Responsibility to Protect by Military Means
– Emerging Norms on Humanitarian Intervention?

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Department of Law
Stockholm University
2008
To Juana Paez Amnéus and Wilhelm Amnéus
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Print: US-AB Universitetsservice, Stockholm
Acknowledgements

My deepest thanks and gratitude are extended to my supervisors, Professor Ove Bring and Associate Professor Kjell Engelbrekt, Stockholm University and the Swedish National Defence College, which has unstintingly supported me and this project and provided guidance on the theoretical challenges and skilled commentary on the material, in particular during the final stages. To them my obligation is unique.

I would also like to express special thanks to my former teacher in law and intellectual inspirer Pål Wrange, LL.D., Principal Legal Adviser on Public International Law at the Ministry for Foreign Affairs, for his invaluable contributions, and to co-examiner Professor Jutta Brunnée, Toronto University, whose comments on this thesis have been of immeasurable value. I am also indebted and thankful for the professional workmanship of editor Brian Moore on the English language.

My close colleagues in public international law at the Department of Law at Stockholm University have offered inestimable support and generous friendship during my doctoral studies. To them I extend my heartfelt appreciation. Special recognition is due to Fredrik Stenhammar, LL.D., David Langlet, LL.D., and doctoral candidates Mark Klamberg and Linnea Kortfält, who listened with patience to my countless questions, commented on earlier drafts, and engaged in lively discussions. Particular thanks furthermore go to those colleagues who also have been involved in commenting on earlier drafts of the manuscript, including Professor David Fisher, doctoral candidate Katinka Svanberg-Torpman, Lecturer Pernilla Nilsson, Mauro Zamboni, LL.D., Maria Bergström, LL.D., and doctoral candidate Annelie Gunnerstad. I am exceptionally grateful to all of those not from Juridicum who provided valuable comments and insights on the drafts at my final seminar: Professor Inger Österdal, Ola Engdahl, LL.D., Erik Wennerström, LL.D., Legal Adviser Magnus Sandbu, The Defence, Associate Professor Lisbeth Segerlund and Theresa Höghammar, the UN Association of Sweden. You have been fertile in suggestion, constructive in criticism and vigilant in the detection of errors. I also extend my appreciation to Professor Said Mahmoudi, Professor Jonas Ebbesson and all my friends at the Department of Law, in particular the doctoral candidates.
While engaged in the arduous task of writing this thesis I had the privilege coming into contact with several outstanding Swedish professionals in the field on various relevant topics. Not only were they of immense value, but also a source of joy. Many thanks and much appreciation are extended to Ambassador Hans Corell, Ambassador Lena Sundh, Jan Eliasson, former Minister for Foreign Affairs, Monica Andersson, member of the UN Advisory Committee on Genocide Prevention, Associate Professor Anders Mellbourn, Aleksander Gabelic, Bonian Golmohammadi and Jens Pettersson, UN Association of Sweden, for valuable inspiration and discussions on R2P, humanitarian intervention, the prevention of genocide, international relations and international law. Other Swedish lawyers in public international law who have provided me with material or engaged in supportive discussions on relevant topics helpful to this work are Per Sevastik, LL.D., Professor Per Cramér, Associate Professor Marie Jacobsson, Principal Legal Adviser on International Law at the Ministry for Foreign Affairs, Gustaf Lind, LL.D. and State Secretary for Foreign and EU Affairs, and Cecilia Hellman, Ministry of Defence. I am also indebted to my colleagues from the Human Rights Program at the Stockholm School of Theology, Associate Professors Göran Gunner, Kjell-Åke Nordquist, and Elena Namli.

I had the privileged opportunity of being a guest researcher for six months at the University of British Columbia, Canada, in 2005, and I accordingly proffer my sincere thanks to the Liu Institute for Global Issues for receiving me and providing me with a working space. The guidance in knowledge shared, opportunities to network and friendship offered during my visit there, were invaluable for my continued research. I wish to convey my sincere gratitude to Professor Paul Evans, Professor Brian Job, Professor Richard Price, Wade Huntley, Director of the Simons Centre for Disarmament and Non-Proliferation, Andrew Mack, Director of the Human Security Report Project, Zoe Nielsen, Deputy Director the Human Security Report Project, Assistant Professor Shaun Narine, Dr. Kai Kenkel, Dr. Karthika Sasikumar and Elaine Hynes. Other scholars with whom I had the opportunity of discussing my thesis and related issues while in Canada were Professor Sandra Whitworth, Professor David Sugarman, Professor Peter Penz, Dr. Christie Ryerson, and doctoral candidates Mark Busser, Colleen Bell, and Wai Zubairu at York University, as well as Professor Marie-Joëlle Zahar from the University of Montreal. My wholehearted thanks go out to you all.

Another, but shorter, research trip to the United Kingdom in 2007 was enormously helpful to the construction of this thesis. I wish to extend my deep appreciation and gratitude to those gracious and courteous people who took the time to meet me to discuss the R2P and specific sections of my dissertation. They were Professor Maurice Mendelson, Professor Christine Chinkin, Professor Christopher Greenwood, Professor Nicholas Wheeler, Professor Andrew Linklater, Professor Ken Booth, Professor Ian Clark, Dr. William Bain, Susan Breau, LL.D., Alexander Ramsbotham, IPPR, and doctoral candidate Linnea Bergholm.

I extend my deep gratitude to those who financed my research visit to Canada: The Swedish Foundation for International Cooperation in Research and Higher Education (STINT), and Forskraftsstiftelsen Theodor Adelsvärd’s Minne. I am also indebted to the foundations that supported me in the final stages of my work and made it possible for me to ‘wrap up’ and conclude my study: Emil Heijnes Stiftelse
for rättsvetenskaplig forskning and Alfred Ossian Winroths minnesfond. Many thanks are also due to Knut och Alice Wallenbergs Stiftelse for covering the travel expenses for my research trips to London and Aberystwyth. I am grateful to Professor Emeritus Gustaf Lindencrona, Stiftelsen av den 28 November 1982, and others involved in arranging the doctoral visit to Harvard Law School in 2007, and Dr. Vincenzo Bollettino from the HPCR at Harvard University, who kindly agreed to an interesting meeting in Boston to discuss the operationalisation of R2P.

Much appreciation is owed to the knowledgeable library staff at Stockholm University Library for their great patience and dedication to efficient service. I wish to mention in particular Ingrid Kabir and Gunilla Appelgren, who have been particularly friendly and helpful to me. Similar appreciation is due to Sinikka Sandén, our post manager and caretaker at the Department of Law, for showing unhesitating help and support in times of stress. Without the reference program Endnote research life would have been much harder than it already was. I therefore extend sincerest thanks to consultant Bengt Edhlund, and my colleagues Jane Reichel, LL.D., and doctoral candidate Helena Andersson, who collaborated in the adaption of this program to Juridicum. I also wish to extend considerable thanks to Nina Ewalds, LL.D., doctoral candidate Fredric Korling, and our technical support team Ulf Färjare, Dan Olsson and Bengt Beckmark, who were of great assistance in the application of the program and in problem-solving. The team members who helped me in editing the footnotes, the bibliography and proof-reading the manuscript, saved me valuable time in the final stages. Countless thanks to Caroline Säfström, Sara Lindström, Christina Weilander, Heléne Hedberg, and my good friend Sabina Bossi.

My friends and co-founders of the Empowerment Network at Stockholm University (ENSU), Dr. Ulrika Flock, Dr. Pernilla Rosell Steuer, and doctoral candidates Ditte Eile and Gunnel Testad, will always occupy a particular place in my heart. It was a wonderful journey to develop the ‘Validation Techniques and Counter Strategies’ in company with all of you. This experience will continue to give me support and strength in times of challenge.

My near and dear friends have, of course, been a source of exceptional worth, support and joy during this long process. For reasons of space it is impossible to mention them all. However, my blessings and warm gratitude for their love and patience go to Professor Emerita Ritva Jacobsson, Mari-Ann Roos, Ministry of Justice, Monica Helles, Stockholm School of Theology, Sabina Bossi, Karolinska Institutet, Dr. Jenny Grönwall, doctoral candidate Laila Abdallah, Dr. Elin Lundin, Jörgen Lindström, Ministry for Foreign Affairs, Professor Anders Karlsson, Eva Johles, Lena Östman, and Joel Ståhl.

I owe many thanks to my family for their patience, support and understanding during the hardest times of this task, in particular to the steadfast support given by Wilhelm Amnéus. Gratitude and appreciation to Ambassador Henrik Amneus, and my aunt Catarina Amneus Bondestam are also owed for their inspiration and encouragement in my academic career.

Finally, while I gratefully put record my indebtedness to all of those who have contributed by way of help and support, my deepest and most sincere gratitude and reverence is addressed to our Creator – all glory and honour is Yours, now and forever.
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PREFACE

My theoretical journey – A loop?

As with any other student of law and public international law I was a so-called ‘knowledge consumer’ during my undergraduate and postgraduate studies. On becoming a doctoral candidate all this changed. A dissertation at this level is expected to contribute to new knowledge, and accordingly I was expected to some extent to become a ‘knowledge producer’.

As an undergraduate student of law I was trained in the predominant legal paradigm, ‘legal positivism’.1 My teachers were influenced by the Scandinavian realists and their methodology in interpreting and applying the law to legal problems and questions. In my studies for a Master’s degree in public international law I was introduced to post-positivist perspectives of law, such as the New Haven School, critical legal studies and New Approaches to International Law (NAIL).2 Through the teachings of Pål Wrange, Assistant Professor at Stockholm University at the time, who had been a guest researcher at Harvard University and greatly influenced by David Kennedy, critical legal theory, post-modernism and Foucauldian thinking, my world of perspectives in relation to international law broadened. Feminist, race and third world perspectives demanded a critical stance on the law, and broader approaches towards the legal order.

After a few years work in the field I returned to the University to undertake my PhD. During the course on methodology in the first semester I felt that the traditional legal positivist, critical perspectives of law and the social world that I had incorporated as a ‘consumer of knowledge’ were very difficult to reconcile in a coherent methodology for the chosen subject of my thesis. The course primarily focused on a legal positivist perspective of the law, quite pervaded by the Swedish Uppsala School, and set a framework within which I found myself, and the subject of my thesis, impossible to fit. I was faced with several awkward dilemmas. First of all, the subject matter that I had chosen, humanitarian intervention and the emergence of new customary norms

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1 The principal claims of legal positivism are that laws are rules made by human beings and that no inherent or necessary connection exists between the validity conditions of law and ethics or morality. Legal positivism stands in opposition to the tradition of natural law that asserts that there is an essential connection between law and morality or justice. The term ‘positivis’ draws attention to the idea that law is ‘positive’ or ‘posited,’ as opposed to being ‘natural’ in the sense of being derived from natural law or morality. Legal positivism is said to be a descriptive theory of ‘law as it is’ (lex lata), as opposed to ‘law as it should be’ (lex ferenda), and may be applied to describe valid law or law proper. See more in Chapter 1.3.2.2.

2 The New Stream scholars reject positivism and naturalism and the very notion that law is an objective enterprise. They seek to disclose the inherent contradictions dichotomies and essential oppositional nature of international law. Ideology is seen as the base upon which all law and politics are constructed, see Beck, Robert J., Arend, Anthony Clark, Vander Lugt, Robert D., International Rules. Approaches from International Law and International Relations, Oxford University Press, New York, 1996, p. 227, and its purpose is to dissect the way in which law constructs its own histories, see Cass, Deborah Z., Navigating the Newstream: Recent Critical Scholarship in International Law, Nordic Journal of International Law, vol 65, 1996, pp. 341-383 p. 382.
in international law, was in my view not suitable for a narrow legal positivist thesis. Secondly, practically all of my training as a lawyer had been spent in applying a legal positivist methodology, so even though I needed to use a broader framework of methodology, I felt that my legal training had not sufficiently prepared me for this task. Having once stepped out of the system it was not easy to jump back into the box, in particular in the absence of a good strategy. My acquired interest for broader questions connected to international law and issues beyond law made it difficult to approach the subject in a strict legal positivist manner.

In my search for an appropriate theoretical framework for my study I arrived at a turning point in my examination of the post-modern movements in jurisprudence. The more I learned about the post-modern epistemological implications when adopting a theory based upon an anti-foundational approach to law and knowledge, I felt there was very little point in even attempting the study. For me, the idea of complete relativisation was a negative experience. Koskenniemi formulated the dilemma well with these words:

If “all” is interpretation and interpretation has no solid epistemological foundation, what basis is there to embark on any specifically legal enterprise at all?

The anti-constructivist and critical New Approaches to International Law (NAIL) that seemed attractive to me in earlier years, did not provide me with a satisfactory epistemological point of reference for my study. The legal post-positivist and post-modern ontologies and epistemologies appeared to have problems with lack of concretisation, reduction and inconclusiveness.

Many of the post-modern perspectives consist of a style of legal analysis that concentrates more upon the discourse behind the legal positivist discourse than on the subject matter itself. I found these

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3 Anti-foundational theories hold that objective knowledge is not perceived to be realisable since there are no neutral grounds for making truth claims, and therefore all meta-theoretical grounds are rejected as only reflecting a particular view of epistemology. Truth claims are relative, contextual and historical according to anti-foundational approaches; they deny that such can be made through empirical testing of hypotheses against evidence of facts. Smith, Steve, Owens, Patricia, *Alternative approaches to international theories*, Baylis, John and Smith, Steve, with the assistance of Patricia Owens (Eds.), The Globalization of World Politics, An Introduction to International Relations, 3rd edition, Oxford University Press, Oxford, 2005, pp. 274-275. Foundational theories on the other hand uphold the belief that the world can be tested or evaluated against any neutral or objective procedures and that truth claims can be judged true or false. Foundationists look for meta-theoretical grounds for choosing between truth claims.

4 For an explanation of the theoretical terminology see Appendix I.

5 Koskenniemi, Martti, *From Apology to Utopia, The Structure of International Legal Argument*, 1st edition, Finnish Lawyers' Publishing Company, Helsinki, 1989, p. 478. Koskenniemi, however, explains that it is important to show that such consequences do not follow from adopting a critical position towards the illusion of objectivity in the legal argument.


approaches to be of limited usefulness for the purpose of this study. Deconstruction or a method to disclose the inherent dichotomies or oppositional nature and structure of international law with respect to humanitarian intervention would not answer my research questions on emerging norms. To my surprise I now found myself supporting some of the critique against the shortcomings of New Stream, or NAIL, in that it offered no alternative to the doctrine that it deconstructed and no alternative vision of a prescriptive international law, as illustrated by the literature on the ‘FIN de NAIL’. This does not mean that deconstruction is less relevant or important, just that its methodology was not particularly helpful for this study.

In order to avoid getting stuck in the so-called ‘post-modern condition’ of jurisprudence, I decided to go ‘beyond the law’ and look for answers outside the legal toolbox. I took recourse in the field of international relations (IR) in search of an interdisciplinary perspective in relation to my study. There I discovered a perspective of law (and international relations) that occupied the middle ground between the objectivist and critical stances – constructivism. Constructivism is a ‘constitutive theory’ that views theory, language and concepts as contributing to the construction of the social world and the creation of reality. Constructivist perspectives on international relations focus on analysis where the elements of agents, identity, interests, norms, structures and institutions in international society are seen as mutually constitutive in international relations.

From a constructivist perspective I view the international legal order as a social “construction”, providing a system of more or less stable, determinable norms and a methodology for determining them. These methods depend, of course, on the type of constructivist perspective one chooses. This stance also helped me to accept the legal positivist

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9 Constructivism is the notion of a heterogenous theoretical perspective or theory in international relations having certain factors in common such as emphasising the importance of normative and ideational structures as well as material structures, the role of identity in shaping political action and the interlinkage of identity, interest and action by the mutually constitutive relationship between structures and agents, see Reus-Smith, Christian, Constructivism, Burchill, Scott (Ed.), Theories of International Relations, 3rd edition, Houndmills, Basingstoke, 2005, p. 188. Among its major founders and developers John Ruggie, Alexander Wendt, Nicholas Greenwood Onuf, Friedrich Kratochwil, and Peter Katzenstein can be mentioned. For a brief introductory overview of constructivism see also Segerlund, Lisbeth, Making Corporate Social Responsibility an International Concern: Norm Construction in a Globalizing World, Stockholm University, Stockholm 2007, pp. 19-21. See more about constructivism in Chapter 1.3.3.1. et seq.

10 A constitutive theory rests on the belief that our theories help construct the world and views language and concepts as contributing to create reality, see Smith and Owens, Alternative approaches to international theories, p. 273. For explanations of the theoretical terminology used in this thesis, see Appendix I.
perspective as another methodology for the determination of norms, albeit based upon different premises and assumptions about the law.

The constructivist theories on norms and international law, which were most helpful to me in finding a new position towards law, are, however not applied in more depth in the study on the customary process of emerging norms on the concept of Responsibility to Protect (R2P) by military means (humanitarian intervention). This is what Wheeler has already achieved with his book *Saving Strangers* (2000). I found, however, another useful theoretical approach; that of combining my legal background and education with constructivist perspectives on security. This combination may hopefully contribute by way of a new approach to the study of humanitarian intervention. By taking ‘human security’ as an entry point in my study, rather than a human rights approach, the study may add new insights into the emerging norm of R2P. (See more Chapter 1.3.4.)

Although I feel an affinity with legal post-positivist perspectives, I do not reject applying legal positivist methodology for practical purposes, knowing that the theoretical ‘legal positivist’ assumptions upon which it is based are part of a social construction. I am sceptical toward its objectivist assumptions but I employ its methodology as one possible perspective and methodology offered for the study of law. From this sceptical position I am able to analyse the law in a traditional manner, but also allow myself to go beyond a strict legal positivist argumentation in this dissertation. I also include other perspectives such as interdisciplinary and feminist theories in order to complement the legal positivist analysis, and provide inspiration for the so-called *lege ferenda* analysis of how the legal system could be changed or constructed in order to accommodate the changing views on security that are now challenging the state-centric legal order.

In that sense, my theoretical ‘loop’ took me from legal positivism through critical theory and New Stream over to international relations and constructivism and back again to legal positivism. The only theoretical perspective that I never abandoned throughout this journey was the critical feminist stance. Yet I believe that this tour (or detour) may have made me more open and aware of the shortcomings of law and legal theory when describing the customary legal process. During the process of understanding these theoretical dilemmas I also came to realise that my personal experiences with these theoretical clashes were a mere symptom of a larger structural dilemma in the social science field.

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11 Compare the view of Byers, Michael, *Custom, Power and the Power of Rules*, International Relations and Customary International Law, Cambridge University Press, Cambridge, 1999, p. 49, where he rejects the critical legal perspective articulated by Koskenniemi, which according to Byers would imply that lawyers “would be nothing more than participants in an illusion, citing nominally objective, stable and determinable rules while ignoring the impossibility of objectivity, stability and determinacy.” I, however, prefer to see the law and legal order as a social construction rather than as an illusion. I support Koskenniemi’s critique and analytical deconstruction of the legal order and the legal order’s deficiencies and weaknesses, without at the same time rejecting the process in absolute terms by which the present international legal order has been established.
As social scientists already know and take for granted, there is no Archimedean point in social science, so one has to choose a standpoint from which to make its investigations and to account for that choice and its basic assumptions. Lawyers usually do not feel compelled to do this because the underlying basic assumptions of legal positivism are so institutionalised by anyone active in the system that they are seldom questioned – as if everyone automatically would find the same Archimedean point when studying the law. But there are naturally many variations and interpretations of legal positivism. Usually, the legal positivist methodology applied in a doctoral thesis is not defined, problematised nor even seen as affecting the outcome of the research. It is taken for granted as the only valid methodology providing an objective answer to the relevant questions under consideration. My argument, however, is that the application of a legal theory or methodology is a political choice in itself, or at least a choice that has political, material and theoretical implications. There is hence no objective stance towards the law, not even in legal positivism, only different perspectives.

The roles of legal scholars and scholars of social science differ in how the subject relates to the object being studied. Shifting from an international law perspective towards the social science sphere of international relations, I felt compelled to ‘free the subject’ from its traditional, confined role as a ‘neutral and objective interpreter’ of the law, perceived as standing separated from the object of the study (the law), to a position where I could argue my own case with the support of facts and theories.

It may be true that it is easier to separate subject from object when the subject is studying a ‘constructed phenomenon’ such as the legal order. The legal order can be more or less perceived as a fixed structure that the scholar can study separately and lacking the capacity to change. But the complete separateness existing between the law and legal scholars is to some extent an illusion, because both subject and object are part of the same social world.12

When studying the ‘social world’, of which both subject and object are part and therefore interdependent on each other, it is more difficult to maintain such an objective stance towards the object. Taking a constructivist perspective of law and norms, the legal order and actors are also seen as being mutually constitutive and therefore affect and influence each other.13 The lawyer, therefore, cannot take a completely objective position in relation to the law. This also represents the post-modern jurisprudential critique against legal positivism. Taking a constructivist perspective on norms, this thesis may perhaps influence the way that state officials think about and reflect on security and R2P, which in turn could lead to changes in state interests and behaviour, and consequently affect the formation of new norms – and ultimately

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12 Even though legal scholars are not formally part of the legislative process, they may indirectly influence (though minimally) the content of the law through contributions to the legal literature, despite the fact that most legal orders do not acknowledge learned writings as a formal source of law.

13 See Chapter 2.3.4. for an exposé and analysis of constructivism and norms.
contribute to changes in the legal order. The subject is no longer separated from the object it studies. But the ‘freeing of the subject’ carries another form of responsibility.

While writing a thesis is solitary work, writing an interdisciplinary thesis on public international law could be described as ‘working at the periphery of the periphery’. Public international law is often viewed as a marginal research area within the legal departments of universities, and often even questioned as to whether or not it is really a body of law at all. Furthermore, within the area of public international law, to pursue an interdisciplinary project reaching beyond the framework of positive law is not seen as part of mainstream research. I am therefore most grateful to my supervisor Professor Ove Bring, to the Centre of International Relations at the Liu Institute for Global Issues at the University of British Columbia, the Department of Law at Stockholm University and to my Swedish funders for enabling me to spend half a year in Canada researching and connecting with researchers and others working in this inter-disciplinary field.\(^\text{14}\)

14 The Swedish Foundation for International Cooperation in Research and Higher Education (STINT), and Forskraftstifelsern Thedor Adelsvars Minne. I also want to give special thanks to those funders who supported me at the final stages of my work: Emil Heijnes Stiftelse for rätsvetenskaplig forskning, and Alfred Ossian Winroths minnesfond.
Part I. Introduction, method and theory
1 Introduction

1.1. Background

In the new political conditions prevailing after the Cold War new security trends emerged in an ever changing security scene. The trends flow from interstate to intrastate and transnational and global. The number of internal conflicts has surpassed that of interstate conflicts; the disintegration of states, as well, as failed states and the erosion of state control, has led to internal armed conflicts, the gross and systematic violation of human rights and humanitarian law and grave crimes. Transnational threats to human security, such as international terrorism, organised crime, trafficking in humans, drugs and small arms, uncontrolled refugee streams and migration, the consequences of climate change, transnational environmental degradation threatening species on land and sea, HIV/aids and other pandemics, natural catastrophes and the negative consequences of globalisation are all new and increasing threats to security. The narrowly defined, traditional security paradigm based upon the security of states and protection from external aggression, has failed to take into account these emerging security threats that spring from internal, transnational and global sources.

Over the past decade a new broad security concept has been developed as a complementary instrument to deal with these perils; human security. It was initially introduced at the global level by the UNDP in 1994 in connection with human development,15 and came to be further elaborated and developed by other actors. Canada, Japan, the Human Security Network, the independent Commission on Human Security and the Human Security Centre at the University of British Columbia (now at Simon Fraser University) have all promoted different interpretations of the concept.16

Broadly defined it is a holistic security concept that extends and shifts the focus on the security of the state to the security of peoples and individuals. It is concerned with ‘freedom from want’ and ‘freedom from fear’ security issues, which means that it deals in a comprehensive way with security matters related to both violent conflicts and non-traditional security threats arising from economic, social and ecological circumstances. It has been argued that the concept brings together traditionally separated areas such as enforcement of humanitarian law and human rights, development co-operation, conflict prevention, peacekeeping, post-conflict reconstruction, and democracy building under one chapeau.

During the 1990s a wave of interventionism of a humanitarian kind took place, exemplified by UN interventions in Somalia, Bosnia, Rwanda and the non-authorised interventions in Northern Iraq, Liberia and Kosovo. This new practice illustrates the beginning of a debate on the role of human rights in international law and a growing acceptance of the need to shift the balance between the principles of state sovereignty and non-intervention on the one hand and on the other human rights and human security. Although legal and political justification for these interventions did not expressly refer to a right to humanitarian intervention, they were based upon arguments that made reference to the humanitarian emergency of the particular situation and the moral demands to act to prevent or halt genocide, the gross violation of human rights and humanitarian law, and other grave crimes in international law. There is clearly a connection behind this new humanitarian activity and the development of a broadened security approach in the international arena during that same time.

After the Kosovo intervention in the autumn of 1999 the heated debate on a right to humanitarian intervention in the UN General Assembly reached deadlock with the mainly western and developed states arguing for the enforcement of human rights, and the developing and non-aligned states supporting the principles of state sovereignty and non-intervention and arguing against any reinterpretation.17 No consensus could be reached and the terminology of humanitarian intervention became infected. The UN Secretary-General Kofi Annan, was concerned to find a way to stop future genocides and mass atrocities within states, and insisted on broadened view of sovereignty and the recognition of the sovereignty of individuals.18 The Independent Kosovo Commission stated in its Kosovo Report that the unauthorised intervention by NATO in 1999 was in fact illegal but legitimate, and pointed to the ‘gap’ between the ‘legality’ and ‘legitimacy’ of humanitarian intervention.19 The report expressed the need to close this gap and suggested adopting a principled framework of humanitarian intervention, which was formulated in the report.20

In a response to the call made by the Secretary-General, with the financial support of Canada, the Commission on Intervention and State Sovereignty (ICISS) was established and given the mandate to explore

20 Independent Commission on Kosovo, *Kosovo Report. Conflict, International Response, Lessons Learned*, pp. 10-12. The framework was suggested to be adopted by the General Assembly. This has not been done to this date.
the moral, political, legal and ethical aspects of intervention for humanitarian purposes. They were to address the ‘gap’ in the law identified by the Kosovo Commission. Its report, which launched the new broader concept of Responsibility to Protect (R2P), was presented in December 2001. But it received neither the attention nor made any immediate impact, owing much to the ongoing war against terrorism in Afghanistan following the so-called 9/11 terrorist attacks on the United States.

Nonetheless, the concept of R2P was subsequently brought onto the international security agenda in 2003 when the humanitarian situation deteriorated in Darfur. The continued war against terrorism and the situation in Iraq after the invasion in 2003 also contributed to making states increasingly aware that security had become an interdependent phenomenon in the sense that security elsewhere was now similarly part of ‘our’ security. Since then, the content and application of the concept of R2P has been much discussed and debated. It was endorsed at the UN World Summit in New York in 2005, with a formulation that somewhat deviates from the ICISS report. The endorsed concept included the possibility of the use of force under Chapter VII and VIII, but states have so far not yet fully developed or agreed on the precise scope of the doctrine and appear to have left it to be developed through customary interpretations.

The newly-adopted declaration from the UN World Summit shows that the concept has gathered considerable consensus in the international society on the existence of a political norm of R2P. It could be argued that the international society is becoming more ready to strike a new balance between the security and rights of states and individuals in international law.

In its few years of existence, the concept of responsibility to protect has made normative progress. This progress is not only political but it could be asserted that it has begun to embark on a legal journey towards a norm or several norms on R2P, through an international customary process that could lead to informal modification of the UN Charter.

It is in this context, based upon the practice of humanitarian intervention and the acknowledgment by states that there is a responsibility for human security within a state, that the analysis in this thesis on the emerging legal norm (or norms) on R2P should be placed. When it comes to humanitarian interventions, or the responsibility to protect by military means, it will be contended in this thesis that there are several different norms of such a responsibility to protect, each connected to the purported actor carrying the responsibility. The military aspect of R2P is only one of several of the ‘responsibility to react’ element of the R2P doctrine as formulated by ICISS. It is hence only

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22 The ICISS suggested that ‘responsibility to react’ also include non-military measures such as political, economic, legal and diplomatic measures. The ICC Prosecutor Moreno-Ocampo’s charging on 14 July 2008 of Sudan’s President Bashir with genocide, war crimes
1.2. The purpose and research questions of the thesis

1.2.1. Background

Why write a dissertation in international law about human security and R2P, and why necessarily take an interdisciplinary approach? These questions are appropriate and relevant. One strong motivating factor for undertaking legal research on the evolving doctrine on external R2P has been to shed light on the widely acknowledged ‘emerging norm or R2P’ by identifying and analysing the legal aspects of some parts of its elements and contents, as well as its non-legal components possibly developing into law. This study aims at explaining the customary process and the legal issues and consequences involved in the development of (a)(the) legal norm(s) of external R2P. It is to be hoped that the analysis and results might be of interest and value for those involved in the norm-entrepreneurship for this norm, in the general cross-cultural discussions and dialogues on R2P, and not least for those in need of protection.

Since the end of the Cold War, two main routes have been taken in the study of humanitarian intervention: one through international human rights and the other through expanded notions of security. Many international lawyers have already written extensively on the matter using the first human rights perspective on humanitarian intervention. In order to avoid excessive overlap in the research, I have chosen the second path by employing a human security and R2P framework as an entrypoint to analyse and systematise the legal analysis on the developing norms on humanitarian intervention.

These frameworks of analysis serve the purpose of providing a contextual background, delimiting and structuring the argumentation, material and analysis in the subsequent parts of the thesis. The military aspects of the external norm on R2P are primarily directed towards the Security Council as the ‘Right Authority’ authorising military enforcement, and any emerging norm on an external R2P by military means for the Council would have to be based upon a changed perception and interpretation of what might constitute a ‘threat to the peace’. When human security threats are adopted into this security agenda and affect the practice of the Council, this practice in turn contributes to changes in international law. A human security framework for analysis related to the R2P doctrine is thus important for the study and crimes against humanity with a request to the court for an arrest warrant represents the international community’s responsibility to react by legal or judicial measures to the grave crimes against international law being committed in Darfur. But the ICISS Commission’s proposal that R2P be made up of a continuum of responsibilities (the three elements: responsibility to protect, react and rebuild) was not expressly endorsed at the UN World Summit in 2005.

on how a shifting security focus, not only in the Security Council but also by other actors, may contribute to new state practice and a customary process of new legal norms.

The fact that neither the concept of human security, nor that of responsibility to protect, are legal concepts may not preclude a lawyer from integrating them in a study in international law. Taking this track to humanitarian intervention, however, is an approach that to some extent involves a requirement to go beyond the application of traditional legal methodology in some of the analysis. While the concepts of human security and R2P comprise legal elements and *lex lata* components, they are non-legal concepts as such. Adopting non-legal concepts as a point of departure for the legal analysis requires the use of extra-legal theoretical underpinnings reaching outside the legal paradigm and the study of legal norms. Going beyond the law in applying interdisciplinary perspectives on the topic, and in combination with traditional legal analysis may contribute to new insights.

The constructivist perspectives on security, and in particular human security and R2P, has presented me with the theoretical basis for this entrypoint, and made these extra-legal analyses fit the broader ongoing analytical discussions within IR on the issue. Bridging the two disciplines on this topic, from a lawyer’s point of view has been an exciting journey. It is to be hoped that it represents a contribution to the evolving interdisciplinary literature in this field, not only on R2P and humanitarian intervention but also on norm emergence.

The intended readers of this thesis are scholars of international law with security and interdisciplinary interests and ‘international relations scholars’ interested in norms and legal issues on security and ‘norm creation’. Foreign Affairs officers, politicians, practitioners and NGOs as well as other members of civil society, might also be interested in the matters analysed.

1.2.2. Primary purposes and research questions

The main purpose of this dissertation is to conduct an interdisciplinary study on international law and international relations (IR) dealing with the developing process of emerging *jus ad bellum* norms, by which states try to address the legal gap between the legitimacy and legality of humanitarian intervention in order to protect human security within a state. More specifically, this thesis investigates to what extent the new broadened and deepened views of security and concern for human security within states during the post-Cold War period and onwards have affected the international legal order by the development of new rights or obligations on external ‘responsibility to protect’ people from genocide, war crimes and crimes against humanity by military means. The analysis of the R2P doctrine is primarily focused on the *military* aspects of the second element of R2P doctrine, thus on the ‘humanitarian intervention’ aspects of the ‘responsibility to react’. Other reactive measures such as humanitarian, political, diplomatic or economic

24 The cut-off date for the thesis is June 2008.
responses, also belonging to the second element of the doctrine as proposed by ICISS, have consequently been set aside.

The overall and general research question that has informed the interdisciplinary approaches and the overall 'set up' of this thesis has been this:

To what extent have the human security paradigm and R2P doctrine, examined from a humanitarian interventionist perspective, been accommodated into the international legal order?

This research question has been approached by first formulating frameworks for analysis on human security and R2P in order to subsequently contrast them with the legal rules on humanitarian intervention in the international legal order. The answer to what extent the legal order has accommodated this aspect of the R2P doctrine has been examined from two angles; by analysing the legal rules and regimes not traditionally or directly concerned with humanitarian intervention, but which could support such an emerging norm on R2P, and by studying the lex lata and lex ferenda rules applying to humanitarian intervention.

Taking an interdisciplinary approach, the IR parts and legal parts of the thesis have thus naturally been informed by different and more specific purposes and research questions. The substantive IR parts have primarily served the purpose of an 'entrypoint' into the legal analysis on humanitarian interventionist aspects of the R2P doctrine. The introductory chapters on human security and R2P have served the purpose of resulting in discussing and formulating 'frameworks of analysis' rather than answering specific research questions. These human security and R2P 'frameworks for analysis' have in turn been employed for the examination of the extent to which the international legal order has accommodated these conceptions within the area of humanitarian intervention. The IR parts have thus not been informed by their own research questions, but have largely served as background analysis for the legal parts.

The aim of this thesis has been to keep the major part within the traditional legal realm while the IR parts and the interdisciplinary approach has been from the outset only intended to be applied in this work as a contextual background and entrypoint to the legal study. But by contrasting new perspectives and influences on security based upon IR theory with the emerging customary process on humanitarian intervention, the legal analysis has been given a new systematisation, departing from the R2P doctrine instead of departing from traditional legal systematisation of norms, rules and principles.

The constructivist approach to security used for the human security framework of analysis on R2P has helped me approach the subject matter of humanitarian intervention from a non-traditional angle (from a lawyer's point of view). The purpose of the legal parts is to examine the emerging legal norm (or norms) on the external R2P by military means.
within the international legal order. The frameworks of analysis resulted in identifying an organising principle and the framing of a primary research question guiding this legal analysis. The research question thus came to lay the ground for the systematisation of the legal rules and materials used in this study. The examination of the customary process of this emerging R2P norm is thus guided by the following primary research question for the legal analysis:

**Who has a legal external responsibility to protect human security by military means, and when?**

The international legal regulation on the use of military force is different for different actors, which means that the answer as to when the R2P by military means may be activated depends on the actor carrying such a responsibility to protect. The examination of the research question “who has the legal R2P by military means and in which situations”, will therefore employ the so-called ‘Right Authority’ issue (or actors) as the organising principle for the structuring and systematisation of the legal analysis and material. Thus, the answers refer to the legal subjects of international law and to the particular set of legal criteria and circumstances under which the human security and R2P frameworks and the principles they embody are reflected in international law.

A legal responsibility, right or obligation, needs to be linked to an actor. If the R2P is everyone’s responsibility it becomes difficult to know who precisely assumes such a responsibility – in practice resulting in no-one’s responsibility. The primary research question links the R2P doctrine with the legal analysis on humanitarian intervention in a natural manner by the separation of different actors suggested to hold an external responsibility to protect human security by military means within a state.

A hypothesis during the examination has therefore been that there is not only ‘one’ emerging ‘norm on R2P’, but in fact **several different emerging or existent (legal) norms regulating an external R2P by military means**. This hypothesis has been answered in the affirmative (see Chapter 9.1.1.)

### 1.2.3. Secondary purposes and research questions

In order to answer the primary research questions, the study has had several subpurposes or general research questions:

**First purpose and research questions**: In order to study the process of the emerging customary norm(s) of external R2P the thesis examines the legal rules regulating the customary process by which these legal norm(s) of responsibility to protect by military means would develop. What are the rules that govern the source of customary law, and which criteria must be met for an emerging norm to harden into law? In what ways might emerging customary norms have the potential to affect other *lex lata* rules in international law or to modify such rules? Do these rules and criteria need to be taken into account for an emerging norm to become law? What means for customary changes and modifications of treaty
norms does international law offer for a norm development in the area of the use of force, and how does jus cogens affect this process? The thesis identifies the different legal possibilities for changing or creating new legal norms on the use of force by the emergence of a norm of R2P by military means. These rules on the sources of international law are of importance for the analysis of the legal status and value of the R2P formulation in the Outcome Document 2005 for the customary process on R2P (see Chapter 4.6.), and for the analysis of the practice of the Security Council on humanitarian intervention in the 1990s (see Chapter 6.3.), as well as for the case studies on the emerging norm of regional collective humanitarian intervention (RHI) by regional organisations in Chapter 8. (Chapter 2)

Second purpose and research questions: The thesis provides an introduction to, and a comprehensive analysis of the concepts of human security and the R2P primarily from a freedom from fear perspective (violent security threats, armed conflict-oriented and military aspects). What do these conceptions encompass and how do they contribute to the question of humanitarian intervention? How might a human security framework be formulated that relates to the emerging norm of responsibility to protect? How has the idea of a Responsibility to Protect developed and what have been the responses of states? How might an R2P framework of analysis be formulated that connects to the international legal order and the emergence on norms on humanitarian intervention? (Chapter 3 and 4)

Third purpose and research questions: The thesis analyses the main tenets and criteria of the R2P doctrine with relevance for the question of humanitarian intervention from a legal positivist perspective. Can the emerging R2P, including by military means, be accommodated in the legal order as it is formulated today, and in which way does the doctrine build on and connects to existing and relevant legal structures and norms? To what extent do the main tenets, principles and criteria of R2P correspond to international law proper? What parts of the military aspects of the R2P doctrine are lex lata and which elements constitute lex ferenda? (Chapter 5)

Fourth purpose and research questions: The R2P framework of analysis is used as a point of departure for the structure and systematisation of the legal rules on humanitarian intervention. The actors, or ‘Right Authority’, are employed as an organising principle, informing the legal analysis on the research question of who has the legal responsibility to protect human security by military means, and when? To what extent and in which areas has the post-Cold War intervention

25 The principal claims of legal positivism are that laws are rules made by human beings and that there is no inherent or necessary connection between the validity conditions of law and ethics or morality. Legal positivism stands in opposition to the tradition of natural law that asserts that there is an essential connection between law and morality or justice. The word ‘positivism’ draws attention to the idea that law is ‘positive’ or ‘posted,’ as opposed to being ‘natural’ in the sense of being derived from natural law or morality. Legal positivism is said to be a descriptive theory of ‘law as it is’ (lex lata), as opposed to ‘law as it should be’ (lex ferenda), and may be used to describe valid law or law proper. See more in Chapter 1.3.2.2. For the theoretical terminology used in this chapter, see Appendix I.
practice, having the aim of enforcing and protecting human rights, contributed to a development of new norms proclaiming a subsidiary international responsibility for the protection of human security by military means within a state? The practice of the Security Council, but also that of regional organisations and “coalitions of the willing”, is studied for the purpose of finding out whether the parallel processes of the new interventionism and the broadening and deepening of the approaches to security; have contributed to the development of new emerging customary norms on humanitarian intervention. What kind of human security threats have been addressed by such humanitarian interventions and do they correspond to the doctrine of R2P? Does the General Assembly also possess such a right? (Chapters 6 and 7)

**Fifth purpose and research questions:** The emerging customary process on a responsibility to protect by military means for regional organisations is analysed more in depth from an R2P perspective (or ‘lens’). Two specific cases of unauthorised humanitarian intervention (Liberia and Kosovo) are re-examined for the purpose of finding out whether they correspond to the R2P criteria and principles on military intervention, and whether they have been applied consistently and uniformly, thus complying with the legal criteria for the development of international customary rules. Does the state practice of regional collective humanitarian intervention without Security Council authorisation support an emerging norm of R2P, and if so to what extent? (Chapter 8)

**Sixth purpose and research questions:** A parallel research purpose of the thesis has been to examine whether the gendered human security realities in (primarily) armed conflicts are reflected in the normative developments of the military aspects of the R2P doctrine, and how it could become more gender-sensitised to reflect the normative developments on women, peace and security. For the purpose of answering these questions, the thesis includes analyses on gender perspectives on human security, the R2P concept and humanitarian intervention, drawing on feminist theory and feminist jurisprudence. The gender analysis on human security for women and men in wartime (but also indirectly linked to peacetime) is critically analysed and contrasted to the ways in which the doctrine of R2P has addressed women’s security concerns and incorporated a gender perspective. Moreover, feminist

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26 Gender perspectives on ‘human security’ is necessary if we want security to become a reality for the whole of humanity, irrespective of sex. Gender-neutral understandings of security disregard the gendered differences in security needs, interests and experiences, and rely on the male norm as a point of departure, render invisible the security threats and needs of women. The legal and political issues raised in the Security Council resolution 1325 ‘Women, peace and security’ must be an essential and integral part of any analysis aspiring to contribute to human security. The Secretary-General highlighted in his report to the Security Council in 2002, ‘Women, peace and security’, that “[t]he achievement of peace and security will not be achieved without women’s full and equal participation”. See the Report of the Secretary-General on women, peace and security, S/2002/1154, 16 October 2002, UN Doc S/2002/1154, 2002, p. 12. The achievement of peace and security is not, and can never be, a solely male task or project, which is why gender considerations are necessary to integrate.
insights and research that displays gender implications with regard to humanitarian interventions are examined in order to see which gender aspects could and should be integrated into the R2P doctrine on military intervention. Security Council resolution 1325 is critically scrutinised to discern its policy and implications for R2P interventions. Other research questions in this area relate to how a more gender-sensitised security conception could be provided in the R2P doctrine and in which areas the R2P doctrine needs to be developed, reformulated and implemented to better address and include the security needs of women. The main ‘gender’ black holes of the emerging norm of R2P will be mapped through the gender and feminist analyses in this thesis. These analyses are also restricted to the military elements of the R2P doctrine. (Chapters 3.4. and 4.9.)

1.3. Interdisciplinary approach and methodology

This chapter begins with an account of the interdisciplinary approach taken in this thesis and provides a background to the reasons for this approach (1.3.1.). It continues with a chapter on legal theory, with a focus on the legal positivist perspective applied in the legal analyses of the thesis (1.3.2.). It is followed by an introduction and overview of constructivist perspectives on IR and security (Chapter 1.3.3.), and it ends with a chapter on interdisciplinary approaches to international law, where constructivism has been given most attention (1.3.4.). This last chapter does not lay the ground for subsequent material analysis in the thesis, but is kept in the thesis as a solely theoretical contribution to the evolving interdisciplinary field of international law and international relations.

1.3.1. The interdisciplinary approach

1.3.1.1. Background

It was not self-evident from the start that the theory and methodology of legal positivism was to be applied to the study on the emerging customary norm on R2P. Besides the presentation of legal positivism below, also the shortcomings of legal positivism in providing a framework of analysis of an ongoing customary process which had not yet hardened into law are also discussed (see Chapter 1.3.2.5.). In search of another perspective or methodology which could be used for the study of this continuing process, this chapter also includes brief discussions on relevant legal post-positivist perspectives of law. The purpose was to examine whether a legal theory based upon a process-oriented ontology, instead of a rule-oriented theory, would be more useful for the study of the customary process on R2P. However, the arguments and reasons for rejecting the New Haven School perspective of law, as well as other attempts to ‘bridge’ the rule and process-oriented theories of law, are also explained in this chapter. The need to find a methodology to complement the legal positivist study of this process and the rejection of the legal post-positivist legal theories pushed me to
continue my search outside the realm of jurisprudence. The necessity of finding answers to my stipulated research questions based upon a different epistomological standpoint forced me to look further.

The theoretical chapter of the thesis therefore also includes an exploration into interdisciplinary theoretical approaches to law, by mainly constructivist scholars in international relations and international law on the study of norms and norm emergence (see Chapter 1.3.4.). The findings of this study have led to the conclusion that a constructivist study on an emerging legal norm on R2P would be helpful, but that the existing epistemologies were not sufficiently evolved for the study of legal norms alone, and that a study on the emergence of a norm (in a broader sense) on humanitarian intervention had already been undertaken by various scholars of international relations (IR). Wheeler’s *Saving Strangers* applies an IR constructivist perspective on the emerging norm on both unauthorised and UN authorised humanitarian intervention,27 and Finnemore’s *The Purpose of Intervention* also deals with humanitarian interventions from a constructivist perspective, albeit with a more historic ambit.28 Another study on the same subject using the same perspective would be difficult to motivate, although the development of the doctrine of R2P would take the constructivist analysis one step further. The fact that I am a lawyer and the thesis was to be defended in law was also a constraining factor.

Despite the fact that there is no constructivist perspective on norms applied in the material parts of the thesis, the theoretical interdisciplinary discussions on norms and on the legal post-positivist perspectives have been kept integrated in the theoretical chapter for the purpose of contributing theoretical insights to the developing ‘interdisciplinary field’ of international relations and international law on norms (see Chapters 1.3.2.5. and 1.3.4.). Much of the scholarly work in this interdisciplinary field has been done between liberal-institutionalist IR and IL scholars, which is why this presentation might represent valuable contribution, offering another combination of perspectives in this evolving scholarly field. I also hope that by displaying the constructivist perspectives on norms, a rather unknown theoretical perspective for many legal scholars, this new approach might be introduced and so become wider known among legal circles.

But this result does not mean that I have not made use of constructivist insights. Constructivist perspectives are retained and applied on the analysis of ‘security’ and specifically in the analysis of the human security framework. This framework of analysis serves the purpose of providing a contextual background, delimitating and structuring the argumentation, material and analysis for the subsequent parts of the thesis. When human security threats are incorporated into the security agendas of the Security Council and other actors, resulting in


changes of behaviour, this new practice in turn contributes to changes in international law. A human security framework for analysis related to the R2P doctrine is thus important for the study on how a shifting security focus, not only in the Security Council but also by other actors, might contribute to new state practice and a customary process of new legal norms.

Taking a human security and R2P entry point into the legal study on humanitarian intervention instead of the more legally oriented human rights approach, this study distinguishes itself from previous works on humanitarian intervention undertaken by legal positivist scholars. Chesterman’s *Just War or Just Peace* offers a more traditional legal positivist analysis, but adopts a much broader approach towards the new interventionism of the 1990s than a purely humanitarian interventionist, including a longer list of case studies of the new Security Council practice expanding the notion of ‘threat to the international peace’ up to 2001.

Taking a legal positivist approach in the study on the military aspects of an emerging legal norm (or norms) in relation to R2P, the thesis will contribute to the debate on the emerging norm from a more traditional legal viewpoint, while questions of legitimacy and morality will be less considered.29 By applying the soft legal positivist approach,30 this work does not duplicate Téson’s work *Humanitarian intervention: an Inquiry into Law and Morality*, which leans more towards the interface between law and morality and philosophy.31

Both the legal positivist rules on customary international law and the evolutionary interpretation of treaties and informal modifications of treaties are relevant for the study of the specific customary and evolutionary processes of international law in this thesis. In the analysis I shall apply a modern theory on customary law, and an inclusive approach to state practice (see Chapter 2). In order to avoid double-counting of statements *in abstracto* and the epistemological circle, such practice will be assessed in the classical way, albeit taking into consideration the weight of such practice for the formation of the rule. Therefore, only military state practice on humanitarian intervention will be referred to as *usus* in this thesis (see the working definition on humanitarian intervention in Chapter 6.2.).

29 This does not imply that I do not acknowledge the intimate relationship, overlap and interplay between these things, only that these aspects will be particularly integrated or separately discussed in the following analysis.

30 As stated above on soft positivism in Chapter 1.3.2.4. Hart argues that morality can only be a condition of validity where the rule of recognition so stipulates. According to him, the rule of recognition may include moral standards and hence that law occasionally may incorporate moral criteria for ascertaining what the law is. This means that a rule of recognition may make a moral compliance necessary, but not a sufficient, condition of legality. Arguing in line with Hart, I believe that an international legal valid norm may reflect morality but it is not necessary in order to remain valid. The latter situation may, however, lead to the questioning of its legitimacy.

The research questions in this thesis are particularly concerned with the two parallel post-Cold War processes of broadening and deepening the view on security and the legal customary process on emerging norms on humanitarian intervention in order to ascertain to what extent the external R2P doctrine based upon the concept of human security has been accommodated into the legal order. Constructivist perspectives are applied on the former process and a legal positivist perspective on the other.

1.3.1.2. Interdisciplinary approaches applied

At present a general norm of R2P falls short of the threshold of an unambiguous customary legal rule, not least before an international court. Since it might be assumed that there is not yet a *lex lata* norm on *a externa R2P* by military means, the focus of the study is on the process of international customary law – that is, how and whether changing and evolving *jus ad bellum* norms are coming about in this matter.

The major part of this thesis (approximately two thirds) is based upon legal positivist methodology. The object of the study also involves a methodology that goes beyond traditional legal positivism, which is why the interdisciplinary approach combines insights and analyses from both public international law and international relations (IR). To summarise, I shall employ the following:

1. IR constructivist (and to some extent critical) perspectives on security, focusing on the human security paradigm and the doctrine on the R2P, combined with:
2. Legal positivist analysis and methodology on a) the customary process and informal modification of treaties, b) the main tenets and criteria of R2P, c) the normative framework surrounding humanitarian intervention, and d) the case studies of humanitarian intervention with an ‘R2P lens’.
3. The thesis also incorporates gender perspectives based upon feminist theories on security and feminist jurisprudence. Gender considerations on human security, the R2P concept and humanitarian intervention, as well as gender critique and proposals, are all presented with regard to an emerging norm on R2P.

More specifically the interdisciplinary approaches may be explained as follows: **Constructivist** (and to some extent critical) IR approaches are applied:
a) in the theoretical chapter on security, forming the background for the human security framework (Chapter 1.3.3.2.), and
b) on the human security framework for analysis (Chapter 3.5.)

I am furthermore conducting a **legal positivist analysis** with the intention of
1) determining the modes for the change of and emergence of new customary norms in international law (Chapter 2):
2) examining the main assumptions and tenets of the R2P doctrine and to what extent they reflect *lex lata* (Chapter 5);
3) studying relevant *lex lata* rules and regimes to investigate to what extent these might accommodate the norm of external R2P by military means;
4) assessing the legal normative framework as applied by states on the right to undertake humanitarian intervention for four possible actors having *a legre ferenda* external R2P (Chapters 6-7), and lastly:
5) in the case studies on humanitarian intervention with the R2P criteria in order to answer the question of whether or not we are witnessing an emerging customary norm on external R2P by military means for regional organisations (Chapter 8).

Finally, eclectic feminist theory and feminist jurisprudence is applied in the gender analyses on human security, humanitarian intervention and the R2P doctrine, and gender-critique and proposals are specifically made on an emerging norm of external R2P by military means (Chapters 3.4. and 4.9.).

**1.3.1.3. The ‘two culture’ problem**

International relations and international law have their own respective scientific research cultures, which create certain difficulties for someone attempting an interdisciplinary study. As Oran Young put it at the ASIL Annual meeting 1992 on a discussion on interdisciplinarity: “Fundamentally, we are dealing with a true two culture problem, not merely with a problem of two distinct disciplines”. It is not only that the various research communities ask different questions and expect different answers but also use different terminologies that demand of anyone seeking to conduct an interdisciplinary study to become bilingual. “The two cultures represent different language communities with all the difficulty of translation that that implies.” If the study is to be read by members of both communities, it places an extra burden on the presentation of research. Terminology not commonly used and known by the other community has to be explained and accounted for. I will attempt this so that this work will be read and understood by both ‘camps’. To help matters further, there is also an explanatory list of specific terminology in the Appendix to assist the reader (both the theoretical and latin terminology). The new terminology will hopefully be used as a helpful guide in the other discipline, rather than act as a burden.

Both research cultures are also characterised by “epistemological pluralism”, as Young puts it. That is another way of saying that no

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agreement exists within each discipline on the nature of particular knowledge claims made and the methods used to find answers. An interdisciplinary study has to be clear on which epistemological perspectives of each discipline to use and how to combine them in a methodology that addresses the fundamental questions and purposes of the study. There are, of course, strong natural affinities between those theories sharing the same basic objectives and methodology, which will facilitate cross-cultural dialogue and learning – for example ‘Critical Legal Studies’ and ‘Critical Theory’, or ‘New Stream’ and ‘reflective institutionalism’.\textsuperscript{35} It is, however, not necessary to adopt two similar perspectives. It is perfectly possible to contrast different perspectives, based upon opposing ontologies and epistemologies, with one another – as has been done in this thesis. The choice of theory and methodology must be guided by the subject area and the research question of the study to be able to answer effectively the particular questions posed. The perspectives chosen therefore do not necessarily need to be taken as representing the theoretical and ‘intellectual domicile’ of the author.

1.3.2. Legal theory

1.3.2.1. Introduction

Most Swedish dissertations on public international law (or law in general for that matter) do not contain elaborate theoretical chapters that describe the ontology, epistemology or the underlying theoretical assumptions of the legal positivistic methodology used for the study.\textsuperscript{36} Usually, most of them briefly state that a traditional legal dogmatic/positivist methodology is to be applied in the dissertation.\textsuperscript{37} There is, however, no such precise methodology. Legal positivist theory and methodology can encompass many different assumptions. Most authors take for granted that everyone knows what is referred to and do not feel compelled to account for their particular perspective of legal positivism – whether they take a Kelsenian, Hartian or any other standpoint. This trend, however, cannot lead to the conclusion that there

\textsuperscript{35} Beck, Arend and Vander Lugt, \textit{International Rules. Approaches from International Law and International Relations}, pp. 8, 19. Sociological institutionalists, constructivists and New Stream scholars share, for example, an appreciation of the historical and cultural context of international rules and an emphasis on intersubjective meanings of human consciousness. On intersubjectivity, see Adler, \textit{Seizing the Middle Ground: Constructivism in World Politics}, p. 327, citing Cohen’s statement that “intersubjective meanings are not simply the aggregation of the beliefs of individuals who jointly experience and interpret the world. Rather, they exist as collective knowledge ‘that is shared by all who are competent to engage in or recognise the appropriate performance of social practices or range of practices’.”

\textsuperscript{36} See Appendix I for the theoretical terminology used in this thesis. Ontology: the study of the nature of being, existence, or reality in general. Epistemology: the study of how we can claim to know something.

\textsuperscript{37} Not only dissertations in public international law, but in law in general, seem to have this in common, see Sandgren, Claes, \textit{Ar rättsdogmatiken dogmatisk?}, Tidsskrift for Rettstvenskap, 4-5, 2005, pp. 648-656, p. 648. Legal positivism in general has indeed been criticised for its preoccupation with the question ‘what is the law?’, and its failure to address the more fundamental question ‘what is law?’, see Wacks, Raymond, \textit{Understanding Jurisprudence. An Introduction to Legal Theory}, Oxford University Press, Oxford, 2005, p. 44.
is in fact a consensus on the terminology. There are various overlapping definitions or descriptions of its content. My first instinct was that I would not need to make further theoretical explanations. But because of the ontological and epistemological accounts of the IR theories and my interdisciplinary approach referred to in this chapter and Chapter 3, I was compelled to explain briefly the legal positivist ontological and epistemological assumptions on the nature of law and how to find knowledge of it when applying a legal positivist methodology.

Because writers start from dissimilar and often inarticulate premises about the nature of law, these different theoretical presuppositions result in disparate conclusions about what international law is or says. Slaughter and Ratner assert that the choice between different theoretical perspectives or methods is highly personal, but also reflects the relative utility in addressing a particular legal problem as well as what kinds of problem to address. The practice of a particular method is ultimately a matter of choice, and this choice should be as self-conscious as possible.

the method is the message – a message not only about who we are but about what our discipline should be.

I believe that there are no universally true theories of law, and perhaps never will be. What law is or ‘should mean is a question of definition’ and theories are ‘nothing but claims’, as Fastenrath formulates it. Theories are theories – not truths. I have chosen to employ legal positivist methodology in the legal analysis. This is not because I necessarily believe it to be the universally best perspective or theory of law. Even this theory embeds its predispositions of law.

Doctrinal divergences and disagreements are inevitable because all theoretical positions are, to some degree, subjective inasmuch as they reflect the author’s own predispositions and concerns, some of which can be quite transient.

There are two specific reasons for my choice of making use of legal positivism in this thesis: 1) it is the dominant legal theory, and its normative contentions or propositions are considered to represent a

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38 See an account in Sandgren, Är rättidogmatiken dogmatisk?, pp. 649-650. One issue of controversy is whether a legal dogmatic methodology allows for analysis beyond a description of the ‘valid’ law.


41 Ibid., p. 410.


43 Fastenrath, Relative Normativity in International Law, p. 332.

44 Scobbie, Some common heresies about international law, p. 63.
more or less authoritative description of the legal order and its contents,
2) it is the perspective of law that is most useful for the purposes of
answering the research questions under consideration in this thesis since
it purports to determine *lex lata*.

### 1.3.2.2. Legal positivism

international law has entered its post-ontological era. Its lawyers need no longer
defend the very existence of international law.45

The question as to whether ‘international law really is law at all’, will not be
discussed in this thesis since I, as with many scholars, submit to the
quotation of Franck and assume the position that we no longer need to
doubt the existence of international law as law.46 For reasons of space,
neither will the instrumentalist question ‘what the law is for?’ be addressed
in this thesis.47

Legal positivism is the predominant contemporary legal theory
although an array of other theories of jurisprudence exist and offer
alternative explanations to the ontological question: ‘what is law?’, or
more specifically, ‘what is international law?’.48 Even within the realm of
‘legal positivism’ various theories and answers to these questions
abound.49 Legal positivism is one form of ‘positivism’ which in general
philosophical terms is based upon the idea that, logic and mathematics
apart, only phenomena available to the senses are amenable to scientific

45 Franck, Thomas M., *Fairness in International Law and Institutions*, Oxford University Press,
Oxford, 1995, p. 6. The claim may be a truth with modifications. There are still scholars
who challenge this claim, see e.g. Goldsmith, Jack L., Posner, Eric A., *Limits of International

46 Oppenheim’s main defence of international law as law is that those who deny
international law make the mistake of wrongly conceiving a ‘definition of law’, which is
based upon municipal law as a starting point. A body of rules may be law in the strict sense
of the term even though it may not at some stages of its development possess all the
also Jennings, Sir Robert, Watts, Sir Arthur (Eds.), *Oppenheim’s International Law. Vol 1, Peace.
13.

47 To briefly quote the widely cited expression of the Permanent Court of International
Justice in the Lotus Case of the functions of international law: “International law governs
relation between independent states. […] established in order to regulate the relations
between these co-existing interdependent communities or with a view to the achievement
of common aims.”, Case of the S. S. Lotus, PCIJ Series A, No 10, 1927, p. 17.

48 Both modern and postmodern legal movements (such as e.g. modern natural law, Justice
Theory, Rights Theory, Interpretative Theory, Legal Realism, the New Haven School’s
policy oriented jurisprudence, Critical Legal Studies, New Stream/New Approaches to
International Law (NAIL), Feminist jurisprudence, Law and Economics) suggest different
answers to these questions.

49 For example, classical legal positivism developed by Jeremy Bentham and John Austin,
and modern legal positivism by i.a. Hans Kelsen, H. L. Hart, Joseph Raz. As Wacks points
out, their method of inquiry and general objectives are, however, often as different as the
features they share, see Wacks, *Understanding Jurisprudence. An Introduction to Legal Theory*, p. 43.
knowledge. This is an indication that the theory is largely derived from empirical methodology.

Legal positivist theories of law may be briefly described as those that concentrate on a description of law as it is in a given time and place, by reference to formal, rather than to moral or ethical criteria of identification. Legal positivism is said to be a descriptive theory of ‘law as it is’ (lex lata), as opposed to ‘law as it should be’ (lex ferenda). It purports to describe valid law or law proper – that is, law that has come into force or effect and is already binding on its subjects. This form of positivism is known as ‘methodological legal positivism’. Methodological positivists stress the non-existent relationship between jurisprudence and morality. ‘Material legal positivism’ on the other hand, embraces the idea that it is the law and morality that are not conceptually related. Legal positivism is a theory of the nature of law, while there are other theories on legal reasoning, such as for example formalism. It is wholly acceptable to adopt the former and reject the latter. Hence, legal positivism does not automatically mean a formalistic or value nihilistic application of the law.

The main characteristics of classical or traditional legal positivism articulated by John Austin and Jeremy Bentham, is that ‘law is the command of the sovereign backed by a sanction’. International law is seen as a unified system of rules that emanate from state will – voluntarism. Voluntarism, from the tradition of Hobbes, implies that states, because of the principle of sovereign equality of states, only are bound to the law to which they have consented through their own will.

Modern or contemporary variants of legal positivism developed by H. L. Hart and Hans Kelsen share the common features that they reject the idea of law as a command by the sovereign as the basis for validity. Modern legal positivism identifies law with legal propositions and at the

50 Fastenrath, Relative Normativity in International Law, p. 306.
53 Ibid., p. 572.
55 Spaak, Rättspositivism och juridisk argumentation, p. 595.
57 Simma and Paulus, Symposium on Method in International Law: The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: A Positivist View, pp. 303-4. They refer to the classic expression in the Lotus Case (1927) that the rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.
core the concept of validity of the law lies. Kelsen’s grundnorm or basic norm and Hart’s rule of recognition lay the basis for their theories in explaining what constitutes the validity of law. The validity of the grundnorm is based upon a metaphysical assumption, and the rule of recognition is, by Hart, explained as a social fact.

Hart, known for his analytical and linguistic philosophy of law and as a follower of Bentham and Hume, has listed five (but there may be more) meanings of legal positivism: 1) laws are commands of human beings; 2) there is no necessary connection between law and morality; 3) the study of legal concepts is worth pursuing and they should be distinguished from historical and sociological inquiries of their origin, social relations and criticisms; 4) a legal system is a closed logical system in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, and moral standards; 5) moral judgments cannot be established as statements of fact can, by rational argument, evidence, or proof (non-cognitivism in ethics). Hart’s ‘soft positivist’ view of law has been criticised by other legal positivists. Joseph Raz, a ‘hard positivist’ also called ‘exclusivist’, has put forward another set of main claims about the nature of law that are also often cited.

Contending legal positivists support or reject at least one or several of these, or stress other theoretical theses about law, such as for example the separability thesis (denying the existence of necessary moral constraints on the content of law); the pedigree thesis (articulating the necessary conditions or criteria for legal validity in respect of how or by whom law is promulgated); and the discretion thesis (asserting that judges decide hard cases by making new law). Some also add the effectiveness thesis, which contends that law exists and is valid only if it is effective and hence controls the behaviour of its subjects.

1.3.2.3. International legal positivism

International law is described by international legal positivists as the body of rules legally binding on states in their mutual intercourse, or in other words, it regulates the conduct of states in their relations with one another. The basis of international law as a legal system is in the

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59 Fastenrath, Relative Normativity in International Law, p. 307.
61 See Raz, Joseph, The Authority of Law: Essays on Law and Morality, Clarendon Press, Oxford, 1979, pp 37-38: The social thesis upholds that law can be identified as a social and empirical fact without recourse to morality. The moral thesis says that the moral value of law or the moral merit it has is contingent matter dependent on the concept of the law and the circumstances of the society to which it applies. The semantic thesis states that terms such as ‘rights’ and ‘duties’ cannot be used in the same meaning in legal and moral contexts.
63 Spaak, Rättspositivism och juridisk argumentation, p. 568.
common consent of the members of the international community to govern their conduct as members of that community. This consent can be either express or implied.

The idea that the will of states is the basis of international law and hence that law is dependent on the consent of States is referred to in international law theory as ‘voluntarism’ or consensualism.

Falk, however, argues that there is a discernible trend from consent to consensus as the basis of international legal obligations. For this reason, when it comes to legal positivist theory and methodology in international law, there is likewise no generally recognised theory or method, and there never was one.

The link between a legal theory and a legal method is said to lie between the abstract and the applied. There are as many methods as there are legal theories, and the number has only increased over the past century. At the beginning of the last century, Lassa Oppenheim defined the legal positivist method in international law as the science of law that takes existing recognised rules of international law as they are to be found in the customary practice of the states or in law-making conventions as a starting point.

Article 38 of the statute of the International Court of Justice (ICJ) specifies the sources of international law that the court has to take into account in its adjudication. Although it is not the purpose of the provision, it has traditionally been accepted as constituting a list of the sources of international law. In addition to the two primary sources of


72 The Statute of the International Court of Justice, 26 June 1945, I UNTS XVI, .

73 Scholars have criticised it for not listing all sources or that it includes elements that are
international law that Oppenheim mentioned (international conventions and international customary law), the statute lists ‘general principles of law recognised by civilized nations’. Secondary sources or rather subsidiary means for the determination of rules of law are specified as judicial decisions and the teachings of the most highly qualified publicists of the various nations.

In Chapter 2, I shall further elaborate on the primary sources of international law according to Article 38 of the ICJ Statute, with the focus on customary international law, its evolution and changes, since it is the most important source for the study of an emerging norm (or norms) on R2P.

1.3.2.4. Soft (legal) positivism

For several different reasons, soft positivism is the legal positivist theory closest to my own orientation of mind. This does not mean that I agree with all of Hart’s contentions of law or international law in particular, but because it is the theory of legal positivism commonly applied and providing a framework of assumptions closest to my own stance, to which I can connect to and collect some guidance.

Hart’s legal theory led to a revised or modified legal positivism that rejected the classical combination of command and coercion as the basis for validity of law. Instead it stresses a system of rules and their interaction. To Hart, ‘law is a social phenomenon’, and a legal system is a product of the union of primary and secondary rules. The elements of law are made up of these primary and secondary rules and the existence of the primary rules of obligation is identified through the secondary ‘rule of recognition’. The rule of recognition is in a modern legal system the element that identifies the law and particular rules – it is like “the scoring rule of a game”. It provides the criteria by which the


75 McCoubrey and White, *Textbook on Jurisprudence*, p. 32.


77 Primary rules of obligation can be found in primitive social structures in the form of custom, and secondary rules are rules of ‘recognition, change and adjudication’. The secondary rules remedy the defects of primary rules; their uncertainty, static character and inefficiency respectively. See Hart, *The Concept of Law*, 2nd edition, pp. 91-98.

78 Ibid., p. 94.

79 Ibid., p. 102. The existence of such a rule may take any of a great variety of forms, simple or complex according to Hart. It may be no more than that of an authoritative list or text of
validity of other rules of the system are assessed, an ultimate rule. It
certifies whether or not a rule is indeed a legal rule. The validity of the
rule of recognition rests not on an assumption but on its factual
character or basis. It exists, according to Hart, only as:

a complex, but normally concordant, practice of the courts, officials, and private
persons in identifying the law by reference to certain criteria. Its existence is a
matter of fact.

Soft legal positivists are ‘incorporationists’, as opposed to ‘exclusivist’
hard legal positivists, and accept that content or merit may be a
condition of validity where the rule of recognition so specifies. This
means that the determination whether a norm is a legal norm may
depend on its moral principles or substantive values. But morality can
only be a condition of validity where the rule of recognition so stipulates,
according to Hart. As a result, a soft legal positivist hence believes that
the rule of recognition may include moral standards and hence that law
occasionally may incorporate moral criteria for ascertaining what the law
is. This concession, however, only claims that a rule of recognition may
make a moral compliance necessary, not a sufficient, condition of
legality. The Hartian perspective therefore acknowledges that there is a
‘minimum content’ of natural law. The modified legal positivism of
Hart has also been termed ‘New Positivism’ by D’Amato because of its
reconciliatory or middle path position between natural law and positivist
law.

On the question of international law, Hart was reluctant to see it as a
system of rules with legal quality. He believed it to be a doubtful case,
lacking not only secondary rules but also a rule of recognition specifying
the sources of law. His theory contends that in form, international law
together with primitive law resembles a regime of primary rules. On the
question of whether international law can be binding and therefore valid
despite its form, he stated:

the rules of the simple structure are, like the basic rule of the more advanced
systems, binding if they are accepted and function as such.

Accordingly, a set of rules are accepted by states as binding rules and
therefore binding. He refers to Bentham, the inventor of the

the rules found in a written document or carved on some public monument, see p. 94.

80 Ibid., p. 105.
81 Ibid., p. 109.
82 Ibid., p. 110.
84 Ibid., p. 73. See also McCoubrey and White, Textbook on Jurisprudence, p. 55.
85 van Hoof, G. J. H., Rethinking the Sources of International Law, Kluwer, IJsselstein, 1983, pp.
45-46; Higgins, Problems and Prowess. International Law and How We Use It, p. 8.
87 Ibid., p. 235.
88 Ibid., p. 236.
expression “international law”, when explaining that it is “sufficiently analogous” to municipal law.  

In international law, ‘soft’, ‘modified’ or ‘enlightened’ legal positivism means a broader view of the ways and fora in which states can express their will. At the Symposium on ‘Method in International Law’ arranged by the American Journal of International Law in 1999, Simma and Paulus argued for an ‘enlightened’ legal positivism in international law where soft law as well as moral and political considerations are seen as part of the law without rendering it an arbitrary enterprise:

Of course, the time when the claim of positive science to objective knowledge remained largely unchallenged is over, and there is no way back to yesterday’s certainties behind the insights of critical theory, be it late- or postmodern. If we take the critique of positivism as a call for self-consciousness of one’s own political, economic, religious, ethical, male or other bias, we do not object. But what we do reject is the step from criticism of positivism to arbitrariness or postmodern relativism. Enlightened positivism is identical neither with formalism nor with voluntarism. Both custom and general principles cannot simply be reduced to instances of state will. So-called soft law is an important device for the attribution of meaning to rules and for the perception of legal change. Moral and political considerations are not alien to law but part of it.

These words summarise more or less the position on international law that I have adopted in the legal analyses of this thesis. However, notwithstanding all these legal positivist theories and assumptions about law and international law, as the introduction to this thesis has indicated, I take a ‘problem-oriented approach’ in this thesis, rather than that of a solely rule-oriented approach.

1.3.2.5. Legal positivism revisited for ‘emerging customary norms’

1.3.2.5.1. Introduction

Does it make a difference if one applies a definition of international law as rules or as process, and which epistemological effects will one’s ontological position of law have on the methodology used when determining what the law says and how we find knowledge of it? Does the study of ‘emerging or ongoing changes in the norms on the use of force’ need a different epistemology than the one legal positivist theory offers?

89 Ibid., p. 237. The analogy refers to content and not form. According to Bull, Hart does not draw the conclusion that international law should be denied the status of law because it is not possible to discern secondary rules of recognition, change and adjudication. Bull, The Anarchical Society: A Study of Order in World Politics, p. 130.

90 Slaughter & Ratner, The Method is the Message, p. 411; Simma and Paulus, Symposium on Method in International Law. The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, p. 306, where Simma and Paulus explain how modern textbooks recognise the need to widen e.g. the evidence of ‘state practice’. See more about customary international law in Chapter 1.4. of this thesis.

In this chapter I shall discuss the usefulness of applying a legal positivist perspective on emerging or changing international customary norms on R2P, and after having explored several legal post-positivist theories, make use of a constructivist perspective on this customary process, for the purpose of briefly complementing the previous analysis in the thesis with a few thoughts.

Since the emerging norm of R2P has not yet attained lege lata this thesis focuses on a process rather than on determining lex lata. Legal positivism offers a useful methodology in order to answer the question of law proper, but does not fully address the question “to what extent has the R2P doctrine been accommodated in international law”. It primarily helps to answer which elements of the R2P doctrine have attained the status of legal norms lex lata. It may therefore be argued that legal positivism is less useful at describing the customary process of developing norms. Since the rules on the use of force resides within a highly politicised, controversial and power-dominated sphere, changes in the rules on the use of force are much more dependent on a customary process-oriented way of legislating than on other areas of international law. Thus, the assessment of this incomplete customary process with a legal positivist methodology is limited due to its ontological and epistemological basis and limitations.

The claimed shortcomings of the legal positivist perspective on norms as rules rather than process in this context will be addressed by exploring other theoretical perspectives and insights within international law and international relations focusing on norms as process. Legal post-positivist perspectives of law will therefore briefly be examined in order to investigate whether legal theories based upon a process-oriented ontology (instead of the rule-oriented legal positivist theory) is more useful for the study of the customary process on R2P. Furthermore, arguments for rejecting the New Haven School’s view on law and other legal theorist attempts to ‘bridge’ the rule and process-oriented theories are briefly discussed.

Epistemological needs to find further methodologies and theoretical approaches to answer the stipulated research question have pushed me to go beyond law and continue my search outside the realm of legal theory for a suitable methodology to study this customary process from a broader horizon. My attention has been caught by interdisciplinary efforts to describe and explain the emergence of new norms. Legal scholars’ interdisciplinary contributions to the study of norms and customary law have been examined as well as different theoretical approaches to norms by scholars in the international relations discipline. The IR research on norms in general has to a large extent treated norms in a broader sense and has not always been concerned to distinguish legal norms from other norms (for example political, social, moral or cultural). Traditionally, the greatest efforts of interdisciplinary works to explore the interface between international politics and international law have been made by the liberal or neo-liberal institutionalists, with a focus on
regime theories, international institutions and international legal rules. But the constructivist literature on norms has proliferated and contributed to new and interesting insights and widening approaches to the subject matter. Structural realists and neo-realists have traditionally shown little interest in legal norms and have not really explored the relationship between international law and international relations.

The constructivist perspective(s) on norms is an area of research that has mainly been developed by international relations scholars, but there have been a few legal scholars who have been instrumental in the elaboration of constructivist ontology of international law. Below is presented the work of Jutta Brunnée and Stephen Toope, together with research by constructivist IR scholars. Constructivist approaches to law, however, are to a great extent a new and still underdeveloped sphere of legal theory research that needs to be further expanded and evolved, particularly with regard to constructivist epistemologies on law. The constructivist approach in public international law endows this thesis with a rather new approach to law, unfamiliar to many lawyers, which it is hoped will illuminate some issues from a new angle and advance the knowledge of constructivist perspectives within the legal discipline. There is an aspiration that international law will be enriched by this new model of interdisciplinary approach and perspective that could be replicated, used and further advanced in other areas of law.

The application of constructivist theories on the subject of ‘humanitarian intervention’ is not new. Outstanding constructivist contributions on this topic can be found in Nicholas Wheeler’s Saving Strangers and Martha Finnemore’s The purpose of intervention. My analysis, however, distinguishes itself distinctly from their works owing to the subject of the study – the concepts of human security and R2P. Also, as a lawyer, I believe that my analysis can provide additional perspectives on the customary process from a lawyer’s point of view.

Hence, the constructivist perspective on norms has been chosen for a brief and supplementary analysis on the evolution of new customary norms on R2P, contributing to a wider perspective and better understanding of how norms, structures, identity, interest and power interact in the emergence of norms. I shall thus apply one IR constructivist perspective on international law and norm emergence to comment on the international customary law process of emerging norms on R2P, as a complement to the legal positivist assessments in Chapters 5 to 8.

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92 E.g. Robert Keohane, Oran Young, Andrew Hurrell, Kenneth Abbott and Anne-Marie Slaughter; see Byers, Custom, Power and the Power of Rules, International Relations and Customary International Law, p. 34.

93 See e.g. the work of Anthony Clark Arend, Martha Finnemore, Kathryn Sikkink and Richard Price.
1.3.2.5.2. Methodological shortcomings for the study on emerging customary norms

Michael Byers has pointed to a few shortcomings in the legal positivist methodology in explaining the customary law process. Most legal positivist writers are concerned with determining the existence, meaning and scope of application and effect of legal rules, and not so much with understanding the processes through which those rules are created. Byers nevertheless distinguishes the fine line to be drawn between examining the role of power in the customary process and allowing that examination to influence how one determines the existence and content of individual customary rules. He mentions that some lawyers worry that consideration of the role of power might lead judges and lawyers to favour some states over others and considering that role might call into question the stability and determinacy of international law. Instead, lawyers often assume to varying degrees that international law is the result of processes that are at least procedurally objective and in that sense apolitical. Byers contends that the inequalities among actors may have a greater effect on customary law-making than on law-making in other areas due, in part, to the lack of formalised procedures in this area and to the central role played by behaviour in the development, maintenance and change of customary rules.

He furthermore asserts a well recognised phenomenon when stating that although all States are equally entitled to participate in the customary process, in general, it may be easier for more ‘powerful’ States to behave in ways which will significantly influence the development, maintenance or change of customary rules. Such states may also have more opportunities than less powerful States in which to do so.

Powerful states have greater military, economic and political strength that enables them to enforce jurisdictional claims, impose trade sanctions and dampen or divert international criticism. Byers therefore argues that the social process and social dynamics of customary international law is

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94 See Byers, *Custom, Power and the Power of Rules, International Relations and Customary International Law*, which examines the relationship between international law and power within the confines of the process of customary international law.

95 Byers explains several reasons why international lawyers should seek to understand the process of customary law, see *ibid.*, pp. 25, 35-52, 214.

96 This is part of Koskenniemi’s argument and by deconstructing international law, the hidden values and power structures embedded in the law are revealed, hence the indeterminacy of the legal arguments. It is therefore true that more strict legal positivist perspective leads to perceived and constructed stability and order. C.f. *ibid.*, p. 49.


98 *Ibid.*, p. 37. See also on the same topic, *ibid.*, pp. 19, 217. He argues however in this book that the effect of disparities among states is qualified in this context by fundamental principles such as those of jurisdiction, personality, reciprocity and legitimate expectations. Hence, the development, maintenance and change of customary rules are never strictly political or strictly legal in character.
difficult, if not impossible, wholly to explain from within a traditional legal positivist paradigm. He appears to adopt a more sociological or constructivist understanding of the international customary process when stating that rules of customary international law are the result of an interactive and evolving process whereby different States contribute, in differing ways and degrees, to the ongoing development, maintenance and change of generally applicable rules. [...] the frequently unequal contributions of States occur within, and are qualified by, a structured system of those States’ own creation.

The main purpose of legal positivism is to give a correct account of valid law as it is, and not necessarily to find answers on how to deal with ‘hard cases’, or dictate under what circumstances ‘civil disobedience’ can or should be legitimate. The emerging concept of a Responsibility to Protect is sometimes referred to as a legitimate form of ‘necessity’ in which military force is used against another state for humanitarian purposes. The controversial question of humanitarian intervention is a typical hard case in where no clear answers can be found in the law as it is. In the creation of new customary rules, existing lex lata is sometimes violated. In this highly politicised area of law, dealing with the use of force, we must go beyond legal positivism to find a theoretical basis and methodology to analyse emerging norms and its customary process.

1.3.2.5.3. Beyond legal positivism – A process-oriented legal theory?

The best known normative process-oriented theory of international law is the New Haven (School) Policy Oriented School of sociological jurisprudence. The School regards law as process instead of law as rules, and is thus believed to be a midway between natural law and legal positivism.

99 Ibid., p. 216. He adds that it requires the adoption and application of social science type conceptions. “Only by stepping back from the study of ‘law as a norm’ can one begin to account for the full complexity of the interaction of power and obligation in the process of customary international law.”

100 Ibid., p. 216.


102 Spaak, Rättspositivism och juridisk argumentation, p. 567.


105 Mendelson, Maurice H., The Formation of Customary International Law, Recueil des Cours,
It is well known that McDougal’s ‘policy view’ on international law opened up for more national interest centred perspectives in the application of the law. A relatively high risk of subjective application is associated with this approach and the theory may be charged with being in (constant) danger of becoming a mere apology for the policies and preferences of the most powerful. The shift away from rules towards process makes the distinction between law and politics almost impossible. The policy-oriented theory links its formulation of law as decisions of authority and control with the ultimate goal of promoting values of human dignity. This last criterion invites a subjective interpretation of values. Kratochwil describes the dilemma:

The teleological aspect of the theory in which the process of authoritative decision making is linked to achieving a public order of human dignity runs the risk of utilising mistaken instrumentalist metaphors for ascertaining the legal validity of norms.

It is a theory that ‘openly’ allows for and justifies subjective interpretations of the means to achieve the ends. For the above mentioned reasons, this School or theory of law will not be considered as the optimal basis for studying the customary process in this thesis, and its application is therefore rejected.

1.3.2.5.4. Bridges between rule and process-oriented legal theories of international law?

Structural positivism, a term coined by van Hoof and aimed as a follow-up theory to Hart’s New Positivism due to its reconciliatory position or middle path between the rule-oriented and the process or policy-oriented doctrines, seeks the key to answering the question of the sources of law in the ‘practice’ of the members of a society and their relations – that is in the structure of society. van Hoof builds on Hart’s model of the law elaborated in *The Concept of Law* (1961) but takes a very restricted and rigid view on customary law. His view is based upon the conception that there is no rule of recognition in international law, and he chooses to define customary international law narrowly in order to avoid custom
to be stretched to the point where it becomes unclear or meaningless as a source.\textsuperscript{111} Van Hoof writes:

As Thirlway has explained: “the view one takes of customary law, and particularly of the way it comes into existence, necessarily affects the view taken of the present and future part to be played by custom in developing the law.” It should, therefore, be made clear from the outset that in the opinion of the present writer customary international law should be narrowly defined. It was pointed out above, that as a result of the changed structure of international society the latter has grown considerably more heterogeneous. Simultaneously, state-practice has become more diversified and divergent, and this is bound to affect a practice-oriented source like customary international law. It is conceivable to remedy this state of affairs by widening the concept of customary international law so as to encompass the new developments. However, in the present author’s view, such an approach would likely be counter-productive. It entails the standing danger that the concept of custom will be stretched to the point where it becomes unclear or even meaningless as a source and detrimental to the effective operation of international law. In the present circumstances, therefore, it would seem far better to start from a restrictive concept of custom and try to explain methods of law-making which do not fit in by some other way.\textsuperscript{112}

Cheng, in a review of van Hoof’s book \textit{Rethinking the Sources of International Law} (1983), described his approach as ‘doctrinaire dogmatism’ for relying much more on the legal doctrine than on state practice and for containing rigidly formalistic interpretations of article 38 of the ICJ Statute.\textsuperscript{113} This approach is meant to bridge the process and rule-oriented perspectives of law but does not provide a sufficient broad basis for the study of the customary process on R2P. Its excessively narrow approach to customary law limits its usefulness for this study and its application will therefore also be rejected.

The following strategy will therefore be to look for a different bridge between rule and process approaches drawing on interdisciplinary perspectives and insights, and theories of norms within international relations theory in particular (see Chapter 1.3.4.). But first, some comments on international relations theories.

\textsuperscript{111} See van Hoof, \textit{Rethinking the Sources of International Law}, p. 91.
\textsuperscript{112} Ibid., p. 91.
1.3.3. International relations theory (IR)

1.3.3.1. Constructivist perspectives on IR

INTRODUCTION – MY CONSTRUCTIVIST THEORETICAL STANCE

I have chosen to reject a traditional 'positivist approach' to international relations in favour of a 'constitutive theory' that has developed over the past twenty years – constructivism. Constructivist perspectives on international relations focus on analysis where the elements of agents, identity, interests, norms, structures and institutions in the international society are seen as mutually constitutive in international relations.

A 'constitutive theory' rests on the belief that our theories help construct the world and views language and concepts as contributing elements in creating reality. Such theories focus on "how" rather than "why" questions in order to understand how structures constitute social kinds. Constitutive theories have been increasingly influential since the end of the Cold War. It could be argued that the concept of human security could in the long run have the capacity to change the way we look at security as well as the choice of means we employ to address

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114 Positivism in social science is not the same as legal positivism but share similar tenets. Positivism in social science embodies a foundational epistemology which means that objective knowledge is perceived to be realisable and that this can be done through empirical testing of hypotheses against evidence of facts. All truth claims can hence be judged true or false. Positivism in international relations is the underlying methodological assumptions of the contemporary versions of realism, which takes the world and existing framework and institutions, interests and identities of the actors (states) in the international society as given. Barnett, Michael, *Social Constructivism*, Baylis, John and Smith, Steve, with the assistance of Patricia Owens (Eds.), *The Globalization of World Politics, An introduction to international relations*, 3rd edition, Oxford University Press, Oxford, 2005, p. 274. For a definition of legal positivism, see Chapter 1.3.2.2. and the Appendix I on the theoretical terminology used in this chapter.

115 Constructivism is the notion of a heterogenous theoretical perspective or theory in international relations having certain factors in common such as emphasising the importance of normative and ideational structures as well as material structures, the role of identity in shaping political action and the interlinkage of identity, interest and action by the mutually constitutive relationship between structures and agents, see Reus-Smith, *Constructivism*, p. 118. Briefly, constructivism focuses on analysis where the elements of power, identity, interests and the construction of structures and institutions in the international society are seen as mutually constitutive in international relations. Among its major founders and developers John Ruggie, Alexander Wendt, Nicholas Greenwood Onuf, Friedrich Kratochwil, and Peter Katzenstein can be mentioned. A constitutive theory rests on the belief that our theories help construct the world and views language and concepts as contributing to create reality. See Appendix I on the theoretical terminology used in this chapter.

116 See Baylis, John, Smith, Steve, with the assistance of Patricia Owens (Eds.), *The Globalization of World Politics, An Introduction to International Relations*, 3rd edition, Oxford University Press, Oxford, 2005, pp. 273-274. The opposite position, 'explanatory theory', is represented by the realist and structuralist theories, and views the social world as separate and external from theory and which can be studied in the same manner as the physical world. See Baylis and Smith (Eds.), *The Globalization of World Politics, An Introduction to International Relations*, pp. 273-274. For a short explanation of theoretical terminology, see Appendix I.
insecurities. The change of language and terminology with regard to R2P, instead of a right to humanitarian intervention, is not only about semantics but also shapes the way that states act and construct the world.

Constructivism tends to reject the basic tenets of positivism without becoming fully post-positivist, but instead attempts to occupy the ‘middle ground’ between positivist theories (occupied by neo-realism, neo-liberalism and marxism) and alternative ‘post-positivist theories’ for example ‘critical theory’, feminism and ‘post-modernism’. There are various forms of constructivist perspectives and among them I lean more towards the reflective than the rationalist, and towards the modern rather than the post-modern theories. The perspective I feel inclined to embrace would in theory fall under the label of modern

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117 The objective of Wendt’s work was to “build a bridge between these two traditions [the modern and post-modern] (and by extension, between the realist-liberal and rationalist-reflectivist debates) by developing a constructivist argument, drawn from structurationist sociology, on behalf of the liberal claim that international institutions can transform state identities and interests”; Young, International Law and International Relations Theory: Building Bridges. Remarks, p. 394. Barnett, Social Constructivism, p. 263; Smith and Owens, Alternative approaches to international theories, p. 275.

118 For an overview of post-positivist perspectives in international relations, see Smith and Owens, Alternative approaches to international theories, pp. 274-275.

119 Post-modernist theories are sceptical about foundationalism and meta-narratives, and depending on the various branches, is concerned with deconstruction, double reading and the relationship between power and knowledge. For an overview of post-modernism, see Devetak, Richard, Postmodernism, Burchill, Scott, Linklater, Scott (Eds.), Theories of International Relations, 1st edition, St. Martin's Press, Inc., New York, 1996, pp. 179-209; Bayles and Smith (Eds.), The Globalization of World Politics. An Introduction to International Relations, pp. 285-287.

120 Reflectivism includes several different post-positivist and alternative approaches such as feminism, post-modernism and critical theory, and stands in opposition to rationalism and more generally positivism. Such theories emphasise the interpretation of events rather than empirical data. The rejection of the positivist approach has led to criticism that reflectivist theories cannot make reliable statements about the external world. Robert Keohane has, for example, criticised reflectivist theories for being less well specified as theories and that they lack a clear reflective program that could be employed in world politics, see in Barnett, Social Constructivism, p. 256. The opposing position, rationalism (embodied in neo-realism, neo-liberalism and marxism) entails that the major actors, states, are believed to be rationalist in their actions, selecting strategies to maximise benefits and minimise losses. The rationalism applied by the neo-realist and neo-liberalist theories is informed by the assumption of rational choice theory and the logic of rationalist economic theory to international relations. See Reus-Smit, Christian, The Politics of International Law, Reus-Smit, Christian (Ed.), The Politics of International Law, Cambridge University Press, Cambridge, 2004, p. 18; Reus-Smit, Constructivism, p. 188; Robert Keohane, Oran Young and Andrew Hurrell are proponents of rationalist institutionalism. They stress the significance of institutions and international rules that facilitate co-operation between states as well as the role of individual persons and groups for the establishment of institutions. Game theory and rational choice theory can help analyse the rational choices made by states. For a general introduction to alternative theories to international theory, see Smith and Owens, Alternative approaches to international theories, p. 271 et seq.

constructivist theory, making use of empiricist epistemology but regarding its findings as historically contingent.\textsuperscript{122} Taking this position, it would be appropriate to talk of ‘relative foundationalism’ or ‘minimal foundationalism’.\textsuperscript{123}

My inclinations will however not prevent me from employing the insights of other constructivists when their contributions are of interest and relevance for my analysis. Due to constructivism’s close connections and affiliations with critical theory,\textsuperscript{124} I also allow myself to be inspired some extent by critical perspectives on security, and for that purpose attempt to give a short explanation of their relationship with regard to security.

\textbf{CONSTRUCTIVISM IN INTERNATIONAL RELATIONS}

I would like to start by briefly outlining the ontological and epistemological positions of different constructivist perspectives on international relations that appear to be useful for this thesis.

Rejecting the rationalist precepts of neo-realism and neo-liberalism, constructivists advance a sociological perspective on world politics, emphasizing the importance of \textit{normative} as well as \textit{material} structures, the role of \textit{identity} in the constitution of \textit{interests} and \textit{action}, and the \textit{mutual} constitution of \textit{agents} and \textit{structures}.\textsuperscript{125}

Constructivists are concerned with the same issues and features of world politics as those of the rationalist theories, although from a different perspective. But in addition they are also concerned with the identities of actors and the meanings they give to their actions, which is one feature of the reflectivist approach. This theory therefore tends to occupy the middle ground between rationalist and interpretive approaches (post-structural, post-modern and critical).\textsuperscript{126} Armed with considerable ideational insights from both sociological and critical theories,
constructivist scholars claim that ideas and interpretations are essential to the construction of social reality. Because of their close connection to sociological theories, constructivism has also been labelled “sociological institutionalism”, as opposed to rational institutionalism.127 Though John Ruggie had previously conducted a constructivist analysis and critique of neo-realism in the early 1980s, it was in 1989 that Nicholas Onuf first coined the term “constructivism” in his book World of Our Making, and most followers have since seemed to prefer this denomination.128

Not without critique, Price and Reus-Smit argue that constructivism has its roots in critical theory.129 It developed from criticism directed against the inability of the dominant rational theories, in particular that of neo-realism, to explain fundamental changes in international society and global transformation at the end of the Cold War. According to Price, the constructivists took on the neglected dimensions of critical theory, the lack of empirical studies and the development of theories that could explain the social world. They answered the challenge to go beyond the deconstruction and critique of the hegemonic theories of

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127 Beck, International Law and International Relations: The Prospects for Interdisciplinary Collaboration, p. 7. Sociological institutionalism has also been called “reflective institutionalism” by Robert Keohane. This is not a correct term according to Adler who purports constructivism as the middle ground between rationalist and reflectivist approaches. See Adler, Seizing the Middle Ground: Constructivism in World Politics, p. 322.


129 See Price and Reus-Smit, Dangerous Liaisons? Critical International Theory and Constructivism, p. 265 and also p. 261, where Price explains that leading constructivists explicitly identify themselves as critical theorists and trace their roots to the Third Debate of the 1970s and 1980s. According to them, “constructivists work with ontological assumptions, conceptual frameworks and methodological approaches that originate in critical social theory”. The Third Debate consisted of two debates, between rationalists and constructivists, and between constructivists and critical theorists, see Reus-Smit, Constructivism22, p. 188. According to Reus-Smit, constructivism grew out of this debate, challenging rationalism and positivism at the same time as pushing critical theorists away from metatheoretical critique to the empirical analysis of world politics; the Third Debate has also been called the inter-paradigm debate, cf. Tickner, Ann J., Gendering World Politics. Issues and Approaches in the Post-Cold War Era, Columbia University Press, New York, 2001, p. 24; Steans, Jill, Gender and International Relations. Issues, Debates and Future Directions 2nd edition, Polity Press, Cambridge, 2006, pp. 21-22.
international relations.\textsuperscript{130} Other scholars, however, disagree on the roots of constructivism and its relationship to critical theory.\textsuperscript{151}

Price and Reus-Smit have summarised three core ontological propositions\textsuperscript{132} of constructivism as: 1) the importance of normative or ideational structures as well as material structures. ‘Systems of meaning’ or ideas are believed to define how actors interpret their material environment and also the social identities of actors. Material resources only acquire meaning for human action through the structures of shared knowledge in which they are embedded, as Alexander Wendt formulates it; 2) Identities constitute interests and actions. Interests and preferences of actors are shaped by the identities of actors and are not exogenously determined. Regimes cannot change identities and interests if the latter is taken as given;\textsuperscript{133} 3) Agents and structures are mutually constitutive. Normative and ideational structures define the meaning and identity of actors as well as the patterns of appropriate economic, political and cultural activity. These structures are created through reciprocal interaction between actors. Social structures are ‘routinized discursive and physical practices that persist over an extended temporal and spatial domain’\textsuperscript{134} The identities of agents are influenced by ideational and normative structures that in turn influence the behaviour of agents and thus the material structures created by these practices.\textsuperscript{135}

Constructivism is the view that the manner in which the material world shapes and is shaped by human action and interaction depends on dynamic normative and epistemic interpretations of the material world.\textsuperscript{136}

This theory challenges the notion of fixed or exogenous interests of states and claims that interests can be changed through international,


\textsuperscript{131} See more on the relationship between constructivism and critical theory in the next Chapter (1.3.3.2.).


\textsuperscript{134} Price and Reus-Smit refer to the work of the structurationist Anthony Giddens, whose ‘structuration theory’ has contributed to and influenced the constructivist view on interconnectedness between agency (action) and structure.

\textsuperscript{135} For example, it may be argued that the collective security system (a material structure) has been created by agents (states) based upon their perceptions and ideas of security and international relations (normative and ideational structures) influencing their identities and interests in international relations, and in turn guiding the behaviour and practices constituting the collective security system.

\textsuperscript{136} Adler, \textit{Seizing the Middle Ground: Constructivism in World Politics}, p. 322. Its added value is argued to be the emphasis on the “ontological reality of intersubjective knowledge and on the epistemological and methodological implications of this reality”.
trans-national and domestic processes. It purports that the language and concepts that we use to think about the world help us to create the world we inhabit, and that identities are the basis of states’ interests. Furthermore, constructivists claim that the fundamental structures of international politics are social rather than strictly material. Constructivism stands between materialism and idealism, and between individual agency and social structure, based upon the notion of intersubjectivity (implying shared collective knowledge).

Constructivist epistemology is based upon interpretation as an intrinsic part of social science and stresses contingent generalisations. The theory views intersubjective knowledge and ideas as having constitutive effects on social reality and evolution. Intersubjective knowledge, consisting of ideas, rules, norms and understandings that make material objects meaningful, is the source of people’s interests and intentional acts. If institutionalised, then this knowledge becomes the source of international practices. This model explains how states converge on specific norms, form identities and construct interests from collective processes of understanding and learning.

Wendt argued in his famous article on anarchy and power politics, “Anarchy is what states make of it”, that ‘actors and structures are mutually constitutive’. This means that international normative structures are believed not only to constrain but in fact also constitute and construct the identities and interests of states. But at the same time states recreate those very same structures through state practices and interactions. According to him, an institution is a relatively stable structure of identities and interests that are often codified in formal rules and norms. These institutions do not exist apart from the actor’s ideas about how the world works but are a function of what actors collectively know.

Wendt’s strategy for building a ‘bridge’ (between modern and post-modern, realism and liberalism, rationalist and reflectivist) was to argue against the neo-realist claim that self-help is given by the anarchic structure between states and that this fact is independent of the interaction or process between states.

I argue that self-help and power politics do not follow either logically or causally from anarchy and that if today we find ourselves in a self-help world, this is due to process, not structure.

Hence, self-help and power politics are institutions and structures socially created by states, and not essential features of anarchy.

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137 Barnett, Social Constructivism, pp. 251-270.
138 Adler, Seizing the Middle Ground: Constructivism in World Politics, pp. 325-326.
140 Ibid., 102.
141 Wendt, Anarchy is what states make of it: the social construction of power politics.
142 Young, International Law and International Relations Theory: Building Bridges. Remarks, p. 399. Self-help is seen as one of various possible structures of identity and interest under anarchy.
143 Wendt, Anarchy is what states make of it: the social construction of power politics, p. 394.
Structure and institutions have no existence or causal powers apart from processes and interactions between states. Wendt believes that in the realist view, anarchy justifies uninterest in the institutional transformation of identities and interests and this contributes to systemic theories in exclusively rationalist terms. He argues that ‘rationalism’ offers a fundamentally behavioural conception of both processes and institutions in which behaviour may be changed but not identities and interests. The game-theoretic analysis of co-operation among egoists is at base cognitive rather than behavioural, since it treats the intersubjective knowledge that defines the structure of identities and interests as endogenous or prior to interaction, see p. 417.

Thus, depending on the interaction and the identities and interests of states, different responses to the structure of anarchy can be created and developed. Self-help is not the only response. Institutions that are based upon co-operation between states are another response, which liberals have been more keen on promoting than the realists. In a similar manner one may argue that the legal order is a structure or institution in the international society of states that is created and maintained through the processes and interactions between states, which is a co-operative response intended to create a Rule of Law society in place of anarchy.

According to a constructivist perspective the structures of international society are socially constructed and can therefore be changed by changing the way we think – for example, the way we perceive and define security. Wendt argues that the ‘security dilemma’, that is that we shall never live in a world without wars, is a social structure composed of intersubjective understanding in which states are so innately distrustful and therefore define their interests as self-help, from an international lawyer’s perspective, the international legal system can be seen to provide a relatively stable structure of norms, material mechanisms and procedures contributes to some degree of order and predictability in the relations between states.


145 Wendt, Anarchy is what states make of it: the social construction of power politics, pp. 392, 394. He argues that ‘rationalism’ offers a fundamentally behavioural conception of both processes and institutions in which behaviour may be changed but not identities and interests. The game-theoretic analysis of co-operation among egoists is at base cognitive rather than behavioural, since it treats the intersubjective knowledge that defines the structure of identities and interests as endogenous or prior to interaction, see p. 417.

146 Ibid., pp. 410-418. For example, he describes that “the institution of sovereignty transforms identities” is shorthand for saying that “regular practices produce mutually constituting sovereign identities (agents) and their associated institutional norms (structures)”, p. 413.

147 Ibid., pp. 412-413.

148 From an international lawyer’s perspective, the international legal system can be seen to provide a relatively stable structure of norms, material mechanisms and procedures contributes to some degree of order and predictability in the relations between states.

leading to wars as self-fulfilling prophecies. In Wendt’s words: “Concepts of security differ in the extent to which and the manner in which the self is identified cognitively with the other.”\textsuperscript{150} It appears a realist is more pessimistic compared with a liberalist, who is more optimistic about the role and effects of co-operation.

Wendt, however, has been accused of being more rationalist than reflectivist as well as overly state-centred in his assumptions about international relations.\textsuperscript{151} Constructivism in general has also attracted similar objections from more critical scholars:

Thus they really are not constructivists at all, but liberals and positivists in disguise, who stick close to the precepts of rationalist theories.\textsuperscript{152}

### 1.3.3.2. Security theories supportive of human security and R2P?

#### Constructivism and security

The end of the Cold War raised the importance of non-traditional security issues and challenged the neo-realist advantage among security theories and prominence of ‘traditional security’. The fall of the Soviet empire strengthened the weight of the constructivists’ arguments that international relations are not only about power politics but also about ideas. The notion of ‘human security’ was popularised in the 1990s and marked a triumph for proponents of a broad understanding of security. Nevertheless, the concept of security still remains ‘essentially contested’.\textsuperscript{153} The same applies to the concept of human security, and which ontological stance should be applied to it.

‘Human security’ is a promising but still underdeveloped paradigmatic approach to understanding contemporary security politics.\textsuperscript{154}

One prominent ‘human security’ scholar in Canada, Fen Osler Hampson, concluded in his review of scholarly literature on human security, that “[c]onventional realist frameworks of international relations theory prove quite inhospitable to human security approaches”. He states:

\begin{footnotesize}
\begin{itemize}
  \item Wendt, \textit{Anarchy is what states make of it: the social construction of power politics}, p. 399.
  \item Adler, \textit{Handbook of International Relations}, p. 107. The reference is made to the positions of Richard Ashley, David Campbell and Jim George.
  \item The four main questions that the security debate is centred upon are: “1) who or what should be the focus – the referent object – of security; 2) who or what threatens security; 3) who has the prerogative to provide security; and 4) what methods are appropriate, or inappropriate, in providing security? See Henk, Dan, \textit{Human Security: Relevance and Implications}, Parameters, US Army War College Quarterly, vol Summer, 2005, pp. 91-106, p. 96.
\end{itemize}
\end{footnotesize}
systematic attempts to develop theory and methodology helpful for understanding human security ultimately appear to involve the abandonment, if not outright repudiation, of the various realist schools of IR theorizing. Some scholars have turned instead to feminist critiques to address human security questions, and more generally to constructivism.\textsuperscript{155}

Newman points out that constructivism shares fundamental assumptions with human security approaches. For example, that threats are constructed and can therefore be altered or mitigated in the same way as social, political and economic relations are constructed and changeable.\textsuperscript{156} He furthermore asserts that the focus on human security has projected the legitimacy of humanitarian intervention into the international arena, and is an illustration of ‘constructivism in action’.\textsuperscript{157} The feminist theories employed in this study will be accounted for in Chapter 1.3.5., together with feminist theory on jurisprudence.

Acharya holds a different view and contends that human security is not a liberal, constructivist, or critical theoretical notion that realists are obliged to oppose, but instead challenges the academic community to ‘transcend the inter-paradigm debate’.\textsuperscript{158} He believes that each theoretical stance has something to offer in the research on human security and can illuminate human security from different perspectives; for example, liberalism on its emphasis on non-state actors, and critical theory on providing an anti-statist outlook on security. According to him constructivism could offer important insights on ‘how human security ideas are promoted by global norm entrepreneurs and how shifts in the global ideational structure can help or hinder prospects for human security’.\textsuperscript{159}

One of the major concerns of constructivist scholars is the study of the ‘reasons’ for action (answering the ‘why’ questions). These are believed to be composed of both a motive and a justification, which do not need to coincide.\textsuperscript{160} The following subchapters will analyse the most


\textsuperscript{157} Ibid., p. 247.


\textsuperscript{159} Acharya, \textit{A Holistic Paradigm}, p. 356.

\textsuperscript{160} Reus-Smit, \textit{The Politics of International Law}, pp. 22-23. Reus-Smit exemplifies this distinction: the motive explains why NATO intervened in Serbia in 1999 and the justifications where the reasons NATO gave for the right to use force against Serbia. International humanitarian obligations to prevent genocide and grave crimes against humanity provided the justificatory framework.
relevant security theories, their relationships and theoretical contributions, in terms of weaknesses and strengths, for a human security doctrine.

**The Copenhagen School**

The Copenhagen School, emanating from the Copenhagen Peace Research Institute (COPRI), contributed greatly to the broadening of the ‘traditional security’ concept by introducing new security sectors apart from the military sector, for example, societal security, and environmental security. In Buzan’s early work, *People, states and fear*, he criticised the narrow foundations for traditional national security that was dominant during the Cold War and surveyed the area on which a broader view could be built. He was initially closely affiliated with the neo-realist insights of the international system, but later came to develop a more constructivist approach. In ‘Security: A New Framework for Analysis’, Buzan, Ole Waever and Jaap de Wilde argued that ‘securitization’ is intersubjective and socially constructed. They took a radical constructivist approach to security studies, albeit with limitations in their approach to international relations as such.

The theory of *securitization* and *desecuritization* was developed by Waever and builds on a ‘speech act’ theory, and the notions of ‘referent object’, ‘securitization actors’ and ‘functional actors’. An issue can become a security issue through a speech act of effective elites that the audience accepts. Securitization can be seen as a more extreme version of politisation, an exact definition and criteria is argued to be constituted by the intersubjective establishment of an existential threat with a saliency sufficient to have substantial political effects, and Securitization on the international level means to “present an issue as urgent and existential, so important that it should not be exposed to the normal haggling of politics but should be dealt with decisively by top leaders prior to other issues”, p. 29. For more references on securitization, see infra note 98.

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161 Ole Waever and Barry Buzan have contributed with the main theoretical framework for the Copenhagen School.

162 Five security sectors were introduced: military, environmental, economic, societal and political, in Buzan, Barry, Waever, Ole, de Wilde, Jaap, *Security. A New Framework for Analysis*, Lynne Rienner Publishers, London, 1998. Sectors are views of the international system through a lens that magnifies one particular aspect of the relationship and interaction among all of its constituent units, ibid. p. 27.


164 Buzan, Waever and de Wilde, *Security. A New Framework for Analysis*, p. 31. Securitization can be seen as a more extreme version of politisation, p. 23. An exact definition and criteria is argued to be constituted by the intersubjective establishment of an existential threat with a saliency sufficient to have substantial political effects, p. 25. Securitization on the international level means to “present an issue as urgent and existential, as so important that it should not be exposed to the normal haggling of politics but should be dealt with decisively by top leaders prior to other issues”, p. 29. For more references on securitization, see infra note 98.

165 *Ibid.* p. 205. In figure 9.1 on Schools of Security Studies they place themselves as radical constructivists regarding security studies but on a lower constructivist level than CSS regarding international relations in general. See Waever’s reply to Johan Eriksson’s criticism that there is a logical contradiction between taking a widened sectoral approach to security and the theory of securitization, implying a wish to avoid securitization, Waever, Ole, ‘Securitizing Sectors? Reply to Eriksson’, *Cooperation and Conflict*, vol 34, 3, 1999, pp. 334-340.


167 See Waever, *Securitization and Desecuritization*, Waever, *Concepts of Security*, p. 221; Buzan,
existential threat requiring emergency action or special measures and the acceptance of that designation by a significant audience.\textsuperscript{168} There are facilitating conditions under which the speech act works, which are both internal (linguistic) and external (contextual and social).\textsuperscript{169} An example of an external condition is the authority and social capital of the securitizing actor. Securitization can be \textit{ad hoc} or institutionalised, as in the case of when the Security Council decides on the existence of a threat to international peace and security under Chapter VII in the UN Charter.

\textbf{Critical Security Studies}

Critical theory has been a main force behind the deepening of the security concept, which implies a shift in the focus on who is or should be the recipient of security; not only states but also \textit{individuals}.\textsuperscript{170} It has provided a theoretical framework with the individual as the main referent object based upon the understanding that states sometimes are unable to fulfill their functions of safeguarding the physical security of their citizens and can be a source of threat to the security of their own peoples through genocide, ethnic cleansing, mass-killings and other gross violations of human rights.

The critical theorists are sceptical of the notion of objectivity and reject the view that the social world can be studied in the same way as the natural world, like physics, and therefore emphasise discourse, intersubjective meaning, and the historical contingency of knowledge and behavioural regularities.\textsuperscript{171} They are concerned with discovering the underlying political and philosophical assumptions of different security perspectives in world politics. Booth describes critical theory to stand outside prevailing structures, processes, ideologies, and orthodoxies while recognising that all conceptualizations of security derive from particular political/theoretical positions; critical perspectives do not make a claim to be objective truth but rather seek to provide deeper understanding of prevailing attitudes and behaviour with a view to developing more promising ideas by which to overcome structural and contingent human wrongs.\textsuperscript{172}

There are both modern and post-modern critical theorists. The former is open to the use of empirical methods for falsifying or verifying claims while the latter is more reluctant to rely on empirical research.\textsuperscript{173}

\textsuperscript{169} Ibid., pp. 32-33.
Constructivism – Critical Security Studies

Constructivism was at an earlier stage more naturally considered to be part of ‘Critical Security Studies’ (CSS). This was mainly due to the clustering of ‘alternative perspectives’ of security that rejected mainstream neo-realist presumptions of ‘traditional security’. The compilation of such perspectives can be studied in Krause and William’s ‘Critical Security Studies. Concepts and Cases’.[174] Their book, includes a diversity of orientations of interpretative methodology. They were, according to the editors, united on two things. The first was a dissatisfaction with the “renaissance” account of strategic/security studies, in which new issues and challenges are being subsumed under old (and unexamined) approaches to the discipline. Second, they [the authors] were equally dissatisfied with a simple “expansionist” agenda for security that celebrates the end of the Cold War as an opportunity to remove military and security issues from center stage and replace them with diverse challenges to individual and collective well-being or human survival.[175]

For the reader it becomes confusing to try to understand what CSS actually is by studying these various perspectives ranging from globalist, post-structuralist, constructivist, to feminist. It could be argued that it was a first attempt to present what was to develop, although still contested, into Critical Security Studies.

Since this book was published in 1997, constructivism and critical theory seem to have developed into more or less different directions and strengthened their own theoretical framework, more independently and far away from each other. Although Price and Reus-Smit argue that constructivism has its roots in critical theory,[176] some firmly reject this connection,[177] while others argue for their exclusion from the concept of

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175 Ibid., p. xix.
176 Price and Reus-Smit, Dangerous Liaisons? Critical International Theory and Constructivism. They purport that constructivism does not violate the principal epistemological, methodological and normative tenets of critical theory, and in fact as being part of the same ‘family’ even contributes to the development of critical international theory in several ways. Adler lists critical theory as one form of constructivist theory in Adler, Handbook of International Relations, p. 127. There seems to be little consensus on the roots of constructivism and its relationship to critical theory.
177 Kurki, Milja, Sinclair, Adriana, Hidden in plain sight: reflections on the limitations of the constructivist treatment of social context, 2006 (on file with authors). Arguing from a critical non-liberal feminist perspective they contend that constructivist perspectives of law remain unwilling to accept the ‘indeterminacy’ of law and are not critical enough about the social and historical origins of law and how it embeds power and power structures. Their conclusion is that constructivism therefore subscribes to the framework of the liberalist enterprise and contributes to an image of law as objective and apolitical, just like legal positivism. They believe that law is a form of power itself that is indistinguishable from and deeply reflective of other social structures as racism, sexism and capitalism, and therefore not a set of rules between equals. Since law is deeply political they argue for a more contextual approach that helps us gain a better understanding of power relations and causes of actions in IR. Constructivist analysis of international law reproduces the liberal conception of society where free, equal individuals act in a rational manner to best further
CSS. Also, for some, post-structuralism/post-modernism, feminism and 'securitization studies' are not welcome under the umbrella of CSS. Booth argues, for example, that CSS should be restricted to the critical perspectives that have a clear and solid critical foundation. This means they must be rooted in the Frankfurt School tradition and thus on the work of Max Horkheimer, Theodor Adorno, Axel Honneth and Jürgen Habermas.

Based upon the Frankfurt School tradition, and with the aim of renewing the critical project in relation to security, Wyn Jones delineates the contours and contents of an 'emancipatory critical security theory' that widens, deepens and broadens the notion of security. It is an 'open ended theory' that admits to not having answers to all the questions and is open to further developments in different directions. Attractive as it seems for the study of human security by its choice of referent object as the individual, Wyn Jones never mentions the concept of human security. This does not necessarily mean a rejection or uninterest in human security, but nonetheless reflects how this branch of Critical Security Studies for some reason has not yet advanced its research on the topic.

THE COPENHAGEN SCHOOL – CRITICAL SECURITY STUDIES

The Copenhagen School and Critical Security Studies share the idea that security is socially constructed, but the former expressly

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178 Booth, Ken (Ed.), Critical Security Studies and World Politics, Lynne Rienner Publishers, Boulder, 2005, pp. 271-172. Booth does not think constructivism is a theory of security and believes that the most clearly positivist school today is the English School. Headly Bull was an early contributor to the ideas of this school.

179 Ibid., pp. 15, 269-272. Booth believes e.g. that the broad sectoral approach of security of the constructivist Copenhagen School still rests firmly on a neorealirist perspective mixed in a curious combination with liberalism and post-structuralism. Krause also seem to agree with Booth that post-structuralism or post-modernism does not have its roots in the critical theory, which he perceives is derived from the German tradition of thinkers such as Jürgen Habermas. See Krause, Critical Theory and Security Studies. The Research Programme of 'Critical Security Studies', p. 299.

180 Booth (Ed.), Critical Security Studies and World Politics, p. 261. For a thorough exposition of the still developing theoretical framework of the Frankfurt School view of CSS, see Wyn Jones, Richard, Security, Strategy, and Critical Theory, Lynne Rienner Publishers, Boulder, 1999. The Frankfurt School's framework is built upon the concept of 'human emancipation' and that they are the two sides of the same coin – emancipation is and produces security. The critics counter-argue that emancipation is a difficult notion to define.


182 Critical Security Studies is not itself a theory of security but a body of knowledge and comprises 'a variety of critical approaches of security beyond the realist mainstream'. It is contested by the realists and positivists as threatening disciplinary chaos, and it focuses on uncovering the interests and power games underlying the security discourse. See Krause and Williams (Eds.), Critical Security Studies, Concepts and Cases. There are several different schools of thought under this umbrella and it is contested which of these schools really belong there, e.g. critical theory, constructivism, post-structuralism, feminist theory, post-colonial theory. See the misunderstandings of CSS according to Booth in Booth (Ed.), Critical Security Studies and World Politics, pp. 12, 260.
distinguishes its constructivist approach from CSS by being less optimistic of and interested in changes of social structures, and also more interested in understanding the political constructions of security structures and what actually triggers securitization. Buzan, Waever and de Wilde write:

We seek to find coherence not by confining security to the military sector but by exploring the logic of security itself to find out what differentiates security and the process of securitization from that which is merely political.

In the abstract, desecuritization is believed to be the ideal since security can be seen as negative, a failure to deal with an issue as normal politics. The Copenhagen School is also more state centric in their view by claiming that a limited collectivity, implying entities less institutionalised than states, is insufficient for achieving status as a ‘referent object’ of security. This means that they reject the notion of human security based upon the ‘individual’ as a possible referent object of security:

There are other differences between the two approaches (much of CSS takes the individual as the true reference for security – human security – and thus in its individualism differs from our methodological collectivism and focus on collectivities).

Hence, they are closer to traditional security studies than CSS because of their tight link between the state and security. Buzan openly admits that he thinks human security is a non-fruitful, reductionist way of looking at security and furthermore that it is more or less the same thing as human rights, and therefore does not have an added value. I disagree with Buzan on this and would like to point to recent research that has sought to distinguish the differences and relationship between human security and human rights. An important question to ask is whether human

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183 Buzan, Waever and de Wilde, Security. A New Framework for Analysis, pp. 34-35. Cf. also their position among schools of security studies in figure 9.1, where they argue that they are more constructivist in relation to security, but less constructivist with regard to social relations than CSS, p. 205, Buzan, Waever and de Wilde, Security. A New Framework for Analysis.


185 Ibid., p. 29.

186 “Referent objects: things that are seen to be existentially threatened and that have a legitimate claim to survival.” Ibid., pp. 35-37.

187 Ibid., p. 35.


security in fact implies the study of security of individuals or whether it is rather a matter of addressing the security concerns of human beings as a group in different contexts, for example, civilians in internal armed conflicts, an ethnic group facing genocide, child soldiers, anti-personal landmines and so on, rather than on the security of states. There appear to be disparate views on this.\(^{190}\)

Waever, takes the same statist approach as Buzan and hence warns against the broadening and deepening of the security agenda for individuals as well, and for a wide range of issues, so that security does not become all inclusive and a synonym for everything.\(^{191}\) He suggests that security problems are developments that threaten the sovereign or independence of a state in a particularly rapid or dramatic fashion, and deprive it of the capacity to manage by itself.\(^{192}\)

Notwithstanding the founders’ limitations of the theory of securitization and their rejections of the concept of human security, one could still find a use for the securitization theory by analogy and some modification. According to the founders, securitization studies:

aims to gain an increasingly precise understanding of who securitizes, on what issues (threats), for whom (referent objects), why, with what results, and, not the least, under what conditions (i.e. what explains when securitization is successful).\(^{193}\)

This approach to security could be useful for a framework of analysis for the study of the processes whereby in which human security issues are becoming increasingly securitized and contributing to a development of the concept of responsibility to protect. I have chosen the constructivist stance as the main basis for my analysis on human security and responsibility to protect, but there are also valuable theoretical insights offered by Critical Security Studies. One reason is that the non-statist stance of critical theory sees individuals as the main referent object of security, contrary to the Copenhagen School.

\(^{190}\) Newman argues that human security seeks to replace the state as the referent object with either ‘individuals’ or ‘people collectively’, see Newman, *International Studies Perspectives*, p. 239. Møller views ‘human security’ as having the individual as the referent object, ‘national security’ the state, and ‘societal security’ the societal group, see Møller, Bjørn, *National, Societal and Human Security. A General Discussion with a Case Study from the Balkans, 2000* (paper for the First International Meeting of Directors of Peace Research and Training Institutions on *What Agenda for Human Security in the Twenty-first Century?*, Paris, 27-28 November 2000). The Canadian approach to human security is that it is the individual that is the referent object, see Bajpai, Kanti, Kroc Institute, University of Notre Dame, (Publ.), *Human Security: Concept and Measurement, Occasional Paper #19:OP-1*, "http://www.nd.edu/~krocinst/ocpapers/abs_19_1.html ", (2003-08-14) p. 21.


1.3.4. Interdisciplinary approaches to international norms

1.3.4.1. Introduction

This chapter presents and discusses different interdisciplinary approaches to international law, primarily from a constructivist perspective. The presentation on constructivist perspectives on international law is separated by the different contributions made by both international legal and international relations scholars. A constructivist theory on law developed by international lawyers are analysed in Chapter 1.3.4.2., and several different constructivist perspectives on norms by international relations scholars are examined in Chapter 1.3.4.3. The last Chapter 1.3.4.4. analyses whether to apply a constructivist theory on emerging norms on humanitarian intervention in this thesis.

One relevant contribution in the context of interdisciplinary approaches to international law, by a legal scholar focusing specifically on the international customary process, is Byers’ legal dissertation *Custom, Power and the Power of Rules*, in which he combines a traditional legal positivist and a rational liberalist approach. Moreover, Slaughter also elaborates on the application of liberal international relations theory to law in international society. She has developed a “dual agenda” in her interdisciplinary scholarship, bridging the two distinct theoretical traditions in political science: Institutionalism and liberalism with international law.

The constructivist scholar Richard Price, however, is critical of a liberalist interdisciplinary approach to international law. He argues that “Byers’ own integration of international relations theory into customary international law is limited to a conception of norms emphasised by the neo-liberal institutionalist school” and “while these efforts are fruitful, they do not exhaust the contributions of international relations research on norms”. He claims that Byers’ approach is subject to the same limitations as the neo-liberal conception of norms premised on an individualistic ontology usually driven by a materialist conception of state interests. These theories omit the idea that state interests are socially constructed and the importance of identity in constituting norms. Price suggests that the integration of insights from constructivist international relations scholarship with legal conceptualisations of customary international law will enrich the ability to discern the status of

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194 ‘Norms’ imply more than legal norms and the term is used as a broader concept, not only encompassing law.
international norms in ambiguous situations, and overcome some of the difficulties derived from legal positivist conceptions of norms.198

This new approach to law provided by the constructivist branch of international relations evolved in the post-Cold War period.199 These scholars have studied the roles that culture, institutions and norms play in shaping identity and influencing behaviour. Constructivists have created various analytical tools that help identify the emergence of norms through, for example, the process of an ‘argumentative framework’,200 an ‘authority or control index’,201 or describing the ‘life cycle’ of a norm.202

There are several ontological and epistemological reasons for not choosing to apply the liberalist interdisciplinary model developed by Byers nor the ‘dual agenda’ of Slaughter as the primary theoretical basis for my analysis. The liberal tradition is rooted in rationalist assumptions, which treats actors and interests as given and exogenous to interaction.203 It is based upon a formalist and legal positivist conception of law, seen through the domestic law prism. Eriksson critiques rationalism for disregarding the fact that actions are shaped by time and space, political and cultural contexts and therefore does not grasp the complexity of policy and processes – its claim of universality is too simplistic and therefore not ‘sufficiently realistic’.204 Another convincing argument by Toope is that the liberal institutionalist research on regime theories and governance has not concerned itself with the “regime continuum” – that is, the process in which norms harden into legal rules, the consolidation of norms.205 As has been displayed in the theory Chapter 1.3.3.1., my basic underlying approach to international relations is more reflectivist and critical than the rationalist stance to which the theories of Slaughter and Byers belong. However, interesting ideas and arguments in liberal institutional analysis will, when relevant, be included in the analysis.

So why would this study need a constructivist analysis for the study of the international customary law process? Several factors lead to the conclusion that an understanding of ‘what law is’ and how rules are formulated in international relations theories could contribute to the

198 Ibid., p. 122.
204 Eriksson, Johan, Kampen om hotbilden. Rätt och drama i svensk säkerhetspolitik, Johan Eriksson, Santérus Förlag, Stockholm, 2004, p. 57. Eriksson is a Swedish eclectic and pragmatic scholar influenced by social constructivism.
analysis in this thesis. One contributing factor mentioned earlier is that a legal positivist analysis, being separated from politics and power with regard to international law, does not take into account the power politics present in the customary process. A process dealing with new norms in the area of international security and the use of force is particularly burdened with power politics and state interests. If power relationships among states play a role in the process of customary international law, it is unlikely that the customary process could ever be the completely neutral, procedurally objective mechanism that some legal scholars seem to claim.206 Byers concludes in his book on custom and power, the need to go beyond legal positivism when studying customary international law:

Such a social process, in this case the social dynamic of customary international law, is difficult if not impossible, to explain on a traditional, positivist basis. It requires the adoption and application of social science-type conceptions, such as those of institutionalism, shared understanding, social purpose and relative resistance to change. Only by stepping back from the study of ‘law as a norm’ can one begin to account for the full complexity of the interaction of power and obligation in the process of customary international law.207

Not only do the liberal institutionalists share this idea. The constructivists believe that a non-positivist conception of law could help clarify the way norms help to shape identities and influence behaviour – that is, generate normativity.208 Over the past two decades various constructivists have developed their interdisciplinary ontological, and to some extent, epistemological views on international law and research on the relationship between international legal norms and international relations.209 They differ slightly from each other by emphasising, among other things, different elements of international law based upon their ontological inclinations. I would like to draw on these insights for my own analysis on the emerging customary norms of R2P

1.3.4.2. A legal constructivist theory on international law

Brunnée and Toope are two international lawyers who became dissatisfied with their framework for analysis when working on the security aspects of shared fresh water resources and began searching for a new approach to international law and international relationship. When exploring the means of moving the security studies away from their traditional preoccupation by military issues, and ways to conceive of

207 Ibid., p. 216.
209 This type of constructivism should not be confused with the equity-based constructivism that Martti Koskenniemi discusses in his thesis, by which international tribunals employ equitable principles in their judgements. That constructivism is a form of ‘legisitating from the bench’. Koskenniemi, From Apology to Utopia, The Structure of International Legal Argument, p. 223.
human security in broader terms, they found that a shared, narrow understanding of law by lawyers and political scientists hindered the interdisciplinary debate. They realised that many of the potentially useful insights of IR scholars on norms were based upon conceptions of law that had limited explanatory power in a horizontal system such as the public international legal order.

Brunnée and Toope argue that the hierarchical view of law is a construction derived from a ‘grundnorm’ or a ‘rule of recognition’, and that in the horizontal nature of international law this is problematic. By freeing law from a legal positivist optic and accounting for its horizontal traits, constructivists can help international lawyers understand the genesis and effect of law. But they also believe that one of the most helpful contributions in this process that international lawyers can make is to unpack the legal positivist underpinnings of most IR theorists’ understanding of rules and offer alternative explanations of normativity.

They accordingly came to develop a constructivist theory of law called “interactional legal theory” based upon the work of Lon L. Fuller. From this perspective law is seen as a social process “generated and molded through interaction and, in turn, as affecting actor behaviour by influencing actor identity and thereby reconstructing interests” – hence, an enterprise in continuation rather than as a finished project. Brunnée and Toope do not view Fuller as a natural law theorist, mainly because his idea of ‘internal morality’ of norms are to do more with the means (that is, process by which law is created) rather than with the ends that law may achieve. The two scholars argue from a constructivist viewpoint that the ends of the interaction in question are not determined but can be discovered and learned. Structures such as institutions, norms and rules are not immutable but can be recast through changes in actor identity, which in turn, are influenced by interaction and mutually created

210 Brunnée, Jutta, Toope, Stephen J., Interactional International Law, International Law FORUM du droit international, vol 3, 2001, pp. 186-192, see pp. 186-187. Toope argues, for example, that a constructivist view on regime theory helps international lawyers to ask questions about how norms evolve which can lead to a greater appreciation of the independent value of pre-legal normativity, and learning about the evolution of norms that over time may harden into binding obligations, Toope, Emerging Patterns of Governance and International Law, pp. 98, 107-108.


213 For a presentation of Fuller’s theories see Brunnée and Toope, International Law and Constructivism: Elements of an Interactional Theory of International Law, and Fuller, Lon L., The Morality of Law, Yale University Press, New Haven, 1969. Fuller has common ground with constructivism in that he articulates an interactional understanding of law. He also rejects a rigid separation of morality and law by looking at law in a “continuum” where e.g. moral norms sometimes harden into law and can influence behaviour before it has attained legal status. Law can therefore exist by degrees.


215 Brunnée and Toope, International Law and Constructivism: Elements of an Interactional Theory of International Law, p. 56. The moral ends or outcomes of law, or achieved by law, have been the defining characteristic of natural lawyers.
structures. The binding effect of law is seen to be created through a process of mutual construction, legitimacy gained by adherence to internal criteria, and congruence with existing social norms, practices and aspirations.\textsuperscript{216}

According to Fuller’s approach, certain internal characteristics of legal rules, such as clarity, avoidance of contradiction and consistency over time, account for their bindingness rather than hierarchical authority or pedigree.\textsuperscript{217} The more these internal criteria are present, the greater the legitimacy of law.\textsuperscript{218} Morality and law are not seen to be radically distinct concepts; at the same time law is not identical to politics and therefore has a “relative autonomy”.\textsuperscript{219}

Similarities with the traditional notions of state practice and opinio juris can be traced in Toope and Brunnée’s idea of emerging legal norms: “Through processes of institutionalisation and learning, norms emerge from patterns of practice that generate shared understandings.”\textsuperscript{220} The binding effect of law is “self-bindingness”, which is created through processes of mutual construction, legitimacy gained by adherence to internal criteria, and congruence with existing social norms, practices, and aspirations. Hence, they believe that there is no radical discontinuity between law and non-law, that the process of building legal normativity requires many of the same building blocks as other forms of social activity.\textsuperscript{221} Therefore they argue against the structural distinctions that identify law and instead examine the processes that constitute a ‘normative continuum’, bridging from predictable interactional patterns of practice to legally required behaviour.

Their view on law as a social process reminds us more of policy-oriented legal theory. However, these constructivist scholars point to several elements where they differ from the New Haven school in their approach to international law. For example, they reject the idea that bindingness in law arises through authority and by consent of elites. Law is instead self-binding, shaped by ‘internal requirements’ that condition the legitimacy and normativity of law.\textsuperscript{222} They see themselves as less

\textsuperscript{217} The binding effect of law is seen to be created through a process of mutual construction, legitimacy gained by adherence to internal criteria, and congruence with existing social norms, practices and aspirations. \textit{Ibid.}, p. 116.
\textsuperscript{218} \textit{Ibid.}, p. 115. See note 63 for an account of these eight criteria or internal requirements of law. My own critique against this theory is that the internal criteria or characteristics that is the test of whether a norm is really a legal norm could be argued to be more of a test between different kinds of legal norms, \textit{i.e.} those legal norms that are also legitimate and therefore more ‘true’ legal norms in an ideal or moral sense, and other legal norms that live up to the formalistic requirements but that lack legitimacy or morality.
\textsuperscript{221} Brunnée and Toope, \textit{International Law and Constructivism: Elements of an Interactional Theory of International Law}, p. 68.
\textsuperscript{222} \textit{Ibid.}, p. 25.
instrumental than McDougal and Lasswell, who have defined an overriding goal for law – that of serving ‘human dignity’.

Another observation that may be made is that the theory appears to rely on the (self-)bindingness of law as a constitutive element of law, which would exclude many laws not fully complied with but still enacted. Such law would thus hence be deprived of its legal status due to non-compliance in a form of desuetude.

Unfortunately, Brunnée and Toope’s thoroughly elaborated ontology on an interactional international law based upon a constructivist understanding of norms (explaining what a legal norm is) lacks an epistemology that gives guidance on a methodology of how the scholar may discern the legal norm formation in the norm continuum (how to find knowledge of legal norms). The theory does not appear yet ready to be applied for an operational analysis on emerging customary norms. Nevertheless, it is useful in providing an alternative understanding of this customary process per se.

1.3.4.3. IR constructivist theories on international norms

The first key work in the international relations discipline linking constructivist insights to the evolution of international law was undertaken by Friedrich Kratochwil. He argues that the distinctive nature of law is traceable by distinctive features of reasoning with rules and norms. Looking at law as a particular style of reasoning, his analysis, based upon rather unorthodox legal methodology, focuses on the nature of legal reasoning in a way that resembles analytical deconstruction. Kratochwil, and also Nicholas Onuf, have received criticism from other constructivists for being too positivist (here referring to legal positivism), relying expressly on Hart’s hierarchical ordering of norms. These scholars see international law as a vertical construction rather than being horizontal by making domestic analogies of law.

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223 Kratochwil, Rules, norms and decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs. See also the work by Greenwood Onuf who has made significant constructivist (with a more post-modern touch than Kratochwil) contributions to the understanding of legal rules in international relations, Onuf, World of Our Making. Rules and Rule in Social Theory and International Relations.

224 E.g. by Brunnée and Toope, see Brunnée and Toope, The Changing Nile Basin Regime: Does Law Matter? and Brunnée and Toope, International Law and Constructivism: Elements of an International Theory of International Law, pp. 38-39. See examples of a positivist and domestic law perspective in Kratochwil, Rules, norms and decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs, pp. 206-207. Nevertheless, Kratochwil exposes a limited acknowledgement of the horizontal nature of international law by stating “… In this sense international law exhibits some features of a developed legal system and it possesses at the same time traits of a customary order characterised by horizontal patterns of authority.”, ibid., p. 253.

225 Although Kratochwil is suspicious that Hart’s construct is fraught and rejects the conclusion that international law does not have any rule of recognition, he states: “[w]hile international law does not have a ‘rule’ of recognition, it surely has rules of recognition or to use the more common term, sources of law”, Kratochwil, Rules, norms and decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs, p. 192. He also rejects the process-oriented New Haven school and adopts a ‘law as a system of rules’ approach, see pp. 193-200.
Brunnée and Toope define themselves less (legal) positivistic in their constructivist approach to law.\textsuperscript{226} I agree with their critique that Kratochwil’s view on international law as a style of reasoning is seen through a prism of national judicial decision-making and therefore not very helpful for the study of the international customary process. Anthony Clark Arend’s constructivist methodology for determining an international legal rule purports to represent a middle way between the legal positivist and policy-oriented schools of thought.\textsuperscript{227} He shares many legal positivist assumptions on international law, for example, an ontology of law as \textit{rules} and a theory of consensus for the creation of rules, but bases his terminology for an epistemological index on the New Haven inspired concepts of ‘authority’ and ‘control’.\textsuperscript{228} Arend’s interpretation and use of the ‘authority’ and ‘control’ criteria is more or less to assign them the same meanings as \textit{opinio juris} and state practice respectively.\textsuperscript{229} In the determination of who belongs to the ‘effective elites’ who make the authoritative decisions, the concept is given a less broad interpretation in line with the legal positivist meaning in which only the \textit{opinio juris} of states is sought.\textsuperscript{230} He expressly does not acknowledge the importance played by non-state actors in the law-making process, which is unusual for a reflective institutionalist. He further distinguishes himself from the classical New Haven school by admitting that “law is not a process itself,”\textsuperscript{231} and also completely omits the teleological element of ‘human dignity’.\textsuperscript{232} This makes his authority and control index easily accessible, less subjective, useful and pragmatic in providing measurable points of reference in rule determination. Unfortunately I am not wholly convinced of Arend’s contention that he has managed to bridge the gap between legal positivism and the New Haven School in international legal theory. He writes: “I believe that the critical subjective element is whether the putative \textit{rule} itself is seen to be law – not whether the process is seen to be legitimate.”\textsuperscript{233} His ontology of law thus has a clear and strong preference towards the \textit{rule}-oriented approach of legal positivism. Arend’s constructivist position is also distinct from Toope and Brunnée’s in several ways. He rejects the linking

\textsuperscript{226} Their concept of law’s obligation based upon interacionality is at odds with Hart’s hierarchical explanation of bindingness. Their theory relies on the fact that “[l]egal norms are particularly persuasive when they are created through processes of mutual construction by a wide variety of participants in a legal system”, see Brunnée and Toope, \textit{International Law and Constructivism: Elements of an Interactional Theory of International Law}, pp. 72, 74.

