state to protect the welfare of its own peoples and meet its obligations to the wider international community...and that, in circumstances where the state is not able or willing to fulfill this responsibility, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community...”

In 2005, member states unanimously embraced the responsibility to protect populations in the 2005 World Summit Outcome Document at the United Nations General Assembly. This document³⁹ concluded that:

“...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...”

The document also mentions that if all peaceful means have been exhausted, the Security Council will resort to the use of force:

“...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 are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity...”

The Security Council has also acknowledged R2P in recent resolutions regarding the genocide in Sudan. On April 28th 2006, the Security Council passed Resolution 1674⁴⁰ and invoked the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome

³⁹ “2005 World Summit Outcome Document” by the United Nations pg. 31

⁴⁰ United Nations Security Council Resolution 1674 of April 28th 2006

Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. On April 30th 2007, the Security Council passed Resolution 1755⁴¹, and the resolution reaffirms the 2005 World Summit Outcome Document and Resolution 1674.

The Security Council acknowledged on December 11th 2007 the creation of the position of Special Advisor on the Responsibility to Protect⁴². This position is part-time and at the level of Assistant Secretary General. On February 21st 2008 the Spokesperson for Secretary General announced that Edward Luck was appointed as Special Adviser, with a focus on the Responsibility to Protect, as set out by the General Assembly in paragraphs 138 and 139 of the Outcome Document. Mr. Luck's primary role will be to develop conceptual clarity and consensus for the evolving norm.

On February 14th 2008, a Global Centre for Responsibility to Protect⁴³ was established at the Ralph Bunche Institute for International Studies of the City University of New York's Graduate Center. Its mission is to promote and catalyze international action to help countries to prevent or halt mass atrocities.

Javier Solana, the EU High Representative for the Common Foreign and Security Policy (CFSP), welcomed the launch in New York of the Global Centre for the Responsibility to Protect. He stated that the European Union welcomes the launch of the Global Centre for the Responsibility to Protect. The Centre will help to ensure that the concept of the Responsibility to Protect, which was adopted at the 2005 World Summit, is further developed and applied by the international community. This means that all the countries within the EU have all agreed upon the term responsibility to protect. The European Union is composed of 27 independent sovereign countries which are known as member states: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania,

⁴¹ United Nations Security Council Resolution 1755 of April 30th 2007

⁴² <http://www.responsibilitytoprotect.org>

⁴³ <http://www.globalcentrer2p.org>

Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

4.3 THE RESPONSIBILITY TO REACT

4.3.1 Introduction

The doctrine of R2P consists of three different pillars: The responsibility to prevent, the responsibility to react and the responsibility to rebuild. My thesis will focus on the pillar regarding the responsibility to react. In this part I will introduce the content of this pillar and the criteria that need to be fulfilled before an armed intervention for human protection purposes can take place.

According to the report “Responsibility to Protect” by the ICISS there is an international responsibility to protect populations at risk, and the ICISS⁴⁴ has argued that it extends to a responsibility to react by appropriate means if a catastrophe is occurring, or seems imminent. In extreme cases, that responsibility to react includes military intervention within a state, to carry out that human protection. The threshold for intervening is tough, and several precautionary criteria must be satisfied before intervening for human protection purposes. The criteria have to be tough, because the action proposed is itself extreme: military intervention means not only an intrusion into a sovereign state, but an intrusion involving the use of deadly force, on a potentially massive scale.

The report states that⁴⁵:

⁴⁴ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 47 (2001)

⁴⁵ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 31 (2001)

“...In extreme and exceptional cases, the responsibility to react may involve the need to resort to military action...”

But what is an extreme case? Where should we draw the line in determining when military intervention is defensible?

The report concludes that⁴⁶ there are six criteria that must be fulfilled before an armed intervention for human protection purposes can take place. These criteria are: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. I will only give a brief introduction about these criteria. To get a more thoroughly analysis on this subject, I refer to the report “Responsibility to Protect” by the ICISS.

4.3.2 Right authority

The report states very clearly⁴⁷ that the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes. But what happens if the Security Council fails to act towards a humanitarian crisis? The report mentions two alternatives if the Security Council fails to act. One possible alternative would be to seek support for military action from the General Assembly meeting in an Emergency Special Session under the established “Uniting for Peace” procedures. The other alternative is that a regional or sub-regional organization acting within its defining boundaries collective group of countries can take action, such as NATO.

⁴⁶ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 32 (2001)

⁴⁷ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 52-54 (2001)

4.3.3 Just cause

In the ICISS's view⁴⁸, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert: large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape. If either or both of these conditions are satisfied, it is the ICISS's view that the "just cause" component of the decision to intervene is amply satisfied.

4.3.4 Right intention

The primary purpose of the intervention⁴⁹ must be to halt or avert human suffering. Any use of military force that aims from the outset, for example, for the alteration of borders or the advancement of a particular combatant group's claim to self-determination, cannot be justified. Overthrow of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection – and what is necessary to achieve that disabling will vary from case to case. Occupation of territory may not be able to be avoided, but it should not be an objective as such, and there should be a clear commitment from the outset to returning the territory to its sovereign owner at the conclusion of hostilities or, if that is not possible, administering it on an interim basis under UN auspices.