\textsuperscript{227} Arend, \textit{Legal Rules and International Society}, p. 86.

\textsuperscript{228} \textit{Ibid.}, pp. 26, 86.

\textsuperscript{229} \textit{Ibid.}, pp. 87-88. A putative rule is a legal rule if it possesses authority and control according to the New Haven School, meaning that the rule must be perceived as authoritative by the decision-making elites, and controlling in that it reflects the actual practice of states.

\textsuperscript{230} \textit{Ibid.}, pp. 84, 87.

\textsuperscript{231} \textit{Ibid.}, pp. 26-27, 38 at note 47. Arend believes in the possibility of identifying legal rules at a given point in time. C.f. Koskenniemi’s critique against the indeterminacy of international law, Koskenniemi, \textit{From Apology to Utopia, The Structure of International Legal Argument}.


\textsuperscript{233} \textit{Ibid.}, pp. 87-88.
of law and morality and insists on keeping apart moral and legal norms.\textsuperscript{234} Brunnée and Toope do not believe that law is dependent on force for its existence but rather on its internal qualities. According to them, law should not be regarded as an exercise of authority if it means the exercise of power over others. Law is “authoritative” only when it is mutually constructed and therefore legitimate, and it is most persuasive when it is created this way through rhetorical processes by a wide range of participants in the legal system.\textsuperscript{235} They consequently stress the legitimacy of the process of law more than the rules, while Arend concludes:

While ideally, as observed above, a rule that is produced through a legitimate method would itself be perceived to be legitimate, this is not always the case. As a consequence, I believe that the authoritativeness of the rule is still the indicator of the subjective element of a rule of international law.\textsuperscript{236}

A closer examination of the basic assumptions of his proposed methodology reveals a rather traditional approach, which resembles the positivist rationalist schools of thought. It includes the tenets of an anarchical system, states being the primary and unitary actors, the principle of sovereignty and a methodology of international law based upon an examination of empirical data.\textsuperscript{237} Thus, by leaning particularly upon the insights of Wendt and Ruggie, he could be labelled as a state centred, systemic, modern constructivist, less critical and less reflectionist compared with many other constructivists.\textsuperscript{238}

Price calls himself a post-modern constructivist, but critical theorists would most probably think his acceptance of small truth claims, so-called t-claims,\textsuperscript{239} would rule him out as an orthodox post-modernist. He answers the epistemological question “how do we know an international legal norm when we see one?” by reference to customary norms from a position that has clear intertwinings with legal positivism.\textsuperscript{240} The epistemology and methodology for the determination of a customary rule in his analysis of the customary process on anti-personnel landmines is based upon the traditional concepts of \textit{opinio juris} and \textit{usus} (state practice), while his constructivist contribution lies in an arguably distorted application of the modernist approach to customary norms. Relying on the “sliding scale” model of Kirgis', he contends that either \textit{opinio juris} or state practice can provide for the existence of

\textsuperscript{234} Ibid., p. 20.
\textsuperscript{236} Arend, \textit{Legal Rules and International Society}, pp. 84-85. [Author’s italics]
\textsuperscript{237} Ibid., pp. 4, 86. Nevertheless, he criticises rationalists for suggesting that legal rules only matter in certain areas of international politics, e.g. not in the security fields, and for assuming that state identities and interests are exogenously given, Arend, \textit{Legal Rules and International Society}, p. 124.
\textsuperscript{238} Arend, \textit{Legal Rules and International Society}, p. 126.
\textsuperscript{240} Price, \textit{Customary norms and anti-personnel landmines}, p. 107.
customary international norms, and believes in line with D’Amato that state behaviour should be the primary consideration in this assessment. In this way states may exhibit the influence of international norms and embody the existence of the socialising pressures of international law without explicitly granting their conscious consent.241

He furthermore argues that the chronological paradox of customary law dissolves by taking into account the constitutive processes, in which social identity constitutes actors and interests: “In other words, we can identify how a concern with emergent elements of obligatory force shapes who state actors are and what they want.” 242 It is difficult to assess whether Price is aware that the modernist view of customary law illustrated by the aggregate theories of Kirgis and D’Amato is based upon a narrow conception of state practice, where statements and declarations are not considered to be usus but only as evidence of opinio juris. This approach, emphasising state behaviour at the expense of opinio juris, leads to the consequence that practically speaking only strong and powerful states possess the capacity and means to engage in state practice and will have the advantage in the creation of customary rules. It hardly takes into account protests and objections as state practice, capable of hindering the development of a norm.

Finnemore243 and Sikkink, considered to be rational constructivists,244 posit that rational choice theorists can and do have a great deal to say about how norms work, just as empirical studies of social construction and norm emergence repeatedly reveal highly rational strategic interactions.245 They claim that recent theoretical work in rational choice and empirical work on norm entrepreneurs make it very clear that the fault line between the constructivist and the rationalist studies of norms is untenable, both empirically and theoretically. It is explained that this is mainly due to the fact that rational choice theorists now also have begun working on identity problems as well.246

Finnemore and Sikkink have contributed with empirical studies on the emergence of international norms in a broader sense, and claim that empirical research on norms is aimed at showing how the “ought”

241 Ibid., p. 122. At the same time he is aware of the fact that this contention goes against the ICJ’s position and general understanding that practice by itself is insufficient to establish customary law, p. 123, see note 40.
242 Ibid., p. 110.
243 Finnemore has also produced a highly praised empirical constructivist study of emerging norms on intervention that includes an analysis on humanitarian intervention that offers valuable insights for my own analysis, see Finnemore, The purpose of intervention. Changing beliefs about the use of force.
244 They have been criticised by Toope and Brunnée of adopting a view of law that is almost a ‘caricatured version’ of the positivist view of legal normativity, both static and highly ‘artifactual’, being defined by judicial pronouncements and their aggregation over time. Brunnée and Toope, International Law and Constructivism: Elements of an Interactional Theory of International Law, p. 43.
245 Finnemore and Sikkink, International Norm Dynamics and Political Change, pp. 916-917. According to them, scholars are divided on the role that choice plays in norm-based behaviour, what motivates choice and the role that persuasion plays in normative processes.
246 Ibid., p. 909 and onward.
becomes “is” (how a norm evolves). In their research they have developed a description of the ‘life cycle’ of norms that is very useful for the assessment of the process of emerging norms, although it does not answer all the epistemological questions for the determination of norms. According to them there are three stages in the cycle: Norm emergence, norm cascade and internalisation. The tipping point where a norm becomes a legally binding norm happens just between the first and second stage, and is characterised by the existence of a critical mass of states that have become norm leaders and adopted the norm in question. However, they do not make a clear distinction between legal norms and other forms of norms, the reason why it may be difficult to apply these theories solely for the purpose of studying emerging legal norms. Since the R2P norm is in fact a norm which contains both legal norms and other non-legal (political, social, moral, cultural etc) norms, constructivist theory is very suitable for the study of the emerging norm in full. This thesis however focuses only on the emerging legal norms of the R2P concept, specifically dealing with the use of military force.

1.3.4.4. Constructivist theory on norms on humanitarian intervention?

Wheeler has developed a ‘constructivist framework’ linked to the ‘solidarist branch of the English school’ for his study on humanitarian intervention in Saving Strangers. It is concerned with how far the international society of states recognises the legitimacy of using force against states which grossly violate human rights. He argues that intervention has to satisfy certain criteria derived from Just War tradition to count as humanitarian and he calls his constructivist approach ‘a solidarist theory of legitimate humanitarian intervention’. Many of the constructivist ideas are shared by the English School. For example, the belief that states form an international society shaped by ideas, values,

247 Ibid., p. 916.
248 Ibid., pp. 895-909.
249 Ibid., pp. 891-892.
250 The solidarist branch is opposed to the pluralist branch. The pluralists defend the rules of the society of states on the grounds that they uphold plural conceptions of the good, while the solidarists’ point of departure for international society theory is the “glaring contradiction between the moral justification of pluralist rules and the actual human rights practices of states”, see Wheeler, Saving Strangers. Humanitarian Intervention in International Society, p. 27.
251 Ibid., p. 4, see note 11. Wheeler is greatly inspired by the work of the solidarists R. J. Vincent and Michael Walzer, sec e.g. Wheeler, Saving Strangers. Humanitarian Intervention in International Society, p. 28 et seq. Some of their arguments referred to resemble those of ‘conditional sovereignty’ treated in Chapter 5.2. According to Wheeler, these scholars hold that the principles of sovereignty and territorial integrity may not be upheld when governments commit mass murder and other atrocities amounting to crimes against humanity, and that in such circumstances there is a moral right (Walzer) or duty (Vincent) to use force to stop such atrocities.
253 Ibid., pp. 33-34 et seq. The criteria used: just cause/humanitarian emergency, last resort, proportionality, and positive humanitarian outcome.
identities and norms, to a greater or lesser extent common to all, but the English School also holds other perspectives on international relations.\(^{254}\)

Wheeler’s constructivist approach applied in the ‘solidarist theory of legitimate humanitarian intervention’ relies mainly on Wendt’s *Social Theory of International Politics*, but also adopts Finnemore and Sikkink’s constructivist language on norm cycles to explain the customary process of emerging norms on humanitarian intervention.\(^{255}\) His own ‘solidarist theory’, however, is not an IR theory on norms or on norm emergence as such, but a theory on ‘legitimate humanitarian intervention’ embedding and applying constructivist insights in the study on humanitarian intervention and emerging norms. He argues that norms both constrain and enable actions in that state actions will be constrained if they cannot be legitimised by norms and that new norms enable new practices.\(^{256}\) He asserts that the development of a new solidarist norm on humanitarian intervention enables practices on humanitarian intervention by making it a right, but does not determine such practice because it is not made as a duty.\(^{257}\)

He applies the ‘power of legitimacy’ as ‘the framing question around which the empirical case studies on humanitarian intervention are structured’.\(^{258}\) His study focuses on how legitimation concerns constraint and enables state actions in relation to the use of force for humanitarian purposes, and defines legitimacy as “the standards of acceptable conduct set by the prevailing morality of society, be it domestic society or international society”.\(^{259}\) He concludes that it will require additional cases to that of Kosovo before a judgement can be made as to how far there is a new custom of unauthorised humanitarian intervention.\(^{260}\) His conclusions also contrast his constructivist framework, which he has used in the analysis of the case studies, with the realist explanations for constraint on state practice.\(^{261}\)

Wheeler’s study thus applies an IR constructivist perspective on the emerging norm on both unauthorised and UN authorised humanitarian interventions,\(^{262}\) and another study on the same subject from a similar perspective is therefore unnecessary. His work is centred around questions of legitimacy, law and morality and their interplay in state practice on humanitarian intervention. Also Finnemore’s *The Purpose of*
Intervention deals with humanitarian interventions from a constructivist perspective. Another study with such a perspective would be difficult to motivate, although the development of the doctrine of R2P would perhaps take the constructivist analysis a step further. But in not applying a constructivist perspective on emerging norms on humanitarian intervention in my thesis, unnecessary overlap in research with Wheeler and others may be avoided somewhat.

By focusing instead on the responsibility to protect, my thesis goes beyond Wheeler’s study and takes the recent developments in this area into account. It could be argued that the R2P doctrine is developed out of a constructivist approach to security and international law, but this doctrine distinguishes itself from Wheeler’s solidarist theory in several ways.

1.4. Feminist theory on security and feminist jurisprudence

1.4.1. Feminist theory in IR

One shared observation for many feminists, according to Whitworth, is that of all the social sciences IR has been one of the most resistant to incorporate a feminist analysis of women and gender relations. IR feminists have used a variety of methods, most of which would fall into methodological frameworks that have been described as post-positivist, reflectivist or interpretivist and hence tended to identify with the reflectivist side of the Third Debate. Whitworth asserts that there is little in realism (particularly neo-realism) conducive to theorising about ‘gender’, and the liberal paradigm is said to be “ahistorical and denies

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263 Finnemore, The purpose of intervention. Changing beliefs about the use of force.
264 See, for example, the comparisons made on the criteria used in Chapter 5.3.
267 ‘Gender’ does not refer to the biological differences between men and women but to the socially and culturally constructed characteristics associated with masculinity and femininity, which vary across time, culture and material conditions. See Tickner, Ann J., Gender in International Relations. Feminist Perspectives on Achieving Global Security, Columbia University Press, New York, 1992, p. 7; cf. Steans, Gender and International Relations, pp. 8-9; Whitworth, Sandra, Gender in the Inter-Paradigm Debate, Millennium: Journal of International Studies, vol 18, 2, 1989, pp. 265-272, pp. 265-266. Gender itself is a contested concept and its mainstreaming can take many different approaches, see Eveline, Joan, Bacchi, Carol, What
the material bases of conflict, inequality, and power. Although liberal feminism has made major contributions on issues such as women in foreign policy and the military, feminist IR theorists generally agree with post-liberal claims that gender hierarchies are socially constructed and maintained through power structures that work against the participation of women in, for example, foreign and national security policymaking. IR feminists are often sceptical of conventional scholars’ quests for objective, universal explanations based upon positivist and empiricist methodologies, and are therefore generally more committed to the emancipatory potential of theory that helps to understand the gendered structures of domination and inequality. Tickner describes IR feminist ontologies in this way:

In contrast to an ontology that depicts states as individualistic autonomous actors – an ontology typical of conventional social science perspectives on IR and of liberal thinking more generally – feminist ontologies are based upon social relations that are constituted by historically unequal political, economic, and social structures. Tickner argues that there is no unique feminist research method and that feminists have drawn upon a variety of methods and disciplines such as ethnography, statistical research, survey research, cross-cultural research, philosophical argument, discourse analysis, and case study. Feminist perspectives on methodology are often open to combining methods and rely on a pragmatic multi-method approach, drawing on natural sciences as well as on the humanities and philosophy in a variety of epistemological and methodological ways. What nevertheless is common to all feminist research is the epistemological perspective that

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271 Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, pp. 6-7. [Author's italics]

challenges hidden androcentric or masculine biases in the way that
knowledge has traditionally been constructed. Its research aim is to
challenge and rethink what we mean by knowledge, and this knowledge-
building should be seen as an ongoing process, tentative and emergent.273

While feminist scholarship is often transdisciplinary and
multidisciplinary, it is also said to be political, associated with the goal of
bringing about change by exploring gender hierarchies and their effects
on the subordination of women and by using the voices of marginalised
lives.274 "Feminism is a politics of protest directed at transforming the
historically unequal power relationships between women and men."275

1.4.2. Feminist theory on security

Feminist perspectives on security share a common concern for
broadening knowledge to include the experiences of women and
introducing gender as a category of analysis.276 Feminist scholars
challenge the core assumptions of IR discipline and have redefined the
meanings of 'security' and 'insecurity' of conventional security studies by
including the effects of structural inequalities of race, class and gender.277
Through gender analysis the construction of a more comprehensive
definition of security can take place, including freedom from both
physical and structural violence. Such redefinitions of security involve

273 Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, p. 4. Tickner explains that feminist knowledge has emerged from a deep scepticism about universal knowledge claims that in reality are based primarily on men's lives. She mentions four methodological guidelines that inform feminist research perspectives: A concern with which research questions get asked and why; designing research, useful to women (and men) which is less biased and more universal than conventional research; the centrality of reflexivity of and subjectivity of the researcher; and a commitment to knowledge as emancipatory. The reflexivity of feminist research is devoted to bridge the gap between the researcher and the research subject by i.a. participatory action research (participant observation) and personal experience. A reflexive attitude challenges the notion of value neutrality of the researcher and the aim is rather to be a corrective to 'pseudo-objectivity' resulting in 'strong objectivity' or 'robust reflexivity', see Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, pp. 8-9.

274 Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, pp. 4, 9. Feminists, however, disagree on what they believe constitute women's subordination, as well as how to explain and overcome it. For these reasons feminist theories have included a wide array of distinct perspectives described as liberal, radical, critical, socialist, psychoanalytic, post-colonial, and post-modern, see Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, pp. 11-12; for a different account of feminist IR theories, see Whitworth, Feminism and International Relations, pp. 11-25. This diversity of feminist scholarship is often not recognised by IR scholars. See also an analysis of how feminist perspectives have found space within various post-positivist traditions (normative theory, historical sociology, critical theory, post-modernism) and expanded their agendas with gender analyses, in Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, pp. 29-35.

275 Whitworth, Feminism and International Relations, p. 2.


the inclusion of the security of women based upon the visibilisation of the insecurities experienced by women. By starting at the micro-level and listening to the experiences of women, feminists base their understanding of security upon what Donna Haraway has coined ‘situated knowledge’ rather than on universalised or decontextualised knowledge based upon male models of human behaviour and false objectivity. By building on women’s everyday experiences of insecurity, theory on security is believed and claimed to be inseparable from practices of security. But feminist security is transformative by not solely focusing on women’s security but rather on the importance of gender when analysing security. It is hence not simply a question of broadening our definition of security with new issues but to include the capacity of people to articulate their insecurities and present new visions.

At the time when critical security studies began to question the ontological and epistemological foundations of conventional international relations, in particular strategic studies, the first feminist perspectives on security began to be articulated and developed. Also feminist redefinitions on security have a different ontology and epistemology from conventional security studies. The questioning of the state-centric foundations of realism and realism’s positivist-rationalist methodologies based upon the idea of states as rational actors and rational security-seeking behaviour, the bottom-up perspective on security based upon the individual as the object of security as well as the theme of emancipation, are common features to both critical security

278 Ibid., p. 8.
279 Ibid. p. 64. On ‘situated knowledge’, see Haraway, Donna, Situated Knowledge: The Science Question in Feminism and the Privilege of Partial Perspectives, Feminist Studies, vol 14, 3, 1988, pp. 575-599, pp. 583-584: “Feminist objectivity is about limited location and situated knowledge, not about transcendence and splitting of subject and object.” See also a problematisation of ‘women’s experience of security/insecurity’ as a guide for defining a feminist epistemology on security in Peterson, V. Spike, Security and Sovereign States: What Is at Stake in Taking Feminism Seriously, Peterson, V. Spike (Ed), Gendered States. Feminist (Re)Visions of International Relations Theory, Lynne Rienner Publishers, Boulder, 1992, particularly pp. 94-96. Grant acknowledges that women’s experiences have a contingency to male-dominated structures and institutions of security that already set the context and agenda and therefore influence the basis of knowledge for such a feminist epistemology. The approach of this thesis is admittedly of applying add-on or contingent approach on its gender-perspectives of the male inherent structures and norms on humanitarian intervention that are studied. The decision to address these issues were not originally formulated in the project, but added subsequently.
280 Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, p. 64.
281 Hansen, Lene, Olsson, Louise, Guest Editor’s Introduction (Special Issue on Gender and Security), Security Dialogue, vol 35, 4, 2004, pp. 405-409, p. 406. The authors underline that security is gendered through the political mobilisation of masculine and feminine identities linked to practices of militarism and citizenship.
282 Steans, Gender and International Relations, p. 68.
studies (in particular its more radical post-structuralist parts) and to much of the feminist perspectives on security.285

After exploring the available space for feminist perspectives within the present international relations theories, Sandra Whitworth argued in the mid-1990s that critical IR presented the most appropriate place to raise feminist questions, and that a theory which is both feminist and critical would be most useful.286 Tickner also saw feminist research, characterised as having a bottom-up approach, an emancipatory agenda and ontology of social relations on security, as being most compatible with the critical side of the Third Debate in IR.287

But feminist research distinguishes itself from other critical security studies in that it adopts gender as a central category of analysis for understanding unequal social structures and hierarchies.288 In this way it contributes to the discipline by complementing the knowledge created by conventional and critical perspectives with better understandings of the interrelationships between all forms of violence and the extent to which gender contributes to insecurity.289 Feminist research rejects the artificial boundaries (for example private/public, international/national) that prevent us seeing how violence runs across levels of analysis and demonstrates how violence is interrelated. Tickner maintains:

Claiming that the personal cannot be separated from the political and the international, feminists have suggested that issues of personal and international insecurity are not unrelated.290

Hoogensen & Vigeland Rottem argue likewise that ignoring men’s domestic and local violence prevent our fully understanding the causes of global violence. 291 The feminist security argument emphasises the interrelationship between violence at different levels, domestic, local, national, international and global.292
Feminist definitions of security are broad and comprehensive and take human security as their central concern. The role of the state as the security provider is questioned, by not necessarily assuming that military capability of a state is an assurance of human security (in particular women’s). Security is seen in multidimensional and multilevel terms as the “diminution of all forms of violence, including physical, structural, and ecological”. The feminist reformulations of security acknowledge that gender hierarchies themselves are a source of domination in the form of structural violence and thus an obstacle to a truly comprehensive definition of security. Security is self-defeating if it is built on other people’s insecurity, why feminist definitions of security, therefore reject the realist assumptions that security is zero-sum which can be built on the insecurities of others, according to Tickner. She argues that feminist conceptions of security are based upon the assumption that social justice, including gender justice, is necessary for an enduring peace. This assertion has also been acknowledged by the United Nations in the Secretary-General’s follow up report ‘Women, Peace and Security’ (2004) to Security Council resolution 1325.

Hoogensen and Vigeland Rottem support the broadening of the definition of security by focusing on identity and claim that the identities ‘man’ and ‘woman’ shape individual and collective security needs. These Norwegian academics explain that although identity in the security debate is normally linked to ethnicity, nationality, religion and race, they acknowledge that identities themselves are constructed, and by claiming that “[g]ender is inherently linked to identity” they demonstrate the significance of gender for security. Women’s experiences of violence and their security needs differ significantly from those of men, and through gender analyses it is possible to reveal and remove the structures that neutralise gendered identities and create assumptions of security.

293 On human security and feminism, see Steans, Gender and International Relations, pp. 73-77.
294 Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, p. 62. Differently formulated, security can be defined as “the absence of violence whether it be military, economic, or sexual”, Tickner, Gender in International Relations, p. 66. For an explanation of the meaning of ‘looking up’ and ‘looking down’ perspectives, see Tickner, Feminist Perspectives on International Relations, p. 278.
295 Tickner, Gender in International Relations, pp. 53-55.
297 Secretary-General’s Report, Women, Peace and Security (2002), p. 12, para. 68. “[s]ustainable peace and security will not be achieved without women’s full and equal participation.”
298 Hoogensen and Vigeland Rottem, Gender Identity and the Subject of Security, pp. 155-156, 162-163.
based upon the male norm. They claim that “[t]hrough gender, we can make linkages from the individual to identity, and from identity to security”. Building on McSweeney’s argument that “identity is a process of negotiation among people and interest groups”, Hoogensen and Vigeland Rottem point out the imbalance and distortion in the negotiation results for women on security. Since women’s identities in many respects are formed or assumed by others than women themselves, outside the scope of their own powers of decision-making, their identities are more or less imposed upon them by the patriarchal structure of society. Women generally have been traditionally marginalised and invisibilised in society, and still are, by the minimising and invisibilisation of their true identities and security needs. “Security claims cannot be heard from identities that have been enveloped and hidden by the dominant discourse.” The moment the interconnections of violence (domestic, local, national, international, and global) and women’s articulations of security are recognised and heard, a true reorientation of security can take place. This will remove prioritisation of some securities over others, with appropriate resources channelled to meet their human security. Hoogensen and Vigeland build on feminist theory in their arguments by connecting to the general feminist claim that “the personal is political” and that this must be a guiding factor in security studies by considering the individual’s security needs from a bottom-up perspective.

The two, however, argue that in taking a human security approach to security, it is necessary to respond to the security needs of individuals themselves, and that part of the difficulty in human security in becoming part of the dominant security discourse is the implicit genderisation of the concept, which can result in its feminisation. This would reduce its appeal to researchers and policymakers. A counter-argument to this stance with respect to human security could also be made. In speaking of and dealing with human security in a gender-neutral way, which does not take into account the differences between the sexes, the traditional bias towards the male norm sets in which automatically invisibilises and marginalises women’s specific security needs from the human security agenda and discourse.

Women have rarely been security providers in the capacity of soldiers or security policymakers, and their voices and perspectives of security remain traditionally unheard and neglected. Meanwhile there are ample important research contributions such as, for example, the works by Enloe and Moon, which demonstrate how military prostitution and rape are used as tools of war and instruments of a state’s foreign security.

300 Hoogensen and Vigeland Rottem, *Gender Identity and the Subject of Security*, p. 163.
302 *Ibid.*, p. 165; see also Tickner, *Identity in International Relations Theory: Feminist Perspectives*, p. 149, who explains that this was achieved throughout history by containing women in the private sphere of the household and family, which defined women’s functions and lifestyles and excluded them from equal participation in economics and political life.
policy and how the security of a state is frequently dependent on the insecurity of certain individuals, often women.\textsuperscript{305} Moreover, while the social processes lying behind the correlations between gender equality and state’s recourse to war remain unexamined, Caprioli and Boyer have shown how the severity in the violence employed by a state in an international crisis decreases as domestic gender equality increases.\textsuperscript{306}

Feminist scholarship on security has also challenged the myths of war.\textsuperscript{307} By looking at the effects of war on women at a microlevel, feminist research reveals unequal gender relations and social practices that support and sustain war and military activities and illustrates how war is a cultural construction that depends on myths of protection and the subordination of women.\textsuperscript{308}

Following Whitworth’s recommendation, ‘critical feminist IR theory’ could be the most valuable theory for feminist research of international relations to apply in this thesis. But in line with the tendencies of many feminist scholars I have chosen not to limit myself to one theoretical feminist perspective but instead apply and make use of this variety of feminist knowledge, theories and perspectives in an eclectic, multimethodological and pragmatic way.\textsuperscript{309} I am convinced of Tickner’s argument that no single methodology is sufficient for analysing complex


\textsuperscript{306} Caprioli, Mary, Boyer, M., Gender, Violence, and International Crisis, Journal of Conflict Resolution, vol 45, 2001, pp. 503-518; see also Caprioli, Mary, Gendered Conflict, Journal of Peace Research, vol 37, 1, 2000, pp. 51-68, which substantiates the theory that domestic gender equality has pacifying effects on state behaviour on the international level.


\textsuperscript{308} Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, p. 51. Women also face systematic militarised sexual relations around military camps, see Enloe, Maneuvers: The International Politics of Militarized Women’s Lives; Moon, Sex Among Allies: Military Prostitution in U.S.-Korea Relations. Another gendered aspect of war is that the images of the masculinities of war depend on rendering women invisible as actors by identifying them only as victims. Women, however, have in all times been part of armies, rebel movements, and as dependents of soldiers, in the roles of cooks, laundresses and nurses, as well as wives and sex slaves. On ‘gendering war’, see Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, p. 57.

\textsuperscript{309} Tickner, What Is Your Research Program? Some Feminist Answers to International Relations Methodological Questions, pp. 140, 146-147.
social phenomena, and it seems natural to make use of feminist research based upon transdisciplinary knowledge and crossdisciplinary feminist theory as long as the material is relevant for the purpose of this thesis. My aim, however, is to stay connected to IR discipline as much as possible in order to limit the scope of available material. The critical feminist perspectives on security will very likely be of much value.

In order to confine the extent of the theoretical interdisciplinarity of this thesis the gender analyses will be restricted to shorter subchapters in each main chapter. In these subchapters I shall highlight the relevant gender perspectives and display the feminist critique of the respective subject matter. The gender analyses will consist of several different components: critical assessments of a lack of gender awareness, feminist critiques against gendered arguments and theory on security, my own observations, gender analysis and suggestions on how alternative perspectives, theories or practices on human security and R2P, could be constructed or reformulated by taking into account women’s needs and interests, gender considerations in general and feminist theory in particular. The gender chapters in this thesis, however, are not intended to cover all the relevant feminist literature over these vast subject areas.

1.4.3. Feminist jurisprudence

Feminists argue that the international legal order is itself part of the gendered power structures that uphold patriarchy:

Simply “adding women and mixing” obscures the fact that the international legal system is gendered in itself. The utter failure of the “liberal” international legal system in responding to the global phenomenon of oppression of women should indeed make us question its foundations. Patriarchy is not a temporary imperfection in an otherwise adequate system; it is part of the structure of the system and constantly reinforced by it.310

In the seminal volume on international law and feminism, albeit not newly published, ‘The boundaries of international law. A feminist analysis’, Charlesworth and Chinkin support the feminist claim that “[i]nternational law is constructed upon particular male assumptions and experiences of life where ‘man’ is taken to represent the ‘human’.”311


311 Charlesworth, Hilary, Chinkin, Christine, The boundaries of international law. A feminist analysis, Manchester University Press, Manchester, 2000, p. 17. The authors have examined a number of areas in international law with a variety of feminist perspectives such as the sources, treaty law, statehood, right to self-determination, international institutions, human rights, dispute settlement and the use of force. The absence of women in national politics as well as at the UN and international law-making positions is pointed out as explanatory factors for states having been reluctant to take effective steps to realise the advancement of women by the authors, ibid, pp. 70, 174 et seq. For more and other reasons for the silence of women see Charlesworth, Alienating Oscar? Feminist Analysis of International Law, p. 2. See also Bilder, Richard B., Book Reviews. The Boundaries of International Law: A Feminist Analysis, American Journal of International Law, vol 95, 2001, pp. 459-464.
They also express the view that international legal scholarship has tended to be descriptive and prescriptive and has hence avoided scrutiny of the underlying assumptions and commitments of the discipline. The various main legal theories of international law have not addressed the situations of women and have therefore failed to examine the legitimacy of the power and legal structures that effectively subordinate women. Liberal international legal theory with its focus on individuals has historically made major contributions to the equality of women, but the authors stress that the liberal idea of equality is limited to procedural rather than to substantive equality. It is a "very blunt tool when dealing with cases of long-term, structural disadvantage and inequality both as between states and within them".

Newstream theories, such as the critical theory developed by Koskenniemi, have also been important for women in that they share a concern with the political and contingent nature of liberal legal argument and the law’s role in reifying and justifying social, political and economic inequalities. Both feminists and newstream theory aim to uncover the unstated political commitments of the present legal order to be able to reimagine or redefine it in a way that is more just or inclusive. However, the newstream theories in practice have failed to advance the interests of women and been rather vague in its normative visions in this context. Charlesworth and Chinkin question this type of critical approach, built on limited substantive commitments, for failing to deal adequately with the complex forms of structural disadvantage of women. The conclusion seems to be that not only these but all Western legal theories tend to reproduce structures that silence women and fail to accommodate ‘women’s experiences’.

312 Charlesworth and Chinkin, *The boundaries of international law*, p. 25.
314 *Ibid.*, p. 32. Furthermore, the separation of the private and public spheres in liberal theory and practice has engendering consequences that in many cases are negative for women.
316 Charlesworth and Chinkin, *The boundaries of international law*, p. 35; see also Charlesworth, *Cries and Whispers: Responses to Feminist Scholarship in International Law*, p. 567.
318 When speaking of women’s experience one touches upon the long debated issue of ‘essentialism’, hence whether women have a fixed ‘essence’ or set of characteristics. For an account of the debate in relation to international law, see Charlesworth, Hilary, Chinkin, Christine, *The boundaries of international law. A feminist analysis*, Melland Schill Studies in International law, Manchester University Press, Manchester, 2000, pp. 52-56. The authors call attention to the notion that essentialism does not explain historical and social differences between women and men of different cultures, and they list a set of dangers but also potentials with the use of women as a category. They argue instead for the development of ‘situated perspectives’ or ‘discursive universalism’ that encourage awareness of the differences between women as the bases of feminist international legal strategies through the use of both general and specific categories of women. For Charlesworth’s response to the idea of a pluralist view of women’s experiences see also Charlesworth,
Feminist theory of international law on the other hand has been compared to an ‘archaeological dig’ which at a deeper level reveals the gendered and sexed nature of the basic concepts of the discipline, for example states, security, order and conflict. Feminist analysis explores the unspoken commitments of apparently neutral principles of international law and the ways that male perspectives are institutionalised in it. It furthemore exposes and questions the limited bases of its claim to objectivity and impartiality and insist on the importance of ‘gender’ as a category of analysis. One important finding of such analysis is the gendered consequences of the private/public distinctions in international law.

Within international relations there are many different variants of a feminist theory of law. These have been grouped into different categories such as empiricism, standpoint and post-modern or liberal, cultural and radical feminism, but these categories are greatly simplified and overlap in some respects. According to some scholars, all feminist analyses of international law nevertheless have in common the role of deconstructing international law and its claim to objectivity and rationality, as well as the role of reconstruction and rebuilding the basic concepts of international law in a way that erases the subordination of women.

319 Charlesworth and Chinkin, The boundaries of international law, p. 49.
320 The term ‘gender’ in the context of international law is by Charlesworth described as “the social construction of differences between women and men and ideas of “femininity” and “masculinity””, see Charlesworth, Feminist Methods in International Law, p. 379.
321 Charlesworth and Chinkin, The boundaries of international law, p. 50; Charlesworth, Alienating Oscar? Feminist Analysis of International Law, p. 7; Charlesworth, Feminist Methods in International Law, p. 379.
322 Charlesworth and Chinkin, The boundaries of international law, pp. 56-59. The authors also discuss the usefulness of this distinction for women and argue that the feminist goal should be to transcend this gendered dichotomy by incorporating and responding to women and their concerns, so that women’s experiences will not automatically be excluded or marginalised. On the private/public distinction, see also Barnett, Hilaire (Ed.), Sourcebook on Feminist Jurisprudence, Cavendish Publishing Limited, London, 1997, pp. 123-160; Charlesworth, Hilary, Chinkin, Christine, Wright, Shelley, Feminist Approaches to International Law, American Journal of International Law, vol 85, 1991, pp. 613-645, pp. 626-627 and 638-643.
323 Charlesworth and Chinkin, The boundaries of international law, p. 38; for an account of liberal, radical, critical, and post-modern feminist legal scholarship, see Minda, Postmodern Legal Movements: Law and Jurisprudence At Century’s End, pp. 134-148.
324 Charlesworth and Chinkin, The boundaries of international law, pp. 60-61; Charlesworth,
Some feminist theories, moreover, have been accused of ignoring the historical legacy of colonialism and the need to incorporate the women of the Third World.\footnote{325} Orford reminds us of the imperialist mission of liberal institutionalism in international law and how it affects feminism with regard to humanitarian intervention. In her article \textit{Feminism, Imperialism and the Mission of International Law}, she warns against committing to a “white women save brown women from brown men” agenda.\footnote{326} While being aware of the trap of feminist individualism reproducing the heroic narratives of the white, middle-class imperial man to gain their own increased agency, I would to argue that this is not a necessary outcome or conclusion that must be drawn from an R2P agenda based upon feminist perspectives. While acknowledging the world’s imperial and colonial history, the unbalanced global economic structures, and the need to make analyses of the exploitation of women in the economic ‘South’, it must still be possible to conduct gender-analyses of humanitarian interventions without having to take on a compulsory post-colonial analysis of these structures and include race and class in the schemes. I am not counterarguing the argument, as such, or the underlying need for such research and perspectives, but this thesis must adopt for reasons of space a more restrictive gender analysis.

The area in which women’s voices first became heard within international law was within the human rights field, when criticising its private/public distinction and pushing forward a parallel system of instruments directed at the protection of women’s human rights.\footnote{327} Since the UN Decade for Women (1975-1985) feminist critique and feminist analysis on international law have spread into various legal regimes such as international humanitarian law, international criminal law, collective security, the right to self-determination and international organisations. Today the UN has a clear policy of mainstreaming gender in all areas of activity. The field of international security and the use of force is still somewhat underdeveloped from a feminist perspective, although Security Council resolution 1325 on \textit{Women, Peace and Security} adopted in 2000, has opened the way for gender perspectives and for a more inclusive approach to conflict prevention, peace-keeping and peace-building.

On the sources of international law, Charlesworth and Chinkin assert that this area of law also sustains a gendered regime and point to ‘women


specific harms’ within the standard account of sources.\textsuperscript{328} Although I agree with many of their arguments (especially their chapter on customary international law and soft law dealing with violence against women), I do not find all accounts convincing. The critique against the gendered dimensions of the vocabulary in international law-making is very tentative with no fully developed findings that could easily be applied in a way that would alter my results or analysis on the sources of international law in Chapter 2 of this thesis. I shall instead focus on and make use of feminist analysis with regard to the rules on the use of force, and in particular look at what feminist jurisprudence has to say on humanitarian intervention.

However, I choose to echo the claim of Charlesworth and Chinkin that “no single feminist theory is adequate in the context of international law”.\textsuperscript{329} They and many others have chosen an eclectic method in which a variety of analytic strategies rather than a single feminist theory are used.\textsuperscript{330} They base their strategy upon the post-modern method described by Margaret Radin as “situated judgement”, which holds that we should recognise that no theory can tell us which answer or position to adopt and when.\textsuperscript{331} This ‘pragmatist or feminist middle way’ asserts that each mode (in a dichotomy) is in itself inadequate as long as it is part of a universal world view that denies the other mode.\textsuperscript{332} Radin’s argument that one should be open to choose one or the other mode for different contexts instead of trying to synthesise them at all times has been argued to be contextual and non-essential in aspiration.\textsuperscript{333} For these reasons the feminist perspective may be applied in the following thesis. The significance of feminist legal theory by Charlesworth, Chinkin and Wright may be a guiding light in the following analyses:

an interest (gender as an issue of primary importance); a focus of attention (women as individuals and as members of groups); a political agenda (real social, political, economic and cultural equality regardless of gender); a critical stance (an analysis of “masculinism” and male hierarchical power or “patriarchy”); a means of reinterpreting and reformulating substantive law so that it more adequately reflects the experiences of all people; and an alternative method of practicing, talking about and learning the law.\textsuperscript{334}

\textsuperscript{328} Charlesworth and Chinkin, The boundaries of international law, pp. 62-95.

\textsuperscript{329} Ibid., p. 23; Charlesworth, Feminist Methods in International Law, p. 381.

\textsuperscript{330} Charlesworth and Chinkin, The boundaries of international law, p. 50; Charlesworth, Chinkin and Wright, Feminist Approaches to International Law (1991), p. 613.


\textsuperscript{332} The opposing modes of thought that Radin refers to are exemplified by the dichotomies: attachment/separation, co-operation/competition, community/individualism, Radin, The Pragmatist and the Feminist, pp. 1712-1713.

\textsuperscript{333} Minda, Postmodern Legal Movements: Law and Jurisprudence At Century’s End, p. 145. On essentialism, see supra note 319.

\textsuperscript{334} Charlesworth, Chinkin and Wright, Feminist Approaches to International Law (1991), p. 634. The authors underline that feminist method must be concerned with language usage, the organisation of legal materials in predetermined categories, the acceptance of abstract concepts as valid, the reliance of adversarial techniques and the commitment to male,
Drawing on the feminist scholars’ suggestion on what activities feminist legal theory can promote, I shall look closer into several questions regarding human security. These have been outlined in Chapter 1.2.2.

1.5. Working assumptions

What implications do the above accounted theories have for this thesis? Here I summarise the assumptions guiding me in my analyses of human security, responsibility to protect, humanitarian intervention and international law, based upon the theories accounted for.

LEGAL POSITIVIST THEORY

Firstly, international law is real law. It is the body of law that regulates the conduct of states and other international subjects in their relations with one another. Secondly, legal positivism is a descriptive theory of law the legal methodology of which can be applied for the determination of lex lata. Thirdly, soft positivism in international law is a modified, enlightened version of legal positivist theory, embracing broader views of the ways and fora in which states can express their wills.

CONSTRUCTIVISM AND IR

Firstly, anarchy335 is not the absence of social structures between states but in fact is also a socially constructed phenomenon and dependent on ‘what states make of it’. Secondly, the interaction between states is open to changes through new forms of coexistence and co-operation between states. Thirdly, states are the main actors in the international society but not the only ones that influence world politics and the international agenda. Fourthly, international law is assumed to be a constructed social structure having an important role in international relations. Fifthly, the interests of states are held to be partly constituted by a normative framework, and the language and concepts we use to think about the world help us to create and recreate the world we inhabit.

SECURITY THEORY

Building upon constructivist and critical understandings about security, and more specifically about human security, the security studies in this thesis will rest on the following working assumptions: firstly, that as a matter of reality, states are still the main providers of security, and international organisations providing security are dependent on its member states’ conception of security. Secondly, individuals or collectivities of individuals can also be the referent object of security. Thirdly, there exist domestic, transnational, and global threats to human security. Fourthly, the methods for addressing insecurities are socially constructed and can be changed or modified through a social process

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335 Anarchy is defined as ‘the absence of government or rule’ in Bull, The Anarchical Society, A Study of Order in World Politics, p. 44; cf. ‘the absence of a supranational authority’ in Barnett, Social Constructivism, p. 253.
and by creating consensus on new intersubjective meanings of security and how to address such threats.

FEMINIST THEORY AND IR

Firstly, gender hierarchies are socially constructed and maintained through power structures that still work against women’s participation in foreign and national security policymaking. Secondly, there is no one single meaning or understanding of ‘gender’ that ought to be applied everywhere, and all gender analyses are tied to particular agendas that become part of incomplete and partial processes towards an account of gender as an unfinished and ongoing process. Thirdly, post-positivist, reflectivist, and critical feminist theory is useful in order to deconstruct and understand the gendered structures of domination and inequality in international relations. Fourthly, feminist scholarship is a multidisciplinary politics of protest directed at social transformation by rethinking what we mean about knowledge, and should be seen as an ongoing process.

FEMINIST THEORY ON SECURITY

Firstly, the construction of a more comprehensive and inclusive definition of security that involves women’s experiences of insecurity can take place through feminist theory and gender analysis. Secondly, applying feminist conceptions of security may imply questioning the state centric foundations of realism, rejecting a positivist-rationalist perspective of states and international relations, and the adoption of a bottom-up perspective of security that takes its starting point in the individual, and an emancipation agenda through social transformation. Thirdly, social justice, including gender justice, is necessary for an enduring peace. Sustainable peace and security will not be achieved without the full and equal participation of women. Fourthly, through gender analysis it is possible to reveal and remove the structures that neutralise gendered identities and create assumptions of security based upon the male norm. Lastly, that no single methodology is sufficient for analysing complex social phenomena, and an eclectic methodology using a variety of multidisciplinary feminist theory and knowledge is useful for a gender analysis of security, and in particular human security.

FEMINIST THEORY ON JURISPRUDENCE

Firstly, international law is constructed upon particular male assumptions and experiences of life where the ‘man’ is the gender-neutral norm, taken to represent the ‘human’. Secondly, all legal theories, except feminist jurisprudence, tend to invisibilise women and a failure to accommodate their experiences, needs and interests. Thirdly, by making use of gender as a category of analysis feminist jurisprudence can expose and question the limited bases of the law’s claim to objectivity and impartiality. Fourthly, no single feminist theory is adequate in the context of

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336 To be ‘sustainable’, peace must be for all and involve all. As long as peace is based upon oppression or submission of some, there will not be fully peace in the wider sense, and such injustices will erupt and cause threats to the peace in the long run.
international law, but instead an eclectic methodology in which a variety of analytic strategies are used will be most useful for a gender analysis of international law.

### 1.6. Outline of the dissertation

The theoretical approaches presented in this first chapter will be applied in various forms throughout the dissertation according to the object of study.

More specifically, the interdisciplinary approaches may be explained as follows. **Constructivist** (and to some extent critical) IR approaches are applied:

- a) In the theoretical chapter on security, forming the background for the human security framework (Chapter 1.3.3.2.), and
- b) On the human security framework for analysis (Chapter 3.5.)

I am furthermore conducting **legal positivist analysis** for the purpose of

1) determining the modes for the change of and emergence of new customary norms in international law (Chapter 2),
2) examining the main assumptions and tenets of the R2P doctrine and to what extent they reflect *lex lata* (Chapter 5),
3) studying relevant *lex lata* rules and regimes to investigate to what extent they may accommodate the norm of external R2P by military means,
4) assessing the legal normative framework as applied by states on the right to undertake humanitarian intervention for four possible actors having a *lege ferenda* external R2P (Chapters 6-7), and lastly
5) in the case studies on humanitarian intervention with the R2P criteria in order to answer the question of whether or not we are witnessing an emerging customary norm on external R2P by military means for regional organisations (Chapter 8).

Finally, eclectic **feminist theory and feminist jurisprudence** is applied in the gender analyses on human security, humanitarian intervention and the R2P doctrine, and gender-critique and proposals are specifically made on the emerging norm of external R2P by military means (Chapters 3.4. and 4.9.).

Since the legal material and analysis is structured and systematised on the basis of the human security and R2P frameworks, and the legal positivist analysis take its entry point from these concepts and frameworks, it is recommended to read the chapters explaining these concepts and frameworks in order to understand the particular connotations and working definitions used in this thesis with respect to international law.

In short, the dissertation is divided into **four parts**: The **first introductory part** (Chapters 1-2) contains the theories and methods used in the study and displays an overview of the legal sources in
international law, with a focus on the international customary process and the means of informal modification of treaties. In the second part (Chapters 3-4), the human security and R2P concepts are presented with backgrounds, contents, and definitions. A human security and an R2P framework are developed for the purpose of the subsequent legal analysis. This part furthermore contains the chapters on gender-perspective and analysis on human security, humanitarian intervention and R2P. These examine whether the gendered human security realities in (primarily) armed conflicts are reflected in the normative developments of the military aspects of the R2P doctrine, and what could be done to enhance the gender-sensitivity of R2P.

The third part (Chapters 5-7) deals with the responsibility to protect by military means and international law. It comprises the legal analyses of the main underlying assumptions of the R2P doctrine and its connections to already established regimes and norms in international law. The state practice of both authorised and unauthorised interventions for humanitarian purposes during the 1990s are revisited and contrasted with the R2P in these case studies. The relevant treaty and customary rules on humanitarian intervention are contrasted with the Right Authority criteria for the external responsibility to protect, and the rules applicable for the Security Council, regional organisations and coalitions of the willing to protect by military means are examined in order to ascertain which parts of the R2P doctrine correspond to lex lata and lex ferenda respectively.

The fourth part includes the last two Chapters (Chapters 8-9), which are concerned with the emerging norm of R2P by military means by regional organisations. It comprises more in depth case studies on such regional unauthorised humanitarian interventions from an R2P focus, being the most developed customary process of an emerging norm of a responsibility to protect by military means. The final chapter contains the concluding analysis on the general and primary research questions as well as the secondary research questions. It is followed by the concluding remarks, including some personal reflections on certain topical questions on R2P and international law, raised by the analysis in the thesis.

The Chapter one provides the introduction to the dissertation and deals with the theoretical, interdisciplinary and methodological bases for the thesis and delineates the working assumptions guiding this work. Chapter two accounts for the legal positivist theories on the sources of international law, and more profoundly on the international customary process, informal treaty modification by subsequent practice or customary law, as well as modification of jus cogens norms.

Chapter three deals with the human security paradigm and accounts for its background, contents, various definitions and main actors involved in developing its conceptual framework. A description of a human security framework based upon a humanitarian conception of human security is formulated for the purpose of subsequent analysis. The chapter also includes gender-aspects of human security in armed
conflicts and a discussion and critique of the legal protection of women in armed conflict in international humanitarian law and criminal law.

Chapter four presents the evolving doctrine on R2P; its background, principal documents developing the doctrine and norm of R2P, and state responses to this concept are displayed. The use or abuse of the concept in the intervention in Iraq (2003) and its consequences are discussed, and an outline of an R2P framework for the subsequent legal analysis is provided for. A gender analysis of the R2P doctrine is also made and juxtaposed with Security Council resolutions 1325 and 1820 and gender-mainstreaming doctrines on multidimensional peace support operations. Proposals for a more gender-sensitised external R2P norm are presented.

Chapter five contains legal analyses of the main underlying tenets and criteria of the R2P doctrine and its connections to already established legal norms in international law. The Chapter deals with the concept of 'sovereignty as responsibility', and the different R2P criteria and principles for military intervention to protect human security are contrasted with closely related rules in international law. The last part analyses whether the R2P doctrine on military protection can be accommodated in international law as applied by states today.

Chapter six deals with the R2P doctrine on the issue of Right Authority – that is, "who has the right to decide and undertake a military intervention to protect human security within a state?" These criteria are explored with the legal rules regulating humanitarian intervention. The chapter deals with Security Council authorised interventions for humanitarian purposes, and includes a series of case studies of such interventions in Bosnia, Somalia, Rwanda, East Timor, and Darfur. The General Assembly’s Uniting for Peace procedure as a basis for humanitarian intervention is also examined from an R2P point of view.

Chapter seven continues the analysis of the Right Authority with a focus on the more controversial situations of unauthorised humanitarian interventions by regional organisations and coalitions of the willing (Liberia, Northern Iraq, and Kosovo), and the legal norms applicable in those cases. The development of prior treaty-based consent for humanitarian intervention by regional organisations (as, for example, provided for in the African Union Charter and the ECOWAS Protocol) and the legal status of such interventions are furthermore analysed in this context.

Chapter eight focuses on the main area of concern with regard to the emergence of new customary norms on external responsibility to protect by military means. It examines the state practice of unauthorised humanitarian intervention by regional organisations more closely from an R2P perspective (or ‘lens’), to discern to what extent the specific R2P criteria on military intervention proposed by the ICISS and endorsed as an external R2P in the UN Summit Outcome Document (2005) have been applied. The results are assessed together with the criteria for the emergence of new customary norms.

Chapter nine embraces the concluding analysis and remarks of the thesis. It sums up to what extent the R2P is being accommodated into the international legal order. Based upon the findings of the case studies
and the legal analysis above, the conclusions on the customary process in which legal norms on external R2P by military means are already present, or might be emerging are presented. The gender-assessments and gender-critique on these emerging norms are also included. The concluding remarks deal with the question of whether or not we are witnessing a shift of focus towards a new balance between the state and the individual in international law and international security, based upon a new understanding of security, where not only the security of states but also of individuals are included.

2. The customary process on emerging norms and informal modification of treaties

2.1. The sources of international law

2.1.1. Introduction

This following chapter deals first with the sources of international law more generally in Chapters 2.1. to 2.3. Thereafter the following Chapter 2.4. will devote a thorough analysis on the specific source of international customary law, its theories, elements, formation, development, and modification. Chapter 2.5. deals with the relevant question of evolutionary interpretation and informal modification of (multilateral) treaties, which has bearing for many of the legal developments involving the emerging norm on R2P by military means. The last Chapter 2.6. treats the important concept of *jus cogens*, and in particular the debates on the prohibition on the use of force and *jus cogens*.

The specification of the sources of international law in Article 38 of the ICJ statute that the court has to take into account in its adjudication is generally accepted as constituting a list of the sources of international law.337 Several prominent scholars have, however, criticised Article 38 for not listing all sources of law, and for the fact that it includes elements that are not really sources of international law; but none of the alternative lists of sources that have been suggested have yet won general approval.338 I shall therefore briefly account for the traditional positivist

337 Article 38, The ICJ Statute (1945). It reads: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognised by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.”

view of the sources of international law. There are, however, various legal positivist approaches to, and different interpretations of, customary international law (CIL). These relate in particular to the issues of what can constitute state practice, the legal value of decisions of international organisations, and the relationship between state practice and opinio juris. I shall give an account of my own views on these issues and also briefly go beyond Article 38 and comment on how I regard two other possible sources or concepts that have been proposed to complement this list and which are relevant for the analysis on emerging norms of R2P by military means; acts of international organisations and the concept of ‘soft law’.

2.1.2. The primary and secondary sources of IL

The first primary source of international law mentioned is international conventions – that is bilateral or multilateral treaties. Other terms describing different stages of this source of law are international agreement, pact, understanding, protocol, charter, statute, act, covenant, declaration, engagement, arrangement, accord, regulation or provision. Law-making treaties are usually distinguished from ‘international contracts’ because they create general norms for the future conduct of the parties concerned in terms of legal propositions that impose the same obligations.

The second primary source of international customary law is generally considered to consist of a combination of two elements: the objective element usus, which is the practice of states and the subjective element opinio juris sive necessitates (hereinafter opinio juris), which is the conviction that the state practice reflects a legal obligation. Taking an ‘inclusive approach’ (see Chapter 2.4.1.), state practice can consist of national laws and judicial decisions, statements by government spokesmen to Parliament, to the press, at international conferences as well as in

Introduction to International Law, p. 36. Scholars disagree on what constitutes a formal and material source respectively. For an account of different views on the sources of international law, see e.g. Brownlie, Ian, Principles of Public International Law, 6th edition, Oxford University Press, Oxford, 2003, pp. 3-4; Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie mot bakgrund av FN-stadgans innovativa utveckling, pp. 69-76. See, for example, Schachter’s critique against the traditional doctrine of sources, the use of digests of practice as a basis for an inductive factual positive science of international law and the often nationally biased treatises of international law that in fact are incompatible with the premises of scientific positivism. Schachter, International law in theory and practice, pp. 36-38.

339 Thirlway sees Article 38 as an exhaustive list of the recognised formal sources of law and a material source of the ‘secondary rules’ of international law. Thirlway, The Sources of International Law, pp. 117-119.

340 Malanczuk, Akehurst’s Modern Introduction to International Law, pp. 36-37.

341 Brownlie, Principles of Public International Law, p. 12.

342 Jennings and Watts (Eds.), Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition, p. 28. Opinio juris is said to be “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”.

343 Akehurst’s position on customary international law represents the ‘inclusive approach’. Cf. the ‘exclusive approach’ of Anthony D’Amato which is more restrictive on what can constitute ‘state practice’ (only physical acts). D’Amato, Anthony, The Concept of Custom in International Law, Cornell University Press, Ithaca, 1971, p. 88.
meetings of international organisations. Proof of instances of state practice can be gathered from published material such as newspaper reports of state actions. Opinio juris can be derived from several different material sources, and the essential problem is one of proof of its existence. In several cases the ICJ has assumed, not without criticism, the existence of an opinio juris on the basis of evidence of a general practice, a consensus in the literature or previous judicial decisions. See on the customary law process in Chapter 2.4.)

The third primary source is ‘general principles of law recognised by civilized nations’. The intention of this source was to provide a solution in cases where the first two sources gave no guidance and hence help in filling any gaps or lacunae in the law. The exact content of this source is controversial and scholars include either general principles of international law or general principles of law or both in this phrase. The inclusion of this source has been regarded as marking the abandonment of the positivist view, according to which treaties and custom are the only sources of international law, based upon state will.

Secondary sources or subsidiary means for the determination of rules of law are ‘judicial decisions’ and the ‘teachings of the most highly qualified publicists of the various nations’. The first one refers to both judicial decisions of international courts and tribunals as well as national courts. There is no doctrine of stare decisis or precedent in international law – that is, the ICJ is not bound by its earlier decisions. Several scholars have questioned the subsidiarity of judicial decisions and even though they cannot be considered a formal source, they are in some instances regarded as authoritative evidence of the state of the law. The teachings of the most highly qualified publicists have in several cases had a formative influence on international law. Neither of these sources make up binding law but both of them can affect the evolution of international law, by structuring and supporting the development of opinio juris.

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345 Brownlie, Principles of Public International Law, pp. 8-9. In other cases more positive evidence of opinio juris has been sought and it appears according to Brownlie that the choice of approach depends on the nature of the issues and the discretion of the Court.
346 Malanczuk, Akehurst’s Modern Introduction to International Law, p. 48. General principles of international law are not so much a source of law as a method of using existing rules by eg. analogy or inferring broad principles from specific rules by means of inductive reasoning. The ICJ has seldom applied general principles of law, see Jennings and Watts (Eds.), Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition, p. 37, § 12, note 5.
348 Malanczuk, Akehurst’s Modern Introduction to International Law, p. 51.
349 Articles 38 d) and 59 of the ICJ Statute. Only the parties to the dispute are bound by the decision of the Court.
350 Brownlie, Principles of Public International Law, pp. 19-21.
351 Ibid., p. 23.
352 Malanczuk, Akehurst’s Modern Introduction to International Law, p. 51; Bring and Mahmoudi, Sverige och folkrätten, p. 25.
The term “general international law” has traditionally referred to international customary law, and the ICJ has also used the term as a synonym for customary law.\textsuperscript{353} A rule of general international law is binding on all states, also for states lacking consent - unless they are not persistent objectors\textsuperscript{354} during the formation of a particular rule. Although historically the only general rules of international law that existed were customary rules, it has been argued that not all general norms must be customary in character. General international law also encompasses general principles of law.\textsuperscript{355}

\textit{Jus cogens}\textsuperscript{356} is a distinct category of norms defined in the Vienna Convention on the Law of Treaties (VCLT) for the purpose of the convention as a “peremptory norm of general international law”, “accepted and recognised by the international community of states as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.\textsuperscript{357}

There is also disagreement on the question of whether or not \textit{jus cogens} is an autonomous source of international law or can be found in some or all of the recognised sources of law.\textsuperscript{358} A \textit{jus cogens} norm is not to be regarded as regular customary law because of its specific criteria being


\textsuperscript{354} See more on this institution in Chapter 2.4.1.1.

\textsuperscript{355} Bring and Mahmoudi, \textit{Sverige och folkrätten}, p. 25. Bring and Mahmoudi argue that state practice also consists of national law, national judicial decisions and internal statements of a government, and therefore that principles of national law can also constitute state practice and in certain instances also be part of general international law.


\textsuperscript{357} Article 53 of the Vienna Convention on the Law of Treaties (VCLT).

different from that of a customary rule,\textsuperscript{359} but rather as a “special class of general rules made by custom” with a special legal force.\textsuperscript{360} Some scholars argue that the question from which formal source peremptory norms flow is more or less irrelevant.

A \textit{jus cogens} norm derives its status from the importance of its content\textsuperscript{361} but there is no general agreement as to which rules have this character.\textsuperscript{362} (See more on \textit{jus cogens} norms in Chapter 2.6.)

2.2. Alternative sources of law?

2.2.1. Acts of intergovernmental organisations

\textbf{2.2.1.1. Resolutions as verbal acts – Evidence of \textit{opinio juris}?}

One alternative source of law that has been mentioned is the verbal acts and decisions of intergovernmental organisations (IGOs), in the form of resolutions and declarations. The resolutions of IGO organs such as the General Assembly or the Security Council of the United Nations are not generally accepted as being independent sources of law but rather as representing the positions of states.\textsuperscript{363}

The International Law Association (ILA) adopted the final report of the ‘ILA Committee on Formation of Customary (General) International Law’ (the ILA Committee) at the ILA London Conference in 2000 – the ‘Statement of Principles Applicable to the Formation of General Customary International Law’ (the ILA Statement). This ‘Statement’ is arguably the most authoritative pronouncement on the formation of customary law in the legal literature.\textsuperscript{364} The Statement contends that it is probably best to regard these resolutions as representing a ‘series of verbal acts’, that is

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\textsuperscript{359} See the five criteria of a \textit{jus cogens} norm in Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, pp. 3, 6.
\textsuperscript{361} Thirlway, \textit{The Sources of International Law}, pp. 141-142.
\textsuperscript{363} Thirlway, \textit{The Sources of International Law}, p. 141; Bring and Mahmoudi, \textit{Sverige och folkrätten}, p. 26. For a brief overview of the different positions of scholars on this issue, the sceptical, middle position and the radical, see Higgins, \textit{Problems and Process. International Law and How We Use It}, pp. 26-27; For examples of the radical view that has met with much criticism see Falk, Richard, \textit{On the Quasi-Legislative Competence of the General Assembly}, AJIL, Vol. 60, pp. 782-791; Onuf, Nicholas G., \textit{Further Thoughts on a New Source of International Law: Professor D’Amato’s \textquoteleft Manifest Intent'}, American Journal of International Law, vol 65, 4, 1971, pp. 774-782, who proposes that this kind of source of law is to be called ‘manifest community law’, see pp. 781-782.
\textsuperscript{364} Due to lack of other general sources of authoritative determinations on ‘general customary law’ and because of the many international lawyers having taken part in this document, the ‘ILA Statements’ may be seen as representing mainstream opinion on the topic, see International Law Association, \textit{Statement of Principles Applicable to the Formation of General Customary International Law}, Final Report of the Committee, London Conference, 2000, pp. 3-5; Personal interview with Mendelson, Maurice, Professor, Blackstone Chambers, London, 20 May 2007.
\end{flushright}
statements, by those individual member states participating in that organ.

As a general rule, resolutions of IGOs do not ipso facto create new rules of customary law. It is only when a resolution claims (explicitly or implicitly) to enunciate binding rules that we can speak of legal pronouncements. Resolutions of IGOs can, if making implicit or explicit pronouncements on customary law, be either declaratory of existing customary law or contribute to the creation of new customary law. General Assembly resolutions asserting (implicitly or explicitly) the existence of a customary rule constitute rebuttable evidence that such is the case, according to the ILA Committee. The connection between General Assembly resolutions and opinio juris has been confirmed by the ICJ in the Nicaragua Case, where it stated:

This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States toward certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declarations on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of United Nations”. The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.

Non-binding resolutions have been relied upon in international litigation as evidence of opinio juris when they have been assessed as declaratory of customary law. In the Namibia Advisory Opinion the ICJ declared that General Assembly resolutions were not manifestly binding but nevertheless not without legal effect. The court asserted that the General Assembly resolution 2145 (XXI) formulated a legal situation, that is that South Africa’s mandate over the territory had been terminated, and stated that although the General Assembly was vested

365 Among such verbal acts in the form of statements are mentioned: “diplomatic statements (including protests), policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt - all of which are frequently cited as examples of State practice - are all forms of speech-act.” Ibid. p. 14.


367 Ibid., pp. 55-56.


only with recommendatory powers, this did not preclude its adopting, in specific cases and within its competence, “resolutions which make determinations or have operative design”.372

The ILA Statement recognises and confirms that resolutions may “in some instances constitute evidence of the existence of customary law; help to crystallise emerging customary law; or contribute to the formation of new customary law”.373 Such verbal acts could in certain circumstances hence be considered to be a state practice according to the inclusive approach, but also as evidence of opinio juris and thus contribute to a customary process. The same principles apply to the resolutions of international conferences of a universal character, mutatis mutandis, as apply to resolutions of the General Assembly.374

Hence, resolutions and decisions of IGOs do not ipso facto constitute elements of customary law. Such instruments could, if making implicit or explicit pronouncements on law, include either 1) declaratory statements of lex lata (already existing) international law, or 2) statements of lex ferenda with no relevance to customary law. But they can also include 3) statements of lex ferenda that may contribute to a customary process, by serving to clarify it or help crystallise an emerging rule. In the very rare and unusual situations, such a resolution could in fact 4) be constitutive of customary law, that is, by its own force create new general customary law. The ILA Committee recognised that resolutions accepted unanimously or almost unanimously, and which evince a clear intent on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption.375 Unanimity or consensus does not necessarily of itself establish a clear intention to this effect, and other circumstances such as the language used and lack of legal ambiguities in the text, as well as the process of its adoption, must all be examined.376

For the purpose of this thesis it is important to identify such instruments for their potential to contribute to a customary process. The difficulty lies in distinguishing resolutions containing propositions lex ferenda with no relevance to law, from those that do in fact have relevance to a customary process. The ILA Committee acknowledged that resolutions containing lex ferenda statements could, if circumstances

372 Namibia Case, Advisory Opinion (1971), p. 50
373 ILA, Statement of Principles Applicable to the Formation of General Customary International Law (2000), p. 55. See also Thirlway, The Sources of International Law, p. 141; Brownlie, Principles of Public International Law, pp. 14-15. When resolutions are concerned with general norms of international law and adopted by majority vote, these can have law-making consequences, according to Brownlie. Among the examples of ‘law-making resolutions’ that he mentions are: the Resolution on Prohibition on the Use of Nuclear Weapons for War Purposes and the Declaration on the Granting of Independence to Colonial Countries and Peoples.
375 Ibid., pp. 61-62. The Committee further held that in the event of a lack of unanimity, a failure to include all representative groups would prevent the creation of such a rule. Even if all representative groups were included, individual dissenting states would enjoy the benefit of the persistent objector rule. The Friendly Relations Declaration is mentioned as a rare example of constitutive resolutions in accordance with the dictum in the Nicaragua case.
376 Ibid., p. 62.
prove propitious, contribute to the crystallisation or formation of new customary law. Resolutions containing lex lata are simply declaratory of existing law. It is, however, common that resolutions appear to be declaratory of a rule in its formulation in the hope that such a statement will contribute to its development, while the purported rule in fact is merely representing lex ferenda. It is thus important to begin the assessment by first ascertaining whether the purported rule represents lex lata or lex ferenda. If it is a lex ferenda statement one should then consider whether the statement simply represents a statement of lex ferenda or could in fact constitute evidence of opinio juris (or even state practice), and subsequently contribute to a customary process. (See the discussion in Chapter 2.4.4.5. on statements of lex ferenda and its contribution to the customary process as evidence of opinio juris.)

That General Assembly resolutions can, in appropriate circumstances, provide evidence important for establishing the existence of a customary rule or the emergence of an opinio juris has been upheld by the ICJ. In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ asserted that:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.

Thus, the content of the particular resolution, the conditions of its adoption, as well as the normative character of the resolution are important factors for an assessment. Reiterated resolutions repeating the same purported rule do not of themselves add to the legal obligation, but there would be increased political obligation to consider the resolution in good faith, and it could serve to underline the emergence of opinio juris unless it carried significant opposition. It could also serve as an inspiration for the formation of a customary rule. Jennings and Watts have formulated several factors necessary to take into consideration when assessing the significance of a resolution:

In assessing the significance of resolutions in this respect it is necessary to bear in mind not only the facts relating to practice to which the resolution relates but

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377 Ibid., p. 56.
378 Ibid., p. 56.
also the legal force (if any) which the resolution has under the treaty establishing the organisation, the course of debates or other preparatory work leading to its adoption (since this may often disclose a lack of opinio juris which is not apparent from the terms of the resolution itself) and the degree to which a resolution is one of a series indicating a uniform trend.\footnote{Jennings and Watts (Eds.), Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition, § 16, p. 49. [Bold by author]}

The facts relating to the practice to which the resolution relates, any preparatory work and the debates leading to the adoption of the resolution, and its legal force, are all circumstances to include in its overall assessment. Higgins’ position on General Assembly resolutions acknowledges that certain resolutions may be a first step in the process of law creation and constitute evidence of a developing trend of customary law.\footnote{Higgins mentions scholars such as Oscar Schachter, Julius Stone, Lachs and Joyner joining her in this position, downplaying the importance of Assembly resolutions as non-binding, but accepting that it would be exceptional for any single resolution to have normative results. See Higgins, Problems and Process. International Law and How We Use It, pp. 26-28. On the radical stance she positions Richard Falk and Jorge Castaneda, who argue for quasi-legislative powers of the General Assembly and powers beyond its UN Charter competence.\footnote{Ibid., p. 28}} Her suggestion on how to ascertain the role of resolutions is to look at the subject matter of the resolution, whether it is binding or recommendatory, the majorities supporting its adoption, repeated practice and evidence of opinio juris.\footnote{ILA, Statement of Principles Applicable to the Formation of General Customary International Law (2000), p. 58.\footnote{Ibid., pp. 58-59.}}

Besides the circumstances mentioned above, the ILA Committee has suggested the necessity of examining the precise language of a particular resolution, and the circumstances of its adoption.\footnote{Ibid.\footnote{Ibid., pp. 58-59.}} The language indicates the will or intention of the authors of the text (cf. ’should’ indicating a recommendation, and ’shall’ for mandatory actions). Examples of circumstances at the adoption of the resolution are in explanations of the vote, and who voted for and against it. Statements made at the voting can reveal the intentions of the states in terms of the normative value and effect of the resolutions.\footnote{Ibid. p. 60.}

The ILA Committee explains:

States voting in favour of such resolutions are able thereby to provide the subjective element or customary law. How much weight is attributed to this depend, not only on the terms of the resolution and the whole process of its adoption, but also on any other supporting or conflicting statements or practice.\footnote{Ibid., p. 60.}

The problem with many resolutions, however, is precisely that states do not attach any legal significance to their voting and outcome. Many legal positivists therefore find resolutions to be a highly controversial and
dubious source having no legal basis. But this fact does not exclude the possibility of certain resolutions holding such intentions.

While the voting and protests to General Assembly resolutions can constitute a form of state practice, the resolutions also form part of a practice of the organisation. But state practice and organ practice should not be considered at the same time for the same resolution as two forms of practice, in order to avoid double counting the same instrument.

2.2.1.2. Resolutions as statements in abstracto – State practice?

Some academics argue that if these resolutions express an *opinio juris* they can be regarded as ‘state practice in abstracto’, contributing to the development of international customary law. Higgins maintains, however, that resolutions are but one manifestation of state practice and one must not use General Assembly resolutions, for example, as a short cut to ascertaining international practice on a matter – one must look to see if states actually mean what they have voted for by studying other forms of state practice. Resolutions cannot be a substitute for ascertaining custom and the existence other evidence of state practice will be necessary.

Security Council resolutions imposing obligations on states, repeated yearly cause the Council to engage in processes influencing international customary development. The resolutions are not strictly speaking sources of law, but they have an *ad hoc* effect and may create binding obligations for states. Article 25 of the UN Charter establishes the legal obligation for member states to follow Security Council decisions, not their recommendations. Enforcement measures taken under Chapter VII become directly binding on member states while resolutions under Chapter VI will not have the same legal effect, unless it is an Article 34 decision.

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388 See a strong critique in, e.g., Weil, *Towards Relative Normativity in International Law?* Higgins’ list of scholars with deep scepticism towards the relevance of General Assembly resolutions include Judge Sir Gerald Fitzmaurice, Judge Stephen Schwebel, Sir Francis Vallat, Professors David Johnson and Gaetano Arango-Ruiz. They accept that resolutions can contribute to the formation of customary international law, but are deeply sceptical this really happening. See Higgins, *Problems and Process. International Law and How We Use It*, p. 26.


393 Simma, Bruno (Ed.), *The Charter of the United Nations: A Commentary*, Volume II, 2nd edition, Oxford University Press, Oxford, 2002, pp. 456-458. Also Article 94 (2) is considered to be the second article along with Article 34 that can create binding resolutions apart from Chapter VII resolutions. All other Security Council resolutions are recommendatory and thus non-binding.
2.2.1.3. Physical acts – Organ practice or state practice?

In the Namibia Advisory Opinion (1971), the ICJ concluded that the Security Council custom of accepting the practice of abstentions by members of the Council as a new interpretation of Article 27 (3) had amounted to a general practice generally supported and accepted by the members of the organisation, which had modificatory effects on the UN Charter.\footnote{Namibia Case, Advisory Opinion (1971), p. 22, para. 22; Brownlie, \textit{Principles of Public International Law}, p. 664; Simma (Ed.), \textit{The Charter of the United Nations. A Commentary}, Vol. II (2nd edition), p. 461, para. 24.} The Security Council practice in this case was thus regarded as subsequent practice \textit{contra legem} but generally accepted by the member states in the application of the UN Charter, \textit{de facto} informally modifying the UN Charter. Such practice by an organ of an intergovernmental organisation such as the United Nations should be referred to as practice conducted ‘within the treaty framework’ and not as state practice contributing to a customary practice ‘outside the treaty framework’.\footnote{Cf., however, Higgins, \textit{Problems and Process. International Law and How We Use It}, p. 25. She explains that repeated practice of the organ in question in interpreting the treaty may establish a practice that if the treaty, \textit{i.e.} the UN Charter in this case, deals with matters of general international law, it can ultimately harden into custom. She argues that although ‘organ practice’ may not be good evidence of the intention of the original parties, it is of probative value as customary law, and the United Nations consequently plays a role of participant in the international legal process.} (See more on these distinctions in Chapter 2.5.)

This form of practice by an organ of an international organisation creating new law is also called \textit{‘the internal law of international organisations’}.\footnote{Wolfke, Karol, \textit{Custom in Present International Law}, Kluwer Academic Publishers, Dordrecht, 1993, p. 80. The term ‘infra-international law’ has also been proposed by Kocot, see \textit{Ibid.}, p. 80, note 114.} The internal law of an international organisation govern the legal status, structure and functioning of the organisation concerned.\footnote{Alvarez, José E., \textit{International Organizations as Law-makers}, Oxford University Press, Oxford, 2005, p. 144.}

Legally binding decisions of organs of the UN may also give rise to ‘external’ normative effects on international law.\footnote{\textit{Ibid.}, pp. 146 \textit{et seq}, 169 \textit{et seq}, and 184 \textit{et seq}.} The practice of the Security Council of adopting legally binding decisions on member states through resolutions imposing enforcement action under Chapter VII have normative effects on ‘external’ international law (in between states).\footnote{See \textit{e.g.} the argument \textit{Ibid.}, p. 187.}

Security Council authorised humanitarian intervention could arguably be divided into two separate practices where the decision of the Council should be regarded as ‘organ practice’ (comprising both internal and external normative relevance), while the state practice in the implementation of the decision by the Council could be seen as ‘subsequent practice’ of member states in the application of the UN Charter according to Article 31 of the VCLT (or possibly as customary practice outside the UN Charter). The same would arguably also apply
mutatis mutandis when such legally binding decisions are decided upon by a regional organisation and carried out by its member states.400

In practice, the line between internal and external normative impacts of decisions and law-making capacities by international organisations are not easily distinguished and most decisions in fact contain both elements.401 None of these fit well into the mould of classical legislation, and Alvarez explains that neither the process by which such norms emerge nor the norms ultimately produced fit very well within the predominant positivist framework.402 He concludes that the distinction between external law-making capacity and internal law-making collapses the closer one observes it, while this separation may be abandoned in the subsequent analysis. However, in order to distinguish the practice of an organ of an inter-governmental organisation from state practice based upon decisions of such an organ when possible, I shall refer to the former as ‘organ practice’ and the latter ‘state practice’ to denote this difference.

When state practice of humanitarian intervention is conducted without an express Security Council authorisation, the state practice could be seen as a violation of the UN Charter or contributing to a customary process ‘outside the UN Charter framework’ – or both.403 Practice of unauthorised humanitarian interventions by regional organisations similarly should be seen as state practice capable of contributing to a customary process outside the UN Charter framework.404

When state practice contributing to a customary rule of international law is based upon non-binding resolutions of an international organisation, for example, by the General Assembly, the ensuing customary norm may be called “customary international law of the organisations”.405 This would mean that an emerging norm on an unauthorised external R2P by military means could be called customary law of the UN if and when hardening into law, if the practice was undertaken on the basis of an extensive interpretation of the R2P formulation in the legally non-binding Outcome Document (2005). Wolfke explains, however, that additional acceptance and recognition of the state practice as law (opinio juris) would be necessary for such norms, since the legally non-binding recommendations cannot alone fulfil the elements of customary law. Unless this state practice is clearly uniform, constant and representative, the opinio juris of states should be ascertained as well. The non-binding resolutions could under certain circumstances form part of evidence of such opinio juris. (See above Chapter 2.2.1.1.)

400 Cf. ILA asserts that the practice of intergovernmental organisations in their own right is a form of state practice, see ILA, Statement of Principles Applicable to the Formation of General Customary International Law (2000), p. 19.


402 Ibid., p. 145.

403 Article 31 (3)(b).

404 It could possibly also be argued that unauthorised humanitarian interventions by regional organisations constitute subsequent practice contra legem in the application of the treaty, informally modifying the treaty if accepted by states.

405 Wolfke, Custom in Present International Law, p. 109.
This form of state practice should arguably be regarded as *tertium genus* state practice, situated somewhere in the middle position between subsequent practice in the application of a treaty and state practice in the formation of a customary norm outside the treaty framework. Since the formulation of the Outcome Document does not expressly support such an unauthorised external R2P, this thesis does not make use of this form of practice (see Chapter 4.6.).

### 2.2.2. Soft law

The meaning of the term ‘soft law’ and its legal value is somewhat controversial. There is no accepted definition. It denotes some form of ‘guidelines of conduct’ that are not strictly binding norms of law. Examples given in the literature are treaties that have not entered into force, resolutions or declarations of international conferences or organisations which lack legally binding quality, programmes of action, ‘Final Acts’, codes of conduct, joint statements, commitments, standards, and declarations of policy.

It is argued that soft law is a way for states to adopt and test certain rules and principles before they become law, and hence facilitate consensus on certain topics that are not yet ripe for becoming hard law. Non-binding commitments may be entered into precisely to reflect the will of the international community to resolve pressing a global problem over the objections of one or few states causing the problem, while avoiding their lack of consent, as Dinah Shelton states:

‘Soft law’ may also be relevant from a sociological perspective of international law with regard to the process of the formation of customary law or treaty law and the related issue of ‘legitimacy’ in the international legal system.

In recent years non-binding instruments have sometimes provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the

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406 Shelton, Dinah, *International Law and 'Relative Normativity'*; Evans, Malcolm D. (Ed.), *International Law*, 1st edition, Oxford University Press, Oxford, 2003, p. 166. It usually refers to an international instrument other than a treaty containing principles, norms, standards or other statements of expected behaviour. For strong opposition of the idea of ‘soft law’ owing to its effect of blurring the normativity threshold by introducing degrees of legal significance see Weil, *Towards Relative Normativity in International Law*; pp. 415-417; See also Klabbers, *The Redundancy of Soft Law*, where he describes how some writers use it to denote everything that falls short of hard law, others include non-legal phenomena, and for some it refers to politically or morally binding agreements. One of the most sophisticated defences of soft law according to Klabbers has been provided by Ulrich Fastenrath. See e.g. Fastenrath, *Relative Normativity in International Law*.


409 Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 54. Three major features of soft law instruments are described in Cassese, *International Law*, p. 196: indications of modern trends, reflections of new concerns and thirdly to reach convergence on standards that all states are not ready to consent to yet.

norm. The process of drafting and voting for non-binding instruments may also be considered to be a form of state practice. Cassese argues that soft law documents may lay the ground, or constitute the building blocks, for the gradual formation of customary rules or treaty provisions, and whereby soft law may progress into proper law.

Malanczuk, however, asserts that certain principles or rules that are emerging as new norms in the process of law-making, without yet having become accepted as legally binding, may have limited ‘anticipatory’ effect in judicial or arbitral decision-making as supporting arguments in interpreting *lex lata*. It is for this reason generally accepted among positivist scholars that law is binary, hence it is either binding or not, and that law does not have a sliding scale of bindingness. Soft law may contribute to an international customary process, but is not in itself reflective of *lex lata*.

2.3. The relationship between the primary sources

It is appropriate here to make a few general comments on the relationship between the primary sources, in particular customary law and treaties. The question is highly relevant to the analysis on whether or not there is an emerging customary norm on R2P by military means that in turn could modify the prohibition on the use of force laid down in the UN Charter. In the same way as the contents of law-making treaties can affect or develop customary law if globally applied, a treaty can be modified by subsequent customary law. (The relationship between custom and treaties through informal modification is particularly difficult and will be dealt with more in Chapter 2.5.)

Custom and treaties are of equal authority as sources of law, and three legal principles clarify how rules from these sources relate to each other: 1) *Lex posterior derogat priori*: later law prevails over earlier law; 2) *Lex specialis derogat generali*: special law prevails over general law; 3) *Lex posterior generalis non derogat priori speciali*: later law of general nature does not derogate an earlier special law. General principles of law only fill in gaps if the other two primary sources are of no guidance, and these consequently yield to treaty law and customary law.

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411 Ibid., p. 168.
412 Ibid., p. 168.
415 Malanczuk, *Akehurst’s Modern Introduction to International Law*, p. 55. Despite the limited legal effect of non-binding instruments, it is argued that they have an essential and growing role in international relations and in the development of international law.
416 Cassese, *International Law*, p. 199; Thirlway, *The Sources of International Law*, p. 136. A proposed provision indicating that the Court should apply the sources in the named order in which they were mentioned was rejected during the drafting of the Statute.
Another feature of the relationship between the primary sources is that customary rules and their treaty counterparts can have legally separate existences, as the court affirmed in the Nicaragua Case. More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter “supervenes” the former, so that the customary international law has no further existence of its own.

In this context the hierarchy of norms is of relevance. *Jus cogens* is superior in hierarchy to all other rules of international law and the above mentioned three principles governing the relationship between international rules do not apply to them. The hierarchical structure of the legal system is based upon *lex superior*, providing that some rules have a higher rank than other, and that conflict of rules may solved by other rules yielding to such higher norms. *Jus cogens*, for example, overrides the UN Charter and its Article 103 does not apply. This means, for example, that the Security Council has to comply with peremptory norms of *jus cogens* when exercising their powers, in accordance with the UN Charter. The UN Charter rules on the other hand override other treaty rules, according to Article 103.

At the same time, the peremptory norms of *jus cogens* do not appear to constitute the highest hierarchical category of norms. It does not form the source authorising the creation of rules of *jus dispositivum*. However, a peremptory norm cannot be revoked by a norm of *jus dispositivum* – that is a treaty or customary norm.

**2.4. Customary international law (CIL)**

**2.4.1. Introduction**

In order to study the process of the emerging customary norm (or norms) of external R2P (see Chapter 8) the following chapter examines the legal rules regulating the customary process by which such legal norm(s) of responsibility to protect by military means could develop. It seeks to answer the following questions: which rules govern the source of customary law? How is customary law formed? Which criteria must be met for an emerging norm to harden into a legal norm?

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419 Nicaragua Case (1986), p. 95, para. 177. The areas covered by customary international law and in the treaty did not overlap precisely and had slightly different content. For comment see Malančevski, *Akehurst’s Modern Introduction to International Law*, p. 40; Jennings and Watts (Eds.), *Oppenheim’s International Law, Vol 1, Peace. Introduction and Part 1*, 9th edition, pp. 35-36. See also Thirlway, *The Sources of International Law*, pp. 134-135 on the relationship between treaties and customary law.

420 Nicaragua Case (1986), p. 95, para. 177.


422 *Ex analogia* Article 64 of the VCLT.

423 Shaw, *International Law*, p. 119, note 217, which refers to Judge Lauterpacht’s Separate Opinion in the Bosnia Case.


425 Ibid., p. 12. See, however, the discussion on this topic in Chapter 2.6.3.
2.4.2. General on CIL

Customary law is unwritten international law based upon general and consistent practices of states in accepting them as legally binding.\textsuperscript{426} It is facultative, dispositive law, from which states can derogate by concluding a treaty with different obligations, as long as they do not violate \textit{jus cogens}.\textsuperscript{427} The ILA Committee writes in its Statement that customary law is by its very nature the result of an informal process of rule creation, in that the degree of precision found in more formal processes of law-making is not to be expected in the formation of this source of law.\textsuperscript{428} Although there have been some pronouncements on the rules for the formation of customary law by international courts and tribunals, these have tended to be non-systematic and very much incidental to the substantive questions at stake.

The formulation of this source has been criticised for poor drafting in Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ). It has been argued that it would have been better reversedly phrased. The wording ‘[i]nternational custom, as evidence of a general practice accepted as law’, corresponds better with reality in a reverse order: ‘General practice accepted as law, as evidence of an international customary rule’.\textsuperscript{429} Nonetheless, the formulation provides that customary law comprises two elements – “general practice”, that is, \textit{state practice} (the objective element) and secondly, that the practice be “accepted as law”, that is, \textit{opinio juris} (the subjective element). The ILA Committee was of the opinion that the need of a combination of the two elements to form a customary rule is an over-simplification, and that it is not usually necessary to demonstrate the existence of the subjective element before a customary rule has come into being, but it acknowledged that there are instances where it is necessary.\textsuperscript{430}

The ICJ has made significant contributions to the doctrine of customary international law and made statements on the necessary criteria for the formation of a customary rule. In the most cited pronouncement in the North Sea Continental Shelf Cases (1969), the court expressed its view on several requirements for a customary rule to consolidate: The duration, generality, extensiveness and uniformity of

\textsuperscript{426} Kontou, Nancy, \textit{The Termination and Revision of Treaties in the Light of New Customary International Law}, Clarendon Press, Oxford, 1994, pp. 2-3. These Statements were not intended as a draft convention, but rather a statement of the relevant rules of principles as the Committee understands them. Its purpose is to serve as practical guidance for those called upon to apply or advise on the law, as well as for scholars and students. \textit{Ibid.}, p. 4.
\textsuperscript{427} Malanczuk, \textit{Akehurst’s Modern Introduction to International Law}, p. 56.
state practice, the interests of specially affected states and the presence of the subjective element. It stated:

Although the passage of only a short period of time is not necessarily, or itself, a bar to the formation of a new customary international law on the basis of what was originally a purely of conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.431

Traditionally, state practice has been regarded in the legal literature as not being able to create a customary rule on its own.432 The ILA Statement, however, changes the view on the subjective element considerably. The ILA Committee, claims that the contended necessity of this element is the result of a number of misconceptions based upon what may well be faulty reading of the pronouncements on opinio juris by international courts and tribunals.433 The obiter dictum in the North Sea Continental Shelf Cases is claimed to have been taken out of context.434 The ILA Statement presents its own working definition of what constitutes a rule of customary law. From Principle 1 follows that:

1. (i) Subject to the Sections which follow, a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.
(ii) If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of “general customary law”. Subject to Section 15, such a rule is binding on all States.
(iii) Where a rule of general customary international law exists, for any particular State to be bound by that rule it is not necessary to prove either that State’s consent to it or its belief in the rule’s obligatory or (as the case may be) permissive character.435

The working definition is not intended to be a formal prescriptive definition, and it has not been formally adopted by states. The ILA Committee, however, states that the Statement is based upon rules about the sources of customary law found in the practice of states.436 It has been argued that it holds a more advanced elaboration on customary law

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432 Akehurst, Custom as a Source of International Law, p. 31. See also pp. 32-34 about scholars who minimise the need of opinio juris or try to eliminate it altogether. Cf. Kirgis sliding scale in Kirgis, Frederic I., Custom on a Sliding Scale, American Journal of International Law, vol 81, 1, 1987, pp. 146-151.
434 Ibid., pp. 7, 10.
435 Ibid. [Author’s Italics]
436 Ibid., p. 4.
than the currently accepted definitions by states of customary law and state practice. The two elements and their qualifications are discussed below.

2.4.3. The objective element

The objective element of customary law, also called the material element, consists of practice of states, also called usus. This element is regarded by many to be the most important component of customary law. The above mentioned working definition of customary law in the ILA Statement reveals that state practice must be constant and uniform, but also that a sufficiently extensive and representative number of states participate in a consistent manner in the practice. The ILA Statement also formulated another more specific and elaborated definition on state practice:

12. (i) General customary international law is created by State practice which is uniform, extensive and representative in character. These three requirements are dealt with in Sections 13-15.
13. For state practice to create a rule of customary law, it must be virtually uniform, both internally and collectively. “Internal” uniformity means that each State whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. “Collective” uniformity means that different States must not have engaged in substantially different conduct, some doing one thing and some another.
14. (i) For a rule of general customary international law to come into existence, it is necessary for the State practice to be both extensive and representative. It does not, however, need to be universal.
15. If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it.

This definition introduces a new distinction, between “internal” and “collective” uniformity (see more in Chapter 2.4.1.3.). Except for this new distinction on uniformity, the other qualifications for state practice have been identified and discussed in different cases of the ICJ and PCIJ, as well as in the legal literature. I shall make brief introductions to these in the subsequent chapters. These cases provide that state practice should be 1) general, 2) consistent 3) uniform, and 4) have some duration, in order to contribute to the formation of general customary law. The qualifications of extensiveness and representativeness are in the literature often related to and subsumed under the condition of generality, and will therefore be dealt with in Chapter 2.4.1.1.

439 Ibid., p. 20.
440 Ibid., p. 21.
441 Ibid., p. 23.
442 Ibid., p. 27. [Bold by author]
Inclusive and Narrow Approaches to Custom

There has been a longstanding disagreement among scholars as to what forms of practice can actually constitute state practice. One of the most controversial forms of practice has been *statements in abstracto*,\(^\text{443}\) including verbal acts, also referred to as *statements*.\(^\text{444}\) According to the minority ‘narrow approach’\(^\text{445}\) on state practice, only physical acts count, and claims by states through statements can and should not be regarded as state practice. This approach has been called “Rambo” superpositivism because with regard to the use of force it accords great weight to acts of interventions, but no weight to protests, resolutions and declarations condemning them.\(^\text{446}\)

There are convincing and strong reasons for not adopting the narrow approach, which outweighs this disadvantage. Byers explains that the narrow approach “leaves little room for diplomacy and peaceful persuasion, and marginalises less powerful States in the process of customary international law”.\(^\text{447}\) If only physical acts count, fewer states may be able to take part in materially demanding state practice. Villiger lists a set of arguments for the wider notion of practice. Among other things, he contends that states themselves should regard comments at conferences as constitutive of state practice and that courts and a majority of writers should regularly refer to abstract verbal acts when constructing a customary rule.\(^\text{448}\) He maintains that a restricted view has not accommodated sufficiently and the UN and similar bodies have become the most important fora in which to express themselves, collectively or individually. Akehurst contends that it is artificial to try to

\(^{443}\) Akehurst, *Custom as a Source of International Law*, pp. 4-8.

\(^{444}\) Villiger, *Customary International Law and Treaties*, pp. 8-10. Villiger distinguishes between ‘verbal statements’ of states and ‘written texts’, such as conventions, drafts, resolutions and codes. Acts manifestating ‘verbal statements’ can *i.a.* include written observations of states on draft texts to bodies of the UN, statements in the General Assembly or in other UN fora, statements at diplomatic conferences, amendments tabled at such debates, explanations of votes, interpretative declarations and reservations made in connection with the adoption of a text. See his comments on further examples such as votes, consensus as a special means of adopting a text, package deals and collective stands on certain issues, pp. 9-10. As to ‘written texts’, further instances of material practice are required and the instances whereby states apply, refer to or vote upon the written rules in concrete cases will contribute to the formative process of customary law by providing or reflecting evidence of a customary rule, p. 10.

\(^{445}\) The leading opponent to the more generally accepted ‘inclusive approach’ is D’Amato, but also scholars such as Fitzmaurice, Wolfe, Thirlway and Kings represent this more narrow stand on the interpretation of what constitutes customary law. See D’Amato, *The Concept of Custom in International Law*, pp. 87-90. The restrictive view is a minority view according to Akehurst, *Custom as a Source of International Law*, pp. 1-2. Thirlway has a less restrictive view and acknowledges statements in concrete cases but not *in abstracto*. He argues that the latter can only be regarded as supplementary evidence of state practice or *opinio juris*, see Thirlway, H. W. A., *International Customary Law and Codification*, A. W. Sijthoff, Leiden, 1972, p. 58.


\(^{448}\) See Villiger, *Customary International Law and Treaties*, pp. 6-7.
distinguish between different state acts, and furthermore points to the fact that otherwise the only way to change a rule of customary law would be to repeatedly break it.\(^{449}\)

The ILA Statement (2000) embraces the ‘inclusive approach’,\(^{450}\) by asserting that verbal acts, and not only physical acts, count as state practice.\(^{451}\) Verbal acts are in fact more common forms of state practice than physical conduct.\(^{452}\) The ILA Committee lists examples of diplomatic statements (including protests), policy statements, press releases, official manuals (on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements of international organisations and the resolutions that these bodies adopt, as frequent forms of state practice in the forms of speech-act.\(^{453}\) The protests and voting for General Assembly resolutions would also count as verbal acts constituting state practice, according to the Committee.\(^{454}\)

It, however, adds that it is important to distinguish between, on the one hand, the ability or inability of a verbal act to contribute to the formation of customary law in the form of state practice, and on the other, the weight attributed to that act.\(^{455}\) The state practice deduced from a verbal act or statement \textit{in abstracto} must be weighted from the point of view of which states have made them and the circumstances in which they did so.\(^{456}\) The ILA Committee distinguishes between the admissibility of evidence and the weight it would count. Even if statements of states were to be considered as state practice, the issue of weight of this form of state practice must be taken into account. Statements \textit{in abstracto} on R2P by military means must for example be given little weight as state practice in comparison with physical military interventions for protection purposes.

Some statements may therefore be more usefully regarded as expressions of opinion rather than as formal acts of state practice, according to the ILA Committee.\(^{457}\) I would suggest that official verbal acts or statements regarding a state’s view on humanitarian intervention

\(^{449}\) Akehurst, \textit{Custom as a Source of International Law}, pp. 3-4, 8.

\(^{450}\) The ‘inclusive approach’, in which statements are regarded as state practice, has been applied by the ICJ (see e.g. the Nicaragua Case (1986), p. 100, para. 190, and Colombian-Peruvian asylum case, Judgment of November 20th 1950: ICJ Reports, 1950, p. 266, p. 277), ILC (see Report of the International Law Commission, \textit{Yearbook of the International Law Commission}, part II, 1950, pp. 367-372), and also by the majority of scholars, e.g. Akehurst, Mendelson, Brownlie, McDougal, Villiger. See an overview of the evidence of this approach in Byers, \textit{Custom, Power and the Power of Rules, International Relations and Customary International Law}, pp. 134-135.


\(^{452}\) Ibid., p. 14.

\(^{453}\) Ibid., p. 14.

\(^{454}\) Ibid., pp. 60-61.

\(^{455}\) Ibid., p. 13.

\(^{456}\) Personal interview with Professor Mendelson, London (2007).

is an instance where such statements should not be regarded as representing state practice, but rather as the opinions of states, which under some circumstances could count as evidence of *opinio juris*. For example, the pleadings of Belgium and the UK before the ICJ in the Legality of the Use of Force Cases, where these states advanced their legal justifications for the NATO intervention in Kosovo 1999, should not count as state practice on humanitarian intervention as such. The same goes for the reference in the UK manual on humanitarian law, which addresses humanitarian intervention (see Chapters 7.1.5.2 and 7.2.4.3. on opinio juris and RHI and UHI respectively).

In this thesis I generally support the ‘inclusive approach’, in which statements are regarded as constituting state practice. The ‘inclusive approach’ is more consistent with a soft positivist approach used for the present study on R2P. From this approach it follows that state practice can be gathered from not only physical acts and classical material sources. These include not only ‘texts of international instruments, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors, practice of international organisations’, but also general declarations of foreign or legal policy, instructions given to state representatives, government pleadings before international tribunals, parliamentary and administrative practice, as well as press communiqués, official manuals dealing with legal questions, executive practice or decisions, orders to armed forces on rules of engagement, votes in international organisations, observations of governments on International Law Commission (ILC) projects or similar bodies and published material such as newspaper reports of state actions, statements of government spokesmen to Parliament, to the press, at international conferences as well as in meetings of international organisations. Long as it is, the list is not exhaustive of the various forms of state practice in international relations. Even omissions, that is, the absence of state practice, accompanied with an *opinio juris* can contribute to the emergence of a rule of customary law.

The Epistemological Circle

One disadvantage with the inclusive approach is that one does not avoid the ‘epistemological circle’ which arises when assessing a statement which can constitute both state practice and *opinio juris*. Byers explains

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459 Vägging, *Customary International Law and Treaties*, pp. 4-5.
461 Malančuk, *Akehurst’s Modern Introduction to International Law*, p. 39. The vast amount of written material that could inform us about state practice, e.g. correspondence with other states, is normally not published. Certain states publish ‘Digests’ of their state practice but this is an expensive enterprise and not regarded as sufficiently universal and widespread to rely upon as the sole source for empirical analysis and generalisations about state practice.
462 See Akehurst, *Custom as a Source of International Law*, p. 10.
463 Byers, *Custom, Power and the Power of Rules, International Relations and Customary International Law*, p. 136. See more on the epistemological circle in Chapter 2.4.4. of this thesis.
the ‘epistemological circle’ as the difficulty in determining whether *opinio juris* exists if the only evidence of such at the same time constitutes state practice, since *opinio juris* is still required as a separate element to distinguish relevant from irrelevant state practice. However, as the ILA statement explains, the need to assert *opinio juris* is not as important as it has traditionally been considered to be. The risks of double-counting are thus no longer so important.

Furthermore, when it comes to the study of emerging norms of R2P by military means, the risk of double counting is in reality absent, since it is the factual instances of humanitarian intervention, and not states’ general statements on rights or responsibilities with regard to such interventions, that will be regarded as state practice. Statements *in abstracto* holding states’ positions on this issue should not be counted as both state practice and *opinio juris*, but only represent the latter element. Protests and condemnations in relation to humanitarian interventions should, however, count as state practice.

### 2.4.3.1. Generality

**General Custom – Extensive Practice**

For the purpose of Article 38 of the ICJ Statute, a practice must be general in order to constitute an international custom. The criterion of generality has to do not only with the number of states contributing, actively or passively, to the formation of a customary rule (the requirement of *extensive practice*), but also with which states participate in the practice (*representative and specially affected states*). The generality of practice further entails that only one general customary norm emerges on one issue. If the practice is not sufficiently widespread and cannot amount to a general rule, a number of special customary rules may arise, each regulating the same question in a different manner for different groups of states.

The state practice must be extensive. That is, it must be common and widespread – but universal practice is not required. Practice does not have to be either observed or accepted as law, tacitly or expressly, by every state. The ICJ in the North Sea Continental Shelf Cases asserted that it was sufficient if the practice was representative and included the interests of specially affected states.

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466 Ibid., p. 13.

467 Ibid., p. 13.


With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.470

The number of states taking part in a practice is considered to be more important than the number of acts of which the practice is composed of, and a much more important criterion than the duration of the practice.471 Mendelson, on the other hand, rejects the idea that one or two instances of practice _per se_ could create a new customary rule, as well as indirectly rejecting the idea of ‘instant customary law’.472 Furthermore, this is provided that the extent of participation is a qualitative criterion, which means that it is more important which states have participated, rather than how many. If all major interests and specially affected states have participated and are represented, it is not essential for a majority of states to have participated.473 According to the ILA Statement, it is not normally necessary for a majority of states to have engaged in the practice, provided that participation is sufficiently representative and that there is no significant dissent.474 The ILA Committee explains that given the inherently informal nature of customary law, it is not expected, neither is it the case, that a precise number or percentage of states be involved in the practice.475 Much would depend on the circumstances and in particular on the degree of representativeness of the practice.

The amount of practice required to establish a new rule that conflicts with a previously accepted and existing customary rule is greater than the

470 North Sea Continental Shelf Cases (1969), p. 42. para. 73. [Author’s italics] The Court refers to a general customary rule as a general rule of international law. This interchangeability is common in ICJ cases. See also para. 74, where the Court talks of ‘extensive and virtually uniform’ practice.

471 Akehurst, _Custom as a Source of International Law_, pp. 14, 16. Akehurst states that it is difficult to lay down that a precise number of states must participate in the practice for a customary rule to form. He adds that ‘participation’ not only consists of actions of states but also the reaction of other states whose interests are affected.

472 Professor Cheng introduced the idea of ‘instant customary law’ with regard to a unanimously adopted UN General Assembly resolution on outer space, but the concept has met considerable criticism, see Cheng, B., _United Nations Resolutions on Outer Space: “Instant” international customary law?_, Indian Journal of International Law, vol 5, 1965, 23-48; Mendelson, _The Formation of Customary International Law_, p. 25. Certain ‘density’ of the practice is required according to Mendelson who has used this phrase from Waldock, see _Ibid_. p. 211.

473 ILA, _Statement of Principles Applicable to the Formation of General Customary International Law_ (2000), p. 26. The Committee admitted that the CIL process is an undemocratic procedure, in that the more important participants play a particularly significant role in the process, but that CIL is “in touch with political reality”. It states, however, that there is no rule that major powers have to participate in for a CIL rule to develop, but that given the scope of their interests, geographically and _ratione materiae_, such states will often be specially affected states by practice. It is underlined that it is, however, only to this extent alone that their participation is necessary.

474 _Ibid_. p. 25.

475 _Ibid_. p. 25.
sum of practice needed to establish a new rule in vacuo.\textsuperscript{476} This means that a practice followed by a few states can create a rule only if there is no practice where a rule conflicts with that rule.\textsuperscript{477}

General customary law is binding on all states \textit{erga omnes}.\textsuperscript{478} Once it is established that a general rule of law exists, there is no need to prove that a particular state has participated in its formation or otherwise accepted or consented to it, in order to make the rule binding on it.\textsuperscript{479} A state which neither supports nor rejects a general rule of customary law will thus become bound by an emerging customary rule, unless it publicly opposes the rule as a persistent objector, meaning that the concerned state has \textit{consistently} opposed and dissented from the customary rule from its \textit{inception} and therefore has avoided becoming bound by it (persistent objector).\textsuperscript{480}

**Persistent Objection**

Although all general customary law has the potential to be universal, it is possible for states to exclude themselves from the ambit of a general rule by the institution of persistent objection.\textsuperscript{481} The ILA Committee confirms that a state, persistently and openly dissenting from a developing rule of general law, will not be bound by that rule.\textsuperscript{482} The objection must be expressed publicly and repeatedly as often as

\textsuperscript{476} Akehurst, \textit{Custom as a Source of International Law}, pp. 17-18. A great deal of practice is hence needed to overturn existing rules of customary law. As Akehurst formulates it: "The better established a rule is (i.e. the more frequent, longstanding and widespread the practice which supports it), the greater the quantity of practice needed to overturn it.", Akehurst, \textit{Custom as a Source of International Law}, p. 19.

\textsuperscript{477} Akehurst, \textit{Custom as a Source of International Law}, p. 18.

\textsuperscript{478} \textit{Erga omnes} obligations are obligations of a state which are owed towards the international community as a whole. It is a concern of all states and all states can be held to have a legal interest in their collective protection. Case Concerning Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports, 1970, p. 3, p. 32, paras. 33-34. See also Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie mot bakgrund av FNs ständiga ombednas innovation och utveckling, p. 130.

\textsuperscript{479} Mendelson, \textit{The Formation of Customary International Law}, p. 216; ILA, \textit{Statement of Principles Applicable to the Formation of General Customary International Law} (2000), p. 24. See also the ILA Committee’s opinion on the voluntarist view on the necessity of state consent for a customary norm to be binding on a particular state, \textit{Ibid.} pp. 25, 28 et seq. In summary, the Committee denied the validity of this theory.

\textsuperscript{480} Villiger, \textit{Customary International Law and Treaties}, pp. 15-17; Akehurst, \textit{Custom as a Source of International Law}, pp. 23-27; Mendelson, \textit{The Formation of Customary International Law}, pp. 227-244. The concept has been accepted by a majority of writers, although D’Amato and a few other scholars (T. L. Stein and J. Charney) have contested it. Mendelson makes an elaborate response to the criticism of the persistent objector institute, see Mendelson, \textit{The Formation of Customary International Law}, pp. 228-244. There is nevertheless sufficient support for stipulating two criteria for a persistent objector; 1) consistent opposition and 2) in \textit{statu nascendi} of a customary rule, i.e. from its inception. States that object to a customary rule after its formation are called subsequent objectors and their practice will evidently be viewed as a violation of the rule. If a large number of states become subsequent objectors, the breaches of the customary rule may lead to modification or \textit{desuetude}. See Villiger, \textit{Customary International Law and Treaties}, pp. 17-18.


\textsuperscript{482} \textit{Ibid.}, p. 27 et seq.
circumstances allow, in order to establish persistence. Verbal protests, however, are sufficient, and there is no rule that states have to take physical action to preserve their rights. The leading case supporting this institution is the Fisheries Case in which the court asserted that:

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she always opposed any attempt to apply it to the Norwegian coast.483

As has been stated, customary law requires general, not universal practice, and a new customary rule is not called into question by the diverging practice of some persistent objectors.484 Villiger explains that the greater the number of states that actively adhere to a rule, the greater could be the number of states that diverge from the rule in their practice, without that dissent having the effect of preventing the development of the customary rule.485 Consequently, dissent or protest by some states does not prevent the creation of a new customary rule, but could in some cases lead to the creation of different rules of customary law among different groups of states.486

**SPECIAL/PARTICULAR CUSTOMARY LAW**

If the extent of state practice is limited geographically or confined to a limited group of states, the customary rule may be regional, local or bilateral customary law.487 A group of states that adhere to such a common but limited customary practice do not need to be defined geographically. By definition, special custom conflicts with general custom but prevails through *lex specialis derogat generali*.488 In certain situations special customary law *ratione personae* may also supersede treaty law. In the instances where both the treaty rule and the posterior customary rule are special, the latter prevails per *lex posterior*.489

By contrast to general custom, it is necessary to prove that a particular custom has become binding on the specific state concerned through

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484 Villiger, *Customary International Law and Treaties*, p. 17: “There is no majority rule in the formation of customary law”. Villiger emphasises that negating the institution of persistent objection overlooks the sovereignty and equality of states.
485 Ibid., p. 17.
488 Akehurst, *Custom as a Source of International Law*, p. 29. This applies unless the general custom is *jus cogens*.
489 Villiger raises a few implications in situations of special customary law *ratione personae* and treaty rules. He states that if the new modificatory custom is special *ratione personae* it may exist as a parallel subsystem alongside a convention, but that the state parties to the convention should apply the conventional rules in relation to other state parties that are not members of the special custom, see Villiger, *Customary International Law and Treaties*, p. 217.
some form of participation or consent. In the Asylum Case, the court asserted the burden of proof for special custom when explaining:

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

Apart from the strict rule of burden of proof and the specific consent of states, the same criteria are presumed to apply with regard to special custom as to general customary law. However, between states bound by the special custom and a state that is not, the general custom, from which the special custom deviates, applies.

The emerging customary norm of an external right to humanitarian intervention for regional organisations should, however, be seen as a customary process for a 'general' customary rule rather than of a special or particular customary law (special custom ratione personae), since this practice involves the modification of the prohibition on the use of force (an erga omnes obligation), which concerns the whole international community (ratione materiae) (see Chapter 8.3.).

**REPRESENTATIVE PRACTICE**

State practice needs to be representative in the sense that it includes all major participants or groups of participants in the activity. Mendelson explains that this criterion balances the criteria of 'specially affected states' by not allowing the power of states to be over-emphasized. The latter entails that the customary rule will reflect the realities of power, therefore having a reasonable prospect of being effective.

**SPECIALY AFFECTED STATES/STATES DIRECTLY CONCERNED**

The identity of states also matters to certain extent in the formation of customary law (ratione personae). In certain fields it is argued that the practices and attitudes of states directly concerned may be of most

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493 Akehurst, *Custom as a Source of International Law*, p. 29.

494 For a distinction between general and special customary international law, see D'Amato, *The Concept of Special Custom in International Law*, p. 212 et seq. General customary law contains rules, norms and principles that appear applicable to any state and not to a particular state or an exclusive grouping of states, for example, the rules on warfare, diplomatic immunities etc., according to D'Amato.


496 Ibid., p. 227.
importance. This was the case, for example, with coastal states, as opposed to land-locked states, with regard to the continental shelf in the Court’s assessment in the North Shelf Continental Cases. If a significant actor rejects a developing practice it cannot become general customary law. However, even if all specially affected states were to engage in the practice, it would not be sufficient practice for the formation of a customary rule if states indirectly affected were to support a practice inconsistent with theirs. Such contrary practice would deny the rule its generality.

The ILA Committee stated that there was no rule that major powers had to participate in the practice for a customary rule to develop, but given the scope of their interests, geographically and ratione materiae, such states would often be specially affected states. It is, however, underlined that it is to that extent alone that their participation is necessary.

2.4.3.2. Consistency

Manifestations of state practice have to abide by the emerging customary rule with appropriate sufficiency. The court asserted in the Nicaragua Case that the practice should ‘in general be consistent’. It stated:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, as not as indications of the recognition of a new rule.

The customary process thus allows for a certain number of inconsistencies, but not too many. A small amount of inconsistency does not prevent the creation of a rule, but it increases the amount of practice required to establish it. Inconsistencies can also lead to the creation of

497 Jennings and Watts (Eds.), Oppenheim’s International Law, Vol 1, Peace. Introduction and Part 1, 9th edition, p. 29. The authors refer to the Fisheries Case (1951), p. 139.
499 Akehurst, Custom as a Source of International Law, p. 22; Villiger, Customary International Law and Treaties, p. 14. Cf. also Mendelson, The Formation of Customary International Law, p. 224-226. The uncontestable fact that some states have greater influence on the formation of customary international law and the relationship between law, power and customary law has been further explored in Byers, Custom, Power and the Power of Rules, International Relations and Customary International Law.
502 Akehurst, Custom as a Source of International Law, p. 20.
a set of customary rules applicable to some states and a different set among another group of states.503

Inconsistencies are inevitable, especially with customary processes that take place within the UN framework where states have many opportunities of expressing and varying their positions, according to Villiger.504 A broad definition of what constitutes state practice also contributes to increased chances of inconsistencies in state practice.505 Villiger holds that the examining of instances of state practice in too much detail would neglect the important ‘general’ character of customary law.506

2.4.3.3. Uniformity

State practice must be uniform, meaning that the various instances of practice must be essentially similar and represent consistent acts when comparing different states, and even the practice of the same state, thus expressing the same customary rule.507 The uniform practice does not need to be absolutely uniform or complete – a substantial virtual uniformity is sufficient.508 The ICJ has illustrated this requirement of state practice in several instances and stated in the North Sea Continental Shelf Cases that:509

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;510

This qualitative element that refers to the substance of the practice is to a certain extent a matter of appreciation, according to Villiger. If evidence of practice is virtually uniform from the beginning and evidence of opinio juris clear, the necessary number of states actively engaging in practice could be relatively few, which means that a relatively high number of states may abstain from conduct creating a customary rule and the rule might still develop into customary law.511

The ILA Statement has developed this qualification further as mentioned above, by distinguishing between ‘internal’ and ‘collective uniformity’. The ICJ dictum in the Fisheries Case is cited with regard to

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504 Villiger, Customary International Law and Treaties, p. 23.
505 Akehurst, Custom as a Source of International Law, p. 21. Akehurst nevertheless argues that a certain practice should not count more than other forms of practice in order to avoid this problem with an ‘inclusive approach’ to state practice. The ILA Committee takes the opposite position, see Chapter 2.4.1.
506 Villiger, Customary International Law and Treaties, p. 23.
507 Mendelson, The Formation of Customary International Law, p. 212; Villiger, Customary International Law and Treaties, p. 22. Mendelson explains that both internally (each state) and collectively (as between states) practice has to be uniform and refers to the Fisheries Case (1951), p. 131.
508 Villiger, Customary International Law and Treaties, p. 22.
509 See also Asylum Case (1950), p. 276; Right of Passage Case (1960), p. 40.
511 Villiger, Customary International Law and Treaties, p. 20.
internal uniformity, when explaining that “too much importance need not be attached to the few uncertainties or contradictions, real or apparent” in a state’s own practice. The court further explained the reasons hereto: “They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.” But if the duration of time is short for the emergence of a new practice, it could be argued that higher demands should be raised with regard to internal practice.

When it comes to collective uniformity, the ILA Committee, the practice of states as a collective may not deviate too much if a general rule of customary law is to develop. Too many inconsistencies between the practice of states or other actors, such as regional organisations, are not acceptable. According to the judgement in the Fisheries Case, the court asserted that although several states had adopted a ten-mile closing line for bays, other states had adopted other limits and the ten-mile rule had therefore not acquired the authority of a general rule of international law.

2.4.3.4. Duration

It is generally accepted that at least some time is required for the formation. Regarding the passing of time, the ICJ has not stated a fixed time limit for how long the duration of practice must be. In the Asylum Case the court spoke of “constant and uniform usage practiced by the States”. In the North Sea Continental Shelf Cases the court disagreed with the traditional view that a ‘considerable period of time’ should have passed:

it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.

Villiger therefore concludes that duration is a ‘relative requirement’, and that “active and consistent practice of a comparatively large, ‘representative’ group of States may harden into a customary rule after a comparatively short period of time”. Akehurst also maintains that the time requirement can usually be dispensed with if there are no precedents which can be cited against the purported rule of customary law, and moreover states that “[t]he number of States taking part in an

513 Fisheries Case (1951), p. 131.
516 North Sea Continental Shelf Cases (1969), p. 42, para. 73. [Author’s italics]
517 Villiger, Customary International Law and Treaties, pp. 24-25.
Custom is and has normally been a relatively slow process for evolving rules of law, and customary international law is argued to be normally too slow as a means of adapting the law to fast-changing circumstances. However, many scholars point to the important role that international organisations play in contributing to a more rapid adjustment of this source of law to the developing needs of the international community. Information technology has created a ‘high speed society’ in many parts of the world, which is influencing this process and could be argued to further increase the speed of the customary process. Improved communications have enabled the actions and reactions of states to be known all over the world more quickly than in the past, while the traditional view of the time factor has lost some of its importance. The ILA Statement confirms this development:

12. (ii) Although normally some time will elapse before there is sufficient practice to satisfy these criteria, no precise amount of time is required.

The ILA Committee states that there is no specific time requirement, and that it is all a question of accumulating a practice of sufficient density, denoting uniformity, extent and representativeness. These conditions have all been commented on in the analysis above.

### 2.4.4. The subjective element

#### 2.4.4.1. Opinio juris

The subjective element, *opinio juris*, is the evidence of a belief that the state practice is rendered obligatory by the existence of a rule of law requiring it. Also called ‘the philosophers stone’, it has, according to Thirlway, probably caused more academic controversy than all the actual contested claims put together made by states on the basis of alleged

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518 Akehurst, *Custom as a Source of International Law*, pp. 15-16.
520 Jennings and Watts (Eds.), *Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition*, pp. 30-31. The practice of states developed in international organisations is by many scholars regarded as valuable evidence of general practices accepted as law.
521 Akehurst, *Custom as a Source of International Law*, p. 16.
523 Ibid., p. 20.
524 Jennings and Watts (Eds.), *Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition*, p. 28; Villiger, *Customary International Law and Treaties*, p. 26. *Opinio juris sive necessitatis* literally means belief or opinion of law or of necessity, see Mendelson, *The Formation of Customary International Law*, p. 268. However, an alleged rule is not law just because it is alleged to be socially necessary, and *opinio necessitatis* is thus not sufficient, see Hilpold, Peter, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, European Journal of International Law, vol 12, 3, 2001, pp. 437-467, p. 461. Necessity and reasonableness are extra-legal concepts which, however, may play part in the law-creating process.
The purpose or function of this element is to help distinguish legally binding rules from legally non-binding rules and norms. The ILA Committee suggests that its main function is to indicate what practice precisely counts (or more precisely does not count) towards the formation of a customary rule. Furthermore, the *opinio juris* has to concern a *concrete* norm, which means that general or vague formulations of *opinio juris* would be less effective and less indicative of a legally binding customary rule. The evidence of *opinio juris* also has to be clearer the less conclusive the available material practice.

Whether inferred or not, the *opinio juris* has to be widespread but not necessarily universal since customary law is accepted to be based upon ‘general’ rather than ‘universal’ consent. The ILA Committee expresses their position on this issue in a slightly different way:

More generally, whilst *someone* needs to have willed a new practice to become law if the process of custom-formation is to begin (namely, the initiators of the practice and those who respond positively to it), it is not necessary that the international community as a whole should have *consented* to the rule in a conscious sense.

But as has been mentioned above, dissent count, and withholding it in a persistent manner relieves the state from becoming bound, and if there is more widespread persistence, or it involves specially affected states, it will even prevent a general norm to from emerging.

### 2.4.4.2. Evidence of *opinio juris*

One essential problem with *opinio juris* is one of proof of its existence. The ICJ has explicitly stated its requirement but has not explained exactly how to ascertain the subjective element. It may be deduced or derived from various material sources. The legal literature and international case law give various examples of where to find *opinio juris*, such as the conclusion of bilateral or multilateral treaties, attitudes to

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526 Mendelson, *The Formation of Customary International Law*, p. 271; Akehurst, *Custom as a Source of International Law*, p. 33, see the examples of non-legally binding rules are moral rules, courtesy and comity. In the international relations context it is also common to speak of social norms.
533 Villiger, *Customary International Law and Treaties*, p. 27. Villiger explains that the difficulties in ascertaining a legal conviction have led scholars to call into question the concept of *opinio juris* as a whole or to develop new theories. This thesis will, however, not go into this question for reasons of space and will henceforward take into account the requirement of the subjective element in accordance with the criteria accounted for in this chapter.
resolutions of the UN General Assembly and other international meetings, as well as statements by state representatives. Furthermore, votes on single draft rules, amendments to draft rules and draft texts as a whole could be expressing either approval or disapproval of the rule in question, giving an indication as to its legal conviction.

Villiger states that the relevance of ‘consensus adopted texts’ for the formation of customary law is that it gives only one indication as to a *communis opinio juris*; it does not of itself create a customary rule and its value is not the same as a unanimous vote. The UN framework provides ample opportunity for statements of *opinio juris*, but their abundance has also brought about new dilemmas – for example, distinguishing rules of *lex lata* and rules *lex ferenda*.

According to Brownlie, the court has applied two techniques to ascertain *opinio juris*: one a less rigorous and the other a more rigorous approach. In most of the cases the ICJ has ‘assumed’ the existence of an *opinio juris*, without a more rigorous assessment of positive evidence, on either 1) based upon evidence of a general practice, 2) a consensus in the literature or 3) previous judicial decisions. This approach has not passed without criticism. Kirgis criticised the court in the Nicaragua Case of relying on the element of *opinio juris* at the expense of state practice in a way that was unacceptable. In this case the *opinio juris* regarding the principle of non-intervention was based upon the declarations and resolutions of the UN General Assembly and the OAS General Assembly, which the court in its assessment did not match with state practice in conformity with the non-intervention principle.

The view by the ILA Committee on the necessity of proving the existence of *opinio juris*, however, reveals a relaxation in the requirement of the subjective element and thus deviates from a number of *dicta* of the ICJ. The Committee suggests that a belief, on the part of the generality

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534 Jennings and Watts (Eds.), *Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1*, 9th edition, p. 28. See also the ICJ's view and interpretation of *opinio juris* regarding the prohibition on the use of force in the Nicaragua Case (1986), p. 100, para. 189.
536 Ibid., p. 9, note 63.
537 Ibid., p. 28.
538 Brownlie states that in a significant minority of cases more positive and rigorous evidence of *opinio juris* has been sought. He lists three illustrative cases: Lotus Case (1927), North Sea Continental Shelf Cases (1969), Nicaragua Case (1986). It appears, according to him, that the choice of approach of the Court to prove the existence of *opinio juris* depends on the nature of the issues and the discretion of the Court. Brownlie, *Principles of Public International Law*, pp. 8-9.
540 See e.g. Kirgis, *Custom on a Sliding Scale*.
541 Ibid., p. 148.
542 See the Court's reasoning: Nicaragua Case (1986), p. 100, paras. 189-190.
543 Kirgis, *Custom on a Sliding Scale*, p. 147. His critique is directed against the fact that the Court defined the principle of non-intervention as restrictive custom and examined state practice only to see whether a permissive modification had been established for intervention in support of rebel forces and here established the lack of *opinio juris* for a permissive conduct of intervention.
544 ILA, *Statement of Principles Applicable to the Formation of General Customary International Law*
of states that uniform, extensive and representative state practice corresponds to a legal right or obligation is sufficient to prove the existence of a rule of international customary law, but it is not necessary to the formation of such a rule to demonstrate that such a belief exists, either generally or on the part of any particular state, unless it proves to be a hard or special case. One argument for dropping the necessity of the subjective element is the chronological paradox which in fact makes it impossible for a state to express such belief in the formation of a new customary rule (see more on the chronological paradox in Chapter 2.4.4.4.). For the standard type of case of an emerging customary rule where uniform practice is already present, Mendelson maintains that there seems to be no particular reason to insist on proof of the presence of opinio juris:

[I]n the standard type of case, where there is a constant, uniform and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers, with no evidence of opposition at the time of the rule’s formation by the State whom it is sought to burden with the customary obligation, or by another State or group of States sufficiently important to have prevented a general rule coming into existence at all.

In similar vein, the ILA Committee supports the view that it is only in the hard cases where proof of its belief needs to be asserted, and lists some examples of such cases. Situations where evidence of opinio juris would be necessary to look for or prove, are in cases of state practice that satisfy the criteria for the objective element but where there is an assumption or belief among states that such conduct does not give rise to a legal right or obligation. This could be the case when the practice forms part of comity between states, where there is an understanding on the part of states that such practice would not contribute to customary law or entail legal rights or duties, or where the states concerned make a specific disclaimer that the specific practice does not contribute to customary law, and in cases where the practice under consideration is too ambiguous to constitute a precedent contributing to customary law. In these latter cases it is necessary to show evidence that the states concerned intend or accept that a customary rule could result from the conduct in question.

Thus in conclusion, if consistent, extensive and representative state practice, or practice of omission, is present and this practice or omission is not a form of comity nor too ambiguous, and there is no understanding by the state parties that it does not have precependential value, or disclaimed to be without prejudice, the state practice alone can


545 Ibid., pp. 32-33. The Committee expresses this in a slightly different way on page 30: “if it can be shown that States generally believe that a pattern of conduct fulfilling the conditions […] is permitted or (as the case may be) required by law, this is sufficient for it to be law; but it is not necessary to prove the existence of such a belief”.


be relied on for the assessment of a customary rule. In these cases there is thus no need to prove the existence of an *opinio juris*.

2.4.4.4. **Voluntary or belief theory?**

There are various theories regarding the element of *opinio juris*, but I will here only briefly discuss the two major opposing schools of theory on the subjective element: voluntarism and the belief theory. The first relies on the consent or will of states as the basis for legality of customary rules and the second on the belief of states, *opinio juris sive necessitatis*, that their practice is legally binding and therefore necessary. Both approaches have gained acceptance in the doctrine and in the jurisprudence of the ICJ, but the court has not made it clear exactly what it understands the subjective element to be – agreement or belief.

Article 38, 1 (b) of the ICJ Statute confirms both approaches in its formulation of customary law: “International custom, as evidence of general practice accepted as law.” The term ‘general practice’ indicates that not all states have to give their consent (belief theory) for a customary rule to evolve and ‘accepted as law’ denotes the need of the consent of states (voluntarism).

D’Amato’s ‘theory of articulation’ of a customary rule, by which a state must make an objective claim of international legality (qualitative element) in advance or concurrently with the act of custom (quantitative element) in order to count as *opinio juris*, is an example of a voluntarist approach.

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548 Ibid., p. 31.
549 The ‘voluntarist theory’ requires each and every state to give its consent to the customary rule in question before it can be bound by it. The ‘belief theory’ is based upon the idea that customary law comes about because of the social necessity of a practice, an *opinio necessitatis*. See Mendelson, *The Formation of Customary International Law*, pp. 255, 270-271, and an overview of the theories at pp. 246-282. The two approaches have also been called *individualism* (voluntarism) and *collectivism* (belief theory), see ibid. p. 246, note 244. In some literature the ‘belief theory’ is also referred to as the ‘traditional theory’, see Akehurst, *Custom as a Source of International Law*, pp. 36-37, or as the ‘*opinio juris* theory’, see Mendelson, *The Formation of Customary International Law*, p. 246.
550 The Lotus Case (1927) is argued to confirm the voluntaristic approach by referring to the ‘free will’ of states “as expressed in conventions or by usages generally accepted as expressing principles of law” (see p. 18), while the Court in the North Sea Continental Shelf Cases (1969) expressed the belief theory: “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation”, see p. 44, para. 77. Also the Nicaragua Case (1986), pp. 108-109 refers to this *dictum* in the North Sea Continental Shelf Case. Mendelson argues that consent plays a role in some circumstances and belief in others. He states that “the individual State’s consent is not a *necessity* condition, though it may be a *sufficient* one.” Thus, in cases where there is consistent state practice, the *opinio juris* of states is not needed according to him. Mendelson, Maurice, *The Subjective Element in Customary International Law*, British Yearbook of International Law, vol 66, 1995, pp. 177-208, p. 180; see also Mendelson, *The Formation of Customary International Law*, p. 249; Sevastik, *Informell modifikation av traktater till följd av ny sedvanerätt och prakt. En studie mot bakgrund av FN-studagens innovativa utveckling*, pp. 204, 332-333.
approach. Villiger argues that this kind of rigid requirement is incompatible with the flexible and general character of customary law.

Akehurst agrees with D’Amato in that what counts are the statements and not beliefs of states. But he rejects both D’Amato’s theory of articulation and the ‘traditional belief theory’ and instead argues that ‘statements of beliefs’ are what matter. He maintains that it is impossible to prove genuine beliefs of states and that it is their statements that have to be assessed and evaluated, irrespective of the states’ underlying beliefs. Akehurst’s theory of opinio juris based upon ‘statements of beliefs’ rather than on the genuine beliefs of states, is convincing in its argumentation:

This is the main way customary law changes. States assert that something is already a rule of international law. Maybe the States concerned have made a genuine mistake, maybe they know that their statements are false — all that is irrelevant. If other States acquiesce a new rule of customary law comes into being. The practice of States needs to be accompanied by (or consist of) statements that something is already law before it can become law; practice does not need to be accompanied by a genuine belief that it is already law. It is important to note, however, that opinio juris is to be found in assertions that something is already law, not in statements that ought to be law (de lege ferenda statements), or that it is required by morality, courtesy, comity, social needs, etc.

On the other hand, Akehurst accepts lex ferenda statements as being relevant for establishing opinio juris, but he does not seem to accept lex ferenda statements to constitute or substitute opinio juris as such (see Chapter 2.4.4.5.)

The ILA Committee has rejected the voluntary theory to a certain extent by declaring that while the will or consent of a particular state that a practice, satisfying the criteria for the objective element of customary law, is sufficient to bind the state, it is not generally necessary to prove that such consent has been given by a state for a customary rule to be binding. But the Committee appears to have formulated an apparent reconciliation between the voluntary and belief theories, by also using the terms ‘accepted or recognised as law’ in either a declaratory or constitutive manner, except for special circumstances.

551 D’Amato, The Concept of Custom in International Law, pp. 74-75.
552 Villiger, Customary International Law and Treaties, p. 28.
553 Akehurst, Custom as a Source of International Law, pp. 36-37.
556 Ibid., p. 30, and for the exceptions, see pp. 34-38. There may be circumstances which disqualify the practice concerned or parts of it from counting towards the formation of a rule of customary law, and the reason may be that the states express the lack of belief or that it does not have precedential value. The declaratory viewpoint denotes the acknowledgment of an existing state of affairs, while the constitutive imply the state’s choice to acknowledge its obligatory character.
The voluntarists can quite well explain the subjective position of states at the beginning of an emerging customary norm, by pointing to the will and consent in the initiatives to form a new practice with such a goal, but the theory is less capable of explaining the bindingness of a general rule of customary law to states which have not given their express consent to the rule.557 The theory of tacit consent is a mere legal fiction developed by the voluntarists, according to the ILA Committee. It is hence not only by consent through which customary law is created, although neither would it be correct to say that it does not have a role to play.558 The ILA Statement states that it is not so much a question of what a state really believes, but what it says it believes, or in other words, what it claims.559

Whether opinio juris of states is based upon consent, on a state’s belief or a synthesis of both, will not form part of the examination of this thesis.560 Statements of states on the issue of responsibility to protect human security by military means will in particular be an important material source in this thesis for the assessment of the existence of an opinio juris. One main purpose of the study is to verify evidence of its existence regarding norms on responsibility to protect by military means with respect to different actors. Such statements of opinion cannot be regarded as state practice on humanitarian intervention. In this thesis, only real peace-enforcement operations with humanitarian purposes could amount to such state practice, while statements on states’ positions with regard to such practice must be regarded as opinio juris of states only.

2.4.4.3. Opinio juris by inference

Many scholars, including the ILA Committee, support the idea that opinio juris may be inferred indirectly from the actual behaviour of a state.561 It has been questioned whether evidence of opinio juris must necessarily depend on statements or articulations. The North Sea Continental Shelf Cases and other dicta of the ICJ suggest that the opinio may be sought elsewhere; among the instances of practice themselves and the way they are carried out which reveals a legal conviction.562

ascertainment of the opinio could and would be the result, not only of the numerical tabulation of the instances of practice, but also of the evaluation of

557 Ibid. p. 39.
558 Ibid., p. 40.
559 Ibid., p. 33.
560 See a discussion in Mendelson, The Formation of Customary International Law, pp. 283-291. I tend to agree with Beckett and other scholars in that neither consent nor belief theories can adequately explain the psychological element of customary international law and are not an acceptable definition of opinio juris. See Beckett, Jason A., Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to N-AIL, European Journal of International Law, vol 16, 2, 2005, pp. 213-238, p. 233. His conclusion is that consent theory gives privilege to change over stability, and belief theory gives privilege to stability over change.
562 Välliger, Customary International Law and Treaties, p. 28.
the circumstances surrounding the individual instances of practice, and of the other conditions required for a customary rule, namely the generality, consistency and constancy of practice of individual States, and of the State community in general.563

Direct statements of *opinio juris* are thus not necessary to establish a customary rule, but can be inferred from state practice. Such customary rules can be proved by showing that some states have acted in a particular way or claimed that they are entitled to act in that way and that other states whose interests are affected by such acts or claims have not protested that such acts or claims are illegal.564

Some scholars take a more restrictive view and argue that inferring of *opinio juris* from state practice may be made with regard to permissive rules only and that it is necessary to make a distinction between permissive rules and duties or obligations.565 For rules imposing ‘duties’ or ‘obligations’ on states, such inference is not equally acceptable and more direct proof that states regard the action as *obligatory* is needed, so that a failure to act in the manner required by the alleged rule has been articulated so that states are aware of that such act or omissions would be condemned as illegal by other states whose interests are affected.566 Such statements or declarations of *opinio juris* can, according to Akehurst, be made by ‘declarations in *abstracto*’, which are:

declarations that all states have a duty to act, an acknowledgement by a state that it has a duty to act or an assertion by a state that another state has a duty to act.567

I argue in line with many other scholars and the ILA Committee that also when it comes to obligations previous state practice or omissions to act together with subsequent state practice of protests and condemnations of state acts or omissions could be sufficient to form a customary rule of obligation, based upon the inference of *opinio juris* in the state practice alone. The distinction that Akehurst has made between, on the one hand ‘permissive rules’, and on the other ‘duties or obligations’,568 may therefore be less relevant. Furthermore, Mendelson argues that this distinction is not so obvious or clear cut, and that every legal right has a correlative duty, for example, the duty not to use force against a humanitarian intervention made upon a permissive right to

564 Malanczuk, *Akehurst’s Modern Introduction to International Law*, p. 44.
567 Akehurst, *Custom as a Source of International Law*, p. 38. Akehurst explains that such an assertion is usually contained in a protest against action or a claim to be entitled to act by the other state which is at variance with the rule in question.
568 See e.g. *ibid.*, p. 37. Akehurst argues that these ways vary according to the nature of the rule.
Thus the distinction in how to interpret permissive rules and obligations in customary law is to some extent artificial, and furthermore, permissive rules may entail correlative duties, which need to be expressed more explicitly. In fact, sometimes the duties in question are not communicated as explicitly as expected by states, but their presence could still be identified through protests or condemnations against acts that violate such a customary obligation.

2.4.4.5. Justifications or essence of practice?

One important aspect of how to ascertain the *opinio juris* of states is whether to regard the justifications for state practice as the main evidence of *opinio juris*, or whether the essence of the practice should be the guiding light when inferring *opinio juris*. There is no consensus on this but the ICJ supported the former more traditional approach in the Nicaragua Case.\(^{570}\)

Gray is sceptic towards approaches that make precedents of cases where the essence of the precedent does not correspond to the justifications made by the states involved in the practice.\(^{571}\) The theory of essence has received much criticism for its radical interpretation on the formation of customary law. Cases of humanitarian intervention where the intervening states have justified the intervention on other arguments than a right to humanitarian intervention, and explicitly wished to limit its precedential value by articulating the uniqueness and exceptionality of the case, should thus accordingly not be regarded as state practice expressing *opinio juris* of its bindingness on such a basis.

However, it has been acknowledged that *opinio juris* often lags some way behind state practice,\(^{572}\) and that there is no requirement that a specific expression of *opinio juris* should be accompanied by simultaneous practice.\(^{573}\) From the ILA Committee’s distinction of the different stages in the life of a customary rule, especially “the time when it begins to be formed, on the one hand, and the time when it is already established, on the other”, one could argue that the will to change the law must be present in the initial practice, while *opinio juris* that the practice is really binding will appear at later stages of repeated custom.\(^{574}\) The justifications of states should at least reveal some form of will to change

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574 Ibid., p. 30.
or create new law through the practice at initial stages. The justifications by states are important to examine, but at the same time, as has been stated above, the subjective element can also be inferred from the state practice itself, when it is general, uniform, consistent and representative. Whether this means that the justifications by states can be disregarded and the essence of the practice itself be guiding for an assessment of emerging customary norms is probably too hasty a conclusion. A middle position where both aspects (justifications and the essence of practice) are discussed would most probably represent a balanced position.

2.4.5. Protests, silence and acquiescence

The determination of the value of protests or silence play a central role in the formation of customary law. States can dissent or diverge from an emerging practice through statements, votes, reservations to a treaty, protests, or by implication by abstaining from a practice or adhering to a different practice.\(^{575}\)

Protests form part of both the qualitative element of state practice and constitute evidence of *opinio juris*.\(^{576}\) In determining the relative weight to be attached to the acts or claims of states and the corresponding protests against them one should take into account several factors such as the number of protests, their strength and intensity, the subsequent actions of the parties, the importance of the interests affected and the passage of time.\(^{577}\) Isolated protests are regarded as being insufficient for preventing an emerging rule. The number of protests required to prevent an emerging customary rule vary, according to the extent to which the acts or claims affect the interests of other states. So if many states are affected by the rule and only a small number protest, according to Akehurst these will carry little weight. He further asserts that absence of protests against concrete action by a state that has an immediate impact on the interests of another state is more significant than a failure to protest against statements *in abstracto*.\(^{578}\)

Passive conduct, omission or silence, as opposed to active conduct of states, implies that states do nothing, neither accept nor dissent from a customary rule or take part in the practice.\(^{578}\) Passive conduct or silence is considered to be qualified if the state has not disclosed its dissatisfaction with an emerging rule over a longer period of time in situations where other states in good faith could have expected it to. *Qualified passivity* is interpreted as a ‘tacit acceptance’ or ‘acquiescence’ of a new customary rule, according to a traditional view.\(^{579}\) Acquiescence, the

\(^{575}\) Villiger, *Customary International Law and Treaties*, p. 15. Villiger adds that non-ratification of a treaty is inconclusive in this context.


\(^{577}\) Akehurst, *Custom as a Source of International Law*, pp. 39-40.

\(^{578}\) Villiger, *Customary International Law and Treaties*, p. 18. Active conduct implies express or implicit adherence or dissent from a rule.

\(^{579}\) *Ibid.*, pp. 18-20. According to the voluntarist approach, by which the only basis for the binding character of customary law lies in the consent of states, passive conduct cannot be
opposite of protest, is a form of ‘tacit acceptance’ constituting part of
general practice required for the formation of a customary rule.\textsuperscript{580} If state
practice encounters acquiescence on the part of some states a permissive
rule of customary law may emerge but if it encounters protest the legality
of the action in question can be regarded as being doubtful.\textsuperscript{581} Once the
customary rule has come into existence, it will also bind inactive or
passive states, since customary law does not depend on explicit consent
by all states. Byers calls these customary rules ‘some kind of non-
objection rules’, and asserts that most international lawyers rely on
inferred consent in the form of acquiescence to explain the consensual
basis of customary obligations.\textsuperscript{582}

Passive conduct, however, can only amount to qualified silence if the
state is aware of the practice of other states and the process of an
emerging norm.\textsuperscript{583} States, however, are less likely to be ignorant today
due to the expansion of international communications, and increasing
numbers of international organisations and conferences. Villiger points
out that customary processes that also take place within the UN
framework will lead to a smaller number of inactive states because the
difficulty of remaining unaware of the process and the ample possibilities
of expressing their positions within that context.\textsuperscript{584}

Acquiescence by states whose interests are greatly affected by an
emerging norm is more significant than that of a state that is only slightly
affected.\textsuperscript{585} Academics distinguish between silence by ‘specially affected
states’ and ‘others’, and it is only the former that is expected to protest
and if it does not, is presumed to have acquiesced and is therefore
bound.\textsuperscript{586} Mendelson, however, argues that it is not true that all of those
who fail to protest can reasonably be taken to have actually acquiesced,
and that the degree to which a state needs to be considered to be an
affected state is not precise.\textsuperscript{587} He explains, for example, that whenever a
state makes a claim \textit{erga omnes} or relies on a purported general rule, all
other states are potentially affected. On the question of a responsibility

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{580} Ibid., p. 19; Akehurst, \textit{Custom as a Source of International Law}, p. 39. The motives of states
for protest or silence is according to Akehurs irrelevant. What counts is what a state says,
does or refrains from doing, not its beliefs behind it. On acquiescence, see more in
143-186.
\item \textsuperscript{581} Akehurst, \textit{Custom as a Source of International Law}, p. 39.
\item \textsuperscript{582} Byers, \textit{Custom, Power and the Power of Rules}, International Relations and Customary International
Law, pp. 142-143. See also on ‘system consent’, referring to states’ general consent to the
customary process and the ways customary rules develop and change, \textit{ibid.} pp. 144-145.
\item \textsuperscript{583} Mendelson, \textit{The Formation of Customary International Law}, p. 257.
\item \textsuperscript{584} Villiger, \textit{Customary International Law and Treaties}, p. 20.
\item \textsuperscript{585} Akehurst, \textit{Custom as a Source of International Law}, p. 40.
\item \textsuperscript{586} Mendelson, \textit{The Formation of Customary International Law}, pp. 256-257.
\item \textsuperscript{587} Ibid., pp. 257-258. One could argue interminably as to whether this would be the case for
an emerging customary rule on responsibility to protect by military means. Are only states
who have the military, economic and political resources to take humanitarian action
‘specially affected states’, expected to protest, or does the norm have the character of an \textit{erga omnes}
obligation that would make the consent or silence of all other states vital for its
emergence? See also about ‘indirectly affected states’, \textit{ibid.} p. 259.
\end{enumerate}
\end{footnotesize}
to protect by military means, all states could be argued to be specially affected, since such an emerging norm would aspire to become an exception to the prohibition on the use of force, which is an erga omnes obligation.

2.4.6. The formation of CIL – Emerging or changing customary norms

2.4.6.1. Classical and modern theories of CIL

Classical and modern theories of customary law contain different views on the relationship between opinio juris and state practice in the formation of a customary rule. Classical theory does not accept a separation between the elements and regards them as being mutually constitutive and inseparable. According to this view, they are not cumulative and cannot be weighed against each other. A customary rule is for this reason seen as a synthesis between the two elements from this perspective. Modern theories, on the other hand, separate them as distinct elements, based upon D’Amato’s separation of state practice as ‘acts’ and opinio juris as ‘statements’. Customary law then becomes an aggregate of the two elements, which are perceived as being radically separate while one of the elements can be more predominant than the other. Aggregationist theories must ultimately extend privilege to what states ‘say’ (opinio juris) or what they ‘do’ (practice), according to Beckett.

In practice, states and the ICJ tend to conclude the existence of a customary rule where there is a well-established practice by simply relying on that practice and omitting the proof of opinio juris.591 There are many cases where the court has asserted a customary rule without explicit reference to either.592 However, in international cases where there have been ambiguities or uncertainties in state practice, the opinio juris has been treated as a necessary tool to resolve uncertainty.593

588 See a presentation in Beckett, Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL, pp. 220, 231. Beckett concludes in his article that it is almost impossible to track all the potential permutations available between state practice and opinio juris and each permutation will perceive rule formation differently and return different rules. The NAIL critique of customary law is, therefore, that it is not an application of law but an act of choice, justified ex post facto by reference to rules. For a description of a reconciliation attempt between modern and traditional approaches to customary law, see Anthea Roberts and her so-called “reflexive equilibrium” based upon a D’Amato’s separation of usus and opinio juris, and an alternative vision of Dworkin’s interpretive theory combined with Rawlsian reflective equilibrium, Roberts, Anthea Elizabeth, Traditional and Modern Approaches to Customary International Law: A Reconciliation, American Journal of International Law, vol 95, 2001, pp. 757-791.

589 An example of this view is embedded in the North Sea Continental Shelf Cases (1969).

590 Beckett, Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL, p. 231. This is also Koskenniemi’s point in that either opinio juris (utopia) or state practice (apology) must be take privilege over the other.


592 Mendelson, The Formation of Customary International Law, p. 289, note 364 lists examples of such cases.

593 Ibid. p. 286. Mendelson mentions i.a. the Lotus Case (1927); North Sea Continental Shelf
other hand, in the Nicaragua Case, the Court’s handling of with the custom resulted, according to several critics, in an overemphasis on the subjective element.594

2.4.6.2. A sliding scale of custom?

Kirgis, who represents the modern aggregationist approach to custom and to some extent builds on D’Amato, argues that when it comes to the relationship between the two customary elements such distinct cases in the treatment of the two, as mentioned above, can be reconciled if they are regarded as being interchangeable along a sliding scale rather than as being fixed and mutually exclusive. Kirgis argues thus:

On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an opinio juris, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an opinio juris is required. At the other end of the scale, a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.595

However, one of the extremes of this approach is not consistent, for example, with the Nicaragua Case, where the court explicitly stated that it must satisfy itself that the existence of a rule in the opinio juris was confirmed by practice: “The mere fact that States declare their recognition of certain rules is not sufficient for the court to consider these as being part of customary international law, and as applicable as such to those States.”596

According to the ILA Committee, it appears that in the conduct of states and international courts, a substantial manifestation of acceptance (by either consent or belief) by states that a customary rule exists, may compensate for a relative lack of practice.597 It states that “whatever the theory, the result is the same: the more practice, the less need for the subjective element”.598 The ILA Statement at the same time acknowledges that allowing opinio juris to compensate for scarce state practice is controversial, since it is a contradiction in terms to accept customary law without custom. The ICJ, however, demanded little evidence of state practice on the principle of non-intervention in the Nicaragua Case, and chose to refer to what was considered to be proof of opinio juris in the Friendly Relations Declaration and other similar documents of the General Assembly. Notwithstanding the critique

Cases (1969); and the Nicaragua Case (1986).


595 Kirgis, Custom on a Sliding Scale, pp. 149-150.


598 Ibid. p. 41.
against this *dictum* this case follows a more general trend among international courts and tribunals to such an acceptance, according to the ILA Committee. The ILA Statement maintains that the sliding scale of custom could be accepted, but on the premise that the evidence of *opinio juris* must be clearcut and unequivocal.\[599\] Taken together, the legal opinion appears to support the sliding scale of custom.

However, Kirgis’s model on customary law rests on a ‘narrow approach’ to state practice in which statements are not accepted as constituting state practice.\[600\] Byers advances the critique that in a model of custom reliant on state practice constituted by physical acts solely and excluding statements, less powerful states would become marginalised in the process of customary international law.\[601\] The question is whether or not it is possible to make use of the sliding scale, taking an ‘inclusive approach’, and how it affects the application of this model. Since the ILA Committee itself adopts an inclusive approach to custom, one could at least argue that there is no apparent contradiction in also applying the model in relation to an ‘inclusive approach’.

However, the application of Kirgis’s sliding scale with an inclusive approach becomes more difficult in this thesis on the emerging norm of a responsibility to protect by military means. My position in this thesis is that when it comes to state practice short of military force in the form of statements *in abstracto*, such practice would carry very little weight as state practice in the analysis on custom contributing to a customary process on humanitarian intervention.\[602\] Such statements should in fact be better considered as expressing *opinio juris* in the case of humanitarian interventions. Even if such statements were to be clear and unequivocal, they could not alone, either considered in the form of practice or as *opinio juris*, compensate for physical acts of military intervention, and thus by themselves would not create a new customary norm on R2P by military means. It is primarily state practice consisting of physical acts of military intervention that could count as state practice in such cases. Since this practice on humanitarian interventions lacks sufficient consistency and uniformity to form a customary norm, *opinio juris* will be of the utmost important in considering for the study of this customary process. The sliding scale may therefore not be employed successfully in the thesis, but its value for other customary processes is not denied.

\[599\] *Ibid.*, p. 42. This is a very high threshold, according to the Committee.


\[602\] These two different forms of state practice will therefore be separated in the presentations in Chapter 7 and 8 below.
2.4.6.3. A ‘modern inclusive approach’ – A middle position

Although I adhere to a modern aggregationist approach to custom in general, in which the two elements can be separated, I believe that in situations of statements in \textit{abstracto}, the classical theory of custom must remain as an explanatory model where the two elements under certain circumstances must be regarded as being an inseparable synthesis. Such statements could carry less weight as state practice, at least when it comes to the practice of the use of force, but it should be possible to make use of the statement to discern evidence of relevant \textit{opinio juris} as well. Accordingly, I agree with Bring that with a wide definition of state practice, the clear distinction and separation between the two elements of custom dissolves.\footnote{Bring, Ove, \textit{Det folkrättsliga investeringsskyddet. En studie i u-ländernas inflytande på den internationella sedvanerätten}, Liber Förlag, Stockholm, 1979, p. 89. See also de Visscher’s view that \textit{opinio juris} “may perfectly well be inferred from the external qualities of the precedents invoked, especially from their coherence or discordance”, de Visscher, \textit{Theory and Reality in Public International Law}, p. 442, note 23.} I have therefore chosen to take a middle position between the modern and classical approaches to customary law, while at the same time supporting the inclusive approach to state practice which includes abstracto statements.\footnote{Mendelson, \textit{The Formation of Customary International Law}, p. 291.} 

Akehurst gives an intricate description of the synthesis of the two elements of custom when in the form of statements in \textit{abstracto}:

[S]tatements are themselves a form of practice, albeit not a very strong one (unless in the form of a protest). And if we view the customary process as one of claim and response, an express claim by state is both practice and the public “revelation” of its subjective attitude, whilst the same can be said, \textit{mutatis mutandis}, for an act which contains an \textit{implicit} claim that the State is acting in pursuance of a legal right or obligation.\footnote{Ibid., pp. 206-207, 291; Mendelson, \textit{The Nicaragua Case and Customary International Law}, p. 92.}

Mendelson also acknowledges that a verbal act can constitute both a form of practice as an act of speech and through its content and substance an expression of the subjective element by communicating a government position. It often depends on the circumstances which of the elements should be considered, for example, in an official government statement on a legal position or a protest, but that it probably does not matter much which category one chooses. He is very critical of this phenomenon and how statements are dealt with, as for example in the Nicaragua Case regarding the General Assembly resolutions, and warns against double-counting the same act.\footnote{Cf. a different middle position taken as a reconciliation between the traditional and modern approaches to custom in Roberts, \textit{Traditional and Modern Approaches to Customary International Law: A Reconciliation}, American Journal of International Law, pp. 757-791. Her reconciliatory theory aspires to be a coherent theory accommodating both approaches, while this proposal only addresses the synthesis of these approaches in the area of statements in \textit{abstracto}.}
The problem of double-counting creates an epistemological circle where it becomes difficult to determine whether opinio juris exists if the only evidence of such at same time constitutes state practice.607 But I would argue that the same epistemological circle arises in many cases where only state practice is present and opinio juris is abstracted or inferred from the act. In fact, the classical ‘synthetical’ approach to customary law could be charged with the same criticism. The classical way of synthesising customary law may be seen as a form of double-counting. Since acts of states more often count as state practice and as evidence of opinio juris, it could be argued that the same procedure should apply to statements in abstracto when considered as state practice. Opinio juris thus could be inferred from such state practice as well if one accepts the inclusive approach to custom.608

By choosing a synthetical approach to statements in abstracto, the epistemological circle and the problem with double-counting of this source disappears. It would thus be possible to assess the two elements of customary law in statements in abstracto in synthesis in the classical way of analysing custom. However, this approach needs to take into consideration the concerns raised by the ILA Committee with regard to statements in abstracto. Even if statements of states were to be considered as state practice, the issue of weight of this form of state practice must be taken into account, and the state practice deduced from such statements must be given due weight from the point of view of which states made them and in what circumstances they were made.609 The distinction made by the ILA, between the admissibility of evidence and the weight given it would count and must thus be considered. For the emerging norm on R2P by military means, statements in abstracto may therefore not be given the same weight as physical acts of state practice of humanitarian intervention.

2.4.6.4. The chronological paradox and the customary process

With a classical/traditional approach to opinio juris follows the chronological paradox of custom by which states must believe that something is already law when conducting the state practice before the custom can become law – that is, they must believe that their conduct is already obligatory by law as it becomes law.610 The problematic or

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609 Personal interview with Professor Mendelson, London (2007).
610 For an account of several scholars’ theories on opinio juris and of how to circumvent the chronological paradox see Byers, Custom, Power and the Power of Rules, International Relations and Customary International Law, pp. 130-133; Akehurst, Custom as a Source of International Law, p. 32, 34.
impossible condition of the way customary law was defined and formulated in the ICJ statute has been well formulated by Thirlway:

As usage appears and develops, States may come to consider the practice to be required by law before this is in fact the case; but if the practice cannot become law until States follow it in the correct belief that it is required by law, no practice can ever become law, because this is an impossible condition.611

In the ILA Statement, the Committee asserted the importance of distinguishing the different stages in the life of a customary rule, especially “the time when it begins to be formed, on the one hand, and the time when it is already established, on the other”.612 States actively engaged in the creation of a new customary rule may well wish or accept that the practice in question will give rise to a legal rule, but it is logically impossible for them to have an opinio juris in the literal and traditional sense, that is, a belief that the practice is already legally permissible or obligatory.613 If general opinio juris is shown, it is good evidence of the existence of a customary rule, but it does not explain the formation of the rule because opinio juris could not have been present among the pioneers taking the initiative for a new rule.614

Mendelson recognises that opinio juris often lags some way behind state practice:

[T]he usual process of custom formation, where typically the opinio juris lags some way behind the practice, and mere declarations of opinion unaccompanied by concrete conduct are widely regarded as of little or no value.615

He acknowledges that the will or consent of states to law development is important in the first stages of the customary process, and that the recognition of the customary rule is crucial when it is already established.616 Since customary norms evolve from consistent and uniform practice, the need of various repeated instances of practice demands different forms of consent or opinio juris at different stages from different actors. The first or second instances of practice do not create the customary norm (unless it is instant customary law), despite the formulation of concurrent opinio juris in Article 38 of the ICJ Statute. Mendelson believes that this process initially begun by claim and response, where the will of states and explicit approval or protest makes new law if others follow suit.617 This can start a process of new law

611 Thirlway, International Customary Law and Codification, p. 47.
612 ILA, Statement of Principles Applicable to the Formation of General Customary International Law (2000), p. 30. It further believes that it is often helpful to think of customary rules as emerging, in the typical case, from a process of express and implied claim and response – an insight that comes from Myres S. McDougal and his associates. Ibid., p. 10.
613 Ibid., p. 33.
614 Ibid., p. 39.
615 Ibid., p. 39.
emerging where the practice of claims and response may harden into customary law. What counts is the response by the other states concerned. If questioned, customary law will not develop. In similar vein, the ILA Statement asserts that there is no requirement that a specific expression of opinio juris should be accompanied by simultaneous practice, and that it is often helpful to think of customary rules as emerging, in the typical case, from a process of express and implied claim and response. Lege ferenda claims, however, might start a process of new law emerging. The stages could thus be seen in a continuum where a lege ferenda claim could, if followed by practice and positive responses, begin a customary process leading ultimately to its hardening into a customary law lex lata.

Arguing on the basis of this statement, it is therefore possible to see previous state practice on humanitarian intervention in the 1990s, in connection with the General Assembly resolution in the 21st Century endorsing the responsibility to protect, including by military means (the ‘Outcome Document’ from the UN World Summit 2005). (See the discussions on Security Council authorised humanitarian intervention in Chapter 6.3.4. and on unauthorised humanitarian intervention by regional organisations in Chapter 8.4.3.)

2.4.6.5. Statement of opinio juris or lege ferenda argument

An assertion or statement that something ought to be law but which is not yet law is not evidence of the subjective element of belief that it is the law. However, it is argued that if such a statement is made repeatedly and constitutes repeated uniform and consistent practice over time it could arguably, together with an opinio juris, create a customary rule. Akehurst contends:

An assertion that something ought to be the law is obviously not evidence that it is the law; [...] The making of such statements, coupled with the failure of other States to challenge them, may often be regarded as creating a new rule of customary law; the fact that the State making the statement knew that the statement did not reflect pre-existing law does not necessarily prevent the statement from giving rise to a new rule of customary law. [...] claims made by States in the context of concrete disputes can give rise to new rules of customary law in the same way as assertions made by states in abstracto; all that is needed is that the claim or assertion must be phrased as an assertion of lex lata and must be acquiesced in by the other States concerned.

Villiger asserts in similar vein:

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619 Ibid., p. 10. This is an insight from Myres S. McDougal and associates.
620 World Summit Outcome, GA Res. 60/1, 15 September 2005, UN Doc A/RES/60/1, 2005. See more in Chapter 4.6.
621 Akehurst, Custom as a Source of International Law, p. 5.
622 Ibid., p. 5.
If many states assert that something is, or should be customary law, this is or will become the law, if and when the conditions necessary for customary law are satisfied.\(^{623}\)

The ICJ takes a more restrictive approach and distinguishes between *lege ferenda* claims and emerging customary norms in the North Sea Continental Shelf Cases, when explaining that a claim of *lex ferenda* character cannot be regarded at all as “*de lege lata* or as an emerging rule of customary international law”.\(^{624}\) It is hence not surprising that an ‘emerging customary norm’ has been said to qualify as a *tertium genus* (a third category) between *lex lata* and *lex ferenda*.\(^{625}\)

There are many models and theories of the different stages of the gradual hardening of state practice into new customary law where *opinio juris* plays a role.\(^{626}\) Notwithstanding all theories on the customary process, Villiger argues that it would be futile to want to determine the exact moment that a customary rule arises. Likewise, Mendelson argues that the “consumer” of legal rules does not normally need to know when the fruit ripened.\(^{627}\) This is true in the sense that lawyers who need to apply law proper only need to know whether or not the rule exists, and have little use for the knowledge of exactly when it came into existence. But the moment of creation may in fact have importance for assessing whether the law was applicable in a specific situation at a certain time, and contribute to the foreseeability of international law.

**2.4.7. Modifications of CIL – Violations of previous CIL**

When it comes to changes or modifications of customary norms there is a strong presumption against change in the law, in particular against exceptions to broad principles.\(^{628}\) The amount of practice required to establish a new rule that conflicts with a previously accepted rule is much greater than that needed to establish a new rule *in vacuo*.\(^{629}\) If new practice supports the rule and partly goes against it, it is insufficient to destroy or modify the old rule.

Instances of inconsistent practice with a customary rule should generally be treated as a breach of the old rule rather than an indication of recognition of a new rule.\(^{630}\) A state being inconsistent towards an

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\(^{623}\) Villiger, *Customary International Law and Treaties*, p. 8. Thus, when the criteria of uniform and consistent state practice etc. confirming this rule are present.


\(^{625}\) Villiger, *Customary International Law and Treaties*, p. 31.

\(^{626}\) *Ibid.*, pp. 29-30. Villiger mentions one model by Professor Verdross composed of three stages, though it may be shorter for different states or include additional stages. In the first stage, states engage in practice or make claims, in the second stage states react with further conduct, claims and counterclaims and uphold the practice due to expectations based upon reciprocity, and in the last stage these relations harden into a general rule.


\(^{628}\) Akehurst, *Custom as a Source of International Law*, p. 19. According to Akehurst it requires a great deal of practice to rebut such presumptions.


(emerging) customary rule, will, however, still be bound by the rule, if it partly supports and partly opposes it. On the topic of inconsistent practice Villiger explains:

The more evidence of practice discloses inconsistencies, the larger will have to be the number of States actively engaging in uniform conduct over a longer period of time, with fewer States abstaining, to constitute a customary rule.

In the Nicaragua Case the court placed much weight on the justifications of states to their conduct and whether there was any indication that they intended the practice to contribute to modifications of the principle of non-intervention:

The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact, however, the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.

The subjective element thus serves a more important role in distinguishing violations of an already existing customary rule from subsequent modification of the rule. Mendelson supports the view that deviations themselves do not change a law, and that this holds true if the practice concerned lacks claims of right, whether expressed or tacit. The importance of the subjective attitude of states is illustrated in the Nicaragua Case, but according to Mendelson this dictum of the ICJ entails double standards expressing that which states say counts, but not what they do. The court further added:

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

From the discussion above, it appears justified to extend to the subjective element of this study more importance than if it was a normal case of an emerging norm, since it involves the modification of an

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631 Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie mot bakgrund av FN-stadgans innovativa utveckling, p. 132. The burden of proof lies with the state opposing the rule, according to Sevastik.
632 Villiger, Customary International Law and Treaties, p. 20.
636 Ibid., p. 214.
underlying customary norm (the prohibition on the use of force), as well as a treaty rule that is also considered in part to be *jus cogens*.

### 2.5. Evolutionary interpretation and informal modification of treaties

#### 2.5.1. Introduction

This chapter deals with the closely related question of the ways that an emerging customary norm may affect *lex lata* rules in multilateral treaties such as the UN Charter by informal modification. The legal means for customary changes and modifications of treaty norms in international law are thus examined.

One emerging customary norm (or several norms) on external R2P by military means would affect the prohibition on the use of force by introducing new exceptions where the use of military force may be employed. Since the prohibition on the use of force is not only a customary norm but also a treaty norm embedded in Article 2 (4) of the UN Charter, the possibilities available in international law for modifying this rule to accommodate a norm of external R2P are explored, as well as the underlying customary rule. The emergence of an external R2P by military means for the Security Council through a legal right to conduct humanitarian interventions (discussed in Chapters 6.3.3. and 6.3.4.), would arguably develop through other means than a general customary process, and the possible processes of modification of the UN Charter applicable to such ‘organ practice’ are investigated in Chapters 2.5.2. and 2.5.3.

Informal modification should not be considered as an alternative to formal amendment, but rather as a useful supplement, which can provide a method by which unnecessary stagnation of a treaty can be avoided. The area of law dealing with the informal modification of treaties appears to some extent to be burdened by a confusion stemming from alternative terminologies, and the overlap and lack of clear delimitations between the different possible forms of informal modification. These terms sometimes lack clarity. They are used interchangeably, as overlapping or contending concepts, by different scholars – even by the same ones.

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639 Akehurst uses the term ‘amendment’ for both modification of treaties by customary law and by subsequent practice, and sees amendment as opposed to interpretation, see *Akehurst, The Hierarchy of the Sources of International Law*. Kontou also uses the term amendment this way but at the same time uses the phrase ‘modification by subsequent practice’ interchangeably with ‘modification by customary law’, see Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, pp. 16, 19, see the sentence at note 12, which refers to Article 38 of the International Law Commission (ILC) Draft Articles (1966) of the VCLT, which deals with modification by subsequent practice only, see Report of the International Law Commission, *Yearbook of the International Law Commission*, vol II, 1966. Villiger on the other hand confirms the distinction between these two forms, ‘subsequent practice’ and ‘customary law’ modifications, but only focuses on the
Multilateral treaties as well as constitutive instruments such as the UN Charter can likewise be modified informally. This often happens when it is difficult to reach consensus on formal modification according to the formal rules of amendment of the instrument. The UN Charter has been applied and interpreted in many informal and flexible ways during its over 60 years of existence. Thus, general provisions of the UN Charter do not necessarily prevail over later special customary law constituting lex specialis, in accordance with Article 103 (e contrario) of the UN Charter. Consequently, if the customary practice is special, ratione personae or materiae, such a rule may arguably informally modify the UN Charter by the rules of lex specialis derogat generali and lex posterior derogat priori.

The VCLT does not regulate informal modification of treaties, but it has been pointed out in the literature by many authors that this fact does not preclude its existence in customary international law. Kontou asserts that “[...] treaty modification by subsequent practice of the parties is generally considered to be a rule of customary law”. The existence of informal modification of treaties has not only been confirmed in the doctrine but also in case law and in the practice of states and
Furthermore, Article 39 of the VCLT provides that a treaty may be amended by agreement between the parties, and this provision does not require any particular formality for the expression of agreement.

In this subchapter I shall treat three forms of treaty interpretation and informal modification of treaties: 1) by evolutionary interpretation of the treaty, 2) by subsequent practice within the treaty framework (also called de facto modification), and 3) by customary law outside the treaty framework. These lines between the different forms of modification are not clearly demarcated although they have at times been acknowledged as distinctive categories of informal modification of treaties by the ILC and by legal scholars. For example, it is acknowledged in the literature that 'evolutionary interpretation' is normally ascertained by 'subsequent practice' of states or by relevant treaty organs, and if this 'subsequent practice' is accompanied by opinio juris, the practice can lead to the development of customary law which in turn can also contribute to the modification of a treaty. In the drafting of the VCLT, it was concluded that “the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice, legally the processes are distinct.”

The travaux préparatoires of the VCLT in the form of the ILC Draft Articles of the International Law Commission are widely cited in

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645 *Principles of Public International Law*, p. 601.

646 Other scholars have identified and named other categories of informal modification which will not be treated here, e.g. S. Engel distinguished in 1953 three methods of informal modification of the UN Charter: interpretation, non-application and supplementary agreements, referred to in Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, p. 173.

647 *Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie mot bakgrund av FN-stadgans innovativa utveckling*, p. 246.


649 The last situation can develop by way of e.g. the principle of lex posterior non generalis non derogat priori speciali. On the lack of clarity between the different forms of modification of treaties see Villiger, *Customary International Law and Treaties*, p. 220; Akehurst, *The Hierarchy of the Sources of International Law*, p. 278; Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, p. 19.

650 YILC, vol II (1966), p. 236. One example where authors are divided is whether the modification of Article 27 (3) of the UN Charter was an amendment or an interpretation of the Charter. Zacklin treats the case as a de facto modification by treaty interpretation contra legem, see Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, p. 173. (See more in Chapter 2.5.3.)
analyses of this area of law. Article 68 of the Draft Articles (1964) dealt with modification of a treaty by a) subsequent treaty, b) by subsequent practice (within the treaty framework) or c) by customary law (outside the treaty framework). In the later Draft Article 38 of the VCLT Draft Articles (1966), which provided for modification of a treaty by subsequent practice, was subsequently deleted from the VCLT because the questions were considered to form part of the general topic of the relationship between customary norms and treaty norms. These issues were seen to be too complex and outside the scope of the convention.

The rejection or omission of the relevant Article(s) in the Convention should not preclude the recognition of their existence as being useful distinctions in theory, and possible existence in customary law, although they can be difficult to uphold in a concrete case.

Villiger underlines that the distinction between ‘modification by subsequent practice’ and ‘modification by customary law’ was repeatedly confirmed during the preparation of Article 38 of the 1966 VCLT Draft. He furthermore argues that it is most likely that Article 38 refers to the contractual process of subsequent practice of parties (within treaty framework) and not to customary law outside the treaty framework.

Zacklin draws a distinction between developments sub lege and developments contra legem. Sub lege interpretations of a treaty are consistent with the terms of the treaty while developments contra legem imply an application of the treaty in a manner different from that laid down in its provisions. It is only developments contra legem that may be capable of constituting informal or so-called de facto modification. The distinction between ‘interpretation’ of a treaty and the ‘informal

653 See Villiger, Customary International Law and Treaties, pp. 34, 211. He adds that some authors erroneously assume the customary nature of Article 38 despite the fact that it does not concern or envisage general international customary rules. Akehurst has, for example, confused the scope of Article 38 and treats it as dealing with customary modification, see Akehurst, The Hierarchy of the Sources of International Law, pp. 276-277; see also Danilenko, Law-Making in the International Community, pp. 170-171; Tunkin, G.L., Theory of International Law, George Allen & Unwin Ltd, London, 1974, p. 146; Tunkin in Report of the International Law Commission, Yearbook of the International Law Commission, vol I, part II, 1966, p. 220.
655 See the ILC commentary to Article 38 of the VCLT Draft Articles, YILC, vol II (1966), p. 236.
656 E.g. the modification of Article 27 (3) of the UN Charter is considered by Zacklin to be a de facto modification based upon a contra legem interpretation of the Charter. Zacklin, The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies, pp. 173, 185-186. He adds that there seems to have been ‘consistent practice’ to establishing a ‘common content’ for such an application and modification. These two criteria were formulated by the ILC in the commentary to Article 38 for the informal modification of treaties by subsequent practice, see YILC, vol II (1966), p. 236. See also Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie mot bakgrund av FN-studjegnas innovativa utveckling, pp. 295-296.
modification by subsequent practice within the treaty framework’ is thus based upon whether the interpretation was made *sub lege* or *contra legem*.

2.5.2. Evolutionary interpretation of the UN Charter

General treaty interpretation is regulated in Article 31 of the VCLT and encompasses objective, contextual and teleological interpretation, as well as subjective interpretation based upon the intentions of the parties. As mentioned earlier, there is no firm line between interpretation and informal modification of treaties. The results of interpretation, however, are compared with informal modifications, compatible with the ‘ordinary meanings’ of the written framework. Whether this is the case is ascertained in the subsequent practice of the states parties to the treaty. Practice constituting a development *contra legem* should not be regarded as interpretation. Subsequent practice in the application of a treaty *sub legem* falls, however, under Article 31 (3)(b) as ‘interpretation of the treaty’.

‘Evolutionary interpretation’ entails interpretation that takes into account relevant rules of international law applicable in the relations between parties, generally at the time of the conclusion but also with regard to the subsequent development and evolution of the law. Sinclair explains the term ‘evolutionary interpretation’ in this way:

On the one hand, it would amount to a failure of imagination on the part of an international tribunal if it did not take account the historical context in which particular treaty provisions may have been negotiated, that context necessarily embracing the state of international law at the time; on the other hand, while it is not for the interpreter, under the guise of interpretation, to impose upon the parties obligations which were never in their contemplation at the time they concluded the treaty, there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in

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657 Article 31 (1) and (2) of the VCLT.
658 Article 31 (4) of the VCLT.
660 Zacklin argues that interpretation *contra legem* constitutes modification *ex facto* modification while regular interpretation of a treaty is made *sub lege*, i.e. not contrary to the wording or ordinary meaning. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, p. 173.
661 Article 31 (3) (b) of the VCLT.
interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation.\textsuperscript{663}

In the Delimitation of the Continental Shelf Case the Arbitration Tribunal stated that it regarded itself as not being debarred from taking any account of recent developments in customary law when interpreting the Geneva Convention of 1958 on the Continental Shelf and that it had “no doubt that it should take due account of the evolution of the law of the sea in so far as this may be relevant in the context of the present case.”\textsuperscript{664} The Arbitration decision between Guinea-Bissau and Senegal (1989) and the Namibia Case (1971) also confirmed the possibility of evolutionary interpretation.\textsuperscript{665} Sinclair emphasises that evolutionary interpretation of a treaty must always be made on condition that it does not conflict with the intentions of the parties concerned as expressed in the negotiations preceding the conclusion of a particular treaty.\textsuperscript{666}

2.5.3. Informal modification by subsequent practice within treaty framework

Preliminary rules on informal modification by subsequent practice were included in the ILC Draft Articles to the VCLT but were not retained in the convention.\textsuperscript{667} Nevertheless, the ILC Commentaries to these draft rules are often referred to in the specification of criteria applicable for this form of informal modification of treaties. The ILC specified the means for this form of modification:

[A] consistent practice, embracing all the parties and establishing their common consent to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty.\textsuperscript{668}

\textsuperscript{663} Sinclair, \textit{The Vienna Convention on the Law of Treaties}, p. 140. [Author’s italics]
\textsuperscript{666} Sinclair, \textit{The Vienna Convention on the Law of Treaties}, p. 140.
\textsuperscript{667} See Article 68 (b), YILC, vol II (1964), p. 198 and Article 38, YILC, vol II (1966), p. 236. The Commentaries explain that “the question formed part of a general topic of the relation between customary norms and treaty norms which is too complex for it to be safe to deal only with one aspect of it in the present Article”. See YILC, vol II (1966), p. 236.
\textsuperscript{668} YILC, vol II (1964), p. 198; YILC, vol II (1966), p. 236. [Author’s italics] The latter 1966 draft furthermore informs that subsequent practice is authoritative evidence as to its interpretation when the practice is consistent, and establishes its understanding regarding the meaning of the provisions of the treaty. The 1966 draft has left out the earlier formulations about state practice ‘embracing all the parties’.
There are two international cases where the Courts have assessed informal modification to have taken place by subsequent practice and where the two relevant criteria ‘consistent practice’ and ‘common consent’ have been confirmed: the Temple of Préah Vihear Case and the Air Services Agreement Arbitration. The court asserted that the state practice did not have to be general as in customary law, but instead should constitute a practice *inter partes* to the treaty. This will, however, have no practical effect on the state practice related to a multilateral treaty such as the UN Charter where almost all states are members. The Commentaries to the 1966 ILC Draft Articles furthermore asserts that

the Commission intended to indicate that the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question. 670

There is no need for *all* parties to take part in the practice but there must be a common understanding or agreement among them *as a whole* about the modification of a treaty.671 Neither is the existence of *opinio juris* as in customary law needed. The ‘common consent’ should instead be treaty-oriented and concern an intention to modify a treaty.672 Scholars, however, are divided on how to interpret ‘common consent’ with regard to the number of states needed to give consent to modification - whether it must be by the states parties ‘as a whole’ or by ‘a majority’.673 Some argue with respect to the UN Charter that informal modifications would need a qualified majority by two-thirds of members, including all permanent members, *ex analogia* Article 108 of the UN Charter.674 Others maintain that *all* (or in some cases, nearly all) states must consent to an informal modification.675 The ILC Commentary nevertheless indicates

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669 Temple of Préah Vihear (Cambodia v. Thailand), ICJ Reports, 1962, p. 6, p. 33-34; Decision of the Arbitration Tribunal established pursuant to the Arbitration Agreement signed in Paris on 22 January 1963, between the United States of America and France, 3 ILM. 668, 1963, p. 716: ‘[...] the effect of the consent given by the French authorities […], which made provision for the Tehran service, consent which was constantly confirmed by the attitude of these authorities in the course of the years that followed’.

670 YILC, vol II (1966), p. 236. [Author’s italics]

671 See the Namibia Case, Advisory Opinion (1971), p. 22, para. 22. A limited number of states to the UN Charter participated actively in the practice that led to the modification of Article 27 (3), but the practice was ‘generally accepted’ by the members of the UN according to the Court. See also Zacklin, The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies, p. 186.

672 Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law, p. 27.

673 For accounts of different positions see Akehurst, The Hierarchy of the Sources of International Law, p. 278; Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie med background av FN-stadgans innovativa utveckling, pp. 297-298, 358. Kontou speaks of the implied or express consent of states but does not specify it further, Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law, p. 27.

674 Akehurst, The Hierarchy of the Sources of International Law, p. 278. Akehurst argues that if a treaty does not provide for amendment by a majority of members, subsequent practice can amend the treaty *erga omnes* only if it is unanimous or rather unopposed.

675 See e.g. Tunkin in YILC Vol. I, part II (1966), p. 165; Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie med background av FN-stadgans innovativa
that *more* than the majority is required by its reference to ‘an agreement of the parties as a whole’.

The majority, however, does not have to be qualified. When modification is directed towards a rule in a constitutive instrument of an international organisation, *general* acceptance on the part of member states is necessary alongside practice of the organisation concerned. Simma points out the need of ‘general consent of an organisation’, and rules out any application by analogy of the two-thirds majority vote in Article 108 of the UN Charter for informal or so-called *de facto* modification of the UN Charter.\textsuperscript{676} This position was confirmed in the Namibia Case.\textsuperscript{677}

Scholars are also divided over whether the Security Council amendment of Article 27 (3) of the UN Charter, considered by the ICJ in the Namibia Advisory Opinion, should be regarded as an evolutionary interpretation or an informal modification of the UN Charter by subsequent practice.\textsuperscript{678} The court concluded that the Security Council practice on voluntary abstentions by permanent members ‘has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been *generally accepted* by Members of the United Nations and evidences a *general practice* of that Organisation’.\textsuperscript{679} The wording of the court resembles the two above mentioned ILC criteria of ‘common consent’ and ‘consistent practice’ which applies to modifications by subsequent practice. The Namibia Case thus supports this conclusion.

### 2.5.4. Informal modification by new customary norms outside treaty framework

#### 2.5.4.1. The process of informal treaty modification by new general customary law

General custom arising subsequent to the conclusion of a treaty and which may be regarded as *lex specialis* in relation to the regime established by the treaty can have the effect of overriding the treaty, if the parties to the treaty have been acting inconsistently with the treaty through new custom.

Few have deeply examined the relationship between treaties and the process of customary international law,\textsuperscript{680} and the phenomenon of

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\textsuperscript{677} See Namibia Case, Advisory Opinion (1971), p. 22, para. 22. A limited number of states to the UN Charter participated actively in the practice that led to the modification of Article 27 (3), but the practice was ‘generally accepted’ by the members of the UN according to the Court.

\textsuperscript{678} Zacklin’s position of this case seems to connect the two forms of modification in a balanced way by viewing the modification of Article 27 (3) as ‘treaty interpretation contra legem constituting a de facto modification of the UN Charter, see Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, pp. 185-186.

\textsuperscript{679} Namibia Case, Advisory Opinion (1971), p. 22, para. 22. [Italics by author]

informal treaty modification by customary law has rarely been integrated into the wider theory of the formation of customary law.\textsuperscript{681} The question of whether or not rules of treaty law may be changed by contrary customary law is one of the most controversial issues of the treaty-custom interrelationship.\textsuperscript{682} Customary law is slow and difficult to identify and involves in its early stages much legal uncertainty, which is why this form of legislating has been called 'coutume sauvage'.\textsuperscript{683}

The ILC, however, expressly acknowledged the process of informal modification by general customary law in Article 68 c) of the 1964 ILC Draft Articles to VCLT. The Draft Article provided for treaty modification “by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties”.\textsuperscript{684} Article 68 c), however, did not indicate the scope and conditions of the process of customary rule modifying a conventional rule. The article was ultimately not retained in the convention, but the principle of modification was not called into question as such, and is now considered to exist as uncodified customary law.\textsuperscript{685}

The possibility of treaty amendment or termination on account of supervening custom is accepted in the literature and confirmed in case law, although views may differ as to the precise manner in which it takes place.\textsuperscript{686} For example, Akehurst holds that the clearest evidence that a treaty has been replaced by a subsequent conflicting customary rule is to be found in statements acknowledging this fact, or in their absence, abundant and consistent practice showing the termination of the treaty provision.\textsuperscript{687} Kontou suggests that two possibilities may follow from new custom incompatible with a prior treaty; 1) either its amendment or termination, or 2) the existence of parallel treaty and customary rules whose order of priority would need to be established.\textsuperscript{688}

The process of customary modification of treaties has also been confirmed in several international cases. The Delimitation of the Continental Shelf Arbitration Case between Great Britain and France provided a recognition by the Arbitration Tribunal of the evolution of

\textit{of Customary International Law; ILA, Statement of Principles Applicable to the Formation of General Customary International Law (2000).}

\textsuperscript{681} Villiger, \textit{Customary International Law and Treaties}, p. 214.
\textsuperscript{682} Danilenko, \textit{Law-Making in the International Community}, pp. 162-165. Danilenko lists herein the major arguments against and in favour of modification of treaties by custom.
\textsuperscript{683} Villiger, \textit{Customary International Law and Treaties}, p. 225.
\textsuperscript{684} YILC, vol II (1964), p. 198.
\textsuperscript{687} Akehurst, \textit{The Hierarchy of the Sources of International Law}, p. 276.
\textsuperscript{688} Kontou, \textit{The Termination and Revision of Treaties in the Light of New Customary International Law}, p. 16. She adds that new custom may also be a ground for treaty termination when its developments can be regarded as a fundamental change of the circumstances that constituted an essential basis of the parties’ consent to be bound by the treaty (\textit{rehbus sic stantibus}).
the law of the sea and “the possibility that a development of customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations”.689

In the Fisheries Jurisdiction Case the court established that the two concepts ‘fishery zone’ and ‘preferential rights of coastal states’ had crystallised into customary law, arising out of the general consensus revealed after the Second Conference on the Law of the Sea in 1960 and possessed modificatory effects.690 The North Sea Continental Shelf Cases established that the ‘exclusive economic zone’ and the definition of the ‘continental shelf’ had through the practice of states become part of customary law and that these developments could not be left out of consideration as they were considered to be linked together in modern law.691

The presumption against legal change (mentioned in Chapter 2.4.5.) based upon the emergence of new customary rules that conflict with pre-existing customary rules, also applies to the replacement of treaties rules by new customary rules and vice versa, according to Akehurst.692 Danilenko holds that clear evidence supporting a new customary rule is needed to overcome the presumption, and that proof of opinio juris is crucial in this respect. Express statements of the parties or, in the absence of such statements, consistent conduct manifesting a real intention to modify or terminate a treaty would be necessary.693 The idea of an even stronger rule of presumption against change, when there are no express statements supporting the change, by requiring more state practice is contested by Villiger who asserts that this idea has no legal foundation in treaty interpretation (Article 31 (3)(c) of the VCLT).694

Villiger also thinks that the notion of presumption becomes relative in cases of partial change, where only some components of a rule are modified informally. Sevastik explains the existence of partial modification as a process when some components of a provision are modified while others are retained.695 The ILC indicates the possibility of

690 Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, ICJ Reports, 1974, p. 3, p. 23, para. 52.
691 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports, 1982, p. 18, pp. 73-74, paras. 100-101; Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment, ICJ Reports, 1985, p. 13, p. 33, paras. 33-34; These customary developments were endorsed by the court, and considered to make the rules on the freedom of fisheries in the high seas beyond twelve miles, laid down in 1958 Geneva Convention on the High Seas and 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, obsolete, see Danilenko, Law-Making in the International Community, pp. 168-169; for this and other examples of the law of the sea, see Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law.
692 Akehurst, The Hierarchy of the Sources of International Law p. 275.
694 Villiger, Customary International Law and Treaties, p. 222.
695 Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och prakt. En studie mot bakgrund av FN-studiums innovativa utveckling, p. 261.
partial modification of treaty rules by “a new rule of customary law affecting the scope or operation” of the treaty provisions.696

Since there is no hierarchy between the primary sources, apart from the higher norms of *jus cogens*, the rules on priority in case of conflict between different sources become applicable in the case of informal modification by customary law. Customary law can thereby supersede treaty law by either *lex specialis* or *lex posterior*. Article 103 of the UN Charter does not encompass customary law and it has been shown by practice and supported by doctrine that the UN Charter may be informally modified by customary law.697 But there are scholars who are critical as to whether *lex posterior* would also apply to customary rules, and they argue that treaties must be and are given priority over posterior customary law for practical considerations, by force of *jus scriptum*.698 Villiger, however, points out that one should not assume that it is more natural or normal for treaty law compared with customary law to constitute *lex specialis*.699 The identification of whether a rule is special or general is a rather delicate matter of interpretation. In the situation where both the treaty rule and the posterior customary rule are special, the latter prevails per *lex posterior*.700 This means that only posterior special customary rules (*ratione materiae* or *ratione personae*)701 could possess the capacity to modify *lex specialis* in a treaty. Hence, a later but more general customary rule would not have a modificatory effect on a treaty due to the rule *lex posterior generalis non derogat legi priori speciali.*

Villiger and Akehurst seem to disagree on the relevance of the practice by ‘non-parties’ to a treaty. Akehurst maintains that the practice of non-parties and between the parties and non-parties has no modificatory effect on the treaty unless it is followed by the parties in their relationships with one another,702 while Villiger contends that the distinction between parties and non-parties is irrelevant for the purposes of ascertaining modification, since the informal modification would be the result of the formation of a ‘general customary rule’ that presupposes

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698 Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, pp. 20-21. Kontou mentions international cases where this has occurred, see Chapter 5 of her book. *Jus scriptum* means written law. See also for an overview of different positions, Sevastik, *Informell modifikation av traktater till följd av ny sedvanerätt och praxis. En studie mot bakgrund av FN-stadgans innovativa utveckling*, pp. 244-245.
699 Villiger, *Customary International Law and Treaties*, p. 36. He refers to the modification of the 1958 Geneva Conventions by customary law dealt with in the Continental Shelf Cases. See Chapter 2.5.4.1. in this thesis.
700 Villiger raises a few implications in situations of special customary law *ratione personae* and treaty rules. He states that if the new modificatory custom is special *ratione personae* it may exist as a parallel subsystem alongside a convention, and that the state parties to the convention bound by such special custom should apply the conventional rules vis-à-vis other state parties that are not members of the special custom, see *ibid.*, p. 217.
701 *Lex specialis ratione materiae*: a deeper, more detailed regulation of the same subject matter than a general rule. *Lex specialis ratione personae*: a rule which binds few and particular (special) states as opposed to many parties (general).
widespread practice including both parties and non-parties.\textsuperscript{703} I support the latter argument. However, for multilateral treaties with practically universal membership such as the UN Charter, the issue is of no great relevance.

Villiger furthermore states that it cannot be stipulated that all state parties or two-thirds majority should consent to or apply the emerging modificatory customary rule in order for an informal modification to take effect, since the consensual nature of customary law makes allowances for both acquiescing states and a small number of persistent objections.\textsuperscript{704} But the need to rely on the stability of treaties and legitimate expectations of states based upon treaties, guarantee that such modifications do not come about without the sufficient support of states.

Compared with the normal formation of new customary rules \textit{per se}, customary developments having the purpose of modifying conventional rules take more time.\textsuperscript{705} Villiger mentions the correlation between the time necessary for an informal modification and the number of parties to the convention. More time is needed for the customary process modifying a multilateral treaty such as the UN Charter, with many parties involved. The modification of ‘declaratory conventional rules’\textsuperscript{706} is argued to take even longer, since the underlying customary rule beneath the treaty rule must also change.\textsuperscript{707} If the modification furthermore involves developments \textit{contra legem} and is based upon breaches of the conventional rule, the time will most likely be extended because of the often disorganised and haphazard nature of the process, according to Villiger. He concludes that a rule has been modified when the two rules cannot be applied simultaneously.\textsuperscript{708}

\subsection*{2.5.4.2. Modification of underlying customary rules of a declaratory conventional rule}

When a new customary rule modifies a ‘declaratory conventional rule’\textsuperscript{709} informally, the underlying customary rule of that conventional rule must also be considered for modification by the new customary rule. This change in a customary rule by a subsequent customary rule will have consequences, and concerns non-parties to the treaty bound only by customary law.\textsuperscript{710} (For the process involving the modification or change in customary law by a new customary rule, see Chapter 2.4.5). Since the adherence to the UN Charter is almost universal, this customary process

\begin{itemize}
  \item \textsuperscript{703} Villiger, \textit{Customary International Law and Treaties}, p. 220.
  \item \textsuperscript{704} Ibid., p. 220.
  \item \textsuperscript{705} Ibid., p. 223.
  \item \textsuperscript{706} ‘Declaratory conventional rules’: treaty rules declaratory of customary law.
  \item \textsuperscript{707} Villiger, \textit{Customary International Law and Treaties}, p. 224.
  \item \textsuperscript{708} Ibid., p. 215.
  \item \textsuperscript{709} A declaratory conventional rule is a provision in a convention that is also declaratory of a customary rule, e.g. the prohibition on the use of force in Article 2 (4) of the UN Charter.
  \item \textsuperscript{710} Villiger, \textit{Customary International Law and Treaties}, p. 217.
\end{itemize}
has less relevance in the case of a modification of the prohibition on the use of force by an emerging norm on R2P by military means.

However, if the treaty norm is also a *jus cogens* norm, the subsequent customary rule also has to have the character of *jus cogens* in order to be able to modify it.\(^{711}\) (See more on this and the prohibition on the use of force in Chapter 2.6.)

### 2.5.5. Desuetude

Informal modification of treaty rules can have the effect of terminating a treaty rule by its lapsing into desuetude – that is, the treaty rule ceases to exist.\(^{712}\) Desuetude can be a result of informal treaty modification by both subsequent practice and by new customary law.\(^{713}\)

In the process of informal modification by customary law Villiger believes that this result is implied and included if it is shown that a new conflicting customary rule has developed.\(^{714}\) Kontou, however, does not regard this result as a necessary consequence and argues that the *opinio juris* for the formation of new custom does not establish an intent to abrogate prior treaty provisions.\(^{715}\) She believes that supervening custom and conflicting treaty rules can exist in parallel if the parties wish to continue applying the treaty rule *inter se* through a small subsystem, and that one cannot therefore speak of automatic termination following new conflicting custom.\(^{716}\) Akehurst supports this latter view: “subsequent custom can terminate a treaty only when there is clear evidence that that is what the parties intend”.\(^{717}\) New customary law informally modifying a treaty hence does not automatically terminate or modify a prior incompatible treaty, but it may lead to desuetude of a treaty provision, just as well as a modification of the provision.

Informal modification by subsequent practice could thus involve both desuetude and the replacement of the old rule by a new one.\(^{718}\)

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\(^{711}\) Article 53 of the VCLT.
\(^{712}\) YILC, vol II (1966), p. 237: “[...] while ‘obsolescence’ or ‘desuetude’ may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty”. On treaty desuetude, see also Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law, pp. 24-31.
\(^{713}\) Kontou defines desuetude as being treaty termination by implied consent, Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law, pp. 27-28. However, she also confuses the processes of informal modification by subsequent practice and modification by custom, see p. 27 and references to Tunkin in note 62. See also Sevastik, Informell modifikation av traktater till följd av ny sedvanerätt och prakt. En studie mot bakgrund av FN-stadgans innovativa utveckling, pp. 256-265.
\(^{714}\) Villiger, Customary International Law and Treaties, pp. 217-218. Desuetude is also argued to be a natural consequence for an underlying customary rule since *a fortiori* there cannot be two general customary rules with different contents on the same subject-matter.
\(^{715}\) Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law, pp. 29-31, 150-151.
\(^{716}\) See her reference to Villiger, Customary International Law and Treaties, p. 217, who, however, phrases it a little differently.
\(^{717}\) Akehurst, The Hierarchy of the Sources of International Law, p. 276.
\(^{718}\) Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law, p. 28.
Authors sometimes use the term desuetude broadly and will hence mean either just treaty termination or treaty termination including a replacement of the old rule by a new one. Kontou speaks of ‘treaty termination by implied consent’ when referring to informal modification by subsequent practice, since a separate proof of opinio juris for desuetude is not needed as in the case with customary law.

2.6. The development and modification of *jus cogens* norms

2.6.1. Introduction

The specific regulation applicable for the modification of the prohibition on the use of force and the implications of *jus cogens* in this process is specifically dealt with in this chapter. The possibilities available for creating new legal norms on the use of force by emerging norms of R2P by military means are thus identified in what follows.

Since any emerging norm (or norms) on external R2P would affect the prohibition on the use of force, and this latter norm is claimed to possess *jus cogens* character or elements, the relevant rules for this process will be examined and discussed below. A *jus cogens* norm is a peremptory norm binding on all states and from which no derogation is permitted. Would the R2P doctrine then possess legal capacity to modify the prohibition on the use of force and create an exception to this rule? Article 53 of the VCLT confirms and describes the character of such rules:

A peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted.

The prevailing view seems to be that a unanimous consent and acceptance of a *jus cogens* norm is not necessary, and the acceptance of a *jus cogens* norm by ‘all essential components of the international community of states’ suffices. What is meant is that it suffices if ‘a very

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719 Ibid., p. 28.
720 Ibid., p. 28; Her terminology is based upon Villiger’s ‘implied agreement’ referring to Article 38 of the 1966 VCLT Draft Articles, see Villiger, *Customary International Law and Treaties*, p. 34.
721 For the purpose of the VCLT, *jus cogens* is defined this way in Article 53 of the VCLT. Hannikainen summarizes four criteria for peremptory norms; the norms must a) be general international law, b) be accepted by the international community of states as a whole, c) permit no derogation and 3) be able to be modified by new peremptory norms, Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, p. 3. On the doctrinal differences to the definition and identification of *jus cogens* see Sztecki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, pp. 76-89, pp. 63-64. Sztecki also makes a distinction between the term *jus cogens* and the term peremptory norm and believes that seeing them as the same notion is confusing. He states that the drafters of VCLT failed to observe this distinction, see ibid., pp. 103-104.
722 Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, pp. 210-214; Orakhelashvili, *Peremptory norms in international law*, pp. 105-107; Sztecki, *Jus Cogens and the*
large majority’ or ‘nearly all states’ give consent so that the *jus cogens* norm can become binding on a state without its consent. Some scholars argue that *jus cogens* according to Article 53 of the VCLT requires ‘double consent’, not only to the norm but also to its peremptory character, but such a strict adherence to a consensual approach to *jus cogens* would run counter to the peremptory character of *jus cogens* as compared with *jus dispositivum*.723

Some consider *jus cogens* and *erga omnes* norms to be unwritten law distinct from customary law, while others regard them as a species of customary law.724 In all cases, the ILA Committee on the Formation of Customary Law claimed that they clearly have at least some distinctive characteristics that merit separate examinations from their study on customary law.725

There is strong doctrinal support for regarding *jus cogens* as having its roots in natural law doctrine of classical international law, but there is in modern international law ample evidence in positive law in recognising *jus cogens*.726 There is virtually no disagreement that the purpose of international peremptory law is to protect the overriding interests and values of the international community of states.727 There is also considerable agreement that certain rules belong to *jus cogens*, although there still exists opposition towards the concept, and in particular to its content.728 Evidence of the application of *jus cogens* in international tribunals or in international practice is sparse.729

Scholars are divided on which rules have attained a peremptory status, and this issue remains controversial.730 But there seems to exist, a core of fundamental obligations of *jus cogens* character on which many states seem to agree. Among the core norms often mentioned that belong to *jus cogens* are the self-determination of peoples, the prohibition on aggression, genocide, torture, slavery, racial discrimination

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725 Ibid.
727 Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, p. 4.
730 Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, p. 32; Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, pp. 76-89. For a critical view of *jus cogens*, see D’Amato, *It’s a bird, it’s a plane, it’s *jus cogens!*"
(apartheid), piracy, and the fundamental principles of humanitarian law.\textsuperscript{731} Even many of these are contested as belonging to \textit{jus cogens}, but there are also various additional lists of norms mentioned as candidates for this status.\textsuperscript{732} The full content of the category of \textit{jus cogens} remains to be worked out in the practice of states and in the jurisprudence of international tribunals.\textsuperscript{733}

One of the legal consequences of a \textit{jus cogens} norm according to the VCLT is that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”.\textsuperscript{734} The same effect applies to an existing treaty in conflict with a new emerging peremptory norm of general international law.\textsuperscript{735} The treaty then becomes void and terminates. A state being party to the VCLT may refer a dispute over the application or interpretation of Articles 53 and 64 on \textit{jus cogens} to the ICJ or an arbitration tribunal for a decision. To date no such decision has yet been asked for.\textsuperscript{736}

The operation and effect of rules of \textit{jus cogens} in areas other than treaties is also unclear.\textsuperscript{737} There is pertinent evidence in state practice, international jurisprudence and doctrine that the prohibition on derogating from a peremptory norm is to be understood in relation to any acts in conflict with such a norm and not only in treaties.\textsuperscript{738} Jennings and Watts presume that an act done contrary to such \textit{jus cogens} cannot be legitimised through consent, acquiescence or recognition.\textsuperscript{739} They further state that an act violating a \textit{jus cogens} norm cannot be justified as a reprisal against a prior illegal act.


\textsuperscript{734} Article 53 of the VCLT. Cf. the legal ‘effects’ and ‘criterion’ of \textit{jus cogens} in Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, p. 15.

\textsuperscript{735} Article 64 of the VCLT.


\textsuperscript{737} Jennings and Watts (Eds.), \textit{Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition}, § 2, p. 8; Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, pp. 6-7. This should not lead to the conclusion that the operation of a peremptory norm is only confined to the prohibition on treaties, according to Hannikainen.

\textsuperscript{738} Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, pp. 7-8. He argues that this interpretation is consistent with the purpose of \textit{jus cogens}; see also Sztucki, \textit{Jus Cogens and the Vienna Convention on the Law of Treaties}, p. 67. See also Sztucki who points out the important distinction between derogation and violation of \textit{jus cogens} and contests the idea that acts violating \textit{jus cogens} also become null and void, Sztucki, \textit{Jus Cogens and the Vienna Convention on the Law of Treaties}, pp. 67-68.

\textsuperscript{739} Jennings and Watts (Eds.), \textit{Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition}, § 2, p. 8. Hannikainen discusses the possibility of a state being released from its responsibility towards a consenting state although not towards the international community of states, see Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, p. 12. The invitation to another state to use force on the state territory may be such an exception.
Hannikainen argues that peremptory obligations are owed by states to the international community of states in the sense of *erga omnes* obligations, according to the Barcelona Traction Case. These are obligations that are a concern of all states and all states are presumed to have a legal interest in their protection by reacting to instances of violation. According to the court they are derived from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

For these reasons Hannikainen argues that peremptory norms require a fifth criterion in being ‘obligations owed by all states and other subjects of international law to the international community of states’. This view is supported by the ILC, which states in its Commentary that it is generally accepted that *erga omnes* obligations arise under peremptory norms of general international law. Following the Barcelona Traction Case, the ILC has taken the view that ‘peremptory norms’ and ‘obligations owed to the international community as a whole’ are essentially two sides of the same coin. Examples of *erga omnes* obligations mentioned by the ILC are the prohibition on the use of force, genocide, slavery, and racial discrimination. Thus, a peremptory norm involves an obligation to the international community as a whole.

### 2.6.2. Modification of norms possessing *jus cogens* elements

The ILC did not pay particular attention to the question of sources of peremptory norms and therefore many questions regarding the process of modification of *jus cogens* remain unclear. An unresolved matter is whether a new *jus cogens* norm can develop if it contravenes or violates...
another *jus cogens* norm and whether it would have the capacity to modify or terminate the earlier *jus cogens* norm. The process of emerging new *jus cogens* norms has no clear and established doctrine explaining how such a modificatory *jus cogens* norm is to come about.747 *Jus cogens* is not accepted as a separate source of international law or as a higher law with its own law-making rules.748 But there are theories on how this process is initiated. Danilenko, for example, suggests it could happen through the elevation of an already generally accepted norm to a higher peremptory rank, but exactly how this elevation should take place is not clear.749 While it may seem theoretically possible to abrogate an existing norm of *jus cogens*, in practice this is hardly conceivable.750 Changes of the scope of a peremptory norm, by enlarging it rather than abrogating or abolishing it, might be a more feasible avenue of norm development.751

An adjacent question concerns the necessary number of states consenting to the formation of a new *jus cogens* norm. Scholars are divided on whether opposition, or persistent objectors, are permitted and on whether the formation of a *jus cogens* norm is a wholly consensual or a majority process.752 The kind of majoritarian view of the decision-making process (illustrated by irrelevance of persistent objectors) admitted at the Vienna Conference with regard to the emergence of *jus cogens* does not necessarily have to be applied to situations where peremptory norms already exist and could be modified.753

Article 53 of the VCLT exhibits or suggests the possibility of modification of *jus cogens* norms.754 The doctrinal views, however, diverge on the means by which *jus cogens* can be modified.755 The ILC abandoned the idea that the modification of a *jus cogens* norm could only come about through formal treaty-making, and indicated that modification would most probably emerge through a general multilateral treaty.756 The Commission endorsed the view that only a subsequent norm of general international law having the same character may modify a *jus cogens* norm.757 Danilenko argues that it follows from the nature of the

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747 See e.g. the approach in Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, pp. 112-114.
749 Ibid., p. 228.
750 There are as yet no visible and credible examples, according to Orakhelashvili, *Peremptory norms in international law*, p. 130.
751 Ibid., p. 130.
753 Orakhelashvili, *Peremptory norms in international law*, p. 127.
754 A peremptory norm “[…] can be modified only by a subsequent norm of general international law having the same character”.
756 YILC, vol II (1966), p. 248. In order to qualify as a *jus cogens* norm a rule must pass the normative tests for rules of general international law according to Danilenko: 1) be accepted as law by all the states in the world and 2) an overwhelming majority of states must regard it as *jus cogens*, according to Akehurst, *The Hierarchy of the Sources of International Law*, p. 285; Danilenko, *Law-Making in the International Community*, p. 235.
757 YILC, vol II (1966), p. 248; Article 53 of the VCLT.
peremptory law-making process, that modifications to *jus cogens* cannot differ from the law-making procedures by which the original norm was established. Hannikainen further expresses the view that a modification of *jus cogens* may even happen through a determinate resolution or declaration by the General Assembly of the UN or of a representative international conference, declaring expressly the modification of a *jus cogens* norm. Danilenko is critical of this perspective, particularly since it is doubtful whether a *jus cogens* norm could emerge through such instruments in the first place. The important matter, however, is that any modification of a peremptory norm can only be made by the international community of states as a whole.

2.6.3. The prohibition on the use of force and *jus cogens*

The ICJ noted in the Nicaragua Case that the ILC in its work on the codification of the law of treaties had expressed the view that

the law of the [UN] Charter concerning the prohibition on the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.

Both Nicaragua (in its Memorial on the Merits) and the US (in its Counter-Memorial) submitted the view that the principle prohibiting the use of force embodied in Article 2 (4) has come to be recognised as *jus cogens*. The court itself, however, pointed out the necessity of distinguishing “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”. In order to make this distinction the court referred to the Friendly Relations Declaration, which according to the court refers not only to ‘aggression’, but also to less grave forms of the use of force. The court, however, did not make a pronouncement on the scope of the *jus cogens* aspects of the prohibition on the use of force in this case.

The scope of the *jus cogens* aspects of the prohibition on the use of force has been discussed in the literature, and most scholars separate the most grave forms of the use of force from lesser grave forms, and link only the aggressive forms to *jus cogens*. Hannikainen asserts that intervention for humanitarian purposes does not lie within the ‘essential

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759 Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, p. 266.
764 See Articles 1 and 3 of the Definition of Aggression, GA Res. 3314 (XXIX), 14 December 1974, UN Doc A/9619 and Corr.1, 1974, which preliminary defines and provides an non-exhaustive list of the crime of aggression. The document is controversial and not authoritatively adopted by states. The crime of aggression is still not yet legally defined, but states are under a process of negotiations for its determination.
765 See also Nicaragua Case (1986), pp. 100-101, paras. 190-191.
sphere’ of the presumably peremptory norm of the prohibition of the use of force.\textsuperscript{766} The \textit{jus cogens} aspects of Article 2 (4) are limited in his view to the aggressive and dictatorial use of force.\textsuperscript{767} Ronzitti also holds that the peremptory rule banning the use of force in international relations has a narrower definition than the corresponding rule contained in Article 2 (4) of the UN Charter.\textsuperscript{768} Abass likewise concludes that in the context of Article 2 (4), only the prohibition on aggression has become a peremptory norm of international law.\textsuperscript{769} Non-aggressive uses of force are not directed against the territorial integrity or political independence of other states.\textsuperscript{770}

Many scholars thus assert that non-aggressive forms of the use of force, such as humanitarian interventions, do not pertain to the \textit{jus cogens} aspects of the prohibition on the use of force. The ICISS report also indirectly supports this argument.\textsuperscript{771}

I shall also submit to this position in this thesis – that the whole norm prohibiting the use of force in Article 2 (4) or in customary law does not constitute \textit{jus cogens}. This is line with Hannikainen’s formulations that the \textit{jus cogens} status of the prohibition of the use of force could be illustrated as a core of \textit{jus cogens} prohibiting the most aggressive forms of the use of force, with an outer shell of non-aggressive forms of the use or threats of force, which are not part of \textit{jus cogens}.

By submitting to the ‘essential sphere’ approach to the prohibition on the use of force, one will not need to rely on argumentation that the use of military intervention to prevent or stop genocide could be legal or legitimate, even if it violates another \textit{jus cogens} norm since it is made to support another \textit{jus cogens} norm.\textsuperscript{772}

\subsection*{2.6.4. \textit{Jus dispositivum non-scriptum} (CIL) and \textit{jus cogens}}

It has been argued that termination or desuetude of a \textit{jus cogens} norm could take place without creating a new \textit{jus cogens} norm.\textsuperscript{773} A similar

\begin{itemize}
\item \textsuperscript{766} Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, p. 340.
\item \textsuperscript{767} Ibid., p. 348.
\item \textsuperscript{770} Ibid., p. 199.
\item \textsuperscript{772} Jennings and Watts (Eds.), \textit{Oppenheim’s International Law. Vol 1, Peace. Introduction and Part 1, 9th edition}, § 2, p 8.
\item \textsuperscript{773} van Hoof argues that it cannot be assumed that the ILC had wanted to exclude this possibility. The withdrawal of \textit{opinio juris cogens} should, however, not be possible to make at any time, but when there is an overwhelming majority for this as in the creation of the norm, see van Hoof, \textit{Rethinking the Sources of International Law} pp. 166-167; Danilenko, \textit{Law-Making in the International Community}, p. 250.
\end{itemize}
transformation or replacement of a *jus cogens* to a dispositive customary rule is claimed to be possible in principle where there is widespread international consensus to such a change.\(^{774}\) Whether this consensus should encompass the acceptance and recognition of such a change by the international community of states as a whole (*ex analogia* Article 53 VCLT) or if it is sufficient that it is widespread, is unclear.

How may an emerging rule *jus dispositivum* (for example, an emerging norm on R2P by military means) modify a rule with *jus cogens* components such as the prohibition on the use of force? Riesenfeld suggests that this would be plausible if the change itself was non-peremptory. A *dispositivum* customary norm would hence modify the contents of a norm holding *jus cogens* components or even replace such a norm according to customary law permitting such a change and gathering widespread international acceptance.\(^{775}\) Orakhelashvili criticises this claim since it would be incompatible with Article 53 of the VCLT.\(^{776}\) Unilateral acts conflicting with the *jus cogens* components of a norm would be void and state practice would hence not be sufficient. There is no reference to this element of practice in Article 53 of the VCLT.\(^{777}\)

This problematic context, however, does not need to be resolved if holding the ‘essential sphere’ view on the prohibition on the use of force. The partial modification of the dispositive elements of a *jus cogens* norm would arguably be possible through the emergence of modificatory customary *jus dispositivum*. Thus an emerging customary norm on R2P by military means would be able to modify the non-peremptory parts of the prohibition on the use of force.

It would hence be possible to argue that ‘partial’ changes in a norm with *jus cogens* elements can come about through a new customary norm, when relying on Hannikainen’s idea of a distinction between the ‘essential sphere’ (or core) constituting a *jus cogens* norm and the non-core area of a norm, allowing the latter part of the norm to be modified by *jus dispositivum*.\(^{778}\) A new customary norm could arguably have modificatory effects on a norm with *jus cogens* elements where it is possible to ascertain such a non-core peremptory area allowing for changes. The non-aggressive forms of the prohibition on the use of force could hence be modified by the emergence of a dispositive customary norm such as that on R2P by military means.

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\(^{775}\) Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, pp. 514-515.

\(^{776}\) Orakhelashvili, *Peremptory norms in international law*, pp. 127-129.


Part II. Human Security and R2P

Frameworks for analysis
3. A Human Security Framework

3.1. Introduction

To many, there is little doubt that (in and of itself) the traditional state based security paradigm is failing in its primary objective – to protect people.779

The concept of security has traditionally been interpreted narrowly in terms of state security, as security against external aggression, and protection of national interests in foreign policy. It has been related more to the security of nation states than directly to the security of people. To many there is today little doubt that the traditional state-based security paradigm is in fact failing in its primary objective – to protect people.

The fall of the Berlin Wall symbolised the great divide between the old world order and the emergence of the new. However, the period that followed betrayed everyone’s optimism about the coming of a more secure world. In the changing political situation after the Cold War new threats to international peace and security emerged, or rather surfaced on the political security agenda. The dominant nature of conflicts turned intrastate, and gross violations of human rights accompanied by a ‘culture of impunity’ in the aftermath of internal armed conflicts that demonstrated that the doctrine of national security often failed in its role as guarantor of people’s security. Weak or failed states and bad governance brought unforeseen security consequences for their citizens and for the international community. State security did not necessarily mean human security.

Furthermore, globalisation has created new vulnerabilities for states and brought with it transnational threats and insecurity to populations. Large-scale international terrorism entered the scene on September 11 and changed the security landscape completely. But other drastic threats to human security also proliferated, such as the trafficking in people, drugs and small arms, the proliferation of weapons of mass destruction, climate change and the greenhouse effect, an upsurge in international organised crime, extreme poverty, uncontrolled migration and massive refugee flows, as well as pandemics (HIV/AIDS, SARS etc.).

We live in a new world where the analytical and political utility of the concept of national security has declined. There is a growing acknowledgement that non-traditional or non-military sources of instability in the economic, social, humanitarian and ecological fields also pose threats to international peace and security. These non-traditional threats are today equally or even more important security challenges as the traditional interstate security concerns, and it is necessary to address

them as well if we are to ensure international security. New legal and foreign policy instruments, not necessarily focusing on interstate relations but instead directed at mitigating threats to human security, internal as well as transnational, have emerged over the past two decades.

The changing nature of global security has to some extent led to a shift of perspective in foreign policy itself, from state centrism and assumptions of the primacy of national security to a more people-oriented discourse, but we have also witnessed a backlash in this development since September 11. National security interests have again been placed in the forefront and given primacy over human rights and other security concerns.

It has been argued that the concept of human security, encompassing security beyond the protection of borders, has the potential to contribute to a shift in foreign policy and the international security agenda – a *Copernican Revolution* of international security. It is already contributing to a shift of focus and new security priorities, but the present security climate, permeated by the ‘war against terrorism’, inhibits to some extent the current potential to contribute to such a shift. The most dominant human security advocators are also moderate in their claims for change in that they view human security as a complement to state security. I submit to this view for the purpose of this thesis. The potential powers of contributing to a Copernican revolution in international security consequently diminishes with a less ambitious human security approach, and it would be more accurate to speak of a contribution to a gradual change or shift.

Although often portrayed as conflicting claims or theories, state and human security are two sides of the same coin, bottom-up and top-down approaches to protecting the individual. The challenge is how to bring the two theories together. The introduction of human security into the security discourse was not meant to create a substitute for state security. Instead, in acting as a complement to state security its aim is better defined – namely to protect people, not abstract entities. Ultimately, the beneficiary of security must be the individual human being. State security and human security are interlinked in several ways and mutually supportive. State security is a means for providing human security, and has historically been, and still is, the most effective instrument for ensuring the individual’s security. Improving the human security of people strengthens the legitimacy, stability and security of a state: ‘if human security – then state security’. But this axiom does not necessarily work the other way around due to internal and transnational threats.


International security, since the Westphalian order was established in 1648, has relied upon state security. The concept of state security has of course evolved over the centuries, but is today perceived as underpinned by the principles of state sovereignty, territorial integrity and non-interference, as formulated in the first chapter of the UN Charter. Its main focus has been on the defence of boundaries, national institutions and citizens against external aggression.\textsuperscript{783} Since 1945 the system of collective security – the offspring of national security in the form of an internationalised right to collectively uphold international peace and security – has dominated the international legal order.\textsuperscript{784}

In the post-Cold War era, the view on international security has been broadened reluctantly by including, among other things, threats of internal violence in collective security activities. The Security Council has inconsistently extended the interpretation of Article 39 and the circumstances that can constitute a threat to international peace and security, in order to address the new security threats.\textsuperscript{785} The present international legal order was not primarily created to manage intrastate conflicts and failed states, and has therefore had difficulties in responding and adapting to such threats.

The new, broadening \textit{ad hoc} practice of the Security Council has led to tensions within the international community with regard to the interpretation of the foundational principles of the legal order. One reason why human security has not fitted easily into our traditional notions of security concerns is that many human security matters fall within the domestic sphere and are thus not traditionally regarded as being of an international concern.\textsuperscript{786}

Some of the ideas embedded in the concept of human security, however, are not really new. The notion that the protection of people is as important as the sovereignty of states has achieved increased recognition since the end of the Second World War with the creation and development of human rights and international humanitarian law, rooted in the UN Charter. Similarly broad security concepts, such as ‘common security’ and ‘comprehensive security’ can also be traced to earlier work, for example, the reports of the Palme Commission, the Carlsson-Ramphal Commission, and in Boutros-Ghali’s Agenda for Peace.\textsuperscript{787}


\textsuperscript{784} Oberleitner, \textit{Human Security and Human Rights}, p. 8.


3.2. Background – the concept of human security

3.2.1. Introduction

Human security is a relatively new concept in foreign policy and the international security discourse. It evolved during the 1990s as an innovative and holistic tool to address the sources of insecurity that affect people everywhere in a globalised world. It reflects the new security trends and forces in international relations that cannot be captured by the narrow and military-focused notion of national security alone. The concept offers a new lens through which we can understand security, and it is establishing itself as a complement to the more traditional notions of nation-based security.

The concept interlinks an eclectic group of politicians, academics, diplomats, NGOs and activists around issues of security pertaining to the individual. Portrayed as a new theory, concept, paradigm, political agenda, policy framework or world view, it has taken on an inherently interdisciplinary nature and has inevitably crossed traditional academic fields. It does not have one given academic home. It has been subject to a long academic debate for more than ten years within and across many disciplines. The concept itself is said by many to contribute to a better understanding of the relations between the different fields of social change, such as conflict prevention, conflict resolution, humanitarian assistance, post-conflict reconstruction, development co-operation, human rights, democracy and institution building, as well as economic and environmental security.

The proponents of human security as a concept claim that its added value consists in embodying shared political and moral values, and stimulating new and mainly normative lines of inquiry within the security discourse. These discussions should be pursued more rigorously in the future, for example, regarding the relationship between the individual and the state and state sovereignty, intervention, and the role of regional and global institutions. It has established a new means for renewed discussion on its more controversial aspects related to protection, sovereignty and intervention.

Its critics ask whether the concept of human security is needed and in what way it is useful. Some do not see the added value and thinks it

1995; See also Oberleitner, Human Security and Human Rights, p. 1, referring to the Brandt Commission and the Brundtland Commission.


790 For an overview assessment, see Paris, Roland, Human Security: Paradigm Shift or Hot Air?
does not contribute to anything new that the human rights already have. Others are critical of its broad definitions and its utility: “A concept that tries to explain almost everything, in reality explains nothing.”

After all, attempts to reframe and broaden the concept of security are not new, so the question is whether it is to be regarded as old wine in new bottles, as one commentator suggested.

### 3.2.2. Actors promoting human security

During the 1990s several actors – states, networks, organisations, institutions and universities – began to advocate the concept of human security in the international arena as both a new form of diplomacy and an innovative contribution to the international security agenda and discourse. Some of the most dominant actors and their respective human security agendas will be presented here briefly.

The United Nations Development Programme (UNDP) was the first to launch the human security terminology in its 1994 Human Development Report (HDR), although the concept had been in use in academic circles long before. The report examines threats to human security under seven main categories: economic, food, health, environmental, personal, community and political security. The UNDP’s analysis focused mainly on human security in relation to human development, that is, the *freedom from want* aspect of human security.

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while human security in violent conflict situations only, was considered briefly under the category of personal security.

Canada began using the language of human security in the aftermath of the Cold War, when it became clear to that country that a new foreign policy paradigm was needed to protect civilians from violence.796 Under the leadership of Lloyd Axworthy (former Canadian Minister for Foreign Affairs) Canada developed and advocated a human security agenda as a basis for a new way forward in thinking and acting multilaterally on security. Its human security agenda, which is regarded as being complementary and not as an alternative to traditional foreign security policy, has developed over the years.

The initial Human Security Program identified five priorities: the protection of civilians, peace support operations, conflict prevention, accountability and public safety.797 The Program has been replaced by the Glyn Berry Program for Peace and Security, which will in 2007/08 focus on five almost identical thematic priorities: democratic transitions, human rights and protection of civilians, rule of law and accountability, conflict prevention, and public safety.798 In contrast to UNDP, Canada has focused its agenda on the freedom from fear aspect of human security – that is, violent conflict concerns.

Canada’s strong commitment to the concept of human security has contributed to its proliferation into other international fora.799 Axworthy introduced the concept into the G-8 discourse in Cologne in 1999 at the Foreign Ministers’ Meeting, and in the General Assembly of the Organisation of American States (OAS) in the summer of 2000.800 Furthermore, Canada has together with Norway has advanced the concept of human security by building a global network of like-minded countries associated with international organisations and NGOs.801 Building on the momentum of the Ottawa Process on anti-personnel landmines to see if the winning formula could be replicated with other issues, the Canadian and Norwegian Foreign Ministers went into a

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799 The motivating factor of the human security agenda is said to be ‘crucial not only for the security of individuals, but also to maintain Canada’s role as a leading voice on the world stage. See Axworthy, Introduction, p. 9.
801 This approach builds on the ideas of a ‘new multilateralism’, consisting of non-traditional international coalition building, see Waschuk, Roman, The New Multilateralism, McRae, Rob, Hubert, Don (Eds.), Human Security and the New Diplomacy, McGill-Queen’s University Press, Montreal, 2001, pp. 213, 220-221. See also the discussion on the ‘new diplomacy’ by coalitions of the willing, ibid, pp. 250, 254.
bilateral retreat in Lysøen in May 1998. The meeting resulted in the Lysøen Declaration, stipulating an agenda covering nine areas of cooperation for the enhancement of human security. The agenda also places a strong emphasis on freedom from fear issues.

The unwritten objective of the Lysøen process was to create the Humanitarian 8 (H-8), but the partnership expanded into the Lysøen process of twelve states and an observer state. Their first meeting was held in Bergen, Norway, in May 1999, and the following year the Lysøen group became The Human Security Network (HSN), by then including NGOs and experts from the civil society. Today, their agenda covers security matters such as the International Criminal Court (ICC), protection of civilians in armed conflict, action against anti-personnel mines, education on human rights, conflict prevention, war-affected children and corporate citizenship, the protection of children in armed conflicts, the control of small arms and light weapons, the role of women in peace processes and peace operations, the fight against HIV/AIDS, trafficking in human beings, poverty, and in relation to ‘people-centered development’. The HSN’s agenda has been constantly developed and further amplified over the years.

One of the purposes of the HSN is to play a catalytic role by drawing attention to new and emerging security issues. It has rotating annual ministerial meetings to review progress and priorities and to impart action, but also intersessional meetings focusing on specific human security issues. In addition, it works as a thematic network in the UN (in the General Assembly, the Security Council and the former UN Commission on Human Rights), where it acts with a coordinated voice on behalf of its members on issues under the human security umbrella.

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802 DFAIT, Department of Foreign Affairs and International Trade, Canada (Publ.), Norway-Canada partnership for action. The Lysøen Declaration "http://www.nisat.org/export_laws-regs%20linked/Norway/lysoern.htm", (2007-01-09). This is the first time the concept appears in an official agreement between Canada and another government, see Small, Michael, The Human Security Network, McRae, Rob, Hubert, Don (Eds.), Human Security and the New Diplomacy, McGill-Queen’s University Press, Montreal, 2001, pp. 231-235. The initial agenda included the ICC, landmines, human rights, humanitarian law, small arms proliferation, gender and peace-building, children and armed conflict, child labour and arctic and northern co-operation.

803 The idea of the ‘Humanitarian 8’ was to gather like-minded states around a human security agenda just as the G-8 has its economic agenda. See Washuk, The New Multilateralism, p. 219, and Small, Michael, Case Study: The Human Security Network, McRae, Rob, Hubert, Don (Eds.), Human Security and the New Diplomacy, McGill-Queen’s University Press, Montreal, 2001, p. 233. The states in the HSN are: Austria, Canada, Chile, Greece, Ireland, Jordan, Mali, The Netherlands, Norway, Slovenia, Switzerland and Thailand. South-Africa has observer status.


806 In the Security Council, for example, they have made common statements on children and armed conflict (14 January 2003), the protection of civilians (12 December 2002) and women, peace and security (28 October 2002), from personal interview with, Armstrong, Jennifer, Adviser Political Affairs, Permanent Mission of Canada to the United Nations,
The network has also initiated the publication of an annual Human Security Report, as a complement to the existing Human Development Report.\textsuperscript{807} The purpose of the report is to map the incidence of global violence and analyse its causes, health and developmental consequences, as well as community responses to such violence.

The terminology of human security is also a basic component of the doctrine on a responsibility to protect, forwarded in the report of the International Commission on Intervention and State Sovereignty (ICISS). The Commission was created by the government of Canada together with a group of major foundations in September 2000 in response to the debate on humanitarian intervention in the UN, following NATO’s intervention in Kosovo in 1999. However, Canada’s commitment to human security has since 2006 not been as devoted to the cause to the same extent as under (and after) the years of Foreign Minister Axworthy.

Another state, alongside Canada, that has assumed a leading role on human security is Japan. This state also made human security a key perspective in the development of its foreign policy.\textsuperscript{808} Japan has also provided substantial contributions to the Trust Fund for Human Security that was established at the UN in March 1999 on its own initiative. This like-mindedness of Japan and Canada has led to convergence of interests on specific human security issues in some international fora – for example, the G-8 and the UN.

The Commission on Human Security (CHS), which was an initiative of the government of Japan, was established in January 2001 after a meeting between the UN Secretary-General Kofi Annan and Sadako Ogata.\textsuperscript{809} The idea of an independent CHS grew out of the UN Millennium Summit (2000), which focused on securing freedom from fear and freedom from want. The CHS secretariat was located in New York, facilitating close contacts with the UN. Its main purpose was to promote public understanding and support for human security, to develop the concept as an operational tool for policy formulation and to propose a concrete programme of action to address pervasive threats to human security.\textsuperscript{810} Its final report, \textit{Human Security Now: Protecting and Empowering People} (the CHS Report), was presented to the UN Secretary-General on 1 May 2003.\textsuperscript{811}

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\textsuperscript{809} See the Commission on Human Security homepage: Commission on Human Security (Publ.), \textit{Homepage} "http://www.humansecurity-chs.org/index.html", (2002-11-12). Sadako Ogata has been an active proponent of the concept in her position as the former High Commissioner for Refugees and in the CHS.

\textsuperscript{810} It was co-chaired by Mrs. Sadako Ogata and Professor Amartya Sen, Nobel Laureate and Master of Trinity College, Cambridge.

The CHS refrained from proposing an itemised list of the composition of human security. Its belief was that the concept should be dynamic and open to variations across individuals and societies. Its approach to human security, however, was broader than Canada's, involving six main areas. These concerned both violent conflict and poverty; protecting people in conflicts and post-conflict situations; shielding people who are forced to move; overcoming economic insecurities; guaranteeing essential health care; and ensuring universal education. But compared with UNDP, the CHS Report places far more emphasis and weight on security issues connected with violent conflict situations. The CHS intentionally omitted the issue of humanitarian intervention in its report owing the major work done in that area by the ICISS.

An Advisory Board on Human Security was set up to promote and follow up the CHS Report and provide guidance on the criteria to be applied for the UN Trust Fund on Human Security. The Board noted that necessary measures were required to better streamline the application and in this regard, in May 2004, the Human Security Unit (HSU) was established at the UN Secretariat in the Office for the Coordination of Humanitarian Affairs (OCHA). The overall objective of the unit was to place human security in the mainstream of UN activity and translate the concept of human security into the tangible by the dissemination and promotion of activities on human security and highlighting the added value of the human security approach.

The concept of human security was acknowledged to be an important contribution to the international security discourse in the UN High Level Panel Report, and was recognised by all states in the UN World Summit Document 2005. Paragraph 143 of the Outcome Document stated:

We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognise that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.
Apart from being discussed in academic literature, newsletters, conferences, seminars and workshops, the concept of human security has also developed as a subject of new research projects and courses at several universities and institutes. Many of these programmes have interdisciplinary approaches to security where development, human rights, humanitarian relief, conflict resolution and international peace and security are studied together. Canada has also created the Canadian Consortium on Human Security (CCHS) – an academic-based network promoting policy-relevant research on human security.

The main critique against the human security concept is that it is normatively attractive but analytically weak. Owens argues, with regard to the contents of human security, that “consensus will only emerge through long-term theoretical debate and policy experimentation”. Therefore, a dismissal of the concept today for these reasons is premature. He argues that the differences are more about packaging than substance.

Notwithstanding the theoretical critique and debates, human security has shown to have substantive policy relevance. It is sometimes claimed that it works in practice but not in theory. For the policy-oriented proponents the lack of definitory clarity is not of great concern so long as it retains the potential to address policy problems. The concept has shown to be attractive for middle powers but far less popular as a principle in practice for the so-called major powers.

3.3. Definitions of human security

3.3.1. Introduction

Human security has been described as many different things: a rallying cry, a political campaign, a set of beliefs about the sources of violent conflict, a new conceptualisation of security, and a guide for policymakers and academic writers.

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Concepts of human security vary greatly and there is no single authoritative definition. There are at least thirty in circulation.\textsuperscript{824} As has been shown in the previous chapter, it started out as an UN-inspired concept, and was developed under Axworthy’s leadership into a diplomatic initiative. Since the new millennium the concept has flourished in many different fora around the world and is continually being developed, debated and analysed.\textsuperscript{825} It has not yet been given a common political definition by states, as the Outcome Document illustrates.

The definition, scope and utility of the concept of human security is contested in the academic field.\textsuperscript{826} A central part of the academic debate centres on the inclusion or exclusion of threats on the human security agenda and their ranking, prioritisation and placing on the agenda.\textsuperscript{827} The concept is criticised for being too universalistic, containing conceptual flaws, and too many ‘securitized’ issues, and therefore less useful.\textsuperscript{828} At the same time, its proponents see it as a helpful expansion of traditional security concerns and consider it useful in foreign policy to group together a wide range of activities centred on people rather than states. Despite the critique, the concept has come to be regarded as a useful chapeau for a new field of academic security research concerned with non-military threats to the safety of societies, groups and individuals.\textsuperscript{829}

One common feature of the different definitions is that human security is viewed as people-centred, reinforcing human dignity and


\textsuperscript{825} For an introduction to the concept and its connection to R2P, see Amnéus, Diana, \textit{Rethinking Security. Humanitarian Intervention in the Age of Human Security - A Responsibility to Protect?}, Amnéus, Diana, Svanberg-Torpman, Katinka (Eds.), Peace and Security. Current Challenges to International Law, Studentlitteratur, Lund, 2004, pp. 327-372; For an overview on the usage of the concept of human security among national governments, international organisations as well as non-governmental organisations and research institutes, see Edson, Centre for History and Economics, King’s College, University of Cambridge (Publ.), \textit{Human Security: An Extended and Annotated International Bibliography}, pp. 36-76.


containing two basic aspects: Freedom from want and freedom from fear – the same leitmotifs of the United Nations at its creation in 1945. These two fronts are interconnected and interdependent in a holistic way in the human security concept, but some actors have chosen to stress one or the other element in their work and agendas.

In the debate on the definition of human security, two major outstanding questions appear to be central: 1) whether it should include both freedom from want and freedom from fear or only the freedom from fear element, the so called ‘narrow-broad debate’, and 2) the issue of humanitarian intervention. A central part of the narrow-broad debate centres on the inclusion or exclusion of threats from the human security agenda and their ranking, prioritisation and placing on the agenda.

3.3.2. The broad approach

The broad conceptualisation keeps the inclusiveness and holism in which wider issues such as poverty and development, disease and the environment are included. In its widest formulations practically anything that is a critical threat to life represents a security threat, whatever the source is included. Leaning, Alkire, Thakur, Axworthy, Bajpai, Winslow and Hylland Eriksen and Hampson all support approaches to human security that go beyond violent threats.

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830 These appear to have their base in the famous four freedoms formulated by Franklin D. Roosevelt in a statement to the US Congress in 1941: “The first is freedom of speech and expression […] The second is freedom of every person to worship God in his own way […] The third is freedom from want – which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants […] The fourth is freedom from fear – which […] means a world wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in position to commit an act of physical aggression against any neighbor […]” See Ishay, Micheline R., The Human Rights Reader. Major Political Essays, Speeches, and Documents from Ancient Times to the Present, 2nd edition, Routledge, New York, 2007, pp. 479-481. The US Secretary of State stated at the time of the creation of the UN in 1945: “The battle of peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want.”

831 UNDP and Japan are more freedom from want oriented although Japan adheres to both fronts, while Canada and the HSN focus their agendas on freedom from fear issues. The CHS appears to have an integrated approach to human security in this respect, dealing with violent conflict, health, education, economic security and refugee issues in its final report. See the previous Chapter 3.2.

832 Hubert, An Idea that Works in Practice, p. 351.


834 Newman, A Normatively Attractive but Analytically Weak Concept.

environmental, social, political, psychological, health, and economic aspects are considered to pose security threats to human security depending on different conditions and criteria which these authors put forward in different variations.

The broad approach embedded in UNDP’s definition of human security remains one of the most widely cited and, according to Paris, the most authoritative formulation.\textsuperscript{836} When the UNDP wrote about human security in the HDR (1994) (crafted by Mahbub ul Haq), it was the first time the concept of human security was introduced in a UN forum. The UNDP proposed that human security be defined as safety from such chronic threats as hunger, disease and repression, but also protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in jobs or in communities.\textsuperscript{837}

The ICISS report’s definition of human security encompasses a fairly broad view of human security and defines it thus:

Human security means the security of people – their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms.\textsuperscript{838}

The ICISS Commission further expressed the view that when rape was used as an instrument of war and ethnic cleansing, when thousands were killed by floods resulting from a ravaged countryside and with citizens killed by their own security forces, then it was simply insufficient to think of security in terms only of national or territorial security.\textsuperscript{839}

3.3.3. The narrow approach

Those who find fault with a broad definition often remind us that “[a] concept that aspires to explain almost everything in reality explains nothing”.\textsuperscript{840} The proponents of a narrow approach try to limit the number of treats to a minimum. The narrow focus only deals with freedom from fear issues – that is, violent threats to human security. This definition is perceived as giving analytical rigour and more clarity to the concept.\textsuperscript{841}

In the literature, Krause, Mack and Macfarlane argue for a narrow

\textsuperscript{837} UNDP Human Development Report (1994), p. 23. Their definition and analysis of seven elements of human security are vast and all-encompassing and have been criticised for being so broad that is difficult to determine if anything might be excluded, see Paris, \textit{Human Security: Paradigm Shift or Hot Air?}, p. 2.
\textsuperscript{838} International Commission on Intervention and State Sovereignty, \textit{The Responsibility to Protect}, International Research Centre, Ottawa, 2001, p. 15, para. 2.21.
\textsuperscript{839} ICISS, \textit{The Responsibility to Protect}, p. 15.
\textsuperscript{840} Mack, \textit{A Signifier of Shared Values}. Mack, however, points out that is quite possible to share the values that underpin the broad conception while still rejecting its analytical utility. This position is shared by this author. See also Krause, Keith, \textit{The Key to a Powerful Agenda, if Properly Delimited}, Security Dialogue, vol 35, 3, 2004, pp. 367-368.
human security approach and the inclusion of violence into traditional security thinking.\textsuperscript{842}

The Canadian application of human security is perceived to be based upon the narrow approach, but Canada nonetheless officially affirms that human security means safety for people from both violent and non-violent threats. Human security is defined as a condition or state of being characterized by freedom from pervasive threats to people's rights, their safety, or even their lives.\textsuperscript{843}

However, even this supposedly narrow definition of human security has been criticized as being sweeping and open-ended.\textsuperscript{844}

3.3.4. Bridging the broad-narrow approaches?

Owen, who supports both the analytical and policy utility of human security, explains that neither the narrow conception nor national security are immune from ambiguity and vagueness and that the problem or risks of 'securitizing' everything due to the human security concept is exaggerated.\textsuperscript{845} He states that suggesting 'securitization' of an issue does not necessarily need to imply militarisation, and it is in fact the assumption that security is solely a militaristic endeavour that human security attempts to challenge. The desired implications of 'securitizing' is the resources and prerogative attributed to the military and not the guns, as he puts it.\textsuperscript{846}

He has also suggested an attractive threshold-based conceptionalisation of human security that offers a conciliatory way forward in this fractured debate, a bridge between the narrow and broad stands.\textsuperscript{847} Only threats that are critical, severe and pervasive (widespread), irrespective of origin would be included in the definition, according to this conceptionalisation. Those threats that surpass the threshold and are considered to be human security threats should be mitigated by a security infrastructure that has the capacity to identify and address such threats.

3.3.5. A ‘humanitarian approach’ – A working conception

Apart from the broad-narrow distinctions, Hampson et al. have identified a third group of approaches which they call the ‘humanitarian
conception of human security', as this approach views human security as an instrument preparing the ground for humanitarian intervention.848

For the purpose of this thesis, and the analysis on the emerging responsibility to protect people, the most suitable conception of human security to apply is the ‘humanitarian approach’ of Hampson et al. This approach applies the concept of human security

where the ‘safety of peoples’ or ‘freedom from fear’ is the paramount objective behind international interventions.849

War or armed conflict is considered to be one of the principal threats to human security and the proponents of this approach have among their primary goals the protection of civilians in armed conflicts.850 The ‘humanitarian’ approach of human security is also linked to preventive and post-conflict peace-building and hence integrates measures that address the deeper causes of conflict. This development is fully in accord with the doctrine of responsibility to protect. This integrated approach, which also covers preventive and post-conflict aspects, will only be referred to occasionally in this thesis, and the main focus of the human security concerns will lie on the jus ad bellum rules. Analyses of international legal development in the area of conflict prevention and post-conflict peace-building will therefore, for reasons of space, not be included.

The adopted working definition in this thesis is thus a more narrow application of the ‘humanitarian conception of human security’. These limitations should, however, solely be interpreted as being a pragmatic adoption of a limited approach for the purpose of delimiting the thesis to a manageable subject of study, and not that I would not submit to a broad, holistic or integrated approach to human security in general (which I in fact do). This choice does not follow from a belief that armed conflicts necessarily represent the main threats to human security or that military responses are necessarily the only and best means to address human insecurity, but merely that this perspective has been chosen for the purpose of this study.851 This ‘humanitarian conception of human security’ will guide the answers in the following chapter outlining a human security framework.

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848 Hampson et al., Madness in the Multitude, pp. 5, 16-32. Cf. a similar approach has been labelled the ‘assertive’/‘interventionist focus’ by Newman, see Newman, Edward, Human Security and Constructivism, International Studies Perspectives2, 2001, pp. 239-251, p. 244.

849 Hampson et al., Madness in the Multitude, p. 17.

850 This approach has traditionally been focused on the moral and legal rights of non-combatants in war or situations of violent conflict and the provision of emergency assistance to those in need. Ibid., pp. 23-28.

851 There is a disagreement between proponents of the ‘safety of peoples’ approach and the broader ‘human development’ approach to human security, whether war is the main cause of human insecurity or a symptom rather than a cause of insecurity due to lack of human development. The disagreement also includes the order of priority when it comes to the measures to apply in order to address the underlying causes of conflict, see Ibid., p. 35. I submit to the understanding that there is a connection between security and development, armed conflicts and poverty, and therefore does not advocate a limited ‘safety of peoples’ approach in all instances.
For reasons of space this thesis will not cover jus in bello, (i.e. international humanitarian law in general). The primary subject for the examination of developments in international law is humanitarian intervention, and thus the jus ad bellum (i.e. the law that regulates when the use of force/military means may be applied) aspects of this conception of human security.

3.4. Gender, human security and legal protection in armed conflicts

3.4.1. Introduction

This chapter will give a brief overview of the impact of armed conflict on women and men in relation to their different security needs of protection, particularly in internal armed conflicts. As argued in the Chapter 1.4.2. on feminist theory on security, the subject of security depends on its ‘gender identity’. Hoogensen and Vigeland Rottem have shown how the identities of ‘man’ and ‘woman’ shape and form the individual and collective security needs and responses. An additional aspect is that women’s true identities and their security needs have been and still are invisibilised and understated. They therefore argue that “[s]ecurity claims cannot be heard from identities that have been enveloped and hidden by the dominant discourse”. But the moment the interconnections of violence (domestic, local, national, international, and global) and women’s articulations of security are recognised and heard, a true reorientation of security can begin. “Security cannot be assessed outside its social and political context.”

3.4.2. Different security needs in armed conflicts?

Although violence against civilian women has been an integral part of war since time immemorial, it has been largely undocumented until relatively recently. Today many reports are available, and much research has been done on the impact of war and armed conflict on women. The

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852 Hoogensen, Gunhild, Vigeland Rottem, Svein, Gender Identity and the Subject of Security, Security Dialogue, vol 35, 2, June 2004, pp. 155-171, pp. 155-156, 162-163. The Norwegian scholars explain that although identity in the security debate is normally linked to ethnicity, nationality, religion and race, they acknowledge that identities themselves are constructed and by claiming that “[g]ender is inherently linked to identity” they demonstrate the significance of gender for security.

853 Ibid., p. 165.


literature seems solid on the recognition that women, men, girls and boys are affected by, and respond to, armed conflict and violence in different ways and thus have different needs of protection.

It is constantly repeated that women’s experiences of violence and their security needs differ significantly from those of men because women suffer from other forms of violence than men. There follows a brief account of its impact on civilians, which leaves out the security situation for combatants.

3.4.2.1. Women

Human rights violations against women during armed conflict are very closely linked to sexual violence and abuse, and the specific gender-based violence that women face in war is to a greater extent of a sexual nature than the violence directed against civilian men. Virtually always the victim of sexual violence is female, but occasionally male, while the perpetrator virtually always male, and only occasionally female. It is important to acknowledge these basic facts by making clear that when speaking of gender-based violence we are effectively dealing with violence ‘by men’ on women--not just ‘violence against women’. By excluding references to the male perpetrator in the language used when addressing this issue, the result leads to the invisibilisation of the male perpetrator and the marginalising of the issue as a less prioritised ‘women’s issue’ instead of seeing it as a societal problem where men are highly involved and need to be involved for its solution.

Since the wars in Bosnia-Hercegovina and in Rwanda, rape and sexual gender-based violence in wartime has increasingly been acknowledged to be used as a method of warfare. Attitudes in the post-Cold War period have moved from seeing rape and other sexual abuse as a natural by-product of war, to being part of a specific and explicit strategy in war. Male gender-based violence against women continues to be a standard operating procedure in war, and has by some commentators been considered to be escalating in its viciousness.

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859 This does not mean that all men should feel a collective form of guilt, only that the gendered aspects of the perpetrator should be visibilised.

860 Stern, Maria, Nystrand, Malin, Gender and Armed Conflict, Sida, Stockholm, 2006.

861 Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice, pp. 919, 924.
The widespread sexual violence against women by men during armed conflicts may take many forms: rape, forced sexual intercourse or other sexual acts with family members, forced impregnation, forced pregnancy, sexual mutilation, sexual humiliation, medical experimentation on women’s sexual and reproductive organs, forced abortion, forced sterilisation, forced prostitution, forced exchange of sexual favours for essential items, trafficking in women, pornography, forced marriages and cohabitation as well as sexual slavery. The means of sexual torture are almost innumerable. However, it is important to bear in mind that the effects on women of armed conflict differ considerably among cultures and individual women within those cultures, albeit the common themes are mentioned in this chapter.

The feminist literature on women and war informs us that women typically suffer the most civilian casualties of modern warfare, and that there is a gendered illusion of protection that does not correspond to the disproportionate losses of women in war. Women also make up the majority of refugees and experience the most of sexual and physical abuse at refugee camps. Women are raped and sexually abused by

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863 This fact is even more evident if one compares the security needs of women and men in peacetime with those in wartime. The security threats to men in peacetime primarily consist of violent criminal acts different from the sexualised gender-based violence women face because they are women. Gender-based violence by men against women in peace time is often committed by private actors, and is in many states neither regulated nor criminalised to the same extent as the criminalised public violence men face. See e.g. Trioung, Thanh-Dam, Wieringa, Saskia, Chhachhi, Amrita (Eds.), Engendering Human Security. Feminist Perspectives, Zed Books Ltd, London, 2006. This is a structural discrimination which has major consequences on the human security of women when armed conflict breaks out. Those who are already discriminated against during peacetime, will face the worst human rights violations and are considered as the most vulnerable groups during armed conflicts.
864 Gardam and Jarvis, \textit{Women, armed conflict and international law}, p. 25.
other refugees and camp officials, and face great risks of being forced into prostitution.

UN peace-keeping forces have also contributed to the catalogue of sexual abuse, exploitation and harassment of women during armed conflicts.868 Numerous reports from armed conflicts from practically all parts of the world; East Timor, Sierra Leone, Congo, Bosnia, Cambodia, Namibia, Somalia, Kosovo, Angola, Liberia, Mozambique, all testify the same pattern. In Bosnia it is estimated that ‘internationals’ account for about 30 per cent of brothel revenues.869 Several studies also indicate that the presence of peace-keeping troops contribute to increased prostitution, sexual slavery, HIV/AIDS infection, rape, trafficking, child abuse and sexual exploitation.870 These forms of sexual violence, exploitation, and offences committed by the purported security providers themselves represent security threats that men caught up in armed conflicts very seldom have to worry about. If the UN and multilateral forces mandated to provide human security also constitute and pose a real security threat to women’s security, who should and could provide security for women when the state fails to do so? Whose security, are the external forces to protect? And by which means? It is therefore vital that the doctrine of the responsibility to protect takes these important gendered factors into account in order not to risk of becoming “a security strategy by men for the protection of men”.871

After the Congolese allegations of sexual abuse by peace-keepers, the UN adopted a policy of ‘zero tolerance’ of sexual exploitation and abuse in United Nations peace-keeping operations,872 and all missions were given clear instructions to investigate thoroughly allegations of sexual exploitation or assault by peace-keeping personnel and to ensure that offenders were duly disciplined.873 But this zero-tolerance culture has not managed to permeate all levels. Such codes of conduct and gender policies may culturally clash with the cultural gender understandings of certain troop-contributing states with an existing poor human rights culture for women and pervasive gender discrimination within their own

societies. It is uncertain whether such legally non-binding codes of conduct may establish expected standards of behaviour among not only UN staff but among the forces of troop-contributing states. Because it is evident that prostitution, often combined with trafficking, increases in the context of international interventions, further measures are needed to prevent trafficking and the sexual exploitation of women in the context of international peace operations.

The UN Secretary-General has recently reaffirmed his strong and profound commitment to the zero tolerance policy against sexual exploitation or abuse by UN personnel. He stated in the latest Security Council meeting on Women, Peace and Security that:

When we receive credible allegations, we ensure that they are looked into fully. It means zero impunity. When allegations are found to have merit, all personnel -- whether military, police or civilians -- are held accountable based upon applicable national jurisdictions. I will strengthen the current code of conduct by upholding the strictest discipline, whereby not only the individual concerned, but also supervisors up the chain of command, are held accountable in a system of collective responsibility.874

The accountability of such crimes by UN personnel thus depends on national jurisdiction, prosecution and punishment. The development of national action plans for the implementation of Security Council resolution 1325 is thus a very important tool for raising gender awareness and commitment in the military and police contingents of troop-contributing states.875 Most states have ratified the CEDAW Convention, which provides legal obligations on states to suppress all forms of traffic in women and exploitation of prostitution under national jurisdictions.876 But there are obstacles and often a lack of political will in the enforcement of national criminal jurisdictions when peace-keepers and civilian police accused of such things as sexual abuse, prostitution and trafficking, return home.877

Another difference in security that women face is when hostilities cease, for it often marks the beginning or continuation of the battle for survival, since violence against women, in particular domestic violence


875 Until now only six states have adopted such national action plans; Sweden, Austria, Denmark, Norway, Switzerland, the Netherlands, Iceland and the UK, see Inter-Agency Network on Women and Gender Equality, Taskforce on Women, Peace and Security (Publ.), National implementation of Security Council resolution 1325 (2000), "http://www.un.org/womenwatch/daw/genderwalk/taskforces/wps/national_level_impl.html", (2008-07-21).


increases. The neglect of this fact is part of the structural discrimination of women’s human rights and lack of gender-equality in peacetime. It also exhibits a lack of a holistic security concept where the local, private, national, public and global threats to security are acknowledged as being interlinked and influencing women’s and men’s security. The artificial construction of the private and public distinction has strong and negative impact on women’s security, through invisibilisation and denials of their equal rights to personal security and freedom.

3.4.2.2. Men

A few other scholars state the opposite on the gender of civilian casualties in armed conflicts – that more men than women are killed in wars. It is argued that non-combatant males have been, and continue to be, the most frequent targets of “mass killing and genocidal slaughter” as well as victims to lesser atrocities and abuses. This feature in which gender-selective mass killings of men take place have been coined “gendercide”. Jones argues that this deliberate extermination of human beings of one sex (or gender) has not received attention at the level of academic scholarship or public policy, at least within male victims. The most common example, mentioned is the genocide of Muslim men and boys in Srebrenica, but also that of Kosovo in 1999.


881 The term gendercide was first coined by Mary Anne Warren in Gendercide: The Implications of Sex Selection, 1985, with regard to female infanticide and witch-burning. It was picked up and developed by i.a. Adam Jones and R. Charli Carpenter, but with regard to men; see Jones, Gendercide and Genocide, pp. 2-3. Jones has argued that genocide is gendered in the way that most genocides target men, as in Srebrenica. Jones acknowledges that gendercide can also target women, as has been described by Warren. However, he applies a narrow conception of genocide where e.g. rape is included only when it is followed by murder, which excludes many of the genocidal acts against women. Ibid., p. 11; Cf. the case law of the ad hoc tribunals accounted for on this issue in Chapter 5.3.3., which asserts that gender-based violence during armed conflicts can constitute genocide under certain circumstances; Cf. also Buchanan, David, Gendercide and Human Rights, Jones, Adam (Ed.), Gendercide and genocide, Vanderbilt University Press, Nashville, 2004, pp. 139-142.

882 Jones, Gendercide and Genocide, p. 2.

Men, however, also face and suffer sexual violence in armed conflicts to some extent, although there is very little material and lack of reporting in this area, according to Sivakumaran.884 The final report of the United Nations Committee of Experts, chaired by Professor Cherif Bassiouni (the Bassiouni report), pointed to instances of sexual assault on men that formed part of organised sexualised torture, mainly while held in detention.885 Sexual violence by men against men may take various forms such as rape, enforced sterilisation, enforced nudity, enforced masturbation, and genital violence.886 The Bassiouni report stated that men were forced to rape women and to perform sex acts on guards or on one another, as well as being subjected to castration, circumcision or other sexual mutilation.887

There appears to be a lack of discussion, research and clear jurisprudence relating to sexual crimes against men. So it remains unknown to what extent such violence occurs. The evidence is largely anecdotal and relates to offences committed in peacetime.888 The most thorough investigation made was in the conflict in former Yugoslavia, according to Sivakumara. There, examples of sexual violence were to be found at all stages of the investigation.889 He asserts, however, that it is unlikely that the number of men sexually violated in armed conflict will ever exceed or even equal those of sexually abused women (in armed conflict).890

3.4.2.3. Conclusion

To summarise, the facts given in the research identify gender differences in security threats and needs of protection during and after armed conflict. It has been argued that more men than women are killed in armed conflicts (gendercide) while women suffer more violence, in particular gender-based sexual violence.891 These apparent different security experiences and needs of women and men demand different responses on protection and regulation, which should be taken into account in peace-enforcement operations in general and in humanitarian

888 Sivakumaran, Sexual Violence Against men in Armed Conflict, p. 255.
889 Ibid., p. 259.
890 Ibid., p. 260.
interventions in particular. Chapter 4.9. on gender perspectives on the R2P doctrine looks closer at these issues, albeit with a focus on the specific needs of women to ensure protection from rape and other sexual gender-based crimes of violence.

3.4.3. Legal protection in armed conflicts – gender perspectives

Sexual violence against women in armed conflicts has occurred everywhere in the world throughout history. But it was during the armed conflict in the former Yugoslavia that for the first time rape and sexual violence against women became officially linked to the maintenance of international peace and security. Reports of widespread, organised and systematic detention and rape, in particular of Muslim women in Bosnia and Herzegovina, led the Security Council to demand the immediate closure of all women’s camps. A series of Council resolutions referred to the widespread rape. Grave violations of humanitarian law in the former Yugoslavia caused the Security Council to determine the situation a threat to international peace and security. In its resolutions establishing the International Criminal Tribunal for Former Yugoslavia (ICTY), the Council made specific reference to the systematic offences of rape committed during the war. Gardam and Jarvis state that this unprecedented reaction to sexual violence against women could at first glance be read as a signal for change in attitude on the UN and Security Council in their recognition of crimes committed against women in armed conflicts. However, they point to the lack of a similar UN response in the case of Rwanda, despite the shocking treatment of women, which called into question the extent of this supposed change of attitude.

International humanitarian law (IHL), in particular so far as it relates to the protection of civilians, encompasses a considerable range of provisions for the protection of women in armed conflicts, which also have a bearing on the assessments of the above mentioned crimes.

892 In the article Jones, Adam, Journal of Humanitarian Assistance (Publ.), Genocide and Humanitarian Intervention: Incorporating the Gender Variable, 26 November 2002, "http://www.jha.ac/articles/a080.htm", (2007-10-08), Jones poses the important question of how the role of gender in genocide might affect strategies of genocide prevention and humanitarian intervention. However, the article does not give a clear answer to this. A logical response would be to direct the security protection towards the respective security threats that women and men face in order to prevent their taking place.

893 Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice, pp. 917-918.

894 Gardam and Jarvis, Women, armed conflict and international law, p. 148.

895 Ibid., see Security Council resolution 798, preambular paras. 2-3.


897 Gardam and Jarvis, Women, armed conflict and international law, pp. 151-152. Gardam and Jarvis give a number of possible explanations as to the inconsistencies of treatment in the cases of Yugoslavia and Rwanda, see ibid., pp. 154-160.

898 Bennoune, Karima, Do We Need New International Law to Protect Women in Armed Conflict? Case Western Reserve Journal of International Law, vol 38, 2006/2007, pp. 363-391, p. 372, which mentions that approximately 50 Articles out of 560 Articles of the Geneva Conventions provide special protection to women or deal with non-discrimination.
Albeit, for many feminist critics, these rules are archaic, based upon antiquated notions of sexual violence, and do not offer sufficient protection and fail to correspond to the security needs of women facing war in all its horrors and in reality. Instead of prohibiting and categorising men's sexualised gender-based violence against women as grave and violent crimes under IHL, male rape and sexual offences against women are formulated upon outdated notions of chastity and virtue and perceived, as attacks on women's honour from which they should be protected. These archaic formulations mischaracterise and reduce the violent and criminal nature of such assaults as violations committed of IHL. Bennoune argues that rape and other forms of sexualised violence committed in conflicts is 'implicitly prohibited' by progressive interpretation of the concept of torture in IHL to include such acts. A different view is taken by the ICRC which holds that the IHL adequately covers the needs of women in situations of armed conflict, and that violations against women in such circumstances stem from an unwillingness to comply with the rules rather than to normative gaps. Excellent gender-specific research on IHL conducted by Gardam, Jarvis and others, as well as the following presentation, however, counterprove the ICRC claim.

IHL is based upon formal equality, but also includes ‘special provisions’ for women. The Articles providing for the same treatment

899 Ibid., p. 364; Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice, p. 925 et seq. for a thorough account of international humanitarian law (IHL) and the rules regarding the protection of women, see Gardam and Jarvis, Women, armed conflict and international law, p. 56 et seq.; a critique and analysis of the discrepancy between IHL and the real impacts of armed conflicts of women, see ibid. p. 93 et seq. Gardam and Jarvis argue that the system of formal equality in IHL contributes to a very limited extent to substantive equality for women. Cf. the commitments of the Beijing Declaration and Platform for Action (A/52/231) as well as those contained in the outcome document of the Beijing + 5 Follow-Up Summit, the twenty-third Special Session of the United Nations General Assembly entitled “Women 2000: Gender Equality, Development and Peace for the Twenty-first Century” (A/52/231/Rev.1), in particular those provisions concerning sexual violence and women in situations of armed conflict.

900 For backgrounds to the phenomenon of honour to violence against women in IHL, see Division for the Advancement of Women (Publ), Women 2000: Sexual Violence and Armed Conflict: United Nations Response, "http://www.un.org/womenwatch/daw/public/cover.htm", (2007-07-18). The DAW study examines the manner in which sexual violence during armed conflict changed within the UN from attack to honour or personal dignity prior to the early 1990s to its emergence as an item of serious concern within the UN; and also briefly in Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice, pp. 921-925.

901 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 379 et seq.


903 Article 12 of the Geneva Convention II, Article 16 of the Geneva Convention III, and Article 2 (1) of Additional Protocol II; See also Gardam and Jarvis, Women, armed conflict and international law, pp. 61-62.

904 According to Gardam and Jarvis, these special provisions are concerned with the vulnerability of women; the protection of their honour, chastity and modesty from sexual violence, as well as special protection during pregnancy, childbirth and maternity. Critique against these rules of special protection is directed towards their common theme of protecting women in terms of their relationships with others and viewed from a male
irrespective of sex, are based upon the assumption that women and men have identical security needs. Gardam and Jarvis maintain that these rules fail to recognise the unequal situation of women and men in society in general, and assume populations in which there is no systemic inequality or structured discrimination. The special provisions regarding the protection of women in IHL have been formulated in the Geneva Conventions and the Additional Protocols, as mentioned above, as obligations to protect women from attacks on their honour and dignity instead of express legal prohibitions of violent attacks against women constituting grave crimes. Furthermore, the special protective provisions for women in the Geneva Conventions are limited to ‘rape, enforced prostitution and indecent assault’ and thus does not cover all the various types of men’s sexual violence suffered by women (cf. supra Chapter 3.4.2.1.).

Moreover, the Geneva Conventions do not explicitly pronounce men’s gender-based violence against women as grave breaches of IHL. Geneva Convention IV makes no express reference to men’s sexual and gender-based violence against women and neither does Additional Protocol I. Gardam and Jarvis make strong criticism of this fact, and claim that the absence of any express reference to such acts most likely to affect women as a result of armed conflicts reflects the historical failure to incorporate the perspective of women into the assessment of the types of harm considered to be the most serious. The legislation is apparently insufficient on the scope of the protection against gender-based violence in armed conflict and too weak in terms of the prohibition and criminalisation of such violence.

The violations of IHL have to reach a certain degree of ‘seriousness’ and involve certain provisions in order to constitute a war crime under perspective, as mothers or objects of sexual violence, and not as individuals in their own right, and that they are given a lower hierarchy than other rules by being formulated as rules of protection rather than of prohibition, see ibid., pp. 62-68, and 94 et seq. Gardam and Charlesworth, Protecting of Women in Armed Conflict, pp. 159-160. See e.g. rules on the protection from sexual violence: Article 27 (2) of the Geneva Convention IV, Articles 75 (2) and 76 of the Additional Protocol I, and Article 4 (2) (e) of the Additional Protocol II; and on childrelated protection: Articles 38, 50, 91 and 132 of the Geneva Convention IV, Articles 70 and 76 (2) of the Additional Protocol I, Article 6 (4) of the Additional Protocol II; and rules demanding separate quarters and sanitary conveniences for women internees and prisoners of war: Articles 25, 29 and 97 of the Geneva Convention III, Article 85 of the Geneva Convention IV. See also Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 379 et seq.

905 Gardam and Jarvis, Women, armed conflict and international law, p. 97.
906 Article 27 (2) of the GC IV, Articles 75 (2)(b) and 76 of the AP I, and Article 4 (2) (e) of the AP II.
907 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 383; Gardam and Jarvis, Women, armed conflict and international law, p. 75, cf., however, with p. 201, where the authors state that it has always been possible to interpret the grave breach provisions of the Geneva Conventions to include sexual violence, e.g. as inhumane treatment.
908 Gardam and Jarvis, Women, armed conflict and international law, p. 74, who refer to Article 147 of the Geneva Convention IV and Article 85 Additional Protocol I.
909 Ibid., p. 185; See the same critique in Women, Peace and Security. Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2002), p. 39.
the Geneva Conventions. It is only the most serious violations that constitute ‘grave breaches’ that entail individual criminal responsibility in accordance with the four Geneva Conventions.910 But other serious breaches that are not considered to be ‘grave breaches’ may, according to Additional Protocol I, still constitute ‘war crimes’.911 However, the extension of the system of grave breaches in Protocol I to also cover more examples of serious breaches does not expressly refer to sexual violence.912

The specific humanitarian provisions protecting women have become progressively interpreted in the post-Cold War period by the international ad hoc tribunals for Rwanda and the former Yugoslavia. A broader range of gender-based and sexualised violence, constituting ‘serious violations’ of the Geneva Conventions and ‘serious violations’ of Common Article 3 and Additional Protocol II, have been deemed to constitute war crimes under international criminal law.913 ‘Rape’914 and ‘sexual violence’915 have been determined by the ad hoc tribunals in several cases to constitute not only ‘ethnic cleansing’ and ‘war crimes’, but also ‘crimes against humanity’ and ‘genocide’.916 The Beijing Platform for Action had previously confirmed this legal development in 1995.917 The Rome Statute also contributed to the codification of this progressive interpretation and further developed the definition of war crimes to better include gender-based sexual violence.918 It provides that not only grave breaches of the Geneva Conventions, but that also serious violations of Common Article 3 and other serious violations of

910 Gardam and Jarvis, Women, armed conflict and international law, p. 73
911 Ibid., p. 75.
912 Ibid., p. 74.
913 Ibid., pp. 75-77.
914 ‘Rape’ was for the first time defined in the Akayesu Judgment (ICTR Trial Chamber 1998) in a broader fashion than of national jurisdictions, and this definition was confirmed and further extended through the Furundzija Judgment (ICTY Trial Chamber 1998) to also encompass oral sexual acts, and in the Kunarac case (ICTY Trial Chamber 2001) also opened up a broader approach to the notion of ‘coercion, or force or threat of force’ to sexual penetrations, see Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice, pp. 934-937. The Elements of Crime to the Rome Statute codifies these developments.
915 ‘Sexual violence’ is a broader category than rape and is defined by the Trial Chamber in the Akayesu case as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. The Tribunal considered sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under coercive circumstances. Sexual violence is not limited to physical invasion of the human body and may include acts that do not involve penetration or even physical contact. […] Sexual violence falls within the scope of “other inhuman acts”, set out in Article 3(i) of the Tribunal’s Statute, “outrages upon personal dignity”, set forth in Article 4(e) of the Statute, and “serious bodily or mental harm,” in Article 2(2)(b) of the Statute.” See Prosecutor versus Jean-Paul Akayesu, Trial Chamber I, Judgement, Case No ICTR-96-4-T, 2 September, 1998, para. 688; See also Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice, p. 935.
916 Gardam and Jarvis, Women, armed conflict and international law, pp. 180-203.
918 Gardam and Jarvis, Women, armed conflict and international law, pp. 75, 77.
the laws of customs of war in international as well as in non-international armed conflicts may constitute war crimes. Furthermore, the recently adopted Security Council resolution 1820 (2008) confirmed that rape and other forms of sexual violence could constitute a ‘war crime’, a ‘crime against humanity’, or a constitutive act with respect to ‘genocide’.

The provisions in IHL and ICL of relevance in a typical R2P situation, in a failed state or internal armed conflict where the international community take on a subsidiary responsibility when the state fails to protect its own population, are the rules applicable in non-international armed conflicts. I shall therefore henceforth primarily focus my presentation on these rules with regard to gender-based violence (but to some extent also discuss the relevant rules on the protection of civilians in international armed conflicts).

These rules follow the pattern with archaic and outdated formulations on sexualised violence, but the Additional Protocol II contains an express prohibition on such acts in Article 4 (2)(e) that provides for “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” shall “remain prohibited at any time and in any place whatsoever”.

Violations of common Article 3 or Additional Protocol II are not included nor considered to be ‘grave breaches’ of the Geneva Conventions since breaches of these provisions regulate non-international armed conflicts. But such violations have been re-interpreted to constitute war crimes that attract individual criminal responsibility according to the practice of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Former Yugoslavia (ICTY), also confirmed in the Rome Statute for the International Court of Justice (ICC), which have introduced the criminalisation of atrocities committed in non-international armed conflicts and defined them as ‘war crimes’. The Rome Statute extends the recognition of sexual violence as a ‘war crime’ in non-international armed conflicts by its explicit gender-specific list in Article 8 (2)(e)(vi) of its Statute. The definition of ‘war crimes’ in non-international armed conflicts includes:

Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of

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920 SC Res. 1820, 19 June 2008, UN Doc S/RES/1820, 2008, op. 4. The Council furthermore stressed the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and called upon member states to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice.
921 Gardam and Jarvis, Women, armed conflict and international law, p. 76; Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 384.
922 Gardam and Jarvis, Women, armed conflict and international law, pp. 76-77. See Article 4 of the ICTR Statute, and Article 8 (2)(e) of the Rome Statute.
sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

It was during the conflicts in the former Yugoslavia and in Rwanda that the relationship between sexual violence and genocide was for the first time considered in international criminal law.\textsuperscript{923} The ICTR presented the first ever conviction for sexual violence as forming part of the crime of ‘genocide’. The judgment found rape to be a part of the genocidal regime of the Hutus and an integral part of the process of the destruction of the Tutsi group, through the destruction of the spirit, the will to live and of life itself.\textsuperscript{924}

The Genocide Convention itself, which is also applicable in peacetime, does not include any explicit gender language or reflect the specific experiences of women with respect to genocide, with the possible exception of Article II (d), which deals with “measures intended to prevent births within the group”.\textsuperscript{925} Many of the acts in Article II of the Convention could however be argued to be interpreted to cover sexual violence\textsuperscript{926} – for example, in their references to torture. Both the ICTR and ICTY have interpreted torture to cover acts of sexualised violence.\textsuperscript{927} Unfortunately, this development in the tribunals’ case law on genocide has not been included in the definition on genocide in the Rome Statute. Thus, the genocide definition in the Rome Statute is identical to the one in the Genocide Convention, and therefore lacks specific gender formulations.

‘Crimes against humanity’ was an offence initially defined in the Nuremburg and Tokyo Charters, but neither of these documents include any gender-specific provisions or formulations.\textsuperscript{928} However, both the definitions of crimes against humanity in the ICTY and the ICTR Statutes expressly refer to rape,\textsuperscript{929} while the Rome Statute provides the far most elaborated gender-inclusive formulation on crimes against humanity, including:

\begin{quote}
Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence or comparable gravity.\textsuperscript{930}
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{923} For an overview of the case law of ICTY and ICTR on this issue, see \textit{ibid.}, pp. 192-197.
\item \textsuperscript{924} Akayesu Case, ICTR-96-4-T (1998), paras. 731-732; See also Deutsch Schneider, \textit{About Women, War and Darfur: The Continuing Quest for Gender Violence Justice}, p. 947.
\item \textsuperscript{925} Gardam and Jarvis, \textit{Women, armed conflict and international law}, p. 82.
\item \textsuperscript{926} \textit{Ibid.}, p. 191 et seq, mentions e.g. that the UNCC has expressly recognised that ‘serious personal injury’ according to Article II (b) includes physical and mental injury arising from sexual assault.
\item \textsuperscript{927} \textit{Ibid.}, pp. 188-190.
\item \textsuperscript{928} \textit{Ibid.}, p. 80.
\item \textsuperscript{929} See Article 5 of the ICTY Statute, and Article 3 of the ICTR Statute. The ICTY and ICTR case law also confirms that crimes against humanity include rape and other forms of sexual violence and enslavement (\textit{i.a.} the Akayesu Judgment, the Foca Judgment, the Tadic Judgment); \textit{ibid.}, pp. 199-200.
\item \textsuperscript{930} Article 7 (1) (g) of the Rome Statute. See also the specification of ‘enslavement’ in Article 7 (2) (c).
\end{itemize}
Acts of torture are also included in the definition of ‘crimes against humanity’, and thus sexual violence constituting torture could be prosecuted as crimes against humanity as well according to Gardam and Jarvis.\(^9\) Two more gender sensitised provisions in the Rome Statute definition of crimes against humanity are in Articles 7 (1)(c), 7 (1)(h), and 7 (2)(c), which deal with enslavement and the trafficking of persons, in particular women and children, as well as ‘gender’ as a ground for persecution.

Gardam and Jarvis also criticise the fact that other forms of war-related violence directed at women from within their communities are not addressed by IHL.\(^9\) A blind spot for women is that IHL does not cover violent acts from their own side of the conflict, which is another common threat to women’s security. They mention among other things, the increased rates of domestic violence, sexual abuse and female genital mutilation committed during armed conflicts, and the security problems women face in camps for refugees or internally displaced persons.\(^9\) The Bassouni report from the war in the former Yugoslavia confirmed, for example, that camps were frequently the reported sites of mass executions, torture, rape and other forms of sexual assault. There the worst acts of inhumanity were committed by guards, police, special forces, and others who were allowed in from outside to perpetrate such crimes.\(^9\) Since IHL is limited in the sense that the prohibitions cover acts of perpetrators as being part of the other party, and all other perpetrators of sexual gender-based violence against women are exempt from the rules.\(^9\)

Evidence and trend analysis in recent years has suggested an increase in the scale and brutality of sexual violence in armed conflicts, and that it is a common strategy of warfare to torture, terrorise, demoralise, injure, degrade, intimidate and punish populations with sexual violence for the purpose of obtaining political and military ends.\(^9\) The Security Council acknowledged on 19 June 2008 that women and girls were particular targets of sexual violence and that such violence was practised as a ‘tactic of war’ to humiliate, dominate, instil fear, and disperse or forcibly relocate civilian members of a community or ethnic group.\(^9\) The Council did not per se determine that such war tactics could in themselves constitute a threat to the peace but stressed that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack

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\(^9\) Gardam and Jarvis, *Women, armed conflict and international law*, p. 197.
\(^9\) Ibid., pp. 102-103.
\(^9\) Ibid., pp. 101-103.
\(^9\) See e.g., ibid., pp. 27-29.
\(^9\) Peacewomen (Publ.), *Women targeted or affected by armed conflict: What role for military peacekeepers?*, pp. 1-2. For example, in Liberia, at least 50 per cent of women suffered some form of sexual violence, rising to over 80 per cent in IDP and refugee camps.
against civilian populations, can significantly exacerbate situations of armed
conflict and may impede the restoration of international peace and security.938

During the Council debate preceding its adoption, states particularly
mentioned the former Yugoslavia, Sudan’s Darfur region, the
Democratic Republic of Congo, Rwanda and Liberia as regions where
deliberate sexual violence had occurred on a mass scale.939 The Secretary
General Ban Ki-moon supported the view that violence against women
had reached “unspeakable proportions” in some societies recovering
from conflict.940 Human rights groups hailed the resolution as historic.
The resolution was not adopted under Chapter VII of the UN Charter,
but is still binding on UN member states in accordance with Article 25.

In conclusion, the threats to human security of women in armed
conflicts, in particular during internal armed conflicts, have traditionally
been invisibilised and neglected in international law. But in recent times,
since the end of the Cold War, they have become increasingly
acknowledged and addressed by progressive interpretation and treaty
developments within international criminal law. The international
community through the Security Council is now showing a willingness to
take this issue more seriously and systematically onto its security agenda
as part of its considerations when discharging its responsibilities of
maintaining to maintain and restoring international peace and security.
These gender-sensitised normative developments should consequently
also be influential in how the international community’s responsibility to
protect is interpreted and implemented, in particular by the Security
Council.

Notwithstanding this positive normative evolution, the weak and
vague formulations in IHL, linked to honour instead of a direct
prohibition on men’s sexual gender-based violence, persist in the Geneva
Conventions and this creates problems for the protection of women in
armed conflicts. Bennoune argues that the implementation of IHL
through international courts alone may not entirely solve the problem.941
There is continued relevance of conventional IHL also in the post-Rome
Statute era.942 The gaps and weak provisions in IHL for the protection of
women could arguably still be invoked to apply in states not under the
jurisdiction of any of the international criminal tribunals. Legal justice for
women violated in armed conflicts in a national court of such a state may

938 Ibid., op. 1.
940 BBC News (Publ.), UN classifies rape a ‘war tactic’, 20 June 2008,
Trevilyan said China, Russia, Indonesia and Vietnam had all expressed reservations during
the negotiations, asking whether rape was really a matter for the Security Council. But the
US-sponsored resolution was adopted unanimously by the 15-member Council.
941 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 364;
see also Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender
Violence Justice. The problems have not diminished in the post-Rome Statute era and still
persist in contemporary conflicts.
942 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, pp. 385-
386.
have to depend on the application of the conventional IHL. Bennoune points to the interesting findings in the Handbook of Humanitarian Law in Armed Conflicts, which contains only two references to women in its index (one on women as combatants and the other referring to Article 27 in the fourth Geneva Convention) and includes no female contributions. The IHL standards of protection of women, therefore remains significant.

The strengthening of the IHL by new amended provisions prohibiting these forms of grave and systematic violations, particularly when men apply sexual violence as a widespread and systematic strategy, tactic or weapon of war, is therefore still needed and should be developed within humanitarian law itself. IHL needs modernising and normatively strengthened to reflect the recent visibilisations of the pervasive gendered threats and crimes of a sexual nature committed against women caught up in war. Formal amendments of the Geneva Conventions may be difficult to attain. Scholars have suggested three different tracks for the reformulation of IHL for this purpose: 1) a Third Additional Protocol to the Geneva Conventions on the protection of women; 2) a Draft Convention on Violence Against Women; or 3) as a Convention to be appended as a Second Optional Protocol to the Convention on the Elimination of All Forms of Discrimination of Women (the CEDAW Convention).

3.4.4. The link between men's gender-based violence in war and peace

It is widely known that categories of persons or groups that are discriminated against and targeted in times of peace become even more vulnerable and face exacerbated discrimination and violations of their human rights during armed conflicts. Gender discrimination and violence against women accepted in times of peace deepen in war. The Beijing Platform for Action confirms that women and girls are particularly affected by violence in armed conflicts because of women's subordinate status in society in general.

The lack of explicit human rights law effectively prohibiting gender-based violence against women in peacetime and the weak regulation of the same phenomenon in IHL in war-time are inter-linked and should be treated comprehensively through reformulation of human rights and humanitarian law.

944 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 387; Women's Convention (1979).
945 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 369.
Gender-based violence is not only a human rights violation but also a form of discrimination that seriously inhibits the ability of women to enjoy their rights and freedoms on equal terms with men. Gender-based violence against women is recognised in the non-binding Declaration on the Elimination of Violence against Women (1993) as being one of the crucial social mechanisms and ruler techniques by which women are forced into a subordinate position to men. The (also legally non-binding) CEDAW General Recommendation 19 (1992) makes clear that gender-based violence that impairs and nullifies the right to equal protection according to humanitarian norms in times of international or internal armed conflict is covered by the CEDAW Convention as a form of discrimination based upon sex. The CEDAW Convention shares a common gender equality agenda with resolution 1325 and together these instruments fortify demands on gender-commitments in armed conflicts – for example, the legal obligation in the CEDAW Convention to suppress all forms of traffic in women and the exploitation of prostitution in Article 6. But the CEDAW Convention is not expressly applicable in war and lacks specific and explicit provisions prohibiting and regulating gender-based violence, either in peace or war. Neither are the reports or recommendations by the Special Rapporteur on Violence Against Women binding on states.