⁴⁸ "The Responsibility to Protect" by the International Commission on Intervention and State Sovereignty pg. 32 (2001)

⁴⁹ "The Responsibility to Protect" by the International Commission on Intervention and State Sovereignty pg. 35 (2001)

4.3.5 Last resort

Every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored⁵⁰. The responsibility to react, with military coercion, can only be justified when the responsibility to prevent has been fully discharged. This does not necessarily mean that every such option must literally have been tried and failed: often there will simply not be the time for that process to work itself out. But it does mean that there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded.

4.3.6 Proportional means

The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question⁵¹. The means have to be commensurate with the ends, and in line with the magnitude of the original provocation. The effect on the political system of the country targeted should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention. While it may be a matter for argument in each case what are the precise practical implications of these strictures, the principles involved are clear enough.

4.3.7 Reasonable prospects

Military action can only be justified if it stands a reasonable chance of success⁵², that is, halting or averting the atrocities or suffering that triggered the intervention in the

⁵⁰ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 36 (2001)

⁵¹ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 37 (2001)

⁵² “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 37 (2001)

first place. Military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all. In particular, a military action for limited human protection purposes cannot be justified if in the process it triggers a larger conflict. It will be the case that some human beings simply cannot be rescued except at unacceptable cost – perhaps of a larger regional conflagration, involving major military powers. In such cases, however painful the reality, coercive military action is no longer justified.

After a closer look at the doctrine of R2P and the pillar of R2R, one problem seems to arise: First, the report “Responsibility to Protect” by the ICISS concludes that in extreme circumstances, and if the Security Council is unable to issue an authorization for an armed intervention, a collective armed intervention may take place to end the human suffering. The 2005 World Summit Outcome Document, however, concludes that an armed intervention can only take place after getting an authorization of the Security Council. I will therefore discuss the importance of the report by ICISS and find out if the pillar of R2R has become a legal exception from the prohibition on the use of force put down in the UN Charter Article 2 (4).

4.4 HAS THE PILLAR OF “RESPONSIBILITY TO REACT” BECOME CUSTOMARY INTERNATIONAL LAW?

4.4.1 Introduction

Having determined that the UN Charter Article 2(4) clearly prohibits the use of force in any matter, one may ask whether a right to intervene on humanitarian grounds to

protect people from massive human rights violations such as genocide, ethnic cleansing, and crimes against humanity, has developed in customary international law.

In this part I will try to find out if the right of unilateral intervention for R2P purposes is a legal exception to the prohibition on the use of force. In order to find out if R2R has become a legal exception to the prohibition on the use of force, I need to investigate if R2R has become customary international law. In order to find out if R2R has become customary international law, I need to examine if R2R fulfills the conditions for customary international law put down in the ICJ Statute Article 38 (1) (b). I will look at what governments have done to fulfill the conditions for *state practice* and *opinio juris*. If R2R fulfills these conditions, it has become customary in international law and therefore a legitimate and lawful exception from the prohibition on the use of force.

4.4.2 Has the pillar of “responsibility to react” become “general state practice accepted as law”?

In this part I will determine if R2R fulfills the conditions to become customary international law. But how will I determine whether or not governments agree upon the pillar of R2R? Do I need to find explicit evidence of either verbal or physical acts that states around the world practice the pillar of R2R and feel legally obligated to do so? I will discuss how many governments that have stated that they agree upon the pillar of R2R. Since there is a requirement of a widespread practice, it is a condition that many states have acknowledged R2R. Those states must also feel obligated to follow R2R. If R2R manage to fulfill these requirements, it will be considered customary international law.

4.4.3 State practice

During NATO's bombing of Yugoslavia in 1999, Belgium stated that the bombing was a case of humanitarian intervention⁵³ and they supported the intervention even though it did not have the authorization of the Security Council. Belgium did therefore acknowledge a right of unilateral interventions for humanitarian purposes.

In the aftermath of the 1999 Kosovo War, U.S. administration officials articulated a Clinton doctrine⁵⁴ that proclaims that the United States will forcefully intervene to prevent human rights abuses when it can do so without suffering substantial casualties. This doctrine rhetorically suggests a new, assertive U.S. approach to promoting and defending human rights abroad. The United States have since then intervened with armed forces in both Afghanistan (2001) and Iraq (2003), without the explicit authorization by the Security Council. The United States claimed that the interventions in Afghanistan and Iraq were legal due to self-defense and the humanitarian crisis in these countries. The United States clearly acknowledge a right of unilateral interventions for humanitarian purposes.

The United Kingdom is also one of the strongest advocates for a right to unilateral interventions for humanitarian purposes. They were the first country to acknowledge the 2003 Iraqi intervention, and former Prime Minister Tony Blair said that⁵⁵:

“... We surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's...”