Strong normative developments in the field of men's sexual and gender-based violence against women in peace or war is urgently warranted in order to change the pervasive culture of impunity in relation to such violence and to enhance women's human rights and their protection under humanitarian law worldwide. As Bennoune argues: “[t]he law should reflect advanced understandings of violence against women”. It is a cause for shame that in a globalised and modern world sexual violence is the only crime where a community's response is more often than not to stigmatise the victim rather than punish the perpetrator.

The Secretary-General Kimoon launched a multi-year campaign (2008-2015) in March to intensify action to end all manifestations of

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950 Committee on the Elimination of Discrimination Against Women, General Recommendation 19, Violence Against Women, A/47/38, 29 January, 1992; briefly on the discrimination of women in armed conflict, see Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, pp. 369-370.
951 UNIFEM (Publ.), CEDAW and Security Council Resolution 1325: A Quick Guide, "http://www.unifem.org/attachments/products/CEDAWandUNSCR1325_eng.pdf", (200807-11), p. 7. Resolution 1325 does not provide detailed normative or operational guidance about how these goals should be met, while CEDAW offer guidance to meet these obligations, in particular in the post-conflict and peace-building phases, but not only, see ibid. pp. 9-10.
952 Bennoune, Do We Need New International Law to Protect Women in Armed Conflict?, p. 390.
953 Peacewomen (Publ.), Women targeted or affected by armed conflict: What role for military peacekeepers?, p. 5.
violence against women and girls, including the abominable practice of sexual violence in armed conflicts.\textsuperscript{954} The recent UN initiatives on this topic in the spring and summer of 2008 show that the organisation is beginning to take these issues more seriously and in a more holistic and comprehensive manner. It is to be hoped that they may become more mainstreamed into the organisation’s work with peace, security and development.

3.5. A human security framework for analysis

This framework of analysis serves the purpose of providing a contextual background, delimitating and structuring the argumentation, material and analysis for the subsequent parts of the thesis, and primarily lay a foundation for the R2P framework for analysis (see Chapter 4.10.).

3.5.1. Introduction

The focus on human security has projected these and other debates – such as the legitimacy of humanitarian intervention – onto the international arena: constructivism in action.\textsuperscript{955}

It has been argued that taking a human security approach seriously could have a substantive impact on the emerging international law of humanitarian intervention and in particular via the concept of a ‘responsibility to protect’ people. Humanitarian intervention has been described as the most extreme form of promoting human security. The NATO intervention in Kosovo has for these reasons been called the ‘first human security war’, since the prevention of genocide and ethnic cleansing was widely regarded as the motive for the intervention.\textsuperscript{956}

Hampson concluded in his review of scholarly literature on human security that “[e]volved realist frameworks of international relations theory prove quite inhospitable to human security approaches”, and found that systematic attempts to develop theory and methodology helpful for understanding human security, ultimately appear to involve the abandonment of the various realist schools of IR theorising.\textsuperscript{957} He

\textsuperscript{954} Ki-moon, UN News Centre (Publ.), Remarks to the Security Council meeting on Women, Peace and Security, see also UNiTe to end violence against women (Publ.), Press Release, UN Secretary-General Ban Ki-moon Launches Campaign to End Violence against Women, "http://endviolence.un.org/press.shtml", (2008-07-21).
\textsuperscript{955} Newman, Human Security and Constructivism, p. 247.
\textsuperscript{957} For an analysis on the differences between the ‘human security paradigm’ and a traditional ‘realist’ or ‘liberalist’ security perspective, see Hampson et al., Madness in the Multitude, Chapter 3, pp. 38-61. Hampson et al. argue that a human security framework offers a view on international politics fundamentally different from the established paradigms of traditional realism and liberalism. Liberalism has much more in common with a ‘theory on human security’ in terms of its assumptions. Even though the human security discourse is distinguished from the liberalist perspective on security, the authors have
notes that many scholars have instead turned to feminist critiques to address human security questions, and more generally to constructivism.958

Taken together, constructivist and feminist analyses offer promising methodologies for examining exactly the phenomena that concern human security.959

Newman also points out that constructivism shares fundamental assumptions with human security approaches – for example, that threats are constructed and can therefore be altered or mitigated in the same way that social, political and economic relations are constructed and changeable.960 He also argues that the focus on human security has projected the legitimacy of humanitarian intervention onto the international arena, and that this illustrates ‘constructivism in action’.961

Taking a constructivist (and to some extent critical) approach to security I shall rely on elements of the ‘securitization theory’ in a modified version in this chapter. The analysis will discuss parts of the human security discourse based upon a limited version of the ‘humanitarian conception of human security’ (see Chapter 3.3.5.), for the purpose of outlining a framework for the subsequent study on Responsibility to Protect by military means.

According to the Copenhagen School, ‘securitization studies’ aim to gain an understanding of “who securitizes, on what issues (threats), for whom (referent objects), why, with what results, and not least, under what conditions, (i.e. what explains when securitization is successful)”.962 Security is therefore regarded as always being a political construction and not something a scholar can describe ‘as it really is’.963 Buzan, Waever and de Wilde maintain that “[s]ecurity is intersubjective and socially constructed”.964 According to them, an issue becomes a security issue through a speech act of ‘effective elites’ that the audience accepts.965 “Thus a problem is a security problem when it is defined so by the power...
The ‘effective elites’ constitute those ‘security actors’ who securitize issues by declaring a ‘referent object’ existentially threatened. ‘Referent objects’ are objects that have a legitimate claim to survival and are seen to be existentially threatened, and ‘functional actors’ are defined as actors who significantly affect and influence decisions in the field of a security sector.

The proponents of the Copenhagen School, however, are not devoted to the human security discourse as such, and perceive the securitization of individuals as referent objects to be futile from a systemic perspective. Their view of dealing with the security of individuals is limited to the ‘political sector’ and to the question of establishing or promoting human rights. The ‘political sector’ is defined by these scholars as the organisational stability of social order and the locus that takes care of non-military threats to sovereignty. Their view is equivalent to adopting a narrow definition of human security, encircling human rights and the rule of law at the national level.

The military sector is described by the Copenhagen School as the core subject of traditional security studies, but this sector does not include human security or individuals as a referent object, according to them. Since this thesis focuses primarily on violent threats to human security and using military means to protect people from such threats, the Copenhagen School’s narrow view, excluding the individual as a referent object from the military security sector and their separation of the political and military security categories, is not a useful perspective in its entirety for this thesis. Although various of their general postulates on security appear to fit well in describing the acknowledgment of a human security perspective in the international security arena, the connection to humanitarian intervention to address some of those security threats is not integrated or accounted for by this theory.

For the purpose of this thesis I shall therefore apply their theory for security analysis in a more flexible manner with respect to the protection of human security by primarily military means. I shall address four of the above mentioned questions, which have also been raised more specifically in relation to human security by among others, Henk and Evans:

1) Security for whom? (i.e. who is the referent object?); 2) Security from what? (i.e. from which human security threats?);

968 Ibid., p 36.
969 Ibid., pp. 39, 141.
970 Ibid., 49, 52-55.
971 Cf. the answers to these four questions in Henk, Dan, Human Security: Relevance and Implications, Parameters, US Army War College Quarterly, vol XXXV, 2, 2005, pp. 91-106, pp. 96-98; Evans, A Concept Still on the Margins, but Evolving from Its Asian Roots. All the above mentioned questions of the Copenhagen Schools will not be discussed owing to limitations on space in this thesis. But those questions having have relevance for humanitarian interventions and the creation of new legal norms will be addressed.
3) Who is the security provider? (i.e. which actors can or shall carry out a humanitarian intervention to protect human security);
4) Security by which means? (in this case already set out to be with military means)

Related questions that will not be addressed further in this thesis, but are of great importance and fundamental to the other questions, are: ‘Why security’ or ‘security for what’? Why should we protect human security in the first place? The answers to these questions are related to issues of peace, security necessity, order, regional stability or national political and security interests as well as justice, prosperity, solidarity, human dignity and the protection of human rights. All these things are a matter or innate motivating factors for the protection of human security. One could probably even argue that it is compassion or love among human beings that explains why we wish to promote human security. This topic, however, will not be further discussed owing to the limitations of the research question and the chosen structure of this thesis.

3.5.2. Security for whom?

There is for obvious reasons consensus in the human security literature that the individual (or ‘people collectively’) is the referent object in the human security discourse. The individual is also the natural referent object in Critical Security Studies. In a traditional state-centric security discourse, the state is the natural referent object of security. Taking a human security perspective, the shift in focus is obvious but does not necessarily imply that the security of states becomes irrelevant. It is not a question of ‘either or’ but of ‘both and’. One could argue that the two perspectives of security rather complement and reinforce each other. Although human security does not necessarily follow from state security, human security is difficult to achieve in a failed or failing state.

The Copenhagen School views the state as the most important or dominant security referent, but not the only one. The School has widened/broadened the security concept for other units as referent objects, such as tribes, nations, militias, international organisations and other collectivities, but also general principles, and even religion, are mentioned. Individuals or small groups are considered to be incapable of establishing wider security legitimacy in their own right.

973 Hampson et al., Madness in the Multitude, p. 33; Newman, Human Security and Constructivism, p. 239.
975 Ibid., p. 37.
976 Ibid., pp. 49, 52-55.
977 Ibid., p. 36. See also Waever’s statement that security on the individual level makes everything a potential security problem and that no concept of individual security exists, Waever, Concepts of Security, p. 214.
Moreover, Buzan has put forward a severe critique against the concept of human security as such. Taking the individual as the referent object he argues that there is no real difference between human security and human rights,\(^{978}\) and that it promotes an unwarranted reductionist understanding of international security.\(^{979}\) I do not share this view.

Gender-sensitivity towards the object-referent should not be forgotten, and the different security needs and experiences of women and men should be taken into account when addressing human security. (See Chapter 3.4.)

### 3.5.3. Security by whom?

The view on which actors are or should be human security providers is contested in the literature and in the opinions of states. Not only states but also other actors, such as international and non-governmental organisations and institutions have been suggested alongside the state to fulfil the task of advancing human security, or as Hampson \(\textit{et al.}\) describe it, to be a 'public good provider'.\(^{980}\)

He groups the different views on the human security public good providers into four categories: cosmopolitans, institutionalists, minilateralists, and middle-power multilateralists.\(^{981}\) Cosmopolitans\(^{982}\) see NGOs, civil society and social movements as the best guarantor of human security on a voluntary basis. Institutionalists prefer reformed international organisations and institutions. Minilateralists see hegemonic leaders such as the United States and its allies as the best providers, while middle-power multilateralists, such as Canada, advocate coalitions of the like-minded (middle-powers and their civil society 'partners').

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\(^{978}\) Buzan, Barry, \textit{A Reductionist, Idealistic Notion that Adds Little Analytical Value}, Security DialogueGG, vol 35, 3, 2004, pp. 369-370, p. 369. \textit{Cf.} Hampson \textit{et al.}, \textit{Madness in the Multitude}, p. 15, who states that human security is not just an argument about securing basic human rights, it is a conception that goes much further in understanding the potential sources of threats as well as the institutions and governance arrangements required to sustain such rights. See also a legal analysis of the differences between the two concepts in Oberleitner, European Training and Research Centre for Human Rights and Democracy (Publ.), \textit{Human Security and Human Right}, pp. 18-22; Oberleitner, \textit{Porcupines in Love, the Intricate Convergence of Human Security and Human Rights}; Oberleitner, \textit{Kärlek mellan piggsvin. Förhållandet mellan mänsklig säkerhet och mänskliga rättigheter}. Oberleitner states that the right to security as a human right, found in article 3 of the Universal Declaration of Human Rights (1948) is much more limited than human security. Human security and human rights, however, are interlinked in several ways and they share similar concerns, since both focus on the individual. The differences are greater than the similarities and human security should be seen as a much wider conception than human rights, although the latter is better normatively defined. Human security also encompasses threats which do not only emanate from the state, \textit{eg.} transnational and global threats, as well as threats emanating from non-state actors. Not all threats to human security can constitute violations of human rights, \textit{eg.} pandemics such as HIV/AIDS, terrorist threats, global environmental problems, and reversibly not all violations of human rights are considered to constitute threats to human security.

\(^{979}\) Buzan, \textit{A Reductionist, Idealistic Notion that Adds Little Analytical Value}.

\(^{980}\) Hampson \textit{et al.}, \textit{Madness in the Multitude}, pp. 51, 54.

\(^{981}\) \textit{Ibid.}, pp. 54-59.

et al., however, demonstrate that each of those actors has specific strengths and weaknesses and assert that no single actor has a clear comparative advantage over the others, but rather they complement one another in the provision of human security. They therefore argue for a ‘portfolio diversification strategy’ that builds on the capabilities of a wide range of institutional actors, since there is no single or simple way to provide human security.

I would tend to lean towards taking a state-centred approach and argue that despite the great contributions of other actors, the state has the greatest institutional and legal capacities to provide security and guarantee human security. Without a stable state, internal security would diminish. Internal institutions providing good governance, a functioning legal order and Rule of Law system, public safety, economic stability and development, democracy and human rights are necessary for the advancement of human security within a state. A society’s abilities to counter human insecurities depend on the existence of such capacities. However, many human security proponents are ambivalent about the role of the state in advancing and promoting human security, and certain aspects of the modern state are even considered to be obstacles to human security. Instead of relying on the state as the sole or main security provider, new kinds of international security governance arrangements are advocated that can transcend the territorial and traditional functions of the state in order to promote human security in a changing security environment.

However, the question of whether it is possible to adapt existing international institutions, so that they better address existing and emerging human security issues despite their inherent bias towards the state, has long been debated. Resourcing problems, lack of political leadership and deadlocks in the decision-making organs of international institutions are mentioned as things getting in the way of the desired result of the protection of human security through these actors.

The Human Security Unit (HSU), established at OCHA of the United Nations in 2004, takes primarily a state centric view on the security provision, asserting that states have the primary responsibility for the protection of human security. They apply the ‘CHS human security framework’ of “protection and empowerment” of people in their work. ‘Protection’ is here referred to as a “top-down” approach where...
the state provides national and international norms, processes and institutions that shield people from critical and pervasive threats. ‘Empowerment’ emphasises people as actors and participants in defining and implementing their vital freedoms by enabling and developing them through a “bottom-up” approach. In the document describing the HSU’s ‘overview and objectives’, the promotion of partnerships with civil society groups, NGOs, and other local entities are also included as vehicles in order to encourage implementation by entities other than the state. The ‘collaboratory efforts approach’ to the promotion of human security, which means involving individuals as well as civil society, institutions, private actors and international actors alongside the state is also supported in the human security literature as well as other human security actors.991

The reforms at the UN in 2005 created a new Human Rights Council and a Peace-Building Commission (PBC), the results of the difficult task of reorganising the UN to better meet new security challenges. The PBC demonstrates an integrated approach to security where conflict prevention and post-conflict reconstruction are dealt with in a holistic way. Whether these efforts and changes are sufficient to remould the UN in order to better commit itself to a human security discourse can of course be questioned. So long as there is no global consensus on the political interest of committing to a human security discourse or agenda, states and the UN will address human security needs or human insecurities on the basis of those elements that it is possible to agree upon within the organisation.

On the more specific question of who will provide human security by military means, the ICISS Commission argues that the primary responsibility lies with each state, but that there should be a subsidiary responsibility to protect human security for the international community in certain ‘conscious-shocking’ situations of large scale loss of life and ethnic cleansing. They mention other agents such as the Security Council, the General Assembly, regional organisations, and in certain instances, ‘coalitions of the willing’ to take a lead when a state is unwilling or unable to itself be a security provider within its own jurisdiction.992 (These will be discussed in greater detailed in Chapter 6 and 7 with regard to international law.)

It would, however, be considered controversial if other agents or actors were to take over the responsibilities of national governments as security providers for internal security, either as international or non-governmental local entities.

human security framework is based upon the “protection and empowerment” of people, which includes freedom from want and development on an equal footing with freedom from fear aspects.

991 Henk, Dan, Parameters. US Army War College Quarterly, p. 97; See also McRae and Hubert (Eds.), Human Security and the New Diplomacy. Hank mentions the Human Security Network as one supporter of this model.

992 ICISS, The Responsibility to Protect, pp. 47-55.
3.5.4. Security from what?

The narrow-broad debate demonstrates the level of disagreement on which threats to human security should be covered in the concept. Taking a limited humanitarian approach to human security, the number and kinds of threat become more limited.

There is no single ‘humanitarian approach to human security’ that clearly indicates which threats should fall within or outside the scope of the situation in question when humanitarian intervention is to be considered. Also, the thresholds or criteria for military intervention vary. I shall sketch an outline here covering the typical threats that have been discussed generally to be the major focus for humanitarian interventions, and which have been considered to provoke such interventions in the 1990s. The situations at stake are those humanitarian crises considered to be conscious-shocking, demanding some form of military response from the state or the international community – or both.

The growing number of internal armed conflicts, now outnumbering those at the international level, point to human security threats from within states rather than between states. According to the humanitarian approach, the most pressing human security threats therefore arise or originate in failed or failing states, and states facing internal armed conflicts, insurgency or repression. These threats can be placed in one of two categories:

1) Violent threats to human security related to (internal) armed conflict creating a humanitarian crisis

Such threats can be posed both to civilians and combatants, but the humanitarian crisis appears first when the first category is targeted in a widespread and systematic manner. Such atrocities would constitute violations of humanitarian and human rights law, and if of a grave nature could entail individual criminal responsibility for war crimes, genocide, crimes against humanity and ethnic cleansing. In this thesis I shall focus primarily on the security threats to, and protection of, civilians in armed conflicts and the enforcement of such protection, and omit combatants from the analysis.

2) Violent threats to human security not originating from armed conflicts but which could create a humanitarian crisis within a state

Threats to human security not related to armed conflicts can also constitute or be related to serious violations of international law, such as crimes against humanity, genocide and gross violations of human rights committed in peacetime. Many of these threats fall under the ICISS

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993 Hampson et al., Madness in the Multitude, p. 34. Cf. ICISS, The Responsibility to Protect, p. XI. (1)(B).
994 France, for example, has publicly discussed whether the junta in Burma is committing a crime against humanity in not co-operating with external humanitarian organisations and
doctrine of R2P (see the criteria of R2P in Chapter 5), but gross violations of human rights short of armed conflict have not yet been acknowledged as such in UN and state practice on humanitarian intervention (see the case studies on humanitarian intervention by the Security Council in Chapter 6 and by other actors in Chapter 7). This is not necessarily saying that international prohibits or limits such action by the UN (see Chapter 6.3.2.4.). Cases of great human suffering caused by natural disasters, widespread and systematic racial discrimination or systematic and structural gender discrimination have, for example, not yet been acknowledged yet by states as a ground for humanitarian intervention.

The military aspects of the external norm on R2P are primarily directed towards the Security Council as being the ‘Right Authority’ authorising military enforcement, and any emerging norm on an external R2P by military means for the Council would have to be based upon a changed perception and interpretation of what might constitute a ‘threat to the peace’. When human security threats are adopted into this security agenda and affect that practice of the Council, that practice in turn contributes to changes in international law. A human security framework for analysis related to the R2P doctrine is thus important for the study on how a shifting security focus, not only in the Security Council and states but also by other actors, may contribute to new practice and a customary process of new legal norms.

It is argued in this thesis that the R2P doctrine should become better gender-sensitised in order to take into consideration the human security needs and rights of women on an equal base with men. The differences in human security for women and men in armed conflicts have been discussed in Chapter 3.4. However, this thesis does not analyse the literature on women’s human rights and violence against women in peacetime, but still intends to point to the crucial link between these crimes and the need to acknowledge that local, national and international forms of violence against women are inter-connected. It is well known that people being discriminated against in peacetime constitute the most vulnerable groups in armed conflicts as well. The gender-based violence and sexual abuse that women face in peacetime becomes exacerbated during war. There is thus a strong link between men’s gender-based violence against women in peacetime and in war, and this

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996 Bennouna, Do We Need New International Law to Protect Women in Armed Conflict?, p. 369.

imbalance in the protection of human security should also affect the emerging doctrine on R2P (see more in Chapter 4.9.).

Honour crimes, genital mutilation, domestic violence, enforced prostitution, sexualised violence and exploitation, and enforced marriage are all examples of cultural practices widely accepted in certain societies as opposed to their being criminalised and seen as violations of human rights, or even torture. Cultural legitimacy and acceptance of gender-based violence against women because of their subordination and weak status in many societies, resulting in a widespread culture of impunity and disrespect for women’s human security and rights in peacetime, opens the way for grave sexualised and gender-based violence in armed conflicts, such as systematic rape, sexual slavery, enforced pregnancy, sterilisation and mutilation. Combating men’s violence against women in peacetime therefore needs to be linked (and also seen as a preventive and long-term strategy) to the fight against the abhorrent and systematic sexualised gender-based violence against women caught up in war.

The use of such violence as a weapon of war has both deep and widespread destabilising effects not only for the victims, but for their families and communities as well. Thus society at large is affected by such crimes, in particular those in honour cultures where women are considered to be at center of, and carriers and guarantors of, their particular cultures. The invisibilised link between these forms of violence must be widely acknowledged and visualised for women’s rights and security to be respected on equal terms as men. Male violence against women is an issue of paramount importance for society as a whole. It has also proved to be crucial in relation to peace and security. It is, however, not only women who need post facto redress, rehabilitation and compensation, but the male perpetrators should arguably also, in the end, be seen as victims themselves in need of rehabilitation (and societal training) as well as punishment.

3.5.5. Security by what means?

The concept of human security is notoriously difficult to apply with any precision, consistency, or even moral certainty, especially when the use of force (threatened or actual) is involved.

Hampson et al. also suggest that the human security paradigm offers the policy community means of exercising ‘soft power’, and that intervention and engagement in pursuit of human security objectives can take many forms other than coercive military action. There is much

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999 Hampson et al., Madness in the Multitude, p. 11.

1000 Ibid., p. 11. This soft power includes according to Hampson diplomatic and unofficial interventions and preventive conflict resolution measures such as mediation, demobilisation and disarmament, private track two activities, economic incentives, and development
controversy over the utility of soft versus hard power in the pursuit of human security objectives.\textsuperscript{1001}

The growing consensus (not yet universally shared) on a global human security agenda (based upon a narrower conception of human security) is reflected in the achievements of non-military measures for the promotion of human security such as the landmines campaign and treaty, the creation of the International Criminal Court and efforts to control small arms.\textsuperscript{1002} The R2P doctrine is also an illustration of this wider conception of human security that includes other measures besides the ‘responsibility to react’ by military means (conflict prevention and post-conflict reconstruction). However, the following focus is on the \textit{jus ad bellum} issues and on situations where military means can be considered to advance human security.

Hampson \textit{et al.} assert that ‘hard power’ – the use of military force – is exceedingly problematic when used for human security purposes.\textsuperscript{1003} This is a highly controversial area, to say the least, despite the new interventionism for humanitarian purposes during the 1990s and the endorsed responsibility to protect by states in the Outcome Document of the UN World Summit in New York, 2005.

Important questions that arise when discussing the use of military force to advance human security include the issues of political will, right authority, capacity, legality and legitimacy – as well as the results or consequences. There exists not only a conflict of norms (between the principles of state sovereignty and non-intervention on the one hand and the protection of human rights and humanitarian law on the other hand), but Hamson \textit{et al.} further stress the important relationship between norms, their application and the consequences of action.\textsuperscript{1004}

Success will be judged not by formulaic resort to procedure, institution or self-interest, but by standards of legitimacy – and good effect.\textsuperscript{1005}

These authors suggest that military interventions undertaken ‘in the name of human security’ require institutional and legal legitimacy if they are to uphold the values on which they are purportedly based, and that they also need to be carried out successful in order to retain that legitimacy.\textsuperscript{1006} Moreover, they agree with the constructivists Katzenstein, Finnemore and Sikkink that the provision of most human security public goods depends on the creation and promotion of new international norms that inform the rules, the principles of behaviour, and institutions

\footnotesize{\textsuperscript{1001} Ibid., see Chapter 7. } 
\footnotesize{\textsuperscript{1002} Ibid., pp. 170-171. } 
\footnotesize{\textsuperscript{1003} Ibid., p. 126, see the case studies in Chapters 6, 7 and 8, illuminating some of the problems inherent in the hard-power provision of human security, connected to who decides, who goes in, and what the lasting effects or results are. } 
\footnotesize{\textsuperscript{1004} Ibid., pp. 125, 147. } 
\footnotesize{\textsuperscript{1005} Ibid., p. 149. } 
\footnotesize{\textsuperscript{1006} Ibid., p. 61. }
that deliver those goods.\textsuperscript{1007} These issues will be further examined in connection with the discussion and analyses on R2P in the following chapters.

Gender-sensitivity should be incorporated when carrying out and providing human security by military means. The different security needs and experiences of women and men should be taken into account when constructing the human security and civilian protection mandates for humanitarian interventions, and the new norms on women, peace and security embedded in Security Council resolution 1325\textsuperscript{1008} and based upon the gender-sensitised legal developments in humanitarian law and international customary law (see Chapter 3.4.3.) should guide in this respect. (On gender-perspectives, R2P, humanitarian intervention and resolution 1325, see Chapter 4.9.)

4. The Responsibility to Protect and a framework for analysis

4.1. Background and introduction

The following five subchapters describe the development of the R2P doctrine and lay the background for the main analysis on the R2P formulation in the Outcome Document (see Chapter 4.6.). The aim is to introduce the concept and the relevant security developments that have affected its current composition and content. The responses and positions of states are of interest for an overview of the growing opinio juris on an emerging norm of R2P. Since the external R2P by military means has developed mostly in the regional sphere, through a customary process on regional collective humanitarian intervention (RHI), the positions of states have been presented by region in Chapter 4.8.

The concept of responsibility to protect is most commonly associated with the report of the ICISS Commission,\textsuperscript{1009} although it has been endorsed and further elaborated in various subsequent reports and documents. But many of its inherent ideas and elements can be traced to earlier works and international reports, paving the way for this new doctrine.\textsuperscript{1010}

The UN Secretary-General’s Agenda for Peace (1992/1995) presents the idea of consorted action on the part of the organisation in a wider context suitable for a globalised and interdependent post-Cold War

\textsuperscript{1007} Ibid., pp. 177-178.
\textsuperscript{1009} ICISS, \textit{The Responsibility to Protect}.
\textsuperscript{1010} The present French Minister for Foreign Affairs, Bernard Kouchner, has been portrayed as one of the very first supporters of a moral ‘responsibility to protect’ by hiring a boat in 1979 to rescue Vietnamese boat people fleeing from the Ho Chi Minh communist regime, see Cohen, Nick, \textit{We must do our moral duty in Burma: The French foreign minister has a history of standing up for human rights against ideologues. Now he’s taking on the UN}, Guardian Weekly, 16 May 2008.
world. In the report of the Commission of Global Governance (1995), the need to broaden the concept of global security was recognised, and the 'security of peoples' was introduced to push forward for international interventions on humanitarian grounds by the United Nations as a last resort. 

In 1993 Francis M. Deng wrote of international responsibility for protecting internally displaced persons, involving the need to force access to provide protection and assistance in the most extreme situations, and in 1996 Deng et al. developed the idea of 'sovereignty as responsibility', basing their arguments on limitations of sovereignty in international law, legal doctrine and state practice since the end of the Second World War. 

In the article Two Concepts of Sovereignty in the Economist, the UN Secretary-General Kofi Annan expressed a broadened view of sovereignty by highlighting the sovereignty of individuals to counterbalance that of states. He stated:

To avoid repeating such tragedies in the next century, I believe it is essential that the international community reach consensus – not only on the principle that massive and systematic violations of human rights must be checked, whenever they take place, but also on the ways of deciding what action is necessary, and when and by whom.

After NATO’s intervention in Kosovo, the UN Secretary-General Kofi Annan made compelling appeals, in his speech at the General Assembly.

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1012 Boutros-Ghali, *An Agenda for Peace. With the new supplement and related UN documents*, pp. 12-29, 45-62. Cf. also the Brahimi report, Report of the Panel on United Nations Peace Operations, A/55/305, 21 August 2000, UN Doc A/55/305, 2000, which included in its recommendations for preventive action reference to these notions. See also Breau, *The Impact of the Responsibility to Protect on Peacekeeping*, which makes a survey into how the systematic approach of prevention, reaction and rebuilding in R2P has been utilised or not as a routine part of peace support operations by the United Nations.
1013 The Commission of Global Governance, *Our Global Neighborhood, The report of the Commission of Global Governance*, pp. 81, 85-93. The Commission proposed “a UN Charter amendment permitting such interventions in cases that constitute a violation of the security of people so gross and extreme that it requires an international response on humanitarian grounds”, ibid, p. 90.
1016 Annan argued that ‘individual sovereignty’ must also enter the calculations and not merely state sovereignty, Annan, *Two Concepts of Sovereignty*.
1017 Ibid.
(1999) and in his report to the Millennium Summit (2000), to the international community to find once and for all an international consensus for resolving the dilemma of humanitarian intervention.1018

The report from the Independent International Commission on Kosovo, which assessed the legality of the NATO intervention in 1999, contained language on ‘duties and responsibilities’ for the international community. It recommended, among other things, a framework of principles for humanitarian intervention, and moreover, a formal adoption of such a framework by the General Assembly of the United Nations in the form of a ‘Declaration on the Right and Responsibility of Humanitarian Intervention’, and that the UN Charter shall be adapted to this Declaration either by appropriate amendments or by a case-by-case approach in the Security Council.1019

A series of government-commissioned reports elaborating on the topic of humanitarian intervention emerged in the aftermath of the Kosovo intervention. The UK issued guidelines for humanitarian intervention that was circulated to the other permanent members of the Security Council in late 1999 and 2000.1020 The Danish DUPI report

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1019 Independent Commission on Kosovo, Kosovo Report. Conflict, International Response, Lessons Learned, p. 187. The Kosovo Commission’s framework for humanitarian intervention, see pp. 10, 192–197. The declaration should deal with the duties on behalf of the UN and other collective actors in the international community to act effectively on behalf of the implementation of human rights and the prevention of humanitarian catastrophes, balanced by respect for sovereign rights. The Kosovo Commission underlined the need to close the gap between legality and legitimacy of humanitarian intervention by incorporating a more flexible view of legitimacy – as an international moral consensus, see ibid. pp. 10, 164, 186.

(1999) and the Dutch AIV/CAVV report (2000) discussed the legality and legitimacy of humanitarian interventions, proposing assessment frameworks with similar sets of criteria for future interventions. This was not the first time criteria were developed for the purpose of justifying or legitimising humanitarian intervention but these reports marked the beginning of a new movement among certain liberal states to press for an international consensus on humanitarian intervention.

The ‘Brahimi report’ from the Panel on United Nations Peace Operations (2000) indicates, according to Bring, the acceptance of some form of ‘blanket mandate’ for human protection for UN peace-keepers even in the absence of a specific mandate, and that operations with a civilian protection mandate must be given specific resources to deliver such protection. It states:

Finally, the desire on the part of the Secretary-General to extend additional protection to civilians in armed conflicts and the actions of the Security Council to give United Nations peacekeepers explicit authority to protect civilians in conflict situations are positive developments. Indeed, peacekeepers — troops or police — who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with “the perception and the expectation of protection created by [an operation’s] very presence”.

In response to the Secretary-General’s challenge and call for consensus, the Canadian government, under the initiative of Foreign Minister Lloyd Stromseth and Wheeler explain that the UK had sought to formalise agreement within the Security Council on guidelines along these lines in a Presidential statement of the Council. The UK initiative was supported by the Dutch, but resisted by Russia, which would only accept such a formula provided that it must always have the express authorisation of the Security Council – an unacceptable compromise for the UK. Instead, the UK wanted to leave the possibility of Western action outside the UN Charter framework unresolved and open.

1021 Danish Institute of International Affairs, Humanitarian Intervention. Legal and Political Aspects, DUPI, Copenhagen, 1999, pp. 106-111; Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law, Humanitarian Intervention, The Hague, 2000, pp. 28-32. For detailed analysis on the differences and similarities between the DUPI, AIV/CAVV, ICSS and the Kosovo Commission reports, see Newman, Edward, Humanitarian Intervention, Legality and Legitimacy, International Journal of Human Rights, vol 6, 4, Autumn, 2002, pp. 102-120. Several of these criteria have their basis in just war doctrine. For an excellent overview of the just war tradition see Bellamy, Just Wars, and with regard to humanitarian intervention in particular, pp. 199-228.

1022 For example, a serious effort to develop a doctrine on humanitarian intervention and a preliminary list of criteria among lawyers was made in the 1970s in the International Law Association. It has been continually discussed and debated in the legal doctrine for many centuries.


Axworthy, established the ICISS Commission in the autumn of 2000. Their report Responsibility to Protect was published in December 2001 (see more in next chapter).\footnote{ICISS, The Responsibility to Protect.}

Given this background, it appears clear that the ICISS Commission picked up already existing ideas and trends, developed them further and wisely packaged them neatly into a doctrine on a ‘responsibility to protect’. Weiss affirms that the ICISS report is neither a forerunner nor pacesetter, but rather stakes out a helpful middle ground.\footnote{Weiss, Thomas G., The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era, Security Dialogue, vol 35, 2, 2004, pp. 135-155, p. 140.} According to Newman, the reports of the Dutch AIV/CAVV, DUPI, the Kosovo Commission and the ICISS Commission all find a consensus in the broadening of the notion of threats to international peace and security, and by this reaffirm political liberalism and the doctrine that human welfare ultimately underpins the stability of political institutions.\footnote{Newman, Humanitarian Intervention, Legality and Legitimacy, p. 117.}

The ICISS ideas of R2P were further integrated in the Secretary-General’s Action Plan to Prevent Genocide, launched in April 2004, and viewed as a serious attempt to provide guidelines to identify and respond to genocide and other extreme cases.\footnote{Annan, Kofi, Preventgenocideinternational (Publ.), UN Secretary-General’s Kofi Annan’s Action Plan to Prevent Genocide. April 7, 2004, SG/SM/9197 AFR/893, "http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlantoPreventGenocide7Apr2004.htm", (2004-11-15).} The concept was furthermore endorsed and developed in the High-Level Panel report A More Secure World (2004), and in the Secretary-General’s report In Larger Freedom (2005).\footnote{UN High-Level Panel, A More Secure World: Our Shared Responsibility; Annan, Kofi, In Larger Freedom. Towards Development, Security and Human Rights for All. Report of the Secretary-General, United Nations Publications, New York, 2005.} Finally, the concept of R2P came to be acknowledged in a somewhat modified form in the UN Summit Outcome Document in September, 2005. These two reports, as well as the Outcome Document formulation of the R2P, contribute to the development of the doctrine on R2P.\footnote{For other accounts by lawyers of the R2P notion in these reports, see e.g. Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm; Slaughter, Anne-Marie, Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform, American Journal of International Law, vol 99, 2005, pp. 619-631; Breau, Susan, A Comparison of the United Kingdom and Canadian Approaches to Human Security, Waters, Christopher P.M. (Ed.), British and Canadian Perspectives on International Law, Koninklijke Brill NV, Netherlands, 2006, pp. 207-213; Hilpold, The Duty to Protect and the Reform of the United Nations - A New Step in the Development of International Law, Bogdandy, Armin von, Wolfrum, Rüdiger. Managing Editor: Philipp, Christian (Eds.), Max Planck Yearbook of United Nations Law, Martinus Nijhoff Publishers, Leiden/Boston, 2006.} It is, however, only the 2005 endorsement of the R2P by states, which has the status of a General Assembly resolution that may contribute to an emerging norm of R2P in international law.
4.2. The ICISS report (December 2001)

The ICISS Commission was in response to the call by the UN Secretary-General to the international community to find a new consensus on how to approach and respond to situations of massive violations of human rights and humanitarian law within a state.

Its main aim was to look into the legal, moral, operational and political questions in the debate on humanitarian intervention. The Commission was chaired by former Australian Foreign Minister Gareth Evans and the seasoned UN diplomat Mohamed Sahnoun, and financed by Canada and the Carnegie and McArthur Foundations. The report, which was released in New York in December 2001, is based upon extensive research, wide and global consultations and on more than ten regional roundtable conferences. Although the Commission purported to develop a truly global product, the report has still been criticised to be confined to liberal international discourse.

The report was published in the aftermath of September 11, and was moved quickly into the shadows of the international security agenda. Weiss states “when the dust from the World Trade Center and the Pentagon settled, humanitarian intervention became a tertiary issue”. Although the impact of the report was not immediate, it later came to shape the developing agenda and reformulations of a doctrine on humanitarian intervention and responsibility to protect. Since the humanitarian crisis loomed in Darfur in 2003, the concept of R2P became revitalised and was widely discussed, debated and analysed, but also recognised and endorsed.

The ICISS report has met with much approval and praise from many Western and liberal states, but with concern from certain non-Western

1031 Just as the Brundtland Commission on the Environment and Development coined the term ‘sustainable development’ in response to the apparently irreconcilable issues of development and environmental protection, there was hope that the ICISS Commission would be able to find new ways to reconcile the concepts of intervention and state sovereignty. See ICISS, The Responsibility to Protect, p. 81.


states. Among other things, there has been concern with the prospect of consistency in real world application and the risk of serving as a justification or pretext for inappropriate interventions.\textsuperscript{1035} (See more on responses and state positions on responsibility to protect in Subchapter 4.7. below.)

The report’s ideas however are perceived to be innovative in several ways.\textsuperscript{1036} The concept of R2P is based upon the concept of human security, and consequently manages to merge two fields – the need for a broader security perspective and the need for the international community to make humanitarian interventions under certain circumstances to protect people’s security. It furthermore introduces a change of terminology, away from the highly controversial right to humanitarian intervention to a responsibility to protect.

The first of the report’s basic principles provide that ‘state sovereignty implies responsibility’ (see the analysis of this tenet in Chapter 5.2),\textsuperscript{1037} and the primary responsibility to protect lies in each individual state with respect to the population. The second basic principle of R2P is formulated as follows:

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.\textsuperscript{1038}

Thus, the primary, (internal) responsibility to protect falls on each and every state vis-à-vis its own population, and is directed towards both the citizens and the international community through the UN, according to the ICISS report.\textsuperscript{1039} The internal responsibility of a state to protect addresses ‘the safety and lives of citizens and promotion of their welfare’.\textsuperscript{1040} More specifically, the report mentions ‘internal war, insurgency, repression, and state failure’ as examples of situations where a population may suffer serious harm, against which a state should protect them.\textsuperscript{1041}

\textsuperscript{1035} For a thorough analysis and critique on the assumptions and controversies of the findings in the ICISS Report, see Welsh, Thielking & MacFarlane, \textit{The Responsibility to Protect. Assessing the Report of the International Commission on Intervention and State Sovereignty.}

\textsuperscript{1036} See Weiss, Thomas G., \textit{Cosmopolitan force and the responsibility to protect}, International Relations, vol 19, 2, 2005, pp. 233-237, p. 234, for Weiss’ opinion of what the Commission’s most important contributions were. However, he acknowledged that the ICISS formulations on R2P are not as innovative as first thought.

\textsuperscript{1037} As stated in the previous chapter, the idea of ‘sovereignty as responsibility’ is not in itself new but a continuation of a line of thinking that had already been pursued since its introduction by Deng \textit{et al.} in the mid-1990s. See Deng \textit{et al.}, \textit{Sovereignty as Responsibility. Conflict Management in Africa.}

\textsuperscript{1038} ICISS, \textit{The Responsibility to Protect}, p. XI.

\textsuperscript{1039} \textit{Ibid.}, p. 13, para. 2.15.

\textsuperscript{1040} \textit{Ibid.}, p. 13, para. 2.15.

\textsuperscript{1041} \textit{Ibid.}, p. XI, (1). B. These are much less precisely defined situations in terms of scope and limitations of the primary responsibility to protect for each state than in the Outcome Document (2005) (see chapter 4.6).
Obligations to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity are derived from a state’s obligations under human rights, humanitarian law and international criminal law, both through treaty[^1042] and customary law.[^1043] Some of these norms or aspects of them have also attained the status of _jus cogens_, such as the prohibition on torture, which is included as an act that could constitute war crimes and crimes against humanity. Certain of these obligations can be argued to be owed to the international community as a whole as _erga omnes_ obligations, for example, the prohibition on genocide and torture. The legal obligations of each state to protect are owed towards other states through their commitments in different treaties and customary law, but the rights holders or subjects of protection are the individuals on the state territory.

But there is also an apparent lack of a normative basis for the protection of people within a state. One problem area is the absence of international legal obligations to protect the human security of IDPs from grave violations of human rights and humanitarian law that do not amount to genocide, war crimes, ethnic cleansing or crimes against humanity. But in general, the main bulk of the internal and primary responsibility of states to protect their populations is part of _lex lata_.[^1044]

The Commission also proposes an external, subsidiary responsibility for the international community of states, if a state is unwilling or unable to. The new terminology focuses attention where it should be most


[^1043]: It is, however, beyond the space and purpose of this thesis to delineate the exact scope and basis of the internal legal responsibility to protect in international customary law.

[^1044]: See _supra_ note 34.
concentrated – on the human needs of those seeking protection or assistance. The responsibility encompasses more than humanitarian intervention, suggesting an integral approach where prevention and rebuilding are included. Thus the concept of responsibility to protect embraces three elements: the responsibility to prevent, react, and rebuild, and thus not just the military aspects of humanitarian intervention. Protection by military means is only one aspect among several different means available in the second element of responsibility to react, which also includes reaction by diplomatic, political, juridical and economic means. This spectrum of action is the most significant contribution, according to Welsh, Thielking and MacFarlane. In this thesis I shall, as stated earlier, deal only with the military aspect of the element of a responsibility to react – a very small portion of the concept, but nonetheless carrying great implications.

Vesting the primary responsibility for the protection of humanitarian standards in the state itself is natural but not unproblematic. With it follows the great worries of failed and weak states, being one of the greatest sources of international instability. The decision to intervene by military means to protect people when a state is unable or unwilling to discharge its primary responsibility, is suggested to be limited to extreme cases that genuinely “shock the conscience of mankind”, or situations that present such an obvious and imminent danger to international security that they call for coercive military intervention. In order to identify such exceptional cases the Commission proposed a set of criteria

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1045 ICISS, *The Responsibility to Protect*, p. 15. The change of language has three other big advantages, according to Gareth Evans and Mohamed Sahnoun. It focuses on those who need support instead of on states that want to intervene; it implies that the primary responsibility rests with the state concerned and that only if it fails will the international community take its place; and finally it is an umbrella concept, which is much broader than just a right to intervene for humanitarian purposes. See Evans, Gareth, Sahnoun, Mohamed, *The Responsibility to Protect*, Foreign Affairs, vol 81, 6, November-December, 2002, p. 101.

1046 The responsibility to protect is the single most important element of R2P, and it is argued that the international community needs to change its basic mindset from a culture of reaction to that of prevention. However, until this is done, it has been argued that “we need to forge a consensus on the issue of intervention, as the people of the Congo, Liberia, Sudan and beyond need a “dam today”“, see Levitt, Jeremy I., *Book review: The responsibility to protect: A beaver without a dam?*, Michigan Journal of International Law, vol 25, 2003-2004, pp. 153-177, p. 165.


1048 It should be pointed out, however, that ICISS regards prevention to be the single most important dimension according to the Commission, and that this author agrees with this claim. ICISS, *The Responsibility to Protect*, p. XI. For an analysis of the preventive element of R2P and a critique of the Canadian approach, which according to the authors, steers away from its long-standing commitment to prevention in favour of the humanitarian aspects of R2P, see Zahar, Marie-Joëlle, *Intervention, prevention, and the "responsibility to protect". Considerations for Canadian foreign policy*, International Journal, Summer 2005, pp. 723-734.


that must be fulfilled before a decision to intervene is taken. A just cause threshold must be met, involving the danger of a large-scale loss of life or large-scale ethnic cleansing. The circumstances can be either actual or apprehended (i.e. imminent), so that an intervention can be undertaken either to halt or avert such a situation. Consequently, the ICISS formula for humanitarian intervention legitimises anticipatory measures in response to clear evidence of probable large-scale killing, as explained in the report, in order to “avoid the morally untenable position of having to await the beginning of a genocide before being able to stop it”.

Four precautionary principles for military intervention are also included in the criteria demanding a) a right intention, b) last resort, c) proportional means, and d) reasonable prospects of achieving the intended results. (See the analysis on the R2P criteria in Chapters 5.3.2. and 5.3.3.)

The ICISS idea of a “right authority” for those authorising or carrying out the intervention is wider than the subsequent reports dealing with the concept of R2P. The ICISS report acknowledges that the Security Council is the appropriate body to authorise military interventions, but if the Security Council rejects a proposal or fails to deal with it within a reasonable time, the Commission proposes alternative options. The matter could in such situations be considered in the General Assembly under the ‘uniting for peace’ procedure, or if that fails by a regional organisation, subject to its seeking a Security Council authorisation under Chapter VIII of the UN Charter. (See more on right authority in Chapters 6 and 7). The Commission furthermore warns that if the Security Council fails to discharge its responsibility to protect in ‘conscience-shocking situations crying out for action’, the Council should take into account that it is unrealistic to expect concerned states to rule out other means or forms of action to meet the security emergency. Thus the possibility of coalitions of the willing taking action under the R2P doctrine is not exactly recommended, but stated not to be ruled out, in situations where all other responsible actors fail to.

Lewitt argues that the ICISS solution to the problem of Security Council inaction does not create a dam of protection but rather a conceptual quagmire. If countries within regions are perceived to be more sensitive and best suited to enforce peace by having a greater stake, then he argues, that they should be the most qualified to make informed decisions on intervention instead of having to seek prior authorisation from the General Assembly under the Uniting for Peace resolution.

1051 However, the Commission deliberately gives no definition of what constitutes large-scale.
1054 Ibid., pp. XIII, 47–55.
1055 At the same time the Commission stresses that the credibility of the UN may suffer as a result, and that the task is not to find alternatives to the Security Council but to make it work much better than it does at present. Ibid., p. XIII, 49, 55.
1056 Levitt, *The responsibility to protect: A beaver without a dam?*, pp. 171-172.
He claims that the state practice and treaty developments in Africa illustrate the need to find consensus on a set of proposals for military intervention that acknowledge the validity of intervention not authorised by the Security Council or the General Assembly. But the ICISS proposition that the Security Council is the only right authority is undermined according to him by the contradictory suggestion of a doctrine of *ex post facto* authorisation. He claims therefore that the ICISS approach to protect populations at risk creates a swamp rather than a dam of protection, and argues that both the Uniting for Peace procedure and the Chapter VIII *ex post facto* approach are legally ambiguous and weak.1057 (For a legal analysis of the Right authority of the General Assembly and regional organisations, see Chapters 6.4. and 7.1.)

After the launch of the report, Commission members and other R2P proponents and advocators dedicated significant time spreading its ideas with a view to reaching some form of international consensus on the doctrine. The next step for the authors of the report was to induce the UN General Assembly and the Security Council to adopt resolutions affirming the just cause criteria and the four precautionary principles.1058 This was achieved at the General Assembly Special Session of the UN World Summit in 2005 when the Outcome was adopted, endorsing the R2P (see Chapter 4.6.). The Security Council also managed to adopt a few resolutions reiterating R2P (see Chapter 4.7.).

### 4.3. The war against terrorism and weapons of mass-destruction – expanding the R2P?

#### 4.3.1. The Iraq Case (2003)

The non-authorised military invasion of Iraq in 2003 by the United States, the United Kingdom and their allies, had negative effects on support among states for the evolving concept of R2P and its subsequent development.

Initially, the formal legal justifications for the intervention were based upon other arguments other than humanitarian.1059 Although the political leaders of all the major troop contributors gave considerable weight to the humanitarian arguments at a later stage of the war in their public justifications, the humanitarian case of the Iraq war has been widely

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1059 For a good overview and legal analysis of the main official arguments for war, see Jacobsson, Marie, *The Use of Force and the Case of Iraq*, Amnéus, Diana, Svanberg-Torpman, Katinka (Eds.), *Peace and Security. Current Challenges in International Law*, Studentlitteratur, Lund, 2004, pp. 373-407. The main argument, which was mentioned in the US and UK letters to the Security Council, was based upon the suspected possession of weapons of mass destruction and the need to secure compliance by Iraq with its disarmament obligations in resolution 1441. The link to Al-Qaeda as well as the Bush Doctrine on a right to pre-emptive self-defence were also mentioned as a ground of justification.
rejected by the international community and in the literature. Describing the war as a humanitarian intervention in line with R2P in order to justify the overthrow of the tyrant Saddam Hussein was contested for various reasons. Despite the horrors of Saddam’s rule, there were no ongoing or imminent threats of mass slaughter or genocide in Iraq at the time of the intervention. The just cause threshold was not met. Peaceful means to ascertain the presence or otherwise of weapons of mass destruction had not been exhausted. The right intention to intervene for humanitarian purposes was questioned from many directions, since it was not the primary purpose of the intervention.

The misuse of humanitarian arguments in the Iraq war had dire consequences for the support and development of R2P. The invasion increased concerns that the responsibility to protect would be used to further erode the sovereignty of smaller developing countries. Bellamy argues that the Iraq war undermined the standing of the United States and the UK as credible norm carriers when it came to R2P. This has resulted in a situation after 2003 where these states have been unable to build consensus on collective humanitarian action owing to their diminished credibility as humanitarian agents. The war has also come to affect on the advocates of R2P. In the wake of the Iraq Case, when Canada and the UK tried to quote basic principles of R2P in the 2003 Progressive Governance Summit of left-of-centre government leaders, they met strong opposition from Argentina, Chile and Germany, which earlier had shown support for the concept. Neither the Canadian government nor the ICISS commissioners felt able to press the case further for unauthorised humanitarian intervention.

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1061 There were surely times in the past of Iraq when the just cause threshold would have been met, as the 1988 Anfal genocide of the kurds and shia muslims or the repression of the kurds in the post-Gulf War uprising 1991, see Roth, Human Rights Watch (Publ.), War in Iraq: Not a Humanitarian Intervention.


1063 Bellamy, Alex J., Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, Ethics and International Affairs, vol 19, 31, 2005, pp. 31-53, p. 33.


1065 Bellamy, Alex J., Whither the Responsibility to Protect? Humanitarian Intervention and the 2005...
The abuse of the humanitarian cause in Iraq made it practically more difficult to advance the original R2P agenda in the Darfur Case. MacFarlane, Thielking and Weiss also argue that the war against terrorism may be undermining commitments to the human rights principles that underpin the logic of humanitarian intervention. The Iraq war and the war on terror have had an impact on other aspects of the humanitarian intervention agenda as well, but in which ways remain hotly contested.

A different view of the effects of the misuse of the language in relation to the war in Iraq (and Afghanistan), is that they have proved to be good illustrations of situations that do not find widespread acceptance of R2P or humanitarian intervention, and that therefore the risks for future abuse of the concepts are low. The protests against the war in Iraq minimise the risk that this case would have any precedential value as an application of R2P, and consequently does not contribute to the emerging customary process on the concept.

4.3.2. The ‘Duty to Prevent’ (2004)

Moreover, in January 2004 two American scholars presented the idea of a corollary ‘Duty to Prevent’, more rightly called a ‘right to pre-empt’, in the field of global security, in which the international community would supposedly have a collective duty to “prevent nations run by rulers without internal checks on their power from acquiring or using weapons of mass destruction” (WMD). To them, this duty addresses the same kinds of threat that R2P addresses, but from a different source – the prospect of mass murder through the use of WMD. Their focus is on targeting certain unreliable regimes, also called “outlaw states”, “rogue states” or the “axis of evil” by the US administration. The doctrine contains both non-forceful and military enforcement measures, to force states to stop their programmes or prevent the transferring of WMD.
capabilities or weapons. The latter should only be used as a last resort, but the authors argue that preventive use of force may be warranted, even when there is no imminent threat, and furthermore that the Security Council would not need to authorise it. Force by regional organisations such as NATO, or unilateral action of coalitions of the willing could be considered. They suggest, however, that precautionary principles should be complied with when force is involved.\footnote{The use of force should be carried out as a last resort, on the smallest scale possible, for the shortest time, the lowest intensity necessary to achieve the objective, the objective must be reasonably attainable when measured against the likelihood of making matters worse, and the force applied should comply with humanitarian law.}

Many R2P advocates have been critical of against the notion of a ‘Duty to Prevent’. Weiss stated that the worst fears of a Trojan Horse, where humanitarian intervention is permitted to serve as a cover for big power intervention, are to be found in Feinstein and Slaughter’s 2004 article.\footnote{Weiss, \textit{Cosmopolitan force and the responsibility to protect}, p. 235; See also other examples of this in Falk, Richard; Kaldor, Mary; Tham, Carl; Power, Samantha; Mamdani, Mahmood; Rieff, David; Rouleau, Eric; Mian, Zia; Steel, Ronald; Holmes, Stephen; Thakur, Ramesh; Zunes, Stephen, \textit{Humanitarian Intervention: A Forum}, The Nation, vol 277, 2, July 14, 2003, pp. 11-20.} Evans also points out several problems with the idea of a ‘Duty to Protect’ in his remarks at the ASIL meeting in April 2004.\footnote{Evans, Gareth, \textit{The Responsibility to Protect: Rethinking Humanitarian Intervention}, American Society of International Law Proceedings, vol 98, 2004, pp. 78-89. His five main arguments were: 1) The focus on regimes rather than on actual behaviour in relation to WMD is problematic, 2) the bar for action is set too low, 3) the level of proof required for any kind of preemptive or preventive action is insufficiently acknowledged, 4) their acknowledgement of the legitimacy options not involving Security Council endorsement is problematic, and 5) the notion is not only a corollary to R2P but has the potential to actively undermine it.} He stated that this notion goes much further than R2P, and if the two concepts are seen in harmony he fears that the R2P “will be strangled at birth”. Brunnée and Toope also criticise the notion of a ‘Duty to Prevent’ and state that its criteria on preventive action bear considerable resemblance to the elements of the US National Security Strategy’s concept of ‘rogue states’\footnote{Brunnée and Toope, \textit{Slouching Towards New ‘Just’ Wars: International Law and the Use of Force After September 11th}, p. 389.}. It has no comparable indicator to the R2P just cause threshold, and they argue that the very point of the notion is to overcome the fact that the existing criterion of imminence is difficult to meet.\footnote{See Brunnée and Toope, \textit{The Use of Force: International Law After Iraq}, pp. 803-804; Brunnée and Toope, \textit{Slouching Towards New ‘Just’ Wars: International Law and the Use of Force After September 11th}, p. 389.} They are also deeply concerned that this approach effectively draws together independent normative frameworks and treat them all as sub-categories of ‘security’.\footnote{The danger is that clarity of purpose and the necessary ability of legal categories to force justification will be lost if such merging of all use of force justifications into one overarching security threat.} They warn against the blending of humanitarian and security justifications for military action as is being
done in this doctrine, since it undermines the legal restraints on military force, and furthermore promotes the collapse of legally distinct categories such as self-defence, protection of human rights, and threats to international peace and security into one super-category of ‘threat to prevention’, using the other categories simply as examples of dangers that can be invoked to justify action as either defensive or protective.

Breau confirms in her dissertation in 2005 that there has not evolved any such ‘duty to prevent’ in international law outside the United Nations system. The Iraq war justifications based upon humanitarian intervention and the Duty to Prevent doctrine apparently did not leave the world unaffected, and Evans proposed in a lecture at Oxford University in May 2004 that the Security Council should take into account five criteria of legitimacy, similar to the just cause threshold and the precautionary principles of ICISS, whenever considering authorising the use of force. One reason seems to have been the Secretary-General’s call for “early authorisation of coercive measures to address certain types of threats – for instance, terrorist groups armed with weapons of mass destruction”. This call began a discussion on criteria for such early authorisation.

Evans’s expanded way of thinking about ICISS’s precautionary principles for Security Council authorisation of the use of force appears to have had a further impact since it came to be reflected in the High-Level Panel report, and then later in the Secretary-General’s In Larger Freedom. (See more about these in Chapters 4.4. and 4.5.)

It should be specified that the possibility of using the basic tenets and principles of R2P in response to a terrorist attack was not initially included in the concept by ICISS. Despite the apparent doctrinal lack of connection between terrorism and R2P, Welsh, Thielking and MacFarlane have demonstrated three ways where the R2P and the war against terrorism are interlinked. Firstly, that collapsed or failed states such as Somalia and Afghanistan can have both international humanitarian and terrorist security implications. Secondly, the responsibility to prevent and to rebuild is equally important in a state that has provided safe havens for terrorists, such as Afghanistan. Thirdly,

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1077 Brunnée and Toope, Slouching Towards New ‘Just’ Wars: International Law and the Use of Force After September 11th, p. 385. Although they do not deny that there are links between humanitarian crises, repressive regimes, terrorism and international security threats, international policy responses or law will not be aided by this blend, according to them. Ibid. p. 391.

1078 Ibid., p. 389.


1080 Evans, 2004 Cyril Foster Lecture: When is it right to fight? Legality, legitimacy and the use of military force, see in particular pp. 15-17.

1081 Ibid., p. 9.

1082 ICISS, The Responsibility to Protect, p. 34, para. 4.27. Instead they refer such cases to article 51 of the UN Charter or Chapter VII measures by the Security Council.

the right to asylum is seen as a quintessential recognition of the responsibility to protect but has become limited in Western states’ efforts to combat terrorism in their own states through Anti-Terrorist Acts that put the Asylum right at risk. There are most certainly other connections between these two areas of insecurity. The US military action in Afghanistan after September 11 is, as Chesterman describes it, “[d]istinct from the traditional conception of humanitarian intervention, but the politics bear suggestive similarities”.

4.3.3. Pre-emptive use of force and ‘cosmopolitan humanitarian intervention’

Another different but also similar call for rethinking preventive military force is the cosmopolitan institutional proposal made by the two scholars Allen Buchanan and Robert Keohane. They explore the permissibility of preventive war from a cosmopolitan normative perspective, and outline three different models for their analysis. The third model of cosmopolitan institutional proposal is found to be the most attractive, introducing a “healthy competition with the UN system without bypassing it altogether”, by envisaging a democratic coalition as an “additional channel for authorisation”. What exactly the authors denote with their cosmopolitan normative perspective, however, is not

1084 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 1


‘Cosmopolitan’ is the adjective from the Greek word ‘cosmopolis’ composed of ‘cosmos’ (universe) and ‘polis’ (city-state), see Archibugi, Cosmopolitan humanitarian intervention is never unilateral, p. 222, who thinks that it should be used only when there is genuine intention to act through international or global political institutions, and not only for others but ‘with others’. Smith and Fine believe that the cosmopolitan paradigm, based upon Kant’s vision, rests on an ideal of an international order regulated around law and the acknowledgement of universal human rights, rather than realpolitik and national self-interest, see Smith, William, Fine, Robert, Kantian Cosmopolitanism. Today: Johan Rawls and Jurgen Habermas on Immanuel Kant’s Foedus Pacifictum, The Kings College Law Journal, vol 15, 5, 2004, pp. 5-22, p. 5. On the meaning and uses of ‘cosmopolitan’ see Farer, Cosmopolitan humanitarian intervention: a five part test. He explores whether ‘humanitarian’ and ‘cosmopolitan’ are distinguishable. Farer argues that ‘cosmopolitan’ does not yet have any generally agreed referent, and concludes that the adding of ‘cosmopolitan’ to the list of conditions for humanitarian intervention for it to become legitimate, has no value, see ibid. p. 213. The historical lineage of the concept is debatable, but it is clear that the roots of ‘cosmopolitanism’ can be traced to the orbes of the Stoics, natural law theory, and Immanuel Kant, see Bellamy, Just Wars, p. 202. The cosmopolitan ideas have been further reconstructed and developed by John Rawls (enlightened liberal internationalism) and Jürgen Habermas (post-national constellation), see Smith and Fine, Kantian Cosmopolitanism. Today: Johan Rawls and Jurgen Habermas on Immanuel Kant’s Foedus Pacifictum; Cf. however Gould, Harry D., Toward a Kantian International Law, International Legal Theory, vol 5, 2, 1999, pp. 31-42, who argues that Kant was not a cosmopolitan; Janda, Richard, Toward Cosmopolitan Law, McGill Law Journal, vol 50, 2005, pp. 967-984, who draws on the work of Jacques Derrida; on the normative theories cosmopolitanism vs. communitarianism, see Brown, Chris, Human rights, Baylis, John, Smith, Steve (Eds.), The Globalization of World Politics. An Introduction to International Relations, 3rd edition, Oxford University Press, Oxford, 2001, p. 691.

very well defined in the article. Their own view of what cosmopolitanism implies is broadly explained as taking the human rights of all persons seriously and incorporating that commitment into an effective accountability regime for responsible decision-making concerning the preventive use of force. Their cosmopolitan institutional framework is not only directed towards situations of threat from weapons of mass destruction, but is suggested to also be useful for humanitarian interventions. The main idea is to create more accountability for preventive action through a system of *ex ante* and *ex post* mechanisms and sanctions. This is proposed to be achieved by contract between democratic states setting up a decision-making body (a coalition of democratic states) for such a purpose. The cosmopolitan institutional model of Buchanan and Keohane suggests that the body may take action in the event of a Security Council deadlock, and that its practice could over the course of time become customary international law. The coalition of democratic states, however, would not replace the Security Council.

My own critique against this proposal is that the concept has grown out of a concern over US unilateralism and recent pre-emptive practice, and does not flow from, nor is it primarily developed, out of a genuine concern for the protection of human security within a state. The devil’s advocate could even argue that the proposal could find more support by reaching into the area of humanitarian intervention, since such situations could also justify preventive action. But the proposal is not a full-grown doctrine for humanitarianism and hence only takes into account preventive action and leaves out all other situations where humanitarian intervention could or would be warranted.

Téson has picked up the idea of cosmopolitan perspective on humanitarian intervention in the interests of humanity, and sees it as opposed to that of the national interests of states and governments. He explains that it fits nicely with his own Kantian normative view of...
international relations in its hopes for freedom and peace relying on an alliance of liberal states. However, he leaves the content of this interest explicitly undefined. To him its only purpose in relation to humanitarian intervention is clear and minimal: “to save persons from tyranny and anarchy, from the most brutal forms of oppression”. Despite his cosmopolitan standpoint, he criticises Buchanan and Keohane’s idea of a ‘council of democratic states’ as being dysfunctional for the purpose of protecting human freedom.\footnote{Ibid., p. 763; for another critic, see Weiss, Cosmopolitan force and the responsibility to protect, p. 235.}

He acknowledges that the model seems to be an attractive idea at first blush, but has reluctantly become aware that it is unrealistic for a number of reasons. The main causes are related to the endemic problem of the UN human rights machinery and scholarship – its distortion and rhetorical use to mask self-interest or hostility to individual freedom and free markets.

Instead Téson proposes a new body, a Court of Human Security, composed of life-tenured independent judges.\footnote{See Téson, The vexing problem of authority in humanitarian intervention: a proposal, pp. 771-772.} Though he admits this idea is utopian, it is more than easy to find counter-arguments and weaknesses with it as well. Why assume that lawyers would be the most impartial, independent, and most committed category of persons to make decisions on the use of force to protect human rights?

Ignatieff, for long a strong voice for human rights and a member of ICIS Commission, appears to support an idea of expanding R2P to cover the elimination of weapons of mass-destruction and terrorist threats.\footnote{See MacFarlane, Thielking and Weiss, The Responsibility to protect: is anyone interested in humanitarian intervention?, p. 989 with reference to Ignatieff, Michael, ‘Why are we in Iraq? (And Liberia? And Afghanistan?)’, New York Times Magazine, 7 September 2003.} MacFarlane, Thielking and Weiss have also been affected by the vastly changed security landscape after the Iraq invasion, and argue that humanitarian intervention is likely to remain a distraction unless the concept of ‘sovereignty as responsibility’ is joined to a debate on the range of horrors that could justify military action to sustain human values.\footnote{Ibid., p. 989.} A future merging of these two security challenges in international relations and international law is open to debate, but will ultimately be based upon the political will of states to take such a course. I recommend that the concepts be kept strictly apart to avoid misuse and abuse of the concepts.

4.4. The High-Level Panel Report (December 2004)

The High-Level Panel was set up by the Secretary-General in November 2003 with the mandate to examine contemporary global threats, provide analysis of future challenges to international peace and security and recommend necessary changes to ensure effective collective action by the United Nations.\footnote{UN High-Level Panel, A More Secure World: Our Shared Responsibility, United Nations} Slaughter summarised the Panel’s work in this short sentence:

\begin{flushleft}
\textbf{Ibid.}, p. 763; for another critic, see Weiss, Cosmopolitan force and the responsibility to protect, p. 235.
\footnote{Ibid., p. 763; for another critic, see Weiss, Cosmopolitan force and the responsibility to protect, p. 235.}

\footnote{See Téson, The vexing problem of authority in humanitarian intervention: a proposal, pp. 771-772.}


\footnote{Ibid., p. 989.}

\footnote{UN High-Level Panel, A More Secure World: Our Shared Responsibility, United Nations}
it considered threats to people as well as states, generating a holistic view of security that understand state security and human security to be fundamentally intertwined.\textsuperscript{1095}

She found the Panel’s conception of a new security consensus resting on solidarity and an awareness of common threats and common responsibilities.\textsuperscript{1096} The Panel was widely influenced by the concept of responsibility to protect and endorsed it as

the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.\textsuperscript{1097}

The Report treated the key issues of internal threats, the responsibility to protect and Chapter VII of the UN Charter under the same Chapter.\textsuperscript{1098} Rather than looking at the issue as a right to intervene, the Panel acknowledged that there was a growing recognition that there was “a responsibility to protect of every state when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease”.\textsuperscript{1099} Exactly what was meant by this emphasis on every state is difficult to understand. Breau has interpreted it as if the Panel did not rule out interventions from bodies other than the United Nations.\textsuperscript{1100} Stahn states that ‘every’ state could be read as a simple reminder of the \textit{erga omnes} nature of international obligations on the prohibition on genocide and torture, grave breaches of the Geneva Conventions, that give rise to the R2P.\textsuperscript{1101} But one could also argue that it is a reference to the primary responsibility of each and every state to provide security for its own population. On the specific issue of humanitarian intervention,

Press Release (Publ.), \textit{Secretary-General names High-Level Panel to study global security threats, and recommend necessary change}, \textit{SG/A/857}, 04/11/2003, "www.un.org/News/Press/docs/2003/sga857.doc.htm", (2004-09-17). Its main task was hence to bring forward new ideas of institutional reform of the United Nations in order to better meet the new global security threats. Wheeler claims that an important objective behind the Secretary-General’s decision to set up the Panel was that it might offer a means of healing the bitter divisions that opened up after Iraq (2003), Wheeler, \textit{Towards a New Transatlantic Consensus on the ‘Collective Responsibility to Protect’}, p. 12; see also Pace and Deller, \textit{Preventing Future Genocides: An International Responsibility to Protect}, p. 23, who describe Kofi Annan proclaiming that the UN had come to a fork in the road and that it must adapt itself to global political realities or be marginalised.

\textsuperscript{1096} \textit{Ibid.}, p. 625.
\textsuperscript{1097} UN High-Level Panel, \textit{A More Secure World: Our Shared Responsibility}, p. 66, para. 203.
\textsuperscript{1098} See Chapter IX A 3 of Part 3.
\textsuperscript{1099} UN High-Level Panel, \textit{A More Secure World: Our Shared Responsibility}, p. 65, para. 200.
\textsuperscript{1101} Stahn, \textit{Responsibility to Protect: Political Rhetoric of Emerging Legal Norms?}, p. 105.
the report solely recommends such action through the Security Council and within the UN Charter framework.\textsuperscript{1102} The Report states that the principle of non-intervention in internal affairs cannot be used to protect “genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing”.\textsuperscript{1103} Such acts are instead properly to be considered a ‘threat to international security’ and as such provoke action by the Security Council.\textsuperscript{1104} The Panel likewise recognised and supported the idea of ‘sovereignty as responsibility’, affirming that sovereignty carried with it the obligation of a state to protect the welfare of its own people and meet its obligations to the wider international community.\textsuperscript{1105} In some circumstances, however, it states that some portions of those responsibilities should be taken up by the international community as a matter of collective security within the UN Charter framework.

The legal significance embedded in the report’s acknowledged shift from a ‘right’ to ‘responsibility’, is unclear. Whether the Panel supported the view that this responsibility would entail accountability and state responsibility for non-compliance, or whether in fact the responsibility is nothing more than a permissive right but not a legal duty, was not clarified in the report. Most likely, the purported intentions must have been that the responsibility to protect would have legal connotations with regard to each state’s internal responsibility to protect its own population, but political and moral implications for the international community through the Security Council when a state fails to protect. My own view is that the Security Council already retains a permissive right under international law to undertake humanitarian interventions. Whether the Panel argues in the report that it should also have a legal responsibility under the UN Charter to take military action to prevent such enumerated crimes is a far-reaching conclusion to draw, lacking sufficient support in the report.

On the ICISS precautionary criteria proposed for military intervention, the Panel transformed these criteria, in the way Evans proposed in his Cyril Foster lecture in May 2004,\textsuperscript{1106} into five basic criteria of legitimacy that are to contribute to the overall legitimacy of the Security Council: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences. The report suggests that these should be taken into account whenever the Council is disposed to authorise or endorse the use of military force.\textsuperscript{1107} The

\textsuperscript{1102} The R2P is a broader concept than humanitarian intervention and the military dimension of the concept is only a small part of it. It could therefore be argued that the responsibility to protect of every state, whether it be within its own territory or in relation to another state’s population, based upon the mentioned erga omnes obligations in international law are primarily of a non-military nature.

\textsuperscript{1103} UN High-Level Panel, \textit{A More Secure World: Our Shared Responsibility}, p. 65, para. 201.

\textsuperscript{1104} Ibid., p. 65, para. 201.

\textsuperscript{1105} Ibid., p. 17, para. 29.

\textsuperscript{1106} Evans, 2004 Cyril Foster Lecture: \textit{When is it right to fight? Legality, legitimacy and the use of military force}.

\textsuperscript{1107} UN High-Level Panel, \textit{A More Secure World: Our Shared Responsibility}, pp. 66-67, paras. 204-209.
purpose of such guidelines would be to enable the Council to work better and maximise the possibility of achieving consensus among its members. According to Slaughter, this idea was to make the use of military force by the Council a phenomenon that is both legal and legitimate.\textsuperscript{1108} She contends, however, that it sounds more like a recipe for further inaction by the Council, giving the members new criteria to argue about while “Rome, or Rwanda, or Darfur, burns”.\textsuperscript{1109}

4.5. The ‘In Larger Freedom’ Report (March 2005)

The Secretary-General’s report \textit{In Larger Freedom}, released in March 2005, formulated his agenda of proposals for UN reform to be considered at the UN Summit in September 2005, in order to better meet the security challenges of the twenty-first century.\textsuperscript{1110} The report draws heavily on the High-Level Panel report, which prepared the ground for a change of perspective. But at the same time the Secretary-General exercised more moderation in the most contentious fields – for example, on R2P.\textsuperscript{1111} The report takes a comprehensive approach to human security where the twin tracks of ‘freedom from want’ and ‘freedom from fear’ are united and incorporated into all of the proposed United Nations activities.\textsuperscript{1112}

Annan integrated the idea of a responsibility to protect in his report, but not under the Chapter on the rules on the use of force (where it had been placed in the High-Level Panel report), but instead in the Chapter on the Rule of Law.\textsuperscript{1113} This move was made to mitigate the concerns by some states against the military dimensions of the concept of R2P and ease the tensions around it.\textsuperscript{1114} Nonetheless, Annan explicitly stated in the report that he ‘strongly agrees’ with the R2P approach of both the ICISS and the High-Level Panel Report:\textsuperscript{1115}

I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies first and foremost, with each individual State, whose primary raison d’être and duty is to protect its

\textsuperscript{1109} Ibid., p. 626.
\textsuperscript{1110} Annan, \textit{In Larger Freedom. Towards Development, Security and Human Rights for All. Report of the Secretary-General}.
\textsuperscript{1111} Hilpold, \textit{The Duty to Protect and the Reform of the United Nations}, p. 37.
\textsuperscript{1112} Breau, \textit{A Comparison of the United Kingdom and Canadian Approaches to Human Security}, p. 212. The Secretary-General’s report illustrates this clearly by Annan’s view that ‘larger freedom’ encapsulates the idea that development, security and human rights go hand in hand, and are imperative and reinforce one another, see Annan, \textit{In Larger Freedom. Towards Development, Security and Human Rights for All. Report of the Secretary-General}, p. 5, paras. 14, 16.
\textsuperscript{1114} Stahn, \textit{Responsibility to Protect: Political Rhetoric of Emerging Legal Norms}, p. 107. Stahn explains that the Secretary-General placed stronger emphasis on the need to implement the R2P through peaceful means; see also Pace and Deller, \textit{Preventing Future Genocides: An International Responsibility to Protect}, p. 25 on the recharacterisation of the responsibility to protect.
population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required. In this case, as in others, it should follow the principles set out in section III above.1116

Compared with the High-Level Panel, the Secretary-General was more modest with respect to R2P, for example, when leaving the question unanswered on whether there is a ‘right’ or perhaps an ‘obligation’ to use force protectively to rescue people in other states from genocide or other grave crimes.1117 He merely posed questions, rather than advocating a proposition:

As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?1118

The formulation’s linkage to legally defined international crimes also limited the scope of humanitarian situations for R2P and dismissed the more open formulations of the ICISS report. This could have affected the formulation in the Outcome Document. The linking of humanitarian crises to international crimes limits the trigger, avoids preventive action by requiring the actual commission of these crimes, which also delays the response by the need for legal assessments of their existence.1119

In line with the Panel, he recommended that the Security-Council adopts a resolution setting out five principles or criteria to guide the Security Council when deciding whether to authorise or endorse the use of force.1120 The five principles are identical to the ones proposed by the Panel (see Chapter 4.4.). The Secretary-General’s aim is to make the Council’s deliberations more transparent and its decisions more likely to be respected.1121 Wheeler argues that this contention is based upon the assumption that if the Council agrees to the criteria, this would enable it to reach agreement in future cases where the issue of intervention is contested. He is, however, critical of this assumption and argues that there is no guarantee that these principles would lead to consensus.1122

1116 Ibid., p. 49, para. 135.
1117 Ibid., p. 43, para. 122.
1118 Ibid., p. 43, para. 125.
1121 Ibid., p. 43, para. 126.
1122 Wheeler, Towards a New Transatlantic Consensus on the ‘Collective Responsibility to Protect’, pp. 6-7. Wheeler takes the examples of Rwanda and Kosovo to show that the criteria would not have made any difference, since the decisions to intervene were ultimately based upon a political will to act. However, he argues that the principles are still important as legitimating grounds for action.
Hilpold also holds that the criteria or guidelines, although they would receive international recognition, would neither constitute an effective barrier against abusive interventions nor a real guarantee that the Security Council would authorise an intervention if a factual need for such an intervention were to be given.1123 This catalogue of principles would thus produce diverging interpretations and would not necessarily of itself create political pressure or the will to intervene for legitimate reasons or in a legitimate manner.

4.6. The Outcome Document of the UN World Summit (September 2005)

The world’s Head of states endorsed the UN reform agenda at the World Summit in New York on 15 September 2005. After many long and strenuous negotiations, the member states managed to agree on a formulation of a principle of responsibility to protect in the Outcome Document.1124 This provision has been hailed as one of the few true successes of the Summit.1125 The primary responsibility of each state to protect its population was reinforced in the Outcome Document (paragraph 138),1126 but the subsidiary external responsibility to protect of the international community was also acknowledged and specified (paragraph 139). The states also recognised the concept of human security and committed themselves to discussing and defining it further in the General Assembly.1127 A failure of agreement in the Document, however, is the absence of language that called on permanent members of the Security Council to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.1128

According to Bellamy, disagreements on the responsibility to protect were centred on two main issues: Firstly, whether the Security Council alone would have the authority to authorise humanitarian intervention, and secondly, whether to accept criteria or guiding principles for decisions on the use of force.1129 In paragraphs 138 and 139, in the Chapter on human rights and the rule of law, the responsibility to protect was formulated:

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1125 Pace and Deller, *Preventing Future Genocides: An International Responsibility to Protect*, p. 27.
1128 Bannon, Alicia L., *The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism*, Yale Law Journal, vol 115, 2006, pp. 1157-1165, p. 1160. Bannon explains that it was largely due to US pressure that the final Summit agreement removed this proposed language, and she argues that this gap leaves permanent members with a powerful negotiation tool, permitting bad faith vetoes in the face of clear atrocities.
138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The differences with this approach to R2P and the one in the ICISS report are several. The Outcome Document does not affirm that R2P is an emerging norm that spans a continuum of prevention, reaction, and rebuilding. Neither does it include the criteria or precautionary principles for intervention, mainly due to the strong opposition from the United States, China and Russia. The criteria for R2P have instead been suggested to be further discussed in the General Assembly. Instead, paragraph 139 refers to already legally defined crimes in international law, namely genocide, ethnic cleansing, war crimes and crimes against humanity, in order to frame the humanitarian situation that should be at hand. The same approach was taken in the High-Level Panel Report (see Chapter 4.4.). Whether this more legal, rather than political criteria, will help to bring states into consensus on whether and when to take collective measures to protect people within states is difficult to know. Byers finds this set of crimes a negative and unwarranted limitation upon the Council to act on responsibility to protect, especially since it has

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1130 Pace and Deller, Preventing Future Genocides: An International Responsibility to Protect, p. 27. They confirm that the final text on R2P of the Outcome Document is weaker than in the High-Level Panel or the Secretary-General’s report.

1131 Bellamy, Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit, pp. 165-166. The United States did not want criteria to limit its freedom of action or reinforce R2P’s prescriptive component. China and Russia opposed criteria for fear of abuse. Other governments expressed concern during the General Assembly debates that the criteria would be applied arbitrarily or subjectively, see Pace and Deller, Preventing Future Genocides: An International Responsibility to Protect, p. 28.
acted to prevent other humanitarian emergencies such as mass starvation in Somalia and to restore democracy in Haiti. Hilpold similarly sees the criteria as being equivalent to a very soft self-regulation. On the other hand, the risk of the Council becoming active in fewer rather than more humanitarian cases might not be too great. As Byers points out, the Security Council will not in the end be bound by non-binding guidelines and in reality it will continue to have all means available to it under the UN Charter and international law to make decisions on military interventions.

The paragraph endorsing a principle on responsibility to protect stipulates a set of elements or criteria that are discussed briefly below. The analysis on the external responsibility to protect may be separated in two parts – one dealing with the non-military measures to protect human security, and the second establishing when military intervention may be considered. Both aspects of the principle of R2P in the Outcome Document could be regarded as a moral and political commitment by states with binding effects for international organisations, but not yet a legal responsibility in the form of legal duties. However, certain aspects of the commitment to protect by non-military means, however, reflect international law proper, in particular the obligation to prevent genocide, enforcement of international humanitarian law, and the duty to cooperate for the promotion and respect of human rights. (See more in Chapter 5.4.)

Firstly, it is established that it is the international community, through the United Nations, that assumes responsibility for helping to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility is to be exercised through the use of appropriate diplomatic, humanitarian and other peaceful means (in accordance with Chapters VI and VIII of the Charter). These ‘non-forceful’ measures shall, according to the formulation, be channelled through the UN, but should also for natural reasons be possible to undertake individually by states when such measures are not in violation of international law.

Secondly, when considering military enforcement measures as a means of carrying out the responsibility to protect, the states express that they are prepared to carry out this responsibility through the Security Council, not that there is a legal obligation to do so. It is notable that this part of the principle is not formulated with obligatory language in the

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1132 Byers, *High ground lost on UN's responsibility to protect*.
1135 The prohibition on genocide, for example, is an *erga omnes* obligation that all states have a legal interest in protecting and upholding, and the Genocide Convention also imposes legal obligations individually on states to prevent and punish genocide. See also other legal obligations for states to use non-military means to promote respect for human rights and humanitarian law in Chapter 5.4.
form of a duty, but by simply stating a preparedness to act collectively in a timely and decisive manner. Thus the states are in the position of indicating that they may use force to protect, but that this shall be achieved collectively through Security Council authorisation under certain circumstances and on a case-by-case basis. The responsibility of the Security Council to protect under Chapter VII, endorsed by states in the Outcome Document, therefore confirms a legal right of the Council to protect by military means but not a legal obligation in all cases alike. Paragraph 139 furthermore establishes a moral and political responsibility of the Security Council to consider the protection of populations by military means when certain circumstances prevail.

The military aspect of the principle to protect in the Outcome Document is connected to several criteria in order for such a forceful measure to be considered. Firstly, the forceful action must be made “in accordance with the UN Charter, including Chapter VII”. This phrase can apparently be read in different ways. One way, which the majority of states would submit to, is that enforcement action must be in accordance with Chapter VII. Hence only Security Council authorised military action to protect was accepted by states. The Outcome Document is generally considered to have placed the external responsibility to protect by military means squarely under the auspices of the Security Council by focusing primarily on collective action through the Security Council and Chapter VII.

The paragraph also mentions co-operation with regional organisations ‘as appropriate’. Even though the paragraph includes a reference to Chapter VIII, it is not made in relation to the phrase indicating co-operation between the Security Council and regional organisations. It is therefore unclear in what way this co-operation may take form, and whether this open spot allows for ex post facto legitimisation of unauthorised humanitarian interventions by regional organisations. However, the paragraph completely leaves out any explicit statement on the possibilities open for either regional organisations or coalitions of the willing to make unauthorised humanitarian interventions. The topic was far too controversial to be considered in the intergovernmental debates leading to the Summit, and its main focus was on improving, reforming and strengthening the UN system rather than considering alternative ways of operating outside the UN.1136 A supportive factor for this interpretation is the placing of the R2P paragraph under Chapter IV of the Outcome Document, dealing with human rights and the rule of law, separate from the section on the use of force. It is possible to argue that the Global Centre for the Responsibility to Protect also supports this interpretation by its official homepage statement that the World Summit Outcome consensus on R2P was silent on the question of what would happen if the Security Council fails to act, and that the Centre supports the opinion that even in a situation where peaceful means are inadequate and the precautionary principles are satisfied, it would be illegal for states to take military action in the

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1136 Pace and Deller, Preventing Future Genocides: An International Responsibility to Protect, p. 29.
absence of a Security Council resolution (or a General Assembly resolution under “Uniting for Peace”). The debates at the UN Summit also support this interpretation. There was no state that officially made express statements in support of unauthorised humanitarian intervention, and even the strongest proponents in the EU and Africa stated that the use of force to protect was a measure only of last resort and exceptional circumstances. The view expressed by Russia in declaring that the UN was already capable of responding to crises under current situations supported the interpretation that the Security Council already had the power and legal right to carry out its external responsibility to protect. (See more in Chapter 6.3.)

The other alternative interpretation, which some commentators propose, is that military action may also be taken separate from the Security Council, as long as it is done in accordance with the UN Charter. This interpretation, however, is based upon reinterpretations of the UN Charter with regard to unauthorised humanitarian interventions, which have not yet been accepted by the majority of states. Bellamy and Stahn claim that the key phrase in paragraph 139 that “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter”, could be read as suggesting that concerned states may choose to work with the Security Council, but also through alternative arrangements justifying their action on R2P language. Bellamy believes that this small window of opportunity was reinforced in the section on the use of force. As a result states would be able to make unauthorised interventions aimed at either upholding the UN’s humanitarian principles outlined in Article 1 of the UN Charter or acting on ‘implied authorisation’. He is saying that the UN Charter’s purpose of promoting human rights (Article 1 (3)) together with a restrictive interpretation of the prohibition on the use of force (Article 2 (4)), would allow for unauthorised military intervention for humanitarian purposes if it does not threaten the territorial integrity or political independence of a state. Similarly, regional action would not violate the UN Charter (Article 53) if implied legitimisation of the Council is sought. This interpretation, however, conflicts with the

1139 See Chapter 7.
1141 See more on this argumentation for unauthorised humanitarian intervention in Chapter 7.2.3.
1142 See more on this type of argumentation in Chapter 7.1.3.1.
express wording “through the Security Council”, and should therefore not be given too much weight, but rather be seen as a *lego ferenda* argument for further action when the Security Council fails to take action.

In the section on the rules on the use of force in the Outcome Document, the member states reiterate the obligation to “refrain from the threat or use of force, in any manner inconsistent with the Charter”.1143 No criteria or guidelines for intervention are included in this passage. The states furthermore pledge themselves determined to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations that might lead to a breach of the peace.1144

This passage has been interpreted by some scholars as leaving the door open for unilateral humanitarian intervention.1145 I disagree with this conclusion. It seems somewhat overly optimistic and leaves out a contextual interpretation of the Document. Two paragraphs below this passage the Document makes clear the impossibility of unauthorised unilateral humanitarian interventions:

We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.1146

It is therefore reasonable to assert that the Outcome Document neither advances the question of how to deal with unauthorised interventions nor sets it back.1147 At the most, one could concede that the paragraph leaves the door open for interpretation, but that it lacks express and explicit acknowledgment of the rights or responsibilities of regional organisations or a coalition of willing states to protect by military means.

A second criterion for military action, is that the Security Council is to consider the responsibility to protect on a case-by-case basis. This clearly shows that member states have agreed to limit responsibility to that of a permissive right rather than a duty to be carried out in all cases alike. The decision to take military action will be based upon a political assessment by the Council in the individual case. This element reflects

1144 Ibid., p. 21, para. 77.
and takes into account the political reality and existing power structures in the Council and world order.

Thirdly, the decision is a question of last resort. The criterion stating that “should peaceful means be inadequate” can be interpreted in different ways. Some commentators interpret the phrase as being a requirement that peaceful means must have been exhausted. Another more convincing interpretation is that peaceful means must be considered to have had no impact on or was unable to change the security situation. Thus it could be argued that it should be given the same interpretation as that of the same phrase in Article 42 of the UN Charter. There it means that not all forms of peaceful means must have been employed and failed, but that the Security Council believes that such means would be inadequate to address the security situation in question.

Fourthly, the state has to ‘manifestly fail’ to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, rather than just be unwilling or unable to protect its population from mass atrocities, in order for the responsibility to fall to the international community. The wording “national authorities are manifestly failing to protect their populations” increases the threshold (cf. unable or unwilling to protect in the ICISS report) for the UN to take action to protect. It furthermore delays early assessment and action, and excludes the possibility of forceful preventive action. Precisely what ‘manifestly fails’ entails is difficult to ascertain and the future of Council practice will have to show where the threshold lies. Anti-interventionists have argued for non-intervention by the UN with arguments referring to the primary responsibility of the state and that the UN does not as yet have a responsibility to protect. Stahn argues that the terminology is unclear in the Outcome Document and could thus be invoked in order to prevent UN action (as in the case of Darfur on genocide). Some commentators have argued that this formulation does not provide for the Security Council to act on the basis of neglect and obstruction of a state to provide security for its population. However, in the immediate aftermath of the humanitarian crisis in Burma after the Nargis cyclone in May 2008, France’s Foreign Minister Bernard Kouchner suggested invoking the ‘responsibility to protect’ in the UN Security Council as a legal means to prise open Burma’s borders to outside help. The call, however, was later retracted by Kouchner as being inappropriate in a non-conflict situation, which came to generate an intense debate in policy, advocacy and media circles. Edward Luck, the Secretary General's Special Adviser on R2P argued, for example, that “linking the ‘responsibility to protect’ to the situation in Burma is a misapplication of

1148 See Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, p. 115; see also same opinion in Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, p. 33.
the doctrine". The Secretary-General also rejected the application of the R2P and stated:

Our conception of RtoP, then, is narrow but deep. Its scope is narrow, focused solely on the four crimes and violations agreed by the world leaders in 2005. Extending the principle to cover other calamities, such as HIV/AIDS, climate change or response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.

The omission of protection, unwillingness to protect, or even obstruction to protect its own population appears to be insufficient in order for the external ‘responsibility to protect’ by military means by the Security Council to be activated, according to present state practice and application of the norm since 2005. What distinguishes the case of Burma from others where the Council has authorised humanitarian intervention is the lack of the ingredient of armed conflict as an element contributing to the Council’s determination of a threat to the peace under Article 39. The situation in Burma would have required a new interpretation and additional widening of the notion ‘a threat to the peace’ by the Council, to also encompass natural catastrophes where the state concerned manifestly fails to protect its population.

However, Gareth Evans and other commentators have argued that in the case of Burma (2008) the refusal to co-operate with the external humanitarian relief agencies could be considered in itself as a crime against humanity. Deliberate omission to protect a population from natural disasters, starvation and disease are not encompassed as such by the crimes enlisted in the Outcome Document, but it could be argued that a policy of malign neglect and the blocking of external humanitarian aid to a suffering population has widespread security consequences. The systematic causing of great suffering in such circumstances should be regarded on an equal footing with an ‘attack against civilians’ and ‘as other inhuman acts’ and thus constitute a crime against humanity.

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1150 Chatpar, Sapna, Responsibility to Protect Civil Society (Publ.), Responsibility to Protect and Burma/Myanmar, 9 May 2008, Digest Number 350.
1152 Thakur, e-International Relations (Publ.), Burma and the responsibility to protect: first, do more good than harm.
1153 Evans, Facing Up to Our Responsibilities, The Guardian, 12 May 2008. He argued that “If what the generals are now doing, in effectively denying relief to hundreds of thousands of people at real and immediate risk of death, can itself be characterised as a crime against humanity, then the responsibility to protect principle does indeed cut in. The Canadian-sponsored commission report that initiated the R2P concept in fact anticipated just this situation, in identifying one possible case for the application of military force as ‘overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened’.”
1154 On the definition of crimes against humanity that would apply to this situation, see Article 7 (1)(k) of the Rome Statute: “[O]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”; see also Thakur, e-International Relations (Publ.), Burma and the responsibility to protect:
Apparently this argumentation was not persuasive in this case. Even if the negligence and deliberate obstruction by the regime in Burma were to be considered a crime against humanity, the Security Council would still have to find that the crime and the humanitarian situation constituted a threat to the peace in order to decide whether or not to take enforcement measures under Chapter VII. The humanitarian situation in Burma was never determined as one that constituted such a threat.

Lastly, any military action is to be undertaken in order to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity. The ICISS just cause threshold for military action was dropped in the Outcome Document, but it could be claimed that any of these listed grave crimes are more or less a substitute for the threshold. The formulation does not appear to allow for preventive action, since the state has to be already seen to be manifestly failing to protect when the appropriate responsibility is to be transferred to the international community. Bellamy explains that both Russia and China rejected this possibility, which means that the ICISS and High-Level Panel's recommendations that action may also be taken in anticipation in order to prevent a humanitarian catastrophe, was dropped in the Outcome Document.\footnote{1155} 

On the question of the potential impact of R2P in the Outcome, Document Brunnée and Toope state that it might only have been intended as a rhetorical shell by some states:

It could be argued that the inclusion of the responsibility to protect in the Outcome Document was simply the result of a trade-off, in which some states agreed to the articulation of the concept because they gained other benefits. Primary amongst these benefits would be the inclusion of many references to development assistance as a core responsibility of the United Nations and of wealthy member states. Bargaining might also have resulted in the exclusion of certain proposals, such as a definition of terrorism and details related to the new Human Rights Council, with the responsibility to protect being included because it was actually less worrisome to some member states than were other proposals. They might have been willing to go along with a rhetorical shell.\footnote{1156}

\textit{first, do more good than harm.} He argues in line with Gareth that in the ICISS report “we had explicitly included ‘overwhelming natural or environmental catastrophes’ causing significant loss of life as triggering R2P if the state was unable or unwilling to cope, or rebuffed assistance. This was dropped by 2005. But ‘crimes against humanity’ was included and \textit{prima facie} would seem to apply to the Burmese generals’ actions in blocking outside aid’. However, practically and politically he did not believe in invoking R2P in the situation in Burma since it would not gather sufficient support, and thus argued that invoking it there would have endangered lives elsewhere in the future without saving any, and possibly even delaying help for the Nargis victims.


However, the scholars assert that it is difficult to dismiss the Outcome Document’s endorsement of the R2P as mere ‘cheap talk’. But they point out the failure to design a role for the new Peacebuilding Commission in relation to the responsibility to protect, despite the obvious interconnections between humanitarian crises and peacebuilding. In particular, the idea that the Commission would fill an early warning function was rejected, which undercuts the emphasis previously placed upon prevention as a central aspect of the responsibility to protect.\footnote{Ibid., p. 16.} The Summit also failed to locate the responsibility to protect in any UN structures apart from the Security Council, and this choice increases the pressure on the Security Council to meet the burden of the world’s expectations for action in humanitarian crises. According to Brunnée and Toope, one reason for the opposition to adopting principles or criteria against which the Council’s decision to use force in defence of suffering populations should be justified, these would also become a test against which Security Council inaction could be measured, and opening up the way for alternative action.

Despite the critique raised with regard to the Outcome of the Summit, Kirgis believes that paragraph 139 could be viewed as a legally-significant interpretation of the scope of Security Council authority in situations of mass violence within a single state.\footnote{Kirgis, Frederic L., ASIL Insights (Publ.), International Law Aspect of the 2005 World Summit Outcome Document, "www.asil.org/insights/2005/10/insights051004.html", (2006-03-28).} He, however, bases this assessment from the standpoint taking a rather narrow position of the Security Council powers to act under Chapter VII, while at the same time stating that the Security Council’s authority to use force under Chapter VII remained somewhat controversial if the mass violence in question were to take place entirely ‘within’ a state. The general view among scholars on the Council’s powers to authorise humanitarian interventions is broad, and it could be argued that this right is already part of loc lata and confirmed by the Council’s practice of humanitarian interventions during the 1990s (see Chapter 6.3.3. and its conclusion).\footnote{The practice concerns the interventions in Somalia, Bosnia, Rwanda, Haiti, and East Timor.} It could be added that there is a debate whether the practice is qualified to humanitarian situations emanating from armed conflicts having international effects, or from a failed state situation (see Chapter 6.3.2.).

Other scholars have come to the conclusion, in particular after the Darfur Case, that paragraph 139 would not have made any difference if it had existed during the humanitarian crisis in Rwanda or Bosnia.\footnote{Bellamy, Preventing Future Kauusos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit, p. 8.} Bellamy argues that it permits the view that the Security Council’s responsibility is different from that of the host state, and the formulation does not solve the problem of which actor should shoulder responsibility. He maintains that R2P, as formulated in the Outcome Document, is unable to avoid the two most important pitfalls: 1) to
become a phraseology for justifying inaction or 2) to become associated with the abuse of humanitarian justifications. Bellamy argues that the Darfur and Iraq Cases have in fact shown that ‘responsibility to protect’ language can be mobilised to legitimate opposition to intervention in humanitarian emergencies as well as to supporting it in other less emerging situations and hence be abused as a ground for justification.

Many lawyers have been slow in reacting and analysing R2P in international law, or shown reluctance towards adopting the concept as such. A heavy critique and resistance towards it was delivered in a speech by José E. Alvarez, the President of American Society of International Law, at the 2007 Hague Joint Conference on Contemporary Issue of International Law, 30 June 2007. Alvarez, states that old-fashioned notions of unimpeachable sovereignty and non-intervention against overweening power retain their traditional appeal in the war against terrorism after 9/11, and that now is not the time for such a fundamental reinterpretation of the UN Charter or other fundamental norms of international law. He states that R2P reflects a post-Cold War but pre-9/11 view of sovereignty that treats it as more of a hindrance than a protection, and argues that this view is counter-productive at a time when the largest military and economic power seems all too ready to deploy “preventive” use of force anywhere and everywhere. The post-9/11 effects on sovereignty have arguably made it more porous why he argues that its traditional interpretation should be upheld.

Although the Outcome Document formulation on the R2P is not legally binding it is not without some legal significance. It should first and foremost be regarded as a moral and political declaration by the international community representing the positions of states. But secondly, it may be argued that the Document is a written statement in abstracto for all states, which could be said to possess value of evidence of opinio juris that may contribute to a customary process on emerging norms on R2P. The value of this statement with regard to the external R2P by military means, however, is limited to the external responsibility of the Security Council, and would therefore carry little value as evidence supporting such forceful external R2P of other actors.

Resolutions of IGOs can, if making an implicit or explicit pronouncement on customary law, be either declaratory of existing customary law or contribute to its creation. The same principles apply to the resolutions of international conferences of a universal character.

1161 Ibid., p. 12.
1162 Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, p. 40.
1164 Ibid., pp. 7-8.
1165 See the ILA Committee view on IGO resolutions in Chapter 2.2.1.
mutatis mutandis, as to General Assembly resolutions.1167 The connection between General Assembly resolutions and opinio juris was confirmed by the ICJ in the Nicaragua Case, and these may “in some instances constitute evidence of the existence of customary law; help to crystallise emerging customary law; or contribute to the formation of new customary law”.1168 In this case it could even be discussed whether the formulation explicitly or implicitly enunciates binding rules on R2P by military means in the form of a legal pronouncement.

But the phrase “we are prepared to take collective action” most likely only indicates a political and moral commitment or duty and not a form of legal commitment in the form of a legal duty. The following analysis in Chapters 6 to 8 show that the emerging norms on R2P by military means are concerned with legal rights and not legal duties to protect by military means. This, however, does not preclude that the Outcome Document declaration of commitment to take collective action to protect populations in certain circumstances may constitute a legal pronouncement of already existing legal duties to undertake non-military measures to protect. This is in fact the most realistic interpretation, which also corresponds with the findings of the legal analysis in Chapter 5.4.

4.7. The R2P at the UN

The Security Council met for two days in May 2002 to discuss the ICISS report.1169 There appeared to be little appetite to commit to the principles of R2P, and the specific results of the meeting were regarded as mixed.1170 There are several reasons for the apparent lack of interest in the R2P concept by many of the permanent members. The US has expressed scepticism on the wisdom and utility of articulating criteria in advance, and in its view such criteria should instead be assessed in light of the circumstances of a particular case.1171 Russia and China preferred to reiterate the commitment to the principles of non-intervention, state sovereignty and territorial integrity, and were more than reluctant to

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1168 Ibid., p. 55. See also Thirlway, The Sources of International Law, p. 141; Brownlie, Principles of Public International Law, pp. 14-15. When resolutions are concerned with general norms of international law and adopted by majority vote, these can have law-making consequences, according to Brownlie. Among the examples of ‘law-making resolutions’ that he mentions are the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes and the Declaration on the Granting of Independence to Colonial Countries and Peoples.
1170 Welsh, Thielking & MacFarlane, The Responsibility to Protect. Assessing the Report of the International Commission on Intervention and State Sovereignty, p. 511. Lack of political will seemed to be the greatest hindrance to enforcing R2P if new humanitarian situations evolved. Russia resisted any idea of restraint in the veto-power, and the United States showed little interest in the concept at the meeting.
1171 This has been their position from the beginning, before and during the 2005 Summit, see Stromseth, Rethinking humanitarian intervention: the case for incremental change, p. 264.
open the way for a new doctrine encompassing humanitarian intervention. The UK, on the other hand, has been much more keen on embracing criteria for humanitarian intervention since the NATO intervention in Kosovo, and has taken initiatives for a ‘framework to guide humanitarian intervention’.1172

The High-Level Panel recommended that the General Assembly and the Security Council adopt resolutions setting out the criteria to govern decision-making on the use of force.1173 The Secretary-General endorsed in his report In Larger Freedom the idea of ‘codifying’ the criteria, but did so only in respect of a Security Council resolution. Appeals to adopt criteria or frameworks for humanitarian intervention are not new and such proposals have constantly been turned down in the course of history.1174 It was not until 2005 that the first historical resolution embedding such formulations was adopted in (a Special Session of) the General Assembly. Subsequent the adoption of the Outcome Document, the Security Council adopted a couple of resolutions endorsing the principle of R2P established in 2005. The formulations, however, were far from a codification of a full doctrine or framework of R2P. But they established a principle of R2P with some elementary criteria to guide the action of states and the United Nations to protect human security.

Despite the lack of initial interest for R2P in the Council, the UK together with France and Denmark took an initiative in a Draft Security Council resolution on ‘the protection of civilians’ in the autumn of 2005. The first Draft, which recalled the Outcome Document and underlined its provisions on R2P, also made references to the responsibilities of individual member states as well as the international community acting through the UN, including the Security Council.1175 The draft, however, was rejected by the Council because of the major controversy surrounding R2P. Russia, China, Algeria, the Philippines and Brazil took a guarded approach and advocated a discussion in the General Assembly before any Council adoption of R2P language.1176

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1172 Foreign Secretary Robin Cook articulated in a speech to the American Bar Association, meeting in London on 19 July 2000, a set of guidelines for intervention to stop massive and systematic violations of human rights, humanitarian law and crimes against humanity, as a response to Kofi Annan’s challenge after Kosovo. These would help the Security Council to reach consensus on action during a crisis, see Cook, Robin, Speech 19 July 2000, Humanitarian Intervention, United Kingdom Materials on International Law, BYIL, 2000; for a short presentation of the British guidelines see also Stromseth, Rethinking humanitarian intervention: the case for incremental change, pp. 262-264. These guidelines were developed into six principles, see Cook, Robin, Speech 19 July 2000, Humanitarian Intervention, United Kingdom Materials on International Law, BYIL, 2000, and later on, into a set of ten policy guidelines for the use of force in the ‘UK paper on international action in response to humanitarian crisis’, see UK Paper on International Action in Response to Humanitarian Crises, BYIL (2001); see also Stromseth, Rethinking humanitarian intervention: the case for incremental change, pp. 262-265.


On 9 December 2005 the first open debate on ‘the protection of civilians’ was held in the Security Council. States discussed the Secretary-General’s report on the protection of civilians in armed conflicts (2005), in which Annan referred to the Outcome Document formulations on R2P. Annan stated in the report that he was particularly pleased that the Document emphasised the R2P. In the following debate, 21 states spoke in favour of it and on its inclusion in a thematic resolution on the protection of civilians. The UK circulated a second draft resolution in the Council at the beginning of April 2006, which came to gain the acceptance of Russia and China. The Council thus made its first express reference to the ‘concept of R2P’ on 28 April 2006, in its third unanimously adopted ‘thematic resolution’ on the ‘protection of civilians’ – resolution 1674. The preamble reaffirmed that it is the parties to a conflict that bear the primary responsibility for taking all feasible steps to ensure the protection of affected civilians. Operative paragraph 4 of the resolution reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

In 2006 and 2007 there were three additional open debates in the Security Council on the protection of civilians, with states continuing to discuss the issue of R2P within the Council. The Security Council

1177 On the links between R2P and the protection of civilians, see MacFarlane and Foong Khong, *Human Security and the UN: A Critical History*, pp. 219-223, 183 et seq.


1181 SC Res. 1674 (2006), 28 April 2006, UN Doc S/RES/1674, 2006. The thematic resolutions, however, were not adopted under Chapter VII. See also S/PV.5430, 28 April 2006, UN Doc S/PV.5430, 2006. The two previous resolutions are: SC Res. 1265, 14 September 1999, UN Doc S/RES/1265, 1999 and SC Res. 1296, 19 April 2000, UN Doc S/RES/1296, 2000; see also Stahn, *Responsibility to Protect: Political Rhetoric of Emerging Legal Norms?,* p. 100; Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, p. 36.

1182 They were held on 28 June 2006 (following the adoption of resolution 1674), on 4 December 2006 and the third on 22 June 2007.
made its first reference to R2P in a ‘country specific resolution’ on Darfur on 30 July 2004 in resolution 1556,\textsuperscript{1183} and later also on 31 August 2006 in resolution 1706.\textsuperscript{1184} It has continued to make references to R2P in several resolutions, in particular those dealing with the situation in Darfur.\textsuperscript{1185} In resolution 1769, adopted on 31 July 2007, the Security Council authorised under Chapter VII the UN/AU hybrid operation (UNAMID) in Darfur. The Council explicitly included the mandate to “protect civilians without prejudice of the government of Sudan”.\textsuperscript{1186} The Council also decided to make use of the previously elaborated mandate for UNAMID made in the letter by the Secretary-General to the President of the Security Council, dated 5 June 2007.\textsuperscript{1187} Paragraph 54 (b) of this document states that the mandate shall contribute to the protection of civilian population under imminent threat to physical violence and prevent attacks against civilians, within its capability and areas of deployment, without prejudice to the responsibility of the Government of the Sudan.

UNAMID’s tasks on security, stated in paragraph 55 (b)(vii) of the Secretary-General’s letter, reiterates the protection of civilians under imminent threat of physical violence and the prevention of attacks against civilians. Protection mandates have become common in the Security Council’s practice of the 21st Century, but in almost all cases they have been linked to consent-based operations.\textsuperscript{1188} The Darfur Case apart, there has been no example of Security Council practice of humanitarian intervention since the ICISS launch of the R2P doctrine in 2001, nor since the acknowledgment of the R2P doctrine in the Outcome Document 2005. (On the failed efforts to protect civilians in the case of Darfur, see Chapter 6.3.3.)

In the general debates of the General Assembly in 2006 and 2007, states have discussed the issue of operationalising R2P, improving the capacity to act, and achieving institutional reforms, in particular with regard to the situation of Darfur.\textsuperscript{1189} There is an ongoing backlash in the

\textsuperscript{1183} SC Res. 1556, 30 July 2004, UN Doc S/RES/1556, 2004, preambular para. 9: “Recalling in this regard that the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory and that all parties are obliged to respect international humanitarian law.”


\textsuperscript{1186} See op. para. 15 (ii), S/RES/1769 (2007).


\textsuperscript{1189} See e.g. Kurki, Milja, Sinclair, Adriana, Hidden in plain sight: reflections on the limitations of the constructivist treatment of social context. Article to be submitted to EJIR, work in progress, 2006 (on file with authors); Responsibility to Protect - Civil Society (Publ.), Excerpted statements
support of an emerging norm of R2P within the General Assembly. Canadian Ambassador Heinbecker explained in a seminar at SIPRI in the spring of 2008, that certain states have even openly claimed that they were forced into endorsing the concept in 2005, but that they no longer support the norm.1190

On 11 December 2007, Secretary-General Ban Ki-Moon received an assent from the Security Council to appoint Edward Luck as his new Special Adviser on the Responsibility to Protect.1191 Luck is now serving part-time as Assistant Secretary-General and will be working closely with Francis Deng, the Special Representative for the Prevention of Genocide and Mass Atrocities. There was initially resistance among some states to allow this appointment.1192 There was likewise resistance against the adding of the word ‘Mass Atrocities’ to Deng’s title, because of opposition to widening his mandate in this respect.1193 The majority of states in the General Assembly were against this change, while the Security Council pressed for it. The primary role will be conceptual development and consensus-building. In Ki-Moon’s letter to the Security Council it is stated:

As the Special Representative and the Special Adviser develop and implement their mandates, they will closely consult and coordinate with the Department of Political Affairs of the Secretariat and the High Commissioner for Human Rights, including in the context of their field presences and link to the United Nations human rights Treaty Bodies and Special Procedures.1194

4.8. Responses and state positions on R2P

4.8.1. General overview

Reactions to the ICISS report were generally positive, in particular among Western and ‘pro-humanitarian intervention’ states.1195 Western from open debates at the opening of the 62nd General Assembly Session, 25 September-03 October 2007, General Assembly Chamber, "http://www.responsibilitytoprotect.org/index.php/government_statements/", (2007-11-23), e.g. Lithuania, UK, Liechtenstein, Belgium and Lesotho. Different initiatives to make R2P operational have been taken in several places by different actors, see e.g. Mepham, David, Ramsbotham, Alexander, Safeguarding Civilians. Delivering on the Responsibility to Protect in Africa, IPPR, London, 2007.


1195 Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, p. 36. See also Responsibility to Protect - Civil Society (Publ.), Background of the norm. 30 November 2006, "http://www.responsibilitytoprotect.org/index.php/civil_society_statements/?theme=alt3
and many sub-Saharan African and Latin American states have largely welcomed the report, while East Asian countries have been more cautious. In the “Ezulwini Consensus” adopted in March 2005 by the AU, the concept of R2P was acknowledged and supported by its member states.

The ICISS report was most favourably received by Canada, Japan, Germany and the UK, but several other strong supporters to the concept of R2P can be found not only among states in Europe (such as Sweden, Norway, Denmark, France, the Netherlands, Switzerland, Croatia, Slovakia and Ireland), but also among African states (Rwanda, Congo, Nigeria, South Africa, Ghana, Mali, Guinea-Bissau, and Tanzania), and in South America (Peru, Argentina and Colombia). Australia, Japan, South Korea, and New Zealand have also been positive and supportive of R2P. Among Asian states in general, reactions have been mixed. Several states, including Myanmar, North Korea, and India, have encouraged G77 to reject the report on the grounds that it provides a pretext for developed countries to meddle in the domestic affairs of the developing world.

In the Security Council most of the P-5 states were sceptical from the beginning. The Council retreated in May 2002 for discussions on R2P. The concerns of the United States were related to a reluctance to precommit its forces in situations where it had no national interests to act upon, and to constrain its right to decide when and where to use military force. China has consistently opposed the concept by asserting that the Security Council should be the only decision-maker with regard to the use of force. Russia shared China’s view but supported some of the rhetoric of R2P. Both strongly rejected any

\[\text{\textquotedblright} (2007-05-15), which mention Canada, Argentina, Ghana, Mali, Sweden, Switzerland, Rwanda and United Kingdom as the concept's strongest advocators.\]
\[1196\] MacFarlane, Thielking and Weiss, The Responsibility to protect: is anyone interested in humanitarian intervention?, p. 982. Both the AU (African Union) and SADC (Southern African Development Community) has explicit provisions in their Charters for military intervention to stop genocide, war crimes and crimes against humanity which is an explanation for the positive response by African states towards R2P (see more in Chapter 7.1.3.2.1.). Lewitt, however, points out that it is ironic that the ICISS threshold appears to be more conservative than those of African states, since it does not include systematic racial discrimination, see Levitt, The responsibility to protect: A beaver without a dam?, p. 168.

\[1197\] The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”, Executive Council, 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ethiopia, Ext/EX.CL/2 (VII), 2005, p. 6. The AU agreed that humanitarian interventions by the AU should be made with the approval of the Security Council, but stated that “although in certain situations, such approval of the Security Council could be granted ‘after the fact’ in certain circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations”.


\[1200\] Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, p. 36.
developments that could open the way for unauthorised unilateral interventions.

In the preparations for the UN World Summit in 2005, draft formulations on the responsibility to protect in the Outcome Document were somewhat contested and closely debated. The United States proposed changes that were to substantially weaken the concept, and the Non-Aligned Movement (NAM), represented by Malaysia, was rather hostile to wordings acknowledging that all governments had a responsibility to protect civilians. R2P was instead framed as a “moral responsibility”. The preference for this framing was also apparent in the US position during the negotiations. The US Representative to the United Nations, John R. Bolton, declared in a letter that the US supported the Security Council in carrying out its responsibilities, including enforcement action, to protect civilian populations against genocide, ethnic cleansing, crimes against humanity and other large-scale atrocities when national authorities were unwilling or unable to do so. However, the US refrained from interpreting the UN Charter creating a legal obligation for the Security Council to support enforcement action in various cases involving serious breaches of international peace, and furthermore did not accept the predetermination in the abstract of what measures to adopt in specific cases. Bolton also argued that the responsibility of other countries was not of the same character as the responsibility of the host state, and therefore wished to avoid language that reflected the idea that other states inherit the same responsibilities as the host state. He explicitly stated that the US did “not preclude the possibility of action absent of authorisation by the Security Council”, just as they do not accept that either the UN as a whole, or the Security Council, or individual states have an obligation to intervene under international law.

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1201 This information in the following text is to a great extent based upon government statements during the informal discussions of the General Assembly in advance of the September High-level Plenary. The World Federalist Movement (WFM) collected written statements, which were circulated by governments and sometimes made available on their mission’s websites, and analysed oral statements delivered on behalf of governments during the deliberations on R2P. See R2P-CS (Publ.), State-by-State Positions on the Responsibility to Protect; See also Reform the UN.org (Publ.), 2005 World Summit Excerpts, "http://www.reformtheun.org/index.php/issues/1736?theme=alt4", (2007-08-16).


1205 For a background account see Bellamy, Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit, p. 7.

1206 This statement stands in contrast to the US state practice on the use of force formulated in 2003, based upon the Haass theory on forfeiture of sovereignty, see Contemporary Practice of the United States, Use of Force and Arms Control, American Journal of International Law, vol 97, 1, 2003, pp. 203-205, p. 204: “The first qualification of sovereignty comes when a state commits or fails to prevent genocide or crimes against
The NAM argued that R2P would compromise the sovereignty of individual states and could not be enforced consistently. Ardent R2P spoilers at the deliberations, keen on weakening the drafts on R2P, included India, Pakistan, Iran, Egypt, Syria, Venezuela, Cuba, and Russia. The G77 and China had previously made sceptical or negative comments on R2P during the UN Summit preparations in April and June, but made no common comments on R2P at a later stage of the process. It seems that states belonging to both the NAM and G77 became openly divided over the issue over time. NAM noted the divergence of views on R2P and is considering its content and implications.

The three ‘CANZ-states’ (Canada, Australia and New Zealand) were all positive on R2P and strongly affirmed its principles and importance. Canada declared that no other element in the Outcome Document was more important than R2P. They also joined Rwanda and Sweden in emphasising prevention. Australia believed that discussions on R2P should not be restricted to the General Assembly and urged states to strongly endorse R2P. New Zealand expressed the view that R2P was within the parameters of international law, with the use of force as last resort. The Caribbean Community (CARICOM) was less clear in its position but welcomed the opportunity to discuss the concept further. It would consider giving support to R2P if necessary safeguards were put in place to ensure respect for the principles set forth in the UN Charter and in international law.

At the World Summit several states continued to advocate strongly the emerging R2P, while other states objected to it forcefully. Among the African states the Rwandan President, Paul Kagame, stressed “the importance of international collective responsibility to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity,” while humanity on its territory. The international community then has the right – and, indeed, in some cases, the obligation – to act to safeguard the lives of innocents.”

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1207 Gray, A crisis of legitimacy for the UN collective security system?, p. 167.
1208 Oxfam Press Release (Publ.), United States and other governments may thwart chance for major UN reforms.
1210 See and cf. R2P-CS (Publ.), State-by-State Positions on the Responsibility to Protect, See also Reform the UN.org (Publ.), 2005 World Summit Excerpts.
1211 Canada, New Zealand and Australia.
1212 R2P-CS (Publ.), State-by-State Positions on the Responsibility to Protect.
1213 Ibid.
1214 See the compilation of R2P excerpts, Reform the UN.org (Publ.), 2005 World Summit Excerpts.
President of Zimbabwe, however, expressed strong misgivings on the responsibility to protect:

The vision that we must present for a future United Nations should not be one filled with vague concepts that provide an opportunity for those states that seek to interfere in the internal affairs of other states. Concepts such as “humanitarian intervention” and the "responsibility to protect" need careful scrutiny in order to test the motives of their proponents.\textsuperscript{1216}

The militarily important African state of Nigeria neither mentioned R2P nor considered how to address genocide in any of its statements. Venezuela argued for a new economic and political order in which they questioned the very idea of R2P:

let’s not allow a handful of countries try to reinterpret with impunity the principles of the International Law to give way to doctrines like “Pre-emptive War”, how do they threaten us with pre-emptive war!, and the now so called “Responsibility to Protect”, but we have to ask ourselves who is going to protect us, how are they going to protect us.\textsuperscript{1217}

The Canadian position on R2P and humanitarian intervention became more restricted and took a step back during the Summit, mainly due to the forceful resistance of many states, and it came to have a more Security Council orientation than originally. Former Prime Minister Paul Martin mentioned pride in the Canadian lineage of R2P, and declared:

Clearly, we need expanded guidelines for Security Council action to make clear our responsibility to act decisively to prevent humanity’s attack on humanity. The “Responsibility to Protect” is one such guideline. It seeks rules to protect the innocent against appalling assaults on their life and dignity. It does not bless unilateral action. To the contrary, it stands for clear, multilaterally-agreed criteria on what the international community should do when civilians are at risk.\textsuperscript{1218}

Ireland was the other state that spoke explicitly on military force within the UN framework with regard to R2P:


We are all sovereign states, with sovereign rights and responsibilities. But where these responsibilities are not exercised to protect citizens from gross abuses or genocide, others must assume them through the UN, including, if all else fails, by military force. We have rightly committed ourselves never to allow events such as those that took place in Rwanda and Srebrenica to happen again.1219

Direct support for the concept during the UN World Summit was also received in the statements of Armenia, Botswana, Cyprus, Italy, Liechtenstien, Lithuania, Mauritius and Monaco.1220 Brasil, the Philippines, Ukraine, Belarus, Algeria, Qatar, Nigeria, Namibia, and Singapore, however, all lived up to the epithets of ‘R2P sceptics’ or ‘R2P spoilers’.1221

4.8.3. State positions on R2P at the UN World Summit 2005 – regionwise1222

LATIN AMERICA

Most countries in Latin-America that spoke on the R2P deliberations were supported of the concept at the World Summit, except Cuba, Veneuzuela and El Salvador.1223 Among the positive and active R2P states were Argentina, Chile (strong support), Colombia, Mexico, Panama, Peru (very strong) and Guatemala.1224 Brazil was more sceptical and expressed the view that Chapter VII measures on R2P were not appropriate, but agreed that the international community could play a positive role in supporting the individual state’s responsibility by other means.

ASIA

Asian states were more mixed in their positions towards R2P. Among the positive states, Japan, Korea, Sri Lanka and Singapore, encouraged the wording of R2P in the Outcome Document. However, Korea and Sri Lanka wanted precise language on the appropriate use of action and

1220 See Reform the UN.org (Publ.), 2005 World Summit Excerpts.
1222 This chapter is a summary primarily based upon the R2P-CS state excerpts on R2P from the Summit, categorised into regions or continents, see R2P-CS (Publ.), State-by-State Positions on the Responsibility to Protect.
1223 Ibid. Cuba expressed the opinion that R2P will only facilitate interference, put pressure and intervention in the domestic affairs of states by the superpowers and their allies. Venezuela also stated that R2P would only serve the interests of powerful states and El Salvador agreed to a dialogue on R2P in the General Assembly but believed that responsibility rested first with the state itself.
1224 See also i.a. Pace and Deller, Preventing Future Genocides: An International Responsibility to Protect, p. 25.
concrete mechanisms and modalities for carrying out such responsibility, properly defined and delimited in order to alleviate concerns over encroachment of sovereignty.\textsuperscript{1225}

Several NAM and G77 countries in Asia, including Indonesia, Malaysia, India and Vietnam, were either sceptical or negative on R2P wording. They welcomed further discussions on the subject in the General Assembly and due diligence with respect to Chapter VII measures. India was clear that peaceful means and Chapter VI reference were sufficient with regard to R2P. Vietnam stated explicitly that it saw R2P as a reincarnation of humanitarian intervention.\textsuperscript{1226}

Pakistan and China were also negative. The former maintained that “measures to promote protection of civilians should not become a basis to contravene the principles of non-interference and non-intervention or question the national sovereignty and territorial integrity of States.”\textsuperscript{1227}

AFRICA

The position of the African Group, represented by Mauritania was unclear but there was a positive opening. They declared that it must be made certain that R2P was not open to subjective interpretation.\textsuperscript{1228} However, several African states spoke strongly for the endorsement of a responsibility to protect. South Africa, Rwanda, and Tanzania stood out at the meeting as strong advocates of the R2P concept. Rwanda expressed a belief of a moral duty to embrace it and emphasised its preventive element. South Africa (also pertaining to the NAM and G77) recognised that it should only be discharged in exceptional circumstances in order to avoid misuse. Tanzania (also G77) declared its strong support and challenged the NAM position.\textsuperscript{1229}

EU AND OTHER EUROPEAN STATES

The EU states demonstrated strong, enumerated support. They upheld the idea of R2P as presented in the High-Level Panel report and addressed the concept in the same paragraph as the ‘use of force’. France was of the opinion that force military should be used as a last resort, and through the Security Council. Germany supported the view that the use of force should be carefully circumscribed. Sweden stated that R2P should address the population as a whole, and not just civilians. The UK reaffirmed that force should be used only in extreme cases, and on a case-by-case basis.

Other European (non-EU) states including Finland, Iceland, Liechtenstein, and Norway, favoured R2P. Turkey made no comment but declared itself to be fully aligned with the EU.\textsuperscript{1230} The Holy See was unclear on its position, and suggested that the criteria for the use of force be reinserted into the R2P draft.

\textsuperscript{1225} R2P-CS (Publ.), State-by-State Positions on the Responsibility to Protect.
\textsuperscript{1226} Ibid.
\textsuperscript{1227} Ibid.
\textsuperscript{1228} Ibid.
\textsuperscript{1229} Ibid.
\textsuperscript{1230} Ibid.
**ARAB STATES**

The Arab states as a group were the most negative on R2P. Algeria (NAM) did not wish it to be included at all in the Outcome Document and preferred discussions in the General Assembly. Furthermore, it stated that R2P was not compatible with international law. Syria commented that there was no basis for R2P in the UN Charter. Egypt (NAM) denied the existence of a shared responsibility outside that of the state to protect its own citizens and emphasised the Security Council’s responsibility to address matters of international peace and security. The protection of civilians was seen only as a moral responsibility.1231

**MISCELLANEOUS**

Israel supported the concept. As mentioned already, the US was unclear in its position, expressing supportive language of R2P principles, but suggesting weak language on the responses. It avoided referring to the terminology of ‘responsibilities’ of the international community.1232

Iran (NAM and G77) believed R2P to be too vague as a concept, and that it undermined the principle of state sovereignty and territorial integrity. Belarus shared concerns with NAM, and expressed its doubts about it. Russia declared that it undermined the Charter. It is said that there was insufficient understanding of the concept and that the UN was already capable of responding to crises under current situations.1233

4.9. Gender and the concept of R2P

4.9.1. Introduction

In general, women’s groups, human rights organisations and feminist researchers have been slow to react on and develop gender positions on R2P, and the variety of responses have been mixed, ranging from a reluctance to accept any new norm on the use of force or breaking solidarity with developing countries, to that of embracing the concept despite its lack of gender analysis.1234 The critical point for the pro-R2P group, however, was that the doctrine should develop in a direction that takes into account the provisions of Security Council resolution 1325 on women, peace and security.1235

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1231 Ibid.
1233 R2P-CS (Publ.), State-by-State Positions on the Responsibility to Protect.
This chapter pursues a discussion on gender and feminist critique of the concept of a R2P and humanitarian intervention and contrasts the doctrine with the relevant normative gender framework and feminist views on the security and protection of women in armed conflicts, as well as on gender and peace-enforcement and peace-keeping. The following questions have informed the analysis below: 1) In what ways has the responsibility to protect doctrine incorporated a gender-perspective? How are women’s security concerns addressed by R2P? 2) What gender aspects have been raised and discussed with regard to humanitarian interventions by feminist scholars? 3) What gender considerations embedded in Security Council resolution 1325 are relevant for the implementation of R2P by military means, and are those gender aspects integrated in the doctrine? 4) In what ways may a more gender-sensitised human security protection be provided through R2P, taking into account feminist critique and concerns regarding R2P and humanitarian intervention? Could the doctrine be reformulated to better address and include the security needs of women?

4.9.2. The R2P doctrine and gender critique

The ICISS report is almost entirely gender-neutral in its construction of the R2P, but does in a few instances take into consideration specific security threats to women in armed conflicts. The report has received critique for its gender-blindness on R2P, but there is still scarce research and literature on this specific topic, although the literature and reports produced in the area of women, peace and security in general is vast. It has been argued that the doctrine could be further enhanced if it was more effectively integrated with resolution 1325. Furthermore, the models and guidelines developed out of the efforts to develop and implement the resolution should be used to inform a better gender analysis of the doctrine. Bond and Sherret write in *New Voices, Perspectives. A Sight for Sore Eyes: Bringing Gender Vision to the Responsibility to Protect Framework* (2005):

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1236 See e.g. the analysis in Bond and Sherret, United Nations International Research and Training Institute for the Advancement of Women (Publ.), *New Voices, Perspectives. A Sight for Sore Eyes: Bringing Gender Vision to the Responsibility to Protect Framework*. No other academic articles or papers were found on this topic and it appears that there is very little research done on the question of R2P and gender.


In this paper, the authors argue that existing experience and research on gender, peace and security issues can, and must, be directly incorporated into the R2P framework. Particular attention is paid to Security Council Resolution 1325, as it is the central legal obligation governing this area. The authors demonstrate how gender-sensitive perspectives can be incorporated into all three portions of the existing R2P framework and argue that their inclusion is not only required by international mandates in this area, but is essential to the successful implementation of the doctrine itself.1239

In the following chapter, only gender aspects related to the military component of the R2P doctrine will be discussed. There is still resistance towards 'gender-mainstreaming'1240 in the realm of peace and security, in particular in military interventions where opponents argue that there is neither the time nor the resources to include gender or full and equal participation of women.1241 The urgency to save lives is often used as an excuse to justify the neglect of critical gender concerns, and relegate such issues to the post-intervention and peace-building phases. It is not uncommon to find force commanders holding the idea that first comes security, and when that is provided, development, gender-equality and human rights may then be pursued and promoted. Security providers prioritise traditionally acknowledged security threats – security threats resulting in deadly violence. Such threats and violence is given precedence over the structural systematic non-deadly sexual violence directed against primarily women. This latter violence has traditionally been seen as cultural or private phenomena and therefore not necessary to attend to by military means. This open discrimination in providing security in a manner which prioritises (primarily) men’s security interests and needs is disregarding and invisibilising women’s equally important, but different, human security needs in, and after, armed conflicts (see Chapter 3.4.2.). Fortunately this is changing, but slowly.

One example suggested on how the ‘responsibility to react’ element could be made more gender-sensitised would be to appoint more women as special representatives and envoys, to provide gender training for peace operations, and the inclusion of women in intervention forces and as civilian personnel.1242 These are all measures that might be employed

1239 Bond and Sherret, United Nations International Research and Training Institute for the Advancement of Women (Publ.), New Voices, Perspectives. A Sight for Sore Eyes: Bringing Gender Vision to the Responsibility to Protect Framework, p. 3.

1240 A definition of the concept of gender mainstreaming was formulated in an agreed conclusion of the ECOSOC in 1997: “Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality”. See Report of the Economic and Social Council for 1997 A/52/3, 18 September 1997, UN Doc A/52/3, 1997.


before the start of a military intervention, and do not have to delay or threaten its efficacy, but could have positive and inclusive effects on the mission mandate concerned and on its outreach and outcome.

The first most visible inclusion of any gender-awareness is the just cause threshold criteria of the ICISS concerning ‘large scale ethnic cleansing’, which explicitly includes ‘acts of rape’, albeit conditioned. The report explains that R2P is applicable when there is

systematic rape for political purposes of women of a particular group (either as another form of terrorism or as a means of changing the ethnic composition of that group).1243

The inclusion of rape in the just cause threshold,1244 is, however, a very limited and a non-inclusive response to the security needs of women in armed conflicts, which leaves out all other forms of widespread and systematic sexual violence and abuse of women and girls in a humanitarian catastrophe or an armed conflict. Bond and Sherret pinpoint the flaw in this construction, in that rape becomes a cause for intervention only if it occurs as a means of ‘ethnic cleansing’.1245 They argue that systematic rape (but also other violations) are worthy of protection without the connection or nexus to ethnicity or membership of a particular group.1246 A positive finding, however, is that the ICISS report does not make any distinction on whether it is the state or non-state actors putting people at risk.

Moreover, Bond and Sherret propose that the R2P precautionary principles should be gender-sensitised. For example, by discerning the opinions of local women’s groups for consent prior to an intervention in order to show a ‘right intention’.1247 They also suggest that Right Authority is more gender-inclusive if women are more fully integrated in the highest decision-making bodies deciding on military intervention, such as the Security Council.1248 The two scholars thus recommend gender-related modifications to the concept of R2P, including in the form of

sanctions which are designed for gender inequalities, that women participate in decision-making processes, that the issue of militarization and violence against women is openly addressed by intervening authorities, and that operational

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1246 Ibid., p. 43.
1247 Ibid., p. 46.
1248 Ibid., p. 47.
principles are designed to promote the participation and protection of all members of the population.\textsuperscript{1249}

These proposals are to a certain extent covered by Security Council 1325.\textsuperscript{1250} The resolution does not explicitly address the R2P doctrine or humanitarian intervention, but it may be argued to also encompass such enforcement action by the Security Council mutatis mutandis. (See more in Chapter 4.9.4.)

The almost complete gender-blindness of the ICISS report is further illustrated in its chapter on the operational dimensions of R2P. On the planning of a military intervention, the Commission’s recommendations on what to include in the mandate or the rules of engagement omit the importance of integrating gender-sensitive assessments and guidelines for the particular operation.\textsuperscript{1251} Instead it speaks of human protection in a gender-neutral way. The report acknowledges that ethnicity may not be a ground for discrimination when providing security, but ignores gender or sex. The ICISS Commission thus displays gender-blindness in its perception of human security when addressing the civilian population as a gender-neutral collective or group with the same security needs irrespective of the sex.\textsuperscript{1252} It asserts that:

One of the essential functions of an intervention force is to provide basic security and protection for all members of a population, regardless of ethnic origin or relation to the previous source of power in the territory.\textsuperscript{1253}

The report reveals insensitivity towards the structural discrimination of women in both peace and war in relation to security and the different needs and experiences of it by men and women. Bond and Sherret contend that the operational dimensions should be planned and executed with the potential effects in mind on women, men, girls and boys.\textsuperscript{1254} The negative security effects that women have endured in many previous military interventions has resulted in increased commercial sex, the trafficking of women, sex slavery and general exploitation, as well as a proliferation of HIV/AIDS. Such things must be considered in order to ensure the protection of women’s human security.\textsuperscript{1255}

\begin{thebibliography}{100}
\bibitem{1249} Ibid., p. 42. See also their list of recommendations for a gender inclusive approach to the ‘responsibility to react’, \emph{ibid}. pp. 82-83; see a few other gender-sensitive recommendations on R2P in R2P-CS (Publ.), \emph{Women and Conflict}.
\bibitem{1250} S/RES/1325 (2000).
\bibitem{1251} ICISS, \emph{The Responsibility to Protect}, pp. 60-62.
\bibitem{1252} The same gender-neutrality reappears on the issue of disarmament, demobilisation and reintegration. The Commission furthermore mentions the need of high standards and codes of conduct that should govern the behaviour of troops in respect of civilian populations. But the specific problem with gendered violations involving civilian women is unfortunately not explicitly mentioned or addressed further in the report, \emph{ibid.}, p. 61.
\bibitem{1253} \emph{ibid.}, p. 40.
\bibitem{1254} Bond and Sherret, United Nations International Research and Training Institute for the Advancement of Women (Publ.), \emph{New Voices, Perspectives. A Sight for Sore Eyes: Bringing Gender Vision to the Responsibility to Protect Framework}, p. 48.
\bibitem{1255} \emph{ibid.}, pp. 49-50.
\end{thebibliography}
Apart from the lack of gender awareness in the report, Bond and Sherret also criticise the composition and expertise of the ICISS Commission and the almost full exclusion of gender issues at its consultations and roundtable conferences as further blind spots.\textsuperscript{1256} Similar gender critique could be forwarded on the Outcome Document from the UN Summit (2005). It did not at all deliver any formulations on gender aspects with regard to R2P, but it has been argued that resolution 1325 should inform its implementation, in particular with regard to the protection from systematic attacks on women.\textsuperscript{1257} Paragraph 139 provides that the international community is to be prepared to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity through collective action by the Security Council and in co-operation with relevant regional organisations on a case-by-case basis, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from such crimes.

The interpretation of the definitions of these crimes in international humanitarian law (see Chapter 5.3.3.) underwent significant developments during the 1990s with regard to rape and sexual gender-based violence. This was especially the situation in international criminal law through the case law and statutes of the ad hoc tribunals of the former Yugoslavia and Rwanda and the Rome Statute (see Chapter 3.4.3.).\textsuperscript{1258} Although the case law and statutes of the tribunals and the ICC represent secondary law and hence is not directly binding on states, it should nevertheless be taken into consideration and voluntarily implemented by states when assessing the occurrence of such crimes. The 2005 endorsement that any of the four grave crimes of international law would activate R2P would consequently entail a broader gender approach to it than the original ICISS proposal, limited to rape linked to the persecution of an ethnic group. This means, for example, that ‘crimes against humanity’, encompassing a gender-sensitised definition as in the Rome Statute, may include acts involving “rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence or comparable gravity” when committed on a widespread or systematic manner.\textsuperscript{1259} Furthermore, acts of torture are included in the ICC definition of ‘crimes against humanity’, and thus sexual violence constituting torture would be included in this crime,\textsuperscript{1260} as well as enslavement (which includes the trafficking of persons, in

\begin{itemize}
  \item \textsuperscript{1256} \textit{Ibid.}, pp. 22 et seq.
  \item \textsuperscript{1258} Gardam and Jarvis, \textit{Women, armed conflict and international law}, pp. 185-204.
  \item \textsuperscript{1259} Article 7 (1) (g) Rome Statute. See also the specification of ‘enslavement’ in Article 7 (2) (c).
  \item \textsuperscript{1260} Gardam and Jarvis, \textit{Women, armed conflict and international law}, p. 197.
\end{itemize}
particular women and children) and gender as a ground for persecution, when it is systematic or widespread.\textsuperscript{1261}

These developments have been recognised by the Security Council in resolution 1820, which asserts that “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide” (see more in Chapter 4.9.5.).\textsuperscript{1262}

This conclusion should logically also have gendered consequences for the newly endorsed principle of R2P, and the international commitment and responsibility to protect human security from these crimes with military means.\textsuperscript{1263}

4.9.3. Feminist arguments on (humanitarian) intervention

The issue of humanitarian intervention (or R2P by military means) is a complex topic. It has been scarcely addressed in feminist literature or by women’s groups. As mentioned with respect to the concept of R2P, the issue of military intervention, albeit for humanitarian purposes, raises many different concerns among feminists on the use of force in general (the pacifist branch) and with respect to the Third World in particular (the post-colonialist branch).\textsuperscript{1264} Since the research questions of this study are primarily related to the emergence of a new customary norm on R2P by military means, a comprehensive feminist analysis of the security system as such is not warranted.\textsuperscript{1265} I shall only investigate whether relevant gender aspects are integrated in the customary process on emerging norms on R2P and humanitarian intervention. But there

\textsuperscript{1261} Articles 7 (1)(c), 7 (1)(h), and 7 (2)(c) of the Rome Statute.

\textsuperscript{1262} S/RES/1820 (2008), op. 4.

\textsuperscript{1263} World Summit Outcome Document, 15 September 2005, para. 139.

\textsuperscript{1264} The Women’s International League for Peace and Freedom (WILPF), established as the International Committee of Women for Permanent Peace at the Hague Congress of Women in (1915-1919) and later on renamed, has been in the forefront among the many anti-militaristic women’s organisations and movements for peace, see Otto, Dianne, A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council, Michigan Journal of Gender and Law, vol 13, 2006, pp. 113-175, pp. 114-115; For an example of a post-colonial feminist analysis of humanitarian intervention, see Orford, Anne, Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law, Cambridge University Press, Cambridge, 2003.

\textsuperscript{1265} This choice and limitation of the thesis does not imply that I do not support some more radical feminist positions towards women, peace and security. In fact I support and believe in working and pursuing parallel tracks, both within and outside the system to reach change and more gender inclusive approaches and outcomes. See Otto, A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council, p. 170 et seq, who also argues that the experiences of Security Council resolution 1325 show the importance of both outside and inside organisation for change, and that “pursuing transformative goals within mainstream institutions depends above all, on a productive relationship with outside activism”. Cf. also the dangers of deploying gender as a biological category reducing its transformative vision to a set of bureaucratic techniques and measures antithetical to feminism but to the service of global regimes and legitimising the power-structures and inequalities of the global order, raised by Otto at ibid, p. 173, and the discussion by Whitworth, Men, Militarism, and UN Peacekeeping. A Gendered Analysis, pp. 119-135. see Otto, A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council, p. 170 et seq.
will be a short discussion on a few of the many feminist voices that have highlighted certain gender aspects relevant to humanitarian interventions.

Rodgers maintains that the international legal system is profoundly gender-blind on military intervention and shows little concern for gendered war crimes as criteria for protection by the international community.\textsuperscript{1266} She therefore argues that it is necessary to define rape and other gender-based atrocities more directly in political terms. If seen as part of the strategy of war it may potentially become a ground for intervention:

As a political, rather than a legal issue, rape would thus fall into the human rights category which the international community appears keen to use as a justification for intervention.\textsuperscript{1267}

Despite the gender-blind legal definition of genocide in the Genocide Convention, rape for the first time became equated with genocide by some commentators during the Bosnian war by some commentators.\textsuperscript{1268} MacKinnon suggested that genocide would be apt for violence against women if women were seen as a group capable of destruction as such. Engle, however, is negative on this development and claims that the more rape is seen as being genocidal, the more that those calling for intervention will invoke rape as a justification. This has been seen in the case of Darfur where calls for intervention make rape as a substitute for genocide when genocide is not openly and officially acknowledged to have been committed.\textsuperscript{1269}

A different expansionist argument with regard to humanitarian intervention is raised by Charlesworth and Chinkin. They critique the traditional view by Téson on situations warranting humanitarian intervention being limited to situations of gross violations of civil and political rights.\textsuperscript{1270} Téson’s narrow view is problematic for women because the violation of women’s economic and social rights may be as life-threatening (for them and their children) as the denial of civil and political rights. But they furthermore assert that a focus on the denial of civil and political rights has not yet led to forceful intervention in Afghanistan, Kuwait and Saudi Arabia, despite the pervasive, systematic and state-enforced denial of women’s civil and political rights. In any case, the doctrine of humanitarian intervention is clearly gender-discriminating in the way it has been exercised until now, disregarding widespread and systematic violations of human rights that constitute real human security threats for women, just simply because such acts are

\textsuperscript{1266} Adler, Handbook of International Relations, p. 193.
\textsuperscript{1267} Ibid., p. 191.
\textsuperscript{1270} Charlesworth and Chinkin, The boundaries of international law. A feminist analysis, p. 269.
committed in time of ‘peace’. Such structural peacetime violence is invisibilised and largely socially and culturally accepted.

On the same track, MacKinnon makes a radical argument by drawing a parallel between the number of civilians killed in the attacks of September 11 and the number of women who die each year in just one country, from violence by men, in peace as in war.\textsuperscript{1271} She points to the fact that such ‘peacetime’ male violence against women causes far more deaths than traditional terrorism and that it could be seen as a constant civil war between the sexes – a specific form of ‘terrorism against women’. She also critiques the fact that terrorism against women is met with silence in the international arena, while other forms of terrorism threatening civil society or the state in general elicits a response equal to that of an armed attack against a state. McKinnon argues that widespread male violence against women’s security qualifies as a \textit{casus belli} for intervention and is a form of terrorism “every bit as much as the events of September 11th”.\textsuperscript{1272}

McKinnon maintains that “acts of violence against women are mass atrocities, mass human rights violations, widespread and systematic attacks on the basis of sex, i.e. crimes against humanity pervasively unaddressed”.\textsuperscript{1273} But rather than being treated as widespread or systematic violations of international law and human rights on a global scale, such acts are viewed as individual, sporadic and isolated acts by some and therefore treated as private, outside the scope of official acts governed by international law.\textsuperscript{1274} She explains this discrepancy by asserting that male violence against women is regarded a ‘non-threat’ to the state, while large-scale international terrorism constitutes an actual threat to state security.\textsuperscript{1275}

McKinnon does not advocate war or military intervention as being the only effective response to this violent war prosecuted by men on women, but urges the need for an appropriate response in relation to the structure and practice of international law. But at the same time she argues that if situations where attacks by private and non-state entities on civilians can become \textit{jus ad bellum} triggers as in the 9.11 events ‘why should not brutal, systematic violence against women legally justify resort to force?’\textsuperscript{1276} She ironically recalls how the situation of women in Afghanistan has been used as one of several rationales justifying the need to intervene by military means – albeit after, not before September 11.

Women’s human rights throughout history have been marginalised and not fully acknowledged and respected in the same way as those human rights of men.\textsuperscript{1277} Cultural relativism has prevailed and gender-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{1271} McKinnon, \textit{Women’s September 11th: Rethinking the International Law of Conflict}, p. 4.
\item\textsuperscript{1272} \textit{Ibid.}, p. 14.
\item\textsuperscript{1273} \textit{Ibid.}, p. 22.
\item\textsuperscript{1274} \textit{Ibid.}, p. 15.
\item\textsuperscript{1275} \textit{Ibid.}, p. 20.
\item\textsuperscript{1276} \textit{Ibid.}, p. 25.
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specific violence against women was neither regulated nor regarded as a human rights issue until recently. Instead it was seen worldwide as a culturally and socially accepted form of behaviour.1278 To expand on McKinnon, one could argue forcefully that in situations where widespread and systematic (culturally based or not) human rights violations and violence against women in peacetime amount to ‘crimes against humanity’, the responsibility to protect (by non-military and military means) should apply when a state fails to protect large parts of its own female population from such abuses and exploitation.1279

R2P by military means against crimes against humanity and other grave crimes, including widespread and systematic human security threats of sexual violence and other human rights abuses, committed in peacetime, would involve a new interpretation of the practice on humanitarian intervention. Many would perhaps argue that such crimes against humanity would be difficult to consider as threats to ‘international peace’, and that military intervention to combat such structural and cultural practices in peacetime would not address the root of the problem. But this does not detract from the force of the argument that such practices, if constituting crimes against humanity, could and should be addressed by other non-military means under the R2P doctrine, perhaps through threats to bring responsible politicians before the ICC if such practices are not addressed politically and legally at national level. To analyse and address the situation of women in Afghanistan or Iran from this perspective would be most interesting.

Rodgers raises another feminist concern regarding humanitarian interventions. She voices the difficulties of promoting a feminist agenda in humanitarian interventions for acceptance by a male-dominated, militaristic international community, while at the same time trying to take into account the unique local gender constructions in a particular culture or society.1280 Basing her arguments on the experiences of Bosnia and Kosovo, she holds that there are two dominant perspectives on how to

The feminist critique of human rights also covers the fact that the construction and formulations of human rights were elaborated on the male norm and example.1278 The Women's Convention (1979) does not mention violence against women, but the CEDAW Committee General Comment No. 19 states that Article 1 of the Convention defining discrimination against women should be interpreted to encompass such violence. The Declaration on the Elimination of Violence Against Women (1993), is a non-binding instrument as well as the Report of the Fourth World Conference on Women, Annex 1, Beijing Declaration, A/CONF.177/20 (1995), which treats violence against women in Part Two, Four, Chapter D; see also Etienne, Margareth, *Addressing gender-based violence in an international context*, Harvard Women's Law Journal, vol 18, 1995, pp. 139-170. 1279 Cf. the argument of subsidiary right of protection and prevention of violence with regard to women’s needs of protection from gender-based and sexual violence in Women, Peace and Security. Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2002), pp. 55-56. 1280 Adler, *Handbook of International Relations*, pp. 183-184. She explains in her article that the feminist agenda for the promotion of gender criteria for intervention is premised on a different gender construction and feminist needs than those of the local communities, which most often are based upon extremely patriarchal constructions of gender relations. “Specific constructions of gender and nationalism create localized differences which the international community has limited mechanisms for addressing”, *ibid.*, p. 184.
advance a ‘feminist ethics of intervention’, but unfortunately she found neither to be satisfactory. The suggestion is that one may either 1) accept that some forms of sexual violence during and after armed conflict will go unpunished because of local gender constructions where admitting sexual abuse means undermining the solidarity of the national group, or 2) accept the price of violated women becoming excluded and alienated by their communities if there is the desire to end impunity and punish the perpetrators in such patriarchal societies.\footnote{\textit{Ibid.}, p. 184.}

Rodgers’ concerns and arguments, however, are more linked to the post-conflict and post-intervention phase of reconstruction, peace-building and enforcing justice for perpetrated crimes. The inclusion of gender-based violence and sexualised violence against women within the definitions of grave crimes of international law does not prevent or protect women and is not a sufficient deterrent for making it disappear from armed conflicts. Very few persons are indicted for such grave crimes at the international level and there are, as Rodgers points out, there are other local cultural gender structures that assent to impunity for such crimes at the national level as well. Furthermore, the implementation of the international regimes on humanitarian and human rights law on these issues may not provide a sufficient legal protection for women at the national level. (See the gender-analysis in Chapter 3.4.3. and 3.4.4.) Apart from the important leverage that the threat of accountability might have, what is further needed is stronger gender-sensitised protective and preventive measures at earlier stages of the conflict in question.

4.9.4. Security Council Resolution 1325 and R2P

Security Council resolution 1325, adopted on 31 October 2000, reaffirms the important role of women in the prevention and resolution of conflicts as well as in peace-building and post-conflict reconstruction.\footnote{\textit{S/RES/1325 (2000).} For brief overviews of the history and content of the resolution see \textit{Binder, Christina, Lukas, Karin, and Schweiger, Romana \textit{Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts},} Radical History Review, Issue 101, Spring, 2008, pp. 22-41, pp. 23-24; \textit{Otto, A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Deutsch Schneider, About Women, War and Darfur: The Continuing Quest for Gender Violence Justice,} Binder, Lukas and Schweiger, \textit{Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts}.} The resolution stresses the importance of women participating in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making for the conflict prevention, management and resolution at all levels.\footnote{\textit{S/RES/1325 (2000), see e.g. preambular para. 5 and op. paras. 1-4.} The Secretary-General is urged, for example, to appoint more special representatives and special envoys as well as to expand the role and contribution of women in UN field-based operations, especially among military observers, civilian police, human rights and humanitarian personnel.} Moreover, it addresses the need to fully implement IHL and human rights for the protection of women and girls during and after conflicts, and recognises
the importance of specialised training for all peace-keeping personnel on the protection, special needs and the human rights of women and children exposed to war.\textsuperscript{1284}

In sum, the main content of resolution 1325 lies in ‘protection’ (of the human rights of women and girls in armed conflict), ‘participation’ (of women in the political, security and social sectors) and ‘prevention’ (of gender-based violence in armed conflict) – the three P’s.\textsuperscript{1285} As with other thematic resolutions, it is binding for member states under UN Charter Article 25, but it has not been adopted under Chapter VII, and it is thus not a coercive (enforcement) decision imposed on states.\textsuperscript{1286}

Resolution 1325 explicitly addresses Council enforcement measures under Article 41 of the UN Charter and provides that the Council shall give consideration to the impact of such non-military enforcement measures on the (special) needs of the (female part of the) civilian population.\textsuperscript{1287} But the resolution lacks any specific and express gender considerations for military enforcement measures taken under Article 42. The term peace-keeping, which is used in the resolution, should be interpreted in a broader sense. It should include not only traditional peace-keeping based upon state consent, but also multidimensional peace support operations adopted under Chapter VII of the UN Charter. The Secretary-General’s reports on women, peace and security support such an interpretation.\textsuperscript{1288} Therefore, implicitly, the general provisions on

\textsuperscript{1284} \textit{Ibid.}, see e.g. preambular para. 6 and op. paras. 6 and 9-10. Member states are called upon to incorporate gender guidelines and material (requested to be provided by the Secretary-General) into their national training programmes for military and civilian personnel, and all parties to an armed conflict are called upon to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse.

\textsuperscript{1285} Report of the Secretary-General on women and peace and security, S/2007/567, 12 September 2007, UN Doc S/2007/567, 2007, pp. 3, 13-14. In addition to the three thematic areas of prevention, participation and protection, two additional thematic areas have been added in the 2007 report: ‘Relief and recovery’, and ‘normative’. These five areas have been identified as the priorities in the updated Action Plan for 2008-2009. The 2005-2007 Action Plan had identified 12 areas of action, but these were found to be broad and in need of sharpening and consolidation.

\textsuperscript{1286} \textit{Cf.} Security Council resolution 1373 (2001) adopted under Chapter VII, which has been considered to have quasi-legislative characteristics.


\textsuperscript{1288} The first reports up until 2005 refer generally to peace-keeping in a wider sense, arguably also comprising non-consensual military enforcement measures, or interventions under Chapter VII of the UN Charter. See Report of the Secretary-General on women, peace and security, S/2002/1154 (2002); and Women and peace and security. Report of the Secretary-General, S/2004/814 (2004). The 2002 report stated, for example, that a number of ways to enhance attention to gender perspectives in ‘peace operations’ need to be addressed. “A clear commitment to the promotion of gender equality throughout the entire mission is required, from the inception of its mandate to its end. This commitment must be translated into concrete actions in all areas of the mission and should be the responsibility of all mission staff, particularly senior managers. Many managers and professional staff are still uncertain about the relevant gender perspectives in their areas of work and as to how they can integrate these perspectives in different areas of peacekeeping. More systematic training of all staff on gender perspectives before and after their deployment is necessary. Gender perspectives have to be integrated into all standard operating procedures, manuals, instructions and other instruments offering guidance to peacekeeping operations.” See
the role and participation of women in peace-keeping and the willingness expressed by the Council to ensure that “missions take into account gender considerations and the rights of women, including through consultation with local and international women’s groups” are indicative for peace-enforcement measures as well.\footnote{1289}{S/RES/1325 (2000), op. paras. 1-4, 15.}

Resolution 1325 sets up a minimum standard of gender-sensitivity for all peace-keeping operations and parties involved in armed conflicts, and it could therefore be argued that it has normative relevance for the military aspects of the R2P doctrine, and in particular for Security Council authorised humanitarian interventions \textit{ex analogia}. Though the resolution does not directly mention humanitarian interventions, in operative paragraph 5 of the resolution, the Council expresses a willingness to incorporate a gender perspective into peace-keeping operations and urges the Secretary-General to “ensure that, where appropriate, field operations include a gender component”.\footnote{1290}{Report of the Secretary General on women and peace and security, S/2005/636, 10 October 2005, see the Annex on pp. 14-17.}

Two out of the 12 identified areas of action (i.e. peace-making and peace-keeping) in the 2005-2007 UN \textit{System-wide action plan for the implementation of Security Council resolution 1325 (2000)}\footnote{1291}{Ibid., see the Annex on pp. 14-17.} have a bearing on the military aspects of R2P.\footnote{1292}{Ibid., see the Annex on pp. 18-19.} The Action Plan reiterates, for example, the development of strategies, including training and capacity-building initiatives, support for local women’s peace initiatives and systematic training on gender-issues for all personnel involved in peace-making (and peace-building) efforts.\footnote{1293}{Report of the Secretary General on women and peace and security, S/2005/636, 10 October 2005, see the Annex on pp. 14-17.} It also suggests that gender perspectives should be integrated into the mandates of all peace-keeping missions, and include a “gender component in all field operations with adequate resources and standard guidance on roles and functions to ensure effective implementation of their mandates”.\footnote{1294}{Report of the Secretary General on women and peace and security, S/2005/636, 10 October 2005, see the Annex on pp. 14-17.} The UN Department of Peace-keeping Operations (DPKO) proposed in the 2005-2007 Action Plan that gender-expertise be included in pre-mandate assessments and planning, and that gender concerns be included systematically in all new peace-keeping mandates. All field operations should be assigned full-time gender advisers and gender units, and that indicators develop to measure the impact of gender mainstreaming on mission activities. In the 2007 Secretary-General’s report on women and peace and security, however, it is admitted that the 2005 Action Plan was not established as an integrated UN system-wide strategy, but rather as a compilation of ongoing activities by UN entities, and that the 2008-2009 Action Plan

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would include an updated strategy and be reconceptualised into a results-based programming, monitoring and reporting tool, amending earlier gaps and weaknesses.

Although gender advisers have been appointed, more women have become involved in UN peace-keeping missions, and (country specific) Security Council resolutions are increasingly incorporating women or gender considerations. The Secretary-General’s reports on women, peace and security display multiple efforts to develop policies, supply training material and guidelines, and recruit more women at all levels. Initiatives include on-line courses, effecting best practices and how to benefit from lessons learned. Gender databases have been created and courses in conduct capacity-building and training set up. Down to earth suggestions on how to formulate mission mandates to better incorporate a gender-perspective for the protection of women from gender-based violence in armed conflict have yet to be seen in the Secretary-General’s reports and in the System Wide Action Plans on women, peace and security. Some UN entities and other international organisations, however, appear to have elaborated more on such specific guidelines.

However, resolution 1325 refers to the Windhoek Declaration and Platform for Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations. This document’s more specific and elaborated gender guidelines for peace support operations should at last be taken as accepted, if not directly endorsed, by the Security Council. (See briefly the Namibia Plan of Action in Chapter 4.9.6.)

1293 For example, 11 out of 18 peace-keeping missions have one full-time gender adviser, eight of whom are at P-5 level and seven gender focal points, see Report of the Secretary-General on women and peace and security, S/2007/567, 12 September, p. 6. In February 2007, an all-female police contingent from India was deployed to Liberia. For more statistics on women’s participation, see e.g. Women and peace and security, Report of the Secretary-General, S/2004/814 (2004), pp. 7-9; Bond and Sherret, United Nations International Research and Training Institute for the Advancement of Women (Publ.), New Voices, Perspectives. A Sight for Sure Eyes: Bringing Gender Vision to the Responsibility to Protect Framework, pp. 21, 51; Whitworth, Men, Militarism, and UN Peacekeeping. A Gendered Analysis, pp. 123-124.


Criticism could be made that resolution 1325 fails to offer a comprehensive and systemic approach covering gender guidelines and considerations for military enforcement action under Chapter VII and VIII.\textsuperscript{1298} The resolution is more specific on strategies to achieve an increased role and full participation of women, and less specific on the protection mandates of UN missions and how to prevent and protect women from sexualised gender-based violence on women by men in armed conflicts.\textsuperscript{1299} The Secretary-General’s reports have however been a bit more specific and elaborate on such needs, but has been slow in developing clear and operational guidelines in this respect.\textsuperscript{1300} The 2002 report, for example, mentions the need for adequate mechanisms for the protection of women and girls in camps from and prevention of violence, including gender-based and sexual violence, and states that it requires ‘practical steps’ but fails to explain what they are.\textsuperscript{1301}

Since resolution 1325 does not directly address Security Council authorised humanitarian interventions, a less inclusive or extensive interpretation could lead to the conclusion that it most likely excludes unauthorised humanitarian interventions as such from its application. The gender-normative scope of 1325 for protection mandates in humanitarian interventions, and thus in particular unauthorised collective and unilateral humanitarian interventions, could be said to have limited direct guidance. The emerging norm of R2P by military means outside the UN Charter framework has little gender normative support to lean on unless it could be argued that 1325 also applies implicitly to these cases, or by extension \textit{ex analogia} and \textit{mutatis mutandis}.

\textsuperscript{1298} These are my own observations of the resolution. For more general feminist critique on resolution 1325, see Whitworth, \textit{Men, Militarism, and UN Peacekeeping. A Gendered Analysis}, pp. 119-127; for a discussion on the pros and cons with the resolution, see Cohn, Carol, Kinsella, Helen, Gibbings, Sheri, \textit{Women, Peace and Security: Resolution 1325}, International Feminist Journal of Politics, vol 6, 1, 2004, pp. 130-140.

\textsuperscript{1299} Despite these new normative commitments the resolution also fails to comprehensively address the financial resources necessary for an overall gender-mainstreaming in the area of peace and security, and only mentions financial resources with respect to gender-sensitive training efforts. The critique against the under-financed gender-units, focal points, and gender-adviser’s office at the UN is not a surprising result. This weakness was in fact acknowledged in 2007 Secretary-General’s report on women and peace and security, which mentions that many of the UN entities do not have adequate funding earmarked for women, peace and security, and that extra budgetary resources are neither sufficient nor predictable, see Report of the Secretary-General on women and peace and security, S/2007/567, 12 September, p. 12.

\textsuperscript{1300} For example, the 2002 report informed that few mandates of peace-keeping missions had included a commitment to gender equality as part of a mission’s mandate, but stated that the differences in men’s and women’s security priorities and needs, both in the home and in the public sphere, need to be identified when working to establish a safe environment. However, the statement that civilian police components as well as in human rights monitoring need to be able to address crimes committed against women and girls in a gender-sensitive manner, illustrates a more post-crime orientation rather than a preventive and protective attitude, see Report of the Secretary-General on women, peace and security, S/2002/1154 (2002), p. 6, para. 39.

\textsuperscript{1301} \textit{Ibid.}, p. 8, para. 50.
4.9.5. Security Council resolution 1820 and R2P

The Security Council affirmed in the historic and recently adopted resolution 1820 that effective steps to prevent and respond to sexual violence used or commissioned as a ‘tactic of war’ in order deliberately to target civilians, or as a part of a widespread or systematic attack against civilian populations can significantly contribute to the maintenance of international peace and security. The UN Development Fund for Women, UNIFEM, stated positively in response to this that to recognise sexual violence as a security issue is to justify a security response.

The Council did not explicitly define or limit the possibilities of effective steps to prevent and respond to such sexual violence but expressed its readiness when considering situations on its agenda “to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence”. Chapter VII measures, including the authorisation of the use of force could not be ruled out as appropriate steps in situations where such widespread or systematic attacks used or commissioned as a tactic of war are found to constitute a threat to the peace. Such a conclusion is supported by operative paragraph 5 of resolution 1820 which states that the Council

affirms its intention, when establishing and renewing state-specific sanctions regimes, to take into consideration the appropriateness of targeted and graduated measures against parties to situations of armed conflict who commit rape and other forms of sexual violence against women and girls in situations of armed conflict.

Targeted and graduated measures are most likely referrable under Article 41 as non-military measures, but both measures could possibly also involve military enforcement measures under Article 42. It may at least not be ruled out. The Conference Summary of a recent Wilton Park Conference on the role of peace-keepers for the protection of women targeted or affected in an armed conflict, however stressed the need for the Security Council to explicitly recognise that in certain situations the

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1302 S/RES/1820 (2008), op. 1: “Stresses that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, affirms in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security, and expresses its readiness, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence.” [Author’s italics] (See more on this resolution in Chapter 3.4.3.)

1304 [2008 #800], op. 1.
widespread use of targeted, systematic sexual violence might constitute ‘a threat to international peace and security’, and urged the Council to strengthen its capacity both to monitor sexual violence and any action taken to eliminate it, including through regular reporting by peace-keeping missions. The resolution moreover requests the Secretary-General, in consultation with the Security Council, the Special Committee on Peace-keeping Operations and its Working Group and relevant States, as appropriate to develop and implement appropriate training programs for all peace-keeping and humanitarian personnel deployed by the United Nations in the context of missions as mandated by the Council to help them better prevent, recognise and respond to sexual violence and other forms of violence against civilians.

The resolution is historic in that sexual violence committed in armed conflicts (or for that matter in peacetime) has not until now been recognised as an international security problem requiring a systematic security response. The days where the possibility of dismissing sexual violence as a cultural phenomenon, or at the most, solely treated as a domestic criminal matter, might be over – at least when it comes to the widespread or systematic prevalence of such conduct pursued as a strategy of war. This also poses responsibilities for UN peace-keeping missions mandated to protect civilian populations under imminent threat of physical violence. Together with resolution 1325, these provisions demand an institutionalised response where resources, doctrine and guidance of such missions better protect and match the security needs of women.

In several instances, the Security Council has expanded the mandates of multidimensional peace-keeping operations to assist in carrying out protective and monitoring functions to address security threats to women and girls, but these have been obstructed by such things as delays in deployment, low numbers of peace-keepers, or insufficient financial resources. The 2005 Secretary General’s report on women, peace and security frankly admitted that “[m]ore efforts are needed to protect women’s rights, including to prevent, document and report on gender-based violence”.

Participants in the 2008 Wilton Park Conference underscored this continuing need. They called for the identification, systematisation, dissemination and institutionalisation through tailored responses of operational practices to protect women from such violence in armed conflicts. The Conference Summary also suggested that ad hoc tactical responses needed to be codified as doctrine and included in predeployment in mission mandates and scenario-based training for UN peacekeepers.

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1305 The Conference convened 70 participants from former Force Commanders, army personnel and staff of Defence Ministries, members of Parliament, UN Permanent Representatives, UN DPKO staff, and other UN personnel, peace activists and academics, see Peacewomen (Publ.), Women targeted or affected by armed conflict: What role for military peacekeepers, p. 7.

1306 S/RES/1820 (2008), op. 6. [Author’s italics]
peace-keeping missions. Force commanders and other participants at the Conference confirmed that today’s peace-keepers lacked the capacity to predict, prevent and respond effectively to attacks on the civilian population involving sexual violence. They believe that a paradigm-shift was needed to change this situation. The 28 January 2008 MONUC Force Commander’s Directive on Protection of Civilians was mentioned as a positive exception in this pattern, standing out with its operational directive mentioning sexual violence and a response.

It was emphasised in the Conference Summary that tailored responses were needed to address sexual violence and that present intelligence on attack patterns and profiles of perpetrators was scarce. Gender-sensitive conflict assessments were considered to be required for the identification of threats of sexual violence and on how risks differ for women and men, for the purpose of consequently contributing to inform deployment planning and resources. It was suggested that more active security responses should be directed towards unconventional areas at unconventional times where a current regular security presence was lacking, such as “homes, pre-dawn hours, forests where women forage for fuel, fields where they cultivate crops”.

To briefly conclude, there appears to be an increasing awareness that international security forces need to be given clearer guidance on how to operationalise the protection mandate with regard to sexual gender-based violence. Furthermore, they must work closer to where women actually are, and in places where women and girls risk exposure to systematic or widespread sexual violence. The Security Council and Secretary-General’s initiatives confirm this trend. Ban Ki Moon is firmly committed to the cause, and is “eager to appoint more women”. At the time of writing he was due to appoint a ‘Messenger of Peace’ tasked entirely with advocacy for ending violence against women.

Resolution 1820 supports the development of viewing men’s sexual and gender-based violence against women in armed conflicts as grave crimes under international law. When widespread, systematic, or used as a tactic in warfare, these human security threats could be viewed as a threat to international peace and security, and thus a matter for the Security Council. It could be argued that the Security Council’s political, moral and legal ‘responsibility to protect’ human security within a state may also encompass military measures to combat sexual violence in armed conflict as a last resort when such raw and brutal violence is found to constitute crimes against humanity, war crimes, or genocide. Pervasive sexual and gender-based violence by men against women in armed conflicts may, and arguably should come to inform the Council’s implementation of the R2P doctrine. However, the resolution has its limitations and sexual and gender-based violence constituting crimes against humanity committed in peacetime

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1307 Peacewomen (Publ.), Women targeted or affected by armed conflict: What role for military peacekeepers?, p. 4.
1308 Ibid., pp. 3, 5.
1309 Ki-moon, UN News Centre (Publ.), Remarks to the Security Council meeting on Women, Peace and Security.
are not covered. The Council’s intention to take into consideration the appropriateness of targeted and graduated measures against parties in situations of armed conflict, who commit systematic or widespread rape and other forms of sexual violence against women and girls when establishing and renewing state-specific sanctions regimes, is limited to situations of ‘armed conflict’ which leaves out the systematic violence committed against women that continues in the post-conflict phase.

Thus the resolution, despite its good intentions, has in effect limited impact on the human security of women, in particular in post-conflict situations. The need to bridge the gap existing in both peace and wartime legal regimes in relation to the protection of human security both in times of peace and war, is of the utmost importance for the protection of, and respect for, women’s human rights and human security during and after an armed conflict (see more in Chapter 3.4.4.). There are weaknesses and gaps in the normative framework in this area that need to be addressed and further developed.

4.9.6. Mainstreaming a gender in multidimensional peace support operations

The Windhoek Declaration and Namibia Plan of Action on ‘Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations’ was adopted on 31 of May 2000 at a seminar arranged by the UN DPKO and hosted by Namibia. The Plan of Action urged the Secretary-General to ensure that appropriate measures be taken to implement its recommendations with regard to leadership, mandate, training, recruitment, and resources, in consultation with member states in order to ensure that the principles of gender equality permeate missions at all levels. For example, the Namibia Action Plan’s recommendations on the mandates for future peace support operations included the appointment of a senior adviser on gender mainstreaming. The Secretary-General’s initial report on the assessment mission to the Security Council should, it was urged, include the issue of gender mainstreaming and propose adequate budgetary provisions, as well the incorporation of specific gender mainstreaming mandates in Security Council resolutions setting up and extending peace support operations. Moreover, all mandates for peace support operations should, according to the Plan, refer to the provisions of the CEDAW Convention, as well as to other relevant international legal instruments.

The Brahimi report on the reform of UN peace support operations, which was adopted shortly after the Windhoek Action Plan, unfortunately failed to take a comprehensive approach on gender and

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peace support. It only brings the importance of ensuring a fair gender distribution in recruitment efforts at various levels, and that UN personnel respect local norms and practices.\footnote{1312 Brahimi report (2000), see \textit{e.g.} paras. 96, 101 and 145; see also Whitworth, \textit{Men, Militarism, and UN Peacekeeping, A Gendered Analysis}, p. 127.} It is silent on all other gender aspects raised in the Windhoek Plan of Action. Resolution 1325 had not yet been adopted, and one may wonder whether, and how, it would have changed the content of the Brahimi report if it had already been in place. One cannot but support Whitworth’s assertive statement:

What 1325, and the efforts that both preceded and followed it, reveals is the inconsistent ways in which the UN bureaucracy treats gender – attentive when lobbied by women and women’s organisations and often entirely silent when dealing with its “bread and butter” issues of war, peace, and security.\footnote{1313 Whitworth, \textit{Men, Militarism, and UN Peacekeeping. A Gendered Analysis}, p. 120. This claim is supported more generally, see Binder, Lukas and Schweiger, \textit{Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts}, p. 27.}

The Secretary-General has even conceded recently that key challenges of “incoherence, inadequate funding, fragmentation and insufficient institutional capacity for oversight and accountability for system performance as well as low capacity for gender mainstreaming” remain in the organisation with regard to gender, women, peace and security.\footnote{1314 Report of the Secretary-General on women and peace and security, S/2007/567, 12 September, pp. 11-12.} Apart from the inconsistent ways the UN is integrating and implementing gender-perspectives at the policy level, there is also a real gap between the policy pronouncements and research papers produced at the UN Headquarters and in the actual implementation of such policies on the ground.\footnote{1315 Whitworth, \textit{Men, Militarism, and UN Peacekeeping. A Gendered Analysis}, p. 133.} Further gaps and challenges in the implementation of resolution 1325 identified in the 2005 Secretary-General’s report on women and peace and security were, for example, the collection of sex-disaggregated data and statistics as part of conflict prevention, gender capacity-building for staff, gender-mainstreaming in all conflict prevention and early warning efforts, as well as in peace agreements and peace processes.\footnote{1316 Report of the Secretary General on women and peace and security, S/2005/636, 10 October, p. 5.}

Whitworth goes far in her critique on UN peace operations and its failure in relation to ‘gender mainstreaming’ security issues. She explains how the UN has produced its own gender culture of problem-solving through creating and upholding narratives of what count as armed conflict, how those conflicts impact on women, who the appropriate actors are in resolving such conflicts, and where women fit in terms of the particular response.\footnote{1317 Whitworth, \textit{Men, Militarism, and UN Peacekeeping, A Gendered Analysis}, p. 127.} According to her, the liberalist UN culture omits any possibility of radical feminist change to the policies to be applied, and limits many feminists to traditional patterns of problem-solving within such constraints and structures that feminists challenges
to peace operations had originally sought to critique. Instead, she prefers to advocate a feminist challenge of the role and limitations of the United Nations in framing contemporary debates on gender and security, in order to ensure that critical questions and not bureaucratic imperatives inform the feminist work on peace and security. We should seek to shift our attention from those who conduct the missions to the people concerned, and who are affected by peace-keeping, in order to avoid gender mainstreaming reinforcing or facilitating militarism.

Whitworth’s claim is a timely good reminder that the conditions for forceful enforcement action must take a different point of departure in order to achieve effectiveness in providing security for all, including women. But a counter-argument to her critique could be that by dismissing gender problem-solving as such for being insufficiently radical, critical or too much consistent with the prevailing ‘weak’ gender culture of the UN, one fails to acknowledge that permanent change sometimes occurs through piecemeal steps rather than by radical change. My view is that as long as this work is conducted in the right direction, such efforts should not be assumed to be useless ‘work of the status quo’. Parallel efforts and tracks to promote women’s security both within and outside the system will, however, continue to be needed. There is no need to choose between one or the other.

4.9.7. Concluding analysis – A more gender-sensitised R2P?

The gender analyses on human security, international humanitarian law and international criminal law, the R2P doctrine and gender-mainstreaming of peace support operations, all show that the international community is still struggling with inadequate legal protection for women in armed conflicts. Incomprehensive and incoherent policies and a lack of implementation prevail both at the UN and at national level, despite the positive developments and achievements of the post-Cold War period in international criminal law and ‘women, peace and security’. More research and a strengthening of normative frameworks primarily within IHL but also on R2P and the management of international peace and security are required.

The positive gender developments have unfortunately not gained express and direct recognition nor have they influenced the R2P doctrine as formulated by the ICISS Commission. But arguably, with the strong support and commitment from the Security Council and the Secretary-

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1318 Ibid., see pp. 120-121, 132-133, 139. Whitworth contends that the manner in which the UN has used the concept of gender in its understanding of peace and security, mainly limited by a focus on women as victims of sexual violence and to women’s contributions to peace-making, has transformed gender analysis from a critical to a problem-solving tool, which does not challenge prevailing practices in response to armed conflict. A whole series of questions are ruled out of bounds, such as whether peace-keeping is best conducted by military forces, and whether humanitarian operations are a form of imperialistic practice; and other questions being dismissed as impractical, idealistic and irrelevant to the central concerns.

1319 Ibid., p. 140. The work of status quo refers to the traditional UN understandings of war, security, states and territories, which depend on the absence of women, the marginalisation of gender analyses, and the reproduction and reinforcement of militarism.
General to combat sexual violence against women in armed conflicts, these should be considered for the continuing advocacy and implementation of an emerging norm on R2P. The development of a norm for the protection of human security from grave crimes in international law must also take these normative developments into account. Widespread or systematic sexual or gender-based violence constitutes crimes against humanity and other grave crimes in international law that should be addressed by the international community – and as a last resort, if the state concerned is unable or unwilling to protect women from such atrocities, by military means.1320

A gender-neutral doctrine to protect human security through humanitarian intervention would fail in several ways to address the underlying different security needs of civilians and the gendered power structures affecting such security needs and threats. Feminist theory and research show that by excluding the security needs of certain people in the criteria for intervention, the operations concerned become gender-insensitive and lopsided. As an example, Rodgers argued that in the case of the intervention in Bosnia, the human rights of women were largely ignored and therefore not treated as being relevant criteria for intervention.1321 The mandate of the peace support operation excluded protection from such gendered human rights violations and it has been contended that this contributed to a proliferation of sexual violence.

The case law of the ad hoc tribunals, the Rome Statute, and resolutions 1325 and 1820 have all contributed to some amelioration in the awareness of this problem among the policy elite, and to some extent at the field level, but the problem persists at the stage of implementation. More gender-sensitised training, guidelines, specified mandates, reporting systems, and inclusion of women at all stages of a peace support operation is needed to combat and address the invisibilisation of women’s security threats and needs.

Peace support operations that fail to acknowledge the security needs of half the population because of discrimination based upon sex, and with non-inclusive protection mandates not taking into consideration the different human security needs, will not provide security for all, irrespective of sex, and thus not become sustainable. These problems have been explicitly acknowledged by the Security Council, which stated:

[P]ersistent obstacles and challenges to women’s participation and full involvement in the prevention and resolution of conflicts as a result of violence, intimidation and discrimination, which erode women’s capacity and legitimacy to participate in post-conflict public life, and acknowledging the negative impact this has on durable peace, security and reconciliation, including post-conflict peacebuilding.1322

1321 Adler, Handbook of International Relations, p. 183.
Furthermore, a culture that informally allows for prostitution, sexual abuse and exploitation on the part of peace-enforcers themselves, represents a real obstacle and is wholly counterproductive to protecting women in a humanitarian intervention. The UN zero tolerance for such violations should become binding for states to implement. It should be strongly enforced through national criminal law to effect a change in this malevolent culture in peace-keeping practices if the specific intervention is to have significant and positive outcome on women’s security.

Further research, however, should be encouraged to investigate deeply into ‘whose human security is addressed’ by the present formulation and construction of R2P. Is such a formulation sufficiently gender-inclusive with respect to women’s human security threats, particularly in armed conflicts? How may the international community better address women’s human security through R2P? In what circumstances should the R2P doctrine apply to become better gendersensitised? Would it be more fruitful to argue for the full visibilisation of the pervasive, widespread and systematic sexual violence targeting women and girls in armed conflicts by insisting that it be classed as a crime in its own right, rather than accepting such conduct as part of defined grave crimes in international law (war crimes, crimes against humanity and genocide)?

Men should also be encouraged to be involved. They should be increasingly urged to engage in integrating male aspects in the so-called gender components of conflict prevention, management and resolution. By working together, gender mainstreaming security may develop to reflect equally male and female needs, interests and experiences. Such mutual respect might evolve beyond the holding of feminist-only standpoints, which would ultimately benefit everyone. As long as the general security policies alone reflect male needs, interests and experiences, the gender component will continue to be dominated by feminist perspectives in order to push for a balance, complementing the ruling gender-blind practices. This disequilibrium on the surface appears to serve and benefit men, but the illusion veils the male victimisation and sacrifices inherent in the system, as well as the negative repercussions on men and society in allowing and maintaining abuse and the repression of women. After all, women are the sisters, wives, daughters, mothers, and friends of men.

The international policies on gender mainstreaming of peace support operations and gender-sensitised definitions of grave crimes in international law arguably have a practical relevance for the Security Council’s implementation of R2P with military enforcement measures. But not only the Council, but also individual member states, are legally, politically and morally bound to implement the gender policies and integrate gender perspectives, especially when contributing with troops

for international peace and enforcement operations, including humanitarian interventions or R2P operations.

4.10. An R2P framework of analysis

UN Secretary-General Kofi Annan stated after the Kosovo War:

To avoid repeating such tragedies in the next century, I believe it is essential that the international community reach consensus – not only on the principle that massive and systematic violations of human rights must be checked, whenever they take place, but also on the ways of deciding what action is necessary, and when and by whom.\textsuperscript{1324}

The following four questions are similar to the four that were posed for the human security framework of analysis in Chapter 3.5., and appear to fill a central battery of questions for an analysis on humanitarian intervention, or a responsibility to protect by military means.\textsuperscript{1325} The questions will form the basic structure of the R2P framework for the analysis that follows, which is made in order to structure the material, rules and arguments in the subsequent legal analysis on R2P by military means in Chapters 6 to 8.

In this thesis the R2P framework will be based upon the military aspects of the second element of R2P (the responsibility to react) only. More specifically, the analysis will primarily revolve around the ‘humanitarian intervention’ aspects of the ‘responsibility to react’ element of the R2P doctrine. The humanitarian, political, diplomatic or economic responses that are also part of the ‘responsibility to react’ element will consequently be set aside. (For a working definition on humanitarian intervention, see Chapter 6.2.)

Both R2P versions, proposed in the ICISS report as well as the slimmer version in the Outcome Document, will be referred to below when discussing an R2P framework for analysis.

4.10.1. The R2P ‘whom’?

The R2P doctrine, as proposed by the ICISS, is directed towards the protection of populations within a state from extreme suffering, and more specifically, certain grave crimes under international law.\textsuperscript{1326} The term ‘populations’ embraces peoples in general, and more specifically civilians or individuals as such. This entails both women and men, girls and boys.

\textsuperscript{1324} Annan, \textit{Two Concepts of Sovereignty}.


\textsuperscript{1326} ICISS, \textit{The Responsibility to Protect}, p. XI; World Summit Outcome Document, 15 September 2005, paras. 138-139.
4.10.2. The R2P by whom?

There are several actors mentioned in the ICISS report suggested to have a responsibility to protect by military means. Apart from the internal responsibility of states, the external responsibility is primarily considered to belong to the Security Council. This hierarchy of responsibility has been acknowledged at the World Summit, where the Security Council was recognised as the first and primary agency to carry the moral and political external responsibility to protect by military means when a state manifestly fails in its internal responsibility to protect its population. Relevant regional organisations are also mentioned as possible agents in the Outcome Document, when acting in co-operation with the Security Council “as appropriate”.

However, in order to find solutions to those situations where the Security Council is unable or unwilling to take on its moral and political responsibility, those other actors suggested in its place to have a responsibility to protect by military means, should also be included in the analysis on an emerging norm (or norms) on external R2P. Several possible actors have been mentioned in the ICISS report in relation to an external responsibility to protect: The Security Council, the General Assembly, regional organisations, and coalitions of the willing. There are thus four potential actors that could take on a subsidiary external responsibility to protect when the state concerned manifestly fails to protect its people.

The Security Council is the primary and sole actor at the present time considered to have a Right Authority to undertake humanitarian interventions. But the R2P doctrine was developed to find alternative means to fill the gap when the Security Council was found to be unable or unwilling to protect. This is why other actors are important to consider in the study on emerging norms on R2P. The General Assembly’s capacity to represent a realistic option as an institutionalised authority for an external R2P, however, is questioned. The Uniting for Peace Procedure has not been used in situations of humanitarian intervention, since the Assembly does not possess the necessary majority support for such action. The Assembly would be an unlikely actor to take on such an external responsibility on a more institutionalised basis.

The other two possible actors, regional organisations and coalitions of the willing, have already contributed in a few cases of unauthorised humanitarian intervention, which will form the subject of the customary study on emerging norms on R2P. These two forms of unauthorised military action to protect will be the primary focus of concern for the case studies on and emerging customary norm (or norms) on external R2P in Chapters 7 and 8.

1327 Each individual state has an internal responsibility to protect its own population from grave crimes in international law. This internal responsibility will, however, not be part of the subsequent analysis, which instead will focus on the external responsibilities to protect by military means and the jus ad bellum rules in international law. The following chapters will only treat the external and military dimensions of the R2P doctrine.
When it comes to the question of emerging customary norms on external R2P by military means, the Council's ‘authorisations’ of humanitarian interventions is a form of ‘organ practice’ and should not be seen as state practice contributing to a customary process outside the UN Charter (see Chapter 2.2.1.3.). This practice, however, is analysed from the point of view of evolutionary interpretation or possibly informal modification of the UN Charter by subsequent practice.

The study of international law proper with respect to the purported responsibility to protect by military means for each of these three remaining actors will provide the answer to the question of ‘who has the legal right and/or legal obligation to protect by military means?’ The legal analysis will thus separate the lex lata and lex ferenda elements of the doctrine of responsibility to protect with respect to Right Authority to undertake military interventions, and identify the parts and elements of the doctrine that are, or could be, subject to a customary process on emerging legal norms on R2P.

4.10.3. The R2P from what/when?

The ICISS report suggests that populations within a state should be protected from “suffering serious harm, as a result from internal war, insurgency, repression or state failure”.1328 Hence protection encompasses not only extreme suffering during an armed conflict, but also other ‘conscious shocking’ humanitarian crises short of armed conflict. More specifically, the proposed threshold criteria provide that there must be present serious and irreparable harm to human beings (or of imminent likelihood), in the form of large scale killings or large scale ethnic cleansing (whether carried out by killing, forced expulsion, acts of terror or rape).

The states have, however, in the Outcome Document only accepted that the external responsibility to protect be activated in order to protect populations from very serious crimes under international law: Genocide, ethnic cleansing, war crimes and crimes against humanity. The case studies of humanitarian intervention by the three main actors mentioned (the Security Council, regional organisations and coalitions of the willing), should thus focus on the criteria laid down in this document. The R2P criteria that need to be examined in the case studies are the presence of any of the listed grave crimes, but also whether the state in question was ‘manifestly failing to protect’ and whether ‘peaceful means were found inadequate’.

The analysis in Chapter 4.6. shows that it is clear that this formulation does not encompass unauthorised humanitarian intervention by the last two named actors. When it comes to unauthorised interventions the relevant state practice should also be analysed with respect to the R2P criteria for military intervention developed in the ICISS report, since the Outcome Document does not explicitly allow for such action, at least with a restrictive interpretation.

1328 ICISS, The Responsibility to Protect, p. XI.
The additional relevant criteria that should also be considered are thus the four precautionary criteria for military intervention. Moreover, the state concerned must be manifestly (seen to be) failing to protect and the Council unable or unwilling to do so. The inadequacy of peaceful means is part of the ‘last resort’ criteria. The case studies on the emerging customary norms of the external R2P by military means will thus focus on these R2P criteria in order to answer the question of which situations and for which human security threats the R2P should be directed at (see Chapter 8). The case studies will be specifically analysed from an R2P ‘lens’ in order to find out whether this practice conforms with the R2P criteria in a general, uniform, consistent and representative manner that contributes to emerging customary norms of R2P.

At this moment the state practice falls short of the customary criteria, but the case studies will illustrate to what extent the human security paradigm and R2P doctrine are being accommodated in international law.

4.10.4. The R2P by which means?

The use of force is vigorously regulated in international law, and its use for the protection of populations within a state is neither an uncontroversial nor an uncomplicated matter. The legal right to use military force will depend heavily on the actor particular aspiring to carry out this responsibility to protect with force. The absence of such legal rights limits the possibility of carrying out a moral and political responsibility to protect, but the case studies may indicate that such a legal right may emerge for certain actors.

Chapter 6 will thus examine whether the Security Council has a legal right or obligation under the UN Charter to authorise the use of force for humanitarian protection purposes within a state. On unauthorised humanitarian intervention, international law as applied by states today has not yet admitted the emergence of a legal norm of R2P for regional organisations or coalitions of the willing. Article 53 of the UN Charter limits the forceful practice of regional organisations and the prohibition on the use of force in Article 2 (4) the UN Charter, together with the principle of state sovereignty and territorial integrity of states legally preventing these organisations and coalitions of the willing from intervening militarily for protection purposes. But the practice of these actors is examined in the case studies of humanitarian intervention (Chapter 7) in order to ascertain whether new customary norms are emerging in these areas, holding such legal rights, and potentially modifying the UN Charter rules informally. In particular, the doctrines of ex post facto or implied authorisation, as well as the practice based upon treaty developments on prior consented humanitarian interventions in Africa, will be specifically examined.

4.10.5. Summary – Actors as the organising principle

The four questions above have been useful for the purpose of structuring and delimiting the analysis on the emerging norm (or norms)
on external R2P by military means. The answers to the first and last questions (the responsibility to protect whom – individuals/peoples, and by which means – military means) are self-evident in this dissertation and do not need to be further discussed. The two remaining questions – who has an external R2P by military means, and in which situations? – are the most crucial questions to find answers to in the legal analysis. The four actors, suggested by the ICISS as competent to carry an external responsibility to protect, have different legal rights and obligations under international law on the use of force, and these should therefore serve to guide or structure the analysis. It may be possible for these actors to determine or establish different sets of thresholds or situations in which the R2P can be activated in accordance with international law. This will at least be a hypothesis in the following analysis.

The separation of these actors, the Security Council, the General Assembly, regional organisations, and coalitions of the willing, will therefore be crucial to discern and identify the respective *lex lata* and *lex ferenda* elements of emerging norms on R2P. The results of the R2P framework of analysis will thus be employed as an organising principle, structuring the following study on the customary process of emerging legal norms.
Part III. The R2P doctrine on protection by military means and International Law (IL)
5. The R2P doctrine on military intervention and IL

5.1. Introduction

This chapter contains two different approaches to the external R2P and international law. The first takes the doctrine on R2P as the point of departure. It examines the *lex lata* and *lex ferenda* elements in some of its main tenets and the criteria and principles relevant for military protection of human security within a state (see Chapters 5.2. and 5.3.). However, the R2P criterion of ‘Right Authority’ is not included in this analysis but is instead applied as the organising principle for the subsequent legal analysis in Chapters 6 to 8. The legal rules on the use of force with respect to different actors were too extensive to include the criterion of ‘Right Authority’ in the analysis here.

The second approach in this Chapter takes different legal rules and regimes in international law as the point of departure and investigates to what extent the external R2P builds on already existing legal regimes, and to what extent it may be claimed on the basis of those rules (see Chapter 5.4.). The final two subchapters discuss the external R2P as a legal right or obligation, and to what extent there could be collective responsibility or accountability for failing to comply with this right or obligation (Chapters 5.5. and 5.6.).

The development of the idea of ‘sovereignty as responsibility’ is presented and discussed in Chapter 5.2. The legal analysis of the military aspects of the R2P concept in Chapter 5.3. aims at examining how the main R2P tenets and criteria for military intervention correspond to the rules and principles of international law.¹³²⁹ Stahn argues that some of the features of the concept are already well embedded in contemporary international law, while others are so innovative that it might be premature to speak of a crystallising practice.¹³³⁰ This legal irregularity in ‘principle of R2P’ was earlier acknowledged in the ICISS report:

[T]he emerging guiding principle of the responsibility to protect, [...] as we have already acknowledged it would be quite premature to make any claim about the existence now of such a rule.¹³³¹

States and international legal scholars support this view, that the R2P doctrine does not yet adequately and fully reflect achievements in


¹³³⁰ Stahn, *Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?*, p. 110. He raises doubts about the status of the concept of R2P as an emerging legal norm, and claims that this characterisation is somewhat misleading. See his examination of this assumption, pp. 48-65.

¹³³¹ ICISS, *The Responsibility to Protect*, p. 50, para.
It is therefore important to draw a distinction between the *lex lata* and *lex ferenda* elements of the R2P, and for the purpose of this thesis its military aspects in particular.

Chapter 5.4. analyses the claim that ‘the principle of R2P is grounded in a miscellany of legal foundations’ with respect to relevant instruments and regimes in international law proper. It specifically investigates to what extent an ‘external responsibility to protect by military means’ is already building on, or developing existing rules and regimes in international law. The regimes and rules that could accommodate an external responsibility to protect are identified and contrasted with the R2P doctrine. However, the specific rules and state practice on ‘humanitarian intervention’ supporting an emerging customary norm of a R2P by military means is, however, analysed in Chapters 6 to 8, in relation to the R2P criterion of ‘Right Authority’.

The primary focus is on the military aspects of the second element of R2P (the responsibility to react) from an international law perspective. More specifically, the analyses revolve around the *jus ad bellum* aspects of the ‘responsibility to react’ – the ‘humanitarian intervention’ dimension of R2P and the legal rules dealing with the external protection of civilians within a state. The humanitarian, political, diplomatic or economic responses that are also part of the responsibility to react will consequently be set aside. Neither the security provision for delivery of humanitarian assistance nor the protection of UN personnel conducting peace-enforcement operations is included. Other related issues, such as the prosecution and punishment of war criminals and perpetrators of genocide and other serious crimes under international criminal law, fall under the third element of R2P – the ‘responsibility to rebuild’. For this reason they are not included in the following.

The observance of human rights and humanitarian law is generally more connected to the ‘responsibility to prevent’ element of R2P according to Breau, and she argues that it is the ‘failure’ to respect these standards that triggers the ‘responsibility to react’. But the UN Charter, human rights and humanitarian law instruments impose legal obligations on states, as well as the UN, to promote the respect for human rights and humanitarian law. The question is thus whether the ‘duty to co-operate’ and promote the respect for human rights and the obligation to ensure the respect of humanitarian law also include the use of external military force for their protection and enforcement will be specifically discussed below.

The Genocide Convention provides international obligations for both states and the UN to prevent, punish and suppress genocide. The examination of the ‘duty to prevent genocide’ under the Convention has

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1333 See my working definition in Chapter 6.2.
1334 Breau, *A Comparison of the United Kingdom and Canadian Approaches to Human Security*, p. 217. Breau argues that bringing justice for perpetuations of international crimes can be seen as part of the post-conflict, peace-building and reconciliation process. This author submits to this categorisation.
1335 Ibid., p. 218.
relevance for the question to what extent this regime gives legal support to the R2P concept. In consequence the *jus cogens* character of the prohibition on genocide and the *erga omnes* obligation to prevent genocide will also be examined in order to support the emerging norms on an external responsibility to protect by military force. Preventive obligations obviously fall within the first ‘responsibility to prevent’ element of R2P, but also provide legal obligations and responsibilities to take a reactive approach in order to prevent genocide. This part would fall under the second element of R2P – the responsibility to react.

The R2P concept is not yet a coherent, well-defined concept. Its content and application is still under discussion and subject to the practice of the states themselves. There are several different propositions and interpretations with regard to its content and criteria. The Outcome Document (2005) displays a framework different from the ICISS report. The most authoritative of these is the former. The principle of R2P endorsed in this document is not fully developed and it may not necessarily follow the same path proposed in the ICISS report. The General Assembly has still not discussed the concept nor agreed on how it should be applied. The practice of states and different statements, protests and acquiescences will therefore shape the process whereby this norm is further developed and formed. When an issue is too controversial for states to negotiate on directly, a less formal process becomes more suitable. Such informal means of managing an issue sometimes develop into a customary legal process, but which does not necessarily have to crystallise into law, at least not into all its aspects.

For the purpose of this thesis I shall make use of the most authoritative and hence by states the most recognised version of R2P – paragraph 139 of the Outcome document. But this formulation of the concept explicitly only regulates the responsibility to protect by military means within the UN Charter framework. This is why I shall also make use of and analyse the ICISS version of the R2P concept when analysing the external R2P outside the UN Charter framework.

This chapter thus analyses the most basic tenets relevant to the military aspects of the ‘responsibility to react’ element from an international law perspective, based upon both versions of R2P in the Outcome Document and the ICISS report.

### 5.2. The idea of ‘sovereignty as responsibility’ and IL

The ICISS report claims that “sovereignty as responsibility has become the minimum content of good international citizenship”, and explains that this implies dual responsibility, both internally and externally.¹³³⁶ This proposition appears to resonate with similar understandings of the concept of sovereignty among academic scholars. For example, Weiss argues that the idea of ‘sovereignty as responsibility’ lies in that the three characteristics of a sovereign state (territory, population and...

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¹³³⁶ ICISS, *The Responsibility to Protect*, p. 8, para. 1.35. Internally, states have a responsibility to respect the dignity and basic rights of all the people within the state, and externally, states simply respect the sovereignty of other states.
government) are supplemented by a fourth prerequisite – the respect for human rights. According to Slaughter it is the emergence of ‘solidarity’ in international society and the international legal order that redefines sovereignty. This modern understanding of sovereignty in which the state does not have unlimited power, is central in the ICISS approach to the question of intervention for human protection purposes and in the development of the R2P. This approach, according to Powell, is based upon the premise that sovereignty is conditional and defined in terms of a state’s willingness and capacity to provide protection for its citizens.

The ICISS Commission provides that the foundations of a responsibility to protect as an emerging guiding principle for the international community is inherent in the concept of sovereignty, and can be found in a miscellany of legal provisions in human rights and humanitarian law as well as in state and in Security Council practice. It is maintained that the external responsibilities owed to the international community flow from the signing of the UN Charter and the membership of the UN. The ‘sovereignty as responsibility’ has a threefold significance, according to the ICISS. The first, that state authorities are responsible for the functions of providing for the safety and lives of citizen; the second, that they are responsible not only to their citizens but also to the international community through the UN; the thirdly, that the agents of states are responsible for their actions and accountable for acts of both commission and omission.

In the Supplementary Volume to the ICISS report the authors explain further the idea of ‘sovereignty as responsibility’. R2P is thought to complement the individual’s right to protection with a correlative collective duty or responsibility in order to realise such rights. They identify several bearers of obligation: The state being the primary one, the international community as having a residual responsibility, and multilateral bodies. Ultimately ‘everyone’ bears a responsibility when a state fails to fulfil its obligation to protect. But the responsibilities suggested appear to be ethical rather than legal. The Supplementary Volume states that these are “types of actions that we are obliged to take and ensuing moral responsibility”. The R2P is by some suggested to


1342 Ibid., p. 13, para. 2.15.


1344 Ibid., p. 148.
be a moral obligation or responsibility. Nonetheless, it could be argued that actions taken by the international community based upon moral responsibilities may come to have legal implications – for example in the form state practice on the use of military force to protect populations. This state practice is further analysed in Chapters 6 to 8.

For many advocators of R2P, the evolution in language from that of right to responsibility represents the main achievement of the ICISS. But as Welsh, Thielking and MacFarlane point out, the notion of ‘sovereign responsibility’ is not new, and other similar arguments, for example ‘conditional sovereignty’, have previously been discussed by authorities on international relations as well as by international law.

In 1996 Deng et al. launched the idea of ‘sovereignty as responsibility’, implying dual responsibilities, in their book on conflict management in Africa. Balancing between national sovereignty with the need for international action to provide protection and assistance to victims of international conflicts would mean that the responsibilities and accountabilities of sovereign bodies to the domestic as well as to external constituencies are acknowledged as being interconnected. To be considered legitimate, sovereignty must demonstrate responsibility, which means at the very least ensuring a certain level of protection and providing for the basic needs of people. The authors identified four phases of development in the principle of state sovereignty; 1) the initial phase represented by the Treaty of Westphalia, 2) the erosion of sovereignty and development of human rights and humanitarian standards in the period after the Second World War, 3) the reactive phase asserting these new values in the post-Cold War era, and 4) the contemporary pragmatic attempt at reconciling state sovereignty with responsibility. The current presence of the fourth phase appears to be confirmed by legal scholars and others. Thus it was not until recently, in particular since the launch of the concept of R2P, that the reformulation of this notion came to be acknowledged by states.

Stahn regards the inclusion of R2P in the Outcome Document as a testimony of a broader systemic shift in international law where the principle of state sovereignty finds its limits in the protection of human security. However, he holds that the shift to ‘sovereignty as responsibility’ rather than sovereignty as ‘control’ is less radical than.

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1345 See e.g. Slaughter, Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform, p. 627.
1348 Deng et al., Sovereignty as Responsibility, Conflict Management in Africa, see e.g p. 1.
1349 Ibid., p. 27.
1350 Ibid., p. 2.
1351 Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, p. 101. However, he states that the quick rise of R2P from an idea into an alleged legal norm within four years, raises suspicion from a positivist perspective.
suggested by its history. It is well understood that today sovereignty entails duties on the international plane and in international law. The UN Secretary-General Kofi Annan recognised this development of sovereignty in 1999 in an article in The Economist. He said:

State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa.

Newman argues that not only the ICISS report but also the Dutch AIV/CAVV report and the DUPI and Kosovo Commission reports are premised on an evolving, perhaps ‘post-Westphalian’ notion of state sovereignty that is unambiguously conditional upon responsibilities towards citizens. He asserts that some of this is borrowed from classical humanist thought and it therefore might be more accurate to think in terms of ‘re-emergence’ of a norm of humanitarian intervention. But he also mentions that responsibilities towards the needs and rights of citizens are in fact not a prerequisite for state sovereignty. Many states do not meet this standard and their sovereignties are never doubted internationally, with the exception of the most shocking of cases. These four reports all belong to the post-Kosovo intervention period, and this development is thus recent.

Slaughter notes that the twin responsibilities (internal and external) implicit in sovereignty as responsibility is nothing less than ‘conditional sovereignty’, although “the panel itself did not and politically could not use that term”. She argues that the ICISS suggestion to change the core meaning of UN membership to imply the recognition of states as ‘responsible’ members of the international community, is a shift to ‘conditional sovereignty’ resembling more the post-Westphalian order of states in the EU and a reconception of the UN Charter as being far more demanding than it has been interpreted since 1945.

The theory of ‘conditional sovereignty’, also-called ‘the forfeiture of sovereignty’, ‘the temporary surrender of sovereignty’, or ‘involuntary sovereignty waiver theory’ was formulated by Richard Haass in 1993, contemporary with the Kosovo intervention. Haass outlined three instances which if realised could constitute a constructive waiver by a state of its sovereignty claim: 1) humanitarian intervention, 2) fighting terrorism and 3) stopping the spread of weapons of massdestruction. Simultaneously, the right of interference would not require prior UN authorisation. See Contemporary Practice of the United States, Use of Force and Arms Control, AJIL, vol 97, 2003, pp. 204-205, where these three exceptions to the norm of non-intervention are delineated.

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1352 Ibid., p. 111.
1353 Stahn refers to the UN Charter, subsequent international instruments on human rights, the Barcelona Traction Case where the ICJ asserted the concept of *erga omnes* obligations and the ILC Draft Articles on State Responsibility.
1354 Annan, Two Concepts of Sovereignty.
1356 Ibid., p. 118.
1358 Ibid., pp. 628-629.
1359 Ambassador Dr. Richard Haass, the US State Department’s Director of Policy Planning, outlined three instances which if realised could constitute a constructive waiver by a state of its sovereignty claim; 1) humanitarian intervention, 2) fighting terrorism and 3) stopping the spread of weapons of massdestruction. Simultaneously, the right of interference would not require prior UN authorisation. See Contemporary Practice of the United States, Use of Force and Arms Control, AJIL, vol 97, 2003, pp. 204-205, where these three exceptions to the norm of non-intervention are delineated.

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essentially to hold that countries constructively waive their sovereignty shields and invite international intervention when they undertake to massacre their own peoples, harbour terrorists, or make or import weapons of mass destruction. Such conduct would not require Security Council authorisation.\textsuperscript{1360} His theory has influenced US state practice on the use of force and his arguments were adopted by the US Administration in justifying waging the war in Iraq.\textsuperscript{1361} Furthermore, this theory has clear connections to Slaughter and Feinstein’s notion of ‘duty to prevent’ (see Chapter 4.3.2.). Kelly holds that Haass’s notion of sovereignty forfeiture uses the increasing acceptance for unauthorised humanitarian intervention as a vehicle to push for acceptance of intervention to prevent terrorism and the spread of weapons of mass destruction.\textsuperscript{1362}

Deng et al. argued in 1996 that any government that allowed its citizens to suffer in a vacuum, or through a lack of responsibility for moral leadership, could not claim sovereignty in efforts to keep the outside world from stepping in to offer protection and assistance.\textsuperscript{1363} But their idea of sovereignty waiver never stretched as far as implying ‘conditional sovereignty’ in the Haass sense\textsuperscript{1364} Neither does the ICISS doctrine on R2P. Saechao argues that the ICISS version of the ‘forfeiture of sovereignty’ is more positive because it reconciles rather than surrenders sovereignty with responsibility.\textsuperscript{1365}

Téson also elaborated on a limited theory of forfeiture of sovereignty when a state fails to protect and guarantee the rights of its subjects. In 1997 he stated:

A government is legitimate in internal and international relations when it observes a certain human rights standard determined by objectively valid (although not self-evident) principles of political justice. […] Another way of conveying the same idea is to say that the state has the international rights of territorial integrity and political independence if, and only if, it is a legitimate state from the standpoint of domestic justice – when it protects and guarantees the rights of its subjects. […] The point here, however, is that the invaded

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    \item \textsuperscript{1360} Kelly, Michael J., \textit{Pulling at the threads of Westphalia: "Involuntary sovereignty waiver" - revolutionary international legal theory or return to rule by the great powers?}, UCLA Journal of International Law & Foreign Affairs, vol 10, 2005, pp. 361-442, p. 367, and note 20, see also p. 401 \textit{et seq}. The document where Haass supposedly formulated this new doctrine could not be accessed on the internet.
    \item \textsuperscript{1361} See Contemporary Practice of the United States, \textit{Use of Force and Arms Control}, AJIL, vol 97, 2003, pp. 204-205.
    \item \textsuperscript{1362} Kelly, \textit{Pulling at the threads of Westphalia: "Involuntary sovereignty waiver" - revolutionary international legal theory or return to rule by the great powers?}, p. 403.
    \item \textsuperscript{1363} Deng et al., \textit{Sovereignty as Responsibility}, Conflict Management in Africa, p. 33.
    \item \textsuperscript{1365} Saechao, Tyra Ruth, \textit{Natural Disasters and the Responsibility to Protect: From Chaos to Clarity}, Brooklyn Journal of International Law, vol 32, 2007, p. 663, p. 673
\end{itemize}
\end{footnotesize}
government does not enjoy the protection of the rights associated with sovereignty.1366

Thus a state which does not observe certain human rights standard is not legitimate, and does not enjoy the protection of rights associated with sovereignty. However, the theory of 'conditional sovereignty' as defined by Haass, cannot be accepted in the modern theory of sovereignty in international law.1367 According to Ruddick, there has formerly been little precedent that failure to honour international obligations leads to a loss of sovereignty.1368 One recent instance where a case could be argued for a forfeiture of sovereignty was in the case of Afghanistan after September 11.

Although sovereignty “is not a legal term with any fixed meaning”, Malanczuk holds that modern interpretations of sovereignty imply ‘independence’ rather than ‘above the law’ as in the classical formulations on sovereignty.1369 ‘Absolute sovereignty’ where a ruler can do whatever he likes with his own subjects is no longer the main rule in international law or international relations. Joyner summarises the traditional form of absolute sovereignty in this way:

Since the mid-seventeenth century, sovereignty, supported by the prerogatives of authority and control, has underpinned the Westphalian state system of international relations. It is said that sovereignty endows a government with the lawful capability to make authoritative decisions concerning the people and use of resources within the territory of its state. The traditional view is that international law empowers a sovereign state to exercise exclusive, absolute jurisdiction within its territorial borders, and that other states and multilateral actors have the corresponding duty not to interfere in a state’s internal affairs.1370

Joyner continues by demonstrating and emphasising how the character of the international system has changed over the past six decades. He claims that the rationale for conceiving sovereignty in terms of responsibility is being increasingly justified by the escalating influence of human rights norms as components of human security.1371 This view is shared by many scholars and states today.1372 Deng et al. argue that it is

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1368 Ibid., p. 463.
1369 Malanczuk, Akehurst’s Modern Introduction to International Law, pp. 17-18; Deng et al., Sovereignty as Responsibility. Conflict Management in Africa, p. 2; Kelly, Pulling at the threads of Westphalia: "Involuntary sovereignty waiver" - revolutionary international legal theory or return to rule by the great powers?, pp. 360-370.
1370 Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, p. 703.
1371 Ibid., pp. 704-707. See also p. 714, where he argues that sovereignty resides in the citizens of the state, not in the government as sovereign, particularly when that government by commission or omission fails to halt brutal depredations of human rights, or is actually engaged in perpetrating them against its own citizens.
1372 Evans, The Responsibility to Protect: Rethinking Humanitarian Intervention, p. 82.
from the acceptance of this responsibility that the legitimacy of a government derives. Governments that deny or ignore the human rights their peoples have increasingly been viewed as non-representative governments of their states, lacking moral legitimacy.

The modern interpretation of sovereignty is thus conceived as having a dual meaning, containing both the relationship of superiors to inferiors within a state (internal sovereignty) and of the state itself towards other states (external sovereignty). ‘Internal sovereignty’ as responsibility today reflects *lex lata* as regulated by international human rights covenants, UN practice and state practice. Obligations to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity are derived from a state’s obligations under human rights, humanitarian law and international criminal law, both through treaty and customary law. ‘External sovereignty’ as responsibility is based upon the respect of the sovereignty, equality and territorial integrity of other states asserted in Article 2 (1) of the UN Charter. The legal consequences of breaches of internal sovereignty by states when ignoring or violating human rights law is still under development, and the theory on forfeiture of the sovereignty of states or conditional sovereignty is part of a contemporary *lege ferenda* debate, gaining more acceptance in the post-9/11 age. This is where the emerging norm of R2P comes in and contributes with its ideas to the debate.

### 5.3. The R2P criteria for military intervention and IL

#### 5.3.1. Introduction

Different sets or lists of criteria for when humanitarian intervention could or should take place have existed for several centuries. Among the first frameworks were part of the just war doctrine (*bellum justum*), dating back to the Middle Ages. To this date they are often referred to and applied in modern versions. In the early UN Charter era, proposals of obligations to prevent certain acts exist in a number of treaties, including most human rights conventions, as well as conventions protecting certain crimes, Milanović, *State Responsibility for Genocide: A Follow-Up*, p. 684; See ICCPR (1966); CEDCR (1966); CERD (1965); CAT (1984); Women’s Convention (1979); CRC (1989); First Optional Protocol to the ICCPR (1966); Geneva Convention I (1949); Geneva Convention II (1949); Geneva Convention III (1949); Geneva Convention IV (1949); Additional Protocol I (1977); Additional Protocol II (1977); The IV Hague Convention (1907); Rome Statute (1998); With regard to the prevention of genocide in particular see Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgement*, p. 699; Bosnia v. Serbia Case (2007), para. 429. It is, however, beyond the scope and purpose of this thesis to delineate the exact scope and basis of the internal legal responsibility to protect in international customary law.

1373 Deng et al., *Sovereignty as Responsibility. Conflict Management in Africa*, p. 32
1375 Obligations to prevent certain acts exist in a number of treaties, including most human rights conventions, as well as conventions protecting certain crimes, Milanović, *State Responsibility for Genocide: A Follow-Up*, p. 684; See ICCPR (1966); CEDCR (1966); CERD (1965); CAT (1984); Women’s Convention (1979); CRC (1989); First Optional Protocol to the ICCPR (1966); Geneva Convention I (1949); Geneva Convention II (1949); Geneva Convention III (1949); Geneva Convention IV (1949); Additional Protocol I (1977); Additional Protocol II (1977); The IV Hague Convention (1907); Rome Statute (1998); With regard to the prevention of genocide in particular see Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgement*, p. 699; Bosnia v. Serbia Case (2007), para. 429.
1376 It is, however, beyond the scope and purpose of this thesis to delineate the exact scope and basis of the internal legal responsibility to protect in international customary law.

1377 See and compare, for example, Bellamy’s just war approach applied in his analyses over Kosovo, Darfur and Iraq (2003) in Bellamy, *Just Wars*, pp 207-226; and Wheeler’s application of just war criteria in Wheeler, *Saving Strangers. Humanitarian Intervention in International Society*, for brief introductions to the just war tradition and humanitarian intervention, see Gill, Terry D., *Humanitarian Intervention: Legality, Justice and Legitimacy*, The
different legal criteria on humanitarian intervention were developed, among others, by Lillich, and Moore. In the post-Cold War period, in particular after the intervention in Kosovo, numberless legal scholars, political scientists, philosophers, states, research institutes and independent commissions have all put forward their own suggestions, often similar lists, of criteria for humanitarian intervention based upon a core of just war doctrine. In the post-9/11 period efforts to articulate criteria have continued to proliferate, but the most predominant framework to have been discussed and in a modified and limited way embraced by states in the new millennium, is the concept of R2P developed by the ICISS Commission.

The ICISS R2P criteria for military intervention, also elaborated on the basis of just war criteria, was primarily developed as guidelines for the Security Council in its deliberations on decisions involving the use of force to protect human rights, and to enable it to work more effectively in that task. The earlier criteria on humanitarian intervention in the legal


1381 Several of the ICISS criteria have a just war lineage: Just cause, right intention, last resort and proportional means, Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, p. 114. See and cf. the Just War criteria for humanitarian intervention in Bellamy, Just IFars, pp. 199-228. According to Welsh, Thielking and MacFarlane there is an important dilemma with the criteria of right authority. They believe that claims about lack of authorisation do not absolve those who have the capability to act from their moral responsibilities. This is why some scholars who employ Just War criteria to humanitarian intervention do not include the principle of right authority as one of the criteria, see Welsh, Thielking & MacFarlane, The Responsibility to Protect. Assessing the Report of the International Commission on Intervention and State Sovereignty, p. 505. I am studying the development of legal responsibilities in this thesis, and will therefore only to a limited extent comment on the moral responsibility to protect. The right authority is an important aspect with regard to legal responsibilities, and it is analysed more closely in Chapters 6 and 7.
literature have been developed chiefly as a form of introducing moral, ethical, and political considerations, serving the purpose of politically legitimising unauthorised humanitarian interventions, and mitigating a violation of the prohibition on the use of force. Lists of criteria have also served as a means of avoiding the risk of abuse of the concept for other political ends. It is debatable whether the utility of the ICISS criteria will encourage political consensus in response to atrocities, making Security Council action more likely in future, or contribute to a legal basis for unauthorised humanitarian intervention – or in worst cases limit the existing right to humanitarian intervention. (See the discussion in Chapters 9.2.2. and 9.2.3.)

The UK and the Netherlands have argued that these guidelines for the Security Council may prove valuable when the Security Council fails to take action in providing a basis for evaluating and justifying unauthorised military action and for minimising abuse by other actors. Other experts, practitioners and commentators disagree on the utility of these criteria (see Chapters 4.4-4.6.). The usefulness of having R2P criteria as guidance for decisions on humanitarian intervention is thus both questioned and supported by different states, politicians and scholars.

The Outcome Document contains no such criteria for humanitarian intervention, apart from those principles outlined for R2P in paragraph 139 (see Chapter 4.6.). At the World Summit, nearly all governments hesitated to commit themselves to criteria that would require military action. It is too controversial a subject among states as to whether criteria for the legality and legitimacy of unauthorised humanitarian intervention should become part of a legal doctrine. Weiss wrote in 2005:

I am quite persuaded that the present is not the moment to lobby for guidelines because the blowback from Iraq precludes serious discussion for the foreseeable future.

Nonetheless, the criteria will in the following chapters be analysed and contrasted with the relevant international legal norms that are applicable

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1383 For a discussion on the utility of criteria see e.g. Stromseth, Rethinking humanitarian intervention: the case for incremental change, pp. 261 et seq.
1384 Ibid., p. 266.
1385 Gray, A crisis of legitimacy for the UN collective security system?, at pp. 165-166. For a more positive view of the utility of criteria, see Wheeler, The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society, p. 47. Read more about state views during the UN World Summit in Chapter 4.6.
1387 Weiss, Cosmopolitan force and the responsibility to protect, p. 234. See more on the negative effects of the Iraq war on the R2P doctrine, Chapter 4.3. For a discussion on different positions on the legalisation of unauthorised humanitarian intervention, see Chapter 9.
in this context, in substance with regard to Security Council military measures. The purpose is to examine to what extent these R2P criteria reflect *lex lata* and which of them form part of *lex ferenda*. It is necessary to make this clear, since the ICISS criteria will be applied in the case studies on unauthorised humanitarian interventions by regional organisations in Chapter 8 (see a discussion on the R2P criteria in the case studies in Chapter 8.2.). The law regulating such actions is scarce, prohibitive or not yet developed. This is why the criteria will be assessed from the perspective of a continuing customary process to determine whether state practice itself is aimed at establishing these criteria through a customary process of humanitarian interventions.

Governments did not agree on including the ICISS criteria for military intervention as a form of precautionary principles for the Security Council in the World Summit Outcome Document. Thus no formally accepted principles – not even voluntary ones – presently exist to guide Security Council decision-making on R2P, apart from paragraph 139 in the Outcome Document. The ICISS standards or criteria can and should, however, continue to inform public debate and deliberations among governments, according to the Global Centre for the Responsibility to Protect.1388

5.3.2. ICISS criteria and international law

Introduction

The Commission argued that there must be limited exceptions to the principle of non-intervention in cases of violence that so genuinely “shock the conscience of mankind” or that present such a clear and present danger to the international community so as to require coercive military intervention.1389 To identify these cases they formulated a set of principles for military intervention that must be met with as much precision as possible in order to reach the necessary consensus on a decision to intervene.1390 These are:

1) Just cause threshold
   a. Large scale loss of life
   b. Large scale ethnic cleansing

2) Precautionary principles
   a. Right intention
   b. Last resort
   c. Proportional means
   d. Reasonable prospects of success

3) Right authority1391

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1389 ICISS, *The Responsibility to Protect*, p. 31.
1390 ICISS, *The Responsibility to Protect*, p. XII.
1391 The criteria of right authority is analysed more closely in Chapters 6 and 7.
The R2P criteria elaborated by the ICISS are not legally defined but are rather political and subjective in form.1392 It is well understood that states will differ in interpretation and assessments on whether these things have been met in a particular case. It cannot be expected that they will in themselves produce agreement among states. Welsh, Thielking and MacFarlane believe that in most cases the problem is not a lack of evidence, but how it is assessed. They assert that despite the presence of evidence meeting the ICISS criteria, states will always take into account other aspects, including order, stability and self-interest: “[T]he ICISS checklist can only represent necessary, and not sufficient, conditions for a decision to intervene”.1393

It has been argued that the ICISS Commission had a ‘dual strategy’ embedded in the concept of R2P through the criteria for military intervention in order to prevent future Rwandas. The first was to enable genuine humanitarian interventions and the second to prevent abuse.1394 However, Bellamy insists that the R2P concept based upon these criteria is still unable to avoid two pitfalls: Its use as a pretext for justifying inaction, and the possible misuse or abuse of the criteria justifying all kinds of intervention.1395 He reasons that the assumptions of the R2P concept have proved to be wrong in the cases of Darfur and Iraq, which did not lead to avoidance of these pitfalls, and that there is little evidence suggesting that states intervene because they are morally shamed into doing so by domestic or global public opinion.1396 Bellamy raises three inherent problems with the ICISS approach and the reliance on criteria for these purposes.1397 First, that the indeterminacy of the criteria in its application can also be used to prevent action; second, that the emphasis on factual elements in each case would contribute to political and non-neutral assessments where powerful states will be able to use their

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1392 Gray, A crisis of legitimacy for the UN collective security system?, p. 166. Welsh, Thielking and MacFarlane argue that the ICISS checklist can only represent necessary but not sufficient conditions for a decision to intervene, see Welsh, Thielking & MacFarlane, The Responsibility to Protect. Assessing the Report of the International Commission on Intervention and State Sovereignty, pp. 497-499.


1396 Other support this view, see e.g. Hilpold, The Duty to Protect and the Reform of the United Nations, pp. 51, 63. Despite the misuse of the R2P concept in the Iraq case (2003), and the lack of or late use of R2P in the Darfur case (2003/2004 and onwards), I would like to counter-argue that the existence of the criteria on an ideational basis in 2003 is not the same as having established criteria actually endorsed and acknowledged by the international community as guiding principles or norms. The principle of R2P as such was not recognised by states on a universal level until the 2005 UN World Summit, and at the time not yet well developed in its content and application (still not). The Security Council decision to authorise a hybrid force to protect people in Darfur in 2007 came late, but it also reflects the need for time duration in reaching agreements and developing opinio juris in a customary process involving international norms regulating the use of force.

military, political and financial powers as leverage for action or inaction; and third, that the strategy relies on an assumption that governments could be persuaded to act in humanitarian crises by means of external force.

Alvarez argues that it is only some of these inherently vague conditions - the principle of proportionality and perhaps last resort, if seen as a version of necessity – that are terms under international law.1398 He does not believe that the international community would be able to reach agreement on their definitions, as little as they have with the definition of terrorism.

a. Just cause threshold

According to the ICISS, military intervention for human protection purposes is an exceptional and extraordinary measure and is justified if serious and irreparable harm occurs to human beings, in order to:

[H]alt or avert:
A. 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
B. Large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.1399

The report includes a list of conditions that typically would be included in such conscience-shocking situations.1400 This list is broadly framed and covers anticipatory measures in order to avert a pending humanitarian catastrophe, but also excludes certain conditions, which from time to time have been included to justify humanitarian

1398 Alvarez, ASIL (Publ.), The Schizophrenias of R2P. Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, p. 9.
1399 ICISS, The Responsibility to Protect, p. 32.
1400 Ibid., p. 33, para. 4.20:
* those actions defined by the framework of the 1948 Genocide Convention that involve large scale threatened or actual loss of life;
* the threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving state action;
* different manifestations of “ethnic cleansing,” including the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group);
* those crimes against humanity and violations of the laws of war, as defined in the Geneva Conventions and Additional Protocols and elsewhere, which involve large scale killing or ethnic cleansing;
* situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war; and
* overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.
intervention. The ICISS has been criticised for excluding specific reference to systematic racial discrimination and the toppling of democratically elected or legitimate governments.

The level of threshold can of course be further questioned and discussed, whether it has been set too low or too high, as well as the lists of conditions included and excluded. But irrespective of this, the ICISS formulation of a just cause threshold challenges several traditional notions and norms from an international law perspective. The situations expressed fall generally within article 2 (7) of the UN Charter prohibiting the UN from intervening in matters essentially within the domestic jurisdiction of any state unless those matters constitute a threat to the peace. The ICISS report even explicitly states that the principles make no distinction between those abuses occurring wholly within state borders, with no immediate cross-border consequences, and those with wider repercussions. Threats to human security solely within a state have traditionally been regarded as being within the domain réservé of states. This principle, however, does not prejudice the application of enforcement measures under Chapter VII, which means that the situation in question has to constitute a threat to the peace, breach of the peace, or acts of aggression in order for the Security Council to take action (Article 39). As known, the Security Council extensive interpretation of ‘a threat to the peace’ in the post-Cold War period has contributed to new practice in this area where threats to human security

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1401 Ibid., p. 34:
* human rights violations falling short of outright killing or ethnic cleansing, for example systematic racial discrimination, or the systematic imprisonment or other repression of political opponents.
* cases where a population, having clearly expressed its desire for a democratic regime, is denied its democratic rights by a military take-over. The overthrow of a democratic government is a grave matter, requiring concerted international action such as sanctions and suspension or withdrawal of credits, international membership and recognition – and there might well be wider regional security implications such that the Security Council is prepared to authorise military intervention (including by a regional organisation) on traditional “international peace and security” grounds. There may also be situations where the overthrown government expressly requests military support, and that could clearly be given within the scope of the self-defence provisions in Article 51 of the UN Charter.
* the use of military force by a state to rescue its own nationals on foreign territory, sometimes claimed as another justification for “humanitarian intervention,” we regard that as being again a matter appropriately covered under existing international law, and in particular Article 51 of the UN Charter. The same goes for the use of force in response to a terrorist attack on a state’s territory and citizens: to the extent that military action is justified, it would be supported by a combination of Article 51 and the general provisions of Chapter VII, as the Security Council has now made clear with its resolutions in the aftermath of 11 September 2001.

1402 Levitt, The responsibility to protect: A beaver without a dam?, pp. 175-176.
1403 For such a discussion, see e.g. Wheeler, Towards a New Transatlantic Consensus on the 'Collective Responsibility to Protect', pp. 9-10; see also the argument that the criteria should demand a violation of a peremptory norm in order for humanitarian intervention to be considered, Breau, Humanitarian Intervention: The United Nations and Collective Responsibility, p. 306.
1405 ICISS, The Responsibility to Protect, p. 33, para. 4.23.
have to a certain extent come to be integrated in the collective security system. (Read more on these cases in Chapter 6.1.)

The possibility of preventive action that the ICISS threshold prescribes by the inclusion of the phrase ‘actual or apprehended’, suggests some form of ‘anticipatory humanitarian intervention’. Scholars have criticised the fact that neither “massive” nor “large-scale” are defined more closely and are not qualifiers which can determine the need for military intervention. But Joyner does not believe that they should be. He states:

If the responsibility to protect is to have any legal credibility or political integrity, military action must be legitimised in anticipation of the onslaught of pervasive killings or ethnic cleansing in a society.1406

The anticipatory feature of the ICISS R2P threshold challenges to some extent the above mentioned new practice and interpretation of article 39.1407 The evidence of threats to human security must hence be of such severity and magnitude as to cause the Security Council to feel compelled to consider the pending humanitarian situation to constitute a threat to the peace. There is, however, no legal limitation on the Council to consider an imminent human security a threat to the peace. (See Chapter 6.3.2.4.)

Should the precautionary principle of ‘last resort’ also be respected, anticipatory action for humanitarian purposes would most probably be difficult to employ in other than very extreme cases.1408 The risk of abuse is however greatest in relation to preventive action as Wheeler notes, and the burden of justification must always lie with those states arguing for an intervention.1409 The assessment of last resort may be a rather subjective enterprise unless such proof is presented, in particular by other actors than the Security Council.

b. Right intention

The Commission declared that the primary purpose of an intervention 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. Occupation of territory may not be able to be avoided, but it should not be an objective as such.\textsuperscript{1410}

The ICISS recognises that it is a fact of life that most often there are other motives present than just the humanitarian one, but mixed motives in themselves should not preclude intervention.\textsuperscript{1411} Budgetary costs and risks to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention. Apart from economic or strategic interests, understandable forms of state interest could be the concern for avoiding refugee flows, safe havens for drug production or terrorism. Furthermore, in order to ensure that this criterion is met, it is argued that intervention should be carried out in a collective or multilateral manner rather than on a unilateral, single state basis.

These formulations regarding right intention comply properly with international law in terms of the principles of non-intervention, the sovereignty and territorial integrity of states, as well as the prohibitions on aggression, the acquisition of territory,\textsuperscript{1412} and the use force against the political independence of another state.\textsuperscript{1413} The main objective, to halt or avert human suffering, could well be argued to be indirectly the purpose of the Security Council’s responsibility for the maintenance of international peace and security, embedded in Article 24 of the UN Charter, although it might not originally have been. So, however, mixed motives or intentions behind the authorisation of a humanitarian intervention do not legally limit the Security Council in taking enforcement measures so long as the Council members agree on their necessity.

Unauthorised humanitarian intervention is not (yet) accepted in international law, why collective enforcement measure through the UN framework is the warranted legal response (see more on the legality of unauthorised humanitarian intervention in Chapter 7). However, if such a right is emerging as a customary norm, the criteria of right intent would be important to uphold, and would find support in the historical legal tradition of the just war doctrine.\textsuperscript{1414} (See the case studies in Chapter 8.4.1.)

There has been critical discussion against the notion of using the ‘humanitarian intention’ or motives of states as a criterion for humanitarian interventions because it focuses on the intervening state as referent object for analysis. Arguments have been made for using the prospects of ‘humanitarian outcome’ as a guiding principle instead.\textsuperscript{1415}

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\textsuperscript{1410} ICISS, \textit{The Responsibility to Protect}, p. 35.
\textsuperscript{1411} \textit{Ibid.}, p. 36.
\textsuperscript{1412} \textit{Ex injuria jus non oritur} (no territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful), see article 5 of the Definition of Aggression, GA Res. 3314 (XXIX), 14 December 1974, UN Doc A/RES/3314 (XXIX), 1974.
\textsuperscript{1413} See Article 2 (1) and 2 (4) of the UN Charter, and \textit{ibid.}
\textsuperscript{1414} Bellamy, \textit{Just Wars}, p. 211.
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Thus it should not be the intention and justification of states but the outcome of the intervention in question that guides the assessment of whether or not it constitutes a humanitarian intervention. Thus if it had ‘humanitarian effects’, it should be regarded as one, even though it was not the main intention of the interveners. In this thesis, however, the view that addresses the official intentions or motives of states and their ‘justifications’ for intervention, will be employed when assessing a case of state practice for the purpose of examining whether there is an emerging customary rule in international law.\textsuperscript{1416}

One way of helping to ensure that the right intention criterion is satisfied is to have military intervention take place on a collective or multilateral rather than single-country basis.\textsuperscript{1417} Evans also mentions that the extent to which the intervention is supported by the people for whose benefit the intervention is intended, as well as supported by neighbouring countries.

c. Last resort

It is a requirement that every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must previously have been explored. The ICISS explains that often there will simply not be the time for that process to work itself out, but that there must be reasonable grounds for believing that, in all the circumstances, had the measure been attempted it would not have succeeded.\textsuperscript{1418}

The principle of using force as a last resort is well established in international law, through the obligation to settle international disputes through peaceful means within the provisions of Articles 2 (3) and 33, and in the prohibition on the use of force (Article 2 (4)) of the UN Charter. A humanitarian crisis arising from an international dispute or conflict between states may hence be dealt with by resort to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or by other peaceful means. Humanitarian crises not arising from an international dispute, for example natural catastrophes, internal armed conflicts, failed or fragile states, or the disintegration of states do not fall under the obligation of peaceful settlement of disputes between states.

On how to address a humanitarian crisis within a state, the UN Charter is silent. However, if the crisis concerned is perceived by the Security Council to meet the Chapter VII threshold of Article 39, non-military enforcement measures in accordance with Article 41 will be the primary response before the Security Council resorts to the use of force. Article 42 explicitly states that provided the measures in Article 41 “would be inadequate or have proved to be inadequate”, the necessary use of force to maintain international peace may be employed. This indicates that the Council does not have to go through all the stipulated non-military measures of an economic, political and diplomatic kind.

\textsuperscript{1416} See the importance placed on such justifications for the customary process by the ICJ in the Nicaragua Case (1986), p. 109.

\textsuperscript{1417} Evans, \textit{The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All}, p. 143.

\textsuperscript{1418} ICISS, \textit{The Responsibility to Protect}, p. 36.
before it authorises the use of force, if those measures proved to be inadequate. In practice, the test of inadequacy is difficult to assess and is a political assessment that has to be made by the Council in each individual case.

d. Proportional means

The scale, duration and intensity of any planned military intervention should be the minimum necessary to secure the ‘humanitarian objective’ in question.

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.1419

The ICISS furthermore emphasises that all the rules of international humanitarian law should be strictly observed in such situations, and proposed that even higher standards should apply in these cases.1420

The objective of Security Council military enforcement measures is generally believed to have the aim and purpose of restoring international peace and security (Article 24 of the UN Charter). A ‘humanitarian objective’ in the operations of the Security Council has not traditionally been perceived as being the primary aim, but the new practice of the Council on humanitarian interventions during the 1990s has integrated the protection of civilians through the respect and enforcement of human rights and humanitarian law in the Council’s application of its mandate. There are also several thematic Security Council resolutions today directed towards the protection of civilians, and which emphasise the importance of integrating such mandates in peace support operations.1421

Thus an excessive use of force that includes other military and strategic aims that depart from the humanitarian objective, for example, the total defeat of the other party’s military forces or the achieving of territorial gains, falls outside the legitimate and proportionate use of force in humanitarian interventions. Arguably, this is furthermore incompatible with the UN Charter.

This principle of proportionality legitimising humanitarian interventions must be distinguished from the principle of proportionality embedded in jus ad bellum, although there appears to be considerable

1419 Ibid., p. 37, para. 4.39.
1421 S/RES/1265 (1999), op. 11, which asserts the Council’s willingness to consider how peace-keeping mandates might better address the negative impact of armed conflict on civilians; S/RES/1296 (2000); op. 9, which state and underline i.e. the importance of fully addressing the special protection and assistance needs of civilians in the mandates of peace-making, peace-keeping and peace-building operations.
overlap in that the proportional scale and intensity of the intervention concerned may be judged from the perspective of humanitarian law.\textsuperscript{1422}

The former principle is a \textit{jus ad bellum} rule, requiring the balancing of the use of force of the humanitarian intervention in terms of scale, duration and intensity against the security threat that it seeks to address, namely to avert human security threats amounting to atrocities such as genocide, war crimes, crimes against humanity and ethnic cleansing. The \textit{jus in bello} rule of proportionality was developed as part of the customary rule of a right to self-defence, and demands that the use of force is neither unreasonable in extent nor excessive, and limited by the necessity to avert the armed attack.\textsuperscript{1423} But the principle has also been a part of the just war tradition and therefore also extends to other uses of force, such as humanitarian interventions.\textsuperscript{1424} According to Rodley, the principle is to ensure that

the gravity and extent of violations be on a level commensurate with the reasonably calculable loss of life, destruction of property, expenditure of resources and shock to the international body politic inherent in the violation of a state’s frontiers. This presumably means that a central feature of the situation will be widespread violation of the right to life. Indeed, the violations may well need to amount to systematic crimes under international law such as crimes against humanity [...]\textsuperscript{1425}

The latter principle of proportionality provides that the value of a military attack has to be weighed against the civilian casualties expected from it, and limited or stopped if that balance is not proportionate.\textsuperscript{1426} The use of force during an armed conflict must always be in compliance with humanitarian law, also in a humanitarian intervention.\textsuperscript{1427} The \textit{jus in bello} rule of proportionality restricts the range and means of objects that

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1422 Greenwood argues that the \textit{jus ad bellum} and \textit{jus in bello} are closely interlinked and operate simultaneously in modern armed conflict, see Greenwood, \textit{Essays on War in International Law}, pp. 13–33; see e.g. Wheeler, \textit{Saving Strangers. Humanitarian Intervention in International Society}, pp. 35–36.
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1426 See Article 57 (2) Additional Protocol I (1977): “(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”; see also Fenrick, \textit{Targeting and Proportionality during the N-ATO Bombing Campaign against Yugoslavia}, p. 10 \textit{et seq}.
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1427 See e.g. Rodley and Cali, \textit{To Loose the Bands of Wickedness. International Intervention in Defence of Human Rights}, p. 38.
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may lawfully be targeted.\textsuperscript{1428} (See more on the principles applied in the case studies in Chapter 8.4.1.)

There is also a purported principle of proportionality applicable on the activities of the Security Council embedded in Article 42 of the UN Charter, implying that the military enforcement measures must be appropriate and necessary for the achievement of its purpose, i.e. to maintain or restore international peace and security.\textsuperscript{1429} The rule is revealed under the phrase “[s]hould the Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate […]”.

c. Reasonable prospects

Military action can only be justified if it stands a reasonable chance of success – that is, halting or averting those atrocities or suffering that triggered the intervention in the first place. It should be avoided if the outcome was likely to be worse than if there were no action, or perhaps touched off a larger regional conflagration involving major military powers. The application of this principle therefore naturally precludes military action against any one of the five permanent members of the Security Council and other major powers that are not permanent members of the Security Council.\textsuperscript{1430} This of course raises the question of double standards, and the Commission’s position is that even if interventions are not able to be mounted in every case where there is justification for doing so, it is no reason for not intervening in any case.\textsuperscript{1431}

There is no equivalent principle in international law demanding reasonable prospects of success when deciding on a humanitarian intervention. But it is possible to argue that it is self-evident and that a similar criteria, which avoids conflicts escalating or international security destabilising, is indirectly built into the collective security system through Articles 24, 39 and 42 of the UN Charter and the veto powers of the Permanent Members. The Security Council’s responsibility and mandate to maintain international peace and security and the veto powers are constructions that hinder the major powers in authorising the use of force in circumstances that could lead to an increased security threat to the world. Whether this construction is effective in reality is, of course, open to debate. There are numerous examples of where the Security Council’s decision to authorise the force for humanitarian purposes has failed in its mission, or even contributed to further a humanitarian disaster. The criterion of ‘reasonable prospects’ is in itself difficult to


\textsuperscript{1430} Evans, \textit{The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All}, pp. 145-146.

\textsuperscript{1431} ICISS, \textit{The Responsibility to Protect}, p. 37.
assess, since it will always consist of a hypothetical assessment over the question of ‘what would have happened if no action had been taken’.

Conclusion

The precautionary principles of ‘last resort’ and of ‘proportionality’ could be said to be already part of le\textit{c}\textit{x} \textit{lata} and embedded in Article 42 (and possibly indirectly in Article 24) of the UN Charter, as far as it concerns the external R2P of the Security Council.\textsuperscript{1432} In the following Chapter 6, the position by several scholars that the Security Council is bound by customary law, in particular humanitarian law and human rights including the customary \textit{jus ad bellum} and \textit{jus in bello} principles of proportionality and necessity in its capacity authorising the use of force, is furthermore discussed.\textsuperscript{1433} (See Chapter 6.3.2.4.)

The test of a ‘right intention’ to halt or avert human suffering, could to some extent be presumed to apply to the work of the Security Council. The Council has the primary responsibility of maintaining international peace and security, but its enforcement measures may have political objectives other than halting human suffering in the first place, although in the long run all Council measures could be presumed to have the indirect intention of alleviating human suffering worldwide. The UN Charter preamble states that the purpose of the organisation is to ‘save succeeding generations from the scourge of war’.

The principle of ‘reasonable chance of success’ in stopping or averting human suffering could to a certain extent also be presumed as a pre-existing built-in mechanism in the system of collective security. It must be assumed and expected that the Security Council avoids taking action in situations where such measures would lead to consequences that would worsen a security situation. However, such a result may in reality in fact not always be possible to avoid, even though the particular outlooks might appear to hold a reasonable chance of success.

\textsuperscript{1432} The principle of last resort could be argued to be already binding on the Council due to the wording in Article 42: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate […]”. The principle of proportionality can be found in the wording “as may be necessary”. The principle of proportionality is also part of customary law in both \textit{jus ad bellum} and \textit{jus in bello}, however with a slight difference in content. Frowein/Krisch, Article 42, Simma, Bruno (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, Oxford University Press, Oxford, 2002, p. 753, paras. 7-8; McLemore, Megan, \textit{The Responsibility to Protect: A Legal Perspective}, Graduate Department of The Faculty of Law, University of Toronto, Toronto, 2006, p. 18; Murphy, Sean D., \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, 21, Procedural Aspects of International Law Series, University of Pennsylvania Press, Philadelphia, 1996, pp. 311-312, Cf. the \textit{de lege ferenda} argument in O’Connell, Mary Ellen, \textit{The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform}, Blokker, Niels, Schrijver, Nico (Eds.), The Security Council and the Use of Force. Theory and Reality - A Need for Change?, Koninklijke Brill NV, Leiden, 2005, p. 61, where only right intent is seen as a new addition, and the others subsumed under the principles of necessity and proportionality.

The just cause threshold for R2P interventions is not part of *lex lata* in the sense that it legally binds the Security Council in its powers of action, but the Security Council's extensive interpretation of 'a threat to the peace' in the post-Cold War period has contributed to new practice in this area where threats to human security have to an extent become integrated in the collective security system (see more in Chapter 6.3.1.3).

5.3.3. Outcome Document criteria and international law

**Introduction**

The external R2P criteria endorsed at the UN World Summit differs in several ways from the ICISS R2P criteria. The states abandoned the just war criteria in this R2P formula and focused more on legally defined thresholds or crimes rather than politically defined criteria as guiding principles for intervention.\(^{1434}\)

It follows from paragraph 139\(^{1435}\) that the international community of states is prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis in cooperation with relevant regional organisations as appropriate, should ‘peaceful means be inadequate’\(^{1436}\) when:

- National authorities *manifestly fail* to protect their populations from:
  - genocide,
  - war crimes,
  - ethnic cleansing or
  - crimes against humanity

Apart from the political considerations made with regard to the situation on a case-by-case basis and the inadequacy of peaceful means, two criteria must be met in order for the moral and political responsibility to protect by military means by the Security Council to be considered at all: Firstly, that the government concerned is ‘manifestly failing to protect’

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\(^{1434}\) Gray holds it hard to imagine that the five criteria would have made any real impact on the decision-making of the Security Council. She gives an overview of the discussion and views of states regarding the desirability of the need to adopt such criteria during the UN World Summit 2005, see Gray, *A crisis of legitimacy for the UN collective security system?*, pp. 165-166.

\(^{1435}\) The relevant parts of paragraph 139 reads: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations 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.”

\(^{1436}\) It could be argued that the criterion that ‘peaceful means are found inadequate’ may be considered to be the same as the criterion of ‘last resort’ discussed in Chapter 5.3.2.c.. The same legal analysis would therefore apply to this criterion.
and secondly, that there is a need of protection against any of the listed grave crimes of genocide, ethnic cleansing, crimes against humanity and war crimes. The first criterion, ‘manifest failure to protect’ by states must in all cases be present. The second criterion only demands the need to protect against any of the listed grave crimes. This chapter will discuss what ‘manifestly failing’ implies and the main elements of the crimes. (See more on the general criteria of paragraph 139 in Chapter 4.6.)

The decision to authorise military force under Chapter VII and VIII to protect people in need, will always rest on a political decision by the Security Council and will be dependent on a political, rather than a legal assessment of these R2P criteria. The deliberations in the Security Council preceding a decision under Chapter VII and VIII are primarily political, although the discussions in the Council may be based upon the findings and legal assessments made by inquiry commissions verifying the situation on the ground, such as in the Darfur Case.\footnote{Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004, S/2005/60, Geneva, 25 January, 2005.}

There exists no international legal duty on the Council to make legal assessments of the existence of any of these crimes when taking decisions on authorising the use of force. The Council has recognised and acknowledged the R2P concept in the Outcome Document in recent resolutions,\footnote{S/RES/1674 (2006) and S/RES/1706 (31 August 2006).} but has not adopted it as a binding guideline for its decisions on the use of force, and is thus not legally bound by paragraph 139 (see Chapter 4.6. and 4.7.).

The Council practice on humanitarian intervention in the 1990s shows that neither of these crimes need to be ‘legally’ asserted as being present before the Council authorises forceful measures for protection purposes. Its members must only be in political agreement to determine that the humanitarian situation constitutes a ‘threat to the peace’ and that peaceful means are inadequate. The Council has in a few cases explicitly referred to grave violations of human rights and humanitarian law as one ground for its determination of a threat to the peace, but has also authorised humanitarian interventions in other cases where such express references to such violations have not been made (see more in Chapter 6.3.3.).

This also means that the assessments made by states or other actors of the existence of any of these crimes do not automatically trigger a legal responsibility for the Council to authorise the use of force, or any other enforcement measures for that matter. But if such assessments appear to be the general understanding of what is happening in a state, and the state itself is manifestly seen to be failing to protect its population from such crime or crimes, the Council has a moral and political responsibility to discuss the situation and make an assessment of the most appropriate measures on a case-by-case basis, depending on whether the situations in question may be considered to be a threat to the peace. (See more in Chapters 4.6., 6.3.3. and 6.3.4.)
The following text will briefly set out the legal definitions of these crimes and means of interpretation that should or could to some extent be guiding in this assessment.

a. Manifestly fail to protect

It is not until “when national authorities are manifestly failing to protect their populations” from any of the listed grave crimes in international law, that the internal responsibility to protect may be transferred to the international community through the UN, and the Security Council with respect to the use of force. This illustrates the strong commitment of states, and emphasis on the notion of primary responsibility to protect within each state. The primary responsibility of states is also embraced in the ICISS report. Yet by declaring that the state has to be “manifestly failing” to protect, it indicates that the bar, when the responsibility passes to the international community, is higher than that in the ICISS report. The ICISS Commission prescribed the subsidiary responsibility as working when a state was “unwilling or unable” to halt or avert serious harm to its population – a much lower bar.

According to current international law, the Security Council has no general legal obligation to take over the responsibility of a state to protect its population, neither when a state manifestly fails to do so, nor if the state concerned is unwilling or unable to provide protection – unless the particular situation amounts to a threat to international peace and security. These do not need to exclude each other. The failure of a state to protect its population from such grave violations of international law, in many cases creates a situation that may veritably threaten the international peace and security, as in Rwanda, Somalia and Bosnia. (See the case studies in Chapter 6.3.3.)

The ICISS Commission contends that the responsibility of the Security Council for international peace and security laid down in Article 24 of the UN Charter involves “clear and responsible leadership of 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”.1439 This is a call to the Security Council to adopt an even broader security agenda than it has done in its earlier practice of authorising the use of force. Paragraph 139 could also be said to imply a moral and political responsibility of the Council to widen its agenda, and include any of these grave crimes as a ground for taking vigorous enforcement measures in certain cases when the relevant circumstances are present. Unless such a situation constitutes a threat to the peace in the way that the Council has traditionally conceived such threats (see Chapter 6.3.2.), this moral and political principle could contribute to a further reinterpretation and widening of ‘threats to the peace’. Future Security Council practice may reveal the inherent potentials of the newly endorsed principle of R2P, with respect to military force.

1439 ICISS, 

[Author’s italics]
b. Genocide

Genocide was termed “the crime of crimes” by the ICTR. It is a crime that can be committed in time of peace or war. The authoritative definition of genocide is to be found in the Genocide Convention (1948), and it has been formulated identically in the subsequent statutes of the two ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the Rome Statute for the International Criminal Court (ICC). The view that the major substantive provisions of the Genocide Convention have gradually turned into customary law, has been endorsed by the ICJ and the two ad hoc tribunals.

Article II of the Genocide Convention defines genocide as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

The definition does not include cultural genocide (the destruction of the language and culture of a group) or extermination of members of a political or other social groups.


The objective element, also-called the physical element, the material element or \textit{actus rea}, can be composed of either of the five acts enumerated in the exhaustive list of a)-e) in Article II. The acts have been further defined in the literature\textsuperscript{1445} and in case law.\textsuperscript{1446} Cassese states that one of the flaws with the genocide definition is that the four classes of protected groups (members of national, ethnical, racial or religious groups) have not been defined with any specific criteria. This has been of great detriment when interpreting the Convention. The notion of a group victim of the crime and the identification of the group have turned out to be the main problems concerning the objective element of genocide.\textsuperscript{1447} The \textit{ad hoc} tribunals, however, have in their case law pronounced interpretative guidelines in this respect.\textsuperscript{1448}

The killing of a few members of a protected group with intent to destroy, in whole or in part that group, may amount to genocide even if it is an isolated act.\textsuperscript{1449} The crime of genocide does not require the existence of widespread or systematic practice, as do the acts constituting ‘crimes against humanity’. However, Cassese questions the findings of the ICTR in the Akayesu Case where the Trial Chamber pronounced that there may be genocide even if one of the listed acts was committed against only one member of a protected group. Cassese maintains that “[a]rguably this broad interpretation is not consistent with the text of the norms on genocide, which speak instead of ‘members of a group’”.\textsuperscript{1450}

The subjective element, called the mental or moral element, or the \textit{mens rea}, is formulated in the initial part of Article II of the Genocide Convention. The intent to commit genocide must amount to dolus \textit{specialis}, which entails the existence of an ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’, in addition to the criminal intent of the underlying crime (killing, causing serious bodily or mental harm etc).\textsuperscript{1451} The Trial Chamber made clear in the Akayesu Case that it is difficult, if not impossible, to determine this intent, while it can be inferred from a number of presumptions of fact.\textsuperscript{1452} The ICTY has

\textsuperscript{1445} Schabas, \textit{Genocide in International Law}, pp. 157-178.
\textsuperscript{1446} See also a short summary in Cassese, \textit{International Criminal Law}, p. 102.
\textsuperscript{1447} \textit{Ibid.}, p. 100.
\textsuperscript{1448} See \textit{e.g.} the Akayesu Case, ICTR-96-4-T (1998), para. 516. Any ‘stable and permanent group’ (by birth) should be included according to the Trial Chamber; see a discussion and critique of this and other findings in Cassese, \textit{International Criminal Law}, pp. 101-102.
\textsuperscript{1449} Akayesu Case, ICTR-96-4-T (1998), para. 590; Cassese, \textit{International Criminal Law}, p. 100.
\textsuperscript{1450} Cassese, \textit{International Criminal Law}, p. 102.
\textsuperscript{1451} \textit{Ibid.}, p. 103; for an introduction to \textit{mens rea} see also Schabas, \textit{Genocide in International Law}, pp. 206-256, in particular pp. 217-225. In a general intent offence, the performance of the criminal act is the only issue and no further intent or purpose need be proven, see Schabas, \textit{Genocide in International Law}, p. 218.
\textsuperscript{1452} Akayesu Case, ICTR-96-4-T (1998), paras. 523-524. The Chamber considered that “it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on
also elucidated the definition of the subjective element in the Krštić Case when assessing the Serbian intention to kill Bosnian Muslim men in Srebrenica.\(^{1453}\)

c. War crimes

A war crime is a violation of a rule of international humanitarian law that creates direct criminal responsibility under international law.\(^{1454}\)

A war crime has been committed only if the act fulfills the criteria of a war crime and has a functional relationship or a nexus to an armed conflict.\(^{1455}\) Both combatants and civilians can commit war crimes.\(^{1456}\) The objective element of war crimes can only be inferred from the substantive rule of international humanitarian law allegedly violated.\(^{1457}\) Humanitarian law is part of the laws of war and consists of both treaty law and customary law applicable in armed conflicts.\(^{1458}\)

Different definitions of ‘war crimes’ can be found in various instruments such as the Geneva Conventions, the Statutes of the ad hoc tribunals, and in the Rome Statute. The definition of war crimes in the Rome Statute is comprehensive and is said to embody customary international law in almost all of its provisions.\(^{1459}\) It makes the account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. […]’ Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia also stated that the specific intent of the crime of genocide “may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group-acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct”. Thus the Trial Chamber found that “this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group”.

\(^{1453}\) The Krštić Case, IT-98-33-A (2004), paras. 594-598. See also Bosnia v. Serbia Case (2007).


\(^{1455}\) Ibid, p. 294.

\(^{1456}\) Ibid, p. 296.

\(^{1457}\) Cassese, International Criminal Law, p. 54.

\(^{1458}\) International humanitarian law encompasses The ‘Hague Rules’, regulating the means and methods of warfare, and the ‘Geneva Rules’, regulating the protection of groups and property during armed conflict: The Hague Conventions from 1899 and 1907 (I-XIV); and various protocols; and the Geneva Convention I (1949); Geneva Convention II (1949); Geneva Convention III (1949); Geneva Convention IV (1949); Additional Protocol I (1977); Additional Protocol II (1977). For an introduction see Fleck (Ed), The Handbook of Humanitarian Law in Armed Conflict.

\(^{1459}\) Werle et al., Principles of International Criminal Law, p. 286; Cf. Annan, Two Concepts of Sovereignty, p. 122, who claim that the Statute also takes into account recent developments within the work of the ad hoc Tribunals; Cf. also Cassese, International Criminal Law, p. 54 for an opposing view. For a commentary on the criminal acts, see Werle et al., Principles of International Criminal Law, pp. 298-383; for a more critical analysis of the war crimes.
important distinction between crimes in international (Article 8 (2)(a)–(b)) and non-international armed conflict (Article 8 (2)(c), 8 (2)(e) and 8 (2)(f). (See Article 8 of the Rome Statute in Appendix II).

Article 8 also follows the structure of the Geneva Conventions and its Additional Protocols in the separation of ‘grave breaches of the Geneva Conventions’ and ‘other serious violations of the laws and customs of war’ (cf. section 8 (2)(a) and 8 (2)(b) respectively). Section 8 (2)(a) of the Statute takes into account that the lists of grave breaches of the Geneva Conventions are not identical in the four Conventions.

A similar distinction is also made for non-international armed conflicts in section 8 (2)(c), which deals with ‘serious violations’ of Common Article 3 of the Geneva Conventions, and section 8 (2)(e), which enumerates ‘other serious violations of humanitarian laws and customs’ derived from the Hague Regulations, the Geneva Conventions and Additional Protocol II.

Article 30 of the Rome Statute provides the mental element of war crimes, and stipulates that general criminal intent and knowledge of the crime must be present. No specific intent is required, as in the crime of genocide.

d. Ethnic cleansing

There is no legal definition of ‘ethnic cleansing’. However, it has been applied in the context of the former Yugoslavia to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area”. It has been described as “a complex criminal phenomenon, a policy whose implementation is accompanied by serious human rights violations geared toward forcing an ethnic group out of a certain region in order to change the ethnic composition of the population”. Techniques employed to carry out ethnic cleansing were listed by the Security Council’s Commission of Experts on Violations of Humanitarian Law during the Yugoslav war. They include:

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1461 Annan, Two Concepts of Sovereignty, p. 108.
1465 Werle et al., Principles of International Criminal Law, p. 204; for a historical overview of different definitions by states, judges and scholars see Schabas, Genocide in International Law, pp. 189-200.
murder, torture, arbitrary arrest and detention, extra-judicial executions, and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian populations, deliberate military attacks, or threats of attacks on civilians and civilian areas, and wanton destruction of property.\textsuperscript{1466}

The Commission of Experts for Former Yugoslavia furthermore asserted that such acts constitute crimes against humanity and can be assimilated to specific war crimes as well.\textsuperscript{1467} Articles 7 (1)(d) and 7 (2)(d) of the Rome Statute includes deportation or forcible transfer of populations as a crime against humanity when it constitutes forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Also, Article 8 (2)(b)(viii) and 8 (2) (c)(viii) of the Statute includes deportation or displacement of civilians as a form of war crime under certain conditions.

Moreover, such acts may also fall within the meaning of the Genocide Convention. Ethnic cleansing has sometimes been described as a euphemism for genocide, and the question as to whether ethnic cleansing constitutes genocide, or is distinct from it, has been widely debated.\textsuperscript{1468} Most states seem to see them as distinct but related concepts.\textsuperscript{1469} ‘Mass-displacement of populations’ from one region to another does not in itself constitute genocide and the drafters of the Genocide Convention deliberately excluded it.\textsuperscript{1470} Werle \textit{et al.} argue in a balanced way that whether, and to what extent ethnic cleansing can be classified as genocide, depends on the individual circumstances of the case.\textsuperscript{1471} A blanket classification would be incorrect because the primary aim is expulsion and not extermination. But they claim that undoubtedly ethnic cleansing frequently exhibits genocidal features and in such cases can be punished as genocide. For example, systematic expulsions combined with the withholding of food, medical care, shelter and so on calculated to physically exterminate group members, can amount to the objective criteria of ‘inflicting destructive conditions of life’ within the meaning of genocide.\textsuperscript{1472} The ICJ affirmed this position in the Bosnia v. Serbia Case (2007),\textsuperscript{1473} where it asserted that ethnic cleansing can only be a form of genocide within the meaning of the Genocide Convention, if it

\textsuperscript{1466} S/25274 (1993), para. 56.
\textsuperscript{1467} Ibid., para. 56.
\textsuperscript{1469} Schabas, \textit{Genocide in International Law}, p. 193.
\textsuperscript{1470} Ibid., p. 196.
\textsuperscript{1471} Werle \textit{et al.}, \textit{Principles of International Criminal Law}, p. 204.
\textsuperscript{1472} Ibid., p. 201; see Article 6 (c) Rome Statute and Article 2 (c) of the Genocide Convention.
\textsuperscript{1473} Bosnia v. Serbia Case (2007), p. 71, para. 190. Cf. GA Res. 47/121, 7 April 1992, UN Doc A/RES/47/121, 1992, preamble stating: "Gravely concerned about […] mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing", which is a form of genocide".
falls within the prohibited acts in Article II in the Convention. Ethnic cleansing is not necessarily equivalent to destruction of a group nor is destruction of a group an automatic consequence of displacement. Hence, “ethnic cleansing” has no legal significance of its own.\textsuperscript{1474}

e. Crimes against humanity

Crimes against humanity are mass crimes committed against a civilian population and constitute a broader crime than genocide.\textsuperscript{1475} No specific target group needs to be identified but a civilian population in general,\textsuperscript{1476} and there is no requirement of intent to destroy a group in whole or in part. Crimes against humanity can be committed in peace or war.

The ICTY and ICTR Statutes have reaffirmed the customary law character of crimes against humanity.\textsuperscript{1477} There have been various definitions of crimes against humanity throughout history, and they vary to some degree and extent, and even appear contradictory.\textsuperscript{1478} The statutes of the two \textit{ad hoc} tribunals have the same definition and a structure of the crime similar to the Rome Statute. The definition, of the Rome Statute appears to provide the most clear and broad definition, intending to have prospective global jurisdiction and will therefore be referred to in this chapter.

The definition is structured by a ‘threshold test’ and a list of inhumane acts, including the conditions under which such acts constitute a crime against humanity.\textsuperscript{1479} The threshold test is found in the initial formulations of Article 7, declaring the requirement of ‘widespread or systematic’ character of the acts constituting an “attack against any civilian population”.\textsuperscript{1480} This formula prescribes that the act must be part of a greater campaign of atrocities against civilians and can be either widespread or systematic. ‘Widespread’ is a quantitative element, which means that the number of victims is large, or covers a broad geographic area.\textsuperscript{1481} ‘Systematic’ is a qualitative criterion and implies a series of acts of extreme gravity that cannot be limited to a sporadic event, but instead form a pattern of misconduct and an organised nature of acts.\textsuperscript{1482}

The inhumane acts, also-called the objective element of the crime, are listed in paragraph 1 of Article 7, and are further explained in paragraphs

\textsuperscript{1475} Werle \textit{et al.}, Principles of International Criminal Law, p. 216, para. 633.
\textsuperscript{1476} See more specifically about the ‘civilian population’ as the object of the crime in \textit{ibid}, pp. 221-224.
\textsuperscript{1477} ICTY Statute (1993); ICTR Statute (1994); Werle \textit{et al.}, Principles of International Criminal Law, p. 218, para. 641.
\textsuperscript{1478} Annan, \textit{Two Concepts of Sovereignty}, pp. 90-91; for an explanation of this see Werle \textit{et al.}, Principles of International Criminal Law, pp. 218-219, para. 641. One example of a contradiction is that some definitions require that the crime against humanity takes place in an armed conflict, while other definitions do not carry this qualification.
\textsuperscript{1479} Annan, \textit{Two Concepts of Sovereignty}, p. 91.
\textsuperscript{1480} For a more specific legal analysis of these criteria, see \textit{ibid}, pp. 92-98.
The list is based upon the major precedents such as the Nuremberg and Tokyo Charters and the Statutes of the ICTY and ICTR. The subjective element of the crime, the intent or mens rea, requires not only criminal intent, but also an awareness of the broader context into which the crime fits, for example, knowledge that the offences in question form part of a systematic policy or widespread and large-scale abuses. Article 7 of the Rome Statute defines crimes against humanity (see Appendix II).

5.4. Accommodated of external R2P in IL proper?

5.4.1. Introduction

This chapter purports to analyse the legal rules behind the claim that ‘the principle of responsibility to protect is grounded in a miscellany of legal foundations’ with respect to relevant instruments and regimes in international law proper. The ICISS report suggest that the legal foundations for a ‘responsibility to protect’ are based in several legal obligations under international law, and lists the principle of state sovereignty, Article 24 of the UN Charter, specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law, as well as the developing practice of states, regional organisations and the Security Council itself. It continues in more specific reference by adding:


The following analysis investigates to which extent an ‘external responsibility to protect by military means’ is already building on international legal rules and regimes, or whether existing law would have to develop in order to accommodate an external R2P norm in

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1483 For an introduction to the case law in which these acts have been further defined, see Cassese, International Criminal Law, pp. 74-81.
1484 Ibid., pp. 81-82. On the mens rea requiring intent and knowledge of the attack, see Article 30 of the Rome Statute:
“1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.”
1485 See the synopsis para. (2), ICISS, The Responsibility to Protect, p. XI.
international law. The specific rules which may accommodate an external responsibility to protect are thus identified, analysed and contrasted with the R2P doctrine. However, the specific state practice on humanitarian intervention supporting an emerging customary norm of an external responsibility to protect by military means is however analysed in Chapters 6 to 8, with regard to different actors.

5.4.2. The R2P – A legal obligation to prevent genocide?

5.4.2.1. The Genocide Convention and humanitarian intervention

Because genocide, imminent or present, imposes legal obligations on state parties to the Genocide Convention to act to prevent it, and to punish the perpetrators of the crime, the international community has tended in several cases to resist declaratory statements of the existence of genocide in order to avoid activating certain legal consequences.1487 There have been several debates around the ‘g-word’ (the g-word controversy) in the cases of Rwanda, Bosnia and Darfur, where the term ‘genocide’ was deliberately avoided so as not to create a moral or legal imperative to take action.1488 Instead other terms such as ‘ethnic cleansing’, ‘mass murder’, and ‘crimes against humanity’ were referred to in describing atrocities and various humanitarian situations.

The declaration and use of the term genocide confers legal obligations to prevent and punish this crime under the Genocide Convention.1489 The following chapters will discuss this legal obligation to prevent genocide for individual state parties, as well as for the UN, in relation to military force. The legal obligation to prevent genocide on the part of state parties is regulated by Article I of the Convention, which affirms that genocide is a crime under international law, entailing certain legal consequences. It reads:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

The Article does not expressis verbis prohibit states from committing genocide themselves, but the ICJ asserted in the Bosnia v. Serbia Case (2007) that such a prohibition follows from the fact that genocide is a crime under international law and follows from ‘the obligation to prevent and punish’ the commission of the crime of genocide.1490

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1487 Schabas, Genocide in International Law p. 495; Engle, "Calling in the Troops": The Uneasy Relationship among Women’s Rights, Human Rights, and Humanitarian Intervention, p. 212.
1489 See Article I of the Genocide Convention; Schabas, Genocide in International Law, pp. 495-496.
1490 Bosnia v. Serbia Case (2007), p. 63, para. 166; the pronouncement that states are under the obligation no to commit genocide was criticised for stretching the interpretation of Article I. This issue raised several dissenting opinions arguing that genocide can only be committed by individuals. State responsibility for genocide, however, only occurs if genocide actually was committed, but state responsibility for failure to prevent genocide can
The Genocide Convention is not specific on what the legal obligation to ‘prevent genocide’ exactly entails. However, case law from the ICJ and the legal literature elucidate different aspects of the obligation of states to prevent it. This obligation may include both non-military measures and military force. Serbia Montenegro was, for example, ordered by the ICJ in 1993 to take “all measures within its power to prevent the commission of the crime of genocide”. In 2007 the court restated that a state must “employ all means reasonably available” to it to prevent genocide as far as possible, from the point that it learns, or should normally have learned, of the existence of a serious risk that it will be committed. In this area the notion of “due diligence”, which calls for an assessment in concreto, is of critical importance.

A violation of the obligation to prevent genocide results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. Responsibility for such omissions is only activated if genocide is actually committed. The Court’s statement that to incur state responsibility for failure to prevent genocide it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed, has been met with scepticism since it is not supported by international practice.

There are limitations on the legal obligation to prevent with respect to the state’s ‘capacity to effectively influence’ the actions of persons likely to commit genocide. The scope of obligation to prevent is directly proportionate to this ability to influence according to Milanović. The capacity varies greatly from state to state and is dependent on the geographical distance and the strength of political and other links to the actors involved in an imminent genocide. (See more on this in Chapter 5.4.2.2.)

1493 Some scholars argue that Articles VIII, and V sets the outer framework for what is meant by prevention, involving the activation of the collective security system and the enactment of necessary legislation for effective penalties for genocide.
1496 Milanović, State Responsibility for Genocide: A Follow-Up, p. 687.
The following chapter illustrates that the legal obligation of states to prevent genocide under the Genocide Convention also imposes far-reaching obligations outside their own territories when there are links to the perpetrators and the action. In the 2007 case, the ICJ declared that the ‘duty to prevent’ genocide is not territorially limited and extends beyond a state’s borders, so that the state concerned may act in ways appropriate to meet its obligations under the Genocide Convention.¹⁴⁹⁹

However, this does not mean that a state’s duty to prevent genocide under the Convention implicitly allows for the use of force in any other state. If no links or ‘capacity to effectively influence’ are present, the legal obligation to prevent genocide in another state may not be based upon the Genocide Convention but possibly under customary law, as an *erga omnes* obligation to prevent it (see below Chapter 5.4.2.3.).

When it comes to the legal duty to prevent genocide beyond state territory, the legal right to use military force must comply with the general rules on the use of force under international law.¹⁵⁰⁰ The Genocide Convention does not expressly vest state parties with such a legal right in the obligation to prevent genocide in Article I, and the ICJ case law does not extend this obligation to include the use of military force in another state, even if there are links to the perpetrator.

In cases of genocide on the territories of other states where no such links have been present, state practice on military intervention in fact shows limited reactions of state parties to the Genocide Convention in such episodes. This might represent a practice suggesting a permissibility of inactivity by individual states.¹⁵⁰¹ States would therefore be obliged to seek a Security Council authorisation or develop a customary rule for unauthorised interventions for the prevention of genocide in another state through military means.

The UN’s obligation to prevent and suppress genocide is also regulated in the Genocide Convention. Article VIII of the Convention reads:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

¹⁴⁹⁹ Bosnia v. Serbia Case (2007). See more on the ‘duty to prevent genocide’ and the territorial limitations in the Bosnia v. Serbia Case analysed in Chapter 5.4.2.2.


¹⁵⁰¹ Schabas, *Genocide in International Law*, p. 495, who quotes the separate opinion of Judge Lauterpacht in Application of the Genocide Convention Case, Indication of Provisional Measures, Order 13 September (1993), pp. 444-445, para. 115: “But does the duty of prevention that rests upon a party in respect of its own conduct, or that of persons subject to its authority or control, outside its territory also mean that every party is under an obligation individually and actively to intervene to prevent genocide outside its territory when committed by or under the authority of some other party? As already stated, the undertaking in Article I of the Convention ‘to prevent’ genocide is not limited by reference to person or place so that, on its face, it could be said to require every party positively to prevent genocide wherever it occurs. At this point, however, it becomes necessary to look at State practice.”
While the formulation reflects a need for a state party of the Genocide Convention to push the UN to take action, the legal obligation for the UN to take such action may not be questioned. The precise nature of this legal obligation, however, is not stipulated expressly in the provision, only that it should be considered appropriate for the prevention and suppression of genocide and made in accordance with the UN Charter. This means, for example, that Article VIII allows for the Security Council to decide on military enforcement action under Chapter VII for the prevention and suppression of genocide, as long as the action is made under the UN Charter. Schabas states that state parties to the Genocide Convention have expressly conceded to the United Nations, the right of intervention in this sphere, and state practice since 1948 suggests that such intervention may include military action, but that this is viewed as a right rather than an obligation.\footnote{1502 Schabas, \textit{Genocide in International Law}, p. 498.} Thus a situation where genocide is being committed must be deemed to constitute a ‘threat to international peace and security’ within the meaning of Article 39 of the UN Charter, and military enforcement measures considered to be an appropriate measure by the Council in order for an authorisation of such forceful action to take place.\footnote{1503 Ibid., p. 499.}

The use of military force for the prevention of genocide cannot be legally based upon the Genocide Convention alone, but depends on the political assessment of the Security Council under the UN Charter. Thus the Genocide Convention does not grant an express treaty-based right for the UN through the Security Council to use force for the prevention and suppression of genocide. Neither does it impose any express obligation on the part of the UN to intervene by military means in other states to in order prevent genocide.\footnote{1504 Schabas, \textit{Genocide in International Law}, p. 491.} The Security Council practice on humanitarian intervention confirms, however, that military means may be employed, and have been employed, for the purpose of preventing genocide among other grave crimes under international law (see the case studies in Chapter 6.3.3.). The UN Charter provisions regulating and limiting the Security Council’s powers under Chapter VII will however set the framework for such action (see Chapter 6.3.2.4.).\footnote{1505 It is open to discussion whether Article VIII of the Genocide Convention extends the right of the UN through the Security Council to decide on military enforcement measures to prevent genocide to also cover the commission of this crime within a state in peace-time. As Chapter 6.3.2.4. shows, the Council’s right to authorise humanitarian intervention has been limited to humanitarian crises emanating from armed conflicts with international effects. The UN Charter provisions prevail over a conflicting treaty, which is why the answer to this question lies in how extensive or restrictive one prefers to interpret the Council’s powers under Chapter VII of the UN Charter.}

\footnote{1502 Schabas, \textit{Genocide in International Law}, p. 498.}
\footnote{1503 Ibid., p. 499. Schabas mentions two cases of Security Council practice on the prevention of genocide: in Bosnia (1992) and Rwanda (1994), see \textit{ibid.}, pp. 459, 461. Schabas argues that prevention may entail other rights and obligations that are only implicit in the Genocide Convention, see his chapter on prevention of genocide Schabas, \textit{Genocide in International Law}, p. 447 et seq, and on humanitarian intervention as prevention of genocide \textit{ibid.} on pp. 491-502.}
\footnote{1504 Schabas, \textit{Genocide in International Law}, p. 491.}
\footnote{1505 It is open to discussion whether Article VIII of the Genocide Convention extends the right of the UN through the Security Council to decide on military enforcement measures to prevent genocide to also cover the commission of this crime within a state in peace-time. As Chapter 6.3.2.4. shows, the Council’s right to authorise humanitarian intervention has been limited to humanitarian crises emanating from armed conflicts with international effects. The UN Charter provisions prevail over a conflicting treaty, which is why the answer to this question lies in how extensive or restrictive one prefers to interpret the Council’s powers under Chapter VII of the UN Charter.}
In summary, neither states nor the UN have a legal obligation under the Genocide Convention in the sense of a ‘legal duty’ to use “military means” to prevent genocide in the territory of another state. The legal obligation for states under the Genocide Convention to prevent genocide does not expressly vest state parties with such a ‘legal right’ to use military force in another state under Article I. Thus states would have to seek a Security Council authorisation or develop a customary rule for unauthorised interventions for such protections through military means.

The legal right and obligation of the UN (when called upon by a state) to take appropriate measures to prevent and suppress genocide under Article VIII does not directly grant an express treaty-based legal right or duty for the UN to use force for the prevention and suppression of genocide. But at the same time, neither does Article VIII exclude the legal right of the Security Council to authorise military enforcement action if the particular situation is considered to constitute a threat to the peace under Chapter VII of the UN Charter and therefore warrants the prevention of genocide by military means. Thus the UN, through the Security Council, has a legal right under the Genocide Convention and the UN Charter to take military enforcement measures to prevent and suppress genocide.

To conclude so far, the international treaty obligations to prevent genocide do not independently support a legal right or duty for states to use military force to prevent it. At the same time, the Genocide Convention protection regime does not exclude the use of military force as long as it complies with general international law, meaning that authorised, not unauthorised, humanitarian interventions for the prevention and suppression of genocide are legal. The UN through the Security Council has a legal right under the Convention and the UN Charter to take military enforcement measures to prevent and suppress genocide. This legal regime, however, does not fully accommodate the emerging norm on ‘external responsibility to protect’ human security within a state by military means against all the grave crimes listed in the Outcome Document, other than genocide. It also appears that authoritative interpretations hold it questionable whether the Council powers under the UN Charter includes and supports an external responsibility to protect by military means when genocide is committed within a state in peacetime. (See more in Chapter 6.3.2.4.)

5.4.2.2. The Bosnia v. Serbia Case (2007) and the duty to prevent genocide

As mentioned in the previous Chapter, the ICJ asserted in the Bosnia v. Serbia Case (2007) that the obligation to prevent genocide is “unqualified” and creates obligations distinct from those that appear in the subsequent Articles of the Convention. The obligation to prevent
genocide is both normative and compelling, not merged in the duty to punish, but has its own scope extending beyond Article VIII of the Genocide Convention.\textsuperscript{1507} The court furthermore pointed out that despite the possibility of states requesting the competent organs of the United Nations to take such action as deemed appropriate according to that Article, states are not relieved from their own state obligations to take action in accordance with Article I in order to prevent genocide, as long as it is achieved in accordance with the UN Charter or any decisions by its competent organs.\textsuperscript{1508}

The duty to prevent imposes “positive obligations on states to do their best to ensure that such acts do not occur”, according to the Court.\textsuperscript{1509} A state may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.\textsuperscript{1510}

The court asserted that a state has positive obligations to take preventive action at the moment it becomes ‘aware’, or should normally be aware, of a ‘serious risk’ that genocide will be committed. The \textit{dictum} urges states to take positive anticipatory measures in accordance with the Genocide Convention. For a particular state to be found guilty of violating this duty it is sufficient to establish that the state possessed the ‘means’ to prevent genocide and manifestly refrained from exercising them.\textsuperscript{1511} Moreover, a state must “employ all means reasonably available” to it to prevent genocide as far as possible, from the point that it learns, or should normally have learned, of the existence of a serious risk that it will be committed.\textsuperscript{1512} This is a wide ranging positive obligation for states to prevent genocide, which the court outlines in its interpretation of Article I.