In order for R2R to fulfill the condition regarding *state practice*, more than three governments need to acknowledge a right to unilateral intervention for humanitarian purposes. It is, however, very difficult to find governments that acknowledge such a right. The above mentioned countries represent rather the minority than the majority. It is clear

⁵³ “Customary international law on the use of force” by Cannizzaro and Palchetti pg. 15 (2005)

⁵⁴ “Humanitarian military intervention” by Jules Lobel and Michael Ratner in *Foreign Policy*, Number 5, Volume 1, January 2000

⁵⁵ “War Law” by Michael Byers pg. 107 (2005)

that the first condition regarding *state practice* in the ICJ Statute Article 38 (1) (b) is not fulfilled.

There is one question, however, that I would like to address, and that is the importance of recent Security Council resolutions. The Security Council has recently endorsed the doctrine of R2P and the pillar of R2R in resolutions regarding the conflict in Sudan. Resolution 1755⁵⁶ reaffirmed the 2005 World Summit Outcome Document regarding R2P. The resolution concluded that states have a responsibility to protect its own citizens from mass atrocities, and if the states in question do not comply, the United Nations will take sufficient action. Since heads of governments are present during the voting of these resolutions, one can claim that this is an act of state practice. Even though these resolutions claim that only multilateral interventions for humanitarian purposes are legal, it shows that there is a development regarding interventions for human protection purposes.

Regarding the conflict in Sudan, the Security Council has reached far as R2R is concerned. In 2004, the Security Council endorsed an African Union peacekeeping force, consisting of 150 troops, to protect Darfur civilians. By mid-2005 its number were increased to 7.000 troops. Since the conflict continued to escalate, the Security Council decided that the African Union troops were to be reinforced by a UN-led peacekeeping force, consisting of 17.300 troops⁵⁷. However, the Sudanese President denied the force to be established, so the peacekeeping force did not arrive. In mid-July 2007 a unanimous Security Council⁵⁸ authorized a deployment of a joint United Nations and African Union force, consisting of 26.000 troops. The members of the Security Council were at that time⁵⁹ the following countries: Belgium, China, Congo, France, Ghana, Indonesia, Italy, Panama, Peru, Qatar, Russian Federation, Slovakia, South Africa, the UK and the USA. This act shows that there is a new awareness regarding humanitarian crisis.

⁵⁶ The United Nations Security Council Resolution 1755 of April 30th 2007

⁵⁷ The United Nations Security Council Resolution 1706 of August 31st 2006

⁵⁸ The United Nations Security Council Resolution 1769 on July 31st 2007

⁵⁹ <http://daccessdds.un.org/doc/UNDOC/PRO/N07/444/45/PDF/N0744445.pdf?OpenElement>

4.4.4 **Opinio juris**

There have been many wars and conflicts in the world since the formation of the United Nations, but there have been very few multilateral interventions for humanitarian purposes that have been authorized by the Security Council. It is therefore even more difficult to find examples of *opinio juris* regarding R2R, since R2R is a fairly new term; developed in 2001. Since my task in this thesis is to find out if the condition regarding *opinio juris* is fulfilled, I need to find examples of governments acting out of a legal obligation regarding R2R. In other words, are there many governments that feel legally obligated to follow the pillar of R2R?

The answer to this question is not complicated. It is clear that such a legal obligation does not exist. Scholars have tried for years to make the doctrine of humanitarian intervention a legal exception from the prohibition on the use of force, but they have been unsuccessful. The same applies to the doctrine of R2P. There have been no multilateral interventions for R2P purposes since the doctrine itself got introduced in 2001.

The pillar of R2R has not reached the status of customary international law, but I want to discuss this problem a little further. As mentioned, there is a new awareness around human rights, and I will therefore find out if this awareness is also among legal scholars.

4.4.5 **Legal scholars that acknowledge the right of unilateral intervention for human protection purposes**

According to Alicia L. Bannon in the article “The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism”⁶⁰ she argues that the 2005 World Summit Outcome Document strengthens the legal justification for limited forms of

⁶⁰ “The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism” by Alicia L. Bannon in Yale Law Journal, Number 5, Volume 115, March 2006

unilateral and regional action, including military action, if the United Nations fails to act to protect populations from genocide and other atrocities. The document strengthens the justification for unilateral action in two main ways. First, the document affirms important limits on national sovereignty by recognizing a state's responsibility to protect its own citizens. Second, the document sets clear responsibilities for the international community when a country fails to protect its own citizens. In cases of UN inaction, would-be unilateral actors can point to an explicit failure to fulfill a duty. However, the document only supports unilateral action in a narrow set of circumstances. First, the document is limited to a small set of extreme human rights abuses. Second, the document implies a hierarchy of actors and of interventions: Good faith UN action is privileged over unilateralism and peaceful action is privileged over violent means. Finally, the document limits the scope of intervention to the goal of protection.

Other scholars just conclude that when it comes to Sudan, enough is enough. According to Susan E. Rice, Anthony Lake and Donald M. Payne, the time of negotiation, sanctions and boycotts are over. They stated that⁶¹:

“After swift diplomatic consultations, the United States should press for a UN resolution that issues Sudan an ultimatum: accept unconditional deployment of the UN force within one week or face military consequences. The resolution would authorize enforcement by UN member states, collectively or individually. International military pressure would continue until Sudan relented...If the United States fails to gain UN support, we should act without it. Impossible? No, the United States acted without UN blessing in 1999 in Kosovo to confront a lesser humanitarian crisis (perhaps 10,000 killed) and a more formidable adversary. Under NATO auspices, it bombed Serbian targets until Slobodan Milosevic acquiesced. Not a single American died in combat. Many nations protested that the United States violated international law, but the United Nations subsequently deployed a mission to administer Kosovo and effectively blessed NATO military action retroactively...”