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\textsuperscript{1508} \textit{Ibid.}, p. 153, para. 427. This assertion, however, is somewhat contradicted by the \textit{dictum} in paragraph 159. Here the Court argues that the articles regulating the punishment of genocide, Articles V, VI and VII (requiring legislation and penalties for genocide and other crimes in Article III and the prosecution and extradition of alleged offenders) also have a preventive effect or purpose, and therefore could according to the ICJ, “be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide in Article I”, see \textit{ibid.}, p. 60. The Court furthermore added that Article VIII may be seen as completing the system by supporting both prevention and suppression.

\textsuperscript{1509} \textit{Ibid.}, p. 155, para. 432.
\textsuperscript{1510} \textit{Ibid.}, p. 155, para. 432.
But it does not need to be proved that the state concerned definitely had the ‘power to prevent’ the genocide in question in order to incur state responsibility if failure to prevent genocide were to occur. The court stated that the obligation to prevent genocide is one of ‘conduct’ and not of ‘result’, in the sense that a state cannot be under an obligation to succeed in preventing it. The court mentioned ‘due diligence’ and that state responsibility is incurred if the state ‘manifestly fails’ to prevent genocide. The language selected by the court resonates with the formulations on responsibility to protect in the Outcome Document (2005).

In assessing whether a state has duly discharged its obligation to prevent genocide, the ‘capacity to effectively influence’ the action of persons likely to commit, or who are in the midst of committing genocide must be is analysed. This capacity depends, according to the Court, on several parameters: 1) the geographical distance of the state concerned from the scene of the events, and 2) on the strength of the political links, as well as links of all other kinds, between the state authorities and main actors. This capacity may also vary depending on the state’s legal position vis-à-vis the situation and persons at risk of genocide. International law may restrict or in other ways regulate the means available for the state to have recourse to in carrying out its obligation to prevent genocide. The court asserted that the FRY was in a position to influence the Bosnian Serbs during the period under consideration (the massacres of Srebrenica):

Owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

The court further concluded:

The Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.

In the Court’s judgement on the preliminary objections in the Bosnia v. Serbia Case (1996), it asserted that the obligation of states to prevent and punish the crime of genocide was not territorially limited by the Convention. In the final judgement, the ICJ explained that this did

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1513 Ibid., p. 154, para. 430.
1514 World Summit Outcome Document, 15 September 2005, para. 139.
1516 One interpretation of this dictum could well be that the prohibition on the use of force restricts unilateral humanitarian interventions for the purpose of preventing genocide.
1518 Ibid., p. 157, para. 438.
not mean that the Convention is territorially unlimited.\footnote{1520} The court continued by stating that Article I and III are not limited by territory but apply to a state “wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question”.\footnote{1521}

The obligation to prevent is, however, limited by the state’s ‘capacity to effectively influence’ the action, the geographical distance to the state concerned and the political and other links to the actors involved in an imminent case of genocide. The proximity between Serbia and Republika Srpska indicates the necessary level of control over the actors preparing to, or actually committing, genocide. Serbia was found to have violated its obligation to prevent genocide committed by the Bosnian Serb Army (VRS) and the Republika Srpska in the case of Srebrenica in July 1995.\footnote{1522} Due to lack of conclusive evidence of genocidal intent and knowledge of the genocide plans, Serbia was not found complicit to the genocide, but the strong links and support to these actors gave Serbia a position of influence over the Bosnian Serbs.\footnote{1523} The ICJ, however, rejected the ‘overall control’ test adopted by ICTY in the Tadić Case, and instead used the two-test of attribution for state responsibility for acts by non-state actors applied in its own case law from the Nicaragua Case:\footnote{1524} ‘effective control’ based upon 1) the issuance of directions or 2) the enforcement of specific operations.\footnote{1525} The ‘overall control’ test of the Tadić Case was considered to overly broaden the scope of state responsibility.\footnote{1526}

The traditional criterion of jurisdiction for state responsibility was thus exchanged with a ‘capacity to effectively influence’.\footnote{1527} The line of control or capacity to influence with regard to the legal obligation to prevent genocide outside a state’s territory is not only dependent on the geographical distance and political links to the actors, but must also, according to the Court, be assessed by legal criteria, since every state may only act within the limits permitted by international law.\footnote{1528}

\textbf{Footnotes:}

\footnote{1521} \textit{Ibid.}, para. 183.
\footnote{1522} \textit{Ibid.}
\footnote{1523} Milanović, \textit{State Responsibility for Genocide: A Follow-Up}, p. 687.
\footnote{1524} Nicaragua Case (1986), para. 115; Milanović, \textit{State Responsibility for Genocide: A Follow-Up}, p. 670; Prosecutor v. Tadić, Appeals Chamber Judgement, Case No IT-94-1-A, 15 July 1999, para. 120.
\footnote{1525} Cassese, \textit{The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia}, pp. 652-653, 665. The test was, however, not based upon state practice or other authoritative grounds, and does not seem validated on by general international law.
\footnote{1526} \textit{Ibid.}, p. 649.
The ‘closeness’ in the links between the relevant states, institutions and actors involved or connected to imminent acts of genocide must of course be assessed case-by-case. Even if it was not the intention of the Court, one may argue de lege ferenda that in the future, it would be possible to open up the interpretation leading to wider responsibilities to react towards impending genocide than has been seen today. A stronger focus on the ‘capacity’ to take action to prevent when a state becomes aware of a serious risk that genocide will be committed, together with historical and political links and responsibilities could play a larger role in its prevention in an ever interdependent and interlinked global village.\textsuperscript{1529} This \textit{ex lege ferenda} development finds support and in the newly developed concept of R2P, entailing moral and political responsibilities to protect in certain circumstances.\textsuperscript{1530}

The ICJ judgment does not pronounce on the right to use military force (humanitarian intervention) to prevent genocide in another state.\textsuperscript{1531} In the interpretation of the Court’s \textit{dicta}, international law proper should be viewed as setting the outer framework in the interpretation of what ‘reasonable means available’ may imply. The legal rules regulating the use of force by not only individual states, but also in relation to the conduct of states through coalitions of the willing, by regional organisations and through the Security Council, should therefore guide the answers in each individual case.\textsuperscript{1532} (These rules are discussed in Chapters 6-8, and summarised in Chapter 9.)

To summarise, whether the Genocide Convention’s limited obligation for states to prevent genocide outside the own state territory of other states, could or should be undertaken by military means, is not

\textsuperscript{1530} Ibid., p. 687; Gattini, \textit{Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgement}, p. 702; World Summit Outcome Document, 15 September 2005, para. 139. Cf. the just cause threshold in the ICISS report. It does not include the criteria on genocide as defined in international law. It reads: “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”. A genocidal intent must thus not be present for the external R2P to be activated in the proposals of this report. See ICISS, \textit{The Responsibility to Protect}, p. XII. (1) A.
\textsuperscript{1531} Gattini, \textit{Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgement}, p. 701.
\textsuperscript{1532} In short, humanitarian intervention by individual states as well as for coalitions of the willing is prohibited, while the Security Council has a legal right under the UN Charter to take such action. Regional organisations have started a customary development of \textit{ex post facto} legitimisation of unauthorised humanitarian interventions. (See Chapter 7.)
regulated in the Convention, nor directly or explicitly ruled upon by the ICJ in the Bosnia v. Serbia Case (2007). This ICJ case does not extend this legal obligation to a right to use military force in another state, even if there were to be links to the perpetrator. The court’s reference to ‘all reasonable measures’ does not expressly rule out the use of force, but since such action would involve the trangression of territorial borders, the use of force on another state’s territory must comply with the regulation on the use of force in international law in general. There is no indication that the court intended to interpret the Genocide Convention to grant an individual legal right or duty for states to use military force outside their own territories for the purpose of preventing genocide. The legal obligation of states to prevent genocide under the Genocide Convention does impose far-reaching obligations outside the state’s own territory, but on the use of military force to prevent genocide in another state, the rules on the use of force in international law have to be complied with. Thus states would have to seek a Security Council authorisation or develop a customary rule for unauthorised interventions for such protections.

5.4.2.3. An erga omnes obligation to prevent genocide by military means?

The principles underlying the Genocide Convention are recognised as binding on states, even without conventional obligations. The condemnation of genocide and the duty to co-operate to liberate mankind from genocide takes on a universal character. The ‘prohibition on genocide’ has the character of a *jus cogens* norm, and the ‘duty to prevent genocide’ on the part of states may be referred to as an *erga omnes* obligation – one which all states have a legal interest in upholding, and possibly also enforcing. Thus the obligation of states to protect people from genocide is not only regulated in the Genocide Convention, but is an *erga omnes* obligation and thus part of customary law. Consequently, the obligation to prevent genocide is owed to the international community as a whole and exists even if a state is not a party to the Genocide Convention, since the prohibition on genocide is a *jus cogens* norm binding on all states. A breach of the obligation to prevent genocide does, however, not itself constitute a violation of *jus cogens*.

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1533 See the preamble to the Genocide Convention; see also the Court’s statement on the issue of genocide as a crime under international law in Advisory Opinion, Reservations to the Genocide Convention Case (1954), p. 23.


If a state violates a peremptory norm of *jus cogens* or an *erga omnes* obligation, any state may invoke the state responsibility of that state, since all states are considered as injured parties when an obligation owed to the international community as a whole is breached.¹⁵³⁸ The possibility open to invoke state responsibility for committing genocide or failure to prevent it is hence open to every other state under customary law and the rules on state responsibility.¹⁵³⁹ However, the law on state responsibility admits military countermeasures only if the prior violation of international law also involved the use of force against another state. Since the use of force involved in genocide is not directed as an armed attack against a state but against people, forceful reprisals without Security Council authorisation would be in breach of international law (see more on countermeasures in Chapter 5.4.3.3.).

Schabas argues *lege ferenda* that humanitarian intervention could be legally permissible as a result of the treaty-based obligation to prevent genocide in article I of the Genocide Convention and the customary norm that it reflects, even without Security Council authorisation.¹⁵⁴⁰ Since the prohibition on genocide is a *jus cogens* norm and constitutes an *erga omnes* obligation, it would trump any incompatible obligation such as the prohibition on the use of force, even if embedded in the UN Charter, and thus allow for the use of military force by individual states to prevent genocide.

A counter-argument to the justificatory claims of Schabas for unauthorised intervention is that there exists no legal rule that regulates conflicts of *jus cogens* norms as in this case – in a conflict between the prohibition on the use of force and the prohibition on genocide.¹⁵⁴¹ On the other hand, as I am taking the narrow approach to the *jus cogens* character of the prohibition on the use of force in this thesis (see Chapter 2.6.2.), only aggression is part of *jus cogens*. The use of force in order to prevent genocide would thus fall under the customary part of the prohibition and would therefore yield to the *jus cogens* prohibition on genocide as well as the *erga omnes* obligation to prevent it. There is thus a window of opportunity in this area, in that states may develop a right under customary law by state practice on such humanitarian intervention supported by *opinio juris*.

Toope claims *de lege ferenda* that the UN, and in particular the Security Council, may also be vested with another basis for action to prevent genocide apart from Article VIII of the Genocide Convention, namely as a right and duty under customary law on behalf of all states and of humanity to enforce and implement the *erga omnes* obligation to prevent it.¹⁵⁴² He mentions that the Council could adopt “an active coordinating and recommendatory role that carries strong legitimacy”, but neither does he further specify what this would consist of nor specifically

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¹⁵³⁹ See Article 48 (1) (b) of the ILC Draft Articles on State Responsibility.
¹⁵⁴¹ See Chapter 2.6.
¹⁵⁴² Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?*, p. 194.
address whether it would include the use of military force for this purpose.

However, regulation on *erga omnes* obligations is scarce. There is lack of support to argue that such obligations also include a right to use military force even without Security Council authorisation for their protection. The ICJ did not rule on the *erga omnes* character of the obligation to prevent genocide in the Bosnia v. Serbia Case, and specifically left out the issue of prevention of genocide of non-nationals in another state.\(^{1543}\) Schabas’ and Toope’s contentions could be regarded as a *lege ferenda* argument not yet firmly supported in international law and by states, although with strong moral support. The legal analyses and case studies on unauthorised humanitarian intervention in Chapters 7-8 do not show sufficient support for the positions being part of general intentional law. There are no genuine cases of unauthorised humanitarian intervention in the post-Cold War period for the purpose of preventing genocide (the cases of Liberia, Northern Iraq and Kosovo did not involve crimes of genocide). However, a potential customary process of an emerging norm allowing for such unauthorised humanitarian intervention by states for the prevention of genocide could, and would, legalise such action when crystallised into law.

Thus, in summary, neither states nor the UN have a *lex lata* customary *erga omnes* obligation to protect genocide ‘by military means’. The same limitations to the right to use military force to prevent genocide under the Genocide Convention would apply to the customary *erga omnes* obligation to prevent genocide on the part of states and the UN. States would have to seek Security Council authorisation or develop a customary rule for unauthorised interventions for such protections through military means.

5.4.2.4. An external ‘responsibility to protect’ people from genocide?

Engle holds that the vast majority of policymakers and international legal scholars who equate a finding of genocide with a ‘responsibility to protect’, rely on the Genocide Convention’s Article I.\(^{1544}\) But it would perhaps also be possible to argue that there are even more similarities between R2P in the Outcome Document and Article VIII of the Genocide Convention. The principle of R2P as endorsed by states, including by military means, is primarily to be carried out collectively through the Security Council and not by each and every state unilaterally (cf. Article I of the Genocide Convention which is directed towards each state). The Genocide Convention’s limited obligation for states to prevent genocide outside the own state territory in other states (based upon a capacity to influence) is not really equivalent to the ‘external responsibility to protect’ populations from genocide and other grave

\(^{1543}\) See Bosnia v. Serbia Case (2007), para. 185.

\(^{1544}\) Engle, “Calling in the Troops”: The Uneasy Relationship among Women’s Rights, Human Rights, and Humanitarian Intervention, p. 211.
crimes. The external R2P does not assume any linkages or capacity to influence a potential perpetrator of genocide in another state for the responsibility to protect to be activated.

From the various *dicta* of the court in the case, and drawing on Article VIII, it seems that a reasonable conclusion would be that the use of military force to prevent genocide in another state complies with the Genocide Convention as long as the measures are taken in accordance with international law and the UN Charter.

In other words, when people face genocide the Genocide Convention Article I imposes a legal obligation on state parties to prevent genocide (and punish the perpetrators). Article VIII endows the UN with the legal right and duty, when called upon by a state, to take appropriate measures to prevent and suppress genocide, involving both non-military and military measures – as long as these measures are made in accordance with the UN Charter and international law. For individual states this means that the use of force may be employed in the own territory, but when acting outside its territory, and when the UN employs the use of force to prevent genocide, military action should be authorised by the Security Council in accordance with the UN Charter. An emerging norm on R2P by military means, however, might change the legal scene in the future, if regional organisations are also granted the legal right to use unauthorised military force to prevent grave crimes in international law when a state is manifestly failing to protect its own population (see Chapters 7 and 8).

5.4.3. The R2P doctrine and state responsibility

5.4.3.1. R2P – A state of necessity precluding wrongfulness?

Belgium argued for the legality of the NATO intervention in Kosovo in 1999 in the oral pleadings before the ICJ. It was asserted that it was justified by the doctrine of humanitarian intervention, and supplemented this by argumentation on the state of necessity based upon the International Law Commission Draft Articles on State Responsibility (hereinafter the ILC Draft Articles):

This is a case of a lawful humanitarian intervention for which there is a compelling necessity. And, Mr. President, Members of the Court, if we have failed to convince you that what has been taking place is armed humanitarian intervention justified by international law, the Government of the Kingdom of Belgium will also plead, in the alternative, that there is a state of necessity. The notion of a state of necessity, which is enshrined in all branches of the law, is unquestionably acknowledged in international law; and the draft Article 33 proposed by the International Law Commission [1996] reflects this. [...] what is a state of necessity? A state of necessity is the cause which justifies the violation of a binding rule in order to safeguard, in the face of grave and imminent peril, values which are higher than those protected by the rule which has been breached. [...] We do not accept that that any rule has been breached. However, for the sake of argument, let us say that it is the rule prohibiting the use of force. Where is the imminent peril, the grave and imminent peril? There it was – no doubt it – at the time of the armed intervention; there it is still, the humanitarian catastrophe recorded in the resolutions of the Security Council – an impending peril. What are the higher values which this intervention attempts to safeguard?
They are rights of *jus cogens*. It is the collective security of an entire region. And the final element of a state of necessity, I almost forgot, is that the acts must be proportionate; the intervention must be proportional to the threat. The intervention is wholly in proportion to the gravity of the peril; it is limited to aerial bombardments directed solely and exclusively against the war machine of the aggressor and against its military-industrial complex.1545

The UK also referred to the ‘overwhelming humanitarian necessity’ as a justification for the military intervention in Kosovo.1546 In accord with Belgium and the UK, Molier argues that Article 25 of the ILC Draft Articles (2001),1547 laying down the principle of necessity,1548 can serve as a potential legal justification for humanitarian intervention.1549 Article 25 reads:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) The international obligation in question excludes the possibility of invoking necessity; or
   (b) The State has contributed to the situation of necessity.

He states that the commission of the crime of genocide or the violation of fundamental human rights by or in a state could at least potentially be considered a ‘grave and imminent peril’ for the international community as a whole, as formulated in Article 25. This would enable every state to invoke necessity to justify action when large-scale and systematic human rights violations take place. But Molier also recognises several legal problems with this approach.1550 One is that Article 26 of the ILC Draft Articles could limit the available action to non-military measures, since it rules out actions taken in necessity that do not conform with a peremptory norm, in this case the prohibition on the use of force. Article 26 reads:

1546 S/PV.3988, 24 March 1999, UN Doc S/PV.3988, 1999, p. 12: “Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justified.”
1547 Cf. former Article 33 of the 1996 ILC Draft Articles.
1549 Molier, *Humanitarian intervention and the responsibility to protect after 9/11*, pp. 52-61.
1550 Ibid., p. 58.
Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Although there are some commentators who regard the prohibition on its use to be a peremptory norm in its entirety, the position of many scholars (also adopted in this thesis), is that it is only in its more extreme form — that is, the prohibition on aggression, that it takes on a *jus cogens* character (see Chapter 2.6.2.).\footnote{Ibid., pp. 54-59.} This view was also held by the ILC in its 1980 report, where a ‘differentiated character’ of peremptory norms was acknowledged and the prohibition on aggression was recognised as a *jus cogens* norm.\footnote{Ibid., p. 58.} The ILC held earlier, at the time of the drafting of the VCLT, the opposite position that article 2 (4) of the UN Charter and the prohibition on the use of force as a whole constituted a *jus cogens* norm.\footnote{YILC, vol II (1966), p. 247; Molier, *Humanitarian intervention and the responsibility to protect after 9/11*, p. 59.} This position appears to be supported by Crawford, who stated in his second report on state responsibility to 1999 that invoking the necessity to justify humanitarian intervention was excluded.\footnote{Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, International Law Commission, Fifty-first session, A/CN.4/498/Add.2, 1999, pp. 30-31, paras. 286-287; Molier, *Humanitarian intervention and the responsibility to protect after 9/11*, p. 59; see also a brief comment on this in Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility*, pp. 289-290.} The ICJ does not appear to have taken a firm and explicit stance on the issue.\footnote{Nicaragua Case (1986), pp. 100-101, para. 190. The ICJ referred to the earlier ILC position (see YILC, vol II (1966), p. 247), but did not determine its own position; Molier, *Humanitarian intervention and the responsibility to protect after 9/11*, p. 59.} Molier’s conclusion is that the question whether any use of force violates a *jus cogens* norm has not been firmly settled yet. Therefore, the possibility to preclude the argument of necessity on this ground is unsure.

Taking a narrow approach to the *jus cogens* elements of the prohibition on the use of force, it could be argued that the unauthorised use of military force for the purpose of humanitarian interventions would thus not breach the peremptory elements of the prohibition on the use of force, due to its non-peremptory part (customary and treaty-based parts). However, it would breach the prohibition on the use of force, but the wrongfulness of the use of military force in such cases would, according to the rule on ‘state of necessity’, be precluded when the situation in question warrants the safeguard or protection of an ‘essential interest’ against a ‘grave and imminent peril’. In the case of the R2P, human security would be such an essential interest that could meet the need to be ‘safeguarded against grave and imminent perils’ such as genocide, crimes against humanity and war crimes.

Rytter is of the opposite opinion. He holds that the defence of necessity cannot provide a legal justification for humanitarian intervention under existing customary law.\footnote{Rytter, Jens Elo, *Humanitarian Intervention without the Security Council: From San Francisco to The Hague*, p. 76.} Apart from the use of the

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\footnote{1551 Ibid., pp. 54-59.}
principle of necessity by Belgium in the intervention in the Congo in 1960, the second use of this rule as a justification was made again by Belgium in support of the NATO intervention in the Kosovo crisis.\(^{1557}\) Chesterman, however, undermines the Kosovo Case as a precedent for this doctrine by arguing that it seems unlikely that the NATO action would have satisfied the requirements for the state of necessity.\(^{1558}\) The intervention did not meet the test that it did not seriously impair an essential interest of FRY, since its territorial integrity was violated. Chesterman also argues maintained that NATO’s approach to the Rambouillet negotiations contributed to the need for military action.

The ICJ recognised the principle of necessity in customary international law as a ground for precluding the wrongfulness of an act not in conformity with an international obligation, but also stated that such grounds for precluding wrongfulness could only be accepted on an ‘exceptional basis’.\(^{1559}\) The ICJ stated that the ILC Draft Articles on State Responsibility provided that:

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\text{[I]t must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. Those conditions reflect customary international law.}\(^{1560}\)
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The right to refer to a state of necessity was originally formulated as an argument for states for the protection of the state, not primarily for the protection of people in other states. Rytter maintains that the UN Charter implicitly excludes the invocation of defences such as the state of necessity to justify the use of force for humanitarian purposes in another state, even in exceptional circumstances.\(^{1561}\) A cautious view in relation to the application of necessity for humanitarian interventions is somewhat affirmed by Crawford, who states that Article 25 does not regulate this military action. He declares:

\(^{1557}\) See Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, CR 99/15, 10 May (1999), pp. 13-14; and S/PV.3988, 24 March 1999, p. 12; see Molier, Humanitarian intervention and the responsibility to protect after 9/11, pp. 55, 57. Belgium’s statement in the Kosovo crisis was not contested by third states, according to Molier.

\(^{1558}\) Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 214.


\(^{1561}\) Rytter, Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond, p. 135.
As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”. It is true that in a few cases, the plea of necessity has been invoked in relation to excuse military action abroad, in particular in the context of claims to humanitarian intervention. The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.1562

Moreover, Molier refers to the ILC study of state practice on this matter in 1980, which gave no answer to the question on whether the use of force (not qualifying as aggression) could be justified by appealing to the principle of necessity.1563 The legal literature does not appear to give clear guidance on the matter, and there are both arguments pro as well as contra using the principle of necessity as a justification for humanitarian intervention, depending on one’s view on which parts of the prohibition on the use of force have peremptory character. However, the ILC Draft Articles and Commentary have not denied that state practice based upon such justifications could contribute to a customary process for an emerging norm in changing and asserting the law in this respect.

State practice on the state of necessity as a legal basis for unauthorised humanitarian intervention is thus insufficient with only the Belgian state practice in Congo or Kosovo Case as precedent (or precedents). A customary process has not yet evolved into such a norm. But it could be claimed that the responsibility to protect could de lege ferenda find a legal basis in the principle of necessity, where the use of force outside the UN framework is applied to protect people from genocide, crimes against humanity, ethnic cleansing and war crimes, in taking the position that it is only the prohibition on aggression that is part of jus cogens.1564 State practice of such interventions where states have used this argumentation would thus have normative relevance for the development of an emerging customary norm or norms of external R2P by military means. There is an opening for legal developments in this legal regime for the future.1565

1562 Crawford, The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries, p. 185, para. 21. [Author’s italics]
1564 Security Council mandated action under the responsibility to protect, however, has no connection to this principle, since such action derives its justifications directly from Chapter VII of the UN Charter.
1565 Cf. however the opposite opinion DUPI Report (1999), pp. 85-87, which leans on the Corfu Channel Case and Article 2 (4) of the UN Charter.
5.4.3.2. R2P – A duty to co-operate to end ‘serious breaches of peremptory norms’?

The 2001 ILC Draft Articles on State Responsibility suggest that certain serious violations of international law, ‘serious breaches of a peremptory norm’ affect all states and therefore stipulate that all states may, and shall, respond to such breaches. States may respond by claims to end such serious breaches, demands for reparation or taking lawful countermeasures, but they would also have a ‘duty to co-operate’ to end such breaches. State responsibility for such serious breaches has been called ‘aggravated state responsibility’ in the ILC Draft Articles, and it is distinguished from (regular) state responsibility by its link to breaches of peremptory norms. A breach of a peremptory norm is ‘serious’ if it involves gross or systematic failure by a state to fulfil an obligation arising under a peremptory norm of general international law. Article 40 of the ILC Draft Articles provides:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

This hierarchical aspect of the law on state responsibility is not yet considered to be part of customary law and was seen as a progressive development of international law when adopted in the ILC Draft Articles. The ILA acknowledges that it is open to question whether this positive ‘duty to co-operate’ in Article 41 (1) may reflect progressive development of international law, and states that it seeks to strengthen the existing mechanisms of co-operation on the basis that all states are called upon to respond to a serious breach of a peremptory norm. The idea of ‘aggravated responsibility’ of states is more concerned with the legal consequences or obligations of third states in response to such violations than with the responsibility of the state actually committing the breach. Serious breaches of peremptory norms, that is obligations owed to all other members of the international community,

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1569 Milanović, State Responsibility for Genocide, p. 563.
would entail a ‘community responsibility’ for all states to respond towards the violating state, not just states directly injured.

Examples of peremptory norms, as defined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties, have been non-exhaustively listed by the ILC to include the prohibitions on aggression, genocide, slavery, racial discrimination, torture, crimes against humanity, and the right to self-determination.\(^\text{1570}\) According to the ILC, there was general agreement among governments as to the peremptory character of these prohibitions at the Vienna Conference when negotiating the Vienna Convention on the Law of Treaties.

The ILC states in its Commentary to the ILC Draft Articles that it is generally accepted that ‘obligations towards the international community as a whole’, or so-called *erga omnes* obligations, arise under ‘peremptory norms’ of general international law.\(^\text{1571}\) Following the Barcelona Traction Case, the ILC has taken the view that peremptory norms and obligations owed to the international community as a whole are essentially two sides of the same coin.\(^\text{1572}\) The ILC states that there is at least a substantial overlap between them, and the difference lies in their focus – that is, the scope and priority accorded to a certain number of fundamental obligations (peremptory norms) and the legal interests of all states in their compliance (*erga omnes* obligations).\(^\text{1573}\) Among the examples mentioned of peremptory norms that no treaty may violate were the unlawful use of force (violating the UN Charter), genocide, slavery and slave trading, the principle of self-determination and violations of human rights.\(^\text{1574}\) These peremptory norms entail obligations owed to the international community as a whole, to respect and ensure such norms.

The ILC Draft Articles provide that certain legal consequences flow from these obligations owed to the international community as a whole within the field of state responsibility.\(^\text{1575}\) As mentioned above, serious breaches of peremptory norms can attract additional legal consequences for all other states, and not only for the responsible state (Article 41 ILC Draft Articles). Furthermore, all states become entitled to invoke the responsibility for such breaches of obligation to the international community as a whole (Article 48 ILC Draft Articles). Article 48 of the Articles asserts that “any State other than an injured State is entitled to invoke the responsibility of another State” if “the obligation is owed to the international community as a whole”.\(^\text{1576}\)

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\(^{1570}\) Report of the ILC, Fifty-third Session, A/56/10 (SUPP) (2001), pp. 208, para. 5, and pp. 282-284, paras. 2 and 4, where the ILC states that the concept of peremptory norms of general international law is recognised in international practice, in the jurisprudence of international and national courts and in legal literature. The ILC Commentary refers to case law from the ICTY, the British House of Lords and ICJ, see *ibid.* p. 208, notes 442 and 443.


\(^{1576}\) Article 48 (1)(b), ILC Draft Articles on State Responsibility (2001). Article 48 (2)
Article 41 (1) prescribes a ‘duty to co-operate’ for states to put to an end a serious breach through lawful means:

1. States shall co-operate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognise as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

This positive ‘duty to co-operate by lawful means’ to end a serious breach of a peremptory norm has not been regulated in terms of how the co-operation is to be undertaken or organised, except for its legality. Milanković argues that the consequences of a serious breach of a peremptory norm of international law are not exhausted by the regime of state responsibility:

[They can, and should, provoke a much wider, institutional reaction, such as Chapter VII action by the Security Council or enforcement action by regional organisations.]

Article 41 (3) of the ILC Draft Articles provides that the consequences of serious breaches prescribed in the Article are without prejudice to further consequences that such breaches may entail under international law. The decision of other consequences for the commission of genocide or war crimes remains to be a choice, not a duty of states, according to Milanković. The ILC states in its Commentary both limitations and possibilities in this choice of further consequences:

Co-operation could be organised in the framework of a competent international organisation, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalised co-operation. […] Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such co-operation must be through lawful means, the choice of which will depend on the circumstances of the given situation.

The ILC has not laid down any specific procedure for determining whether a serious breach has been committed, but states that they are likely to be addressed by the competent international organisation, including by the Security Council and the General Assembly. However, the exclusive reliance of established institutionalised responses provides in summary that a state entitled to invoke responsibility may claim cessation of the wrongful act, assurances and guarantees of non-repetition and ‘reparation in the interest of the injured state or of the beneficiaries of the obligation breached’.

1577 Milanović, State Responsibility for Genocide, p. 603, with reference to Article 41 (3).
1579 Ibid., p. 286, para. 9.
to serious breaches of obligations resulting from peremptory norms has been criticised. Klein states:

In particular, the dominant part played there by the Security Council raises considerable difficulties. The rather unrepresentative nature of that body has, for some years, given rise to a problem of legitimacy. It therefore appears difficult to treat the Security Council as the secular arm of the 'international community', in whose name it would be the only body empowered to respond to the most serious breaches of the international legal order.\footnote{Klein, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law, p. 1253.}

Klein therefore welcomes the ILC’s statement that the duty to co-operate also envisages the possibility of non-institutionalised co-operation, although it does not prescribe what measures states should or could take in order to bring to an end serious breaches.\footnote{Report of the ILC, Fifty-third Session, A/56/10 (SUPP) (2001), p. 287, paras. 2-3; Klein, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law, p. 1253.} He further adds that the Security Council’s abstention from taking measures to cope with these types of situation should not prevent member state from responding to such acts independently of a collective action, a possibility provided for in Article 48 of the Articles.\footnote{Klein, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law, p. 1254.} The duty to co-operate must, however be undertaken through 'lawful means'. This would rule out unauthorised humanitarian intervention (by regional organisations, states or coalitions of the willing), unless or until any of these forms of military intervention become lawful forms of non-institutionalised co-operation.\footnote{See Breau’s argumentation and reference to Cassese and Crawford, Breau, Humanitarian Intervention: The United Nations and Collective Responsibility, p. 295.}

But this does not rule out that the ‘duty to co-operate’ in cases of aggravated responsibility under the law of state responsibility admits the use of military force when authorised by the Security Council. Non-military unilateral measures to end the particular breach would be, and has naturally been, confirmed lawful by state practice in this context.\footnote{Report of the ILC, Fifty-third Session, A/56/10 (SUPP) (2001), p. 351 et seq.} Hence the non-military aspects of R2P sit better with the duty to co-operate as well as Security Council authorised enforcement action to protect. The ILC recognises that such co-operation is already being carried out in response to the gravest breaches of international law and that it is often the only way of providing an effective remedy.\footnote{Ibid., p. 287, para. 3.}

Stahn argues that the duty of co-operation in Article 41 (1) comes close to the idea of the collective external responsibility to protect envisaged in the concept of R2P. But he believes that the R2P marks an even more progressive development than Article 41 (1).\footnote{Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, pp. 115-116.} The R2P goes a step further than the progressive formulation of the ILC Draft
Articles since it does not link the external responsibility to protect of third states to a similar ‘double qualifier’ – that it be a ‘serious breach’ of a peremptory norm. However, one could counter-argue that the state must be seen to be ‘manifestly failing’ to protect its population from any of these crimes for external R2P to be activated in accordance with the Outcome Document, and is equivalent to the double-qualifier of ‘gross or systematic failure to fulfil an obligation’ under a peremptory norm.

However, another complication is that not all of the prohibitions of the crimes set out in the Outcome Document constitute ‘peremptory norms’. War crimes would not generally be considered as breaches of peremptory norms, although there are some that could arguably constitute breaches against peremptory prohibitions, such as torture and the use of chemical and biological weapons. Many war crimes, however, fall outside this regime. By definition the commission of the crime of ethnic cleansing is included in the crimes of genocide or crimes against humanity, and could thus fall under the ILC regime of aggravated responsibility for breaches of peremptory norms. This means that if a state manifestly fails to protect its populations from war crimes, it would not be considered as aggravated responsibility and an external R2P could not be claimed on the basis of a legal ‘duty to co-operate’, according to the Articles on state responsibility. The doctrine on R2P does not distinguish whether or not international crimes take on a peremptory character. This however, does not preclude the possibility of invoking the right to take lawful countermeasures on the basis of (regular) state responsibility for violating the obligations of the state under international humanitarian or human rights law, when the particular violations are grave (see next Chapter 5.4.3.3).

Furthermore, Stahn indicates that the R2P doctrine involves diplomatic, humanitarian or other peaceful means or collective security action to help protect populations from atrocities, while the ILC Draft Articles simply speak of a legal obligation to end breaches through lawful means. To again counter-argue Stahn, this is not a difference in essence but in formulation.

Another difference illustrated by Breau is that the rules on state responsibility are so-called secondary rules – rules that regulate a situation when primary rules have been breached. Breau argues that the R2P is not only a secondary rule prescribing certain action when states violate international law, but something far more expansive than a secondary rule. The R2P doctrine is also prescriptive – for example, in its stipulation of a primary responsibility.

Despite these differences does the external responsibility to protect, as formulated in paragraph 139 of the Outcome Document, necessarily imply a state responsibility in the same sense as the duty to co-operate in Article 41 of the ILC Draft Articles? The latter demands that serious

1587 Breau, A Comparison of the United Kingdom and Canadian Approaches to Human Security, p. 215. Breau argues that there are indeed common elements in R2P and the rules on state responsibility in the obligation of the international community “to intervene in some fashion to stop serious abuses of human rights which violate jus cogens norms”, see ibid., p. 216.
breaches of peremptory norms have been made. The ‘manifest failure’ to protect a population from a crime prohibited in a peremptory norm could be argued to be seen as a ‘serious breach’ of a peremptory norm. Thus a manifest failure of a state to protect its people from genocide and crimes against humanity could infer ‘aggravated responsibility’ for serious breaches of a peremptory norm, entailing an ‘external responsibility to protect’ on the part of third states in the form of a legal ‘duty to co-operate’ to end through lawful means the commission of such crimes.

Thus the external responsibility to protect people from grave crimes in international law when the state concerned manifestly fails to protect bears strong similarities with the duty to co-operate to end serious breaches of peremptory norms. Whether the concept of R2P could be subsumed under the regime of aggravated state responsibility and be used as a supportive argument in the development of a norm of ‘responsibility to protect’ must, however, be answered partly in the negative. Several aspects of the R2P doctrine and the law on state responsibility or both would have to develop in particular directions for them to match fully. Firstly, only two of the crimes in paragraph 139 are considered to be peremptory norms. The prohibition on war crimes would have to assume peremptory character, or the idea of aggravated responsibility to expand to cover such crimes. Secondly, since only lawful means are permitted in the duty to co-operate, the emergence of a legal norm on R2P on unauthorised military action would be ruled out with the support of this legal regime. Besides, both the external R2P and the duty to co-operate represent in some parts lex ferenda rather than lex lata, which is why it may not be argued that the external R2P fully builds on existing legal regimes in this context.

### 5.4.3.3. R2P – As countermeasures for ‘manifest failure to protect’ against international crimes?

The previous Chapter (5.4.3.2.) discussed in more detail the similarities and differences between the external R2P and the law on state responsibility suggesting a duty to co-operate to end serious breaches of peremptory norms incurring aggravated responsibility more in depth. In this context I shall discuss a few related issues on state responsibility and international crimes, and consider some links between international crimes and countermeasures against breaches of international law incurring state responsibility.

The R2P doctrine is concerned with the protection against international crimes which are concerned with peremptory norms but also other non-peremptory norms in international law, for example some

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1588 The ILC Draft Articles regime on a duty to co-operate proposes ‘aggravated responsibility’ when a state seriously breaches a peremptory norm such as the prohibition on genocide or crimes against humanity. A state manifestly failing to protect its populations from genocide and crimes against humanity would de lege ferenda incur ‘aggravated state responsibility’, creating state responsibility for all other states in the form of a duty to co-operate to end serious breaches of peremptory norms.
types of war crimes. This chapter discusses to what extent other forms of legal support that the law on state responsibility could give to an emerging norm (or norms) on R2P by military means when international crimes also of non-peremptory character are being committed. Could measures undertaken as part of an ‘external responsibility to protect’ be seen as a form of legal countermeasure for the failure to fulfil a state’s ‘primary’ international ‘responsibility to protect’ its population from grave crimes under international law?

Genocide, war crimes, and crimes against humanity are all crimes defined in international criminal law and entails individual criminal responsibility, but no criminal responsibility for states. International law does not recognise international criminal responsibility for states. The ILC dropped former Article 19 from its earlier Draft (1996), which dealt with ‘international crimes’ of states (punitive), because of strong resistance among states to the idea of state criminal responsibility. The ILC affirms in its Commentary to the ILC Draft Articles that there has been no development of penal consequences for states’ breaches of fundamental norms. But when an individual (or organisation) commits an international crime that can be attributed to the state, civil (not criminal) state responsibility is also incurred, apart from individual criminal responsibility. On the specific crime of genocide, individual responsibility and state responsibility may run concurrently in international law. According to Milanović, individual responsibility for genocide serves the purpose of punishment, deterrence and prevention while state responsibility for the commission of, or failure to prevent, genocide according to the Genocide Convention is remedial and reparatory rather than punitive. This dual responsibility for genocide has been affirmed by the ICJ, the General Assembly and the ILC. The same also applies mutatis mutandis for other international crimes.

Article 25 (4) of the Rome Statute holds that no provision of the Statute relating to individual criminal responsibility shall affect state responsibility under international law. The ILC Draft Articles on state responsibility include a similar article providing that “[t]hese articles are without prejudice to any question of individual responsibility under international law of any person acting on behalf of a State”. The assessment of individual criminal responsibility and state responsibility apply separately in international law.

Yet the R2P paragraph 139 of the Outcome Document makes a link between the listed grave crimes punishable under international criminal law on the one hand, on the other, an ‘external responsibility’ of third states to protect people from these crimes when a state is considered to

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1590 Milanović, State Responsibility for Genocide, p. 64, para. 170. On the rules regarding the attribution of state responsibility, see Articles 4-11, ILC Draft Articles on State Responsibility (2001).
1591 Milanović, State Responsibility for Genocide, p. 561.
be ‘manifestly failing’ to protect its population. However, for the external R2P to be considered, according to the Outcome Document, individual criminal responsibility for any of the grave crimes does not first have to be established. The fact of any of these international crimes being committed on the state territory concerned, together with a ‘manifest failure’ of the state to protect its population from such crimes, would be sufficient. Whether or not such grave crimes must also be attributable to the state and incur civil state responsibility for the ‘external responsibility to protect’ to set in, is not expressly specified or dealt with in the R2P doctrine.

Even if individuals have incurred international criminal responsibility, (civil) state responsibility may not always be concurrently activated if and when the crimes in question cannot be attributed to the state. Furthermore, when peremptory norms are breached solely by non-state actors with no attribution to the state organs, then ‘aggravated responsibility’ and the ensuing ‘duty to co-operate’ will not be incurred. The limitation of the regime on state responsibility is dependent on the ‘state’ being the perpetrator of the breaches of peremptory norms (or that such breaches may be attributed to the state), does not have an equivalence in the R2P doctrine. The R2P doctrine only mentions the presence of these crimes.

However, the phrase “manifestly failing to protect” could be interpreted to cover not only commission of grave crimes by the state itself, but also point to state responsibility for breaching its legal obligations under international law to protect people from such grave crimes through the promotion of respect for human rights, ensurance of respect for humanitarian law and prevention and punishment genocide. The violations and crimes do not have to be attributable to the state itself. In situations where international crimes may not be attributable to the state and state responsibility or aggravated responsibility cannot be incurred, the state is not exempted from its international obligations to try to prevent such crimes on its territory, or if they occur, to criminalise, prosecute and punish those responsible under its human rights, humanitarian law instruments and international criminal law obligations. If in that regard a state fails to fulfil its obligations (to criminalise, prosecute, punish and prevent the commissions of international crimes on its territory), it may nonetheless still incur civil

1594 States have legal obligations to prevent and punish such grave crimes under the Genocide Convention, the Geneva Conventions on humanitarian law, customary law and the Rome Statute. See also the Bosnia v. Serbia Case (2007), p. 65, para. 173, where the Court cites a passage in the ILC Commentary on Article 58 of the ILC Draft Articles: “Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)
state responsibility for breaching those obligations under international law – though the crimes themselves are not attributable to the state. The law on state responsibility opens the way for lawful countermeasures from other states also in such situations.

Furthermore, the legal obligations to prevent and punish breaches of peremptory norms are *erga omnes obligations*. The gross and systematic failure to prevent and punish individuals responsible for such crimes could therefore incur state responsibility (or ‘aggravated responsibility’ as well), conferring on third states a legal right to recourse to countermeasures (or a ‘duty to co-operate’ according to the ILC Draft Articles) to end the breaches concerned when the state itself fails grossly and systematically to do so.

The criteria of ‘manifest failure’ in the Outcome Document does not expressly reveal whether the ‘manifest failure to protect’ refers only to situations where state responsibility is incurred for the commission of such crimes or whether it also involves situations where state responsibility is incurred for failure to prevent such crimes committed by other independent non-state actors on its territory. But, the distinction of different forms of state responsibility or even lack of it when failing to protect under the R2P doctrine may arguably be irrelevant. But in order to claim an external responsibility to protect as a countermeasure (or a duty to co-operate under the law on state responsibility), some form of state responsibility must be incurred. The law on state responsibility thus supports the external R2P doctrine to some extent but not fully.

If international crimes committed in a state by non-state actors can be attributed to the state, thus incurring state responsibility, measures undertaken as part of an external R2P could be claimed as a ‘lawful’ countermeasure for this state responsibility. From the ‘act of state doctrine’ follows that if the state had direct or ‘effective control’ over the acts and perpetrators the violations and crimes may be attributed to the state. The ILC has suggested three standards for the attribution to a state of conduct of private individuals, involving instructions, directions or control. When it comes to organised armed groups, Cassese argues that the Tadić Case support the view that it suffices to show that the

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1596 Neither is it expressly revealed even in situations where state responsibility may not be incurred, for example in a failed state situation where there is no government in control.
1597 A reliance on the law of state responsibility for a right to recourse to countermeasures or a duty to co-operate would thus limit the possibility of claiming external R2P in relation to situations where the state is the perpetrator of the particular violations, or where the crime can be attributed to the state. International crimes committed by non-state actors not attributable to the state would fall outside this lege ferenda regime.
1598 E.g. through Article 8 of the ILC Draft Articles on State Responsibility (2001); see also Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia*.
1599 Articles 49 and 52, ILC Draft Articles on State Responsibility (2001).
1600 Article 8, ibid.
When it comes to the crime of genocide, the ICJ ruled in the Bosnia v. Serbia case that the control has to be ‘effective’, confirming its assessment in the Nicaragua Case. This dictum, however, has received criticism for not complying with state practice and the ruling in the Tadić Case. The cases of Behrami v. France and Saramati v. France, Germany and Norway from the European Court of Human Rights, appear to support an idea of ‘overall authority and control’.

Counter-measures involving any use of force would require Security Council authorisation under current international law. Military countermeasures channelled through the Security Council would thus be possible under lex lata where the state has incurred state responsibility for not protecting its population from international crimes. However, the unauthorised use of force as a countermeasure when a state manifestly fails to protect its people in these situations does not have support in lex lata until any such emerging norm on external R2P crystallises. According to the law on state responsibility, the use of military force as a lawful countermeasure for a previous breach in international law is only permitted if the previous breach by the state itself involves the use of force, thus as a right to self-defence. In R2P situations, the use of force has not been directed in armed attacks against the state but towards assisting the population internally within the state. The presence of grave crimes could not per se justify a right to use force as a countermeasure for previous violations of international law.

Furthermore, the limitations on the lawful use of military force under the rules on state responsibility (raised in the previous subchapter on the topic of a ‘duty to co-operate’), also applies to state responsibility rules on countermeasures. There is thus no great difference in the potential of third states to respond to international crimes by military means, whether by turning to a legal ‘duty to co-operate to end breaches of peremptory norms’ or a ‘right to take lawful countermeasures’ when regular state responsibility is incurred. Apart from the limitation of peremptory norms the difference is mainly a question of duty (lege ferenda) rather than a legal right. But the legal possibilities open to employ

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1602 Ibid., pp. 665-667.
1604 Tadić Case, No IT-94-1-A (1999), para.120.
1606 ILC Draft Articles on State Responsibility (2001), Article 50.
1607 Ibid., Article 51.
1608 In order to legitimise a forceful reprisal for the presence of international crimes, a new interpretation would have to come about where the right to use force did not have to be based upon interstate reciprocity, but would be accepted as a lawful response towards the use of force within a state against a population and by non-state actors not linked to the state as well. This is at the present moment an unlikely development of the law. The idea of a ‘duty to prevent’ and ‘aggravated responsibility’ could perhaps be argued to be a form of development in this direction with respect to breaches of peremptory norms but not for international crimes in general.
1609 ILC Draft Articles on State Responsibility (2001), Article 50.
military force would be similar in both cases when state responsibility is incurred.

In summary, it can be concluded that the doctrine on an external R2P by military means is mismatched, to some extent, with the rules on state responsibility – in particular on aggravated responsibility and a duty to co-operate. The rules are too limited in several aspects to be able fully to hold and support an external R2P by military means for actors other than the Security Council. However, it could at least be argued that military enforcement measures authorised by the UN Security Council as a lawful countermeasure against violations of the primary responsibility to protect a population from international crimes are supported by lex lata. The law on state responsibility is also limited in that it does not support an external R2P as a form of preventive measure, and first when state responsibility has been incurred.

5.4.4. R2P – A duty to co-operate to promote and respect human rights?

As evidenced by the UN Charter Article 56 and the Friendly Relations Declaration (1970), international law also holds a treaty and customary ‘duty to co-operate’ for states in the promotion of universal respect for, and observance of, human rights and universal fundamental freedoms, and in the elimination of all forms of racial discrimination and religious intolerance. Although this ‘duty to co-operate’ of states has been referred to by some scholars as a legitimate ground for humanitarian intervention, nowhere does this ‘duty to co-operate’ expressly include a specific right (nor obligation) for a state to use military force in the promotion of human rights. Such use of force in the form of humanitarian interventions must comply with the general rules on the use of force in international law (see more on authorised and unauthorised humanitarian interventions in Chapters 6 to 8).

Article 1 (3) of the UN Charter holds that one of the purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms for all, and Article 55 (c) prescribes that the UN shall promote the universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. A minority of scholars argue that the Security Council has a legal (or at least a moral) duty to intervene militarily for the

1610 Article 56 of the UN Charter states: “All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.” See the fourth principle (b) of Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970, UN Doc A/8018, 1970. The Friendly Relations Declaration is seen as an authoritative interpretation and endorsement of the principles laid down in the UN Charter, Bring, Ove, Regionala organisationers roll i den internationella säkerhetspolitik, Engdahl, Ola, Hellman, Cecilia (red), Responsibility to Protect - folkträttliga perspektiv, Försvarshögskolan, Stockholm, 2007, p. 180.
protection of human rights, based upon this purpose and legal obligation set down in the UN Charter.

Traditionally the duty of states to co-operate (with one another and in co-operation with the UN) to promote respect for human rights and freedoms has been seen as being qualified by the superior purpose of the UN to maintain international peace and security. The duty of states to co-operate to promote human rights is only to be carried out to the extent necessary for the maintenance of international peace and security, and not further. This position may be questioned, but nonetheless, this duty to co-operate in the promotion of human rights does in all cases not hold an express right or obligation for states to use military force for the promotion or enforcement of human rights. Such humanitarian interventions by states require Security Council authorisation under the UN Charter.

The obligation of the UN to promote human rights under the UN Charter does not legally demand such forceful military measures for the enforcement of human rights. At the same time it neither excludes such measures if taken in compliance with the other provisions of the UN Charter. Consequently, it could be argued that when grave and systematic violations of human rights occur that constitute crimes against humanity, genocide, war crimes or ethnic cleansing, and the situation is determined by the Security Council to be a threat to the peace, member states as well as the UN have a legal ‘duty to co-operate’ to promote and respect human rights in order to maintain international peace and security. This legal duty could also imply the use of military force if peaceful means are found by the Security Council to be inadequate and it considers that the situation in question needs to be addressed by the authorisation of military enforcement. In situations where the Council does not make such an authorisation, the legal ‘duty to co-operate’ of states does not hold a legal right or obligation to use military means outside the UN Charter framework.

To sum up, there is thus no legal duty to use military means for the promotion of human rights according to international law proper, but a legal right for the Security Council to authorise such measures under Chapter VII if the situation concerned is determined a threat to the peace. The legal duty to promote human rights of the Council thus consist of a legal right to use military force for this purpose when

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1613 It could, however, be argued de lege ferenda that in situations where genocide, war crimes and crimes against humanity are found to constitute a threat to the peace, and the Security Council is unable or unwilling to take the necessary decisions to eliminate such threat, regional organisations and possibly other actors may consider as a last resort if peaceful means are inadequate, forceful actions in exceptional circumstances and if certain criteria are at hand (see Chapters 7 and 8).
Chapter VII is activated, but does not impose a legal duty to authorize the use of force. For the R2P by military means to be accommodated under this regime it is directed to and dependent on the Security Council’s discretion and decision. Thus no general legal duty exists within the UN Charter (nor in international human rights law) that would accommodate the norm to use military means to protect human rights as long as the situation concerned does not constitute a threat to the peace.

5.4.5. R2P – A legal obligation to ensure respect for humanitarian law?

There exists a legal obligation for states to take active measures, in particular during armed conflicts, to ensure the respect for humanitarian law, according to the Geneva Conventions on humanitarian law. Common Article 1 of the Geneva Conventions stipulates that state parties have a legal obligation “to respect and to ensure respect for the present Convention in all circumstances”.\footnote{1614} The Commentary of the International Committee of the Red Cross (ICRC) to the four Geneva Conventions states that a state must of necessity prepare in advance in peacetime, the legal, material or other means of ensuring the faithful enforcement of the Convention when the occasion arises, and to supervise the execution of the orders it gives. It furthermore provides that in the event of a member state failing to fulfil its obligations, the other contracting parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention, and should not be content merely to apply its provisions themselves, but “should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”\footnote{1615} But it should be noted that the words “in all circumstances” do not cover the case of civil war.

Neither the Diplomatic Conferences nor the Geneva Conventions closely defined the precise measures that the parties to these treaties should take to execute the obligation to “ensure respect” by the other parties, but the ICRC Commentary to Additional Protocol I mentions that states should examine the wide range of diplomatic or legal measures that can be taken. Article 89 of Additional Protocol I (1977) regulates the repression of breaches of the conventions and of the Additional Protocol, and stipulates:

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-

\footnote{1614} Geneva Convention I (1949); Geneva Convention II (1949); Geneva Convention III (1949); Geneva Convention IV (1949). “In all circumstances” does not mean that the Protocol as a whole applies at all times, see the International Committee of the Red Cross (Publ.), ICRC Commentary to the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, "http://www.icrc.org/ihl.nsf/WebList?ReadForm&cid=380&et=com", (2008-08-07).

\footnote{1615} International Committee of the Red Cross (Publ.), ICRC Commentary to the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
operation with the United Nations and in conformity with the United Nations Charter.

The ICRC Commentary however underlines that there are legal limitations to any action undertaken in accordance with Article 89. Rules imposed by general international law, ‘particularly the prohibition on the use of force’, regulate the types of measures allowable. The Commentary is informative on the use of military force for these purposes and states:

Even if the United Nations were to take coercive measures involving the use of armed force in order to ensure respect for humanitarian law, the limitation would be that of the very respect due to this law in all circumstances.  

The humanitarian obligation is to ensure that respect for humanitarian law is not directly legally binding on the Security Council as such, but on the member states of the Security Council. Customary humanitarian law would be binding on the Council, but it is not asserted that it would include a legal duty to ensure the protection of humanitarian law. The practice of the Council, however, shows that it is concerned with gross and systematic violations of humanitarian law and has determined situations where human rights and humanitarian law is being widely violated to constitute threats to the peace, and in a few cases has even authorised the use of military force (see Chapter 6.3.2.-6.3.3).

The legal obligation to ensure the respect of the Geneva Conventions unfortunately does not have equivalence in the Additional Protocol II (1977) for non-international armed conflicts. Neither does Common Article 3 to the Geneva Conventions, which stipulates that “the parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.” This means that the legal obligation in Common Article 1 does not ipso facto apply in non-international armed conflicts, but would be dependent on special agreements between the ‘parties to the conflict’. However, the ICRC Commentary confirms that humanitarian law creates for each state erga omnes obligations towards the international community as a whole in view of the importance of the rights concerned, and each state can be considered to have a legal interest in the protection of such rights, arguably in internal armed conflicts as well.  

A state, it could be contended, would thus have a customary erga omnes obligation towards the international community to implement and enforce humanitarian law in also internal armed conflicts.

Many scholars often refer to this obligation in the context of R2P, laying down legal obligations to take action. It is a strong legal basis for the primary responsibility of states on the respect for humanitarian law in international armed conflicts, but arguably also within the own territory.

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1617 Ibid.
during internal armed conflict. However, this legal obligation to ensure respect for humanitarian law “everywhere” during an international armed conflict does not expressly extend the obligation to the territory of another state not part of an international armed conflict, nor does it grant a right or duty for non-third states (not part of the armed conflict) to use military force in the territory of such a state.

The state parties have a legal obligation in ‘international’ armed conflicts under Article 89 of the Additional Protocol I, to act jointly or individually, in co-operation with the UN to ensure respect for humanitarian law when it is violated. If the particular situation amounts to a ‘threat to the peace’, the states concerned may take forceful enforcement measures to enforce respect for humanitarian law, if authorised by the Security Council, as long as it is limited to that purpose. But the same legal obligation does not extend to ‘internal’ armed conflicts. Thus this humanitarian legal obligation is in fact non-existing for internal armed situations, and may thus not legally support an unauthorised ‘external responsibility to protect’ human security by military means within a state.

5.5. A legal obligation or permissive right?

Stahn’s idea that the R2P in the Outcome Document is placed under a ‘double qualifier’ makes the responsibility to protect a voluntary, rather than a mandatory engagement. According to him, heads of state have merely reaffirmed their preparedness to take such action, and states have committed themselves only to act on a case-by-case basis through the Security Council. This stands sharply in contrast with an assumption of a systematic duty or a responsibility. The voluntary character or possibilities open for R2P action which is formulated in paragraph 139 could therefore more correctly be described as a ‘permissive right’ rather than as a duty or obligation in a legal sense.

This statement does not in any conclusive manner take into consideration the different kinds or categorisations of rights in the Hohfeldian system of correlatives and contradictions (right, privilege, power and immunity) which Peltonen analyses in his study on “what kind of a right is the right to humanitarian intervention”. Peltonen suggests that the right of the Security Council intervene or to authorise humanitarian interventions does not only have characteristics of a claim

1619 Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other legal Essays, p. 36 et seq.
1620 See Peltonen, Hannes, Right and Responsibility. What kind of Right is the Right of Humanitarian Intervention?, European University Institute, Political and Social Sciences Department, EUI Working Papers, SPS No. 2006/03, 2006. He, however, refers to these with a slight modification, as claim, privilege, power and liberty. See also the application of the Hohfeldian system with respect to other rights in international law: Boccara, Marie-Hélène, A Right to Self-Determination and a Privilege to Independence. A legal Assessment of the Prospects for Peace & Security in the Middle East. Uppsala University, Uppsala, 2007; Grönwall, Jenny, Access to Water. Rights, Obligations and the Bangalore Situation, Linköping University, Linköping, 2008.
and a duty of non-interference corresponding with it, but that the right also incorporates an element similar to a privilege, and power. The type of right to humanitarian intervention that this external responsibility to protect may hold and the legal implications in terms of duties, no-rights, liabilities or disabilities other entities fall outside the scope of this thesis. The main point wished to be made here is that the emerging and existing norms on external responsibility to protect may not be regarded as legal obligations. Alvarez, maintained for example, in his panel presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law, that the Outcome Document formulation on R2P suggests that there is no systematic mandatory duty on the Council to act in all cases and leaves it open for states to intervene in humanitarian catastrophes where they have a legitimate basis to act in self-defense. Thus the ‘external responsibility to protect’ by military means as endorsed by states should not be translated into a legal duty or obligation.

The ICISS attempts to shift the language from right to humanitarian intervention towards a responsibility to protect have not to this date through the Outcome Document shown a tendency of becoming a legal responsibility in the form of a legal duty. The shift appears to be on the political and moral level rather than on the legal. The emergence of a norm on R2P including by military means in the form of a duty could therefore be argued to be more of a political or moral norm or both, rather than a legal norm. This, however, does not preclude the possibility that there may be emerging, if not already existing, legal rights to protect by military means – for example, for the Security Council and regional organisations. These conclusions therefore do not place the R2P by military means completely into the realm of rhetoric, but merely draw attention to the fact that language can sometimes be illusory.

This political/moral norm developing into law could at the most create (or has already created) permissive rights but not legal obligations for states, or the international community through the Security Council or regional organisations. (See Chapters 6-8.)

5.6. Collective responsibility and accountability?

Stahn asks this very important question: What are the implications of inaction when states, the Security Council or the international

1621 Ibid., pp. 12-14.
1622 Alvarez, ASIL (Publ.), The Schizophrenias of R2P, Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, p. 3.
1623 Ibid., p. 14. He, however, states that compared to the idea of a right to a humanitarian intervention that works like national rules precluding the wrongfulness of liability for good Samaritans, the notion of R2P require Good Samaritans to act, less they be held legally responsible. But, he furthermore adds that to the extent R2P (as formulated in the Outcome Document) tries to achieve that, this is likely to prove to be a step too far internationally (if not nationally).
community should have taken on their residual responsibilities to protect and fail? The R2P documents analysed in this chapter are silent on the issue of legal accountability.1625 Stahn concludes that this silence sheds doubt on the R2P notion that it was meant to be an emerging hard norm of international law, instead of soft law or as a political principle.1626 Alvarez is also sceptical of the possibility of invoking responsibility or accountability for inaction, and questions who at the UN would be legally responsible for a failure to protect – the UN as a whole, the members of the Security Council, only the P-5, or states able to contribute with troops?1627 What forms of countermeasures would be suitable? Who would be accountable for failure to protect people from genocide, war crimes, and crimes against humanity? Apart from the concerned state failing its internal responsibility to protect, most likely, nobody.

The Outcome Document speaks of multilateral rather than unilateral external responsibility to protect when declaring that “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means”.1628 Moreover, paragraph 139 directs the external R2P by military means to collective measures through the Security Council and as appropriate in co-operation with regional organisations under the UN Charter. Does ‘everyone’s responsibility to protect’ mean ‘no-one’s accountability’, as suggested by the House of Commons?1629

Normally violation or non-compliance by a state of an international obligation results in the incurring of state responsibility and hence the possibility of taking countermeasures in the form of lawful sanctions or in court proceedings. Such consequences would most probably not arise for the Security Council or a regional organisation if their external R2P is not undertaken. As shown in the following chapters 6 and 7, the external R2P for international organisations to use military force to protect would rather be formulated as legal rights than as legal obligations. Failure to undertake a permissive right does not necessarily lead to accountability. Furthermore, the ILC Draft Articles on international responsibilities of

1625 Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, pp. 117-118. For a different view on R2P and accountability in the Outcome Document, see Pace and Deller, Preventing Future Genocides: An International Responsibility to Protect, p. 28.
1626 Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, p. 118.
1627 Alvarez, ASIL (Publ.), The Schizophrenias of R2P, Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, pp. 11-12. For a different view, although more limited with respect to accountability, see the reference to the Security Council failure to take enforcement action and lift the arms embargo against the Government of Bosnia and Herzegovina, and the argument that some members of the Council, which are also parties to the Genocide Convention, made them accomplices of genocide, see Schabas, Genocide in International Law, p. 492.
1628 World Summit Outcome Document, 15 September 2005, para. 139.
international organisations had not been completed at the time of writing.\textsuperscript{1630}

Thus as Stahn observes, it has not been conclusively determined whether and under what conditions inaction by an international organisation may entail international legal responsibility.\textsuperscript{1631} The ILC Draft Articles provide that there must exist a ‘legal obligation’ under international law that must be binding on international organisations, and that this obligation must be seen to have been breached before an international responsibility on the part of the organisation concerned can be incurred.\textsuperscript{1632} In the case of external R2P, the Security Council must thus have a legal obligation to protect by military means and to fail in this responsibility in order to incur international responsibility and legal accountability for inactivity.

What conclusions should be drawn from these preliminary findings? Since the norm of R2P by military means is not yet a legally binding norm of obligation, and the developing norm of R2P to react by military means should be seen as a permissive right rather than a legal duty or responsibility. The Security Council and regional organisations could never be bound or legally accountable for non-compliance unless the norm of an external R2P and the rules on international responsibility for international organisations develop and harden into law and the latter in the form of obligations. The likelihood of such a development may be argued to be small.

One argument raised with regard to the failure of UN peace-keepers to protect people from genocide in Rwanda, which would hamper such a development, was made in a statement by Kofi Annan:

\textit{If we allowed our peace-keepers to be brought to courts and tried over matters like this, that would be the end of peace-keeping.}\textsuperscript{1633}


\textsuperscript{1631} Stahn, \textit{Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?}, p. 117.


\textsuperscript{1633} Riley, Mark, Global Policy Forum (Publ.), \textit{UN to Seek Immunity on Rwanda}, "\textit{http://www.globalpolicy.org/security/issues/rwanda/suit.htm}" (2007-09-24); see also a discussion around this statement in Wills, \textit{Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations}, p. 417. The background to the statement was the planning of suing the UN for alleged complicity in the Rwandan genocide, acting for two Rwandan women whose families were among the victims. The UN responded by declaring a readiness to possibly exercise its broad diplomatic immunity.
6. The R2P criterion ‘Right Authority’ and IL

6.1. Introduction

The R2P criteria of ‘Right Authority’ deals with the relevant actors pertaining to the authority to decide and carry out (or delegate the authority to carry out), a military intervention for human protection purposes. In the ICISS report, the Security Council is regarded as being the principal actor having the Right Authority, but there are two others suggested as having lege ferenda authority under certain circumstances when the Security Council fails to deal with the situation concerned within a reasonable time, and one more mentioned as a warning for the Council to consider. The General Assembly and regional organisations are identified as having subsidiary responsibility to protect under certain circumstances, and concerned states may not be ruled out in taking action in ‘conscience-shocking’ situations in the form of coalitions of the willing, according to the report. It could be argued that a hierarchy exists between the authorities of these actors rather than them being seen as independent based upon separate criteria. State practice also confirms that in the case of regional organisations they do not act until the Security Council has failed or been unable or unwilling to act (see Chapter 8.4.1.). However, states have only explicitly acknowledged one of these actors to have the principal legal authority when it comes to protection by military means in the Outcome Document: The Security Council.

The R2P criterion of a ‘Right Authority’ has been used as the organising principle for the legal analysis on humanitarian intervention and the emerging norm of external R2P in the following Chapters (6 to 8). The external responsibility of the UN Security Council and General Assembly form Chapter 6, and ‘unauthorised humanitarian interventions’ by regional organisations and coalitions of the willing make up Chapter 7. The emerging customary process on an external R2P by military means for regional organisations is examined from an R2P ‘lens’ in Chapter 8.

Both the R2P formulas (the ICISS lege ferenda and the Outcome Document lege lata) on the issue of Right Authority are dealt with in this and subsequent Chapters 7 and 8, when contrasted with the applicable rules of international law on the use of force, jus ad bellum, and also other

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1634 ICISS, The Responsibility to Protect, p. 32, para. 4.17, and p. 47 et seq. According to Welsh, Thielking and MacFarlane there is an important dilemma with the criteria of authority. They believe that claims on lack of authorisation do not absolve those who have the capability to act from their moral responsibilities. This is why others who have employed Just War criteria to humanitarian intervention do not include the principle of right authority as one criterion, see Welsh, Thielking & MacFarlane, The Responsibility to Protect. Assessing the Report of the International Commission on Intervention and State Sovereignty, p. 505. Since I am studying the development of legal esponsibilities in this thesis, I shall therefore only occasionally comment on the moral responsibility to rotect.

1635 ICISS, The Responsibility to Protect, pp. XII-XIII.

1636 See Bellamy’s three-tiered scale of authority, Bellamy, Preventing Future Kaosus and Future Ruandas: The Responsibility to Protect after the 2005 World Summit, p. 6.
relevant rules pertaining to humanitarian intervention. Most of the rules applicable in international law on the responsibility to protect by military means can be found within the legal doctrine of humanitarian intervention, but there are many others relevant for the analysis. On the ‘external’ responsibility to protect human security by actors other than the state itself, in this case international and regional organisations as well as other states, the relevant rules in international law are complex and are not only to be found in the *jus ad bellum*. These different rules in international law will be dealt with in this chapter and the subsequent chapter, but have also been dealt with in Chapter 5.4.

The responsibilities of other actors such as multilateral bodies, organisations or even ‘everyone’, as argued in the ICISS Supplementary Volume, are partly drawn from different regimes in international law but also constitute to a great extent to *lege ferenda* proposals not yet part of international law. The authors of the ICISS Supplementary Volume recognise this in stating: “[T]here is yet no accepted obligation to protect those at risk in other countries”.

“Who has the responsibility to protect human security by military means?” On this question the study aims to analyse the relevant actors and the legal context within which they would operate. The following analyses proposes to identify these elements of the R2P by military means already part of international law and those that are *lege ferenda* arguments on how international law could or should develop in order to accommodate R2P as a legal norm.

As the conclusions show, there are legal barriers in the current legal order on the development of the R2P into a legal obligation or duty, even for the Security Council, which is the primary organ to assume an external responsibility to protect when a state manifestly fails to do so. However, a legal right for the Security Council to protect by military means already exists. With regard to other actors, the legal development of the norm differs profoundly, and this study will therefore in the subsequent analyses treat them as several norms of R2P. For this reason this author views this development as several different emerging norms, all in different stages of development, with each one connected to the relevant actor potentially holding an external responsibility to protect. It is in fact more logical to speak of two, or possibly three, different emerging norms of an external responsibility to protect, in order to answer the question: Who has the responsibility to protect by military means?

First, a few words on the issue of the different existing definitions of humanitarian intervention in the legal literature and how the term will be used in this thesis.

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6.2. Definitions of humanitarian intervention

The existence of a legal right to humanitarian intervention, in particular without Security Council mandate, is a long-standing controversy among states and legal scholars. The historical roots of the doctrine are to be found in the classical works on international law on just war (*bellum justum*) in the 13th and 17th centuries.\(^{1638}\)

There has been scholarly confusion concerning intervention in general, and in particular, the terminology on humanitarian intervention has been used inconsistently. Most scholars and states today seem to argue that the term humanitarian intervention should denote ‘military intervention without the mandate of the Security Council’, but it is also frequently used in relation to UN authorised military interventions for humanitarian purposes.\(^{1639}\)

The legal concept of humanitarian intervention as used today developed after the Second World War from a legal doctrine based upon (primarily developed/Western) states’ right to self-help for the protection of human rights – first addressing the human rights of the state’s own nationals in a foreign state and later to also include the non-nationals/population in the foreign state. The right to self-help was based upon a broad interpretation of the right to self-defence and built on the right of the state to protect its own nationals abroad. It could be contended that the modern right to humanitarian intervention evolved from this doctrine when the focus shifted to the protection of non-nationals abroad suffering gross and systematic violations of their human rights. At the beginning of the 21st century the development of the concept of a responsibility to protect shifted the terminology again and has, in the view of some commentators, replaced the doctrine of humanitarian intervention.\(^{1640}\) The ICISS Commission made a deliberate choice in not adopting the terminology of ‘humanitarian intervention’ and has preferred to employ the phrase ‘military intervention for humanitarian purposes’ when speaking of a responsibility to protect by military means.\(^{1641}\)

Kioko states that this approach was informed, by the controversy and lack of common understanding surrounding the meaning of the term humanitarian intervention, and as a response to criticism against the militarisation of the term ‘humanitarian’ put forward by humanitarian agencies, organisations and aid workers.\(^{1642}\)

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\(^{1640}\) Molier, *Humanitarian intervention and the responsibility to protect after 9/11*, pp. 50, 52.


\(^{1642}\) Kioko, *The right of intervention under the African Union’s Constitutive Act: From non-interference*
corresponds with only a minor aspect of the R2P doctrine, namely the military dimension of its second element. The second element of R2P, providing a ‘responsibility to react’ to protect human rights, also entails humanitarian, economic, political and diplomatic measures to protect. Since the concept of humanitarian intervention is a well known and analysed doctrine in the legal literature, this term will nonetheless be used in the following analyses as equivalent to “the military aspects of the responsibility to react element”.

There does not exist ‘one’ authoritative definition of the concept of humanitarian intervention, but most formulations found in the legal literature are similar. Variations depend on the inclusion or exclusion of the authorisation of the Security Council, on interventions for the protection of the intervening states’ own nationals, on the partly made consent or not by the state that is the subject of intervention, and different formulations of situations of human rights violations for which such intervention is taken to remedy.

For the purpose of this study I have employed the following working definition in order to delimit the cases for the subsequent case studies:

Humanitarian intervention is the use of force across state borders by an international governmental organisation, a group of states, or a single state aimed at preventing or ending widespread and systematic violations of the fundamental human rights of individuals other than its own citizens, without the full permission of the state within whose territory force is applied.
This definition of humanitarian intervention is broad in the sense that it covers three different forms of humanitarian interventions:

1) Security Council **authorised** humanitarian interventions – carried out either by one state, a group of states, or a regional organisation;
But also **unauthorised** humanitarian interventions carried out by either
2) a regional organisation, or
3) a single state or by a less institutionalised group of states ('coalitions of the willing').

Since unauthorised humanitarian intervention by only one state is not part of the doctrine of R2P, and there is no such state practice in the post-Cold War period, it will not specifically be dealt with in this study. Moreover, it is argued in this thesis that the state practice of unauthorised humanitarian interventions by a single state in the 1970s, such as the intervention by India in East Pakistan, Vietnam in Cambodia, and Tanzania in Uganda, did not manage to develop a customary legal norm in support of such a right. This does not mean that a future customary norm for such action could develop, but there is no current evidence for such a development. However, Chapter 7.2., treating 'coalitions of the willing' and R2P, does to a certain extent also apply to individual states when specific circumstances are at hand.

The inconsistent use of terminology to separate these different forms of humanitarian intervention is confusing and has variously affected the way legal scholars have systematised their analyses of state practice and applicable norms. No one coherent categorisation has yet been firmly accepted or widely used. Many scholars use the term ‘unilateral humanitarian intervention’ to encompass not only unauthorised interventions by single or groups of states, but also for other more interventions and humanitarian assistance. The non-separation of such operations confuses the local population and makes it difficult for the humanitarian organisations to carry out their activities. These are weighty arguments and there are obvious reasons for making efforts to achieve such separations in the field. See on the MSF critique against the use of ‘humanitarianism’ for military purposes, Feher, *Constancy in context*, p. 780 et seq. But for the purpose of this theoretical study I shall use the terminology 'humanitarian intervention', as it has been traditionally used in the scholarly literature.

One confusion in the literature on humanitarian intervention is that different scholars use the term ‘humanitarian intervention’ encompassing several forms of humanitarian interventions and it is common to find the term ‘doctrine on humanitarian intervention’ used interchangeably for all three different kinds of humanitarian intervention, even in one and the same work.

Unilateral intervention is illegal in international law, Lauterpacht, Hersch (Ed.), *Oppenheim’s International law: a treatise. Vol I*, P hare, 1, 7th edition, Longmans, London, 1948, p. 280; Article 2 (4) of the UN Charter; and the R2P doctrine does not include a responsibility for individual states, see the ICISS, *The Responsibility to Protect*.

Although unauthorised unilateral intervention by one state is illegal according to international law, it could be argued *lege ferenda* that in exceptional situations of humanitarian emergency the doctrines of *ex post facto* or implied authorisation could grant an unauthorised humanitarian intervention by one state legality or legitimacy if certain circumstances are at hand, see Chapter 7.2.4.2.
‘collective’ forms of unauthorised humanitarian interventions by regional organisations. Security Council authorised interventions are often referred to as ‘collective humanitarian interventions’. This is why the terminology unilateral and collective humanitarian intervention becomes somewhat misleading.

I have found that it is not helpful to use the above mentioned terminology for the separation of the law regarding the different actors involved in the norm of R2P. Accordingly, this thesis will not employ these distinctions. The more institutionalised collective forms of unauthorised humanitarian intervention by regional organisations will be distinguished from Security Council authorised humanitarian interventions by the term ‘regional humanitarian intervention’. The term ‘unilateral humanitarian intervention’ will in this thesis denote unauthorised humanitarian interventions by groups of states in a less institutionalised form, so-called ‘coalitions of the willing’, but also include interventions made solely by one state.

In order to keep apart these three main different forms of humanitarian intervention, I shall thus refer to ‘authorised humanitarian intervention’ for Security Council authorised humanitarian intervention, and ‘unauthorised humanitarian intervention’ for both the second and third cases. These two second forms of unauthorised intervention are separated accordingly: ‘regional collective humanitarian intervention’ (RHI) for interventions undertaken by regional organisations, and ‘unilateral humanitarian intervention’ (UHI) for non-institutionalised interventions by coalitions of the willing.

This choice of systematising the material is based upon the ICISS doctrine on ‘Right Authority’ for R2P and the separation of different actors suggested to have an external R2P or the potential capacity to act in extreme humanitarian emergencies to protect.

I have chosen my own systematisation for the use of terminology for three reasons; 1) in order to follow the R2P structure of the ‘Right Authority’ to intervene which is structured around the potential actors that could assume a responsibility to protect, and 2) because I believe that emerging legal responsibilities must be linked to a specific (type of) actor, and 3) it is possible that different legal norms of responsibility to protect by military means may emerge for different (types of) actors in different constellations. This last contention will be a guiding thesis for the following study. The results for each and individual (type of) actor are presented in the conclusions of Chapters 6 and 7.

The chosen definition in this thesis, however, excludes humanitarian interventions for the purpose of rescuing a state’s own nationals, interventions by (complete or full) invitation or consent, as well as

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1651 Humanitarian interventions should be distinguished from peace-keeping operations.
interventions made for democratic purposes – for example reinstating a democratically elected but ousted politician).\textsuperscript{1652}

The ICISS report omits democratic interventions from the concept of R2P, which is why situations of disruption to democracy are not included in the following discussions.\textsuperscript{1653} But those resulting in democratic interventions in order to overthrow an illegitimate regime and reinstate the democratically elected government, do not necessarily \textit{ipso facto} have to fall outside the threshold for military intervention for humanitarian purposes, if the particular situation at the same time meets the criteria for such interventions. These include the illegitimate government concerned manifestly failing to protect its population from genocide, ethnic cleansing, crimes against humanity and war crimes (or large scale loss of life or ethnic cleansing, according to the ICISS report). But not all (or many) situations where a legitimate government has been ousted has led to such grave humanitarian crises involving genocide, crimes against humanity, ethnic cleansing or war crimes, prompting external protection through a humanitarian intervention as a last resort.

The use of force in another state is not an intervention if made with the consent of the host state.\textsuperscript{1654} With regard to Security Council authorised military measures, the Commentary to the UN Charter confirms that as soon as the target state is in agreement with the use of force on its territory, the measures can no longer be considered as traditional enforcement measures under Chapter VII and need not be based upon Article 42.\textsuperscript{1655} Frowein and Krisch state that the Council may wish to make a Chapter VII authorisation for military measures despite such consent for legitimacy reasons, in particular in situations where such force is directed against parties in a ‘civil war’ that do not recognise the government’s sole right to invite foreign troops.\textsuperscript{1656} When consented military operations go beyond ‘traditional peace-keeping’,\textsuperscript{1657} such an

\begin{itemize}
\item \textsuperscript{1652} The cases of Haiti and Sierra Leone are therefore omitted from the thesis.
\item \textsuperscript{1653} ICISS, \textit{The Responsibility to Protect}, p. 34, para. 4.26. But see the conclusions on its legality and status in international law, Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, pp. 157-160.
\item \textsuperscript{1654} It may instead be a UN authorised or non-authorised ‘peace-keeping operation’ and is legal as long as there is host state consent. See more below in note 24.
\item \textsuperscript{1655} Frowein/Krisch, \textit{Article 42}, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 754, paras. 11-12.
\item \textsuperscript{1656} \textit{Ibid.}, pp. 754-755, paras. 12-14.
\item \textsuperscript{1657} ‘Traditional ‘peace-keeping’ is characterised by the consent of the parties, impartiality and the non-use of force except for self-defence by the peace-keepers, see Engdahl, Ola, \textit{Protection of Personnel in Peace Operations. The Role of the ‘Safety Convention’ against the Background of General International Law}, Martinus Nijhoff Publishers, Leiden, 2007, pp. 15-16. Traditional tasks have been to monitor ceasefires or buffer zones. In 1973, new guidelines were issued for the use of force in relation to UNEF II which has formed the basis of all subsequent peace-keeping operations. It includes a broader understanding of self-defence including “resistance to attempts by forceful means to prevent the force from discharging its duties under the mandate of the Security Council”, see Zacklin, \textit{The Use of Force and Peacekeeping Operations}, p. 94. New tasks have included the facilitation of humanitarian assistance, and protection of civilians at risk in their close vicinity. Such use of force may be interpreted as
\end{itemize}
authorisation may grant the operation greater legitimacy when not all factions involved in an internal armed conflict have consented to the use of force. The Chapter VII authorisation may also serve as an additional legal basis for the stability and forceability of the operation if the consent is withdrawn at later stages of the operation.\(^{1658}\)

In practice, the Council now frequently also authorises military action under Chapter VII where the consent of the state is present.\(^{1659}\) Such Chapter VII authorised and consented forceful action that goes beyond ‘traditional peace-keeping’\(^{1660}\) is referred to as ‘peace-enforcement operations’ in this thesis.\(^{1661}\) The difference, however, between robust peace-keeping and peace-enforcement is that the latter does not rely on the consent of the host state,\(^{1662}\) and at the same time it distinguishes part of a broadened notion of self-defence. The second generation of peace-keeping operations includes multifunctional tasks beyond the above mentioned elements of impartiality, consent and only self-defence. ‘Expanded peace-keeping operations’ with broader mandates are backed up with operational consent from the host government. These more robust peace-keeping forces are made to prepare to face lack of local consent by some parties in an armed conflict, and may become involved in combat operations acting in self-defence in parts of a mission area. See ibid. p. 17. Peace-keeping operations may be carried out with or without the authority of the UN. The legality of authorised ‘peace-keeping’ has been approved by the ICJ in Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 20 July 1962: ICJ Reports, 1962, p. 151, pp. 164-165, with regard to the General Assembly authorisation. On the blurring between ‘expanded peace-keeping’ and ‘enforcement operations’ under Chapters VI and VII, see Zacklin, *The Use of Force and Peacekeeping Operations*, pp. 91-101.


\(^{1659}\) See the examples of UNMIL in Liberia, MINUSTAH in Haiti, and UNOCI in Ivory Coast, Zacklin, *The Use of Force and Peacekeeping Operations*, pp. 98-100; Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, p. 123.

\(^{1660}\) Peace-enforcement operations are generally and in this thesis used to describe military enforcement measures authorised under Chapter VII of the UN Charter but made with the consent of the state, although consent is not needed as a legal basis for Chapter VII operations, see for example Engdahl, *Protection of Personnel in Peace Operations. The Role of the 'Safety Convention' against the Background of General International Law*, pp. 18-19. Such mandates go beyond traditional and expanded peace-keeping operations when it comes to the use of force, which may also be used for purposes other than self-defence, and where there is no demand for impartiality. Engdahl states that UN forces in 'peace-enforcement operations' may, however, not initially act as combatants in an armed conflict since it is a peace operation, and the consent to the operation is supposed to make the operation more peace-focused than enforcement-oriented. But combat may not always be avoided in parts of the territory where the host government does not have full control. On the other hand, Security Council authorised 'enforcement operations' lack consent or invitation by the host state and is characterised by an identified enemy and combat operations. In such situations the laws of war also apply to the UN forces as combatants. Resolution 678 authorising the use of force against Iraq during the first Gulf war in 1991 is one example.

\(^{1662}\) Zacklin, *The Use of Force and Peacekeeping Operations*, p. 91. The distinction, however, is not very clear and the line in between these are indeed blurred, as Zacklin describes in his article. The difficult application of the Convention on the Safety and Security of United Nations and Associated Personnel to the various peace-keeping operations under the ‘authority and control of the UN’ is a reflection of this dilemma. It also applies to peace-keeping authorised under Chapter VII but not if authorised as an enforcement operation in which personnel are engaged as combatants where humanitarian law applies, see ibid. pp. 101-103.
itself from ‘enforcement action’ in that some form of government consent is involved.

The common legal definition of humanitarian intervention (both unauthorised and authorised) is based upon the position that the intervention in question is taken ‘without the consent’ of the target state. Most Council practice since the late 1990s, and in particular in the 21st Century, of authorising military enforcement measures contain this feature of parallel legal bases, consisting of both host state consent and Chapter VII authorisation, including those operations with more strong humanitarian or civilian protection mandates – for example, UNAMID in Darfur. But all of the many UN authorised (under Chapter VII or VIII) military peace support operations in the 21st century with civilian protection mandates where consent of the government and parties involved has been present do not qualify as cases of humanitarian intervention. Several such peace-enforcement operations, coupled with the consent or part consents of the warring parties, have been established or expanded from earlier traditional peace-keeping mandates given wide civilian protection mandates. For example, the operations in Sierra Leone (1999-2000), the Democratic Republic of Congo (2000-2005), Liberia (2003), Burundi (2004), the Ivory Coast (2004), Chad and Central African Republic (2007). Because the underlying consent to these peace-enforcement operations gave them less of an intervention character, these peace-enforcement operations cannot be regarded as typical ‘humanitarian interventions’ in the sense of the given definition in this thesis. These cases will thus not be analysed as those of humanitarian interventions in the following analysis.

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1663 The attempt in the case of Darfur in 2006 to authorise an intervention without the consent of Sudan failed to gather troop contributions, but even the redrafted initiative in 2007 setting up the AU/UN force UNAMID with the consent of Sudan met many hindrances and failed to become fully deployed (at the time of writing).


1666 SC Res. 1509, 19 September 2003, UN Doc S/RES/1509, 2003, op. para. 3. (There is, however, no express reference to consent for UNMIL in the resolution.)


1670 For a display over a large number of Security Council resolutions with protection mandates under Chapter VI and VII, see Holt and Berkman, *The Impossible Mandate: Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, Annex I, p. 201 et seq. Some of these cases, however, in future analysis may possibly be reconsidered as cases of ‘humanitarian peace-enforcement’ or ‘civilian protection peace-operations’, see my argument in Chapter 9.2.
If this trend by the Security Council of using a double legal basis for its military enforcement actions under Chapter VII becomes a permanent model, as peace-enforcement operations with humanitarian mandates, the traditional cases of humanitarian intervention that we have seen in the first half of the 1990s may not appear again. We may need to redefine the concept of humanitarian intervention where consent may be included, or the terminology rephrased, dropping the term ‘intervention’. UN authorised peace-enforcement measures having a dominant humanitarian character and an extensive civilian protection mandate could perhaps instead be referred to as ‘humanitarian peace-enforcements’ or ‘civilian protection peace-operations’ to distinguish them from other types of peace-enforcement operations with less focus on the civilian protection component. Gareth Evans uses the term ‘coercive protection missions’ to denote complex peace-keeping operations to distinguish them from traditional peace-keeping and (peace-)enforcement since these operations they are embarked on with a reasonable expectation that force may not be needed.1671 It may be possible that in such instances only unauthorised humanitarian interventions will be referred to as humanitarian interventions.

Furthermore, not all cases of internal armed conflict where the Council has authorised military enforcement action under Chapter VII without consent are considered as classical cases of humanitarian intervention, because the enforcement action in question does not have primary humanitarian purposes and protection mandates (for example Haiti where the purpose was to reinstate the ousted president and to promote democracy).1672 Only those cases where the Council has authorised the use of force for the protection of civilians and human security, and furthermore where the host state has not consented to an intervention are included in this study.

However, there exist two special cases of Security Council authorised humanitarian interventions that do not precisely fit the definition mentioned above, but are still included in this study. The cases of peace-enforcement operations in East Timor and Darfur could arguably be seen as *sui generis* humanitarian interventions in that they involve the consent (albeit partly, or a weak consent) of the host state. These cases, however, have direct relevance as important precedents in the discussions on humanitarian intervention and an emerging norm of R2P.

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1671 Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, p. 123. These are, according to him, properly to be described as peace-keeping, albeit peace-keeping plus or complex peace-keeping.

1672 Frowein/Krisch, *Article 42*, Simma (Ed.), *The Charter of the United Nations. A Commentary*, pp. 751-752, paras. 5-6. They list those cases where the Security Council has made use of Article 42, mentioning Iraq/Kuwait, Somalia, Bosnia, Haiti, Rwanda, Eastern Zaire, and Central African Republic, Sierra Leone, Kosovo, East Timor, Congo, and Afghanistan. But not all of these cases constitute precedents for humanitarian intervention or an emerging practice of R2P by military means for the Security Council. Even some of these cases that include civilian protection mandates have not been considered as humanitarian interventions in the legal literature.
by military means, and can therefore not be excluded from the analysis in this thesis.\textsuperscript{1673}

6.3. Security Council authorised humanitarian interventions and R2P

6.3.1. The external R2P of the Security Council

6.3.1.1. The Right Authority of the Security Council

The ICISS report acknowledges the Security Council as the main authority under the UN Charter that carries the responsibility to maintain international peace and security, but also states that there is no better or more appropriate body than the Security Council to deal with military interventions for humanitarian purposes.\textsuperscript{1674} It is the Council that has the authority to authorise interventions for the purpose of the protection of human security, and such authorisation must always be sought for before an intervention.\textsuperscript{1675} It has also suggested that the P-5 should not exercise the veto powers unless their vital interests are threatened.\textsuperscript{1676} The report states on the issue of Right Authority:

Right Authority
A. There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
B. Security Council authorisation should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.
D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.\textsuperscript{1677}

\textsuperscript{1674} ICISS, The Responsibility to Protect, p 49.
\textsuperscript{1675} The Commission has proposed that the threshold criteria and the precautionary principles must be satisfied when the Council takes a binding decision on a responsibility to react by military means, ICISS, The Responsibility to Protect, p. 47.
\textsuperscript{1676} Ibid., see also p. 51, para. 6.21.
\textsuperscript{1677} Ibid., pp. XII-XIII.
The Supplementary volume also mentions the Security Council practice of the 1990s as a watershed in which the Security Council became active in humanitarian aspects of conflicts, and that there appears to be no theoretical limits to the ever-widening interpretation of a ‘threat to the peace’.  

At the World Summit 2005, the primary responsibility of the Security Council for the maintenance of international peace and security was also endorsed with respect to the external R2P by military means. No other alternative actor was explicitly mentioned to hold a subsidiary right or role to use such force. Regional organisations were mentioned but in connection with appropriate co-operation with the Security Council in paragraph 139. The issue of a reformed veto application was also omitted in the Outcome Document. The relevant parts of this paragraph that touch upon the issue of right authority with respect to military means have been emphasised below with italics:

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

States hence agreed at the 2005 World Summit that they may take collective action through the Security Council, in accordance with the UN Charter including Chapter VII, and in co-operation with regional organisations, on a case-by-case basis in order to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity – should peaceful means be inadequate and the state itself manifestly fails to protect its population. This paragraph speaks quite clearly in that R2P action should be channelled through the United Nations, and in particular the Security Council, albeit in co-operation with relevant regional organisations when appropriate. The Document points out the primary right authority to be the Security Council, but also mentions regional organisations as possible co-actors in the area of R2P. The formulation on co-operation leaves it unclear whether this requires a Chapter VIII authorisation or accepts *ex post facto* legitimisation. (See more on regional organisations and R2P by military means in Chapters 7 and 8.)

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1679 *World Summit Outcome Document, 15 September 2005.*

1680 Excerpt from paragraph 139, ibid.
6.3.1.2. The R2P threshold for military intervention

The original proposal by the ICISS that the ‘just cause threshold’ (large-scale loss of life or large-scale ethnic cleansing) must be met for the responsibility to protect to be carried out by the Council would thus appear to limit the authority and powers of the Council in its determination of what constitutes a ‘threat to the peace’. The Outcome Document’s criteria for R2P made up of any of the grave crimes, with the state concerned manifestly failing to protect its population from those crimes, also sets up a threshold, or qualifier, that would appear to limit the Council in its deliberations for future humanitarian interventions. It may be possible that one would have to distinguish future Council authorised ‘humanitarian interventions’ from future authorised ‘military R2P interventions’ depending on whether or not the R2P criteria were present. The latter form could perhaps qualify as a specific qualified form of humanitarian intervention, but the utility of a more elaborate distinction between ‘R2P interventions’ and ‘humanitarian interventions’ could be open to question.

Furthermore, a legal obligation or a duty for the Council to execute its responsibility to protect when the R2P threshold or criteria are met, arguably does not conform with loc lata and neither could it develop into such a legal duty. There are many situations in the world where such crimes occur, and it would neither be politically nor militarily feasible to take enforcement action or even peace-enforcement action in all such cases, particularly in the territory of a permanent member state, but also in states where major powers have political, military or economic interests. This problem of ‘selectivity’ with the R2P was also acknowledged and discussed in the ICISS report. Council authorisation must be on a case-by-case basis, as stated in the Outcome Document.

6.3.1.3. The precautionary principles – guidelines for the Security Council?

The precautionary criteria listed in the ICISS report, which intended to make the Security Council more efficient by maximising the potential to achieve consensus for action, minimising abuse of the concept of R2P and legitimising its decision to use force, were not embraced by the UN member states in the Outcome Document – with the possible exception of the ‘principle of last resort’. The formulation in paragraph 139 that enforcement measures under Chapter VII and VIII could be considered if peaceful means were to be inadequate, does not impose a new obligation on the Security Council, but already forms part of Article 42 of the UN Charter.

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1681 Cf. ICISS, The Responsibility to Protect, p. 33, para. 4.20.
1682 Although the Security Council has a primary responsibility for the maintenance of international peace and security in accordance with Article 24 of the UN Charter, this responsibility has arguably its political and military limitations. Certain decisions on enforcement measures are just not politically possible to achieve in the Council. The veto powers set the outer limits of the Council’s action.
These suggested precautionary principles had already been transformed both in the 2004 High-Level Panel report and the *In Larger Freedom* report to constitute guidelines for the Security Council in deciding on the authorisation of the use of force in general, not only with respect to R2P situations. However, these recommendations were rejected by states at the World Summit 2005. It is probable that R2P proponents held the view that such guidelines might become a barrier to action, or create unnecessary restrictions on the powers of the Security Council. At this point, the guidelines are not legally binding on the Council.

Whether the Council should comply with the precautionary principles (right intention, last resort, proportional means and prospects of success) when deciding on the question of authorising military enforcement to address grave human security threats that meet the R2P threshold, is therefore debatable, except for the principles of proportionality and last resort that already reflect *lex lata* (see Chapter 5.3.2.).

The Security Council could be said to be bound by the customary *jus ad bellum* and *jus in bello* principles of proportionality and necessity in its capacity of authorising force. The ICISS report thus challenges *lex lata* to some extent, in particular Article 39 of the UN Charter, by its prescription that the precautionary principles must be satisfied when the Council takes a decision on responsibility to react by military means.

Since the R2P criteria for military intervention were not accepted as guidelines for the Council at the 2005 UN World Summit, and since then not been endorsed by the Council as binding guidelines for future Council decisions, they are not legally binding on the Council as such. The ICISS proposition thus continues to be a *lex ferenda* proposal until such time it happens. As a matter of fact, the formal adoption of the R2P precautionary principles by the Council as binding guidelines for itself is unlikely to happen. There is too much resistance by the US to restrict or bind itself to further legal obligations on the use of force, and there is even more resistance by China and Russia to codify any legally binding rules relating to humanitarian interventions.

Furthermore, the Security Council could not become bound by the R2P precautionary principles by implementing them in its own practice, since it does not become legally bound by its own organ practice. The Council could thus not informally adopt them through practice. There would therefore be no point in investigating whether the Council’s practice on humanitarian intervention is becoming consistent with the R2P ‘precautionary principles’ because it would not carry any legal significance in terms of enabling, limiting or restricting the powers of the Council in taking decisions on the use of force. However, it could be

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1684 *Cf.* the *de lege ferenda* argument in O’Connell, *The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform*, p. 61, where only right intent is seen as a new addition, and the others subsumed under the principles of necessity and proportionality.


1686 ICISS, *The Responsibility to Protect*, p. 47, para. 6.1., and pp. 31–37, in particular paras. 4.13 and 4.32.
assumed that the Council at least acts of a right intention in the sense that its decisions on enforcement action have the purpose of maintaining international peace and security, and are undertaken when there is prospect of success to uphold international security.

If Council practice on civilian protection in armed conflict continues within the ambit of peace-enforcement operations (including both consent and Chapter VII mandate) instead of as humanitarian interventions against the will of the state, these guidelines may be of little importance for the legitimacy of an operation.\textsuperscript{1687} In fact, the most important situations where the precautionary principles for R2P could play a guiding and legitimising role are in those cases of humanitarian authorised by the Security Council, but where consent is lacking, or unauthorised enforcement action outside the UN Charter.

6.3.2. Security Council authorised humanitarian interventions and IL

6.3.2.1. Introduction – Article 39 of the UN Charter

The affirmation in the ICISS report and the Outcome Document that it is the Security Council that has the primary authority to authorise the use of force, under certain circumstances, for the protection of human security within a state constituting a threat to the peace, reflects \textit{lex lata}. A more restrictive or cautious interpretation of the UN Charter and Security Council practice would somewhat limit this statement by adding this: At least as long as the human security threat within the state concerned flows from, or causes, an imminent armed conflict.\textsuperscript{1688} Some would also add that the crisis must have international effects, unless it is a failed state situation (which eventually, however, will have such effects if not addressed).

Several cases of military intervention authorised by the Security Council in the post-Cold War period manifest a new, broad interpretation of what could constitute a threat to the peace under Article 39, and an era of greater international concern for humanitarian

\textsuperscript{1687} Cf. Evans, \textit{The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All}, pp. 137-141. Evans argues that the effectiveness of the global collective security system depends on the legitimacy of interventions, morally as well as legally. These principles are important for the legitimacy of the use of force, and if adopted by the Council, would change the nature of the Council debate, maximising the possibility of achieving consensus.

and human security issues. Österdahl holds that it has become almost trivial to point out that not only military circumstances but also social, political, economic, humanitarian, ecological and other non-military factors may constitute threats to the peace, domestic or international. Because of the new interventionist practice of the Security Council in situations of internal armed conflict, internal humanitarian crises and disruptions to democracy, it is today widely accepted among governments and writers that the Security Council has a legal right to authorise humanitarian intervention under Chapter VII of the UN Charter.

Jennings and Watts recognise that

the growing involvement of the international community on both a global and a regional basis, with the protection of human rights diminishes any need for states to retain or exercise an individual right of humanitarian intervention. The Charter of the United Nations in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society.

This is a relatively new view in international law, and it was not so long ago that critics of humanitarian intervention denied that the Council retained such powers. But today there is no doubt that serious and
flagrant violations of human rights no longer belong to the domain reservé of states under Article 2 (7) of the UN Charter. If a threat to the peace is determined under Article 39 then Article 2 (7) does not apply, according to its own wording. The provision precludes enforcement measures under Chapter VII from the prohibition of the UN to intervene in internal matters of a state. Jennings and Watts go even further when concluding:

Although Article 2 (7) of the Charter provides [...] that provision does not exclude action, short of dictatorial interference, undertaken with the view to implementing the purposes of the Charter. Thus with regard to the protection of human rights and freedoms – a prominent feature of the Charter – the prohibition of intervention does not preclude study, discussion, investigation and recommendation on the part of various organs of the United Nations. The principle stated in Article 2 (7) does not prejudice the applications of enforcement measures under Chapter VII of the Charter.

The portal provision of Chapter VII, Article 39, provides for a two-step process by which the Security Council first determines the existence of a threat to the peace, breach of the peace, or aggression, and secondly shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. Article 39 reads:

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 Article 41 and 42, to maintain international peace and security.

To a degree, this requirement of first reaching an agreement on the determination of a threat to the peace, breach of the peace, or aggression, forces the Council to adopt a consistent practice with regard to the threshold for its further action under Chapter VII, according to Frowein and Krisch. It has been the determination of a threat to the peace that has served as the ‘trigger’ for Chapter VII action in the recent period of Security Council activism.

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1696 Frowein/Krisch, Article 39, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 727, para. 26. They point to the Kosovo case where this order was not maintained by the Council, and it passed SC Res. 1160, 31 March 1998, UN Doc S/RES/1160, 1998 deciding on non-military enforcement measures according to Chapter VII, before it deemed the situation to constitute a threat to the peace in a subsequent resolution.
6.3.2.2. A reinterpretation of a ‘threat to the peace’?

The Council has in its new practice considered several situations that have not been traditional international armed conflicts. It has determined internal armed conflicts, humanitarian crisis, systematic and widespread violations of humanitarian law and human rights, disruption of democracy, and large-scale international terrorism to constitute a threat to the peace. The practice has been described as a shift away from any reference to the specific articles of Chapter VII and a reliance on the Chapter as a whole. An expanded function of the Security Council through the authorisation of military enforcement action in a wider range of circumstances including those on the promotion of human rights is a form of teleological interpretation of the UN Charter. The new practice of the Security Council in the post-Cold War era has developed into a process informally broadening the conception of ‘threat to the peace’ in Article 39 of the UN Charter, from solely concerning international and interstate security matters to embrace as well situations of human security threats within a state.

de Wet claims that the international community has not yet attributed a ‘positive’ content to the term ‘peace’ in Article 39 to include friendly co-operation between states and respect for human rights in the concept of peace. She claims that the term peace in Article 39 still only possesses a negative content, implying no more than the absence of ‘international armed conflict’. She also argues that the ‘double-strategy’ requiring a link to ‘international’ peace and security under the UN Charter for Article 39 determinations has not been abandoned. This narrow view of peace and what may constitute a threat to the peace, however, is being increasingly challenged by the expanding view and practice of the Council on international security, confirmed previously in 1992 in a Presidential Statement of the Security Council. The British Prime Minister John Major, representing the Council, asserted:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.

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1698 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 125.
1699 Damrosch, Commentary on Collective Military Intervention to Enforce Human Rights, p. 219.
1702 Note by the President of the Security Council, S/23500, 31 January 1992, UN Doc S/23500, 1992, p. 3. [Author’s italics]
Frowein and Krisch take a middle course and state that this Presidential statement recognises that the Council’s function under Chapter VII is limited to ‘armed conflict’, and that the responsibility to promote a positive peace rests on the UN membership as a whole and not in particular on the Council.\textsuperscript{1703} Nevertheless, the statement quoted above acknowledges, albeit informally and non-binding, that non-military threats have become ‘threats to the peace’ – an area of primary concern for the Security Council, according to the UN Charter.

The broadening and deepening of our understanding of security grew and developed with the new security challenges after the end of the Cold War. This shift in our security reality, for example, the fact that there are more internal than interstate armed conflicts,\textsuperscript{1704} as well as in our perception of what security really is, has arguably had an impact on the practice of the Security Council in its efforts to maintain international peace and security. Murphy has formulated this necessary transition of our security perception well:

Our understanding of the maintenance of international peace and security will be remarkably unattuned to the violence inflicted on people if it remains narrowly focused on the issue of violence arising from transnational war.\textsuperscript{1705}

Two earlier Security Council resolutions took an extended view on the determination of a ‘threat to the peace’ in the 1965, 1970 and 1977, in the cases of Southern Rhodesia\textsuperscript{1706} and South Africa,\textsuperscript{1707} but were not followed by coercive military measures for the direct protection of human security.\textsuperscript{1708}

The continuing trend of broadening the term ‘threat to the peace’ in Article 39 and imposing military enforcement measures, began in the early 1990s, with the first resolutions marking this shift in 1991 in the

\textsuperscript{1705} Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 291.
\textsuperscript{1706} SC Res. 217, 20 November 1965, UN Doc S/RES/217, 1965, op. para. 1. The Security Council declared the continuance in time of the illegal authorities of Southern Rhodesia, which had declared independence, to constitute a “threat to international peace and security”.
\textsuperscript{1708} de Wet argues that both these cases rely on the ‘double strategy’ in which the tensions created in the region by the secession in Southern Rhodesia as well as the arms build-up in South Africa gave the cases the necessary international link for the Council to determine the situations as threats to international peace and security, de Wet, The Chapter VII Powers of the United Nations Security Council, pp. 150-151. In the case of Southern Rhodesia, the Council authorised limited use of force (by the United Kingdom) to stop oil tankers from violating the embargo. See also Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 157.

In the Yugoslav war, long before the seceding states were recognised as independent, the Council also referred to the situation as a threat to the peace.\footnote{SC Res. 713, 25 September 1991, UN Doc S/RES/713, 1991, preambular para. 5. This was, however, not a determination of a threat to the peace, only a “concern that the continuation of the situation constitutes a threat to international peace and security”. See the discussion on the different Council formulations on this topic, in Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp. 127, 240, who sees the different wordings on threats to the peace as the experimenting of the Council with its newfound powers. The acclaimed “concern” has less value than a ‘determination’ and hence does not open the door to Chapter VII measures, according to Chesterman.} The breakdown of Somalia soon followed, and the Council determined that the human tragedy caused by the internal conflict there, and the obstacles being created to the distribution of humanitarian assistance, constituted ‘a threat to international peace and security’.\footnote{SC Res. 794, 3 December 1992, UN Doc S/RES/794, 1992, preambular para. 3.}

Commentators, debate whether Articles 39 and 24 (1) of the UN Charter are interlinked, so that the ‘primary responsibility of the Security Council for the maintenance of international peace and security’, according to Article 24, restricts the Council in its determination solely to ‘international’ threats to the peace under Article 39. de Wet claims that although threats to peace in the post-Cold War era have predominantly have originated within states, it is their impact on international relations rather than their source of origin that has been decisive for the Council’s determination of whether there has been a threat to the peace.\(^{1722}\) In her research on whether the Council has linked a threat to the peace with the potential outbreak of an international armed conflict, she found the existence of an international link in practically all cases, except for Somalia, where resolution 794 determined that the magnitude of human tragedy constituted a threat to peace.\(^{1723}\) She therefore holds that the Security Council has consistently used a “double strategy” by means of which the internal (humanitarian) situation has been regarded as a threat to international or regional stability only when the potential involvement of neighbouring countries in the conflict was also regarded as being a concrete risk in all instances.\(^{1724}\) The case of Somalia is the only exception to the Council’s ‘double-strategy’, according to de Wet.\(^{1725}\) This position appears to be in minority, and other authoritative pronouncements of the law disagree on this assessment.\(^{1726}\)

Weiss argues that there has been a gradual drift from strict reliance on the transboundary implications of a humanitarian situation as forming the determining factor in an international threat to justify international action.\(^{1727}\) In considering the humanitarian interventions authorised by the Security Council in the 1990s, Österdahl holds that what seems to have motivated the Council’s actions has not been actual threats to ‘international peace’, but massive violations of human rights not really threatening peace and security in another country.\(^{1728}\) Murphy argues that even if there were transboundary effects of human rights through refugee flows and in other ways, the essence of the ‘threat to the peace’ in all of the cases did not lie in the transboundary effects of the human


\(^{1723}\) S/RES/794 (1992), pp. 3; de Wet, *The Chapter VII Powers of the United Nations Security Council*, pp. 155-158. She explains the case by its uniqueness and that the international support for this decision would constitute evidence of an expanded definition of peace with respect to failed or collapsed states only. Hence, if there is a complete breakdown in government authority, the mere existence of a severe humanitarian crisis within a country could constitute a threat to the peace. She rejects, however, the idea that the case would open the way for a complete de-linking of a threat to the peace and the outbreak of international armed conflict.


\(^{1725}\) Ibid., p. 175.


rights deprivations, but rather in the deprivations themselves. 1729 It was not the transboundary effects that were the central focus of the Security Council’s attention. Enforcement measures were not directed towards those effects, but instead were concerned with the rights and security of civilian populations.

Security Council practice, however, reveals that internal human security threats have been firmly accepted as constituting threats to ‘international peace’, although not entirely exclusively. Paraphrasing the UN Commentary, it appears now safe to assume that any ‘internal conflict’ of a considerable scale can constitute a threat to the peace. 1730 A new understanding and view on ‘international security’, which increasingly includes ‘human security threats’ within states, has thus evolved. 1731

6.3.2.3. Which humanitarian situations can constitute a threat to the peace?

The exact content or meaning to be attributed to a ‘threat to peace’ is difficult to assert, and neither is its determination an entirely objective assessment on the part of the Council. 1732 What is certain is that it does not presuppose an actual or potential violation of international law. 1733 At the time of the drafting of the UN Charter this term was considered primarily to cover military threats to international peace, but the research has shown that the issue was in fact disputed from the very beginning. 1734 The travaux préparatoires to Article 39 of the UN Charter reflect the drafter’s intention of allowing the Council to take enforcement action in a broad range of cases and not to subject it to severe restrictions in its decisions on when to act. 1735 The intention was to allow the Council to

1731 von Tigerstrom, *Human Security and International Law. Prospects and Problems*, p. 71; Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, p. 134. One example of this broadening trend is the formulations in the thematic resolution on the protection of civilians, see S/RES/1296 (2000), op. para. 5, where the Security Council “states that the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international and human rights law in situations of armed conflict may constitute a threat to international peace and security, and, in this regard, reaffirms its readiness to consider such situations and, where necessary, to adopt appropriate steps”, and op. para. 8, where the Council further states that denial of access of humanitarian personnel to civilians in armed conflicts may constitute a threat to international peace and security.
1732 Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, p. 139; also Österdahl states that the Council’s interpretation of a threat to the peace is arbitrary, see Österdahl, *Threat to the Peace. The interpretation by the Security Council of Article 39 of the UN Charter*, p. 103.
1734 Österdahl, *Threat to the Peace. The interpretation by the Security Council of Article 39 of the UN Charter*, p. 18, see also note 1.
enjoy great freedom in its decisions on whether their existed threats to the peace, breaches of the peace, or acts of aggression.

According to Chesterman, who has made a thorough research into the Council’s practice of ‘threat to the peace’ determinations under Article 39, it is now uncontroversial and broadly accepted that a civil war or internal armed conflict may constitute a threat to the peace within the meaning of Article 39. Chesterman adds that it appears more likely when the internal armed conflict concerned takes on transborder consequences and where serious violations of humanitarian law take place.

Frowein and Krisch assert that the Council has now established consistent practice in dealing with internal conflicts, in which both the texts of the resolutions and the preceding debates show that a threat to the peace has consisted in the internal situation as such, and that “[i]t appears now safe to assume that any internal conflict of a considerable scale can constitute a threat to the peace”. The 1995 decision of the Tadić Case supports such a conclusion:

But even if it were considered merely as an “internal armed conflict”, it would still constitute a “threat to the peace” according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a “threat to the peace” and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the “subsequent practice” of the membership of the United Nations at large, that the “threat to the peace” of Article 39 may include, as one of its species, internal armed conflicts.

Frowein and Krisch state that internal armed conflicts can also constitute ‘breaches of the peace’ once it is accepted that they might pose threats to the peace regardless of any ensuing risk of an ‘international’ war: “If the prospect of a destabilization of the respective country, of human rights violations and of dire humanitarian consequences is considered as the cause of a threat to the peace, a breach of the peace occurs when these consequences manifest.” In practice the Council, however, has not yet termed a situation a breach of the peace.

The Council has also determined in several resolutions that ‘systematic, widespread and flagrant violations of human rights and

Commentary, p. 718, para. 2.
1736 See Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp. 112-162, see also the useful overview of the relevant resolutions on pp. 238-240.
1737 Ibid., pp. 129-130, 139, 151. This can be compared to the Security Council rejection to determine that the Franco regime in Spain 1946 constituted a threat to the peace.
1739 Prosecutor v. Dusko Tadić, Defence motion for Interlocutory Appeal on Jurisdiction, ICTY Trial Chamber I, Case No IT-94-1-AR72, 2 October, 1995, para. 30.
international humanitarian law’ may constitute a threat to ‘international peace and security’. This determination was made in Bosnia Hercegovina and Rwanda, where the Council decided to establish the ad hoc tribunals ICTY and ICTR, and in the situation in East Timor as a ‘threat to the peace’.\footnote{ICTY: S/RES/808 (1993); S/RES/827 (1993); ICTR: SC Res. 955, 8 November 1994, UN Doc S/RES/955, 1994; S/RES/1264 (1999); Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 151.} In all of these cases, except for the resolution on Rwanda, the voting in the Council was unanimous. In the case of Rwanda, China abstained, and the representative of Rwanda voted against the resolution. The reason for Rwanda’s objection to the resolution had nothing to do with the determination of the situation as a threat to the peace, but was primarily linked to their dissatisfaction with the statute of the ICTR.\footnote{S/PV.3453, 8 November 1994, UN Doc S/PV.3453, 1994, pp. 14-18. Rwanda listed seven reasons for not being satisfied with the tribunal and felt concerned that it was inappropriate and ineffective with the present set-up.} China had no objections to the determination of the situation in Rwanda as constituting a threat. It explained their prudence by its consistency with its unchanged position against the creation of ad hoc tribunals per se in particular in the present case since Rwanda itself objected to the current set-up of the tribunal. So the determination of flagrant violations of human rights and international humanitarian law, as such, had the full support of the Council.

Frowein and Krisch also mention the cases of Northern Iraq, Somalia and Eastern Zaire in support of this new Council practice.\footnote{Frowein/Krisch, Article 39, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 724, paras. 19-20.} They confirm that since this development did not lead to principled opposition among states, one may properly conclude that the severe and widespread suffering of the civilian population in ‘armed conflicts’ can give rise to a threat to ‘international peace and security’. The thematic Security Council resolutions on the “protection of civilians” and on children in armed conflict, adopted in 2000, also reaffirm that the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to ‘international peace and security’, expressing the Council’s readiness to consider such situations and, where necessary, take appropriate steps.\footnote{S/RES/1296 (2000); SC Res. 1314, 11 August 2000, UN Doc S/RES/1314, 2000.} The human rights and humanitarian law violations are in all cases and statements made in connection with an armed conflict.

The Security Council’s powers have a functional limitation under the UN Charter which requires, that any threat to the peace must in some way be linked to a present or impending armed conflict or other destabilisation of the security of a country or region.\footnote{Frowein/Krisch, Article 39, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 725, para. 20.} Grave and systematic violations of human rights short of armed conflict, which do not threaten to destabilise the state or region concerned, may not
automatically be considered to be a threat to the peace.\textsuperscript{1746} The recent example of Burma (regime neglect in the cyclone crisis in May 2008) appears to support this conclusion. Although several international commentators have argued that the Burmese regime’s neglect and obstruction on delivery of humanitarian relief constituted crimes against humanity, no threat to the peace was determined by the Council. Frowein and Krisch point out in the Commentary to the UN Charter that a humanitarian crisis without the presence of violence or armed conflict would most likely not constitute a threat to the peace.\textsuperscript{1747}

The exact scope of what is meant by a particular crisis and from where the danger of forcible action may arise is unclear. But a crisis would logically include humanitarian crises and in those situations it is of less importance from where the forcible action is derived, whether from the government itself, from non-state actors within or outside a state, or another state. Furthermore, natural or other catastrophes not caused by man could be the source of a humanitarian crisis, such as in the case of Burma in June 2008 after the cyclone Nargis. But if there has to be a danger of forcible action as well, such situations would not fall within the scope of Security Council action. This is contrary to the ICISS R2P doctrine, which also includes these latter situations.\textsuperscript{1748}

Moreover, Chesterman’s research asserts that humanitarian situations have been determined to constitute a threat to the peace through denial of access to humanitarian assistance,\textsuperscript{1749} and in some circumstances because of large refugee flows. The presence of these non-forceful factors have still motivated enforcement action, at least in part due to their negative external effects on other states.\textsuperscript{1750}

The Security Council practice of humanitarian interventions analysed in the case studies that follow show that several of the listed grave crimes in the Outcome Document have been present in cases that have been determined to constitute threats to the peace (see Chapter 6.3.3.). Such grave crimes were a significant factor for the determination of a threat to

\textsuperscript{1746} Frowein and Krisch claim that the cases of gross human rights violations in Southern Rhodesia and South Africa, which were considered to be a threat to the peace, were also driven by other concerns such as the danger of armed conflict in Southern Africa and South Africa's aggressive stance towards its neighbours and its rearmament programmes.\textsuperscript{1747} Frowein/Krisch, Article 39, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 726, para. 25.\textsuperscript{1748} In the case of Burma (2008) there was not a danger of forcible action, but there were still commentators who thought that the junta’s negligent handling of the crisis could be considered to be a crime against humanity, where the responsibility to protect could be activated. Evans, Facing Up to Our Responsibilities, The Guardian, 12 May 2008. See more on the Burma case in Chapter 4.6.\textsuperscript{1749} Chesterman, Just War or Just Power? Humanitarian Intervention and International Law, p. 151. In the case of Bosnia-Hercegovina SC Res. 770, 13 August 1992, UN Doc S/RES/770, 1992 and S/RES/787 (1993). In the case of Somalia SC Res. 794, 3 December 1992, UN Doc S/RES/794, 1992.\textsuperscript{1750} Chesterman, Just War or Just Power? Humanitarian Intervention and International Law, p. 151. He mentions S/RES 819 (1993), S/RES/824 (1993), SC Res. 836, 4 June 1993, UN Doc S/RES/836, 1993 in Bosnia and S/RES/918 (1994), S/RES/929 (1994) in Rwanda as examples of this practice. Cf. also Weiss, Humanitarian Intervention. War and Conflict in the Modern World, p. 48.
the peace, for example, in the cases of genocide in Rwanda and Bosnia, ethnic cleansing in the case of Bosnia, and the crimes against humanity and war crimes in Darfur. In these cases such crimes also contributed to the decision to authorise military enforcement in order to end the violations and atrocities that were taking place.

Thus, genocide, ethnic cleansing, war crimes and crimes against humanity in internal armed conflicts may be determined by the Security Council to be a threat to the peace under Article 39. (On grave crimes committed in peacetime see Chapter 6.3.2.4.)

6.3.2.4. Limitations in the powers of the Security Council

What is the extent of the powers of the Security Council under the UN Charter, and in particular with regard to Article 39, and the limits thereon, if any? Is the Council limited in its determinations of what constitutes a threat to the peace? Are there any rules limiting the ability of the Council to determine ‘R2P-situations’ constituting threats to the peace?

An overwhelming majority of the governments participating in the San Francisco Conference before the creation of the United Nations, were of the opinion that the circumstances where threats to the peace or aggression might occur are so varied that Article 39 should be left as broad and flexible as possible – but at the same time they did not intend giving the Security Council unlimited powers. The Council enjoys considerable discretion in its determinations under Article 39 but is not entirely free to act, according to UN Charter Commentary. The ICTY tribunal pronounced its view on the limitations of the Security Council to determine threats to the peace in the Tadić Case. The tribunal stated that the Council exercised a very wide discretion under Article 39, but that its powers were not unlimited. The Security Council is subjected to certain constitutional limitations, however broad its powers under the UN Charter may be. The tribunal stated:

Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organisation at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organisation. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law).

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1752 Frowein/Krisch, Article 39, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 719, paras. 4-5. This reflects the political rather than the legal approach of the UN Charter and its general tendency to emphasise procedural and not substantive limits, according to Frowein and Krisch.
The Security Council is not only bound and restricted by the UN Charter, but also by *jus cogens*, and according to many scholars, also customary law (in particular humanitarian law and human rights). The Security Council is bound by the customary *jus ad bellum* and *jus in bello* principles of proportionality and necessity in its capacity of authorising the use of force. However, there are arguably no ‘principles of international law’ that are applicable to Council military enforcement action under the Charter. It is also commonly believed that the Council is not bound by its own earlier practice, so-called ‘organ practice’. However, this should be distinguished from state practice amounting to customary law when supported by *opinio iuris*.

Nevertheless, lawyers are divided on the issue of the extent of the limits to the Council’s powers. While the most believe that the Council has a great flexibility to make its determinations under Article 39, but is restricted under the legal or structural limitations of the Council in the Charter, others see the powers and scope of action of

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1755 See e.g. Gardam, Legal restraints on Security Council military enforcement action, p. 294; O’Connell, The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform, p. 56; Lind, The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security, p. 138; cf. Stenhammar, Richtade FN-sanktioner och rule of law i folkrätten, pp. 70, 95-99, who argues that the *sui generis* character of the enforcement capacity of the Security Council as a legal figure makes it questionable whether customary law is applicable and binding on the Council in this respect, or if it should rather be used as an instrument of interpretation of the legal limits of the enforcement powers. [Translation by author]

1756 The promotion and respect for human rights is one of the principal purposes of the UN, see Articles 1 (3) and 55. It could also be argued that the Universal Declaration of Human Rights (1948) is binding on the Security Council as it has attained the status of customary law; Gardam, Legal restraints on Security Council military enforcement action, Gowlland-Debbas, Vera, UN Sanctions and international law: an overview, Gowlland-Debbas, Vera (Ed.), United Nations Sanctions and International Law, Kluwer Law International, The Hague, 2001, pp. 14-16; Angelet, International law limits to the Security Council, p. 75; Zacklin, The Use of Force and Peacekeeping Operations, pp. 103-104; cf. Stenhammar, Richtade FN-sanktioner och rule of law i folkrätten, pp. 92-93 on the Security Council and the *bona fide* principle in Article 2 (2) of the UN Charter.


1758 Gardam, Legal restraints on Security Council military enforcement action, p. 294, cf. however, the _lege ferenda_ argument on ibid. p. 300; see also the application of the ‘principle of good faith’, Gowlland-Debbas, UN Sanctions and international law: an overview, pp. 14-15.

1759 See e.g. references to earlier debates, Gardam, Legal restraints on Security Council military enforcement action, p. 296 and notes.

1760 For restrictive views imposing limitations on the Council’s powers, see Glennon, Limits of Law, Prerogatives of Power. Interventionism after Kosovo, pp. 104-105; and de Wet, The Chapter I ‘II Powers of the United Nations Security Council, pp. 139-140. An example of a structural limitation of the Council’s powers is the argument that the Council was created to be an organ of reaction to deal with short or medium term threats to international security and therefore not the appropriate body to deal with the long-term structural causes of threats to
the Security Council as being very broad, discretionary or even factually unlimited.1761

Would the Security Council therefore have the powers to determine that crimes against humanity, ethnic cleansing, war crimes, and genocide constitute threats to the peace in any situation and without restriction as well as to authorise military enforcement for the protection against such crimes? Or is the Council limited in its powers of decision under Chapter VII to exercise an external responsibility to protect by military means in certain situations? From the above mentioned, it is clear that although the Council enjoys a high degree of political discretion in determining a threat to the peace, its authority and powers are not unlimited, and it must operate within the boundary of Charter norms, and arguably also other rules in international law.1762

A claim that the Security Council has exceeded its authority under the UN Charter is not easily made the subject of judicial review, and the UN structure lacks an automatic constitutional process of judicial review with compulsory effect.1763 The Lockerbie Case confirms that the Security Council is bound by the UN Charter but that there is no provision for judicial review of Security Council decisions.1764 Legal academics support the position that the ICJ cannot pass directly binding or routine judgment on the legality of Security Council action.1765 The ICJ can, however, exercise some form of judicial control indirectly when the question is posed incidentally before it, and it has in its past jurisprudence asserted its competence both to interpret UN resolutions in the light of the Charter and made judicial pronouncements concerning

the peace (economic or social).

1761 See e.g. Hilpold, The Duty to Protect and the Reform of the United Nations, p. 55; cf. Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, pp. 284-286, who believes that the Council enjoys discretion in the ‘weak sense’, since its decisions are constrained by international law and in particular the UN Charter, even if its decisions are not formally subject to review. The most extreme position that grants the Council an absolute licence to determine what constitutes a ‘threat to the peace’ has been called the ‘Humpty Dumpty School’ of interpretation, and has not attracted much support, according to Chesterman, see Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 158.

1762 Lamb, Legal Limits to United Nations Security Council Powers, pp. 375-376; Tadić Case, No IT-94-1-AR72 (1995), para. 29: “While the ‘act of aggression’ is more amenable to a legal determination, the ‘threat to the peace’ is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter”. Cf. Lamb, Legal Limits to United Nations Security Council Powers, p. 365.


1765 Lamb, Legal Limits to United Nations Security Council Powers, p. 363. Lamb supports the opinion of Brownlie that there is no automatic subordination of the Security Council to judicial control.
their legality and validity with respect to the Charter.1766 Gowlland-Debbas argues that although the determination by the Council of a threat to the peace under Article 39 “cannot be questioned as a basis for the Council’s actions under Chapter VII in the fulfilment of its own functions”, this does not rule out the possibility that the ICJ could not “exercise its right to protect the law of the Charter should the finding itself or the choice of measures be patently contrary to […] requirements of the Charter, to the principle of good faith, or to peremptory norms.”1767 This potential of incidental, indirect and infrequent judicial review within the UN system is supported in the legal literature.1768 Lamb, however, emphasises that it is difficult to define the exact extent of a UN organ’s powers owing to the evolutionary character of the UN Charter.

The question of judicial review is nonetheless an independent question from the legal constraints of the activities of political organs.1769 In the Certain Expenses Case, the ICJ stated that when the UN takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation.1770 Thus there is a presumption of legality and that acts of UN organs are made intra vires.1771 The court furthermore explained that each organ must, at least in the first instance, determine its own jurisdiction as it was anticipated in 1945.1772 It is generally believed that it must be taken for

1767 Gowlland-Debbas, UN Sanctions and international law: an overview, pp. 14-15; see also support for the ICJ as the guardian of international law in this context, Lockerbie Case (Libya v. US), Provisional Measures (1992) (dissenting opinion of Judge Weeramantry), pp. 164, 166-167, and 176. It is argued that although Article 39 determinations are entirely matters of Security Council discretion, the maintenance of international peace and security is not an exclusive competence of the Council in the UN as an organisation, according to Article 1 (1). However, Weeramantry states that neither the Charter nor the practice of the court provides a basis for interfering with the exercise by the Council of its primary responsibility for maintaining international peace and security.
1771 Lamb, Legal Limits to United Nations Security Council Powers, p. 367; The Lockerbie Case (Libya v. US), Provisional Measures (1992) (dissenting opinion of Judge Weeramantry), p. 176. The doctrine of ‘compeitence de la competence’ was thus confirmed in the Lockerbie case with regard to Chapter VII measures; Stenhammar, Riktade FN-sanktioner och rule of law i folkrätten, p. 76.
1772 Certain Expenses Case, Advisory Opinion (1962), p. 168: “In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of
granted as a practical matter that the Security Council itself is the UN body best equipped to authoritatively determine its own competence. This also includes its assessments of whether a situation constitutes a threat to the peace, and whether or not to resort to humanitarian intervention. Thus the practice of the Council should be presumed to reflect its powers under the UN Charter and international law. The major power of control lies in the hands of the member states themselves, and their reactions (acceptance, protest or non-compliance) towards the activities of the Council are important for the determination of its legality and legitimacy. A decision *ultra vires* is not legally binding on member states in terms of Article 25 of the UN Charter.

The provisions of the UN Charter that primarily limit the Security Council action are the purposes and principles in Article 1 and the Articles articulating its mandate. The only express limitations under the UN Charter to the powers of the Council is the provision in Article 24 (2) providing that the Council shall act in accordance with the ‘purposes and principles’ of the Charter. These are laid down in Article 1. The primary purpose for the Security Council is to maintain international peace and security (Article 1 (1)), but the purpose of the UN is also to develop friendly relations among nations (Article 1 (2)) and promote human rights (Article 1 (3)). These latter purposes are secondary and have been accorded little weight and priority in the interpretation of the UN Charter in relation to the primary purpose. Österdahl argues, however, that while Article 1 (1) has been considered to be superior, the balance has swung towards the protection of human rights, though it is difficult to say how far. It is undoubtedly a fact that

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1777 Angelet, *International law limits to the Security Council*, p. 74. See in particular Articles 24-26 of the UN Charter on the functions and powers of the Council, and Chapters VI, VII, VIII and XII on its specific powers.


1779 See e.g. *Certain Expenses Case, Advisory Opinion (1962)*, p. 168.


the development of human rights law since 1945 has had an impact on
the international community’s expectations of what constitutes a ‘threat
to the peace’.1782 It is increasingly being acknowledged that the Council
may take decisions for the enforcement of international law as a
necessary means of maintaining international peace and
security,1783 arguably including the promotion and respect of human
rights. Furthermore, the ICJ asserted in the Namibia Case that the denial
of fundamental human rights is a flagrant violation of the purposes and
principles of the UN Charter.1784

Regarding the ‘primary purpose’, the reference to the principles of
justice and international law in this Article 1 (1) are to be understood as
only applicable in relation to peaceful settlement of disputes and with
regard to collective measures, which means that the Council can derogate
from existing rules in international law in actions dealing with threats to
the peace in order to restore international peace and security.1785 This is
confirmed by Article 103 of the UN Charter, which together with Article
25, provide that Security Council resolutions are binding on member
states and prevail over inconsistent treaty law.1786 Some scholars have
consistently maintained that on issues of peace and security, the Council
is not bound by international law.1787 But this does not exclude the
application of international law and legal constraints on the Council in
other circumstances, including decisions on military enforcement,
according to Gardam.1788 O’Connell supports this view, and she argues
that the Security Council has never rejected the claim that general
international law applies to its conduct, and several factors and
statements indicate that the UN has rights and responsibilities beyond
the UN Charter, one of them being its commitment to the customary
principles of humanitarian law.1789 This confirms the ICJ statement in the
Reparations Case that “the rights and duties of an entity such as the

Charter, p. 25.
1783 Angelet, International law limits to the Security Council, p. 79.
1784 Namibia Case, Advisory Opinion (1971), p. 16, p. 57, para. 131; “To establish instead,
and to enforce, distinctions, exclusions, restrictions and limitations exclusively based upon
grounds of race, colour, descent or national or ethnic origin which constitute a denial of
fundamental human rights is a flagrant violation of the purposes and principles of the
Charter.”
1785 Angelet, International law limits to the Security Council, p. 78; Gardam, Legal restraints on
1786 Gardam, Legal restraints on Security Council military enforcement action, p. 297; Boyle, Alan,
Chinkin, Christine, The Making of International Law, Oxford University Press, Oxford, 2007,
p. 232; The Lockerbie Case (Libya v. UK) Provisional Measures (1992), paras. 39, 42.
1787 O’Connell, The United Nations Security Council and the Authorization of Force: Renewing the
Council Through Law Reform, p. 56.
1788 Gardam, Legal restraints on Security Council military enforcement action, pp. 303, 318-319. She
points to the fact that there is nothing in the ICJ case law which indicates that the Council
operates under no legal restraints under Chapter VII. Since the matter is left open she
argues that there is no justification for the denial that the Council operates to a certain
extent within the general system of international law.
1789 O’Connell, The United Nations Security Council and the Authorization of Force: Renewing the
Council Through Law Reform, pp. 57-58.
Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.\(^{1790}\)

Article 2 (7) and the principle of the domain réservé of states is one of the principles of relevance to the exercise of the Council’s powers, according to Article 24 (2). The extent to which Article 2 (7) limits the Council’s powers in its determinations has been widely debated.\(^{1791}\) Chapter VII measures are exempted from the operation of Article 2 (7), but this does not mean that the sphere of domestic jurisdiction of states disappears entirely as soon as Chapter VII is applied.\(^{1792}\) The Security Council cannot act in complete disregard of international law after Chapter VII has been invoked, and in its implementation and application of the measures decided on the Council is obliged to respect international law.

Another effect of this Article has been raised by scholars who have protested against arbitrary actions of the Council, who not only refer to Article 2 (7) but also to Article 2 (4) of the UN Charter to claim that Article 39 is not applicable to situations that do not amount to threats to ‘international peace and security’.\(^{1793}\) It has been contended that the phrase ‘threat of force’ in Article 2 (4) correlates to ‘threat to the peace’ and refers solely to cross-border violence.\(^{1794}\) Glennon thus argues that a threat to the peace must include a threat of action by a state that is violent, and secondly that the threat has cross-border effects.\(^{1795}\) This very restrictive position has partly become overruled by post-Cold War practice and post-9/11 events and responses, which have broadened the notion of threat to the peace to cover threats and use of force by non-state actors, within states and also without cross-border effects.

Closely related is the argumentation by restrictive scholars who only accept that the Council makes determinations of a narrow, negative definition of ‘peace’ under Article 39 meaning “the absence of armed conflict between states.” This view precludes a positive definition of the peace that includes friendly relations and other economic, social and political and environmental conditions from the Security Council’s primary responsibilities.\(^{1796}\) Thus only security threats which would (or

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\(^{1791}\) The views on the exact content of the domain réservé and the limits of the exclusive domestic jurisdiction are divided between the legalist (international law defines the boundaries and limits differently at any time given in history) and the essentialist (the nature of the state and its essential attributes define what is essentially within the exclusive domestic jurisdiction) schools of thought, but Téson argues that there are problems with both positions. Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, pp. 175-177; Glennon, Limits of Law, Prerogatives of Power: Interventionism after Kosovo, pp. 106-112; Ostendahl, Threat to the Peace. The interpretation by the Security Council of Article 39 of the UN Charter, p. 31.


\(^{1795}\) Ibid., p. 108.