⁶¹ “We saved Europeans. Why not Africans?” by Susan E. Rice, Anthony Lake and Donald M. Payne in Washington Post, Monday, October 2, 2006, Page A19

They also confirmed the responsibility to protect.

“...Others will insist that, without the consent of the United Nations or a relevant regional body, we would be breaking international law. Perhaps, but the Security Council recently codified a new international norm prescribing “the responsibility to protect”. It commits U.N. members to decisive action, including enforcement, when peaceful measures fail to halt genocide or crimes against humanity...”

Gareth Evans, the co-writer of the report “Responsibility to Protect” and the President of the International Crisis Group, gave the following statement on a Seminar on International Use of Force⁶²:

“...The problem of what exactly is to be done in a situation in which the criteria of legitimacy seem manifestly to be satisfied, yet the cloak of formal legality is not available because, for whatever reason, the Security Council, fails or refuses to authorize the relevant military action: in other words, what most people would now accept was the situation with Kosovo in 1999. As the ICISS commission expressed it, in these cases a very real dilemma arises as to which of two evils is the worse: the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by. Its own response to this dilemma was not to try and establish some alternative basis for the legality of interventions, but to opt instead for a very clear political message: if an individual state or ad hoc coalition steps in, fully observes and respects all the necessary criteria of legitimacy, intervenes successfully, and is seen to have done so by world public opinion, then this is likely to have enduringly serious consequences for the stature and credibility of the UN itself. That is essentially what happened with the U.S. and NATO intervention in Kosovo, and the UN cannot afford to drop the ball too many times on that scale...”

⁶² “The responsibility to protect and the use of force” by Gareth Evans on the Seminar on International Use of Force, World Legal Forum, The Hague, 11 December 2007 pg. 6-7

4.4.6 Part – conclusion

Since the pillar of responsibility to react has not fulfilled the conditions regarding state practice and opinio juris, the pillar has not gained the status of customary international law.

4.5 CRITICISM OF THE UN CHARTER ARTICLE 2(4)

4.5.1 Introduction

In this part I will investigate if the prohibition on the use of force is considered absolute. There are two different angles; the first claims that the prohibition on the use of force has become desuetude. The other angle claims that the prohibition needs to be reinterpreted. The reason why I think this is relevant is due to the fact that if this is true, R2P will become a legitimate exception from the prohibition on the use of force. In this part I will address if the UN Charter Article 2(4) has become desuetude.

4.5.2 Has the UN Charter Article 2(4) become desuetude?

Since the late 1960s or early 1970s, two kinds of challenges⁶³ have been launched against the prohibition on the use of force put down in the UN Charter Article 2(4). In the

⁶³ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 23 (2005)

first category we find arguments that the UN Charter provisions are too restrictive in that national leaders are not allowed to use military force when they personally perceive pressing moral or normative issues to which they wish to respond. The second category consists of arguments that the provisions of the UN Charter no longer bind because of the huge number of rule violations.

Treaties⁶⁴ consist of binding obligations to which parties have expressly consented. *Opinio juris* is thus not constitutive of treaties as it is of customary international law. Yet, the legal opinion of states and international organizations about a treaty is important to a number of other treaty principles: the evolution of treaty provision to rules of customary law and *jus cogens*, the elimination of a treaty provision through desuetude, the preemption of a treaty provision by the creation of a new, contrary customary rule and the modification and interpretations of treaty provisions.

A number of prominent legal scholars are associated with the “rules are dead” argument. Thomas Franck may well have been the first to assert that owing to significant disregard of the UN Charter Article 2(4) it could no longer be considered a viable rule, binding on states⁶⁵. Jean Combacau expressed a similar view. A more recent exponent of this view is Michael Glennon who took up the assertion during the Kosovo conflict. At that time, he argued that NATO should have the right to authorize uses of force, comparable to the UN Security Council. When NATO did not support the US plan to use force against Iraq, however, Glennon argued that:

”...Since 1945, dozens of member states have engaged in well over 100 inter-state conflicts that have killed millions of people. This record of violation is legally significant. The international legal system is voluntary and states are bound only by rules to which they consent. A treaty can lose its binding effect if a sufficient number of parties engage in conduct that is at odds with the constraints of the treaty. The consent of United Nations member states to the general prohibition against the use of force, as expressed in the UN

⁶⁴ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 20 (2005)

⁶⁵ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 23 (2005)

Charter, has in this way been supplanted by changed intent as expressed deeds. It seems the UN Charter has, tragically, gone the way of the 1928 Kellogg-Briand Pact which purported to outlaw war and was signed by every major belligerent in World War II...”

Glennon’s argument⁶⁶ (and that of others) does not seem to be that new rules of customary international law have emerged replacing the UN Charter, but rather that the UN Charter provisions have just evaporated through long failure to respect them. So this is not strictly an analysis of whether the rules on the use of force have the status of customary international law by reflecting general practice followed out by a sense of legal obligation. Rather, the analysis is whether the UN Charter has been so ignored on the use of force issues that its rules have passed into desuetude. Once the UN Charter rules on the use of force disappear through non-use, states will revert to the situation pre-Charter, to a time when under customary international law states were free to use force as an instrument of national policy.

The conditions of desuetude⁶⁷ have not been met, however, in the case of the UN Charter. Far from ignoring it, states regularly attempt to justify uses of force, even the states plainly in breach of the UN Charter, in terms of the UN Charter. All of this activity around the UN Charter is the opposite of ignoring it. We need hardly say more to defeat the desuetude argument, but it is worth adding that much of the attention states give the UN Charter provisions on the use of force is positive support. And that positive support is the key element to keeping treaty provisions viable. This is stated in the Nicaragua Case⁶⁸:

“If a state acts in a way *prima facie* incompatible with a recognized provision, but defends its conduct by appealing to exceptions or justifications contained within the provision itself, then whether or not the state’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the provision.”

⁶⁶ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 24 (2005)

⁶⁷ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 24 (2005)

⁶⁸ Nicaragua v. the United States of America, Judgment of June 27th 2008

4.5.3 De lege ferenda

The points made by these scholars do make sense. Even though all countries in the world have a membership in the United Nations, many of them still violate a lot of the provisions put down in the UN Charter. But even though member states do not respect some of the UN Charter provisions, does not mean that the whole Charter has become obsolete. One would never say that because some citizens commit homicide, they would not have a law against it, because some people violate it. This applies for international law as well.

4.6 REINTERPREATION OF THE UN CHARTER AND INVOKING MORAL NORMS

4.6.1 Introduction

In this part I will determine if it is possible to reinterpret the UN Charter Article 2(4).

4.6.2 Is it possible to reinterpret the UN Charter Article 2(4)?

A different category of criticism⁶⁹ focuses on a problem that challenges all law: the application of a general rule may result in a questionable outcome in a particular case judged by standards other than law compliance. A number of governments, as well as scholars, have argued for exceptions to the prohibition on the use of force to allow greater flexibility for particular desirable ends – such as promoting democracy, ending human

⁶⁹ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 25 (2005)

rights violations and pre-empting future attacks. The UN Charter clearly prohibits the use of force for these purposes without the Security Council authorization. The critics have used a variety of argument to justify such uses, such as re-interpreting that UN Charter to find a right to use force in the text, and invoking moral norms that should override the UN Charter, either by saying that breaching the legal norm in such cases is not really a breach or by saying that even though it is a breach, it should not be treated as other breaches.

The method of reinterpretation⁷⁰ has been invoked by those who want a right of humanitarian intervention. The scholars argue for reading the UN Charter in a certain way so as to find such a right among the human rights provisions. Fernando Teson was an early proponent of this approach. Interpreting the UN Charter through a classical approach, however, can not support a reading that finds a right of humanitarian intervention. The UN Charter Article 2(4) prohibits the use of force. The drafting history makes clear that Article 2(4) was to be read as a broad provision – prohibiting all uses of force, hence the “or in any manner”. This phrase was designed to insure there were no loopholes in the prohibition on the use of force. The plain words of the UN Charter prohibit humanitarian intervention, certainly without Security Council authorization. Nor is there evidence that states have successfully reinterpreted the ordinary meaning of the UN Charter. The evidence from state practice and *opinio juris* supports the ordinary meaning of the UN Charter’s terms as the understanding that has prevailed regarding humanitarian intervention. Although humanitarian is not justified or accepted as a right to use armed forces, it seems that in some cases it is tolerated by the international community. In the cases of Tanzania and India, the international community reacted consistently with the norm of non-intervention, but imposed no countermeasures, which suggests one way of understanding humanitarian intervention is not so much a right, but as illegal conduct which is tolerated by the international community in extreme circumstances.

⁷⁰ “Customary international law and the use of force” by Cannizzaro and Palchetti pg. 26-27 (2005)

4.6.3 De lege ferenda

When the international community witness atrocities committed against an innocent population, it is easy to understand those states that want to end it. The problem, however, is that such an act undermines the UN Charter. If a national leader decides to use force without regard for the UN Charter, on the basis of personal moral, it takes the decision away from the international community that has created the rules and the institutions to act on its behalf. It ignores that these community-created rules have their own internal morality – they were created in the conviction that preservation of peace is the most important factor in the protecting of human rights.

4.6.4 Part – conclusion

After closer analysis it is clear that the UN Charter has not become desuetude and it is clear that governments cannot interpret the UN Charter as they feel like. First, whenever a state has reached the decision to intervene in another state with armed forces, it always tries to get the blessing from the United Nations and especially the Security Council. A recent example of this is the 2003 Iraq War. The United States first wanted to get authorization by the Security Council, and when that failed they decided to intervene unilaterally. This shows that the UN Charter still dominates the international law on intervention. Secondly, the prohibition on the use of force is clear and unambiguous, and other treaties, judicial decisions and legal theory backs this up. States tries to reinterpret the UN Charter so it can fit to their cause, but in the end it will always be the traditional interpretation of the UN Charter that will prevail.