\(^{1796}\) de Wet, The Chapter VII Powers of the United Nations Security Council, pp. 138-140. This is a minority, according to Téson, see Téson, Humanitarian Intervention: An Inquiry into Law and
could) result in an ‘international armed conflict’ could hence be invoked by the Council, taking this restrictive approach. Nevertheless, Council practice in the 1990s has expanded this interpretation to also cover intrastate armed conflicts, albeit having international effects. de Wet, however, is not convinced of the existing arguments for unlinking the ‘international’ dimension of ‘a threat to the peace’ in Article 39. She asserts that an opposite conclusion would amount to an unbounded and unlimited discretion on the part of the Security Council, which would ignore the structural limitations of the UN Charter and give the Council an uncurbed flexibility that could undermine its own efficiency.\footnote{Glennon, \textit{Limits of Law, Prerogatives of Power. Interventionism after Kosovo}, pp. 102, 107-109.}

Glennon goes a step further in stating that peace can only be threatened by the use of a \textit{threat of force}, which is not present in situations of refugee flows or human rights violations.\footnote{How grave human rights violations which give rise to massive refugee flows can take place without violence, persecution and repressive action is difficult to imagine. It appears that this author has not made the shift from state security to human security in his mindset about what security implies. Concepts change over time because reality changes and the perception of reality as well, and the UN Charter is constructed to hold such a flexibility, even though not all commentators appear to agree on this. See also Higgins, \textit{Problems and Process. International Law and How We Use It}, p. 255 who describes the determination of threats to the peace in the cases of Rhodesia, South Africa, Northern Iraq and Somalia as legal fictions.}

Frowein and Krisch assert in the Commentary to the United Nations Charter that the original intention was to task the Council with the prevention of ‘interstate war,’ although not exclusively.\footnote{Frowein/Krisch, \textit{Article 39}, Simma (Ed.), \textit{The Charter of the United Nations. A Commentary} p. 720, para. 7.}

Notwithstanding that a textual and systematic interpretation favours a conclusion that ‘intrastate war’ in itself is not a breach of the peace, consistent practice of the Council since the 1990s has firmly broadened the notion of a ‘threat to the peace’ in this respect.\footnote{The Security Council has established such consistent practice in the cases of Liberia, Angola, Rwanda, Zaire, Albania, the Central African Republic, Sierra Leone and East Timor, \textit{ibid.}, pp. 723-724, para. 18.} The practice comprises determinations of ‘internal armed conflict’ situations as such to constitute threats to the peace even without international effects, and states as well as scholars have accepted and acknowledged this legal development.\footnote{\textit{Ibid.}, pp. 723-724, para. 18. Both the texts of the Council resolutions and its preceding debates before their adoption show this stance in the Security Council, according to Frowein and Krisch.} It thus supports the view of ‘peace’ as a wider notion than just the absence of ‘interstate war’, and includes the absence of ‘intrastate wars’ with or without ‘international effects’. Frowein and Krisch conclude that “it appears now safe to assume that any internal armed conflict of a considerable scale can constitute a threat to international peace and security.”\footnote{\textit{Ibid.} p. 720, para. 7.} Thus, the cross-border criteria

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\textit{Morality, 3rd edition, pp. 286-286.}


\footnote{Glennon, \textit{Limits of Law, Prerogatives of Power. Interventionism after Kosovo}, pp. 102, 107-109.}

\footnote{The Security Council has established such consistent practice in the cases of Liberia, Angola, Rwanda, Zaire, Albania, the Central African Republic, Sierra Leone and East Timor, \textit{ibid.}, pp. 723-724, para. 18.}

\footnote{\textit{Ibid.}, pp. 723-724, para. 18. Both the texts of the Council resolutions and its preceding debates before their adoption show this stance in the Security Council, according to Frowein and Krisch.}

\footnote{\textit{Ibid.} p. 720, para. 7.}

\footnote{\textit{Ibid.}, p. 725, para 18.}
(international effects) for Article 39 determinations may no longer be valid.\textsuperscript{1804}

However, authoritative interpretations claim that the requirement of a threat involving an ‘armed conflict’ may still be a valid limitation in the interpretation of the UN Charter.\textsuperscript{1805} The consistent presence of ‘internal armed conflicts’ in the Council practice on humanitarian intervention extending Article 39 reflect that there is still a military criterion present in the determinations. Thus Council practice does not yet appear to have accepted an interpretation of ‘peace’ as meaning the absence of extreme human suffering, nor viewing security threats which are not linked to an armed conflict to constitute a threat to the peace. The UN Charter Commentary takes this position.

\begin{quotation}
A threat to the peace exists when, in a particular situation, a danger of the use of force on a considerable scale exists. This definition would encompass internal conflicts, but would exclude situations of concern that are either unconnected to a particular crisis or do not involve the danger of forcible action. In any case, though, the SC enjoys broad discretion in the assessment of the situation and the gravity of the danger.\textsuperscript{1806}
\end{quotation}

Furthermore, the case of Burma after the cyclone Nargis in May 2008 supports the view that the Council is politically restrictive in determining natural catastrophes and humanitarian situations not involving military threats or armed conflicts as constituting a threat to the peace.\textsuperscript{1807} (See more on Burma (2008) and ‘armed conflict’ in Chapters 4.6. and 6.3.2.3.)

Other scholars argue that ‘peace’ should not only denote the absence of (international) armed conflict but should be interpreted to include the absence of extreme human suffering emanating from other sources other than interstate war. The legal basis is found in a teleological interpretation of the UN Charter and its preamble, by which prevention of ‘extreme human suffering’ resulting from war is the rationale for the maintenance of international peace and security.\textsuperscript{1808}

This humanitarian undertone of the Charter and its objective of preventing extreme human suffering is contended to also cover extreme suffering in all its forms in situations or crises not necessarily emanating from war, such as grave violations of the \textit{jus cogens} norms prohibiting

\begin{footnotes}
\item[1804] Whether or not one should regard this change as an informal modification of the Charter through evolutionary interpretation or as a result of subsequent practice informally modifying the UN Charter (by ‘consistent practice’ and ‘common consent’) could be debated. It depends on whether one views the new practice and widened interpretation of ‘a threat to the peace’ as falling within the wording of Article 39 or to be contra legem. (See my own position in the conclusions of Chapter 6.3.3. and 6.3.4.).
\item[1806] Ib\textit{id.}, p. 726, para. 25.
\item[1807] It could possibly be counter-argued that the reason the Security Council did not take enforcement measures in this situation was the close ties existing between China and Burma, or that the non-forceful measures were successfully used to achieve the required results, avoiding the unfolding of a further humanitarian catastrophe.
\end{footnotes}
genocide, slavery, systematic torture or systematic and extensive racial discrimination, committed in peace. Such crimes are violations of *erga omnes* obligations which *all* states have a legal interest in curbing, why it is argued that such violations could and should preferably be halted or mitigated by collective enforcement measures channelled through the Security Council – even in situations where there is an absence of war.

Taking a wider approach on the interpretation of ‘peace’ – not necessarily linked to the absence of war – the Security Council is seen to be in power of authorising military measures to prevent genocide and crimes against humanity also in peacetime situations short of armed conflict where an unfolding humanitarian is considered to constitute a threat to the peace and peaceful measures are found inadequate. This position would thus support the concept of external responsibility to protect by the Security Council to protect populations from grave international crimes by military means within a state, both in peace and war. Evans takes this position when contending that the Council has considerable latitude in defining an international threat any way it likes, however limited the actual cross-border impact of a particular situation.1809

It would be possible to criticise this interpretation since it is not yet firmly confirmed by general Council practice with regard to the protection against grave crimes, such as genocide and crimes against humanity, in situations short of armed conflict.1810 Thus if taking the narrow approach to Council powers it could be argued that the external R2P for the Council to protect against grave crimes (in peace and war) by military means is only partly supported by practice, international law and the UN Charter.1811 Taking this position, the Security Council would only have a right to make a determination that an ‘R2P situation’ within a state constitutes a threat to the peace as long as it is linked to an armed conflict, or a failed state situation. However, it could be counter-argued that the Genocide Convention grants the Council further rights to take decisions on collective action to ‘prevent genocide’ also in peace, why its authority is wider on this particular crime.

The R2P situations enumerated in the Outcome Document can in all of the cases, apart from war crimes (which only occur in armed conflicts), by definition take place both in times of war and peace. Both genocide and crimes against humanity are defined as crimes that do not

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1810 The Council authorisation of the use of force for the restoration of democratic government in the case of Haiti (1994) is an example of enforcement measures in situations short of armed conflict.
1811 Taking a more cautious approach under *lex lata*, such determinations involving a situation of R2P within a state could arguably only be considered when related to an internal armed conflict. Such a conclusion on Security Council powers would consequently restrict it in exercising its external responsibility to protect human security within a state by military means. The possibility of undertaking an external R2P by military means would thus need additional widening, evolutionary interpretation or informal modification if it were also to take place in grave humanitarian situations lacking elements of armed conflict (e.g. Burma 2008). According to this view, the Council would thus have to abandon its traditional interpretation of its powers and develop the law further through new practice.
need to be linked to an armed conflict, and ethnic cleansing can be considered to be both a crime against humanity and a war crime. The Outcome Document underlines that national authorities have to be manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity in order for the notion of responsibility to protect to shift to the international community through the Security Council. It would be far-fetched to conclude from the reasoning above that in the case of an extreme humanitarian crisis where any of these crimes were being committed or imminent to occur, the situation must have deteriorated to a position of, or provoked an imminent armed conflict for the Security Council to be able to take action under Chapter VII.

Whether the Council factually assesses and determines an ‘R2P situation’ to constitute a threat to the peace and decides to take military enforcement action in the particular situation, is arguably an issue more of a political rather than a legal character. Although, it has to comply with its obligations under the Charter, international customary law and jus cogens in doing so. Circumstances other than the gravity and extent of violations of human rights and humanitarian law, such as political, security and economic factors, interests and relationships, will carry weight and be decisive on the part of the Security Council in considering whether or not to authorise a humanitarian intervention. The geopolitical aspects, power politics and the security interests of the permanent members of the Council, as well as the political willingness and preparedness of member states to take on their external responsibilities to protect through military means will all be crucial and decisive. But a positive development of a more common understanding among Council members on human security and the importance of the R2P in the future cannot be ruled out.

6.3.2.5. Military enforcement to protect civilians under Chapter VII

The determination to become seized of the situation and any subsequent enforcement action under Chapter VII are two different questions. Article 39 of the UN Charter separates the determination of a situation to constitute a threat to the peace, and the decision (or recommendation) under Chapter VII allowing for military action. Once the determination has been made, both Article 41 and 42 measures are available options for the Council to address the threat. Article 42 clearly states that if the Council has considered that non-military enforcement measures under Article 41 ‘would be inadequate or have proved to be inadequate’, military enforcement measures by air, sea, or land can be taken, as may

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1812 A restrictive approach to the powers of the Council under the UN Charter to determine a threat to the peace would, supported by its own practice (see Chapter 6.3.3), hence limit to some extent the possibilities open to the Security Council to exercise its external responsibility to protect by military means. This would mean that the Council would only have a right under the UN Charter to protect human security within a state by military means when grave crimes were being committed (or causing an imminent armed conflict) unless a new interpretation of what might constitute a threat to the peace is made.

1813 Gardam, Legal restraints on Security Council military enforcement action, p. 299.
be necessary to maintain or restore international peace and security. It is hence not necessary for non-military measures to have been previously ordered and implemented before the Council resorts to a decision on the use of force.\textsuperscript{1814} It is only necessary that it be considered inadequate in the situation at hand.

Owing to the lack of Article 43 agreements, the Council has no choice but to rely on member states and organisations willing to act on its behalf through authorisation. The prevailing opinion is that the non-existence of an Article 43 agreement is not an obstacle to the Security Council’s resorting to decisions under Article 42 of the Charter.\textsuperscript{1815} State practice has in principle accepted that Article 42 allows for the mere authorisation of the use of force by member states in the absence of agreements under Article 43.

‘Authorisations’\textsuperscript{1816} by the Security Council constitute a middle ground between binding decisions and recommendations in that they do not oblige member states to take action but merely allow them to do so, at the same time obliging the target state to tolerate such measures.\textsuperscript{1817} The phrase “use all necessary means” has been applied to denote the possibility open to use force. The Security Council may decide to authorise the use of force to one or several states, or a regional organisation to carry out a humanitarian operation.\textsuperscript{1818} State practice, in

\textsuperscript{1814} Frowein/Krisch, \emph{Article 42}, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 753, para. 7.


\textsuperscript{1816} Chesterman, \emph{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 165.

\textsuperscript{1817} Frowein/Krisch, \emph{Article 42}, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 728, para. 32. The Charter leaves unclear to what extent the Security Council is empowered to issue such authorisations. The system of collective security as envisaged by the Charter remains incomplete in one of its most important parts, according to Frowein/Krisch, \emph{Article 42}, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 751, para. 3.

\textsuperscript{1818} See Articles 39, 42, 48 and 53 of the UN Charter. The innovative Security Council practice of delegating Chapter VII powers now appears to have gained relatively broad acceptance according to authoritative scholars, see Chesterman, \emph{Just War or Just Peace? Humanitarian Intervention and International Law}, pp. 165-171; Frowein/Krisch, \emph{Article 42}, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 758, paras. 23-24; de Wet, \emph{The Chapter VII Powers of the United Nations Security Council}, pp. 261-262, with regard to authorising individual states to engage in military enforcement operations, and \textit{ibid}. pp. 290-291, with regard to the authorisations of regional organisations; Sarooshi, \emph{The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers}, p. 211 et seq, and p. 247 et seq, with regard to regional organisations, see also Lind, \emph{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, p. 137 et seq, and further pp. 138-140, with regard to authorisation of regional organisations to take enforcement action in third states, \textit{i.e.} non-member states. A restrictive interpretation of Article 53 would limit such decisions to member states of the regional
the cases of Somalia, Bosnia, Haiti, Rwanda, Eastern Zaire, Albania, the Central African Republic, Kosovo (KFOR) and East Timor, has illustrated an acceptance that Article 42 allows for the authorisation of the use of force by member states and regional organisations in the absence of agreements under Article 43. The Council has however with time come to refrain from using the very broad authorisation formulae, as it did in the beginning of the 1990s, and instead introduced more precise definitions of the aims of the enforcement operations, clearer limits and more thorough reporting duties.

Two legal limitations govern the Council’s decisions on authorising the use of force, according to the wording of Article 42 (the principle of necessity and proportionality). Military enforcement measures may only be taken when no others are considered to be capable of remedying the particular threat and halt bringing to a halt ongoing or imminent atrocities. The Council also has to conform to the principle of proportionality when considering whether or not military action is justified, as indicated by the phrase ‘as may be necessary’.

The Security Council has demonstrated in its practice (see the case studies that follows) that it perceives itself to have the power and right under the UN Charter to authorise humanitarian interventions for the protection of civilians in humanitarian crises, when the situation in question is considered to constitute a threat to the peace.

6.3.3. Post-Cold War practice on humanitarian intervention

INTRODUCTION

The focus on the case studies of the Security Council practice examined below will deal with those where the Security Council has determined that grave and flagrant violations of human rights and humanitarian law have constituted a threat to the peace, and at the same time authorised enforcement measures involving the use of force for the protection of civilians with the aim of preventing or ending such offences – without the permission of the state concerned. These cases may have more or less achieved their intentions, or in some cases even totally failed. But the success or otherwise of the particular humanitarian interventions is not the main objective of this study.

The purpose is to show that based upon this practice, the Security Council may legally authorise humanitarian interventions. The study of these Council authorised military enforcement measures in these cases will expose whether or not the cases support an emerging norm on an external R2P by military means. The criteria of the R2P doctrine on military intervention endorsed by the international community in the organisation, but a plethora of Security Council resolutions evidence a practice based upon a broad interpretation of Article 53 read together with Article 48.

1820 Ibid., paras. 24-26.
1821 Article 42 of the UN Charter, Ibid., p. 753, para. 8.
1822 Boyle and Chinkin, The Making of International Law, p. 111.
Outcome document will be crucial to this assessment. Under examination will be the Council’s compliance with the relevant R2P criteria. These are the presence of any of the grave crimes affecting the determination of a ‘threat to the peace’, that the state concerned was manifestly failing to protect its population from such grave crimes, and that peaceful means were found to be inadequate. The last criteria does not really have to be part of the assessment but can automatically be assumed, since in all of the cases where the Council has authorised military enforcement measures, peaceful means have been considered inadequate, in accordance with Article 42. The precautionary principles have not been adopted to guide the Security Council action, which is why these criteria will not form part of the study.

The brief examinations of this practice will then be used for further analysis of the legal capacity in terms of a legal right or duty (or both) of the Security Council to carry out an external responsibility to protect by military means, according to the emerging doctrine of R2P. The conclusions of Chapter 6.3.3. and Chapter 6.3.4., will analyse whether or not the Council practice supports the development of such a norm, or whether the Security Council has already developed a legal right or duty to protect populations from such grave crimes, and the manner in which such a legal evolution might have taken place in relation to the UN Charter rules. The possibility of an evolutionary interpretation or de facto modification through informal modification of the UN Charter is thus discussed with respect to this emerging or existing norm of external R2P by military means.

The purported cases of Security Council authorised humanitarian interventions involve those interventions where the Council has authorised an individual state, “all member states”, or a regional organisation. These comprise the interventions in Bosnia (1992-1993), Somalia (1992), and Rwanda (1994), as well as two borderline cases where intervention was (partly) consented to – in East Timor (1999) and Darfur (2006-2007).

The expanded practice of the Security Council during the post-Cold War period has contributed to progress towards a norm holding a right of the Council to authorise humanitarian interventions, although it has been considered to have failed to take robust and efficient action in these and several other cases, such as Northern Iraq (1991), Rwanda (1993) and Kosovo (1999).1823 The question is whether this practice also supports a norm on an external R2P by military means for the Security Council.

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1823 Bellamy, *Just Wars*, p. 205. The failure of the Council to take action is these three latter cases created a ‘schism’, as described by Brunnée and Toope, between this norm and the Security Council practice and therefore there have been numerous attempts to articulate alternative courses of action and norms for situations where the Council fails to act, according to Bellamy. See Brunnée and Toope, *The Use of Force: International Law After Iraq*, p. 800.
THE POST-COLD WAR PERIOD

BOSNIA-HERCEGOVINA (1992-1993)

The disintegration of the Socialist Federal Republic of Yugoslavia (hereinafter former Yugoslavia) into four new states in the Balkans in 1991 and 1992 led to violence and war of great complexity, where terror reigned, with genocide and flagrant violations of humanitarian law being committed. The euphemistic term 'ethnic cleansing' was coined – the practice of mass expulsion or killing of people from opposing ethnic groups within a certain area. Systematic rape became acknowledged as a weapon of war. Mass displacements of people and refugee flows threatened the stability and security of the region. Hundreds of thousands were killed and close to two million people were displaced during the war in Bosnia-Hercegovina (hereinafter Bosnia) as a result of Serbian ethnic cleansing, involving forced evacuations and genocide.\textsuperscript{1824} The Security Council had been ‘concerned’ that the continuation of the situation constituted a ‘threat to international peace and security’ even before the disintegration.\textsuperscript{1825} The situation was first formally ‘determined’ to constitute a threat to the peace after the completion of secession, when Croatia, Slovenia and Bosnia were admitted as new member states of the United Nations on 22 May 1992.\textsuperscript{1826} Continued Serbian aggression and acquisition of great parts of the territority of Bosnia put pressure on the UN to take forceful action. On 13 August 1992, the Council authorised under Chapter VII, states, nationally or through regional organisations, to take all measures necessary for the delivery of humanitarian assistance to Bosnia.\textsuperscript{1827} But no states made troop contributions to realise the resolution mandate. The second Security Council decision on forceful humanitarian intervention in Bosnia was made on 31 March 1993, when member states were authorised to take all necessary measures in the airspace of Bosnia to prevent further violations of the flight ban.\textsuperscript{1828} NATO became politically involved in the implementation of the flight ban threatening to enforce the no-fly zone while the US Air Force dropped food and medicines to civilians in enclaves that could not be reached over land. The third authorisation of forceful humanitarian intervention was made on 4 June 1993, when the mandate of United Nations Protection Force (UNPROFOR)\textsuperscript{1829} was

\textsuperscript{1826} SC Res. 757, 30 May 1992, UN Doc S/RES/757, 1992, preambular para. 17. This was recognised again in S/RES/770 (1992), preambular para. 5.
\textsuperscript{1827} S/RES/770 (1992), op. para. 2.
\textsuperscript{1829} UNPROFOR was already present on the territory and was originally set-up as a peacekeeping force in Croatia with the consent of the warring parties through SC Res. 743, 21 February 1992, UN Doc S/RES/743, 1992, and later the mandate was extended to Bosnia through SC Res. 749, 7 April 1992, UN Doc S/RES/749, 1992, and further extended through numerous resolutions, see e.g. S/RES/749 (1992), S/RES/761 (1992), S/RES/776 (1992), S/RES/779 (1992), S/RES/787 (1992), S/RES/781 (1992), S/RES/795 (1992), S/RES/819 (1993), S/RES/824 (1993). Most of the resolutions were decided under Chapter VI (e.g S/RES/776 (1992), but a few included extended mandates under Chapter
expanded to protect the UN safe areas, and member states were authorised to use force in order to support UNPROFOR in the performance of its mandate.\textsuperscript{1830} It was not until two years later that NATO became militarily involved in fighting the Serbs on the basis of earlier Council resolutions. Thanks to these forces, the Serbs were forced to retire and the war ended. Each of these three resolutions had a few abstaining states. They did not oppose forceful action as such, but expressed concern that member states were authorised to use force and that such enforcement would not be executed under UN control and command.\textsuperscript{1831} Despite the initial criticism of a few states, the Council authorisation in Bosnia for the protection of humanitarian deliveries and for the protection of safe areas was assessed as a UN authorised military intervention for humanitarian purposes.\textsuperscript{1832}

The background to the war started after the recognition of the new state of Bosnia by the European Community on 15 January 1992.\textsuperscript{1833} Violence intensified in the spring when the army of the Yugoslav National Army (JNA) and Serbian militia launched attacks on Bosnia and managed to take control of large portions of its territory.\textsuperscript{1834} From the point when Croatia, Slovenia and Bosnia became members of the UN, the conflict was seen as an international armed conflict (or mixed), but it was questionable whether any threat to the peace extended beyond the borders of former Yugoslavia.\textsuperscript{1835} On 30 May 1992 the Security Council determined that the situation in Bosnia and in other parts of former

\textsuperscript{1830} S/RES/836 (1993), op. paras. 5, 9-10; The six safe areas established under resolutions 819 (16 April 1993) and 824 (6 May 1993) were Srebrenica, Tuzla, Zepa, Gorazde, Bihac, and Sarajevo.

\textsuperscript{1831} Fear was raised that this broad mandate could be abused and worsen the security situation, including the safety of UNPROFOR. Regarding resolution 770 see the statements of China, India and Zimbabwe in S/PV.3106, 13 August 1992, UN Doc S/PV.3106, 1992; on resolution 816 see statement of China in S/PV.3191, 31 March 1993, UN Doc S/PV.3191, 1993; and on resolution 838 see the statements of Venezuela and Pakistan in S/PV.3228, 4 June 1993, UN Doc S/PV.3228, 1993. The Commentary to the UN Charter, however, asserts that state practice in principle has accepted that Article 42 allows for the mere authorisation of the use of force by member states in the absence of agreements under Article 43. The Council, however, refrained from using broad authorisations formulae as in the beginning of the 1990s and instead introduced more precise definitions of the aims of operations, clearer limits and more thorough reporting duties, see Frowein/Krisch, \textit{Article 42}, Simma (Ed.), The Charter of the United Nations. A Commentary, pp. 758-759, paras. 24-26.

\textsuperscript{1832} Abiew, \textit{The Evolution of the Doctrine and Practice of Humanitarian Intervention}, pp. 187, 189; Beekman, Olof, \textit{Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument}, Media Tryck, Lund University, Lund, 2005, p. 190; Téson, \textit{Humanitarian Intervention: An Inquiry into Law and Morality}, 3rd edition, p. 327; Cf. Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, pp. 214-216, who argues i.a. that the action does not fit as a humanitarian intervention due to the situation being an international armed conflict, and that the humanitarian aid given to Bosnia should be regarded as a support to their right to self-defence against Serbian aggression.

\textsuperscript{1833} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 134.


\textsuperscript{1835} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 134.
Yugoslavia constituted a threat to ‘international peace and security’. In the same resolution 757, it called for the “immediate cessation of forcible expulsions and attempts to change the ethnic composition of the population” and reaffirmed “the need for the effective protection of human rights and fundamental freedoms, including those of ethnic minorities”. Concern over the obstructed delivery of humanitarian assistance to Sarajevo and other parts of Bosnia was also raised. The Serbian practice of ethnic cleansing and violations of human rights of Bosnian Muslims in particular, made up a substantial consideration in the Council’s assessment of the security threat at stake in Bosnia.

The siege of Sarajevo was the defining feature of the war in Bosnia, as Sarajevo was the headquarters of Bosnian government forces and holding the largest UN troop concentration. It was surrounded by Serbian artillery and snipers in the mountains, while its population faced years of death, terror and hunger. In July 1992, UNHCR together with UNPROFOR, coordinated an airlift of humanitarian supplies into Sarajevo airport. But most of the people in need of assistance lived in towns and villages outside Sarajevo, and the vast bulk of aid was delivered by NGOs working with the UNHCR and the WFP, using convoys of trucks from locations outside Bosnia. These convoys faced roadblocks where they were fired upon, forced to turn back, had their cargoes stolen, and met other barriers to the safe delivery of humanitarian relief to the Serbs, Croats and Bosnians in need.

Later in the summer, the Security Council reached the point where it considered the necessity for forceful enforcement action in order to prevent a disaster of genocidal proportions in Bosnia. On 13 August 1992, in resolution 770, the Council expressed its dismay at the continuation of conditions that impeded the delivery of humanitarian supplies, the consequent suffering of the people in Bosnia and by the abuses practised on civilians imprisoned in camps, prisons and detention centres. Accordingly, it authorised member states and regional organisations to take all measures necessary to support the delivery of humanitarian assistance. This resolution was the first in UN history in

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1836 Österdahl, however, points out that the situation in Bosnia constituted a breach of the peace rather than a threat to the peace, by the aggressors Serbia and Montenegro and Croatia, see Österdahl, Threat to the Peace. The interpretation by the Security Council of Article 39 of the UN Charter, p. 48.

1837 S/RES/757 (1992), preambular para. 17. A trade embargo with the Federal Republic of Yugoslavia (FRY), i.e. Serbia and Montenegro, and a flight ban over FRY and other measures to isolate FRY were also imposed under Chapter VII through this resolution.


1839 Ibid., pp. 63-64, and note 84. The protection of the airport was critical but less successful, according to Seybolt. UN force commanders were in constant negotiations with the Army of Republika Srpska (VRS) forces, who remained in power in position around the city of Sarajevo and could close the airport at any time. The airlift was allowed to operate in exchange for a share of the supplies.

1840 Ibid., p. 65.

1841 Ibid., p. 65. In resolution 776 (1992) UNPROFOR was given a Chapter VI mandate to protect humanitarian convoys.

which the Security Council authorised the use of military means to enforce humanitarian undertakings.\textsuperscript{1843} Member states were called upon to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organisations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina.\textsuperscript{1844}

The resolution was adopted with three abstentions – China, India and Zimbabwe.\textsuperscript{1845} The two main concerns of these states were the risks attached to authorising the use of force to \textit{all} UN member states, and of the operation not remaining under UN control, command and supervision – which they believed could compromise the safety of the peace-keeping force UNPROFOR, also present on the territory.\textsuperscript{1846} China was specifically concerned that the broad authorisation to all states to take all necessary measures would be tantamount to issuing a blank cheque that could effectively lead to the loss of control of the situation, with serious consequences for which the UN and the Security Council could be held responsible.\textsuperscript{1847} India explicitly endorsed the substance and objective of the draft resolution and was not opposed to authorisation of the use of force as such, but preferred the command and control to be held by the UN. India also had reservations on “bringing compliance with international humanitarian law within the competence of the Security Council” and making it the subject of Chapter VII action.\textsuperscript{1848} Zimbabwe interpreted the draft resolution as empowering any state able and so inclined to use military force in any part of Bosnia and Herzegovina but without any genuine control from or accountability to the United Nations, and that it therefore would be left entirely up to individual states to define the exact scope of the humanitarian operation.\textsuperscript{1849}

Their worries were never met. The humanitarian mandate given to member states in resolution 770 promised more than member governments were willing to do.\textsuperscript{1850} Unlike the later international

\textsuperscript{1843} Österdahl, \textit{Threat to the Peace: The interpretation by the Security Council of Article 39 of the UN Charter}, p. 48.
\textsuperscript{1844} S/RES/770 (1992), op. para. 4. The resolution only “recognised” that the situation constituted a threat to international peace and security, but since this had already been determined in Security Council resolution 757, so another determination was not necessary in order to take enforcement action through Chapter VII in Bosnia. If it once has been established, the door is open to Chapter VII measures. The Council also demanded that unimpeded and continuous access to all camps, prisons and detention centres be granted immediately to the ICRC and other humanitarian organisations, and that all detainees were to receive humane treatment, food, shelter and medical care.
\textsuperscript{1845} S/PV.3106 (1993).
\textsuperscript{1846} The force was established by S/RES/743 (1992).
\textsuperscript{1847} S/PV.3106 (1993), p. 51.
\textsuperscript{1848} \textit{Ibid.}, pp. 11-15.
\textsuperscript{1849} \textit{Ibid.}, p. 16.
response in Somalia, no state or states undertook initially to organise and deploy a multinational force for Bosnia.\textsuperscript{1851} Moreover, the peace-keeping mandate of UNPROFOR under Chapter VI to support UNHCR in the delivery of humanitarian aid was not initially given the necessary expanded mandate to allow for a military backup on the ground for the protection of civilians from rape, assaults and murder. Instead the UN force remained unwilling to use force beyond the delivery of relief, in order to avoid troop casualties and to stay neutral and impartial in the conflict.\textsuperscript{1852} This led to a moral crisis in the UN’s humanitarian action, according to Abiew.\textsuperscript{1853} By the end of 1992, some 10,000 civilians had lost their lives and a further 10,000 were wounded. Well over 100,000 people were displaced or sought refuge abroad.\textsuperscript{1854}

Further strong enforcement measures were therefore imposed in the following spring, through resolution 816, on 31 March 1993. The objective was to stop continuing violations of the flight ban over Bosnia. In this resolution, the Council again authorised member states and regional organisations to take all necessary measures in coordination with the UN to prevent further violations of the ban. It stated:

Authorises Member States, acting nationally or through regional organisations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with the ban on flights.\textsuperscript{1855}

The resolution was adopted, with only China abstaining. It adhered to its principled position and again made reservations against the invocation of Chapter VII in order to authorise states to use force.\textsuperscript{1856} But China did not oppose the establishment of the no-fly zone in itself. Russia did not abstain, but stated during the debate that the operation must be coordinated with the Secretary-General and UNPROFOR.\textsuperscript{1857}

NATO became politically involved in the implementation of the flight ban, but even with threatened NATO enforcement of the no-fly zone, the warring factions in Bosnia regularly violated the ban with subsequent impunity.\textsuperscript{1858} In March 1993, US forces in coordination with the UN began air-dropping food and medicine to Muslim enclaves in Bosnia, which could not be reached overland.\textsuperscript{1859}

\textsuperscript{1851} Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 204.
\textsuperscript{1852} Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention, p. 185; the UNPROFOR mandate was based upon resolution 776 (1992).
\textsuperscript{1853} Ibid., p. 185.
\textsuperscript{1854} Beckman, Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument, p. 188.
\textsuperscript{1855} S/RES/816 (1993). The flight ban over Bosnia had been established through resolution 781 and was further extended through resolution 816, para. 1.
\textsuperscript{1856} S/PV.3191 (1993), p. 22.
\textsuperscript{1857} Ibid., p. 23.
\textsuperscript{1858} Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order p. 205.
\textsuperscript{1859} Ibid. p. 206.
In April and May 1993, six cities and towns were declared safe areas: Srebrenica, Tuzla, Zepa, Gorazde, Bihac, and Sarajevo. The idea of safe areas came initially from ICRC to protect enclaves of Muslims who had remained behind Serb lines after Serb forces swept through Bosnia in the spring of 1992, but it was first rejected as diplomatically undesirable and militarily unworkable by the UNHCR, USA and by troop-contributing governments. When the Vance-Owen Peace Plan was threatened by the potential surrender of Srebrenica to the Bosnian Serb forces in April 1993, the idea of UN protected areas returned. The declaration of the safe areas and the placing of UN troops (UNPROFOR) in them contributed to civilian protection for two years, according to Seybolt, while other commentators observed that the safe zones were anything but safe. They were vulnerable to Serb attacks, where even UN peace-keepers and humanitarian aid workers became hostages.

On 4 June 1993, in resolution 836, the Security Council also authorised UNPROFOR to protect the safe areas with military force under Chapter VII. The UN force was authorised to take the necessary measures, including the use of force in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian envoys.

UNPROFOR was finally bolstered by the resolution, which expanded the mandate under Chapter VII to enable it to deter attacks on safe areas, to monitor cease-fires, promote the withdrawal of military or paramilitary units other than those of the Bosnian government, to occupy certain key points on the ground, and to participate in the delivery of humanitarian relief. The participation of the UN force in the delivery of humanitarian aid was already part of its earlier peace-keeping role under resolution 776, a Chapter VI resolution, but the difference now was that its mandate was broadened and reinforced as a Chapter VII enforcement measure with no requirements of neutrality or impartiality. However, despite the adjustments of UNPROFOR’s rules of engagement the troops on the ground were unable to prevent attacks on civilians and failed effectively to protect the safe areas.

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1860 They were established by Security Council resolution 819 (16 April 1993) and resolution 824 (6 May 1993).
1862 Ibid., p. 66. Bosnians and Croats had agreed to the Vance-Owen Peace Plan but not the Serbs.
1863 Ibid., p. 67.
1866 Ibid., op. para. 5.
1868 Beckman, Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument, p. 189.
authorisation was not specific in granting UNPROFOR a protection mandate for civilians, and the mandate was considered weak in this respect.

The Council decided in the same resolution that member states could also use force to support UNPROFOR to protect the safe areas

acting nationally or through regional organisations or arrangements, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate.\footnote{S/RES/836 (1993), op. para. 10.}

Pakistan and Venezuela abstained in the voting of resolution 836 and underlined the shortcomings of the safe areas which had become like open jails and should not be kept as a permanent, security solution for the Bosnian Muslims in Bosnia. Pakistan pointed out that the \textit{status quo} situation of the safe areas benefited Serbia and that the enforcement measures should have been supplemented by further enforcement measures, such as the lifting of the arms embargo against Bosnia.\footnote{S/PV.3228 (1993), p. 29.} It made its reservation based upon the lack of commitment by the international community to the full implementation of the Vance-Owen Peace Plan, and in particular to its provisions on territorial arrangements for Bosnian Muslim community.

NATO came to act upon the Council authorisation to protect the safe areas under resolution 836 two years after its adoption. The mortar attack from the mountains in a market square in Sarajevo in August 1995, killing 37 people and injuring 90, provoked international outrage and provided the incentive for NATO to take forceful action.\footnote{Bosnia v. Serbia Case (2007), p. 68.} Seybolt argues that the inability of UNPROFOR to protect both civilians and the delivery of aid operations, and even the protection of the force itself – combined with a lack of progress to find a diplomatic solution to the war – led to a much more aggressive use of force by NATO.\footnote{Seybolt, \textit{Humanitarian Military Intervention. The Conditions for Success and Failure}, p. 63.} According to him, it was the NATO bombing campaign, known as Operation Deliberate Force, together with a Croat ground offensive against Serb civilians and military, that convinced the Serbian President Milosovic to settle the war at the negotiating table.

Before the war ended the massacre in Srebrenica was allowed to happen – to the horror of all those who had made such enormous efforts to avoid such an atrocity. In the summer of 1995, the UN troops allowed Serb paramilitary forces to separate 8,000 men and boys of fighting age from the population of Srebrenica before assisting in the deportation of the rest of the population.\footnote{\textit{Ibid.}, p. 67; Cf. Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 211.} These men and boys were slaughtered in the largest massacre of the entire war, which was later

\footnote{Ibid., p. 67; Cf. Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 211.}
asserted to have constituted genocide by the International Court of Justice judgment in the case of Bosnia v. Serbia (2007).\footnote{Bosnia v. Serbia Case (2007).}

At the end of August 1995 NATO airstrikes, together with UN Rapid Reaction Force artillery, broke the Serbian siege of Sarajevo and attacked the headquarters of the forces of Republica Serbska (VRS) in Banja Luka.\footnote{Seybolt, Humanitarian Military Intervention. The Conditions for Success and Failure, pp. 68-69; Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, p. 326.} Within a month the Bosnian Serb commander, Ratko Mladić, agreed to withdraw his forces around Sarajevo and cease all hostile activity in and around all the remaining safe areas.\footnote{Ibid., p. 69.} Following the Operation Deliberate Force, the Bosnian Army reconquered 20 per cent of its total area from VRS, with the help of the force of the Bosnian Croats.\footnote{Ibid.} The war ended in December 1995 when the Dayton Peace Agreement was formally signed in Paris.\footnote{Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, p. 325.}

It is quite clear that UNPROFOR failed to protect the civilian population in Bosnia. The Bosnian safe areas stand as a symbol of failed UN military intervention, in particular the genocide in Srebrenica.\footnote{Seybolt, Humanitarian Military Intervention. The Conditions for Success and Failure, p. 69.} But the NATO air campaign Operation Deliberate Force was more successful in its contribution to ending the war.

The situation in Bosnia had all of the elements present that are included in paragraph 139 of the Outcome Document (2005). The Bosnian government was unable and manifestly failing in protecting its population from ethnic cleansing, war crimes, genocide, crimes against humanity. The widespread and systematic rapes that occurred were later confirmed to have constituted crimes against humanity\footnote{S/RES/827 (1993).} by the ICTY, which had been established to end the impunity of such crimes.\footnote{Gardam and Jarvis, Women, armed conflict and international law, p. 212.} As mentioned above, the Serbian practice of ethnic cleansing and violations of human rights, and the hindrance of delivery of humanitarian supplies were at the heart of the Council’s assessment of the security threat at stake in Bosnia.

There was no direct mention of the international dimension in the Council assessment, but it was more than obvious that the war in Bosnia was in fact an international armed conflict after the disintegration of the former Yugoslavia. However, the situation in Bosnia was not a conventional interstate war. It was also considered to be a civil war, owing to the Bosnian Serb and Bosnian Croat support of Serbia’s aggression towards the Bosnian Muslims.

SOMALIA (1992)

The humanitarian crisis in Somalia developed in January 1991, in the power vacuum arising after the ousting of President Mohammed Siad
Barre, which had run the country under a dictatorship since 1969. The country into 12 zones of control, and conflict among them plunged the country into civil war. The interim Prime Minister, Omer Arteh Qhalib, selected at the reconciliation conference in Djibouti in July 1991, held no perceptible authority over the faction leaders. The collapse of the government and the full-scale war between clan militias and factions worsened both the effects of the drought and food shortages. Widespread malnutrition and starvation spread around the country. The Security Council’s first reaction in April 1992 was to establish a peacekeeping operation, the United Mission in Somalia (UNOSOM I), to monitor the implementation of a cease-fire between the factions and to protect humanitarian aid convoys. But the situation deteriorated, and by October 1992 nearly 4.5 million Somalis faced severe malnutrition of these 1.5 million suffered imminent mortal risk of starvation. Some 300,000 had already died since the end of 1991. On 3 December 1992 the Security Council determined that the human tragedy caused by the conflict, and the obstacles in the way of the distribution of humanitarian assistance due to the war, constituted a threat to international peace and security. In the same unanimously adopted resolution, the Council authorised a US-led multinational force, the Unified Task Force (UNITAF), to establish a secure environment for humanitarian relief operations in Somalia. The operation had success in securing the provision of humanitarian relief to civilians and halting the internal armed conflict in limited parts of the country, but also faced severe backlash. UNITAF was replaced in May 1993 by UNISOM II, with an expanded and robust mandate authorised unanimously under Chapter VII. By March 1995 the UN force had completed its task and was ended.

The UN involvement began in late November 1992 when the Secretary-General declared that “Somalia has become a country without a government or other political authorities with whom the basis for humanitarian activities can be negotiated”, and advised the Security

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1884 SC Res. 751, 26 April 1992, UN Doc S/RES/751, 1992. The Council expressed in the resolution that it was “deeply disturbed by the magnitude of the human suffering caused by the conflict and concerned that the continuation of the situation in Somalia constitutes a threat to international peace and security”, see preambular para. 6. This formulation, however, is less than a determination of a threat to the peace, according to Article 39, see Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, pp. 127, 238. A complete arms embargo was also imposed in the resolution. See more on UNOSOM, Murphy, *Humanitarian Intervention. The United Nations in an Evolving World Order*, pp. 221-223.
1885 Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, p. 141. Over 1.2 million Somalis were estimated to be displaced internally or externally in Ethiopia, Yemen and Kenya, see Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, pp. 161-162.
Council on different options to “create conditions for the uninterrupted delivery of relief supplies to the starving people in Somalia.”\textsuperscript{1888} He stated that the only way in that relief operations could continue was through resorting to armed force under Chapter VII: “[t]he situation has deteriorated beyond the point at which it is susceptible to the peace-keeping treatment”.\textsuperscript{1889} Several of the de facto authorities, including General Aidid, had refused to agree to the deployment of UN troops where the need for relief was most acute. In those places where they had agreed to the presence of forces, the co-operation with UNOSOM I had been sporadic because they did not exercise effective control over all of their armed elements. The Secretary-General had received an offer from the United States to provide troops and take the lead in organising and commanding a humanitarian operation as part of a multi-national force authorised by the United Nations. This offer was included in one of his proposed options for action by the Security Council.\textsuperscript{1890} The US initiative has been seen as driven by the ‘CNN effect’ and its impact on national and international public opinion.\textsuperscript{1891} The US letter to the Security Council also stressed that these further measures to protect humanitarian relief should be accompanied by continuing efforts to promote national reconciliation and the initiation of a process of rebuilding a civil society.

By early December 1992, the Security Council was convinced of the need for more robust action to remedy the humanitarian crisis in Somalia. Resolution 794 determined the ‘threat to the peace’ and ‘authorised’ the US-led humanitarian intervention into Somalia. It furthermore stressed the deteriorating humanitarian situation:

Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.\textsuperscript{1892}

The determination did not refer expressly to the civil war or the collapse of government functions in Somalia, but focused on the humanitarian catastrophe, the famine and mass deaths. Neither were there any direct international or regional links to the threat to peace mentioned in the resolution, which confined itself to the internal situation in Somalia. Only Cape Verde stated in the debate before the voting of resolution 794 that “we have no doubt that the national conflict has a second dimension – an international dimension – in view of the fact that, because of its repercussions on neighbouring States, it is imperilling the stability and

\textsuperscript{1888} Letter dated 29 November from the Secretary-General addressed to the President of the Security Council, S/24868, 29 November 1992, UN Doc S/24868, 1992.
\textsuperscript{1889} Ibid.; Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 141.
\textsuperscript{1891} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, pp. 141-142.
\textsuperscript{1892} S/RES/794 (1992), preambular para. 3.
security of the whole region”.1893 The United States also expressed indirectly the view that the situation threatened international stability.1894 But no state, nor the Security Council, made any similar statement or assessment at the adoption of the resolution.

Instead, the Council raised great concern in the resolution for the continuing reports of widespread violations of international humanitarian law that were occurring there, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities, of deliberate attacks on non-combatants, relief consignments and vehicles, as well as on medical and relief facilities, impeding the delivery of food and medical supplies essential for the survival of the civilian population. In order to deal with such things as the looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies, and attacks on the UNOSOM contingent, the Security Council authorised under Chapter VII “the Secretary-General and Member States cooperating to implement the offer” by the United States and “to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia”.1895

During the debate before the adoption of resolution 794 China indicated that the UN should have control over the operation and expressed reservations on the authorisation of member states to use force.1896 Russia, on the other hand, welcomed the operation and expressed preparedness to cooperate with the UN and all states to effect a speedy settlement, and even explicitly spoke of “the fulfilment of the international community obligation to put an end to the human tragedy in that country”.1897 Zimbabwe believed that the Secretary-General was placed at the controlling centre of the operation according to the resolution – but this was not exactly how the command was authorised.1898

Resolution 794 authorised “the Secretary-General and the Member States concerned to make the necessary arrangements for the unified command and control of the forces involved, which will reflect the offer” made by the US.1899 Belgium said it would have preferred a purely UN operation, but expressed support for the resolution since the

1894 Ibid., p. 38. “But in the case of Somalia, and in other cases we are sure to face in the future, it is important that we send this unambiguous message: the international community has the intent and will to act decisively regarding peace-keeping problems that threaten international stability.”
1895 S/RES/794 (1992), op. para. 10.
1896 S/PV.3145 (1992), p. 17: “However, we wish to point out that, in spite of the fact that the Secretary-General has been given some authorisation, the draft resolution has taken the form of authorising certain countries to take military action, which may adversely affect the collective role of the United Nations. We hereby express our reservations on this.”
1897 Ibid., p. 27.
1898 Ibid., p. 7.
political control over the operation would remain with the UN, in accordance with the resolution.\footnote{3900}

This authorisation was the second case where the Security Council had taken a decision on military enforcement for humanitarian purposes, and it has been considered to constitute an important precedent for future operations under equal circumstances.\footnote{3901} The UNIFAF mandate was not primarily and directly a protection mandate to use force to protect civilians from attacks, but still implied indirect protection of civilians by using force to 'provide a secure environment' for the delivery of humanitarian relief to civilians.\footnote{3902} This focus of the mandate was also the primary concern raised in the statements before and after the vote on the resolution.\footnote{3903} The uniqueness of the case was also reiterated, as the country of Somalia lacked a functioning government with control over its territory in order to take on the responsibilities of protection. The situation – later called a ‘failed state’\footnote{3904} – created the requisite urgency for the international community to take action and responsibility for the worsening humanitarian crisis. The state itself was manifestly failing to protect its population.

UNIFAF, which carried out Operation Restore Hope in Somalia, was composed of up to 30,000 US military personnel and 10,000 personnel from 24 other countries.\footnote{3905} By the end of April 1993, the forces had helped improve conditions significantly.\footnote{3906} Although its primary focus was on protecting relief operations, US forces also became involved early on in nation-building activities, such as creating dialogues among local

\footnote{3902} See more on the peripheral issues that arose as to how this objective might be achieved, Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, pp. 226-227. Murphy explains that it was, for instance, unclear whether the mandate of the forces included the disarming of the Somalian factions, but the Secretary-General maintained the position that it did. Another issue was the extent of nation-building included in the mandate. The US was i.a. involved in infrastructural and rehabilitation projects.
\footnote{3903} S/PV.3188, 26 March 1993, UN Doc S/PV.3188, 1993; see also Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 142.
\footnote{3904} ‘The situation of a failed state implies the loss of effective government, but may also be understood as a state undergoing economic, political and social problems that do not amount to state collapse, see Koskenmäki, Riikka, Legal Implications Resulting from State Failure in Light of the Case of Somalia, Nordic Journal of International Law, vol 73, 2004, pp. 1-36, pp. 5-6. The Article, however, does not deal with the subject of humanitarian intervention, but it states that the temporarily ineffectiveness or absence of a government does not affect statehood, and that state identity enjoys legal protection by a presumption in favour of its continuity and against extinction. “Thus, even the temporary removal of a government, extensive internal strife and prolonged periods of anarchy do not threaten state identity.” She points to the fact that the Security Council even reaffirmed the sovereignty, territorial integrity, political independence and unity of Somalia in resolution 733 (1992).
civic leaders, cleaning up debris, and infrastructural and rehabilitation projects.\textsuperscript{1907} However, UNITAF came to operate in only approximately 40 per cent of the territory.

Resolution 814 was adopted on 26 March 1993 and established UNOSOM II, an expanded version of UNOSOM I, with a military enforcement mandate under Chapter VII. It was to complete the task begun by UNITAF, through disarmament and reconciliation.\textsuperscript{1908} It had the additional task of assisting in rebuilding the nation and its political institutions.\textsuperscript{1909} The Council decided to expand the size of UNOSOM I and its mandate in accordance with the recommendations of the Secretary-General’s report of 3 March 1993.\textsuperscript{1910} The new tasks involved “cease-fire and reconciliation mechanisms, disarmament and creation of a civilian police force, rehabilitation alongside political dialogue”.\textsuperscript{1911} The resolution was adopted unanimously, and even China was expressly in favour of the UN taking strong exceptional measures in Somalia in accordance with the recommendations of the Secretary-General, although it did not think it a good precedent for UN peace-keeping operations.\textsuperscript{1912} UNOSOM II formally took over the control after UNITAF on 4 May 1993,\textsuperscript{1913} but a number of Special Forces remained in Somalia under United States command and control.\textsuperscript{1914} At the time of the transfer from UNITAF to UNOSOM II, the intervention by foreign forces in Somalia was considered by the international community and many Somalis to be a tremendous success, in terms of reducing violence, and preventing widespread starvation.\textsuperscript{1915} UNOSOM II later came to be drawn into the conflict with one of the warring factions, and was not able to carry out its mandate in the absence of an effective ceasefire.\textsuperscript{1916}

The UNOSOM II operation can be divided into three phases. The first was the forcible humanitarian intervention, taking place from its establishment by resolution 814 on 26 March 1993 until 5 June 1993,

\textsuperscript{1907} Murphy, 	extit{Humanitarian Intervention. The United Nations in an Evolving World Order}, pp. 227-228.

\textsuperscript{1908} SC Res. 841, 16 June 1993, UN Doc S/RES/841, 1993, op. paras. 5-7: “5. Decides to expand the size of the UNOSOM force and its mandate in accordance with recommendations contained in paragraphs 56-88 of the report of the Secretary-General of 3 March 1993, and the provisions of this resolution; 6. Authorises the mandate for the expanded UNOSOM (UNOSOM II) for an initial period through 31 October 1993, unless previously renewed by the Security Council; 7. Emphasises the crucial importance of disarmament and the urgent need to build on the efforts of UNITAF in accordance with paragraphs 56-69 of the report of the Secretary-General of 3 March 1993”; see also Abiew, 	extit{The Evolution of the Doctrine and Practice of Humanitarian Intervention}, p. 164.

\textsuperscript{1909} Beckman, 	extit{Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument}, p. 180.


\textsuperscript{1911} \textit{Ibid.}, extract from para. 56.

\textsuperscript{1912} S/PV.3188 (1993), pp. 21-22.

\textsuperscript{1913} Téson, 	extit{Humanitarian Intervention: An Inquiry into Law and Morality}, 3rd edition, p. 301.

\textsuperscript{1914} Beckman, 	extit{Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument}, p. 180.

\textsuperscript{1915} Murphy, 	extit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 229.

\textsuperscript{1916} Zacklin, 	extit{The Use of Force and Peacekeeping Operations} p. 95.
when it faced an ambush in Mogadishu resulting in the death of 50 people (including 23 Pakistani UN soldiers). The second phase was characterised by combat operations against the rebel militias and General Aidid, and were carried out from 6 June 1993, when UNOSOM II was given an extended mandate through resolution 837, until 4 February 1994, when its mandate became limited again through resolution 897. The third period was from 4 February 1994, which emphasised again its humanitarian tasks of delivery of humanitarian assistance and reconstruction of the country, to its final withdrawal on 31 March 1995.

Although the first and third phases of UNOSOM II is regarded as a Security Council authorised humanitarian intervention, phase II of UNOSOM II went beyond a clean cut humanitarian operation, and the mission’s impartiality was also questioned because of its more active participation in the armed conflict. The authorisation in resolution 837 gave the Secretary-General an extended mandate for UNOSOM II, which opened up development into combat operations against the militia and a war against General Aidid. The precise limits of the new extended mandate in resolution 837 may be open for interpretation, since the authorisation was directed towards ‘the Secretary-General’ and not directly to UNISOM II or individual member states. With reference to the armed attack against UNOSOM I on 5 June 1993, the resolution states that the Council reaffirms that the Secretary-General is authorised to take all necessary measures against all those responsible for the armed attacks […], including against those responsible for publicly inciting such attacks, to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their action and their arrest and detention for prosecution, trial and punishment.

On June 12 the operation of effective disarmament of Mogadishu began, and from that point the UN mission began to look more like “a low-level military campaign against urban guerrillas than a mission that was humanitarian in nature”, that also caused collateral damage to civilians. The ‘Mogadishu debacle’ involving the Special Forces under US command happened during phase II. On 3 October 1993 three US helicopters crashed in central Mogadishu in an attempt to arrest General Aidid in what became known as the Olympic Hotel battle. This was an effort by US Army Rangers and Special Forces to disarm and arrest General Aidid under the authorisation of resolution 837, but resulted in failure and the deaths of 18 US soldiers with 75 wounded. The failure of the operation to arrest General Aidid led to President Clinton’s order on

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7 October to withdraw the US forces by 31 March 1994.\textsuperscript{1921} The experience changed US willingness to risk additional casualties in Somalia.\textsuperscript{1922} At the same time, UNOSOM had many achievements elsewhere in that country, ranging from the co-operative disarmament of various factions, to the fostering of police and judicial systems, to the first steps of establishing local governing bodies.\textsuperscript{1923}

In retrospect, despite its many efforts commentators maintain that the UN peace management efforts of UNOSOM II failed because it was never able to fulfil its mandate before the withdrawal began in 1995.\textsuperscript{1924} It left Somalia without a functioning government, and with a separatist movement in the North. In the case of UNITAF, which operated for only half a year, the assessments have been appreciative.\textsuperscript{1925} In the Security Council debates preceding the voting of resolution 814 in February 1994, Morocco, Djibouti and other states expressed their gratitude for the impressive efforts and coordination of UNITAF, which Djibouti called an “unprecedented humanitarian intervention”.\textsuperscript{1926} Cape Verde, which had been somewhat sceptical before the adoption of resolution 794, changed its opinion and stated positively in the same debate that

the important developments that have taken place have not only proven the wisdom of our decision but also put us on the road that will no doubt lead us, with perseverance and greater determination, to the achievement of the United Nations objectives in Somalia, especially.\textsuperscript{1927}

The overall assessments of UNITAF’s humanitarian intervention in Somalia was positive in that the force had been largely successful in resisting attacks from various warring factions, even though they were not able to control and disarm them completely.\textsuperscript{1928}

World reaction to the humanitarian intervention in Somalia did not condemn it as such and was positive in that humanitarian relief was delivered to the suffering and starving population. The humanitarian interventions of UNITAF and UNOSOM II, including its extended mandate to include combat operations (resolution 837), were adopted unanimously. The statements of governments and nongovernmental

\textsuperscript{1921} Beckman, Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument, p. 181; Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 143.
\textsuperscript{1922} Eighteen US soldiers and one Malaysian soldier were killed in addition to 1,000 Somalis, militia and civilians in the battle. Pictures of an American soldier being dragged through the streets of Mogadishu had shocking effects on the American people.
\textsuperscript{1923} Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 234.
\textsuperscript{1924} Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention, p 166; Beckman, Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument, p. 182.
\textsuperscript{1927} Ibid., p. 12.
\textsuperscript{1928} Beckman, Armed Intervention. Pursuing Legitimacy and the Pragmatic Use of Legal Argument, p. 180.
groups during 1992 and 1993 indicated an acceptance of the legality of the intervention, although there was criticism of the conduct of the operations at various times.\textsuperscript{1929} The operations did not manage to find a long-term political solution to the failed state of Somalia, but that neither had that been their primary objective, according to how the mandates had been formulated.

Subsequent analysis of the UNITAF mission suggests that the Council’s primary concern was indeed humanitarian.\textsuperscript{1930} Resolution 794 is claimed to be a ground-breaking resolution in that it invoked enforcement measures under Chapter VII with no references other than domestic, and being the first authorised military intervention driven by solely or primarily by humanitarian motives.\textsuperscript{1931} The UNITAF operation was also the first most comprehensive assistance ever given to a state in the history of the UN.\textsuperscript{1932}

The Council Security authorisation of UNITAF was hence not dependent on an international element and it was not the civil war itself which was found to constitute a threat to the peace. In this case it was the humanitarian crisis caused by the civil war and the obstacles being created to the distribution of humanitarian assistance, which was the major concern. This involved mass-starvation and violations of humanitarian law and the collapse of the government. The humanitarian situation met the criteria of the R2P threshold. As a matter of fact, it would be more correct to say that the ICISS R2P threshold was elaborated on the previous experiences of Somalia and other humanitarian crises during the 1990s. With regard to the Outcome Document criteria the state, was in the case of Somalia, was manifestly failing to protect its population from war crimes and most likely crimes against humanity as well.

The existence of a collapsed government, or failed state, came to determine the responses of the international community to a great extent. A new principle in international law began to take root, as Murphy argues:

\[ \text{[w]hen no authorities exist capable of governing a country, the values of political independence and sovereignty normally at stake during an intervention would seem to be minimized.} \textsuperscript{1933} \]

In the case of Somalia, the immediate security responsibilities of the failed state were passed on unanimously to the international community through the Security Council. The operations of UNOSOM II followed the same track. The extended mandate of the force by resolution 837 included tasks such as disarmament, arrest of militia leaders, and institution-building and could be argued to have gone beyond a

\textsuperscript{1930} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 142.
\textsuperscript{1933} Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 238.
traditional conception of a humanitarian intervention. The operation conforms better to the wider concept of responsibility to protect, which also includes a responsibility to rebuild. Commentators have urged caution when authorising peace-building operations involving political institution building, and the need for the UN to confront the problematic aspects.\textsuperscript{1934} The effort failed in this respect, but being one of the first cases down this road it opened the way for a development towards greater international humanitarian responsibilities, to be reinforced by later cases and the evolution of the doctrine of R2P.

I agree with Murphy, and the majority of legal scholars, in that “[t]he intervention in Somalia serves as a precedent for UN Security Council authorisation of states to intervene for humanitarian purposes, at least in situations where there has been a collapse of the local government” and that the transfer of responsibilities to UN-led forces “serves as a precedent for the UN Security Council itself undertaking intervention for humanitarian purposes”.\textsuperscript{1935} But as the Bosnian case has shown, and the others that follow illustrate, the Council has not only authorised humanitarian interventions in failed states.

RWANDA (1994)

The masskillings and grave violations of humanitarian law in the civil war between the Hutu government and the Tutsi rebel forces developed into one of the most horrific genocides of our time. This appalling humanitarian crisis was initially not met with the necessary robust action normally expected of the Security Council, who instead chose to withdraw most of the already present peace-keeping force, UNAMIR, after 10 of its personnel had been killed. A French initiative to carry out a UN-authorised humanitarian operation to halt the genocide, protect civilians, and secure the safety of those involved in humanitarian assistance was first met with suspicion and then scepticism because of the French liaisons with the Hutus. The Security Council finally authorised the operation on 22 June 1994 – but it was too late to prevent genocide. The decision under Chapter VII gave authorisation to use all necessary means to achieve the humanitarian objectives set out in resolution 925. The mandate limited the French Operation Turquoise to a strict humanitarian operation for the duration of two months, when

\textsuperscript{1935} Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 242; Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, p. 304. Cf. the argument for the opposite conclusion, that the uniqueness and exceptionality of this case due to the failed state situation differentiates it from other cases of internal disorder or instability and could therefore not be used a precedent, see Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention, pp. 169-170, who supports the idea that the Somalia case clearly specifies the use of collective intervention for humanitarian purposes and provides support for the legitimacy of humanitarian intervention, see \textit{ibid}, pp., 170-171. Téson’s counter-argument is that the unique character of Somalia does not deprive it of its precedential value, and that collective humanitarian intervention is action to counter anarchy as well as tyranny. He concludes that reference to its uniqueness means that the same action can be used only in the same extraordinary circumstances, but not form a precedent for broader powers to take action in less egregious cases, see \textit{ibid.}, pp. 305-306.
the expanded UNAMIR force would replace it. The operation was fairly successful despite its limited mandate, but the initiative came too late and by the time it arrived more than half a million Rwandese had been killed. The intervention received a positive response in general and was not condemned as such.

When the carnage began in April, the peace-keeping force UNAMIR\textsuperscript{1936} was already present on the territory of Rwanda to monitor observance of the Arusha Peace Agreement (4 August 1993), a cease-fire agreement between the Hutu government of Rwanda and the Tutsi Rwandese Patriotic Front (RPF). Security Council resolution 912, adopted on 21 April 1994 just weeks after the mass-kilings began, was a major disappointment for all of those who expected a robust response to halt the atrocities and prevent genocide in Rwanda. The decision was even condemned by the OAU and aid agencies, who accused the Council of applying different standards between Africa and Europe.\textsuperscript{1937} In the light of the unstable situation in Rwanda, the Council decided to reduce the mandate and personnel of UNAMIR. This decision was taken in accordance with the second proposed alternative option for action in the Secretary-General’s special report on UNAMIR, dated 20 April.\textsuperscript{1938} At the resolution was adopted, genocide had claimed the lives of several thousands of civilians. By the end of April approximately 200,000 people were dead from the civil war and ethnic massacres. Another 250,000 fled the country.\textsuperscript{1939} Resolution 912 expressed the Council’s regret at the ensuing violence “which had claimed the lives of the Prime Minister, Cabinet Ministers, Government officials and thousands of other civilians”, and which was considered to endanger the lives and safety of the civilian population, particularly in Kigali. The attacks on UNAMIR and other United Nations personnel resulting in the deaths of 10 Belgian UNAMIR personnel were strongly condemned by the Council.

The Secretary-General’s justification for proposing several different options for the Security Council to change the mandate of UNAMIR in April 1994, simply said “[t]he dedicated personnel of UNAMIR, who have performed courageously in dangerous circumstances, cannot be left at risk indefinitely when there is no possibility of their performing the tasks for which they were dispatched”. With the departure of the Belgian contingent and non-essential personnel from other contingents, the reduced strength of military personnel in UNAMIR stood, on 20 April, at 1,515 (from 2,165) and military observers at 190 (from 321), for a total of 1,705 (from 2,486).\textsuperscript{1940} The adjustment decided on by the Security

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\textsuperscript{1936} UNAMIR was established by resolution 872 (1993) of 5 October 1993 and with the consent of the parties.

\textsuperscript{1937} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 145.


\textsuperscript{1939} Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 244.

Council in resolution 912, implied a reduction of the force to 270 personnel in total,\textsuperscript{1941} and was given a restricted mandate to act.\textsuperscript{1942}

A more robust answer to the alarming situation had originally been elaborated in the Secretary-General’s first alternative to the Council, which called on a massive reinforcement of UNAMIR, but this option was rejected by the Council, through the adoption of resolution 912. The reinforcement proposal was predicated on the conclusion that without a cease-fire, warring between the parties and the massacre of civilians would continue. The Secretary-General argued that the internal armed conflict between government forces and the RPF could only be halted by

the immediate and massive reinforcement of UNAMIR and a change in its mandate so that it would be equipped and authorised to coerce the opposing forces into a cease-fire, and to attempt to restore law and order and put an end to the killings. This also would make possible the provision and distribution of humanitarian assistance by humanitarian agencies and non-governmental organisations not only in the capital, but in other parts of the country where the population has been displaced or subjected to deprivation as a result of the violence. Further, the restoration of stability in Rwanda would assist in preventing the repercussions of the violence from spreading to neighbouring countries and leading to regional instability. This scenario would require several thousand additional troops and UNAMIR may have to be given enforcement powers under Chapter VII of the Charter of the United Nations.\textsuperscript{1943}

The Secretary-General also informed the Council in his report that the Permanent Representative of Rwanda to the United Nations had called him on 19 April with a plea to reinforce UNAMIR to enable it to end the chaos prevailing in his country. Moreover, in a telephone conversation on 20 April, President Museweni of Uganda urged the Secretary-General that UNAMIR be reinforced and retained in Rwanda. He said he was attempting to arrange troop contributions from countries in the region, and was personally directing efforts to arrange a cease-fire

\textsuperscript{1941} The second alternative called for a small group headed by the Force Commander, with necessary staff, to remain in Kigali and act as intermediary between the two parties in an attempt to bring them to an agreement on a cease-fire, for a period of up to two weeks or longer. Additional tasks would include assistance in the resumption of humanitarian relief operations to the extent feasible in this situation. The team would require the support of an infantry company to provide security, as well as a number of military observers to monitor the situation, apart from civilian staff, the total being estimated at about 270. The remainder of UNAMIR personnel would be withdrawn, but UNAMIR, as a mission, would continue to exist. The Special Representative, with a small staff, would continue his efforts to resume his role as intermediary in the political negotiations, with the aim of bringing back the two sides to the Arusha peace process. \textit{Ibid.}, paras. 15-16.

\textsuperscript{1942} S/RES/912 (1994), para. 8: “Decides, in the light of the current situation in Rwanda, to adjust the mandate of UNAMIR as follows: (a) To act as an intermediary between the parties in an attempt to secure their agreement to a cease-fire; (b) To assist in the resumption of humanitarian relief operations to the extent feasible; and (c) To monitor and report on developments in Rwanda, including the safety and security of the civilians who sought refuge with UNAMIR, and authorises a force level as set out in paragraphs 15 to 18 of the Secretary-General’s report of 20 April 1994 for that purpose.”

between the RGF and RPF. In April 1994 these pleas remained unheard by the Security Council and the international community.

The humanitarian crisis deteriorated at a speed that shocked the world. By the end of May, the Secretary-General reported that between 250,000 and 500,000 Rwandans, mostly Tutsi, had been killed. In resolution 918 (17 May 1994) the Council determined that the situation in Rwanda constituted “a threat to peace and security in the region”. The Council was deeply disturbed over the “magnitude of the human suffering caused by the conflict” and condemned the “very numerous killings of civilians which had taken place in Rwanda and the impunity with which armed individuals had been able to operate”. The situation in mid-May 1994, less than two months after the massacres began, was found by the Council to constitute a humanitarian crisis of ‘enormous proportions’:

[...] which has resulted in the death of many thousands of innocent civilians, including women and children, the internal displacement of a significant percentage of the Rwandan population, and the massive exodus of refugees to neighbouring countries, constitutes a humanitarian crisis of enormous proportions.

In resolution 918, the Council further expressed alarm at “continuing reports of systematic, widespread and flagrant violations of international humanitarian law in Rwanda, as well as other violations of the rights to life and property”, and made allusions to the crime of genocide without mentioning the word. There had been a studied effort not to acknowledge the magnitude of the crisis, according to Chesterman, and the United States and other governments had resisted using the term genocide as it would have rendered their policies of inaction untenable. A month into the murder spree, Council members were still well informed of what was transpiring on the ground, but still unwilling to use the term genocide. The Council first acknowledged that genocide had been committed in Rwanda on 8 June 1994, in resolution 925.

However, apart from imposing an arms embargo under Chapter VII, the Council also decided in resolution 918 on May 17, while not acting

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1946 Ibid.
1947 Ibid, preambular para. 10: “Recalling in this context that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law.”
1950 SC Res. 925, 8 June 1994, UN Doc S/RES/925, 1994, preambular para. 6: “Noting with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recalling in this context that genocide constitutes a crime punishable under international law.”

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under Chapter VII, to expand UNAMIR’s mandate to include additional responsibilities within the limits of the resources available to it, and authorised an expansion of the UNAMIR force level up to 5,500 troops. The expanded mandate given to UNAMIR was a protection mandate that included these responsibilities:

a. To contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas;

b. To provide security and support for the distribution of relief supplies and humanitarian relief operations.1951

Resolution 918 also recognised that UNAMIR might be required to take action in self-defence against persons or groups who threatened protected sites and populations, United Nations and other humanitarian personnel or the means of delivery and distribution of humanitarian relief. The decision to expand the peace-keeping mandate for UNAMIR was a continuation and expansion of its existing peace-keeping mandate, then under Chapter VI or even an imagined Chapter “VI½”, and included a protection mandate.1952 Its traditional peace-keeping mandate was thus given more robust and expanded powers to use force. This expansion, might however not necessarily be seen as an enforcement measure under Chapter VII, but possibly that the operation had been given a peace-enforcement element.

Despite this attempt to show willingness to take action, there were no major troop contributions were offered and the force was even expected to remain small for three months before it could undertake its full mandate.1953 The United States generally opposed the idea of deploying a large UN peace-keeping force in Rwanda, much due to its own bad experience in Somalia, and had flatly rejected requests for US participation in the UN force.1954

On 8 June, the Security Council resolution 925 reiterated the peace-keeping ‘protection mandate’ of UNAMIR once more under Chapter VI, and reaffirmed that in addition to continuing to act as an intermediary between the parties in an attempt to secure their agreement to a cease-fire.1955

1952 Holt and Berkman, The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations, Annex 1. II, see resolutions on UNAMIR, Bring, FN-stadgan och världspolitiken. Om folkrättens vill i en föränderlig värld, pp. 15, 278, 297, 299. Also in Security Council resolution 925, which was not adopted under Chapter VII, the consent and assurances of the parties for the UNAMIR presence and mandate are explicitly welcomed and acknowledged, see S/RES/925 (1994), op. para. 7.

1953 Ten days after resolution 925 was adopted, only 503 troops were under the command of Major-General Romeo Dallaire. Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 146.
1954 Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, p. 320, see also note 139.

1955 S/RES/925 (1994), op. para. 4: (a) Contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and (b)
France, the only country prepared to offer larger contingents of troops and intervene in Rwanda to stop atrocities and, explicitly argued that it had a duty to do so. But it did not want to act under the previous peace-keeping mandates of UNAMIR, and instead requested that its mission be authorised by the Security Council “in the spirit of resolution 794”, which had authorised the US-led UNITAF operation in Somalia, in order to send a force to maintain a presence pending the arrival of the expanded UNAMIR. The Security Council granted France its request on June 22, through the adoption of resolution 929, despite the suspicion and criticism surrounding the intentions of France its and initiative to intervene.

Resolution 929 expressed deep concern over the continuing systematic and widespread killing of civilians and recognised that the current situation in Rwanda constituted “a unique case” demanding an urgent response by the international community. The “magnitude of the humanitarian crisis in Rwanda” was determined to constitute a “threat to peace and security in the region”, and the Council decided to authorise a temporary humanitarian intervention under national command for the protection of displaced persons, refugees and civilians at risk, as well as providing security for the distribution of supplies and other humanitarian relief operations. The Security Council authorised under Chapter VII “the Member States co-operating with the Secretary-General” (in practice France and Senegal under Operation Turquoise) to act as

a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda”, and to use “all necessary means to achieve the humanitarian objectives set out in subparagraphs 4 (a) and (b) of resolution 925 (1994). The authorisation was limited to two months until UNAMIR was militarily brought up to the necessary strength to replace the multinational UN force under French command.

The resolution authorising the humanitarian intervention in Rwanda was decided in favour with 10 votes. Five states abstained: Brazil, China, New Zealand, Nigeria and Pakistan. In the Council debate on the adoption of the resolution these states expressed their concern over the

Provide security and support for the distribution of relief supplies and humanitarian relief operations.


1957 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 146.

1958 The RPF rejected the initiative completely and feared that the Hutu-friendly French forces would not be neutral, but support government forces. Ibid., p. 146; Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 251. Burundi, Tanzania and Uganda denied France permission to stage operations from their territory, see also Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, pp. 248-249.

French-led humanitarian operation, and their reasons for abstaining.\footnote{S/PV.3392, 22 June 1994, UN Doc S/PV.3392, 1994.} The main arguments were that the operation lacked the consent of the Tutsi Rwandese Patriotic Front (RPF),\footnote{China and Brazil raised this argument, see \textit{ibid}., pp. 2-4.} and the risks associated with parallel missions under different commands in light of the lessons learned in Somalia.\footnote{All the abstaining states except Pakistan, which did not make any statements during the debate, held this view.} Several African states that had previously offered troop contributions to UNAMIR, withdrew after the French initiative. New Zealand stated that the French could undermine the UNAMIR operation and run the risk of becoming bogged down.\footnote{S/PV.3392 (1994), p. 7. New Zealand also added that humanitarian organisations and NGOs were sceptical of the operation.} Nigeria was also negative on parallel command of the French-led force, although it welcomed the 'courage and compassion' of France.\footnote{\textit{Ibid}., p. 10.}

The French force, at first made up of a few hundred troops, entered Rwanda on 23 June 1994, and after a few days was joined by a small contingent of Senegalese troops.\footnote{Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 251.} Altogether there were 2,500 French troops in of Rwanda and Zaire, establishing safe heavens for refugees near the border and supporting the distribution of relief supplies.\footnote{Téson, \textit{Humanitarian Intervention: An Inquiry into Law and Morality}, 3rd edition, p. 321.} The operation in Rwanda was quite small and limited to the west, where the troops managed to create a safe zone. This was therefore clearly not adequate for ensuring the protection of civilians or relief operations throughout Rwanda.\footnote{\textit{Ibid}., pp. 252-253.} When the French forces retired to the safe zone in western Rwanda, the Tutsi rebels managed to rout the Hutu government and this led to its collapse and the mass influx of Hutu refugees into eastern Zaire.\footnote{\textit{Ibid}., p. 253.}

On 19 July 1994 the rebels announced the formation of a government of national unity, composed of both Tutsi and Hutus, which subsequently became recognised as the new government.\footnote{\textit{Ibid}., p. 254.} The French withdrew according to its mandate on August 22, and with the consent of the new government. But it started a new wave of refugees fleeing the safe zone in western Rwanda into eastern Zaire. Reports of continued violence and killings within the huge refugee camps followed, and the Security Council established a Zairean peace-keeping force to keep the order and maintain security in the camps on its own soil.\footnote{Téson, \textit{Humanitarian Intervention: An Inquiry into Law and Morality}, 3rd edition, p. 321.} By August 1994 several thousand blue-helmeted UNAMIR troops from Ethiopia, Ghana and Zimbabwe had replaced the French force in Rwanda.\footnote{\textit{Ibid}., p. 254.}

The French-led humanitarian intervention has been considered to ultimately confirm an overall humanitarian motivation and purpose, by providing security and logistical support to humanitarian assistance
operations both in Rwanda and in refugee camps in Zaire.\textsuperscript{1972} Several scholars have asserted that the French “intervention fits the concept of humanitarian intervention”.\textsuperscript{1973} It has been argued that part of its success was its recognition of the importance of using military force to achieve limited goals while at the same time acting as impartially as possible with respect to the local warring factions.\textsuperscript{1974} Criticism has also been raised, on the inefficiency of the French intervention in that it failed to prevent genocide.\textsuperscript{1975} Regardless of the perceived failure or success of the operation, the legality of the French intervention cannot be criticised.\textsuperscript{1976}

Reaction by the international community on the intervention was generally positive, and no state condemned it as such. Instead, the long-term reactions by the international community have about them a strong sense of shame and guilt for having acted “too little and too late” to prevent genocide in Rwanda. Many subsequent initiatives emerged on finding new and more sustainable international strategies and action plans to prevent or halt genocide. Téson claims that the Rwandan massacres were a catalyst for change in world opinion on humanitarian intervention.\textsuperscript{1977} There was evidence showing the existence of systematic strategies for mass killing, and that the impending disaster was in the making. There was evidence also that the UN had been forewarned and had knowledge of the pending genocide.\textsuperscript{1978} The UN has been the subject of a great deal of criticism for its inertia and inaction in Rwanda.

The situation in Rwanda without doubt fell under the so-called R2P thresholds – a situation of mass-killing, genocide and grave and systematic violations of human rights and humanitarian law. Although it took considerable time for the international community to acknowledge and recognise the existence of genocide, there was more than enough evidence of large-scale killing and ethnic cleansing, war crimes and crimes against humanity for the Security Council to react. The state of Rwanda was more than manifestly failing to protect its people.

The humanitarian crisis was a result of an internal armed conflict. The threat to the peace stemming from the genocide and the internal war had international connections. The human security threats in Rwanda were considered to threaten “the peace in the region”, mainly due to the “massive exodus of refugees to neighbouring countries”.\textsuperscript{1979}

EAST TIMOR (1999)

The case of Security Council authorised humanitarian intervention in East Timor is a \textit{sui generis} case because the forceful intervention was...
(partly)\textsuperscript{1980} consented to by the government of Indonesia. Chesterman points out that there was no legal basis for requiring Indonesia’s consent to the operation,\textsuperscript{1981} but nonetheless it was politically or militarily impossible to take a decision on forceful enforcement measures without its consent. Apparently President Habibie’s promise of co-operation could not be relied upon, and Australia had ruled out taking the risk of becoming involved in an armed conflict with the strong Indonesian army.\textsuperscript{1982} For this reason consent was important in order to avoid the intervention force being drawn into armed conflict with the Indonesian army. The East Timor case is included in this study, since the host state consent was not followed by the establishment of a traditional peace-keeping force under Chapter VI or so called VI½ of the UN Charter. Instead, the Security Council authorised a peace-enforcement operation under Chapter VII on 15 September 1999.\textsuperscript{1983} The multinational force, the International Force for East Timor (INTERFET), under the leadership of Australia, was given the mandate to restore security and order in East Timor, protect the United Nations Assistance Mission (UNAMET)\textsuperscript{1984} and facilitate the delivery of humanitarian assistance.\textsuperscript{1985} Although resolution 1264 explicitly welcomed the statement by the President of Indonesia on 12 September 1999,\textsuperscript{1986} the legality of the force was, due to the Chapter VII mandate, not dependent on the continuance of the Indonesian consent for its legality. At the same time, the Australian motive to become involved to save lives in East Timor was not paralleled with strong national interests in East Timor, but was instead regarded as a moral impulse “to do the right thing”.\textsuperscript{1987} The case of East Timor has been considered to be one more case of humanitarian intervention, illustrating the emergence of a developing norm in favour of intervention to protect civilians.\textsuperscript{1988}

\textsuperscript{1980}The consent to the armed intervention in East Timor was in fact a result of pressure on the Habibie government by threat of financial sanctions developing out of the controversial role played by the IMF and World Bank, the growing diplomatic condemnations and the long and heated debate in the Security Council on 11 September 1999. The statement of invitation by President Habibie was delivered the day after the debate in the Security Council. See Wheeler and Dunne’s account of these decisive forces in coercing Indonesia to accept the armed force, Wheeler and Dunne, \textit{East Timor and the New Humanitarian Interventionism}, pp. 819-822. Cf. also on ambiguous and coerced consents Welsh, Jennifer M., \textit{Introduction}, Welsh, Jennifer M. (Ed.), \textit{Humanitarian Intervention and International Relations}, Oxford University Press, Oxford, 2004, pp. 3, 5.

\textsuperscript{1981} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 150.


\textsuperscript{1984} UNAMET was established in June 1999 by the Security Council to organise and conduct the referendum regarding the future legal and political status in East Timor.

\textsuperscript{1985} S/RES/1264 (1999), op. 3.

\textsuperscript{1986} \textit{Ibid.}, preambular para. 10: “Welcoming the statement by the President of Indonesia on 12 September 1999 in which he expressed the readiness of Indonesia to accept an international peace-keeping force through the United Nations in East Timor”.


\textsuperscript{1988} \textit{Ibid.}, pp. 805-806.
East Timor had been a former colony of Portugal until 1975, when it came under the military control of Indonesia despite major efforts by pro-independence guerrillas to gain independence. The Indonesian government, under the long-lived dictatorship of President Suharto, was for more than 20 years known for its widespread repression and human rights violations, including massacres in East Timor. The successor, President Habibie, announced in January 1999 that he would permit a referendum to be held in East Timor to finally settle the territory’s political status, but the announcement was made without prior consultation with the strong Indonesian military forces (TNI). Subsequently, the TNI established, trained and directed local militia groups in a campaign of intimidation and violence to seek to avert the referendum. During the first six months of 1999, TNI-controlled militiamen killed over 100 people and drove tens of thousands from their homes in East Timor. In the run-up to the referendum, militias forcibly displaced between 40,000 and 85,000 people and attacked a provincial UN office to derail the vote.

The “relatively free” ballot took place on 30 August 1999 under the auspices of the UN political mission UNAMET. The results were announced by Kofi Annan on 4 September. Of the 99 per cent of the population in East Timor voting in the referendum, 21.5 per cent voted in favour of autonomy and against independence, and 78.5 per cent voted for independence and against autonomy. The increased violence ensuing from the ballot continued under the direction of the Indonesian military, if not the government itself, according to Chesterman. TNI and militiamen rampaged through the country destroying homes, crops, public buildings and killing, deporting people and forcing them from their homes. In a matter of days, over 1,000 lives had been lost, and up to a quarter of the population had fled their homes. It became clear that President Habibie had no control over events on the ground, despite his assurances that the Indonesian military and police would restore order. The world was witnessing “ethnic cleansing Indonesian-style”, galvanising the Australian public to demand action. The Secretary-General received a letter on 14 September from the

1990 Ibid., p. 87.
1991 Ibid., p. 87.
1992 Ibid., p. 87.
1995 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 150.
1998 Ibid., p. 816.
1999 Ibid. p. 817. Wheeler and Dunne point to the sense of shame and guilt of Australians over the historical betrayal of East Timor to Indonesia, which spurred support for an armed intervention in 1999.
government in Australia, with an offer to lead a multinational force in East Timor.\textsuperscript{2000}

On 15 September 1999 the Security Council adopted resolution 1264 by which the forceful humanitarian intervention was authorised. In the Council’s determination that the situation in East Timor constituted a threat to peace and security, it expressed concern at the systematic, widespread and flagrant violations of international humanitarian and human rights law being committed there.\textsuperscript{2001} Furthermore, the Council expressed deep concern over the continuing violence against civilians and their large-scale displacement and relocation, the worsening humanitarian situation, particularly affecting women, children and other vulnerable groups, as well as the attacks on UNAMET and other humanitarian personnel.\textsuperscript{2002} Chesterman’s analysis of the Council’s determination of a threat to the peace in the case of East Timor reveals a number of potential bases present in the assessment, and he concludes that widespread and flagrant violations of humanitarian and human rights law provided the justification for the determination.\textsuperscript{2003} Wheeler and Dunne confirm the humanitarian attitude in the Council, towards the post-ballot violence and growing repression, held a general determination that East Timor would not be the next Rwanda or Srebrenica.\textsuperscript{2004}

In the same resolution, the Security Council established INTERFET and authorised it under Chapter VII to undertake the following tasks:

Authorises the establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and authorises the States participating in the multinational force to take all necessary measures to fulfil this mandate.\textsuperscript{2005}

The protection mandate for the delivery of humanitarian assistance was only one of three tasks for the force, but in the same resolution under Chapter VII, the Council restated the urgent need for coordinated humanitarian assistance and the importance of allowing full, safe and unimpeded access by humanitarian organisations. It further called upon all parties to co-operate with such organisations so as to “ensure the

\textsuperscript{2000} Ibid., p. 823. It was in fact the Australian government that had already informally accepted an invitation from Annan to lead the force in a telephone conversation on 6 September.

\textsuperscript{2001} S/RES/1264 (1999), preambular paras. 13-14.

\textsuperscript{2002} Ibid., preambular paras. 4-5.

\textsuperscript{2003} He mentions the actions of Indonesian troops in a nominally Portuguese territory, cross-border violence between Indonesia and the emerging state of East Timor, the transborder effects of a humanitarian catastrophe in East Timor, and violations of international humanitarian and human rights law, see Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 150.


\textsuperscript{2005} S/RES/1264 (1999), op. para. 3.
protection of civilians at risk, the safe return of refugees and displaced persons and the effective delivery of humanitarian aid".\textsuperscript{2006} The resolution was adopted without abstention, and in the Council debate preceding its adoption Indonesia explicitly stated that it placed no conditions on the multinational force to be deployed in East Timor.\textsuperscript{2007} Indonesia affirmed that it would on its part extend its co-operation to facilitate the accomplishment of the task entrusted to the multinational force. Nonetheless, Indonesia contradicted somewhat its earlier statement by declaring that “[i]t is also imperative that the multinational force conduct itself in an impartial manner so that its presence in East Timor will be credible”, and that it should endeavour to earn the confidence of the conflicting parties involved.\textsuperscript{2008}

INTERFET entered East Timor on 20 September 1999 and easily gained control over the territory where the militia had operated, since the TNI avoided military confrontation, thanks to President Habibie’s pledge.\textsuperscript{2009} It has been estimated to probably have saved up to 10,000 lives.\textsuperscript{2010} The killings and human rights violations continued by the militia in parts of East Timor (not yet under international control) and in the refugee camps in West Timor.\textsuperscript{2011} By mid-October 1999 170,000 people were reported to be living in deportation camps in West Timor, and between 520,000 and 620,000 displaced in East Timor.\textsuperscript{2012} A month later, on 22 October, the Indonesian Parliament voted to approve East Timor’s separation, which opened the way for the establishment of the United Nations Transitional Administration in East Timor (UNTAET).\textsuperscript{2013}

INTERFET was decided to be replaced as soon as possible by the UN peace-keeping operation UNTAET,\textsuperscript{2014} which was established on 25 October in resolution 1272.\textsuperscript{2015} UNTAET was not a regular peace-keeping force but was given an extensive peace-building mandate under Chapter VII, and endowed with overall responsibility for the administration of East Timor, including all legislative and executive authority, as well as the right to use force. When UNTAET took over the security responsibilities on 28 February 2000, East Timor was secure, except along the West Timor border, and most of the internally displaced people had returned to their homes.\textsuperscript{2016} According to Seybolt, UNTAET prevented East Timor from becoming a failed state by providing security, maintaining political and judicial institutions and

\textsuperscript{2006} ibid., op. para. 2.  
\textsuperscript{2007} S/PV.4045, 15 September 1999, UN Doc S/PV.4045, 1999, p. 4.  
\textsuperscript{2008} ibid., p. 4.  
\textsuperscript{2010} ibid., p. 91.  
\textsuperscript{2011} ibid., p. 90.  
\textsuperscript{2012} ibid., p. 88. Hunger and disease was widespread among the displaced.  
\textsuperscript{2013} ibid., p. 91.  
\textsuperscript{2014} S/RES/1264 (1999), op. para. 10.  
supporting economic rehabilitation.\textsuperscript{2017} It is considered to have been largely successful in building a new state in East Timor.

The position in East Timor was a typical R2P situation of violent repression of the population, where killings, forceful expulsions and other human rights violations haunted the population in the attempt to prevent East Timor from becoming an independent state. Large-scale killings and ethnic cleansing were present, as well as war crimes and possibly crimes against humanity. The Indonesian government was manifestly failing to protect the population of East Timor from these 'R2P'-crimes. Violence exerted by the TNI and militia groups was resisted by the East Timorese rebel and liberation groups, which amounted to an armed conflict.\textsuperscript{2018} The armed conflict between these forces could probably be regarded as an internal armed conflict, since at the time East Timor had not yet gained independence. Apart from the Indonesian violence, no direct international consequences were involved or mentioned in the Security Council resolution when the threat to the peace was determined in East Timor. East Timor was not a failed state, but developing into a new-born state. Without UNTAETS efforts to support institution-building it could, however, have slid into a failed state. These efforts illustrate the third element of R2P, the responsibility to rebuild.

The forceful action by INTERFET in East Timor is another precedent of Security Council authorised humanitarian intervention, where military force is used to protect human security in an alarming humanitarian crisis. Wheeler and Dunne argue that Indonesia’s exercise of sovereign right became increasingly constrained by norms of humanitarian responsibility.\textsuperscript{2019}

INTERFET was largely successful in ending the violence and restoring order and peace in East Timor. Other commentators, however, see East Timor as another case illustrating the UN’s deficit in the area of conflict prevention, and who would have preferred to see the UN act earlier to prevent the violence and killing, through a robust and effective anticipatory intervention force to ensure the ballot process.\textsuperscript{2020} This would surely have saved more life, suffering and destruction, and it is a strong argument for pushing harder on the preventive element of responsibility to protect. It is not unimaginable or impossible measures that are needed to enable such a shift from reaction to prevention, just a new way of thinking and approaching security threats. Other priorities and agreements need to be compromised and met, which are more proactive, preventive and riskaverse towards the deterioration of a security situation.

\textsuperscript{2017} Ibid., p. 92.
\textsuperscript{2018} The Security Council resolution, deploring the violations against humanitarian law, confirm the existence of an armed conflict. See S/RES/1264 (1999), preambular para. 13.
\textsuperscript{2020} Ibid., p. 827.
THE POST-9/11 PERIOD

DARFUR (2006-2007)

Despite more than 20 resolutions passed by the Security Council on Darfur since the beginning of the crisis in 2003, the international community has not been able to efficiently protect civilians and stop the war crimes and crimes against humanity committed in Darfur. Some, including UN officials, have emphasised the environmental and resource aspects of the conflict, while other stress its ethnic basis and claim genocidal intent by the Arab Janjaweed militia and Sudanese government in their attacks on the African tribes. The armed conflict between the Janjaweed militia and the African rebel groups from the Fur and Zaghawa in Darfur broke out in February 2003. The genocide debate that arose in 2004 became an obstacle rather than an incentive for urgent and robust action. President Bashir has until now ignored the calls of the Security Council to disarm the militia, stop the attacks, and protect its own population from these grave crimes. The AU sent a small monitoring mission, AMIS, to Darfur in June 2004, which was gradually expanded to a peace-keeping mission of 7,000 troops. The failure of AMIS to protect civilians put pressure on the UN and the international community to take on their responsibility to protect. The situation of Darfur has been seen as a test case on how far the emerging norm of R2P has evolved.

A multiplicity of factors have delayed a robust and forceful international reaction to stop the atrocities in Darfur. These include the obstructionist policy of the Sudanese government and its lack of consent to UN interference; Chinese support to the Sudanese based upon its large economic interests in the oil industry of Sudan and trade with military products to Sudan; the US prioritisation of co-operation with

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2024 Grono, Nick, *Darfur: The International Community’s Failure to Protect*, Explaining Darfur. Four Lectures on the Ongoing Genocide by Agnes van Ardenne / Mohamed Salih / Nick Grono /Juan Méndez, Vossiuspers UvA, Amsterdam, 2006, pp. 41-42. Its mandate is to “protect civilians whom it encounters under imminent threat and in immediate vicinity, within resources and capacity, it being understood that the protection of civilian population is the responsibility of the Government of Sudan”. See more on the AMIS operation in Chapter 7.5.3.2.6.

2025 Anonymous, *Ensuring A Responsibility to Protect: Lessons From Darfur*. This anonymous author (LL.M. Human Rights, B.A. Political Science) is not a Sudanese national but has worked in Sudan since mid-2005, and wants to avoid sanctioning by the government when speaking publicly about Darfur.

2026 Not only China, but also Russia and the Arab League is shielding Sudan from robust international action, see Cohen, Sudan Tribune (Publ.), *Darfur Debated*. 

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the Sudanese government to combat terrorism in Sudan; the EU policy of “African solutions to African problems” allowing the AU to take the lead; the international community’s prioritisation of the peace process in the North-South conflict of Sudan; scepticism towards a Western humanitarianism and the R2P doctrine owing to the abuse of the language in the Iraq intervention 2003; the US prioritisation of the war against terrorism in Iraq and Afghanistan. All these factors often mentioned as reasons for this failure.

On 31 July 2007, the Security Council established, with the consent of Sudan, an AU/UN hybrid force made up of 26,000 military and civilian personnel with a mandate to protect civilians in Darfur. At the time of writing, the force had not been fully deployed owing to further obstructions by Khartoum. It is mainly made up of the AMIS troops, still unable to halt the attacks. Thegrave humanitarian crisis in Darfur has not been resolved and the humanitarian situation has substantially worsened. In early 2008 it reached the UN-defined emergency levels for the first time since 2004. Between 200,000 and 300,000 persons have died and two million people have been displaced. Rape and sexual violence is widespread and persistent. The people there are still waiting and hoping for the international community to provide security.

2027 Williams and Bellamy, The Responsibility to Protect and the Crisis in Darfur, pp. 34-35.
2028 Ibid., pp. 34-35.
2029 The House of Commons, Darfur, Sudan: The Responsibility to Protect. Fifth Report of Session 2004-5. Volume I (2005), pp. 36-38. The report states that prioritising the Comprehensive Peace Agreement was misguided and that a more holistic approach to the conflict in Sudan had been possible, and in terms of likely impact, preferable.
2030 Cohen, Sudan Tribune (Publ.), Darfur Debated. The argument is that the Bush administration could not credibly introduce no-fly zones, air strikes and non-consensual NATO forces without significant political fallout in the Islamic world and elsewhere; Williams and Bellamy, The Responsibility to Protect and the Crisis in Darfur, p. 36.
and protection five years after the crisis began – in the face of the repeated “never again”.

In late 2003 and early 2004, the USA was the only member of the Security Council keen on pressing the government in Khartoum to take action in order to protect its own people. From mid-2004 Darfur received increased attention by high-level politicians and officials visiting the war-torn region. After Colin Powell declared on 9 July 2004 that genocide was being committed in Darfur and the US Congress confirmed it in its passing of resolution 467, media coverage exploded.

Since the spring of 2004, the question as to whether genocide was, and is, being committed in Darfur has been the subject of worldwide debate. All of the UN resolutions on Sudan have avoided the term ‘genocide’. While Amnesty International and Human Rights Watch have also generally refrained from using the term, other NGOs, such as Physicians for Human Rights, have found direct evidence of genocidal intent. The EU has described the situation as being “tantamount to genocide”. In later years, many lawyers referred to the ICJ ruling of 2007 in the Bosnia v. Serbia Case and the complexity of the legal issues surrounding the term, in particular when the perpetrators are not under direct governmental control and direction.

Another argument complicating the assessment is that the armed conflict is not only raging between the Arabic Janjaweed and military on the one hand, and African rebel groups on the other, but also between fragmented rebel groups of mixed ethnic backgrounds. Such mixed engagements, as well as banditry, have been spreading – with violence spilling over into Chad, further increasing tension between Chad and Sudan. But it has been argued that the existence of widespread and systematic rape could evidence genocide in Darfur, particularly as the case law of ICTR has expanded the concept to include rape where genocidal intent is present. The question has been partly answered by the application for an arrest warrant by the Prosecutor of the International Criminal Court on the Sudanese President Omar Al-Bashir on 14 July 2008 for an indictment on the charges of genocide, crimes

2037 The Secretary of State Colin Powell made this statement before Congress, and testified that the Janjaweed was responsible. Grono, Darfur: The International Community’s Failure to Protect, p. 59; See also Williams and Bellamy, The Responsibility to Protect and the Crisis in Darfur, p. 31. Powell, however, endorsed a restrictive interpretation of the 1948 Genocide Convention and insisted that no new action would be required on the part of the US government, Gammarra and Vicente, Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan, p. 207.
2038 Feher, Constancy in context.
2040 Cohen, Sudan Tribune (Publ.), Darfur Debated, p. 2.
2041 Ibid., p. 2; see also regarding the genocide debate in the US, Battiste, Leilani F., The Case for Intervention in the Humanitarian Crisis in the Sudan, Annual Survey of International and Comparative Law, vol 11, 2005, pp. 49-70, pp. 64-65, 67-69.
2042 Battiste, The Case for Intervention in the Humanitarian Crisis in the Sudan, p. 70.
against humanity, and war crimes in Darfur. This is the first time that the ICC Prosecutor has ever applied for an arrest warrant on a sitting statesman for genocide issues.

On 30 July 2004 the Security Council determined in resolution 1556 that the situation in Sudan constituted a threat to ‘international peace and to stability in the region’. Factors of concern for the Council determination were the violations of human rights and humanitarian law, the urgent humanitarian needs for assistance by more than one million people, the situation of the 200,000 refugees in neighbouring Chad, and cross-border incursions by Janjaweed militias into Chad. The Council made explicitly clear its “determination to do everything to halt a humanitarian catastrophe, including by taking further action if required”. In the same resolution the Council also underscored that the government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory. This was the first time that the responsibility to protect language was injected into the Security Council debate on Darfur. The US, the UK, the Philippines, Germany, Chile and Spain invoked the language of responsibility to protect during the Council debate referring to the internal R2P of Sudan and the external


2044 S/RES/1556 (2004), preambular para. 21. China and Pakistan abstained, while Russia and Algeria ultimately supported it while expressing the view that the Sudanese government should be given more time, The House of Commons, Darfur, Sudan: The Responsibility to Protect. Fifth Report of Session 2004-5. Volume I (2005), p. 52. For a resumé of the positions taken by states with regard to the internal responsibility to protect of Sudan and the appropriate responses for failure of Sudan to protect its population, see Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, pp. 42-43.

2045 S/RES/1556 (2004), preambular paras. 10, 15-16, and 20. See also the assessment by Gammarra and Vicente, Securing Protection to Civilian Populations: The Doubtful United Nations Response in Sudan. The situation in the region of the border between the Sudan, Chad and the Central African Republic was determined by the Security Council to constitute a threat to international peace and security on 25 September 2007. The Council established a multidimensional peace-keeping operation through resolution 1778 in Chad and the Central African Republic in consultation with the authorities of these states, intended to “help create the security conditions conducive to a voluntary, secure and sustainable return of refugees and displaced persons, inter alia by contributing to the protection of refugees, displaced persons and civilians in danger, by facilitating the provision of humanitarian assistance in eastern Chad and the north-eastern Central African Republic and by creating favourable conditions for the reconstruction and economic and social development of those areas”. See SC Res. 1778, 25 September 2007, UN Doc S/RES/1778, 2007, op. para. 1.

2046 S/RES/1556 (2004) preambular para. 17. The resolution also included a Chapter VII decision on an arms embargo against all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur, as well as a demand on the Sudanese government to disarm the Janjaweed militias, see op. paras. 6-8.

2047 Ibid., preambular para. 9.

2048 Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, p. 42.
R2P of the AU should Sudan fail in its responsibilities. The Security Council also welcomed the leadership role and engagement of the African Union in Darfur, expressed full support for these efforts and endorsed the deployment of its protection force, the AU Mission in Sudan (AMIS). The AMIS operation proved to be limited in its protection owing to scarce resources and a weak mandate. Despite the presence of 7,000 troops in 2006, it has been unable to prevent or halt atrocities. (See a legal analysis of the AMIS mission in Darfur in Chapter 7.1.4.2.2.)

In the summer of 2004 the member states in the Security Council were unable to reach any agreement on whether the Security Council had an external responsibility to protect by military force in Darfur. Pakistan, China, Sudan, Brazil and Russia rejected talks on UN intervention. On 18 September 2004 the Council requested the Secretary-General to establish an international Commission of Inquiry in order to investigate immediately reports of violations of international humanitarian and human rights law in Darfur by all parties, to determine whether or not acts of genocide had occurred. The Commission focused on incidents between February 2003 and mid-January 2005. It was also charged with the task of identifying the perpetrators of any such violations with a view to ensuring their accountability.

By the end of 2004 the Secretary-General Kofi Annan stated that there were strong indications that war crimes and crimes against humanity were being committed in Darfur. This was confirmed by the Commission of Inquiry, which reported:

The Government of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape

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2050 See more about the AMIS mission in Darfur in Chapter 7.5.3.2.6. The Security Council did not authorise the mandate of AMIS, and the mission was legally based upon the AU Charter's prior consent to humanitarian intervention (article 4 (i)) and the consent of Sudan. AMIS, established in June 2004, should not be confused with the UN Advance Mission in Sudan (UNAMIS), a special political mission dedicated to the preparation on international monitoring in the North-South conflict of Sudan, foreseen in the 25 September 2003 Naivasha Agreement on Security Arrangements in the North-South conflict, to facilitate contacts with the parties and prepare for the peace support operation following the signing of a Comprehensive Peace Agreement. UNAMIS was established by SC Res. 1547, 11 June 2004, UN Doc S/RES/1547, 2004, op. para. 1.
2051 Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, pp. 44-45. The AMIS deployment was considered chaotic and characterised by poor logistical planning, lack of trained personnel, funds and experience in intervening to protect civilians.
2052 Ibid., pp. 42-43. There was a debate on who had the R2P in Darfur, Sudan, the UN or the AU.
2055 Grono, Darfur: The International Community's Failure to Protect, p. 39.
and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.2056

Most of the victims of these violations were identified as belonging to the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called ‘African tribes’. Those responsible were found to consist of individual perpetrators, including officials of the government of Sudan, members of militia forces, rebel groups, and certain foreign army officers acting in a personal capacity.2057 Nonetheless, the Commission, chaired by Cassese, concluded that genocide had not been committed at that particular time in Darfur.2058 Although the actus reus had been committed (killing and causing serious bodily harm) against protected groups (the African tribes, according to their own subjective identification), the third crucial element, genocidal intent, appeared to be missing “at least by the central government authorities”. The Commission stated:

Rather, it would seem that those who planned and organised attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.2059

The Commission, however, added that the government may be held responsible for persecution as a crime against humanity, including murder as a crime against humanity, but this should not be taken as mitigating the gravity of the crimes perpetrated: “[d]epending on the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide”.2060 Moreover, it stated that one should not rule out the possibility that in some instances the ingredient of genocidal intent might have been present in certain individuals, including government officials.2061 Taking note of the report of the Commission of Inquiry, and with a vote of 11 in favour with four abstentions (Algeria, Brazil, China, and the United States), the Security Council referred the situation in Darfur to the ICC on 31 March 2005.2062 At the time of writing, several cases involving war crimes and crimes against humanity were being investigated by the Court.2063

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2057 Ibid., p. 4.
2058 Ibid., pp. 131-132.
2059 Ibid., p. 132.
2060 Ibid., p. 132.
2061 Ibid., p. 132.
In the spring of 2005, two years after the crisis erupted, the international community was still failing to protect the people of Darfur. Two-and-a-half million people were at that time in need of humanitarian assistance. Many human rights and R2P advocates, such as HRW, the International Crisis Group (ICG), and the Aegis Trust, turned to the responsibility to protect framework as a basis to call for further international action on Darfur. The ICG has repeatedly proposed that the international community needed to take more robust action, and more specifically pursue three objectives in Darfur: Civilian protection; to implement accountability through targeted sanctions on Sudan’s oil industry; and to build on the Darfur peace process. The proposals have proved more than difficult to attain.

AMIS was failing to provide protection in Darfur, and was considered inefficient, mainly because of its weak protection mandate and lack of resources. On 24 March 2005 a peace-enforcement corps of 10,000 troops, the UN Mission in Sudan (UNMIS), was established by the Security Council to implement the Comprehensive Peace Agreement in the North-South conflict in Darfur. UNMIS was also requested to closely and continuously liaise and coordinate at all levels with AMIS with a view towards expeditiously reinforcing the effort to foster peace in the region. But the means of support to AMIS were to be further worked out by the Secretary-General. Resolution 1556 did not pronounce on whether UNMIS would be deployed to Darfur, but invited the Secretary-General to investigate the types of assistance that UNMIS could offer to AMIS. Co-operation between UNMIS and AMIS in tackling the situation in Darfur did not meet with success.

The security situation deteriorated again in the summer of 2006, despite of the Darfur Peace Agreement (DPA), signed in May 2006 between the government of Sudan and three of the rebel factions. Efforts and plans to deploy a UN peace-keeping force in Darfur have been constantly derailed by the government of Sudan, which resisted

2065 Pace and Deller, Preventing Future Genocides: An International Responsibility to Protect, p. 22.
2066 Grono, Darfur: The International Community’s Failure to Protect, pp. 47-48.

“Decides that UNMIS is authorised to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities, to protect United Nations personnel, facilities, installations, and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers, joint assessment mechanism and assessment and evaluation commission personnel, and, without prejudice to the responsibility of the Government of Sudan, to protect civilians under imminent threat of physical violence”, ibid. op. para. 16 (i).
2069 Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq, p. 50.
giving its consent. In defiance of this reluctance, the Security Council decided in resolution 1706 (31 August 2006) to increase UNMIS to 17,300 troops and deploy the mission in Darfur. It was given an expanded mandate under Chapter VII for the purpose of taking over AMIS’s responsibilities to support the implementation of the 5 May 2006 DPA by the end of 2006. The Council authorised UNMIS to use all necessary means to protect civilians in Darfur in resolution 1706:

12. (a) Decides that UNMIS is authorised to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities:
– to protect United Nations personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations personnel, humanitarian workers, assessment and evaluation commission personnel, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under threat of physical violence,
– in order to support early and effective implementation of the Darfur Peace Agreement, to prevent attacks and threats against civilians.

The resolution was adopted, with three states abstaining: China, Qatar and Russia. The major concern for these states was the absence of full, voluntary consent by the government in Khartoum to the deployment of an enlarged UNMIS to Darfur. China supported the idea of replacing AMIS with UNMIS, while Qatar preferred to continue supporting AMIS financially. Russia had no objections in principle to the contents of the resolution besides the lack of consent.

It was a Chapter VII enforcement mission with the well-needed protection mandate for civilians that everyone was waiting for – a humanitarian intervention to protect human rights in Darfur. Unfortunately, the UNMIS mission in Darfur failed completely and was never deployed there for several reasons. Forceful interventions under Chapter VII are generally not dependent on the consent of the state targeted by the intervention, but in this case no troop contributions for the mission were offered owing to lack of consent by the government in Khartoum. The large area of the territory of Darfur, and the risk of becoming involved in an armed conflict with the large Sudanese army (over 100,000 troops), have been mentioned as deterring factors. Instead, the AU had to extend AMIS’s mandate until the end of 2007, when it was replaced by the AU/UN hybrid force in Darfur (UNAMID), and UNMIS reverted to its peace-keeping mandate specified in resolution 1590.

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2070 Anonymous, Ensuring A Responsibility to Protect: Lessons From Darfur, p. 28.
2072 It was also given an extensive mandate under Chapter VI, including a protection mandate for civilians, in order to satisfy Chinese and Sudanese demands for voluntariness and for co-operation between the force and the government. Ibid., op. paras. 8-9. See also the statement of China, S/PV.5519, 31 August 2006, UN Doc S/PV.5519, 2006, p. 5.
In the Security Council discussion on 11 September 2006, when the Secretary-General’s report on Darfur was considered, resolution 1706 was debated. Sudan declared that the Council had chosen a confrontational approach by adopting resolution 1706, and that it deliberately took hasty measures without preparing the political context with all parties involved, in particular with the Sudanese government. This was counter-argued by, among others, the UK who stated that

We were open to discussions with representatives of the Government of the Sudan, and those were not forthcoming. The net result was that we moved on to adopt Security Council resolution 1706 (2006). We did that so that two simple goals could be achieved: first, that the African Mission in Sudan (AMIS) could be reinforced — and we provided for that — and secondly, that the United Nations Mission in Sudan (UNMIS) could be deployed into Darfur to provide the security that the Darfur Peace Agreement envisages. The protestations that this infringes national sovereignty, when UNMIS has been in the south working to consolidate the Comprehensive Peace Agreement, ring very hollow. [...] We have made it clear that the terms of the resolution reflect what was said to us in Khartoum and separately. We have put forward the most conciliatory resolution possible. That is why we ought to do everything possible now to ensure that the resolution is implemented.

It took a further year of diplomatic, economic and political efforts and pressure to attain the consent of Sudan for a robust military force in Darfur. The pressure on Sudan increased by the international community, in particular when the US called for additional sanctions on Sudan in February 2007. On 12 June 2007, AU officials hailed the announcement that Sudan had agreed to a joint UN and AU force of nearly 20,000 peace-keepers as a breakthrough. A condition of Sudan’s consent was that the forces would be only African. UNAMID was created by resolution 1769 on 31 July 2007, containing both a Chapter VI and Chapter VII mandate. The resolution was adopted without abstentions. The set-up of the force was indeed dependent on the consent of Sudan, whose co-operation laid the foundation for its existence. The consensus reached by the UN, AU, and Sudan in the

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2077 Ibid., p. 6.
2078 Ibid., pp. 8-9.
2079 Anonymous, Ensuring A Responsibility to Protect: Lessons From Darfur, p. 28. The US revealed plans to block increased financial transactions of Sudanese citizens and companies if Sudan continued to resist UN peace-keepers from entering Darfur.
2081 S/RES/1769 (2007), see op. paras. 1 and 15.
2082 Engle has argued that the consent of the government to deploy the hybrid AU/UN force might be a by-product of the failure to call the situation a genocide. Engle, "Calling in the Troops": The Uneasy Relationship among Women’s Rights, Human Rights, and Humanitarian Intervention, p. 15. This criticism has clearly no ground since resolution 1706 adopted without the consent proves the opposite. Even if genocide had been acknowledged, the same results would most likely have occurred.
triptite dialogue mechanism on the hybrid operation was the political prerequisite and the basis on which the resolution was adopted.2083 Despite this achievement, US politicians have criticised the resolution for not going far enough and for lacking sufficient sanctions.2084

The Chapter VI mandate of UNAMID in resolution 1769 is based upon the proposed mandate in Articles 54 and 55 of the Report of the Secretary-General and the Chairperson of the African Union Commission on the Hybrid Operation in Darfur, and draws on the DPA, the AMIS mandate, the Secretary-General’s report on Darfur (2006) and relevant communiqués of the African Union Peace and Security Council, as well as Security Council resolutions.2085 The Chapter VII mandate of UNAMID in the same resolution includes the authorisation to “take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities” in order to among other things:

(ii) support early and effective implementation of the Darfur Peace agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan.2086

UNAMID was to consist of a total of 26,000 personnel and incorporate the AMIS troops through a seamless transfer of authority.2087 Despite the decision to make UNAMID militarily operational by October 2007, at the end of January 2008 UNAMID consisted of only 1,400 police officers, and 7,000 troops.2088 By the end of 2007, the 7,000 AMIS peace-

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2084 Democratic Senator Russ Feingold, who chaired the Senate Foreign Relations subcommittee on Africa, called the resolution overdue, and was disappointed that the resolution had been unacceptably weakened by the removal of threat of sanctions. Barrall, Alison, Responsibility to Protect - Civil Society (Publ.), Special Edition: Security Council Adopts Resolution 176, 2 August 2007, Digest Number 322.
2085 See S/RES/1769 (2007), op. para. 1. The Report was attached in the Letter dated 5 June 2007 from the Secretary-General to the President of the Security Council, S/2007/307/Rev.1. It includes the mandate:
   “54 (b) To contribute to the protection of civilian populations under imminent threat of physical violence and prevent attacks against civilians, within its capability and areas of deployment, without prejudice to the responsibility of the Government of Sudan”
   “55 (vi) To contribute to the creation of the necessary security conditions for the provision of humanitarian assistance and to facilitate the voluntary and sustainable return of refugees and internally displaced persons to their homes. […]
   55 (vii) In the areas of deployment of its forces and within its capabilities, to protect the hybrid operation’s personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations-African Union personnel, humanitarian workers and Assessment and Evaluation Commission personnel, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups and, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under imminent threat of physical violence and prevent attacks and threats against civilians.”
2087 Ibid., op. paras. 2-3.
keepers swapped their green AU helmets for the blue UN headgear and raised both the AU and UN flags.\cite{2089}

The presence of the Sudanese consent to the establishment of UNAMID was not fully sustained in the deployment of the force, with the result of once again keeping troop-contributing states away. The obstructiveness of the Sudanese government in accepting only African troops and another failure of member states to contribute troops substantially derailed and delayed the deployment and expansion of UNAMID substantially,\cite{2090} and led to the withdrawal of Swedish and Norwegian pledges to add troops in January 2008.\cite{2091} Khartoum also resisted such things as granting land and water access rights to UNAMID, night flying rights, and landing rights for air transport. The international community at the same time was criticised for failing in its responsibility to contribute with transport helicopters. A reason put forward for this was that the Status of Forces Agreement (SOFA) had not been signed by Sudan yet, providing the ultimate command and control of UNAMID by the UN.\cite{2092} In an interview in February 2008, President Bush defended his decision not to send troops to Darfur, despite the genocide. He explained that it was a “seminal decision” not to intervene with force, taken partly out of the desire not to send US troops into another Muslim country.\cite{2093}

As attacks on civilians and humanitarian aid workers continued, relief agencies were forced to scale down their operations during autumn of 2007.\cite{2094} Hostilities escalated in November 2007 between Chadian rebels near the Sudanese borders, and the governments of Sudan and Chad began accusations of interference in the internal affairs of each other.\cite{2095}

Many members if not all of the international community were convinced that the crimes and violations committed in Darfur amounted to genocide, or at least that such widespread and systematic violations of human rights and humanitarian law constituted war crimes and crimes against humanity, as assessed by the Commission of Inquiry. Grono from the ICG, the Human Rights Watch and others, have all argued that a process of ethnic cleansing was taking place.\cite{2096} In any case, it is obvious that the R2P threshold has been satisfied in Darfur.\cite{2097} The state

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\textsuperscript{2089} Ibid., p. 4.

\textsuperscript{2090} Ibid.

\textsuperscript{2091} Ibid., p. 5. Negotiations of the Status of Forces agreement began in December 2007.

\textsuperscript{2092} Ibid., p. 6.


\textsuperscript{2094} Africa Action (Publ.), Africa Action Report. An Overview of Conflict in Sudan and the International Failure to Protect, p. 3.

\textsuperscript{2095} Bergholm, Att skydda människoliv i Darfur - ett omöjligt uppdrag?, p. 3.

\textsuperscript{2096} Grono, Darfur: The International Community’s Failure to Protect, p. 39; Gammarra and Vicente, Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan, p. 207.

\textsuperscript{2097} Grono, Darfur: The International Community’s Failure to Protect, p. 46; Williams and Bellamy, The Responsibility to Protect and the Crisis in Darfur, p. 28.
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is manifestly failing to protect its population from grave crimes of
international law.

The case of Darfur represents an example of where not only the
government of Sudan has manifestly failed in its responsibility to protect
people in Darfur from grave crimes when the state itself
manifestly fails to protect, have thus failed so far. Several of the reasons
have already been mentioned. A lack of consent by the Sudanese
government to deploy an ‘international’ (not only with African troop
contribution) peace-enforcement operation in Darfur is the main
challenge in the efforts to implement the external R2P there. The
paradox is that such forceful Chapter VII measures are not supposed to
be dependent on state consent. The difficulty in implementing the
external R2P by military means is apparent in situations where there is a
strong military power involved, and at the same time an unwillingness to
protect its own population. An unwillingness to comply with the internal
responsibility has major implications on the implementation of the
external R2P when a government is militarily strong. The external R2P
by military means is arguably easier to carry out in a situation where the
government is willing, but unable, to protect for various reasons – or if
unwilling, not posing a strong military threat for an enforcement
operation.

The government of Sudan is not only unable but unwilling to protect
its own population, and assents to and supports the commission of many
of the crimes.2098 Unless the international community decides to exert
such pressure on Sudan that it has no choice other than to change its
policy in Darfur and co-operate, then the situation will persist. It may
appear easier to try to convince and force the Sudanese government to
change its policy and comply with its primary responsibility to protect,
than to make the international community support a military
intervention providing external protection in this situation. The security,
economic and political reasons and rationales behind the great powers
and other states’ decisions not to take robust measures to press Sudan
into this position, represents a failure of the international community to
comply with its moral and political responsibility to protect, as endorsed
at the UN World Summit 2005. The slogan “African solutions to African

2098 UN reports show that the Sudanese government has incorporated the militia into
regular military and police forces, and it is by now well-known facts that the janjaweed
militias that have terrorised and decimated Darfur have been directed by the Sudanese
government. The militias were financed by the government, and received direct battlefield
support from the Sudanese military, see Norris, Sullivan and Prendergast, ENOUGH, The
project to end genocide and crimes against humanity (Pubs), The Merits of Justice, Williams
and Bellamy, The Responsibility to Protect and the Crisis in Darfur, p. 33. The government
is responsible for arming the Janjaweed, see The House of Commons, Darfur, Sudan: The
problems” does not relieve Western and non-African states from their moral and political responsibility to protect. The possibility of supporting African actors and states has neither been exhausted. If no one is considered fit to do the job, the job will not be done. This dilemma has come in new light by the request for an arrest warrant on President Omar Al-Bashir on charges of genocide, crimes against humanity, and war crimes in Darfur by the ICC Prosecutor.2099

Whether the problems of implementing the internal and external responsibilities to protect depend on deficiencies inherent in the concept of R2P, or are based in political reality and power structures, is an issue of disagreement. An anonymous writer with experience of humanitarian work in Darfur argues that this case illustrates the embryonic features of R2P as a doctrine that is by no means self-executing, and at present lacks the dexterity to overcome real world politics, but should nevertheless not be seen as a failure.2100 With time, the doctrine will evolve as diplomats and politicians learn how to operationalise the doctrine. The shortcomings are not within the doctrine but in the failure to implement it, according to this anonymous author. (See further discussion in the conclusions of Chapter 6.3.3. and in the Concluding remarks in Chapter 9.2.1.2.)

Williams and Bellamy assert that the case of Darfur illustrates that armed intervention in response to a supreme humanitarian emergency is only likely when a state, a group of states or regional organisations all become so animated that they are prepared to incur significant political and material risks to ease the plight of suffering strangers and secure international legitimacy for their actions.2101 Furthermore, Darfur suggests that Western states are not prepared to invest the requisite political resources to conduct effective humanitarian interventions and match their bold words on the responsibility to protect with concomitant action.2102 But the scholars do not believe that this gap between words and deeds is immutable, and that advocates of R2P should find ways to convince these states to live up to their statements of intent, accept the costs, and take the necessary risks to save strangers.

CONCLUSION
The existing practice of the Security Council in the above mentioned cases show that the Council has established that flagrant and grave violations of human rights and international humanitarian law within a state, may constitute threats to the peace. Not only has the Council extended the interpretation of what constitutes a threat to the peace, but has also shown in a few cases that military enforcement measures may be necessary to address a humanitarian crisis.2103

2099 For an analysis of the political consequences of this arrest warrant see Norris, Sullivan and Prendergast, ENOUGH, The project to end genocide and crimes against humanity (Pbul), The Merits of Justice.

2100 Anonymous, Ensuring A Responsibility to Protect: Lessons From Darfur.

2101 Williams and Bellamy, The Responsibility to Protect and the Crisis in Darfur, p. 42.

2102 Ibid., p. 44.

2103 Boyle and Chinkin, The Making of International Law, p. 111.
In the preceding case studies, the Council decided to authorise military interventions to address humanitarian crises of a different but similar kind. In all of them, the humanitarian crises emanated from internal armed conflicts, but not solely, with the possible exception of the mixed armed conflicts in the case of Bosnia. The humanitarian crises in the different cases have their own particular circumstances of origin such as the genocide in Rwanda, the policy of ethnic cleansing in Bosnia, the drought, food shortages, widespread malnutrition and starvation in Somalia, the colonial background in the Indonesian persecution and harassment of the seceding East Timorese, and the ethnic and/or environmental and resource related conflict in Darfur. All of the humanitarian crises also had international repercussions that were considered to threaten the security and stability of other states or regional stability, Somalia being the only exception. On the other hand, the failed state situation in Somalia made that case unique.

Thus a legal right of the Security Council to authorise humanitarian interventions in such humanitarian crises is confirmed by this practice.2104 The Commentary to the UN Charter asserts that it now seems widely accepted that extreme violence (amounting or leading to a humanitarian crisis) within a state can give rise to Chapter VII enforcement action.2105 This extensive interpretation may be seen as reflecting an evolutionary interpretation by the Security Council in its application of the UN Charter. Its practice in the application of the Charter should be seen as being compatible with the ‘ordinary meanings’ of the written framework and thus sub legem in accordance with Article 31 (3)(b) of the VCLT. (See more on evolutionary interpretation in Chapter 2.5.2.)

One could, however, further argue that these case studies show that the Council’s extensive interpretation of Article 39 through its practice also included the grave grimes of genocide, crimes against humanity, war crimes and ethnic cleansing. The extended interpretation of a ‘threat to the peace’2106 would thus arguably also cover the R2P criteria as set out in paragraph 139 of the Outcome Document,2107 so that any of these grave crimes may be determined to constitute a threat to the peace under Article 39. The practice of the Council in the post-Cold War period by which it has authorised UN forces, member states and regional organisations to conduct forceful humanitarian interventions, shows that it perceives itself to have not only a legal right but also a moral and political responsibility to protect people in need from genocide, ethnic cleansing, crimes against humanity and war crimes committed within a state under certain circumstances (flowing from an internal armed...

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2104 In recent years, almost all writers and governments have accepted humanitarian intervention if authorised by the Security Council, see Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, pp. 188-189.
2106 See more in Chapter 6.3.2.2. on the reinterpretation of a threat to the peace.
2107 The R2P criteria: any of the grave crimes in international law and the state manifestly failing to protect. The assessment whether or not peaceful means are found inadequate is a political decision that the Council may make with respect to Articles 41 and 42, and does not affect the interpretation of Article 39.
conflict). It could be contended that this assessment and conclusion is based upon an evolutionary interpretation of Article 39, within the ordinary meaning of its wording and in accordance with Article 31 (3)(b) of the VCLT.\textsuperscript{2108} It could thus be argued that Council practice of evolutionary interpretation supports a legal right to not only determine that grave crimes of international law might constitute a threat to the peace under certain circumstances, but that it also reflects a legal right to decide on military enforcement measures to address such grave human security threats.

6.3.4. Does the Security Council have a legal responsibility to protect by military means?

Is an external R2P norm developing, or does the Security Council already have such a legal right to protect by military means under the UN Charter and international law? Could the practice of authorised humanitarian intervention in the 1990s amount to evolutionary interpretation or subsequent practice in the application of the UN Charter in developing a legal right for the Council to protect human security by military means have similarities with the external R2P formulated in the Outcome Document paragraph 139?

These case studies reveal that the Security Council has consistently complied with the relevant R2P criteria on military intervention, which supports a legal right for the Security Council to protect populations against grave crimes by military means. The case studies show that the Council has in fact the capacity, power and political will to authorise humanitarian interventions to protect human security within a state, not only when grave crimes of international law are being committed, but also when other factors are present, such as widespread famine as in the case of Somalia. The R2P criteria, as laid down in the Outcome Document, are thus necessary but not necessarily sufficient criteria for

\textsuperscript{2108} Those scholars advocating a more restrictive approach to Article 39 and the meaning of peace as well as the limits of the Security Council powers under the Charter (see Chapter 6.3.2.4.), the Council’s new practice of intra-state interference to protect human security may be regarded as contrary to the wording of the UN Charter (contra legem) and hence better understood as subsequent practice falling (within the UN Charter framework), informally modifying the UN Charter (Article 39) contra legem – an informal modification made in the same manner as was made with respect to Article 27 (3) of the UN Charter. Thus the state practice of authorised humanitarian interventions by the Council has been carried out in a ‘consistent’ manner with regard to these criteria, and that other member states have given their ‘common consent’ to this new practice, including through the R2P endorsement in 2005 (see the criteria for informal modification through subsequent practice in Chapter 2.5.3.). No \textit{opinio juris} is needed for informal modification of the UN Charter through subsequent practice in the application of the Charter, and this informal process only needs ‘consistent practice’ and ‘common consent’ to take place. Subsequent practice by the Security Council under the UN Charter, if unchallenged on the whole may determine the more precise meaning of the words in the UN Charter according to Téson, see Téson, \textit{Humanitarian Intervention: An Inquiry into Law and Morality}, 3rd edition, p. 288. Taking this approach, it is instead possible to argue that humanitarian interventions authorised by the Security Council have become part of \textit{lex lata} by informal modification of the UN Charter through the subsequent practice of the Security Council during the 1990s, accepted by states.
the Security Council to decide on military enforcement measures for the protection of civilians. However, it could be argued that the practice of the Council in the post-Cold War period, in authorising UN forces, member states and regional organisations to conduct forceful humanitarian interventions, shows that the Council perceives itself as having not only a legal right but also a moral and political responsibility to protect people in need from atrocities such as genocide, ethnic cleansing, crimes against humanity and war crimes within a state under certain circumstances.

Accordingly it could be argued that under lex lata, situations of violent and severe threats to human security amounting to grave crimes in international law, such as genocide, war crimes and crimes against humanity, may be considered ‘threats to the peace’, and become addressed by the Security Council by the authorisation of military enforcement action when the state concerned manifestly fails to protect and where peaceful means have proved to be inadequate.

This norm, expressing a legal right for the Council to take on an external responsibility to protect human security within a state by military means under certain circumstances, could be said to be based upon an evolutionary interpretation of the UN Charter. The Council practice constitutes subsequent practice in the application of the UN Charter within the ordinary meaning of the wording of Chapter VII, and in accordance with Article 31 (3)(b) of the Vienna Convention on the Law of Treaties.

This new interpretation and practice, however, is limited to certain circumstances and thus only partly supports an external R2P for the Council. The Security Council’s implementation of the R2P doctrine and the exercise of its external responsibility to protect will be subsumed under a double qualifier, since not only the R2P criteria will have to be present but the Security Council’s must also have to find that the situation in question constitutes a ‘threat to the peace’ under Article 39 of the UN Charter. Council practice on humanitarian interventions in

\[2109\] But if taking a narrow approach to the powers of the Security Council under the Charter, on ‘peace’ and what may constitute ‘threats to the peace’, the new practice may instead be regarded as being contrary to the wording of the UN Charter, and hence better understood as subsequent practice in the application of the UN Charter contra legem, although practice within the UN Charter framework. For a treaty norm to become informally modified by subsequent practice within the treaty framework there must be ‘consistent practice’ and ‘common consent’ by the state parties to the treaty. This means that there must be a common understanding, or general acceptance, among the parties as a whole about the modification of the treaty, implying more than a majority of the members but not a qualified majority. The existence of opinio juris as in customary law is not required. (See Chapter 2.5.3.) In this case, there has been both consistent practice but arguably also common consent to the Security Council practice extending the interpretation of a threat to the peace under Article 39, resulting in the informal modification of the UN Charter – in the same manner as has been the case with the informal modification of Article 27 (3) of the UN Charter. Thus humanitarian interventions authorised by the Security Council establishing a legal right to an external responsibility to protect by military means may be argued to have become part of lex lata (if not by evolutionary interpretation, at least) by informal modification of the UN Charter through subsequent practice by the Security Council during the 1990s.
the 1990s reflects a limitation on the kinds of humanitarian situations which have been considered to constitute a threat to the peace. These have all been linked to internal armed conflict with international effects, or when lacking international effects, the humanitarian crisis has evolved from a failed state situation. The Commentary to the UN Charter shows that international effects are not necessary and that an internal armed conflict as such may constitute a threat. However, future Council authorised humanitarian interventions in humanitarian crises not linked to an internal armed conflict would thus break new ground and constitute an additional new interpretation and widening of Article 39. (Cf. the Burma Case (2008), in Chapters 6.3.2.3. and 4.6.)

In reality, not only the UN Charter and international law but also international politics restrict the Council’s ability to act. The veto powers of the permanent members and the reality of geopolitical security set the outer limits on the possibilities open to the Council to assume its responsibility to protect by military means. Specific conflicts in certain states are not possible to take action on without jeopardising regional or world security and stability. But in those cases where the veto powers do not have vital security (not economic or other types of non-security) interests, the Security Council could, and should, use its legal right and exercise its political and moral responsibility to protect human security when the state concerned is manifestly failing to – and by military means if necessary. Practice shows that even without the presence of a vital security interest but with the presence of other economic and political interests of the permanent members, hinders the Security Council to take necessary humanitarian action when needed. This legal right to protect by military means would be possible in situations where the permanent members do not have large economic or political interests, as long as there are at least some interests or strong humanitarian motives activated in a humanitarian crisis. Where strong national interests, or no interests at all, are present, the legal right and possibility of the Security Council acting with military means risks being ignored.

The Darfur Case reveals another inherent problem with the implementation of the norm. This is the weakness and incompleteness of the collective security system due to the lack of Article 43 agreements and its impact on the Security Council’s capacity to carry out its political and moral responsibility to protect human security when the state concerned is manifestly failing to – and by military means if necessary. Practice shows that even when the Security Council has taken the necessary decisions to implement the R2P with forceful means, because of this gap in the system, the implementation of its resolutions is not automatic. Because the implementation of the Council’s responsibility to protect by military means depends and relies upon individual states to provide troops and to co-operate to implement Council resolutions, the external R2P of Council could not develop into a ‘legal responsibility’ meaning a legal obligation carrying international accountability, if the failure to protect lies in states failing to comply with Security Council resolutions.

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The external responsibility of states to protect by implementing its international legal obligations must instead be developed to complement the efforts of the Council. The collective security system was not constructed to encompass and address R2P situations in a comprehensive manner. Thus the principle of state sovereignty is not the only obstacle for the R2P norm. Certain aspects of the collective security system itself are thus challenged by the external R2P if it is to be implemented on an institutional basis through the Security Council.

Another question to be considered is whether the moral and political responsibility to protect for the Council could develop into a legal responsibility to protect, entailing a legal obligation on the Council to protect by military means. The development of the external R2P of the Council into a legal duty or obligation in the sense that it must decide on humanitarian interventions where genocide, ethnic cleansing, crimes against humanity and war crimes are being committed, if not to face legal accountability, is not realistic for political, military and legal reasons. Such factors will not only prevent such action in all cases, but also the collective security system, as devised in the 1945 UN Charter sets political and legal barriers on the development of a legal R2P by military means into a legal duty for the Security Council.

The geopolitics of international security and the veto power of the permanent members cause the application of the use of military force to protect human security to suffer from selectivity, as with all other cases on the Council’s security agenda, owing to the necessary case-by-case assessments. Article 39 empowers the Council to make a determination on whether or not a situation constitutes a threat to the peace, breach of the peace, or aggression – but it does not oblige the Council to take further action under Chapter VII. The Council’s legal primary responsibility for the maintenance of international peace and security in accordance with Article 24 does not impose a legal duty on the Council to decide on military enforcement measures under Chapter VII.

A legal responsibility in the form of a duty or obligation would require that the Council treats similar cases alike, or otherwise face legal accountability – utopia! No state, organisation, group of peoples, or individual will be able to find a legal remedy for the failure of the Council to take the necessary humanitarian action required to protect by military means as long as the collective security system is presently constructed, nor for that matter, for the failure to take enforcement measures of other kinds. This is a result of, as well as the basis for, the political character of the Security Council and the collective security system.

The ‘R2P norm’ as a whole (holding both non-military and military responses and responsibilities) would arguably never be able to develop into a legal obligation to protect human security within a state from grave crimes for the Security Council as long as the norm includes a


military element. But this does not lessen the fact that the Council may have legal duties to protect human security by non-military means, and that it has a moral and political responsibility to protect, as endorsed at the UN World Summit in 2005. These latter aspects, however, have not been further examined in this thesis.

The terminological shift from the earlier ‘right to humanitarian intervention’ to an external ‘responsibility to protect’ could therefore be asserted to have limited influence or effect on the legal level with regard to humanitarian interventions authorised by the Security Council. Thus from a legal point of view with regard to military protection, a responsibility to protect for the Security Council when involving the use of force may be seen as a misnomer, not as an obligation but more in part as a legal right. But from a political point of view the wording reflects reality to the extent that the Council is able to act on its political and moral responsibility, both by non-military and military means.

In final conclusion, the external responsibility of the Security Council to protect by military means should be seen partly as a legal right but also as a moral and political responsibility, based upon the formulations of the Outcome Document and its earlier practice. This practice supports a legal right to authorise humanitarian interventions to protect people against the commission of grave crimes in connection with an internal armed conflict. The external responsibility of the Council to act by military means in other situations lacking these elements may be regarded as forming part of the moral and political responsibility to protect on the part of the Council (lex ferenda). Future Council practice in this area would break new ground. It would be based upon a new interpretation of the UN Charter and possibly change international law as we know it.

6.4. General Assembly and R2P – ‘Uniting for Peace’

authorised humanitarian interventions

6.4.1. The R2P criteria

The ICISS report suggests alternative means of transferring the responsibility to protect when neither the state itself nor the Security Council manage to address a pending humanitarian catastrophe. As a second option when the Security Council fails to exert the external responsibility to protect by military means, it could be carried out by the General Assembly under a certain procedure:

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:
I. consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure.\(^\text{2113}\)

\(^{2113}\) ICISS, *The Responsibility to Protect*, pp. XIII, 53.
The Commission argues that although the General Assembly lacks the power to “direct that action be taken”, a decision by an overwhelming majority of member states in the General Assembly, taken in an Emergency Special Session for the support of military action, would provide a high degree of legitimacy for an intervention, and encourage the Security Council to rethink its position.\footnote{ICISS, \textit{The Responsibility to Protect}, p. 53.}

The Supplementary volume to the ICISS report acknowledges the fact that the Uniting for Peace resolution has only been used three times to authorise a military operation, that the last time was in the early 1960s, and that today the procedure has reduced relevance.\footnote{ICISS, \textit{The Responsibility to Protect, Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty}, p. 159.} The same politics, which would produce a deadlock in the Security Council, would perhaps produce a similar result in the General Assembly. But at the same time it also highlights that an intervention that took place with the necessary two-thirds backing or more in the General Assembly would almost certainly have a moral and political force sufficient to categorise it as “legal,” even without Security Council endorsement. It would certainly be regarded as legitimate.\footnote{\textit{Ibid.}, p. 160.}

The states did not agree to bring this up as a possibility in the Outcome Document. Paragraph 139 mentions the General Assembly, but only with respect to furthering the discussion on how the more detailed content, scope and application of the responsibility should be formulated.

\textbf{6.4.2. The Uniting for Peace Procedure, R2P and IL}

The Uniting for Peace procedure was created in 1950 through General Assembly resolution 377 (V) to specifically address the situation where the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security.\footnote{GA Res. 377 (V), 3 November 1950, UN Doc A/RES/377 (V), 1950, p. 333; On the issue of authorising the use of force the resolution states: “\textit{Resolves} that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, a breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain international peace and security”; See also Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 118; Bring, \textit{FN-stadgan och världspolitiken. Om folkrättens roll i en föränderlig värld}, pp. 233-239.} The validity of the resolution has been challenged,\footnote{The Soviet Union criticised the resolution as violating international law and the UN Charter, in particular Articles 11 and 12, see Bring, \textit{FN-stadgan och världspolitiken. Om folkrättens roll i en föränderlig värld}, pp. 234-235.} but the machinery has been approved through practice in several instances.\footnote{Brownlie argues that these instances of practice presumably prevent the critics from} In total the General Assembly
has convened ten Emergency Sessions under the Uniting for Peace resolution procedure, the last in 2006 on illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory. Not all of the resolutions adopted at these various sessions have involved the recommendation or authorisation of the use of force. The cases involving decisions on the use of force under the Uniting for Peace procedure, which have frequently been mentioned in the legal literature, are those cases of Korea 1950, Egypt 1956, and Congo 1960. The case of Korea, however, has been challenged as a precedent for the Uniting for Peace procedure, owing to the purported existence of an earlier Security Council resolution authorising all necessary assistance to the United Nations and the Republic of Korea to repel the armed attack, including implicitly the use of force. As a matter of fact Security Council resolution 83 (1950) only recommended, and did not decide to authorise the necessary assistance including the use of force under Chapter VII to repel the armed attack. Frowein and Krisch argue that this recommendation is not a binding decision under Article 42, but should rather be interpreted as a recommendation of collective self-defence under Article 51.