4.7 THE ROLE OF THE SECURITY COUNCIL

4.7.1 Introduction

The report “Responsibility to Protect” by the ICISS stated that⁷¹:

“...The authority of the United Nations is underpinned not by coercive power, but by its role as the applicator of legitimacy. The concept of legitimacy acts as the connecting link between the exercise of authority and the recourse to power. Attempts to enforce authority can only be made by the legitimate agents of that authority. Collective intervention blessed by the United Nations is regarded as legitimate because it is duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested. Those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms...”

It is evident, that an armed intervention which has the purpose to protect the people in another country from massive human rights violations such as genocide, ethnic cleansing and crimes against humanity, must have the authorization by the Security Council in order to be legal. This is spelt out in the report “Responsibility to Protect” by ICISS⁷²:

”...The Commission is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purpose. It is the Security Council which should be making the hard

⁷¹ “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 48 (2001)

⁷² “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty pg. 49 (2001)

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. That was the overwhelming consensus we found in all our consultations around the world. If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that the central role of the Security Council will have to be at the heart of that consensus...”

I have, however, tried to find exceptions to this rule, mainly due to the Security Council’s passive role regarding humanitarian crisis. I therefore think it is important to look at the role of the Security Council and find out if the doctrine of R2P and the pillar of R2R have changed the way the Security Council view the use of force, and if the Security Council as a result will take the appropriate responsibility – to protect people from massive human rights violations when that occur. Since the Security Council is the body that can decide upon interventions, that body has a responsibility to react if grave human crisis occur in the international community.

There are a number of questions that can reasonably be asked about the Security Council’s authority and credibility. The problems I am going to address in this part of the thesis are: the Security Council’s unrepresentative membership, the veto right of the five permanent member states and its unwillingness to authorize intervention for humanitarian purposes. There are many reasons for being dissatisfied with the role that the Security Council has played so far.

4.7.2 The unrepresentative membership of the Security Council

The first problem I am going to address is the unrepresentative membership in the Security Council. The Security Council consists of fifteen member states, five permanent member states which are the United States, the United Kingdom, France, Russia and China,

and ten rotating member states. This composition can hardly be claimed as being representative of the realities of the modern era because it excludes permanent membership to countries of major size and influence, in particular countries from Africa, Asia and Latin America.

There is no doubt that reform of the Security Council, in particular to broaden and make more genuinely representative its composition, would help in building its credibility and authority. The United Nations has to evolve as the world has evolved, and since it has been over sixty years since the formation of this organization, I think it is time to change the composition of the Security Council. Countries such as Brazil, Germany, South-Africa, India and Japan could be candidates for permanent membership of the Security Council.

4.7.3 The veto right of the five permanent countries

An issue which I cannot avoid addressing is that of the veto power enjoyed by the five permanent member states. I believe that the use of the veto, or threat of its use, is the principal obstacle to effective international action in cases where quick and decisive action is needed to stop or avert a significant humanitarian crisis. It is alarming that one veto can override the rest of humanity on matters of grave humanitarian concern.

A recent example of this regards to the conflict in Sudan. It was impossible for the Security Council to decide upon the matter due to China's veto. As we all know, China has interests in Sudan and if they agreed upon an intervention in Sudan, China would lose its biggest import of oil. This is a good example to show how biased the veto right is. The five permanent member states will most likely act in their own interest and thus will grave human crisis not be addressed. The report "Responsibility to Protect" by the ICISS⁷³ suggested that:

⁷³ "The Responsibility to Protect" by the International Commission on Intervention and State Sovereignty pg. 51 (2001)

“...there be agreed by the Permanent Five a “code of conduct” for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution. The expression “constructive abstention” has been used in this context in the past. It is unrealistic to imagine any amendment of the Charter happening any time soon so far as the veto power and its distribution are concerned. But the adoption by the permanent members of a more formal, mutually agreed practice to govern these situations in the future would be a very healthy development...”

I agree upon such a conduct. Ideally no member states should have a veto right, but since that change is going to be very difficult to make, I think a code of conduct when it comes to atrocities is a good way to make a change.

4.7.4 The responsibility of the Security Council

While the Council has from time to time demonstrated a commitment and a capacity to fulfill this responsibility, too often it has fallen short of its responsibilities, or failed to live up to expectations. Sometimes this has been the result of a sheer lack of interest on the part of the five permanent members. Sometimes it has been because of anxiety about how a particular commitment would play in domestic politics. Often in the past, it has been the result of disagreements among the five permanent members on what if any action should be taken. Increasingly, it has resulted from a reluctance on the part of some key members to bear the burdens – especially the financial and personnel burdens – of international action.

It is especially important that every effort be made to encourage the Security Council to exercise – and not abdicate – its responsibility to protect. This means, as the UN Charter Article 24 requires, prompt and effective engagement by the Council when matters

of international peace and security are directly at issue. And it means clear and responsible leadership by the Council especially when significant loss of human life is occurring or is threatened, even though there may be no direct or imminent threat to international peace and security in the strict sense.

Hopefully the Security Council will change the way they work regarding humanitarian crisis otherwise other states make take coercive action to stop it. The Secretary-General's warned that:

“...If the collective conscience of humanity ... cannot find in the United Nations its greatest tribunal, there is a grave danger that it will look elsewhere for peace and for justice...”

If the Council, and the five permanent members in particular, fail to make the Council relevant to the critical issues of the day then they can only expect that the Council will diminish in significance, stature and authority.

5 CONCLUSION

I started off this thesis by asking if the doctrine of R2P and the pillar of R2R have led to a change in how the international community views the use of force against another country to protect its citizens from massive human rights violations such as genocide, ethnic cleansing and crimes against humanity. In that aspect I wanted to find the answer to four different sets of problems.

The first problem I examined was if the pillar of “responsibility to react” had become customary international law. After an analysis of state practice and *opinio juris* by some

governments, the conclusion was that neither of the conditions were fulfilled and thus the pillar of “responsibility to react” has not become customary international law.

The second problem I investigated was if the UN Charter Article 2 (4) had become desuetude. Even though there were some legal scholars that suggested that the UN Charter’s prohibition on the use of force had become desuetude, it did not change the fact that an overwhelming amount of governments together with the International Court of Justice claimed otherwise. The UN Charter Article 2 (4) has not become desuetude.

The third problem that I tried to find an answer to was if it was possible to reinterpret the UN Charter Article 2 (4). After studying the 1969 Vienna Convention on the Law of Treaties, it is clear that such a reinterpretation cannot take place. The treaty provision regarding the prohibition on the use of force is leaves no room for the right to unilateral intervention for human protection purposes.

The fourth problem was more a political issue than a legal issue. I wanted to find out if the pillar of “responsibility to react” had changed the way the Security Council view the prohibition on the use of force. Some decades ago there was no legal basis for an intervention for human protection purposes. It was considered unlawful, and the Security Council would not have authorized it. However, recently this has changed dramatically. The Security Council has, as a result of the report “Responsibility to Protect” changed in the matter of using force for human protection purposes. They have authorized the use of force to protect the civilians in Darfur, and they are also starting to discuss the situation in Burma, and what they can do to protect the civilians there.

After a thorough analysis of the pillar of responsibility to react and the legal material on this issue, the conclusion is that an armed intervention in another state to protect its people from massive human rights violations such as genocide, ethnic cleansing and crimes against humanity has to have the authorization of the Security Council. Right now there is no legal basis for a unilateral intervention for human protection purposes if the Security Council fails to act.

6 DE LEGE FERENDA

We live in a world where violence is a daily occurrence. There are conflicts and wars at any given time and the violence does not seem to end even though the world has become “smaller” and more “civilized”. Atrocities such as genocide, ethnic cleansing or crimes against humanity should not even happen in our time due to all our regulations, but unfortunately they do. There are several problems regarding the right to unilateral intervention to end human suffering.

I believe that an armed intervention authorized by the Security Council would be thoroughly investigated and less bias than a unilateral intervention. It is important that the international community follows international law. If, however, the international community witness atrocities such as genocide, ethnic cleansing and crimes against humanity on a gross scale, and the Security Council is unable to act due to different reasons, I believe that other states can intervene to end the suffering. The reason why I do not want an absolute prohibition on the use of force is due to experiences in the past. There have been some horrifying cases of genocide, Rwanda is probably the best example of such a genocide, where the Security Council obviously should have acted but did not act. In those situations, the international community should be able to act even though the Security Council has not authorized the intervention. With that said, I do not want an intervention for whatever humanitarian reason. This may come across as harsh; it is impossible to weigh human lives because every life is worth the same, but I believe that states can only intervene where the human rights breaches are grossest. This is due to the fact that an armed intervention will also take lives, and should therefore be used as a last resort when all other means have been tried.

Even though I agree upon the right of unilateral interventions for human protection purposes where the Security Council fails to act, there are several problems regarding such a right. The first problem is that there are so many conflicts and wars going on in the world

at any given time, that it would be impossible to address all of them. What should states do when they witness many cases of massive human rights breaches? Should they intervene in all conflicts or wars and thus be consistent, or should they be more selective and intervene where the human rights breaches are the grossest? If states were consistent regarding unilateral intervention for human rights purposes, I would be more inclined to agree upon such a principle. But, such consistency would, however, never be practiced in real life. On the contrary, it seems that some states intervene only for their own selfish reasons and not for the greater good of society. Some examples may be in order. Why has a unilateral intervention in Rwanda never taken place? I personally believe that it was due to the fact that Rwanda was of no significance to the powerful states, and such they did not want to spend money and risk soldier's lives to restore peace. The result is that 1.000.000 million individuals were killed. On the other hand, the ethnic cleansing that went on in Kosovo was obviously much more important to end, and not to downplay what happened there, but this conflict was not even close to what was going on in Rwanda. By this example it is clear that if unilateral intervention was allowed, states would most likely use it for their own good. If I was to agree upon the right of a unilateral intervention without the authority of the Security Council, I need to know that all human rights breaches would be stopped, not just a few selected ones.

So, if the Security Council does not agree on a multilateral intervention due to veto or something else, should states just watch silently when people are being slaughtered? This clearly is against all human empathy. I do not believe that anyone wants to witness another World War II. I am, however, concerned that if the right of unilateral intervention to stop human suffering would be allowed, powerful states such as the United States and the United Kingdom would abuse this right and take the law into their own hands. Powerful states might conceal the real reason for intervention by hiding behind the right of unilateral intervention to stop human suffering. There are unfortunately many examples of this kind. One example is the Clinton-doctrine. Clinton stated that if the Security Council did not act when a country was facing massive human rights violations, other states have the right to intervene and stop the human suffering. After the 1999 Kosovo War he claimed that this

had been a true humanitarian intervention that went well. I can see his point. The NATO forces managed to stop the human suffering, and the former Yugoslavia is today a stable place consisting of different autonomous countries compared to what it was 10 years ago. I am however doubtful to the idea of a right of unilateral intervention without authorization from the Security Council. The reason behind my argument is that it seems that the interventions that countries tend to make, are not necessarily for the right reasons. There has been much bigger crisis than the 1999 Kosovo War. If the United States was so eager to stop human suffering why do they support regimes that clearly breach human rights? For me this shows that the interventions usually are made for selfish reasons not for the people in the country.

A third problem is the paradox, and the paradox is that to end human suffering more human suffering needs to take place. It is impossible for an intervening force to not kill civilians and it is impossible to know the aftermath of an intervention. It is not only human damage that takes place, but often total destruction of infrastructure, government institutions and private homes. With that said, in order for me to agree upon an armed intervention to stop human suffering, the conflict or war needs to be of such significance that the intervention would be less of a burden than the conflict itself. In other words, there has to be such gross human rights violations that an armed intervention would not change the outcome of the conflict. Such an example is the Rwandan genocide in 1994. In less than 4 months 1.000.000 tutsies and moderate hutus were slaughtered and the whole world watched the butchering taking place. If it was not for the tutsi rebel army's determination to end it, even more individuals would be slaughtered. We should have learned after World War II, that there are some conflicts that we are morally obliged to end. We do not want another World War.

Even though there are several problems regarding the right of unilateral intervention for human protection purposes I still stand by my decision to agree upon such a principle. There has to be some kind of security if the Security Council fails to address a gross

humanitarian crisis. That security should be a right to intervene unilaterally to protect people from genocide, ethnic cleansing and crimes against humanity.

7 REFERENCES

BOOKS:

“State Sovereignty as Social Construct” by Thomas J. Biersteker and Cynthia Weber (2006)

“Humanitarian Intervention” by Holzgrefe and Keohane (2003)

“War Law” by Michael Byers (2005)

“Humanitarian Intervention” by Nardin and Williams (2006)

“How International Law Works” by Andrew T. Guzman (2008)

“Practice and Methods of International Law” by Shabtai Rosenne (1984)

“Customary international law on the use of force” by Cannizzaro and Palchetti (2005)

“Law among nations”, 7th Edition by Gerhard Von Glahn (1996)

REPORTS:

“The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty (2001)

“A More Secure World: Our Shared Responsibility” by the UN Secretary General’s High Level Panel on Threats, Challenges and Change (2004)

2005 World Summit Outcome Document by the United Nations General Assembly

“The ethics of armed humanitarian intervention” by Tony Coady, United States Institute of Peace (2002)

“The responsibility to protect and the use of force” by Gareth Evans. Presentation on the Seminar on International Use of Force at World Legal Forum, The Hague, December 11th, 2007

ARTICLES:

“Two Concepts of Sovereignty” by Kofi Annan in the Economist, September 18th, 1999

“Preventing Future Genocides: An International Responsibility to Protect” by William R. Pace and Nicole Deller in World Order, Volume 36, Number 4, 2005

“Humanitarian military intervention” by Jules Lobel and Michael Ratner in Foreign Policy, Volume 1, Number 5, January 2000

“The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism” by Alicia L. Bannon in Yale Law Journal, Volume 115, Number 5, March 2006

“We saved Europeans. Why not Africans?” by Susan E. Rice, Anthony Lake and Donald M. Payne in Washington Post, October 2nd 2006

TREATIES:

1945 Charter of the United Nations

1969 Vienna Convention on the law of Treaties

1945 Statute of the International Court of Justice

JUDICIAL DECISIONS:

Nicaragua v. United States of America, Judgment of June 27th 1986 (the Nicaragua Case)

Federal Republic of Germany v. the Netherlands, Judgment of February 20th 1969 (the North Sea Continental Shelf Cases)

RESOLUTIONS:

The United Nations Security Council Resolution 1674 of April 28th 2006

The United Nations Security Council Resolution 1706 of August 31st 2006

The United Nations Security Council Resolution 1755 of April 30th 2007

The United Nations Security Council Resolution 1769 on July 31st 2007

INTERNET CITES:

<http://www.un.org>

<http://www.responsibilitytoprotect.org>

<http://www.globalcentrer2p.org>

<http://www.usip.org>

<http://www.wikipedia.org>

<http://www.lexisnexis.com>