The proponents of the validity of this machinery argue that the General Assembly has a residuary or secondary responsibility for the maintenance of international peace and security, under Articles 10, 11 (4), and 24 of the UN Charter. The ICJ has made a pronouncement on the legal status of the Uniting for Peace procedure in the Certain Expenses Case. The court recognises that the UN Charter allows the General Assembly to recommend peace-keeping operations, in accordance with Article 11 (2) at the request or with the consent of the reopening the question of interpretation, Brownlie, *International Law and the Use of Force by States*, p. 334. He mentions the existing cases up to the publication of his book in 1963 of Suez (1956), Lebanon (1958) and Congo (1960), but not the case of Hungary (1956).
state or states concerned, but that this is to be limited by the requirement that any question on which (enforcement) action is required is to be referred to the Security Council. The Assembly may not make recommendations of situations that are already on the agenda of the Security Council, according to Article 12 (1), but in practice the Assembly has interpreted this Article restrictively and adopted resolutions dealing with such cases as long as they do not contradict the decisions of the Security Council.

6.4.3. Does the General Assembly have a legal responsibility to protect by military means?

It is hence debatable whether the procedure legally allows for any decisions on the use of force apart from peace-keeping, which is based upon the consent of the host state. Bring, however, interprets the UNEF mandate by the General Assembly in the Suez crisis 1956 as a Chapter VI½ operation made possible through innovative and informal interpretation and revision of the UN Charter. Zacklin also asserts that the power to recommend the use of force given to the General Assembly through the Uniting for Peace procedure has been considered to constitute an interpretation contra legem informally modifying the UN Charter.

Even if this right is accepted, Dinstein makes clear that the Uniting for Peace resolutions only provides a right to recommend recourse to force when an actual breach of the peace or aggression occurs, and hence not in a situation that only constitutes a threat to the peace. Since practically all humanitarian crises have been assessed by the Security Council as threats to the peace and not breaches of the peace, it also appears that R2P situations constituting threats to the peace could be difficult to refer to the General Assembly as long as no breach of the peace or aggression are involved.

This means that the Security Council is the only UN organ that possesses the authority and power to impose explicit obligations of

2129 See the Certain Expenses Case, Advisory Opinion (1962), pp. 164-165: “Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.”; See also Chesterman, Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention, p. 56, note 14.

2130 Article 12 (1) of the UN Charter: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”


2132 Bring, FN-stadgan och världspolitiken. Om folkrätternas roll i en föränderlig värld, p. 278.

2133 Zacklin, The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies, p. 188. Zacklin is, however, cautious in determining the extent of the de facto modification and does not argue any transfer of powers from the Security Council to the General Assembly.

compliance under Chapter VII. \textsuperscript{2135} Dinstein prefers to see the General Assembly recommendations under the Uniting for Peace procedure as an exhortation addressed to member states to take joint action in the exercise of their inherent right of collective self-defence, although he admits that the procedure may have a legitimising effect on an otherwise unlawful use of force.\textsuperscript{2136}

Situations that have been determined to constitute a threat to the peace (or threat to international peace and security) by the Security Council, but fall short of a breach of the peace or aggression, which is often the case where the R2P would be at stake, can hence not rely on the Uniting for Peace procedure, according to this interpretation. This view has gained some support by other scholars with respect to the responsibility to protect.\textsuperscript{2137} Hence the legality of such a recommendation is debatable, although it would most probably attain high levels of legitimacy if widely endorsed by governments.\textsuperscript{2138} There is, however, no practice yet on the issue.

It has been argued by Chesterman that the Uniting for Peace procedure appears to have fallen into disuse, and that the procedure was not even seriously contemplated during the Kosovo crisis - reportedly due to fears that support from the necessary two-thirds majority, in accordance with Article 18 (2) of the UN Charter, would not have been possible to attain.\textsuperscript{2139} The same reasoning lies behind the fact that it was not mentioned in the 2005 Outcome Document. The majority of states in the General Assembly today, compared with the situation prevailing in the 1950s and 1960s, is non-interventionist and resists the development of anything that resembles a right to humanitarian intervention.

This ICISS proposal is therefore not politically viable as an institutionalised mechanism for R2P. Neither is there any post-Cold War practice by the General Assembly to lay the ground for an institutionalisation of this authority with regard to humanitarian interventions. I therefore agree with Hilpold’s conclusion that the ICISS proposal to revitalise the Uniting for Peace resolution, is not convincing.\textsuperscript{2140}

\textsuperscript{2135} Certain Expenses Case, Advisory Opinion (1962), p. 163; Dinstein, \textit{War, Aggression and Self-Defence}, p. 316.
\textsuperscript{2136} Dinstein, \textit{War, Aggression and Self-Defence}, p. 317.
\textsuperscript{2137} Engdahl & Hellman (Eds.), \textit{Responsibility to Protect - folkrättsliga perspektiv}, pp. 24, 51.
\textsuperscript{2138} Evans, \textit{The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All}, p. 136.
\textsuperscript{2140} Hilpold, \textit{The Duty to Protect and the Reform of the United Nations}, pp. 51-52.
7. Unauthorised humanitarian interventions — when Right Authority fails to protect?

7.1. Regional organisations and R2P — regional humanitarian interventions (RHI)

7.1.1. The ‘Right Authority’ of regional organisations

As a third option after the Security Council and the General Assembly (see Chapter 6), the ICISS Commission recommended that the external responsibility to protect be performed by a regional or sub-regional organisation made up of neighbouring states.2141 Such enforcement action would need to be taken under Chapters VII and VIII of the UN Charter in accordance with international law, but should, as argued by the ICISS Commission _lege ferenda_, be also legitimate without prior authorisation if the regional organisation concerned gains ‘subsequent authorisation’ of the Security Council for its actions. The report states:

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

I. [...]  
II. action within area of jurisdiction by regional or sub-regional organisations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council.

The report acknowledges that action by regional organisations always requires prior authorisation from the Security Council, but it also expressly notes that there are recent cases when approval has been sought _ex post facto_, as in Liberia (1990) and Sierra Leone (1997), and that “there may be certain leeway for future action in this regard”.2142

The ICISS Supplementary volume states that if a right to intervene for regional organisations without Security Council authorisation exists in customary international law, it seems limited to cases where three conditions apply: 1) widespread or imminent loss of life, 2) an objective determination of the existence of such a situation and 3) where the Security Council has not explicitly rejected such an intervention.2143 This Chapter will examine the existing rules and customary process with regard to the legal capacity of regional organisation carrying out humanitarian interventions, in order to assess the ICISS Commission’s statement.

The Outcome Document asserts that the primary actor to undertake the external responsibility to protect is the Security Council, but also

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2141 ICISS, _The Responsibility to Protect_, pp. XIII, 53-54
2142 Ibid., p. 54, para. 6.35.
mentions regional organisations as possible co-actors. No other alternative actor was explicitly mentioned as holding a subsidiary right or responsibility to use such force as a means of protection. Regional organisations, however, not mentioned as independent actors carrying a responsibility to protect on their own under paragraph 139. Regional organisations were refered to relevant actors working in co-operation as appropriate:

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 co-operation with relevant regional organisations as appropriate […]

The formulation is not clear on whether co-operation is only appropriate when made in connection to the Security Council, or whether the “appropriate co-operation” refers back to the international community (‘we’). Since this sentence addresses both non-forceful and military measures (including Chapter VII), it is difficult to gather sufficient evidence to indicate state positions with regard to the use of force by regional organisations. A traditional interpretation would be that of states pledging to act collectively through the Security Council, with the Council co-operating with relevant regional organisations as, and when, appropriate. One extensive interpretation could be that the international community declares its preparedness to execute its responsibility to protect by military means in co-operation with regional organisations, including situations without Security Council authorisation if appropriate. But for either interpretation, “as appropriate” could be interpreted in different ways. It thus leaves open the form of such co-operation, whether it is to be achieved in accordance with Chapter VIII or by other means. The paragraph is not sufficiently clear on the controversial doctrine of ex post facto authorisation or the right of regional organisations to act without explicit Security Council authorisation. At the same time, the formulation does neither explicitly reject such a possibility.

The Outcome Document does in fact refer to Chapter VIII in a previous sentence in the same paragraph. But this appears only to be directed towards peaceful and non-military measures. Military interventions for humanitarian purposes with the consent of the host state under Article 52 of Chapter VIII would be included in this context.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The ‘right authority’ of regional organisations on an external ‘R2P by military means’ is thus unclear in the Outcome Document. The

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2144 World Summit Outcome Document, 15 September 2005, para. 139.
following chapters will examine the rules in international law that govern this area and the rights of, and limitations on, regional organisations to conduct humanitarian interventions in the absence of Security Council authorisation.

7.1.2. General on R2P, RHI and IL

The legality and legitimacy of unauthorised collective humanitarian interventions by regional organisations (RHI), together with unauthorised unilateral humanitarian interventions (UHI), is one of the most controversial of subjects in international law, with stark variations of opinions among states and legal scholars.2145

Most legal commentators do not separate RHI and UHI in assessing the legality of unauthorised humanitarian intervention, and both are often referred to generally as the ‘doctrine on humanitarian intervention’. Assertions of the legality of this doctrine therefore often implicitly include both variants.2146 There are, however, scholars who make different legal distinctions within this context. Some argue that although unauthorised unilateral humanitarian interventions by states are in themselves illegal, unauthorised humanitarian interventions might be lawful when conducted by regional organisations.2147 When a regional organisation arrives at a decision to proceed with a humanitarian operation, the institutionalised and collective character of the decision-making process stands as a guarantor of rightful and legitimate intervention, in those situations where the Security Council is either unable or unwilling to issue such an authorisation. But there are also those who criticise the ICISS lege ferenda proposal that interventions by collective organisations should be seen as a compromise or middle way between legal collective intervention authorised by the Security Council and an unlawful and unauthorised intervention by individual states or ad hoc coalitions of willing states. The question remains as to why a unilateral intervention by NATO, for example, should be judged differently from an equally unilateral intervention by an individual group of NATO states.2148 Other academics try to draw on analogy between the collective role of the UN with that of regional organisations,2149 but this...

2145 Legality here refers to the compliance of the intervention with international law, or not, and the legitimacy concerns the political, moral, dimensions of how a humanitarian intervention is perceived by states.

2146 See e.g. Gestri, Marco, ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, Bothe, Michael, O'Connell, Mary Ellen, Ronzitti, Natalino (Eds.), Redefining Sovereignty. The Use of Force After the Cold War, Transnational Publishers Inc., Ardsley, 2005, pp. 234-236.


2149 Lind, for example, builds his argumentation on a statement by Thomas and Thomas. These lawyers assert that the weight of numbers of states involved in an intervention does not per se give a greater right to intervene, and the test of legality is the same as for an individual state. But they also add with regard to the United Nations, that when a group of states are organised into an international juridical community by a multilateral treaty make an intervention in pursuance of the treaty, the intervention is legal by force of the prior...
may not be so easily achieved when it comes to humanitarian interventions.\textsuperscript{2150}

Many of the legal arguments in favour of a right to RHI are hence intertwined with those for UHI in the literature, especially in the case studies and analyses of state practice, and the formation of new customary law on unauthorised humanitarian intervention. In this thesis, the arguments and practice have nonetheless been separated (see the following analyses on UHI in Chapter 7.6.). The analysis on emerging norms of R2P builds on the idea of separating the customary processes for different groups of actors carrying out humanitarian intervention, out of a conviction that international legal responsibilities should be attached to specific actors and that an emerging legal norm or norms on R2P could very well develop varying for different actors. Several norms of a responsibility to protect by military means may therefore be emerging. References to the literature in the following analyses may, however, sometimes have to rely on assessments which cover both RHI and UHI, where no such separation has been made.

‘Regional organisations’\textsuperscript{2151} have the right to take enforcement action when it is authorised by the Security Council.\textsuperscript{2152} The predominant view remains among states and jurists that unauthorised humanitarian intervention by regional organisations is unlawful, both under treaty law

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\textsuperscript{2150} The closest resemblance between the UN collective responsibility and regional organisations would be with those African (sub-) regional organisations having a right to humanitarian intervention provided for in their Statutes. But the analogy would not hold for regional organisations in general. Even if NATO were to acknowledge a right or responsibility to protect by military means, humanitarian interventions carried out by NATO in third states would not be based upon prior consent by treaty from such states, \textit{i.e.} non-state parties. Such an intervention would not fall back on the same mechanism of prior consent provided for in the UN Charter and, for example, the Charter of the African Union. (See more in Chapter 7.1.3.2.)
\textsuperscript{2151} On the definition and scope of this concept see Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, pp. 31-105; Delbrück, Jost, \textit{The Role of Regional Organizations in Maintaining Peace and Security}, Bothe, Michael, O’Connell, Mary Ellen O’Connell, Ronzitti, Natalino (Eds.), \textit{Redefining Sovereignty. The Use of Force After the Cold War}, Transnational Publishers, Inc., Ardsley, 2005, pp. 145-150. The issue of whether NATO can be subsumed under this concept has been debated, but it is now clear that NATO is a Chapter VIII organisation in the eyes of the UN and most states, see Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, p. 55; Bring, \textit{Regionala organisationers roll i den internationella säkerhetspolitiken}, p. 171; \textit{Cf.} Abass, \textit{Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter}, p. 146; for an opposing position see de Wet, \textit{The Chapter VII Powers of the United Nations Security Council}, pp. 293-294.
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and customary law. 2153 But most scholars at the same time acknowledge that this norm is undergoing change. There are a few cases that demonstrate that regional organisations are becoming more assertive in authorising their own humanitarian interventions without prior approval of the Security Council. 2154 Several commentators therefore argue that there is no clear or unambiguous answer to its legality, since we are witnessing an emerging norm in customary law, albeit not yet fully crystallised. 2155 In particular the post-Cold War developments on the African continent, as well as among Western states, are usually mentioned as new state practice and opinio juris which support a new customary norm of unauthorised humanitarian intervention. 2156 I submit to these main contentions. 2157 A valid description of lex lata regarding RHI (as well as UHI) could hence be:

the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal. 2158

However, until firm and unambiguous support by states that this customary rule is forthcoming, an RHI by a ‘regional or sub-regional organisation’ 2159, even with subsequent authorisation or approval from the Security Council, would constitute a violation of the UN Charter – according to a traditional reading. 2160 Thus the ICISS proposal at present does not conform with the provisions of the UN Charter leges stricto.


2156 The developments by regional organisations are dealt with separately in Chapter 7.1. The post-Cold War cases of this new practice are analysed in Chapters 7.1.5.4. and 8.

2157 Whether or not it is a good idea that this emerging practice becomes law, is another question. It is not dealt with in this chapter (see, however, a discussion on the legalisation of unauthorised humanitarian intervention in Chapter 9).

2158 Gray, International Law and the Use of Force, p. 32.

2159 For an overview of regional organisations and international law regulating their use of force, see Lind, The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security.

7.1.3. Invitation or consent – RHI?

An act of RHI could nonetheless gain legality by force of a ‘valid invitation’\(^{2161}\) or consent from the ‘legitimate government’\(^{2162}\) of the state. Unauthorised interventions can thus be considered legal if the host state consents prior to any proposed military intervention.\(^{2163}\)

The preclusion of wrongfulness based upon invitation has been confirmed in the ILC Articles on State Responsibility.\(^{2164}\) It is however very doubtful, whether a government not in ‘effective control’ of its territory could extend a ‘valid invitation’.\(^{2165}\) Some academics have raised arguments in support of a new rule in this respect, stating that the ‘democratic legitimacy’ of the government could replace the necessity of territorial control when a democratically elected government is in exile or fighting rebels on its territory – for example, Sierra Leone (1997).\(^{2166}\) However, there remains insufficient practice and opi

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\(^{2162}\) For a discussion on what constitutes a legitimate government, see Lind, *The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security*, pp. 223-224.


\(^{2165}\) Gestri, *ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?*, p. 226.

\(^{2166}\) Ibid., pp. 227, 244; Lind, *The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security*, pp. 245-246. Lind states that it is possible that the Sierra Leone Case is the first example of a trend where military interventions against unconstitutional coups are accepted and that it is uncertain whether or not this will constitute an exclusive right for regional organisations.


\(^{2168}\) Brownlie, *International Law and the Use of Force by States*, p. 327.
The international rules regarding invitation during an ‘internal armed conflict’, however, prescribe non-intervention in the internal affairs of the state.\footnote{Engdahl, Samtycke till väpnad intervention, pp. 117-118. It is prohibited to send forces on invitation to a government involved in genocide or widespread and systematic violations of human rights, Lind, The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security, p. 225.} Unless all parties involved in an armed conflict give their consent, there is no legal basis for an unauthorised intervention.\footnote{Engdahl, Samtycke till väpnad intervention, p. 119.} It is neither permitted to aid rebel forces nor to send military forces in support of a government involved in a widespread internal armed conflict, and such interventions without the consent of rebel groups or the opposition would constitute a violation of the political independence of a state in accordance with Article 2 (4), as well as the principle of self-determination, Article 1 (2) of the UN Charter.\footnote{Lind, The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security, pp. 221, 223. For a definition of an armed conflict, see Tadić Case, No IT-94-1-AR72 (1995), para. 70: “On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”}

State practice shows that interventions to prevent military coups or to strike back against secessionist groups have generally not been criticised by other states, while those interventions that support a government against popular uprisings or in (armed) conflicts over who controls the central government, have provoked resistance.\footnote{Lind, The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security, p. 225.} Lind states that it is difficult to determine the exact point at which a government relinquishes the authority to invite in armed forces in situations of escalating internal armed conflict. He emphasises the importance of looking at the extent of control of a territory by a rebel force in order to analyse when an internal armed conflict has passed the point at which a government no longer has the legitimate authority to invite in foreign military forces on its own.\footnote{Ibid., p. 225.} In cases where strong rebel forces hold part of the country, their consent should be sought as well. But a rebel group alone does not have the legal authority to extend an external invitation for military help to fight the government of the country concerned.\footnote{Engdahl, Samtycke till väpnad intervention, p. 117; This rule was confirmed in the Nicaragua Case (1986).}

Even if a particular government has had the legal authority to invite, the situation in question might not always warrant a legal right to accept such an invitation on the part of other states or organisations, because of the principles of self-determination and non-intervention. Thus if a civil war rages in the country concerned or if it is obvious that a substantial part of the population supports the insurgents, it could be argued that states must abstain from interfering in the domestic affairs of another state, and that the principle of self-determination creates an obligation not to accept an invitation to intervene.
But the law on this particular issue is not well settled, according to Brownlie.\(^{2175}\) There is also a danger of escalating the conflict into an international armed conflict, and such things should restrain states from becoming involved.

Legal argumentation in the literature has been raised in support of the emergence of *lex specialis* on consent for regional organisations to intervene on the basis of the collective decision-making guarantees of impartiality and legitimacy, so that more permissive interpretations of the above mentioned consensual rules on intervention should apply for regional organisations.\(^{2176}\) Lind, however, asserts that state practice on intervention involving consent for regional organisations indicates that the same consensual rules are still applicable to regional organisations as they are to states, and that no relaxation of the rules has yet emerged.\(^{2177}\)

If the same consensual rules are applied to RHI as they are to UHI, the purported invitations by the democratically elected Presidents in Liberia and Sierra Leone would have had no legal effects on the legal basis of these interventions by ECOWAS, since they did not meet the test of a ‘valid invitation’ due to a lack of territorial control (in both cases). The Liberian President Doe’s letter of invitation to the ECOWAS Standing Mediation Committee was sent on 14 July 1990, at a time when rebel forces controlled most of the country, with the exception of a small part of the capital Monrovia.\(^{2178}\) Charles Taylor’s National Patriotic Front of Liberia (NPFL), whose troops were in control of 90 per cent of the territory, did not consent to the dispatch of the force.\(^{2179}\) Both ECOWAS and the statements made by the Security Council lacked reference to President Doe’s invitation, which confirms this conclusion. It is argued by legal commentators that the legitimacy of the ECOWAS interventions in Liberia should primarily be seen as a precedent for RHI and not as a case supporting the relaxation of the consensual rules with regard to regional organisations.\(^{2180}\)

\(^{2175}\) Brownlie, *International Law and the Use of Force by States*, pp. 323, 327. Brownlie underlines that states should be free to decide on the nature of their governments.


\(^{2177}\) *Ibid.*, pp. 225-227, 247; Lind has examined several cases of practice among regional organisations in order to reach this conclusion: The Arab League’s mission to Lebanon (1976-1983), the OAU’s mission to Chad (1981-1982), the OECS mission to Grenada (1983), the ECOWAS mission to Liberia (1990) and ECOWAS mission to Sierra Leone (1997). See also Engdahl, *Samtycke till väpnad intervention*, p. 119.

\(^{2178}\) Gestri, *ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?*, p. 217. For his analysis on the issue of ‘valid invitation’ in Liberia, see pp. 225-228.


\(^{2180}\) Lind, *The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security*, pp. 238-240. The consensual rule as applicable to states was violated in the case of Liberia, since the government represented by President Doe did not control much of the territory at the time of the invitation, the major rebel groups did not accept the presence of ECOMOG and ECOMOG itself did not refer to the invitation as the legal ground for its intervention.
In the case of Sierra Leone, the democratically elected President Kabbah’s request to ECOMOG, in May/June 1997, to intervene was made from his place of exile in Guinea, from which he exercised no control over the territory.\footnote{Ibid., p. 241.} Despite that fact, there are those who argue that it was still a valid invitation. ECOWAS, however, did not justify its intervention in Sierra Leone on the basis of consent, but argued self-defence against attacks by the junta’s forces.\footnote{Ibid., p. 245.} The Sierra Leone case is primarily to be seen as a precedent in relation to a right to intervene in order to protect a democratically elected leader ousted in a coup, rather than as a relaxation of the consensual rule applicable to regional organisations.\footnote{Ibid., pp. 245-247.} There is hence not sufficient practice and \textit{opinio juris} to support a new rule where the ‘democratic legitimacy’ of the government replaces the necessity of territorial control for a valid invitation.\footnote{Gray, \textit{International Law and the Use of Force}, p. 319; Engdahl, \textit{Sammtes till väpnad intervention}, p. 120; Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, pp. 245-247.}

An intervention for humanitarian purposes based upon an invitation would due to the consent of the host state be considered as a ‘peace-keeping operation’\footnote{Traditional ‘peace-keeping’ is characterized by the consent of the parties, impartiality and the non-use of force except for self-defence by the peace-keepers, see Engdahl, \textit{Protection of Personnel in Peace Operations. The Role of the ‘Safety Convention’ against the Background of General International Law}, pp. 29-30. The second generation of peace-keeping operations include multifunctional tasks beyond the above mentioned elements and often include civilian components. Such expanded or wider peace-keeping operations have broader peace-keeping mandates, at the same as being backed up with operational consent from the host government. These more robust peace-keeping forces are made to prepare to face lack of local consent by some parties in an armed conflict. They may become involved in combat operations acting in self-defence in parts of a mission area, see \textit{ibid.}, p. 31. The multifunctional peace-keeping forces are sometimes also given mandates or use force beyond self-defence under Chapter VII. These aspects of the force should be seen as peace-enforcement rather than peace-keeping, when not backed up with full consent of the parties to the armed conflict.} under Article 52 of Chapter VIII of the UN Charter, rather than as an RHI. This would also apply to those situations of prior consented interventions by regional organisations based upon treaty where a concurrent consent has been given as well (see Chapter 7.1.4.2.). Such operations would thus not qualify as strict humanitarian interventions according to the definition used in this thesis, which relies on an absence of consent to an intervention.

In the new more robust forms of expanded multidimensional peace-keeping operations based upon both consent and Chapters VI and VII mandates, these distinctions are not always upheld in practice. When there is only a weak or partly made consent by the host state, or lack of local consent by any of the factions involved in the particular armed conflict, and peace-keeping forces get involved in fighting against government paramilitary groups or rebel forces, such operations should be regarded as enforcement action if supported by the mandate but
beyond mere self-defence.\textsuperscript{2186} Also prior consented interventions for humanitarian purposes should be seen as enforcement action when there is a lack of concurrent consent at the time of the intervention. (See more on the requirement of parallel consents in Chapter 7.1.4.2.2.)

7.1.4. Treaty law and RHI

7.1.4.1. The UN Charter law and RHI

7.1.4.1.1. Article 53 of the UN Charter and RHI

‘Enforcement action’\textsuperscript{2187} by regional organisations is regulated in Article 53 (1) of the UN Charter and its legality is based upon authorisation by the Security Council. Article 53 differs from Article 2 (4) in that it does not include the threat to use force, and it is therefore regarded as being a more strict regulation, leaving little room for new interpretations permitting enforcement action such as RHI.\textsuperscript{2188} While Article 2 (4) could be interpreted restrictively in order to allow for unauthorised humanitarian intervention (see Chapter 7.2.3.), when ‘not conducted against the territorial integrity or political independence of any state’, Article 53 sets up a formal hindrance for RHI by explicitly requiring Security Council authorisation for enforcement action by regional organisations.\textsuperscript{2189} The granting of authorisation under Article 53 (1) clause 2, is legally contingent on the existence of a threat to the peace, a breach of the peace, or an act of aggression under Article 39 of the UN Charter.\textsuperscript{2190} Action under Article 53 must remain within the powers granted to it by Articles 24, 39 et seq.

Apart from Security Council authorised military enforcement action, regional organisations have no other legal competence to use force other than when acting in collective self-defence, against former enemy states or if validly invited by a legitimate government.\textsuperscript{2191} The UN Charter hence appears to offer less leeway for interpretations supporting RHI

\begin{itemize}
\item \textsuperscript{2186} However, if this use of force is undertaken outside the peace-keeping mandate under Chapters VI and VII, it should be regarded as unlawful use of force unless supported by customary law or other legal grounds.
\item \textsuperscript{2187} ‘Enforcement action’ in Article 53 should be read as “any action which would otherwise be in violation of the prohibition on the use of force as spelled out in Article 2 (4)”, see Ress/Bröhmer, \textit{Article 53, Simma, Bruno (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, Oxford University Press, Oxford, 2002, p. 861, para. 7. Cf. Abass, Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter, p. 43, who defines enforcement action in Article 53 as “any action which would itself be a violation of international law, if taken without either some special justification or without the contemporaneous consent or acquiescence of the target state”; See also Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, pp. 136-137.
\item \textsuperscript{2188} Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, p. 166.
\item \textsuperscript{2189} See and compare the analysis, \textit{ibid.}, pp. 166-167.
\end{itemize}
than interpretations of the Charter supporting UHI. The view that Article 53 does not apply in a situation of veto-deadlock in the Council is untenable, according to the Commentary to the UN Charter. Article 53 (1) of the UN Charter reads:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organisation may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

The intention of Article 53 is to subordinate regional organisations to the overall control of the Security Council. A traditional interpretation of the UN Charter provides that regional organisations may decide freely on the need to adopt coercive measures, but that a Council authorisation is required before putting them into effect. In order for the Security Council to make such an authorisation, there has to be a prior Article 39 determination under Chapter VII.

Another treaty-based argument in support of RHI, based upon a teleological interpretation of the UN Charter, finds its legal basis in one of the UN’s main purposes, namely to protect human rights (Article 1 (3)). This argument, together with a restrictive interpretation of Article 2 (4), means that interventions for the protection of human rights that do not violate the political independence or territorial integrity of a state or is in any other manner inconsistent with the UN Charter would be admissible. For example, Lind’s narrow interpretation of the prohibition on the use of force implies that if enforcement action is not prohibited by Article 2 (4), such action falls outside the scope of Article 53 – for example a humanitarian intervention. Enforcement action not amounting to aggression, such as an RHI, would fall outside the prohibition on the use of force and therefore not be applicable to Article 53. Such a conclusion, however, is debatable. Whether this interpretation fits well with Chapter VIII and regional organisations has been questioned because of the explicit requirement in Article 53 of Security Council authorisation. The majority of scholars and states interpret the

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prohibition in Article 2 (4) extensively – not only covering acts of aggressions but also threat of the use of force against the territorial integrity and the political independence of a state, or in any other manner inconsistent with the purposes of the UN. This thesis does not confirm an interpretation that unauthorised humanitarian intervention per se is currently a third legal exception under Article 2 (4) of the UN Charter (apart from self-defence and Chapter VII measures).

A ‘general authorisation’ by the Security Council would give a regional organisation the right to use force at its own discretion within a certain area or time.2197 There is no clear case of general authorisation, but Lind argues that it could theoretically become of interest to grant a regional organisation a general authorisation to carry out enforcement action – for example, the AU. However, the control mechanisms for the use of force by regional organisations are weaker and there are other legal constraints which makes this form of authorisation in the future practically unrealistic. It would most likely constitute violations of Articles 53 or 24 (or both), unless restricted considerably, and it is not very realistic that the Council would grant a blanket authorisation to a regional organisation.2198

7.1.4.1.2. Evolutionary interpretation/informal modification of Article 53?

EX POST FACTO AUTHORIZATION

The question of subsequent or retroactive authorisation by the Security Council, referred to as ex post facto authorisation,2199 is based upon the idea that an intervention which has been implicitly approved or endorsed by the Security Council afterwards is legally acceptable. The doctrine of ex post facto authorisation has gained increasing acceptance among states and scholars but has not yet fully attained the status of lex lata.2200 Although there is yet insufficient practice, there are hence numerous of arguments by scholars arguing both pro et contra ex post facto authorisation.2201

2197 Ibid., p. 143.
2201 For an overview of different positions and legal arguments on ex post facto authorisation see Österdahl, Preach What You Practice. The Security Council and the Legalisation ex post facto of the Unilateral Use of Force; Lind, The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security, pp. 154-155; Delbruck, The Role of Regional Organizations in Maintaining
Article 53 neither specifies at what point authorisation by the Council must be given for military enforcement action by regional organisations, nor in which form. Abass, a proponent of the doctrine of *ex post facto* authorisation, insists that neither the travaux préparatoires nor the UN Charter ordains a restrictive interpretation of the Article in the sense of a requirement of an authorisation in advance. He believes that the requirement of prior authorisation would appear to compromise the very essence of regional arrangements under Chapter VIII. Gestri, a scholar who argues against the doctrine, states that such an interpretation of Article 53 seems to be irreconcilable with its clear literal terms, and also incompatible with a systematic and teleological interpretation of the UN Charter itself. Many lawyers, however, appear to be in agreement that the UN Charter does at least not exempt the Security Council with competence to make such late authorisations, and some proponents for the *ex post facto* doctrine even contend that the Charter implicitly endows the Council with such competence. In any case, there are no formal obstacles to this doctrine.

An authoritative interpretation by Ress and Bröhmer in *The Commentary to the UN Charter* demonstrates that from a teleological point of view of the Charter, only prior authorisation fully ensures effective Security Council control over regional organisations. The control conferred on the Council goes beyond merely reviewing such action after the event and requires that the possibility remains open to exert influence over the concrete enforcement actions planned by regional organisations. To hold otherwise would encourage illegal acts and tempt regional organisations to initiate enforcement action in the hope that the Council would afterwards authorise it.

However, Ress and Bröhmer acknowledge that from a practical standpoint this view might seem too rigid, due to the difficulty in first seeking Council authorisation when swift action is necessary. They therefore argue, especially in situations where the Council has already acted by expressing its grave concern over the situation in question or determined a threat to the peace, that it is difficult to infer illegality of non-authorised action merely from the fact that Council authorisation came subsequently. An exception to the rule of prior authorisation could, however, only be applied to those situations where prior authorisation "would not and could not have changed the course of

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2203 Gestri, *ECONAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?*, p. 231.


2206 Ibid., p. 865, para. 16.
action”. Council authorisation must thus have been made prior to any enforcement action taken by a regional organisation, unless exceptional circumstances applied, which is up to the Council to determine if they were present and not by ex post facto authorisation (and possibly also by commendation). In such cases a subsequent approval of the Council would have a legal effect by legalising the intervention (and arguably legitimising it when commended).

Ress and Bröhmer thus argue lege ferenda that the doctrine could be applied in exceptional circumstances, but add that it is only conceivable if a number of factors fall into place: 1) the need for urgent action, 2) unanimity of the permanent Security Council members, and 3) sufficient evidence for tacit Council approval of the particular action. All these factors need to be present. These conditions would also apply to the acceptance of the doctrine of implied authorisation in exceptional circumstances, according to the UN Commentary.

To date, there has been no explicit ex post facto authorisation by the Council. However, the Council has in two cases after the event commended regional military enforcement action taken without authorisation. The strongest case of such practice supporting the argument of ex post facto authorisation for regional organisations (for CHI) was when the Security Council commended the ECOWAS intervention in Liberia 1990. The Council did not bring the crisis in Liberia on its agenda at the time of the intervention, but commended ECOWAS in a Presidential note of the Security Council in January 1991. It also adopted resolution 788 two years after the intervention, showing a positive attitude towards it. The Security Council stated in resolution 788:

1. Commends ECOWAS for its efforts to restore peace and stability in Liberia;
10. Requests all states to respect the measures established by ECOWAS to bring about a peaceful solution to the conflict in Liberia;

In the case of the ECOWAS intervention in Sierra Leone in August 1997, the Security Council did not directly comment on it at the time.

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2207 Ibid., p. 865, para. 16.
2208 Ibid., p. 865, para. 17.
2209 Ibid., p. 865, para. 19; Lewitt formulates it as a process of “legally oxidizing” interventions by the Security Council in its consistent practice of retroactively authorising otherwise illegal interventions, see Levitt, The responsibility to protect: A beaver without a dam?, p. 161; Österdahl, Preach What You Practice. The Security Council and the Legalisation ex post facto of the Unilateral Use of Force.
2212 Note by the President of the Security Council, S/22133, 22 January 1991, UN Doc S/22133, 1991: “[t]he members of the Security Council commend the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia”.
2213 See e.g. SC Res. 1132, 8 October 1997, UN Doc S/RES/1132, 1997.
but expressly commended ECOWAS twice afterwards – first in a Presidential statement, and then in resolution 1162, which stated:

Commends the Economic Community of West African States (ECOWAS) and its Military Observer Group (ECOMOG), deployed in Sierra Leone, on the important role they are playing in support of the objectives related to the restoration of peace and security set out in paragraph 1 above.

Many member states of the Council commended and endorsed the intervention during several of the Security Council deliberations on the situation regarding Sierra Leone, 1997 to 1998. Instances of state disapproval of the actions of ECOWAS in Sierra Leone are difficult to find, according to Abass, despite its lack of Council authorisation. Some argue that this case is a good precedent for the doctrine of implied authorisation (see more in next chapter).

Österdahl argues leges ferenda that this mechanism is also employed by the Security Council when adopting resolutions on post-intervention reconstruction, having retroactive legalising consequences on prior illegal unauthorised intervention. Security Council resolutions deciding on comprehensive reconstruction schemes involving the United Nations after an unauthorised intervention, such as in Kosovo (1999), Afghanistan (2001) and Iraq (2003), is argued to give such legalising effects, notwithstanding the fact that such reconstruction resolutions have been silent on the legality of prior intervention.

But the majority view is that UN reconstruction ambitions after an illegal intervention does not make such intervention legal. A strong argument is the principle of ‘no fruits of aggression’, and the ‘real political’ necessity for the Security Council to get involved in reconstruction in order to fulfil its mandate to maintain international peace and security. I agree with Lind, who argues that the Security Council cannot refuse to settle an international dispute or conflict only because there has been a prior illegal intervention. A contrary conclusion would fetter the Council, who would not be able to seize the

2216 Abass, Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter, pp. 158-159; See e.g S/PV. 3797 (1997), and S/PV. 3822, 3857, 3861 and 3902 (1998). Only France exercised some restraint, but did not condemn the action.
2217 Ibid., p. 160.
2218 Österdahl, Preach What You Practice. The Security Council and the Legalisation ex post facto of the Unilateral Use of Force, p. 232. Although she admits that there is little support found for this position in the Security Council resolutions and from the Security Council debates at the time of their adoptions.
2219 Ibid., pp. 232, 246, 252. Kosovo (S/RES/1244), Afghanistan (S/RES/1483), and Iraq (S/RES/1386). The intervention in Afghanistan is not a good case supporting this theory, due to its justification being based upon the right to self-defence. See Österdahl, Preach What You Practice. The Security Council and the Legalisation ex post facto of the Unilateral Use of Force, pp. 239, 243-244.
matter even if the situation in question threatened international peace and security.

On the Kosovo Case and \textit{ex post facto} authorisation I would counter-argue Österdahl, in that the insistence that the NATO intervention was illegal, by Russia and China, among others, in the Council debate prior to the adoption of resolution 1244 (which set up the post-conflict interim administration in Kosovo) seriously undermines the interpretation that this resolution would purport to legalise intervention after \textit{post facto}.\footnote{See S/PV. 4011, 10 June 1999, UN Doc S/PV. 4011, 1999. At the most, the effect of the resolution could have been a legitimating one, but not legalising. See also the next chapter on implied authority and the Kosovo case. \textit{Cf.} Österdahl, \textit{Preach What You Practice. The Security Council and the Legalisation \textit{ex post facto} of the Unilateral Use of Force}, pp. 248, 253, 256, who argues that Security Council practice must trump any Security Council opinion to the contrary, and that the significance of practice prevails over \textit{opinio juris} in the long run. This argumentation does not hold in my opinion, and objections and protests must also be regarded as state practice. (See Chapter 2.)} The statements by Russia and China in the Council during its adoption support an opposite conclusion, and the fact that these two states still claim the illegality of the NATO intervention, amounts to sufficient objection that prevents a legalising effect \textit{ex post facto} to be the case with regard to Kosovo. Österdahl also admits that the overall practice of the cases mentioned cannot be said to amount to a general norm of \textit{ex post facto} Security Council authorisation for all different kinds of military intervention. That would in effect have severely weakened the norm prohibiting the use of force and ended the discussions of an emerging norm on unauthorised humanitarian intervention.\footnote{Österdahl, \textit{Preach What You Practice. The Security Council and the Legalisation \textit{ex post facto} of the Unilateral Use of Force}, p. 252; Murphy, \textit{Humanitarian Intervention. The United Nations in an}}

The doctrine of \textit{ex post facto} authorisation by the Security Council does not systematically make a legal distinction between different kinds of interventions – whether or not particular interventions have humanitarian purposes, and whether they were undertaken by states or regional organisations, which in turn would make it difficult to draw general conclusions of the legality of RHI by \textit{ex post facto} authorisation.\footnote{However, Abass does make this distinction. He lists the cases of Liberia, Sierra Leone and Kosovo as precedents for a new practice of \textit{ex post facto} authorisation, and argues that through these cases, the framework of collective security embodied by Chapter VII has become obsolete in the situation that has developed after the Cold War. This contention is in my opinion a somewhat over optimistic and radical interpretation. See Abass, \textit{Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter}, p. 64.} But generally, the arguments tend to exhibit a stronger case for \textit{ex post facto} authorisation for RHI (and possibly also for UHI) than for other kinds of intervention. Humanitarian interventions are in many cases urgent in nature and cannot tolerate waiting for a prior authorisation by the Council.

This leaves us with the Liberian and Sierra Leone Cases as valid precedents of a new Security Council practice of \textit{ex post facto} authorisation.\footnote{Österdahl, \textit{Preach What You Practice. The Security Council and the Legalisation \textit{ex post facto} of the Unilateral Use of Force}, p. 246; Murphy, \textit{Humanitarian Intervention. The United Nations in an}} The issue remains a controversial legal doctrine –
arguably an emerging norm in process, for exceptional situations, where
the Council explicitly shows approval after the event and thereby
legalises the particular action. The ICISS proposal can be seen as a
theoretical contribution to this process arguing for an institutionalisation
of this mechanism within the limited sphere of humanitarian
interventions by regional organisations.

IMPLIED/IMPLICIT AUTHORITY

Implied authority means that a Security Council authorisation is gathered
by implication or necessary deduction from the circumstances, the
general language of a Security Council resolution, or the conduct of the
parties. It has sometimes also been referred to as 'unilateral
enforcement of collective decisions', and is a controversial doctrine of
legal justification for unauthorised interventions in general.

The doctrine of implied authorisation has also been employed by
states as a legal basis for unauthorised humanitarian interventions – for
every, by France, the UK and the US in their interventions in
Northern Iraq 1991 and onwards, and by NATO states in the Kosovo
intervention in 1999. However, these events did not go without
criticism. (The intervention in Northern Iraq was carried out by a
regional organisation bound by Article 53, and was therefore not a case
of RHI. See below on implied authorisation and UHI in Chapter
7.2.4.2.). Some scholars have argued that the ECOWAS interventions
in Liberia and Sierra Leone serve as better precedents for the doctrine of
implied authorisation than for ex post facto authorisation. However, in

2225 See Bring, Regionala organisationers roll i den internationella säkerhetspolitiken, p. 168; Cf.
Österdahl, Preach What You Practice. The Security Council and the Legalisation ex post facto of the
Unilateral Use of Force, p. 239; ICISS, The Responsibility to Protect, p. 46, para. 6.5.
2226 This is a lexical interpretation according to Lind, The Revival of Chapter VIII of the UN
2227 This was made in respect of Security Council resolution 688, but also resolution 678, see ibid., p. 146, in particular note 28; Gray, International Law and the Use of Force, pp. 264-266;
Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, p. 297; See Chapter 7.2.4.2. below on implied authorisation and UHI.
2228 The Dutch and Belgian delegates stated that the NATO attacks in Yugoslavia followed
directly from Security Council resolution 1203 and the lack of compliance to those
decisions by Yugoslavia, see Lind, The Revival of Chapter VIII of the UN Charter. Regional
Organisations and Collective Security, pp. 145-146. See more on the Kosovo case in Chapter
7.1.5.4. and in Chapter 8.
2229 It is, however, unclear whether and in which way the doctrine of 'implied authority'
would apply differently for UHI as for RHI because the requirements of Article 53 can be
disregarded in such cases. It could be argued that the doctrine of implied authorisation may
be easier to develop for UHI situations than for RHI cases.
2230 Abass, Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of
the UN Charter, p. 159, who believes that the ECOWAS action was much bolder than
advocates of implicit authorisation have recognised. However, he bases the strong positive
support from the Security Council upon the statements made in the debates of the Council,
which should not to be regarded as official statements of the Council, but rather as

the interventions by regional organisations in Liberia and Sierra Leone there were no previous Security Council resolutions that had determined that the situations in those places constituted a threat to the peace. Silence on, or failure to disapprove of, unauthorised regional military enforcement action is not sufficient proof of implied authority. There is no basis in international law to interpret silence or inactivity on the part of the Security Council as being an implicit authorisation of the use of force. These cases are therefore not good precedents in support of this doctrine.

On military enforcement action by regional organisations, Article 53 does not prescribe ‘express’ authorisation by the Council, and this has been interpreted to open the way not only for ex post facto, but also for implied authorisation. Thus an intervention by a regional organisation in support of earlier Security Council resolutions and on the basis of a Council’s determination that the situation in question amounts to ‘a threat to international peace and security’ has been argued to be legal. Although no certain form is provided in the UN Charter for the authorisation of regional organisations, the legality of the doctrine on implied authorisation in the absence of explicit authorisation has scant support in the Charter. Neither Article 53 nor a teleological interpretation of the UN Charter accommodates ‘implicit authorisation’. Ress and Bröhmer declare that the possibility of implicit authorisations limits the Security Council’s capability to control regional action, thus endangering the dominant role of the Security Council on enforcement measures. There is, furthermore, insufficient general and consistent practice to show that such an interpretation of the UN Charter would be permitted.

However, Ress and Bröhmer claim authoritatively that a strict position of international law proper on this issue may likewise be too rigid from a practical perspective, and that some degree of implicitness should be allowed in the light of the Security Council’s dominant role in these cases. But they argue that implied authority could only flow from specific circumstances present:

Thus, an implied authorisation can only flow from a resolution passed on the matter that also contains language pointing towards an implied authorisation of enforcement measures. In addition, such a resolution requires the concurring independent statements by member states of the Council.


2235 Ibid., p 866, para. 23.

vote of the permanent members and a majority of all SC members (Art. 27(3)). In passing such a resolution it would be clear to the members of the SC that their action could be taken as an implicit authorisation and they could be asked to behave accordingly.2237

Thus the doctrine of implied authorisation has been suggested legis ferenda by Ress and Bröhmer to be conceivable under exceptional circumstances: 1) if the Security Council resolution language points towards implied authority, 2) the resolution is passed with a concurring vote of the five permanent members and the majority of all Council members, and 3) it is clear to the members of the Council that their action will be as an implicit authorisation.2238 But they add that the doctrine is only conceivable if a number of additional factors fall into place: 1) the need for urgent action, 2) unanimity of the permanent Security Council members, and 3) sufficient evidence for tacit Council approval of the action. These are all necessary factors that need to be present.2239

The Kosovo Case is not a good precedent of the doctrine of implied authorisation if matched against these criteria.2240 The Belgian delegate argued before the ICJ in the Legality of the Use of Force Cases that:

As regards the intervention, the Kingdom of Belgium takes the view that the Security Council’s resolutions which I have just cited provide an unchallengeable basis for the armed intervention. They are clear, and they are based upon Chapter VII of the Charter, under which the Security Council may determine the existence of any threat to international peace and security.2241

Despite this reasoning referring to resolution 1203 and implied authority, the NATO intervention in FRY 1999 has been considered to be illegal and a violation of Article 53.2242 The doctrine of implied authority is difficult to apply in this case because two permanent members of the Security Council (Russia and China) were expressly opposed to the intervention beforehand and post facto the intervention. An authorisation to use force could therefore not be deduced from the previous resolutions on the situation in Kosovo, and not from the behaviour of relevant actors.

In summary, the doctrine of implicit authorisation is not part of lex lata, and there appears to be insufficient valid general, uniform and

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2238 Ibid., p. 866, para. 24.
2239 Ibid., p. 866, para. 25. These conditions would also apply to the acceptance of the theory of ex post facto authorisations in exceptional circumstances, according to the UN Commentary.
2240 See e.g., the reasoning in Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 214.

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consistent practice supported by *opinio juris* for ‘implied authority’ as a legal basis for military interventions by regional organisations, but it could *de lege ferenda* be applied under exceptional circumstances if certain factors are present.

**Tacit Authorisation**

Tacit authorisation implies that an absence of condemnation by the Security Council of earlier unauthorised enforcement action is to be interpreted as an authorisation.\(^{2243}\) In Lind’s analysis on the legal debates surrounding ‘tacit’ authorisation of the Security Council he concludes that Article 53 of the UN Charter does not accommodate tacit approvals of enforcement action by regional organisations.\(^{2244}\) The opposite conclusion would be absurd; regional organisations in which permanent members of the Security Council are member states, would be able to act with almost complete freedom since their use of force would never be condemned by the Security Council.

The argument of tacit authorisation was nevertheless used by Belgium after the Kosovo intervention in its pleadings at the ICJ (Legality of the Use of Force Cases), where it referred to the rejection of the Russian Draft resolution, which was to condemn the NATO intervention, as a proof of tacit consent.\(^{2245}\)

**Amnesty**

Gestri argues *de lege ferenda* that the case of Liberia could be viewed as one case of ‘amnesty’ for an action that in itself should be considered to be illegal.\(^{2246}\) The Council resolutions commending the intervention remedied or at least expressed acquiescence with regard to the illegal action. Gestri also mentions the cases of intervention in Uganda (1978-79), Kosovo (1999) and Iraq (2003) as examples of such Security Council amnesties. He distinguishes the phenomenon of amnesty from that of *ex post facto* authorisation in that the latter theory would allow the Council to bring an already initiated operation back into the UN system and its authority, while amnesty refers to a Council “pardon to an operation unlawfully carried out by a regional organisation, in view of political or ethical reasons overriding the strict application of the Charter”.\(^{2247}\)

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\(^{2244}\) Ibid., pp. 148-151.

\(^{2245}\) Ibid., pp. 148-151.

\(^{2246}\) Ibid., pp. 148-151.

\(^{2247}\) Gestri, *ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?*, p. 233; Cf. Frank, Thomas M., *Interpretation and change in the law of humanitarian intervention*, Holzgrefe, J. L., Keohane, Robert O. (Eds.), *Humanitarian intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2003, p. 226, who states that no undesirable consequences followed on NATO’s illegal intervention in Kosovo because the illegal act produced a more legitimate result in keeping with the intent of the law, than had no action been taken.

\(^{2247}\) Gestri, *ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?*, p. 234.
theory of amnesty for unlawful use of force is not generally accepted by states as *lex lata*.

**CONCLUSION**

Theories of *ex post facto* and implied authorities are not yet part of *lex lata* and there is insufficient practice to support such customary norms supporting an evolutionary interpretation or an informal modification of Article 53 of the UN Charter. But in exceptional cases, Ress and Bröhmer argue *de lege ferenda* in the UN Commentary that both theories could be accepted if certain factors are present. Thus the theory on implied authority would be conceivable for RHI under very specific and limited circumstances: 1) if the Security Council resolution language points towards implied authority, 2) the resolution is passed with a concurring vote of the five permanent members and the majority of all Council members, and 3) it is clear to the members of the Council that their action will be taken as an implicit authorisation. On the application of the theory of *ex post facto* authorisation for RHI it is up to the Security Council to evaluate and determine the presence of exceptional circumstances for a subsequent authorisation legalising the particular action. It could, however, only be applied to situations where prior authorisation would not, and could not, have changed the course of action. In both cases the application of the theories must be based upon 1) a need for urgent action, 2) the unanimity of the permanent Security Council members, and 3) sufficient evidence for tacit Council approval of the action in question. Article 53 does not accommodate tacit approvals of enforcement action by regional organisations and the theory of amnesty for unlawful use of force is not generally accepted by states as *lex lata*.

**7.1.4.1.3. The link theory – A subsidiary responsibility for peace and security?**

Another argument for RHI revolves around the possibility of regional organisations having a subsidiary right to carry out humanitarian interventions, if the Security Council were to fail to act efficiently under its responsibilities in accordance with Article 24 of the UN Charter. The idea of a subsidiary right for peace and security issues has been called the ‘link theory’. Different legal arguments have been advanced in the literature with respect to which actor would have such subsidiary right – another UN organ, individual member states acting separately, or individually or through regional organisations.

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2252 See DUPI Report (1999), p. 82. A scholar advancing this theory is Abass, Ademola, *The
For example, Abass claims that the presence of the phrase “primary responsibility” in Article 24 negates any proposition that the fathers of the UN Charter had any intention of giving the Security Council an exclusive authority over the maintenance of peace and security.\footnote{Abass, \textit{Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter}, p. 131. Nothing in the travaux préparatoires discloses any such intention.} He therefore proposes (lege ferenda) that regional organisations be granted a residual responsibility for the maintenance of peace and security when the Security Council fails to take prompt and effective measures according to Article 24.\footnote{Ibid., pp. 135-140. He argues that since states historically transferred their enforcement powers to the Security Council collectively in 1945 on certain conditions, the repossessing of those powers when conditions are not met can only be achieved collectively. Regional organisations are according to Abass the best candidates to assume such a residual role.} The travaux préparatoires of the UN Charter do not, however, support a subsidiary right to decide on forceful enforcement action for regional organisations.\footnote{Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, p. 172; see also Ress/Bröhmer, \textit{Article 53, Simma, Simma (Ed.), The Charter of the United Nations. A Commentary}, 2nd edition, p. 860, para. 2.} Lind argues convincingly that a right for regional organisations would in any case have to depend on the existence of such a subsidiary right of individual member states of the UN.\footnote{Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, p. 172.} As is shown in Chapter 7.2.3. on UHI and the link theory, the theory has no legal basis in the UN Charter with respect to individual states and UHI.\footnote{Rytter, \textit{Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond}, p. 130.}

7.1.4.2. Regional treaty developments

7.1.4.2.1. (Sub-) Regional treaty developments in Africa

There have been several treaty developments on the African continent in (sub-) regional organisations within the context of regional collective security, providing a new legal basis for (sub-) regional organisations to intervene in a member state by military means for humanitarian purposes. The common feature of these legal rights for intervention is that they are based upon so-called prior treaty-based consent and a lack of express requirement of Security Council authorisation.

Several scholars argue that these treaty developments instituting a new peace and security architecture on the African continent are broadly consistent with the basic principles of R2P, and that the Act of the

Security Law, vol 5, 2005, pp. 211-229. Jessup advanced this claim of subsidiarity with} \\
\textit{respect to individual states for the purpose of protection of foreign nationals and property} \\
in another state and for regional arrangements to maintain international peace and security in relation to international armed conflicts when the Security Council is deadlocked, see Jessup, Philip C., \textit{A Modern Law of Nations, The Macmillan Company, New York, 1948, pp. 170, 207. Thus none of these circumstances are applicable to the RHI situation. Cf. the} \\
\textit{interpretation of Jessup by Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional} \\
Organisations and Collective Security, pp. 171-172. See more on the link theory in Chapter 7.2.3.} \\
\textit{with regard to individual states and UHI.}
African Union (the AU Act), for example, enshrines a responsibility to protect.\textsuperscript{2258} It has even been argued that the prior African practice of unauthorised interventions for humanitarian purposes in Liberia and Sierra Leone might have risen to the level of a doctrine of regional customary law that has now been codified in these treaties.\textsuperscript{2259} Whether ‘prior treaty-based’ consented interventions are reconcilable with international law will be further developed in the next chapter.

Commentators indicate that the African states realised that they could not depend on the member states of the UN Security Council for the maintenance of peace and security in Africa, and as a result have taken control over their own destinies on regional peace and security in a way that departs from the collective security system envisaged in the UN Charter.\textsuperscript{2260} The failure of the UN in the Rwanda genocide, and the ECOWAS unauthorised interventions in Liberia and Sierra Leone are mentioned as factors contributing to this development where African states have moved to establish different mechanisms to ensure that genocide and mass killings never recur. The capability of the new collective security systems to halt such atrocities, however, have shown to be weak and unreliable, as the examples of Darfur and Congo continue to shed lives – mainly from lack of resources, capacity, political will and strong political leadership. One contributing factor to the issue of resources is that the AU Act lacks provisions for its financing.\textsuperscript{2261}

\textbf{THE AFRICAN UNION}

The Constitutive Act of the African Union (the AU Act) was agreed on in Lomé on 11 July 2000 and officially took effect Durban in July 2002.\textsuperscript{2262} It departs from its predecessor the OAU, in that it has

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  \item \textsuperscript{2262} Constitutive Act of the African Union, Lomé, Togo, 11 July, 2000. For an overview of its drafting process and the formation of the AU, see Packer and Rukare, \textit{The New African
abandoned the principle of non-intervention in favour of the principle of non-indifference. According to Powell, the AU Act stands as the first international treaty to identify a right to intervene in a state for humanitarian objectives in cases other than genocide. Article 4 (h) of the Act, which provides for the principles for the function of the AU, acknowledge:

the right for the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

It is the Assembly of Heads of State and Government which has a right, but not a duty, to take the decision of military intervention when the enumerated grave circumstances are present within a state. Definitions of these crimes have not yet been agreed by the AU, although Powell argues that it is likely that it will adopt those enshrined within the Rome Statute.

Commentators have from this article gathered that the AU has appropriated for itself the role which the UN Security Council is meant to play, and in essence denies the Security Council its primary responsibility of maintaining international peace and security. Furthermore, it is claimed that the AU Assembly is not, according to Article 4 (h), obliged to wait for the consent of the member state concerned, and that this will facilitate decisions on intervention.

At the same time as its official launch, the Assembly of the AU adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (the PSC Protocol (2002)), which set up the AU Peace and Security Council (PSC). Article 2 (2) of the PSC Protocol provides that the PSC shall be supported by the Commission, a Panel of the Wise, a Continental Early Warning System,

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2265 Article 4 (h), AU Act (2000). Article 4 (j), gives the right to member states to request intervention from the Union in order to restore peace and security.
2269 Kioko, The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention, p. 817.
an African Standby Force and a Special Fund.2271 The Protocol came into force January 2004 and on 15 March 2004 the Ministers of Foreign Affairs, acting in their capacity as the Executive Council of the AU, elected the 15 members to serve on the PSC. It was subsequently inaugurated on 25 May 2004.2272 Among the powers granted to the PSC, set out in Article 7 of the PSC Protocol, it shall 'in conjunction with the Chairperson of the Commission’

recommend to the Assembly, pursuant to article 4 (b) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments.2273

As Allain observes the actual power of decision in situations of recourse to the use of force does not lie with the PSC specifically, but remains with the Assembly of Heads of State and Government, which is the supreme organ of the AU.2274 But the Assembly has the authority to delegate any of its powers and functions to any organ of the Union, according to Article 9 of the AU Act.2275 The Assembly takes its decisions by consensus, or if failing, by a two-thirds majority of the member states of the AU.2276 The rules of procedure of the Assembly, also adopted in Durban in July 2002, confirm the power and function of the Assembly to “decide on intervention in a Member State in respect of grave circumstances namely, war crimes, genocide and crimes against humanity”.2277

The African Standby Force (ASF) was established in order to enable the PSC to perform its responsibilities with respect to the deployment of peace support missions and interventions pursuant to Article 4 (h) and (j) of the Constitutive Act.2278 The Force shall consist of both military and civilian personnel and be ready to deploy at short notice.2279 It is envisaged that these forces would be available by 2010.2280

2271 For an overview of the functions of these organs see Allain, The True Challenge to the United Nations System of the Use of Force: the Failures of Kosovo and Iraq and the Emergence of the African Union, pp. 270-275.
2273 Article 7 (e), Protocol relating to the establishment of the PSC of the AU (2002).
2275 Article 9 to be read in conjunction with Article 5 (2) of the AU Act.
2276 Article 7 (1), AU Act (2000). Procedural matters including the question whether or not a matter is one of procedure shall be decided by a simple majority.
2277 Article 4 (l)(e), African Union, Rules on procedure of the Assembly of the Union, ASS/AU/2(I), Durban, 9-10 July, 2002.
2278 Article 13, Protocol relating to the establishment of the PSC of the AU (2002).
2280 Ibid., p. 273.
which set up the force, gives no indication of a prior Security Council authorisation for its deployment, but states that:

In undertaking these functions, the African Standby Force shall where appropriate, co-operate with the United Nations and its Agencies, other relevant international organisations and regional organisations, as well as with national authorities and NGOs.\footnote{Article 13 (4), Protocol relating to the establishment of the PSC of the AU (2002). [Italics by author]}

It is argued that the PSC Protocol does not subordinate the actions of the AU to those of the UN Security Council.\footnote{Allain, The True Challenge to the United Nations System of the Use of Force: the Failures of Kosovo and Iraq and the Emergence of the African Union, p. 265.} Despite its lack of express recognition of this hierarchy, it does in several places mention the obligations of the UN Charter, and attempts in some form to regulate its relationship to the organisation. In the preamble of the PSC Protocol, the Heads of State and Government of the member states of the AU declare that they are

mindful of the provisions of the Charter of the United Nations, conferring on the Security Council primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer co-operation and partnership between the United Nations, other international organisations and the African Union, in the promotion and maintenance of peace, security and stability in Africa.\footnote{Protocol relating to the establishment of the PSC of the AU (2002).}

The relationship with the UN and other international organisations is further expressly elaborated in Article 17 of the PSC Protocol:

1. In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall co-operate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also co-operate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.  
2. Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union’s activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organisations in the maintenance of international peace and security.\footnote{[Author’s italics]}

This article makes plain the dislodgement of the UN Security Council from its point of primary responsibility for the maintenance of peace and security on the African continent, according to Allain.\footnote{Allain, The True Challenge to the United Nations System of the Use of Force: the Failures of Kosovo and Iraq and the Emergence of the African Union, p. 175.} Even if it
acknowledges that the Security Council retains the primary role for the maintenance of international peace and security, it does not relegate the PSC to an obligation to defer to the UN in its action, and therefore diffuses the primary role of the Security Council, according to some scholars. Allain and Puley argue that there is no indication of a specific role of the Security Council to authorise a proposed intervention by the AU, but rather they see the Protocol as prompting the UN to assist the PSC in carrying out its activities.

Allain believes that Article 17 of the PSC turns the UN system on its head and formally makes the AU opt out of the normative framework of the United Nations System. This may be an excessively negative interpretation of the Protocol, which in several places does in fact recognise the UN Charter obligations and primary responsibilities in the area of peace and security. Furthermore, Article 103 of the UN Charter prevents such treaty developments and interpretations that change the supreme hierarchical position of the UN Charter among treaties. The question whether the UN collective security system and governance over peace and security is truly challenged by these treaty developments will be further discussed later. (See Chapter 7.1.4.2.2.)

In 2003 the AU Act was amended through the Protocol on Amendments to the Constitutive Act (the Amendment Protocol (2003)), and the Assembly’s powers to decide on an intervention were further expanded. Article 4 (h) of the AU Act was given one more criterion by the additional phrase:

This new phrase, or ‘residual clause’, adds a legally non-defined situation as an intervention ground. It sticks out in comparison with the other criteria, which have been defined in international instruments, such as the Geneva Conventions, the Statutes of the ad hoc tribunals and the ICC, as well as in the case law of the tribunals. For natural reasons it has managed to gather some criticism by commentators – for example, that it will facilitate interventions aimed at protecting regimes rather than people. At the end of the day, it will be the Assembly that makes a


2288 Article 103 provides: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”


decision of what falls within the clause. Interestingly enough, since the
Amendment Protocol was adopted after the PSC Protocol, Allain has
asserted that the PSC does not have recommendatory powers to act with
respect to this residual clause. This new pretext for allowing the use of
force on the African continent is argued to go beyond the Security
Council’s competence to act under Chapter VII of the United Nations
Charter. If concurrent consent cannot be attained for a military
intervention by the AU based upon this new residual clause, and
authorisation is not sought from the Security Council, such intervention
could very well be seen as a violation of the prohibition on the use of
force and of Articles 2 (4) and 53 of the UN Charter.

In 2005 the AU expressly confirmed its move away from the UN
collective security system in the Ezulwini Consensus, the common
African position on UN reform, and acknowledged the need to accept ex
post facto authorisation of the Security Council in certain situations when
engaged in enforcement action for the purposes of complying with the
responsibility to protect. It stated that humanitarian interventions by
the AU (RHI) should be made with the approval of the Security Council,
but added that

although in certain situations, such approval of the Security Council could be

granted “after the fact” in certain circumstances requiring urgent action. In such
cases, the UN should assume responsibility for financing such operations.

Moreover, the PSC Protocol regulates the relationship and coordination
between the ‘Regional Mechanisms’ for conflict prevention,
management and resolution on the one hand, and the AU on the other
(in particular the PSC and the AU Commission). Article 16 (1) of the
PSC Protocol demonstrates a total rejection of the collective security
system prescribed by the UN Charter in stating that

[the Regional Mechanisms are part of the overall security architecture of the
Union, which has the primary, responsibility for promoting peace and security
and stability in Africa.

and Iraq and the Emergence of the African Union, pp. 281-282.
2292 Ibid., p. 283.
2294 Article B (i) on ‘Collective Security and the Use of Force. The Responsibility to
Protec’t, ibid., p. 6.
2295 Regional Mechanisms refer to sub-regional agencies and their instruments and
mechanisms for the coordination of regional defence and security policies, see Allain, The
True Challenge to the United Nations System of the Use of Force; the Failures of Kosovo and Iraq and the
Emergence of the African Union, pp. 275-276.
Eight African regional organisations are mentioned in the ‘Common African Defence and Security Policy’, constituting part of the ‘Regional Mechanisms’ under the PSC Protocol and with the capacity to act in the domain of peace and security. Unlike the West African states, East African states do not yet have in place a functioning sub-regional mechanism for collective intervention, but adopted in 2005, through the Inter-Governmental Authority on Development (IGAD), the Policy Framework, Memorandum of Understanding, and Budget for the establishment of the East Africa Standby Brigade (EASBRIG). This lack of sub-regional capacity to deal with security in East Africa is hence in need of further support for development and capacity building.

In the Southern region, the Southern African Development Community (SADC) has developed procedures for intervention in the event of ‘extra-ordinary’ crises. The SADC Protocol on Politics, Defence and Security Co-operation, which came into effect on 2 March 2004, allows for military enforcement action by the SADC Regional Brigade in the case of significant intrastate conflict, including large-scale violence between sections of the population including genocide, ethnic cleansing and gross violations of human rights; a military coup or other threat to the legitimate authority of a state; a condition of civil war or insurgency, and a conflict with threatens peace and security in the region of in the territory of another state party.

West African states, through the Economic Community of West African States (ECOWAS), decided in 1999 to institutionalise the
power it appropriated from the Security Council in the domain of peace and security through its actions in Liberia and Sierra Leone, and adopted the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (the ECOWAS Protocol (1999)).

In this context only the ECOWAS Protocol will be further analysed, as it constitutes a codification of humanitarian interventions by a regional organisation based upon prior (treaty-based) consent of the member states of a sub-regional organisation. Among the main responsibilities of ECOWAS is to intervene to alleviate the suffering of the populations and restore life to normalcy in the event of crisis, conflict and disaster. The organisation shall in this regard “develop own capacity to efficiently undertake humanitarian actions for the purposes of conflict prevention and management.” Article 25 of the Protocol lays down the conditions for the application of its ‘Mechanism’ for conflict prevention and stipulates that it shall be applied:

(c) In case of internal conflict:
   (i) that threatens to trigger humanitarian disaster, or
   (ii) that poses a serious threat to peace and security in the sub-region;
   (d) In the event of serious and massive violation of human rights and the rule of law
   (e) In the event of an overthrow or attempted overthrow of a democratically elected government
   (f) Any other situation as may be decided by the Mediation and Security Council.

The multinational Cease-fire Monitoring Group ECOMOG was formally established by the ECOWAS Protocol in 1999, but previously and informally established by ECOWAS in 1990 for the intervention in Liberia, and subsequently Sierra Leone. The role of ECOMOG is regulated in Article 22, which provides that it is charged with undertaking missions for the purpose of:

(b) peace-keeping and restoration of peace
(c) humanitarian intervention in support of humanitarian disaster

expanded its competence to security matters. Gestri, *ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rulers*, p. 213.


2304 For the objectives of the 'Mechanism', see Article 3, *ibid*.

The Mediation and Security Council of ECOWAS has responsibility for considering the available options and to decide on the most appropriate course of action on terms of intervention.\textsuperscript{2306} Article 10 (c) and (d) of the ECOWAS Protocol provides that the ‘Mediation and Security Council’\textsuperscript{2307} of ECOWAS shall authorise all forms of intervention and decide particularly on the deployment of political and military missions as well as to approve mandates and terms of reference for such missions.

On the relationship between ECOWAS and the UN, the ECOWAS Protocol calls for the Chairman of the ‘Mediation and Security Council’ to submit a report on the situation in question to the UN, when an urgent measure has been taken, according to Article 27.\textsuperscript{2308} Furthermore, Article 52 provides that ECOWAS shall co-operate with the UN in pursuit of its objectives, and shall inform the UN of any military intervention undertaken in pursuit of the objectives of this Mechanism in accordance with Chapters VII and VIII of the UN Charter.\textsuperscript{2309} ‘Undertaken’ clearly denotes an act that has already taken place, and that the information to the UN may take place after the action has been initiated. In a situation where there is no concurrent consent of the state in question that is subject to intervention by ECOWAS (see Chapter 7.1.4.2.2.), this order of things would be inconsistent with the wording of Article 53 of the UN Charter, which requires a prior Council authorisation for an intervention by a regional organisation, unless in exceptional circumstances (see Chapter 7.1.4.1.2.). No explicit requirement mentioned in the Protocol of a Security Council authorisation for interventions apart from this reference to Chapters VII and VIII of the UN Charter. For it to be legal there has to be either concurrent consent, or a prior Security Council authorisation, or a situation falling under exceptional circumstances, warranting \textit{ex post facto} or implied authorisation. It could therefore be argued that in situations not falling under these categories, such interventions would not conform to the UN Charter.

According to the study Puley has made on the Responsibility to Protect in Africa, consultations among the African stakeholders involved in the project showed little or no unease that the formalisation of enforcement powers at the continental or sub-regional levels would undermine the role or authority of the UN Security Council.\textsuperscript{2310} He concludes that the reinterpretation of state sovereignty does not trigger the same alarm bells in Africa as in other regions of the world.


\textsuperscript{2307} For its composition and functions, see Articles 8 and 10, \textit{ibid.}

\textsuperscript{2308} Article 27, cl 6, \textit{ibid.}

\textsuperscript{2309} Article 52, cl. 1 and 3, \textit{ibid.}

\textsuperscript{2310} Puley, \textit{The Responsibility to Protect: East, West and Southern African Perspectives on Preventing and Responding to Humanitarian Crises}. Working Paper, p. 19. Another interpretation would be that this passage of the Protocol is a nullity according to Article 103 of the UN Charter.
7.1.4.2. Prior treaty-based consent and RHI

Several different legal issues are involved in the analysis of the legality of the above mentioned regional treaties embedding prior treaty-based consent to humanitarian intervention by regional organisations. In order to answer the question of whether or not the codification of prior consented intervention is legal, these issues will be treated under four sections: 1) whether treaty-based consent can replace host state consent as a legal basis for CHI, 2) whether such treaties are void ab initio because they are considered to regulate an exception to a jus cogens norm (the prohibition on the use of force), 3) whether treaty-based consent as a legal basis for intervention accords with the UN Charter, and 4) whether new practice on the basis of these treaties lacking Security Council authorisation may informally modify Article 53 of the UN Charter.

TREATY-BASED CONSENT AS A LEGAL BASIS FOR RHI

The main question to be considered is whether treaty-based consent can replace or supplement the customary rule on host state consent (see Chapter 7.1.3.) for interventions when there is no Security Council authorisation.

According to the ILC Articles on State Responsibility, a valid consent may constitute a circumstance precluding wrongfulness of states as long as the act in question remains within the limits of that consent. The literature is clear and unambiguous in that states may bind themselves by giving consent to intervention by an organisation beforehand in a treaty. The UN Charter is an illustration of this.

Whether this makes treaty-based consented intervention lawful per se is another matter, and it is contended that the answer depends on whether or not the consent is withdrawn at the time of intervention – the existence of so-called ‘concurrent consent’. This is not necessary with respect to the UN Charter rules on the use of force, but it could be said that this is a necessary condition for an intervention by a regional organisation, since the UN Charter obligations prevail over all other treaty obligations. Article 103 of the UN Charter lays down the supremacy of the UN Charter in situations of conflict.

There exist several bilateral and multilateral treaties of guarantee, authorising external enforcement of internal settlements – however, not with regional organisations, which are referred to as examples of this practice. Wippman contends that the validity of such treaties under

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2313 Thomas and Thomas, Non-intervention. The Law and its Import in the Americas, p. 96.
2314 Abass, Regional Organisations and the Development of Collective Security. Beyond Chapter VII of the UN Charter, p. 202; Wippman, Treaty Based Intervention: Who Can Say Not?, pp. 607-608, see notes 4 to 10; Ronzitti, Use of Force, Jus Cogens, and State Consent, pp. 157-158; Brownlie, International Law and the Use of Force by States, pp. 318-320, who states that these treaties in many cases were the product of a relationship in which the interests of one party were subordinated to the interests of the other, but that the legal developments after 1920 have
the ‘concurrent consent model’ is dependent on the concurrent will of the contending communities at the moment of treaty formation, and at any later point in time at which treaty revocation might be sought. The question arises whether such ‘unilateral treaties of guarantee’ between a few states could (or should) be legally compared with multilateral treaties setting up regional collective security mechanisms for limited and defined purposes. Abass argues that this difference is necessary to acknowledge and such treaties which establish regional security arrangements must be distinguished from general ‘Treaties of Guarantee’. According to him, the former must be interpreted to preclude the operation of Article 2 (4) since the parties concerned in giving consent did not intend to use force against their territorial integrity. However, this argument holds only to the extent that the treaties do not also convey intervention rights for other purposes, which the relevant African treaties actually do.

Most scholars appear to be in favour of a requirement of parallel or concurrent consents for such interventions to be legal without Security Council authorisation, but there is also a minority who argue that there is no requirement of further consent in the AU Act. Wippman, who has elaborated extensively on a ‘concurrent consent model’, believes a second parallel consent is necessary. He contends that states remain free to rescind consent to coercive external intervention, but that the consent to intervention, assuming it is freely given, continues in force until revoked. He therefore maintains the view that there must be ‘two moments’ of consent: At the moment of treaty formation and at the moment of intervention or revocation of the consent. But Wippman’s position on treaties having the purpose of protecting human rights entails an additional limitation, in that a government involved in gross human rights abuses should not be deemed capable of revoking the state’s prior consent to intervention. He argues that such a government cannot reasonably be deemed to represent the state as a whole. If violations are extensive and systematic, the state consists of more than one political community. When a split in the political community of the state exists, he argues that the community that suffers rendered the provisions for intervention somewhat incongruous.

Referenced works:

- Ibid., pp. 624, see also 626 et seq. on the issue of ‘who’ speaks for the state. He also argues for a broadened view of what constitutes ‘the will of the state’ for failed states or states in internal strife.
from human rights violations can veto any effort to revoke the treaty’s grant of authority to intervene. Wippman also analyses the important issues of ‘whose will’ counts and what constitutes ‘coerced consent’, but for reasons of space these issues will not be further developed here.

Hannikainen states that it is problematic if the consent is given for the distant future without a requirement that a specific consent shall be given shortly before the proposed intervention. His conclusion supports Wippman’s call for concurrent or parallel consent. In a similar vein, Thomas and Thomas explain that even if the state concerned breached the treaty by withdrawing its consent, another member state to the treaty may not take forceful reprisals against such a breach, and would hence violate the principle of non-intervention and Article 2 (4) of the UN Charter by intervening with military force.

A revocation of prior treaty-based consent is thus possible, which would support the concurrent consent model. Lind is in accord with previous scholars, but only if the target state were to honour the obligation to accept intervention at the time of the intervention. Only then would it be admissible. He asserts in his thesis that the rules on prior consent to military intervention must be construed to imply that the state cannot be bound to give up the right to waive its consent to the use of force and that there will always be a requirement of a current consent parallel to the treaty-based consent at the time of intervention. Lind concludes: “[t]he regional organisation’s right to intervene based upon such consent is curtailed since such a treaty cannot waive the right of the receiving state to withdraw the consent”.

Abass, on the other hand, believes that “the advantage of desegregating consent by these treaties is that it dispenses with the need to obtain specific consent in a crisis situation”. He further reinforces his position by claiming that with regard to the AU Act “[o]nce a state has given its consent, it cannot go back, except as may be permitted by the Act”. Moreover, he believes that if the concerned state did not

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2322 Ibid., p. 680.
2323 See ibid., pp. 624-646. See also Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, p. 349 on the question of when the subsequent consent is coerced.
2324 Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, p. 342. He furthermore asserts that it appears that a treaty which entitles a state to make a future dictatorial armed intervention in the domestic policies of another state, without the specific consent of that other state, violates the *jus cogens* aspects embodied in Article 2 (4). However, it is further explained that this proposition is limited to the aggressive and dictatorial use of force, and not humanitarian interventions. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, pp. 347-348.
2327 Ibid., pp. 161, 163.
2328 Ibid., p. 165.
consent to such an intervention it would be immaterial.\textsuperscript{2331} Kioko confirms the interpretation that the AU Assembly is not, according to Article 4 (h), obliged to wait for the consent of the member state concerned, which will facilitate decisions on intervention.\textsuperscript{2332} Lind takes an opposite position and argues that the AU Act does not appear to codify a general right of military intervention despite the lack of current consent of the target state.\textsuperscript{2333} Abass, however, concedes that a withdrawal of the AU membership would amount to a withdrawal of the consent to intervention under the AU Act, and an intervention in such a situation would then give rise to a violation of Article 2 (4) of the UN Charter.

\textbf{TREATY-BASED CONSENTED INTERVENTION AND \textit{JUS COGENS}}

Article 53 of the VCLT stipulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Furthermore, although it was stated above that consent may preclude the wrongfulness of a state act, this rule does not apply to the extent of a state act violating a \textit{jus cogens} norm.\textsuperscript{2334} Thus, consent to violations of a peremptory norm of general international law is not permitted, according to Article 26 of the ILC Articles on State Responsibility.\textsuperscript{2335}

The scope of the \textit{jus cogens} aspects of the prohibition on the use of force has been widely discussed in the literature, and lawyers are divided on the issue.\textsuperscript{2336} But many appear to argue in line with the ICJ in the Nicaragua Case that one must separate the most grave forms of the use of force from lesser grave forms, and that only the aggressive forms of the use of force should be viewed as part of \textit{jus cogens}. Hannikainen asserts that interventions for humanitarian purposes are not within the “essential sphere” of the presumably peremptory norm of the prohibition on the use of force,\textsuperscript{2337} and supports the view that a treaty which entitles a state to make a future dictatorial armed intervention in the domestic policies of another state, would hence not violate the \textit{jus cogens} aspects embodied in Article 2 (4).\textsuperscript{2338} Thus, the \textit{jus cogens} aspect of the prohibition on the use of force is limited to its aggressive and dictatorial use of force.\textsuperscript{2339} Ronzitti also holds that the peremptory rule

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{2331} Ibid., p. 16.
\item\textsuperscript{2332} Kioko, \textit{The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention}, p. 817.
\item\textsuperscript{2333} Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective Security}, p. 164.
\item\textsuperscript{2336} For a brief overview of known scholars on this issue see Ronzitti, \textit{Use of Force, Jus Cogens, and State Consent}, p. 17.
\item\textsuperscript{2337} Hannikainen, \textit{Peremptory Norms (Jus Cogens) in International Law}, p. 340.
\item\textsuperscript{2338} Ibid., p. 347.
\item\textsuperscript{2339} Ibid., p. 348.
\end{enumerate}
\end{footnotesize}
banning the use of force in international relations has a narrower
definition than the corresponding rule contained in Article 2 (4) of the
UN Charter.\textsuperscript{2340} Abass likewise concludes that in the context of Article 2
(4), only the prohibition on aggression has become a peremptory norm
of international law.\textsuperscript{2341} Non-aggressive use of force is not directed
against the territorial integrity or political independence of other
states.\textsuperscript{2342} Many authoritative scholars appear to support this
interpretation (see more on this in Chapter 2.6.2. above).

Wippman also bases his analysis upon the validity of prior treaty-
based consented interventions on a limited view of \textit{jus cogens} and the use
of force.\textsuperscript{2343} Interventions for humanitarian purposes to protect human
rights would not fall under the limited conception of the \textit{jus cogens} norm
prohibiting the use of force. Abass also arrives at the same
conclusion.\textsuperscript{2344}

As shown earlier, \textit{jus cogens} does not prohibit bilateral or multilateral
treaties giving prior consent to military interventions, as long as the
target state honours its treaty obligation to accept an intervention.\textsuperscript{2345} If,
however, the consent is withdrawn at the time of an intervention, the
legal basis for the intervention is ended.\textsuperscript{2346} (See also Chapter 2.6.2.)

**TREATY-BASED CONSENTED INTERVENTION AND THE
UN CHARTER**

Does a treaty which includes prior consent to intervention by a regional
organisation come into conflict with or violate the UN Charter?
Brownlie stated in 1963 that the limitations on the resort to force in the
UN Charter do not relate to a case where express permission to
intervene is given by treaty commitment.\textsuperscript{2347} The treaty itself does not
come into conflict with the UN Charter, but the question to consider is
whether an intervention based upon it will – with or without concurrent
consent.

Abass, representing one of the most positive proponents of prior
treaty-based consented interventions, claims that Article 10 (c) of the
ECOWAS Protocol (1999) empowers the organisation to dispense with
Security Council authorisation as "\textit{sine qua non} to its enforcement action
in West African conflicts".\textsuperscript{2348} The regulation in the AU Act is perceived

\textsuperscript{2340} Ronzitti, \textit{Use of Force, Jus Cogens, and State Consent}, pp. 150, 159.
\textsuperscript{2341} Abass, \textit{Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of
the UN Charter}, pp. 197-200.
\textsuperscript{2342} Ibid., p. 199.
\textsuperscript{2344} Abass, \textit{Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of
\textsuperscript{2345} Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective
\textsuperscript{2346} Lind, \textit{The Revival of Chapter VIII of the UN Charter. Regional Organisations and Collective
Security}, p. 161; Thomas and Thomas, \textit{Non-intervention. The Law and its Import in the Americas},
pp. 95-96.
\textsuperscript{2347} Brownlie, \textit{International Law and the Use of Force by States}, pp. 320-321.
\textsuperscript{2348} Abass, \textit{Africa at the Crossroads: Current Themes in African Law: VI. Conflict Resolution in
to have a similar effect. Abass maintains that consent given by states through a treaty to regional organisations to use force on their territories may, in specified circumstances not involving aggression, be in compliance with Article 2 (4).\textsuperscript{2349} Such consent would thus preclude the operation of Article 2 (4) in respect of regional actions not violating a peremptory norm such as for example, interventions for humanitarian purposes – RHI. Others add that this holds true only if there is concurrent consent at the time of the operation.

Lind upholds that Article 2 (4) is \textit{lex superior}, according to Article 103, and therefore prevails before any conflicting treaty obligation.\textsuperscript{2350} But he adds that Articles 2 (4) and 103 do not prohibit bilateral or multilateral treaties giving prior consent to military interventions, as long as the target state honours its treaty obligations to accept an intervention.\textsuperscript{2351} A concurrent consent would hence grant the operation legality. RHI based upon prior treaty-based consent and concurrent consent does not constitute a so-called enforcement action under Article 53 due to the consent. It should rather be viewed as peace-keeping under Article 52 of the UN Charter.

But in situations where such concurrent consent is lacking, what is the legal status of such interventions? Wippman, the founding father of the current consent model, argues that the second consent at the time of intervention may be difficult to expect and to uphold as a legal requirement when the government concerned is the perpetrator of gross violations of human rights. A state unable and unwilling to protect its own population may not have sufficient interest to grant this consent for the benefit of the population. Thus Abass’s argument that there is no need for concurrent consent may well be reasonable with regard to humanitarian intervention but not necessarily for other forms of enforcement measure. These scholars arguably support an idea that a differentiation should be made on how to apply the consensual rule when concurrent consent is lacking, depending on whether a regional enforcement action is an RHI or another form of enforcement measure based upon prior treaty-based consent.

From their argument it would follow that an RHI based upon prior consent by treaty, but without concurrent consent, would not conflict with Articles 2 (4) or 53 of the UN Charter. There are certainly good arguments to agree that a concurrent consent would not be necessary in R2P cases where the external R2P needs to be activated and where the state concerned has been unable or unwilling to protect its own population and lacking the capacity to give a concurrent consent.


\textsuperscript{2350} Lind, \textit{The Revival of Chapter VII of the UN Charter. Regional Organizations and Collective Security}, p. 158.

\textsuperscript{2351} \textit{Ibid.}, pp. 158-161. See also Thomas and Thomas, \textit{Non-intervention. The Law and its Import in the Americas}, p. 98.
The question arises of whether such humanitarian action could base its legality upon the prior treaty-based consent alone. The consensual rules could be argued de lege ferenda to have relaxed with regard to RHI based upon prior treaty-based consent owing to the difficulty of obtaining consent by a government unable or unwilling to protect its own population (see Wippman’s argument above). Such military action lacking concurrent consent would be legally based upon the prior consent. But it would not constitute unauthorised military enforcement measures in the form of RHI contributing to the customary process of an emerging customary norm having legal effects on Article 53. It would most probably neither be regarded as peace-keeping when a concurrent consent is not obtained. It would be a sui generis humanitarian intervention legalised on a prior consensual basis. As a legal concept it would contradict its own definition.

A second option would be to regard such enforcement action as an RHI, which could contribute to the customary process informally modifying Article 53, and allow the action concerned to gain legality in exceptional cases through either the theory of implicit authorisation or that of ex post facto authorisation. (See Chapter 7.1.4.1.2.)2352 The 2002 Commentary to the UN Charter on Article 53 does not mention these types of case as being legal under the article, but states that enforcement measures by a regional organisation require prior authorisation of the Security Council, unless it is an exceptional case allowing for ex post facto or implied authority, in order to comply with Articles 2 (4) and 53. (See Chapter 7.1.4.1.2.) Lind asserted in 2004 that there was insufficient practice of collective military intervention based upon prior treaties of prior consent in cases where such unilateral intervention would otherwise be inadmissible, which could shed light on whether these forms of treaty preclude the application of Article 53.2353 He claims that neither the AU Constitutive Act nor the ECOWAS Protocol can be seen as precedents in favour of legality of regional enforcement based upon prior treaty-based consent alone.2354 The second option, however, appears most likely to gain support by states.

Since 2004, however, two new cases were made by the AU after this assertion – the African Union Mission in Burundi (AMIB) and the African Union Mission in Sudan (AMIS).2355 We shall now see how this practice has been assessed.

**Practice based upon prior treaty-based consent**

**The case of Burundi (2003) – AMIB**

Until now, we have had few such cases of RHI based upon prior consent by treaty to analyse, but there are two of such practice to which we can

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AMIB, the AU’s peace-operation in Burundi deployed in April 2003, and was the first AU operation wholly initiated, planned and executed by its members without Security Council authorisation. The central objective of the mission was to create conditions sufficiently stable for the Security Council to authorise a UN intervention. AMIB was replaced by the UN Mission in Burundi (ONUB) in May 2004 by Security Council resolution 1545, a mission robust enough and authorised to also protect civilians. The AMIB mission, however, was based upon the AU Act and the consent of the Transitional Government of Burundi. Apart from the main task of overseeing the implementation of the cease-fire agreement, one of its tasks was to facilitate the delivery of humanitarian aid, including assistance to refugees and internally displaced persons. The AMIB mission lacked a more general protection mandate for civilians and was therefore not initially to be seen as primarily an intervention for humanitarian purposes. But after several months on the ground the rules of engagement (ROE) were redrafted to allow the troops deployed there to use force to protect civilians in “imminent danger of serious injury or death”.

AMIB, however, failed in its capacity to fully realise its mandate and deliver on its revised ROE to protect civilians. Despite these flaws, the AMIB mission was heralded as a possible model for an “African solutions to African problems” approach to peace and security on the continent. A letter from the AU was sent to the Security Council at the time of its deployment on 2 April 2003, but the Council took no decisions taking over the situation or condemning the action. The Council then issued two Presidential statements in May and December 2003 in which it twice expressed its support for the speedy deployment of the African Mission in Burundi and called on donors to give it

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2356 The ECOWAS interventions in Liberia and Sierra Leone were not made on the basis of prior consent by treaty. The ECOWAS Protocol was established in 1999 and not in force at the time. The AU Mission in Somalia (AMISOM) was authorised by the Security Council on 20 February 2007 and launched in March 2007. The ECOMOG interventions in Ivory Coast in 2003 and the ECOMIL (ECOWAS Mission in Liberia) in 2003 were both authorised by the Security Council and do not count as precedents for prior treaty-based consent as the legal basis. S/RES/1464 (2003) and S/RES/1497 (2003).

2357 Murithi, *The responsibility to protect, as enshrined in article 4 of the Constitutive Act of the African Union*, p. 18.


2363 *Ibid.*, pp. 37-38. Powell lists several factors contributing to this failure, e.g. too few troops (3,500 personnel), absence of a comprehensive cease-fire, a lack of financial resources, sophisticated equipment, and proper training for the protection of civilians.

financial, material and logistical support. These approvals and the non-interference by the Council show that the legality of the action was not questioned or perceived to challenge the UN Charter and Article 53. Powell argues that the AMIB intervention gave an early indication of the contribution the AU is likely to make to promote peace and security, including protection of civilians, and that its willingness to implement the provisions in the PSC Protocol might have implications for the future.


The humanitarian catastrophe in Darfur, according to commentators, has posed the first major challenge to the AU PSC. The situation of Darfur has widely been understood to be the ‘litmus test’ of the AU’s capacity and willingness to serve as a regional force for peace and security. The African Union Mission in Sudan (AMIS) (II) was deployed in Darfur in June 2004 with a limited monitoring mission to observe and protect the implementation of the humanitarian cease-fire agreement, signed between the parties on 8 April 2004 and to protect the military observers (AMIS I). The mandate was extended by the PSC on 20 October 2004 in order to transform AMIS to a fully-fledged peace-keeping mission, and to include the protection of civilians in its mandate (AMIS II). The government of Sudan insisted that it retained the primary responsibility for the protection of civilians, which was also confirmed by the Security Council. Consequently, the mission took on itself a rather weak protection mandate that was dependent on the consent of Sudan. The concurrent consent could arguably be considered to be only partly given, to certain aspects of the mandate of the mission. Sudan refused to consent to a broad civilian protection mandate, but a compromise was made where AMIS was charged with the task of protecting civilians it “encounters under imminent threat in the immediate vicinity, within the resources and capability”.

2367 Ibid., pp. 42, 46.
2369 Ibid.; Powell, The African Union’s Emerging Peace and Security Regime. Opportunities and Challenges for Delivering on the Responsibility to Protect, pp. 43, 47. By the end of May 2005, AMIS had just over 2,500 personnel on the ground in Sudan, but on 28 April the PSC agreed to expand AMIS to 7,500 military and civilian personnel by August 2005.
2371 Powell cites the African Union Peace and Security Council Communiqué PSC/PR/Comm (XVII), p. 2, see Powell, The African Union’s Emerging Peace and Security Regime. Opportunities and Challenges for Delivering on the Responsibility to Protect, p. 44. See also Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention
mission achieved the protection of civilians on an *ad hoc* rather than a formalised basis within its limited mandate.\textsuperscript{2372} The deployment of the AU mission, as well as its extension of mandate, was not authorised by the Security Council, but its initial launch in June 2004 was welcomed by the Council,\textsuperscript{2373} and its extensions and expanded mandates were also given its support.\textsuperscript{2374} The primary legal basis for the AMIS operation involving enforcement measures, however, is to be found in the AU Act and the concurrent consent of the Sudanese government to the AMIS deployment, despite its reluctance to a strong protection mandate.

The US, Canada and the EU contributed financially to the force, which reflected a broad international political support to the operation.\textsuperscript{2375} Although the AMIS operation had limited success and impact on the protection of civilians, owing to its weak mandate, lack of resources and small numbers of troops, it signalled willingness by the AU to promote peace and security in a situation of inaction by the UN Security Council at the time, and to implement its provision of R2P.\textsuperscript{2376} (On the action taken by the Security Council in the Darfur Case see Chapter 6.3.3.)

The AMIS II operation, however, should be regarded as a peace-keeping mission in those aspects of its task being consented to by the Sudanese government. However, any military operations going beyond self-defence and the restricted protection mandate for civilians consented to by Sudan should however be seen as enforcement action.


\textsuperscript{2373} S/RES/1556 (2004), op. 2: “Endorses the deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region of Sudan under the leadership of the African Union and urges the international community to continue to support these efforts.”

\textsuperscript{2374} S/RES/1564 (2004), preambular para. 4: “Welcoming the 6 September 2004 letter to the President of the Security Council from the President of the African Union, Nigerian President Olusegun Ohasanjo, including his appeal for international support for the extension of the African Union Mission in Darfur”, and op. 2: “Welcomes and supports the intention of the African Union to enhance and augment its monitoring mission in the Darfur region of Sudan, and encourages the undertaking of proactive monitoring”. See also SC Res. 1574, 19 November 2004, UN Doc S/RES/1574, 2004, op. 13; “Strongly supports the decision of the African Union to increase its mission in Darfur to 3,320 personnel and to enhance its mandate to include tasks listed in paragraph 6 of the African Union Peace and Security Council’s Communiqué of 20 October 2004, urges Member States to provide the required equipment, logistical, financial, material, and other necessary resources, and urges the Government of Sudan and all rebel groups in Darfur to co-operate fully with the African Union”. Resolution 1564, but not resolution 1574, was adopted under Chapter VII. See also S/RES/1706 (2006), preambular para. 5: “Commending the efforts of the African Union for the successful deployment of the African Union Mission in the Sudan (AMIS), as well as the efforts of Member States and regional and international organisations that have assisted in its deployment, and AMIS’ role in reducing large-scale organised violence in Darfur, [...] welcoming the decision of the African Union Peace and Security Council of 27 June 2006 on strengthening AMIS’ mandate and tasks, including on the protection of civilians, and considering that AMIS needs urgent reinforcing”.

\textsuperscript{2375} Bring, *Regionala organisationers roll i den internationella säkerhetspolitiken*, p. 169.

and would constitute a weak precedent for a prior treaty-based consented RHI operation. But as long as AMIS did not act beyond the limited consent by the Sudanese government, the operation may not be considered to be a case of regional enforcement measures to protect civilians or unauthorised humanitarian intervention by regional organisations (RHI).

CONCLUSION
The success or failure of the mission has been argued by Gamarra and Vicente to be a litmus test for the credibility of regional security.2377 The two missions have had some success but failed in implementing the AU commitment on security and the protection of civilians, which illustrates the major obstacles the AU faces on finance, operational and institutional capacity, and training.2378 These two cases have been referred to as examples of an emerging division of labour between the AU and the UN, whereby the AU is willing to deploy a military mission to respond to an immediate crisis and to create conditions sufficiently stable for the Security Council to authorise deployment of a robust UN mission.2379 In the case of Darfur, the relationship developed differently in that a hybrid AU-UN force was established by Security Council resolution 1769.2380 Whether or not a future relationship between regional organisations and the UN will evolve in the area of joint operation or other forms of division of labour is difficult to foresee, and will most probably depend on the prevailing political circumstances of each case.

INFORMAL MODIFICATION OF THE UN CHARTER?
In the two cases above, the concurrent consent of the government in Burundi was present and in the case of Darfur the consent to civilian protection was partly given to AMIS. Although these cases do not constitute general practice they are sufficient to support the proposition that collective military intervention by regional organisations based upon prior treaty-based consent is legal, at least when concurrent consent has been given.2381 These cases illuminate the issue of legality of these forms of intervention when concurrent consent is present. However, because of the concurrent consent in both cases, these interventions should be seen as peace-keeping operations under Article 52 rather than as enforcement action or RHI as long as they operate within the consented

2379 Ibid., pp. 24, 55-56. The division of labour has been described as that of African soldiers handing over a ‘clean baby’ to the UN; that they risked their lives in harsher security situations and that their lives were valued less than those of UN soldiers.
mandate and self-defence limits. The legal relevance of this form of peace-keeping practice by regional organisations consequently has no relevance for informal modification of Article 53 of the UN Charter, as long as concurrent consent is given.

However, RHI made on prior treaty-based consent but without concurrent consent, should not be regarded as peace-keeping but as an enforcement measure. Such practice could arguably, if persistent, general and uniform, contribute to a new and emerging customary norm informally modifying Article 53.

Abass thus asserts that Article 4 (h) in the AU Act will in practice affect both Articles 39 and 53 (1) of the UN Charter. This proposition, however, must be challenged. A treaty cannot itself contribute to the informal modification of the UN Charter according to Article 103, which prescribes the primacy of the Charter over all other treaty obligations. Article 41 (b)(ii) of the VCLT stipulates the possibility open to modify by a new treaty, multilateral treaties between certain parties of the state parties of the multilateral treaty. But this Article in the VCLT does not apply to modifications of the UN Charter.

But could the practice of enforcement measures by regional organisations in the African context in the form of RHI based upon prior treaty-based consent, but lacking Security Council authorisation and concurrent consent, form part of or contribute to a 'special' regional customary process outside the UN Charter framework, giving rise to informal modification of Articles 53 and 2 (4) of the UN Charter? Article 103 of the UN Charter does not encompass customary law, and only applies to treaties. It has been shown by practice and supported by doctrine that the UN Charter may be informally modified by customary law. Only if such instances of RHI based upon prior treaty consent develop into a general, consistent and uniform practice accepted by states as law, constituting lex specialis, could it be argued that such practice could contribute to setting up a new legal basis for RHI by the formation of a new customary norm. Since this form of RHI could at present only arise in one regional context, such practice would arguably develop into special custom (ratione personae) rather than into general customary law (see Chapter 2.4.3.1.).

But could such special custom in one region informally modify a multilateral treaty such as the UN Charter? Could Article 53 and the rules on the use of force become informally modified by regional practice? By definition, special custom conflicts with general custom but

2382 Since AMIS has not acted beyond the limited consent of action by the Sudanese government, the operation should not be viewed as an enforcement measure. To the extent AMIS has not been involved in armed fighting with the Janjaweed militia or other government controlled paramilitary groups, its operation should be regarded as traditional peace-keeping.

2383 Abass, Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union. He states that this is due to the fact that the AU will not wait for the Security Council to first make a determination before acting.

prevails through *lex specialis derogat generali*. It is debatable whether such an emerging special or regional custom could constitute *lex specialis* and prevail over another *lex specialis* embodied in the UN Charter.

It has been argued in this thesis that in certain situations special customary law *ratione personae* may supercede treaty law. In instances where both the treaty rule and the posterior customary rule are special, the latter prevails per *lex posterior*.2385 Villiger claims that if the new modificatory custom is special custom *ratione personae* it may exist as a parallel subsystem alongside a convention, but that the state parties to the convention should apply the conventional rules vis-à-vis other state parties that are not members of the special custom. That would mean that no informal modification of the UN Charter Articles 2 (4) and 53 would be necessary for state parties other than those involved in the special custom. An informal modification of the UN Charter applicable to all state parties on the basis of such special custom may thus be very unlikely to take place.

However, an informal modification of Article 53 could arguably *lege ferenda* take place if the regional practice is clear and multilaterally accepted and endorsed by the international community as a whole, including the member states of the Security Council, as a practice having such an effect on the UN Charter. One may suggest that since this state practice involves the possible amendment of the prohibition on the use of force (*an erga omnes obligation*) concerning the whole international community (*ratione materiae*), responses and protests by the whole international community including third states which are not involved in the intervention, should be taken into consideration as relevant state practice and *opinio juris* on the matter. Therefore, the emerging norm could be argued to be developing into a general customary norm, although the actual practice is limited to member states pertaining to regional organisations. The practice would have to be generally accepted by the other UN member states as a whole and not only regionally by the concerned or specially affected states in order to take effect vis-à-vis all other states not part of the regional custom based upon the regional treaty. For this reason, the international community would have to show sufficient *opinio juris* with respect to such regional practice in order for such informal modification by customary law of Article 53 to become binding on all members of the UN Charter.

Thus a future RHI operation without concurrent consent could *de lege ferenda* be regarded as legal as RHI on the basis of *ex post facto* or implied authority (under exceptional circumstances). (See Chapter 7.1.4.1.2.) In all cases, such future practice may be relevant for the formation of customary law contributing to an informal modification of Article 53, if the regional practice is given a *multilateral acceptance* as a modification of the UN Charter. Thus regional practice where no concurrent consent is given, for example, under Article 4 (h) of the AU Act, could theoretically through state practice and acceptance have an impact on the UN Charter.

Charter. Since there is no state practice of such RHI, the way that states would regard such enforcement action is difficult to foretell.

7.1.5. Customary international law and RHI

7.1.5.1. General

The question whether RHI, possibly also including cases of humanitarian intervention by regional organisations conducted with prior treaty-based consent but without concurrent consent (see above Chapter 7.1.4.2.2.), could be regarded as a third exception to the prohibition on the use of force based upon customary law proper must at present be answered in the negative. The predominant view is that there is yet no established customary international norm legalising RHI, because of lack of consistent practice and widespread acceptance of such a doctrine. Although no customary norm on RHI has emerged yet, states and scholars regard the UN Charter as a flexible and living document that is adaptable to subsequent developments through state practice or practice by regional organisations. As shown in Chapter 2, a treaty may be informally modified by either subsequent practice *inter partes* of the treaty or by new customary law outside the treaty framework, both processes having the consequence of informally modifying the treaty provision. This chapter focuses on the latter process by the emergence of special customary law developed by regional organisations in certain regions, and the legality of such developments.

Cases of RHI where regional organisations have intervened for humanitarian purposes without Security Council authorisation in the post-UN Charter era are few. Liberia (1991), Sierra Leone (1997) and

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2387 When it comes to a multilateral treaty such as the UN Charter the difference between these two forms of informal modification is slightly less, although some criteria will differ, e.g. *opinio juris* is not necessary to prove in the first case which instead is dependent on 'consistent practice', and 'common consent' of the member states 'as a whole' to the application of the treaty in a manner different from that laid down in certain of its provisions.
Kosovo (1999) are those usually mentioned in the legal literature on unauthorised humanitarian intervention. The case of Sierra Leone was primarily an example of a democratic intervention and is excluded from this analysis, since the doctrine of R2P does not include these types of intervention. The case of Northern Iraq did not involve a regional organisation as such, and is thus a case of UHI. (It is analysed in Chapter 7.2.)

7.1.5.2. Opinio juris on RHI

State opinions on the legality of humanitarian interventions made by regional organisations without Security Council authorisation, RHI, have developed in different directions in the post-Cold War period. As yet there is insufficient opinio juris in support of RHI in general, but there appears to exist a greater amount of opinio juris for RHI on the African continent by African (sub-) regional organisations in comparison with the opinio juris for RHI on the part of other regional organisations such as NATO, for example.

Although there is scant practice is scarce on RHI in general, on its practice in the African context Kioko observes that the Security Council has never complained of its powers being usurped by the ECOWAS intervention Liberia (or in the democratic intervention in Sierra Leone) – mainly because the interventions by ECOWAS were popularly supported, and because the Security Council did not take action and was unlikely to do so at the time.2388 The African states have also adopted, codified and are on a regional basis implementing many elements of the R2P doctrine, in particular for the protection of civilians through peace-enforcement types of measures by regional organisations.

However, the regional and sub-regional organisational treaty developments in Africa since 1999, discussed in Chapter 7.1.4.2, introduces another possible legal ground for RHI in Africa based upon prior consent by treaty, and such intervention are to be referred to Article 52 of the UN Charter, unless the government concerned refuses to give a concurrent consent to an intervention. Practice made on a consensual basis cannot contribute legally to the customary process of an emerging regional norm on RHI and is therefore omitted from this analysis. If made without concurrent consent, such practice could come to be regarded as RHI having the effect of contributing to its customary process, if no other legal ground is considered to be present for such interventions (see Chapter 7.1.4.2.2. on informal modification).2389

These codifications point unmistakably to a strong opinio juris in the African context for consensual RHI, albeit with the limitation of RHI on the African continent only. Whether enthusiasm and support from the West in this development indicate a growing opinio juris for RHI in Africa

2388 Kioko, The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention, p. 821.
2389 Such RHI could be considered to be legal due to the prior treaty-based consent if the consensual rules are relaxed vis-à-vis humanitarian interventions, or in exceptional cases through the theory of implicit authority or ex post facto authority.
or for the support of RHI based upon prior consent by treaty only is another issue for future research. But the ECOWAS intervention in Liberia (and then Sierra Leone) prior to these treaty developments, forms sufficient indication of an opinion in the international community that ‘African solutions to African problems’ are accepted, even when they violate the UN Charter rules on the use of force by regional organisations (Article 53).

On the opinio juris of states on RHI practice by Western regional organisations, mainly by NATO and EU (in the future), there is little practice of RHI to analyse apart from the Kosovo Case, despite the fact that these organisations have developed much stronger operational capacities in the new millennium to deal with humanitarian emergencies and the protection of civilians. These organisations have not developed official military doctrines or policies or codifications on R2P by military means without Security Council authorisation. UN authorised military operations carried out by the EU, such as Operation Artemis in the Congo 2003, are considered to have been multidimensional peace-keeping operations or peace-enforcement operations, because of the consent of the host state, even though also authorised by the Security Council under Chapter VII, and sometimes under both Chapter VI and VII. The consent of the state deprives these cases of the status of ‘humanitarian interventions’ as traditionally defined, although civilian protection mandates are frequently integrated into the mandates.2390

The outspoken suspicion and fear among many G77 and NAM states towards neo-imperialist and neo-colonial motives and other hidden political agendas in interventions by the West contribute to the lack of widespread opinio juris on humanitarian interventions by Western states and organisations. The intervention in Iraq (2003) has contributed to this suspicion. The Kosovo Case generated a heated and sceptical debate on humanitarian intervention in the General Assembly in the autumn of 1999, and these debates did not reveal the existence of a universal opinio juris on its legality.2391 Nor did opinion change at the UN World Summit in 2005 (see above Chapter 3.7.). It was primarily the Western states that supported the concept of R2P as well as of the doctrine on humanitarian intervention, although more non-Western states have become supporters, in particular African states.

Belgium has been the only state, and was the only NATO country, to argue for a legal right to armed humanitarian intervention in Kosovo on the basis of previous state practice and a customary ‘doctrine on humanitarian intervention’.2392 Belgium used the ‘counter-

2390 It may be a paradox, but unless the definition of humanitarian intervention is changed, these operations with protection mandates, are excluded from the analyses on humanitarian intervention carried out to protect populations.


restrictionist legal argument as a legal justification for the NATO intervention in the course of hearings on FRY’s request for provisional measures in the Use of Legality Cases. It stated that Article 2 (4) “covers only intervention against the territorial integrity or political independence of a State” and that NATO never questioned the political independence and territorial integrity of the Federal Republic of Yugoslavia.

In retrospect, this claim can be criticised for not carrying much weight as a legal argument for humanitarian intervention, when contrasted with today’s realities concerning the status of Kosovo; its newly declared independence and its recognition by the US, and many EU states, including Belgium. The intervention indeed proved to have a major impact on the territorial integrity of FRY. Belgium’s argument at the ICJ did not, as many states and scholars did distinguish between collective (RHI) by a regional organisation and unilateral humanitarian interventions by coalitions of willing states (UHI), and referred to practice by both types of actors as part of the doctrine on humanitarian intervention. In the pleadings, Belgium explained its legal justifications for the NATO intervention in Kosovo, to be based upon the practice of interventions in East Pakistan (1971), Uganda (1978-79) and Kampuchea (1978-79) as well as the two ECOWAS non-authorised interventions in Liberia (1990) and Sierra Leone (1997) as precedents of a doctrine of humanitarian intervention ascertaining a customary right. This doctrine on humanitarian intervention is hence wider than the definition taken in this thesis, which excludes democratic intervention, and cases such as Haiti and Sierra Leone, because of the more restricted R2P doctrine. The submissions by the UK, Germany, the Netherlands, and Canada to the ICJ in the Legality of the Use of Force Cases, were not as outspoken on the doctrine of humanitarian intervention, but contained elements of the doctrine as well as arguments based upon the necessity of averting a humanitarian catastrophe.

Other developments in Western regional security organisations have evolved that could have legal significance on the customary process of RHI. Since the Kosovo intervention, NATO and the EU have

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2393 See Chapter 7.2.3.
2397 Although the EU has not officially declared itself as a regional organisation, the EU has been treated as one in the context of Chapter VIII of the UN Charter, and its practice i.a. during the war on the Balkans but also in other contexts for regional organisations that confirm this conclusion, see Lind, *The Revival of Chapter VIII of the UN Charter. Regional
developed their military capacities in various ways to be able to provide better and more rapid responses to humanitarian and other security crises and emergencies. But although many individual states in the West support the doctrines on humanitarian intervention and R2P, they do not seem to have been adopted formally in the Western regional organisations in a similar fashion, declaring rights or responsibilities, as within the African context. Military operational capacities have been enhanced in the West, but the legal doctrines or even policy doctrines on the protection of civilians against genocide and crimes against humanity, have not developed in a parallel fashion, at least not officially. There appear to be non-military doctrines including these issues, but these are classified and not publicly accessible (see more in the next chapter). Much of the effort in these organisations has been primarily directed towards capacity building to counter terrorism and the threat of the use of different weapons of mass destruction.

7.1.5.3. State practice not amounting to intervention (NATO Response Force and EU Battlegroups)

In NATO, the Response Force (NRF) has been operational since 2007 to be deployed, among other things, for the purposes of evacuation, disaster management, counter-terrorism and in acting as an initial entry force for larger follow-on forces. The NRF evolved from the 2002 Prague Summit. The Prague Capabilities Commitment from this Summit encompass more than 400 specific areas in eight fields, but do not reveal any express commitment to use the NRF for RHI purposes. It is the North Atlantic Council that authorises the use of the NRF on a case-by-case basis and takes its decisions on consensus.

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2400 See the Prague Summit Declaration, NATO Press Release (2002) 127, 21 November, 2002; and NATO (Publ.), *Prague Capabilities Commitment (PCC)*, "http://www.nato.int/issues/prague_capabilities_commitment/index.html", (2008-02-25). See Prague Summit Declaration, NATO Press Release (2002) 127, 4. d, para. 3: “We will enhance our ability to provide support, when requested, to help national authorities to deal with the consequences of terrorist attacks, including attacks with CBRN against critical infrastructure, as foreseen in the CEP Action Plan.” The ‘CEP Action Plan’ deals with the improvement of civil preparedness against possible attacks against the civilian population with chemical, biological or radiological (CBR) agents. The N in CBR stands for nuclear weapons.
The NATO doctrine on *Peace Support Operations* has no specific section on civilian protection, but recognises many military tasks required to protect civilians from large-scale abuse.\(^{2401}\) According to Holt and Berkman, NATO is cautious on intervening on behalf of civilians, and the organisation is not tailored for humanitarian intervention missions *per se.*\(^{2402}\) But they add that within its range of operation, NATO would view protecting civilians from mass violence as a job for the military. The Kosovo Case illustrates openness towards unauthorised humanitarian intervention in exceptional circumstances.

In the European Union (EU), the Petersberg tasks have been the core of the ‘European Security and Defence Policy’ (ESDP) since the EU Council meeting in Cologne in 1999.\(^{2403}\) The ESDP is a major element of the ‘Common Foreign and Security Policy’ (CFSP) pillar of the EU. The Petersberg tasks were adopted at a WEU meeting in Germany in 1992, and designed to cope with the possible destabilising of Eastern Europe.\(^{2404}\) The Petersberg tasks, which consist of a list of crisis management tasks, were integrated into the CFSP through the Treaty of Amsterdam (1997).\(^{2405}\) This original, limited version of the tasks provides:

Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management.

An extended version of the Petersburg tasks was developed in the rejected Constitution of the European Union (2004):

The tasks referred to in Article I-41(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations,

\(^{2401}\) NATO, *Peace Support Operations, AJP-3.4.1. (July 2001)*, NATO Allied Joint Publication, 2001, sections 3-5, 3-6, see also 2-4, 4-1 (0404); see also for a discussion on this, Holt and Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, pp. 126-127.


\(^{2404}\) Petersberg Declaration, Western European Union Council of Ministers, Bonn, 19 June 1992, see I (1): “2. As WEU develops its operational capabilities in accordance with the Maastricht Declaration, we are prepared to support, on a case-by-case basis and in accordance with our own procedures, the effective implementation of conflict-prevention and crisis-management measures, including peacekeeping activities of the CSCE or the United Nations Security Council. This will be done without prejudice to possible contributions by other CSCE countries and other organisations to these activities.” See also II (4) stating “4. Apart from contributing to the common defence in accordance with Article 5 of the Washington Treaty and Article V of the modified Brussels Treaty respectively, military units of WEU member States, acting under the authority of WEU, could be employed for: - humanitarian and rescue tasks; - peacekeeping tasks; - tasks of combat forces in crisis management, including peacemaking.”

\(^{2405}\) See Article J.7.2., which embeds the Petersberg tasks and deals with the CFSP in Treaty of Amsterdam. Amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October, 1997.
humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.\footnote{See Article III-309 of the rejected Constitution, Treaty establishing a Constitution for Europe, 29 October, 2004.}

The extended version was also included in the Treaty of Lisbon, not yet in force.\footnote{The Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, 13 December, 2007, see Article 43(1), which provides for the same extended Petersburg tasks provided for in Article III-309 of the rejected EU Constitution (2004).} If and when the Lisbon Treaty comes into force, the EU will be bound by the extended Petersburg tasks as part of the ‘Common Security and Defence Policy’ (CSDP). The Lisbon Treaty further prescribes that decisions on CFSP shall be made by the Council of the EU by consensus.\footnote{Article 31 (4), ibid.} Each member state thus has formal veto power on EU military or defence issues, but it is possible to decline participation, in particular when there is a strong majority.\footnote{Cramér, Gustavsson, Oxelheim (Eds.), Europeiska unionen och FN-stadgans våldsförbud, p. 254.} Even if and when the Lisbon Treaty becomes a reality it will not provide a switchover to ‘qualified majority vote’ for CSDP matters. Article 42(1) of the Lisbon Treaty states that:

The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.\footnote{[Author’s italics].}

Thus, in a future application of the Lisbon Treaty, military missions outside the EU will have to be decided by consensus as well as in accordance with the ‘principles’ of the UN Charter.

A primary motive behind the Petersburg tasks was to strengthen the effectiveness of the UN system.\footnote{Council of the European Union (Publ.), A Secure Europe in a Better World. European Security Strategy, 12 December 2003, “http://ue.eu.int/uedocs/cmsUpload/78367.pdf”, (2008-02-18). Nonetheless, the EU has not made troop contributions to UN-led operations since 2003, but has been involved in several peace-keeping operations, which supports and confirms the security goals of the union, Cramér, Gustavsson, Oxelheim (Eds.), Europeiska unionen och FN-stadgans våldsförbud, pp. 255, 260-261, 263.} The EU vision for a security policy is based upon the idea of ‘effective multilateralism within the UN’ and links the Union’s security strategy to the effectiveness of the UN.\footnote{Council of the European Union (Publ.), A Secure Europe in a Better World. European Security Strategy.} But the EU Security Strategy is silent on strategy in situations of
ineffectiveness on the part of the UN.\textsuperscript{2413} The lack of clarity on what to do in such situations endows the EU with an undefined space of reservation for unauthorised enforcement action in exceptional situations.\textsuperscript{2414}

But the future EU doctrine on CSDP in the Lisbon Treaty is, according to some commentators, formulated in an ‘open manner’ that does not exclude the possibility of acting without a Security Council mandate.\textsuperscript{2415} For instance, ‘the UN principles’ are complied with when states are exercising their ‘duty to co-operate’ to promote human rights under the UN Charter. The EU would thus, according to some, arguably be able to execute an external responsibility to protect in the form of unauthorised military enforcement measures in order to promote human rights.\textsuperscript{2416}

There are a few states in the EU that are officially open for military action even without Security Council authorisation, but there are also several member states that oppose any military action without such authorisation in order for the EU to adopt a common policy.\textsuperscript{2417} It could be argued that the likelihood of the EU taking a decision on humanitarian intervention without such authorisation outside the UN framework is minimal, since the decision-making-process is based upon consensus and compliance with the UN Charter and international law.\textsuperscript{2418} This practically rules out RHI (as defined in this thesis) by the EU unless it is developed into a binding customary rule. But the organisation, in exceptional circumstances, could rely on the theory of implied authority or 	extit{ex post facto} (see Chapter 7.1.4.1.2).

Both versions of the Petersburg tasks (the limited now in force and the extended version not yet adopted) are broadly formulated and do not impose a legal right, duty or responsibility on the organisation to conduct RHI in third states (that is, non-member states). The doctrine of R2P thus appears to be more informally adhered to by Western states, in comparison with the African regional organisations, despite the strong political support to the concept by these states.

The European Security Strategy (ESS) was developed in 2003 under the responsibility of the EU High Representative, Javier Solana, to delineate the key threats and the means to address them. The ESS neither mentions humanitarian intervention nor potential efforts to halt genocide, ethnic cleansing, or mass killings, but it does list ‘failed states’ as one of the key threats to be addressed in the ESS.\textsuperscript{2419} Although the

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\textsuperscript{2413} Cramér, Gustavsson, Oxelheim (Eds.), \textit{Europeiska unionen och FN-stadgans våldsförbud}, p. 254.
\textsuperscript{2414} \textit{Ibid.}, p. 257.
\textsuperscript{2415} ICISS, \textit{The Responsibility to Protect}, p. 256.
\textsuperscript{2416} Cramér, Gustavsson, Oxelheim (Eds.), \textit{Europeiska unionen och FN-stadgans våldsförbud}, p. 262.
\textsuperscript{2418} See e.g. Regeringskansliet (Publ.), \textit{EU:s stridsgrupper och den nordiska stridsgruppen}, "http://www.regeringen.se/sb/d/9383/a/83988", (2008-02-26).
\textsuperscript{2419} Council of the European Union (Publ.), \textit{A Secure Europe in a Better World. European Security Strategy}; see also Holt and Berkman, \textit{The Impossible Mandate? Military Preparedness, the
EU is in general concerned with humanitarian emergencies and human insecurity, Holt and Berkman criticise the fact that the ESS does not give guidance on how EU forces might conduct Peace Support Operations or protect civilians in practice.\textsuperscript{2420}

The Headline Goal 2010 adopted in 2004, which reflects the ESS and builds on the Helsinki Headline and Capability Goal 2003, provides for the EU member states’ decision to commit themselves to be able to respond with rapid and decisive military action by 2010. The Goal 2010 sets out a fully coherent approach to the whole spectrum of crisis management operations covered by the Treaty on the European Union, including the Petersberg tasks.\textsuperscript{2421} It further specifies that the EU Rapid Response Force is intended to strengthen the EU’s ability to respond to possible UN requests. But the procedures to assess and certify the operation of the EU Battlegroup Concept are still to be developed in accordance with the Goal 2010.

The EU Battlegroup Concept (EU BG), initiated in 2004, has been ready for deployment since the beginning of 2007. It can be used across the full range of the Petersberg tasks listed in Article 17.2 of the treaty of the European Union and for those tasks identified in the ESS.\textsuperscript{2422} One of the illustrative scenarios discussed in the capability development process of the EU BG Concept was evacuation operations and assistance to humanitarian operations. The Nordic Battle Group, one of the EU Battlegroups, is a rapid reaction battalion which is expected to have the capacity to carry out all specified EU BG tasks.\textsuperscript{2423}

Hamilton asserts that the EU BG Concept has not yet established a military doctrine or rules of engagement for missions where the primary purpose is civilian protection in a non-permissive environment.\textsuperscript{2424} The NBG is neither fully tailored or trained for civilian protection mandates.\textsuperscript{2425} But the political will to meet this development for the

\textit{Responsibility to Protect and Modern Peace Operations}, p. 130. Cf. the work of the Study Group on Europe’s Security Capabilities, which is an independent group convened at the request of EU High Representative Javier Solana to advise on the future of European security policy, Glasius, Marlies, Kaldor, Mary (Eds.), \textit{A Human Security Doctrine for Europe. Project, principles, practicalities}, Routledge, New York, 2006. “It proposes that Europe should develop a new kind of human security capability that involves the military, the police and civilians all working together to enforce law rather than to fight wars.” Elements of the recommendations of the study group were found to be too progressive to be integrated into the European Security Strategy.

\textsuperscript{2420} Holt and Berkman, \textit{The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations}, p. 130.

\textsuperscript{2421} Headline Goal 2010, endorsed by the European Council of 17 and 18 June 2004, A. para. 2.


\textsuperscript{2423} Regeringskansliet (Publ.), \textit{EU:s stridsgrupper och den nordiska stridsgruppen}.


\textsuperscript{2425} Planmo & Peterson, \textit{EU:s snabbinsatsstyrkor och Nordic Battlegroup}, pp. 33-35. Sweden, Norway, Finland, Estonia and also, since 2007, Ireland, have all agreed to co-operate under
future could at least be assumed, since the same states also embrace the doctrine of R2P (see Chapter 3.7.)

The EU BG Concept is planned to complement the NATO NRF, rather than compete with it. In order to coordinate and co-operate with the EU and NATO response forces, the two organisations have concluded the ‘Berlin Plus agreement’ on the complementarity on EU-NATO strategic partnership. The ‘Berlin Plus’ establishes permanent arrangements in the security sector for the coordination of standards, procedures, methods and military capacity. It will allow the EU to have access to NATO’s assets and planning and use its Operation Commanders for certain operations. Complementarity and mutual reinforcement in the field of rapid response is to be ensured, according to the Headline Goal 2010.

Thus these enhanced operational capacities for crisis management in NATO and the EU do not appear to contain explicit mandates, policies or doctrines to operate outside the UN Charter framework for the specific purpose of RHI or R2P. The legal basis for using the rapid deployment forces for RHI in R2P situations depends on Security Council authorisation in accordance with the founding treaties of the organisations. Judging from these agreements, the member states of the Western regional security organisations do not reveal the holding a belief that these organisations have a legal right or obligation to use their military capacities to protect civilians from humanitarian catastrophes without Security Council authorisation.

Despite the Kosovo intervention, and the strong Western support for R2P and humanitarian action in general, there is insufficient evidence of coherent and widespread opinio juris among Western states in support of a customary obligation to carry out RHI in the events of humanitarian catastrophes with military means. No publicly made strategy or declaration appears specifically concerned with the protection of people from grave crimes in international law when a third state or the Security Council fails to protect populations from genocide, crimes against humanity, war crimes or ethnic cleansing. However, there appears to be sufficient evidence for the conclusion that many Western states hold an openness towards RHI on an ad hoc basis, depending on political and other circumstances in a certain case. Such an ad hoc strategy for humanitarian intervention has been defined by the Danish Institute of International Affairs (DUPI) to be an ‘emergency exit’ from the norms of international law that does not seek to challenge or change the existing legal order.

Hence, the central question is whether or not these different developments in Africa and the West illustrate the existence of a difference in opinio juris between regional organisations operating on the

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2426 Ibid., p. 30.
2428 Headline Goal 2010, European Council (2004), B. para. 11.
African continent and Western regional organisations. Differently formulated, the question arises of whether we are witnessing different regional customary processes on RHI. Has the customary process of RHI in Africa developed further than in other regions? There appears to be sufficient evidence to argue that there is more opinio juris gathered worldwide and in Africa in support of an emerging regional customary norm on RHI for regional organisations in Africa than elsewhere. It could, however, be argued that this support towards RHI in Africa is dependent on the prior consented treaties in Africa. If concurrent consent is present, a humanitarian operation would not constitute an RHI but rather should be seen as a peace-keeping operation, since no element of coercion is present. But the question to be considered is whether this African support or opinio juris for humanitarian operations under the AU Charter also encompasses RHI when concurrent consent is lacking. If that could be proved, the customary process for RHI has extended further than in other regions. Another topic, which will not be further explored here, is whether a special or regional custom could emerge for RHI in Africa by African regional organisations.

7.1.5.4. State practice on RHI

The state practice in this chapter focuses on the practice of regional organisations in their enforcement actions for humanitarian purposes that fall under what has been referred to as RHI. The question of whether there is an emerging customary norm of RHI as such must be analysed separately. This chapter therefore looks closer at those cases of practice by regional organisations that support the development of a customary norm of RHI.

Three cases of RHI, humanitarian intervention by regional organisations, are usually mentioned for the post-Cold War period: Liberia (1991), Sierra Leone (1997) and Kosovo (1999). The intervention in Sierra Leone was a democratic intervention and will hence not be dealt with here. The following analysis will therefore deal primarily with the question of to what extent the other two cases contribute to an emerging rule of RHI in customary law. These case

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2430 The same precedents that are analysed here (Liberia and Kosovo) have in previous chapters been mentioned in the discussions on the precedents for other emerging norms relevant for regional organisations, such as the emerging norms on the relaxation of the consensual rules for interventions by regional organisations, and implied and ex post facto authorisations. The cases have answered those questions in the negative or can at best show an emerging customary practice in exceptional cases with regard to implied authorisation and ex post facto authorisation. The invitations by the democratically elected Presidents in Liberia and Sierra Leone were not valid according to the existing consensual rules and they do not constitute sufficient practice to support the relaxation of the consensual rules with respect to regional organisations. No regional prior treaty-based consent for RHI was in force at the time of the interventions in Liberia (and Sierra Leone) to legitimise the interventions. In the case of Kosovo, there was no invitation present, and no prior treaty-based consent nor implied or ex post facto authorisations to legalise the intervention. (See Chapters 7.1.3., 7.1.4.1.2., and 7.1.4.2.2.)

studies will be briefly examined in this chapter. A more in-depth R2P analysis of these two interventions appear in Chapter 8.

THE COLD WAR PERIOD
Murphy asserts that there were no good examples of humanitarian intervention by regional organisations during the Cold War. The military operation of the Inter-American Force of the OAS in the Dominican Republic in 1965 after the US intervention is the only case even remotely discussed in this context, despite its lack of primary humanitarian purpose. Neither the OAS nor the US argued that the operation was an enforcement action under Article 53, and it was viewed as peace-keeping based upon consent to restore normal conditions under Article 52 of the UN Charter. Although the peace-keeping nature was challenged by the Soviet Union, Cuba and Jordan, and the validity of the consent questioned by France and Uruguay, its unclear status of a possibly non-authorised enforcement action by a regional organisation and scarce humanitarian purpose disqualifies the case as one of RHI.

THE POST-COLD WAR PERIOD
LIBERIA (1990)
ECOMOG was established (informally) by ECOWAS on 7 August 1990, to intervene in Liberia for the purpose of monitoring the cease-fire, restoring law and order and to create the necessary conditions for free and fair elections. The letter from Nigeria, representing the Standing Mediation Committee of ECOWAS, to the Security Council on 10 August 1990, stated that “the first and foremost objective of ECOMOG is to stop the senseless killing of innocent civilian nationals and foreigners”, and to “help the Liberian people to restore their democratic institutions”. At the time, Charles Taylor’s rebel forces, the National Patriotic Front of Liberia (NFPL), were in control of most of the country, except for the capital, still in the hands of President Doe.

The Security Council, however, did not consider the security issue in Liberia or the military intervention until a half year later, in January 1991 – that is, four to five months after its deployment. On 22 January 1991 the Council issued a Presidential statement commending the efforts

2432 Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 344.
2433 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 69-71.
2435 Gestri, ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, p. 218.
of ECOWAS in promoting “peace and normalcy in Liberia” and called on the parties to co-operate with the sub-regional organisation.2438 A note from the Council President was issued in May 1992 in which he again, on behalf of the Council, commended ECOWAS for its efforts “to bring the Liberian conflict to a speedy conclusion”.2439 Not until adopting resolution 788, on 19 November 1992, did the Security Council officially declare its formal support for the role of ECOWAS in Liberia: “Commends ECOWAS for its efforts to restore peace, security and stability in Liberia.”2440 The Council thus tacitly accepted or acquiesced in the unauthorised military presence of ECOWAS in Liberia for more than two years.2441 The international community response to the intervention similarly appeared to be one of tacit approval. (For a more in-depth analysis of this case and the R2P see Chapter 8.)

KOSOVO (1999)
The NATO operation Allied Force began on 24 March 1999 with a limited aerial bombardment in Kosovo and later in Serbia in response to the policy of repression, persecution and ethnic cleansing of Kosovo Albanians in Kosovo by the Milosevic government in Belgrade. Thirteen out of nineteen NATO members contributed to the non-authorised military intervention in the former Yugoslavia. The operation lasted for 11 weeks.2442 NATO stated that it was not waging war against Yugoslavia. Its actions were directed towards halting the violent attacks being committed by the Serb Army and the Special Police Forces, and was aimed at further disrupting their ability to conduct future attacks on the population of Kosovo. 2443 The term humanitarian intervention was avoided, but NATO and its member states referred to the need to prevent a humanitarian catastrophe.

Statements by individual member states revealed a division on its legality. Only the Netherlands and the UK argued that the action was a legal response to the unfolding humanitarian catastrophe.2444 Although

2438 Note by the President of the Security Council, S/22133 (1991); Gestri, ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, pp. 220-221.
2440 S/RES 788 (1992), op. 1.
2441 Gestri, ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, pp. 224-225. No member raised any express objections concerning the legality of the operation.
2444 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp. 211-212; S/PV.3988, 24 March 1999, p. 12: The UK delegate stated in the Security Council deliberations that “[t]he action is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. […] Every measure short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.”
many states acquiesced in the intervention, the lack of Security Council authorisation was heavily criticised by other states for violating the UN Charter. Security Council members could not reach agreement on enforcement action in the resolutions preceding the intervention because of resistance from Russia and China, but the situation was determined to constitute a threat to the peace.\footnote{Russia, Belarus and India presented a Draft resolution on March 24 in which the intervention was condemned as a violation of Articles 2 (4), 24 and 53 of the UN Charter, but the resolution was rejected by 12 to 3 (Russia, China and Namibia supporting).} The Security Council adopted resolution 1244 on 10 June 1999, in which it established an extensive scheme for reconstruction of Kosovo and civil interim administration under UN auspices, but there was no explicit post facto authorisation of the NATO action, as in the case of Liberia.\footnote{Russia, Belarus and India presented a Draft resolution on March 24 in which the intervention was condemned as a violation of Articles 2 (4), 24 and 53 of the UN Charter, but the resolution was rejected by 12 to 3 (Russia, China and Namibia supporting).} The Independent International Commission on Kosovo came to the conclusion that the action was illegal according to international law, but added that the action was legitimate.\footnote{Independent Commission on Kosovo, \textit{Kosovo Report, Conflict, International Response, Lessons Learned}, p. 4. NATO had violated Articles 2 (4) and 53 of the UN Charter.}

are inconsistent. They range from those arguing that it is a bad precedent for a new customary norm on RHI\textsuperscript{2450} to those who cite the event as proof that a new right to humanitarian intervention has begun to develop. A few even believe that such a norm is already present.\textsuperscript{2451} The reports on humanitarian intervention by the Danish Institute, the Netherlands’ AIV and CAVV, the House of Commons, and the ICISS, however all assert that no customary international law has yet emerged on unauthorised humanitarian intervention since Kosovo.\textsuperscript{2452} (For a more in-depth analysis on Kosovo and the R2P see Chapter 8.)

7.1.6. Conclusion – The R2P, RHI and IL

RHI constitutes a violation of Articles 2 (4) and 53 of the UN Charter. Regional organisations do not have a subsidiary responsibility for peace and security matters under the UN Charter. The cases of RHI in Liberia (1991) and Kosovo (1999) are not sufficient to support a new norm, but could be argued to contribute to a customary process of an emerging norm of RHI. Among the customary processes on the R2P by military means, this is the most developed process of an emerging norm outside the UN Charter framework.

The theories of \textit{ex post facto} and implied authorisation could legalise RHI in exceptional circumstances if a number of factors fall into place, such as the need for urgent action, unanimity of the permanent Security Council members, sufficient evidence for tacit Council approval of the proposed action, and so on. But more practice is needed to confirm this suggested legalising ground.\textsuperscript{2453}

The treaty developments of (sub-) regional organisations in Africa have opened the way for a new legal basis for prior treaty-based consented RHI when given concurrent consent at the time of the particular humanitarian intervention. These interventions, however, should be seen as peace-keeping operations under Article 52 rather than as an RHI. Prior treaty-based consented humanitarian interventions by regional organisations should be considered RHI if concurrent consent is not forthcoming from the state that is subject to the proposed intervention. Such RHI could, however, be legalised through any of the theories of \textit{ex post facto} or implied authorisation, and in exceptional cases if the relevant criteria are present (see Chapter 7.1.4.1.2.). There is as yet no such practice, but it could be argued to \textit{mutatis mutandis} under certain

\textsuperscript{2450} Hilpold, \textit{Humanitarian Intervention: Is There a Need for a Legal Reappraisal?}, p. 437.
\textsuperscript{2451} Michael Reisman and Christopher Greenwood are mentioned as fervid supporters of this norm, see Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 215.
\textsuperscript{2452} Although these reports were funded by governments, they do not represent official government positions. See a summary of these reports on the issue of UHI in Breau, \textit{Humanitarian Intervention: The United Nations and Collective Responsibility}, pp. 268-269.
circumstances (when lacking legal basis) to contribute to the customary process of RHI and a subsequent informal modification of the UN Charter in the future (Articles 2 (4) and 53).

7.2. Coalitions of the willing and R2P – unilateral humanitarian intervention (UHI)

7.2.1. The Right Authority of Coalitions of the willing

The ICISS report does not really recommend a fourth alternative for carrying out the external R2P if the above mentioned means fail. But the report nevertheless mentions it as a warning example of a possible outcome if the Security Council fails in its external responsibility to protect (by military means). Hence, the report states that there may be the possibility of states in the form of ‘ad hoc coalitions’ or ‘coalitions of the willing’ taking on this responsibility in exceptional cases:

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.2454

The role of such actors is specifically identified within the area of protection by military means. Furthermore, it is indicated in the report that if an ad hoc coalition of individual states fully observes and respects the threshold and precautionary criteria formulated in the report for military intervention, and succeeds in getting the support of world public opinion, this might have serious consequences for the credibility of the UN itself.2455

In the Supplementary Volume, ‘other grounds’ for humanitarian intervention are listed for actors not authorised by the Security Council.2456 These encompass the right to self-defence, humanitarian law, human rights, and the emerging right of intervention in support of democracy as possible legal grounds justifying unauthorised humanitarian intervention.2457 The Supplementary Volume recognises an emerging custom of unauthorised humanitarian intervention, and concludes that state practice since 1945 is inconclusive but that contemporary state practice shows a growing consensus that state sovereignty is no longer inviolable where there is human suffering and where democratic governments are toppled.2458 The Supplementary Volume takes a broader approach to R2P by military means (or

2454 ICISS, The Responsibility to Protect, pp. XIII, 54-55.
2455 Ibid., p. 55.
2456 In this category both regional organisations and coalitions of the willing are dealt with in the Supplementary Volume.
2458 Ibid., pp. 164-168.
humanitarian intervention) than the ICISS report, by including democratic interventions in the study.

These above mentioned claims by the ICISS report and Supplementary Volume cannot, however, of themselves be accepted as legal grounds *lex lata* for unauthorised humanitarian intervention, and must be contrasted to the existing rules in international law on such interventions by coalitions of the willing.

As stated above, much of the literature on humanitarian intervention does not consistently make a legal distinction between authorised and unauthorised humanitarian interventions, nor between collective and unilateral humanitarian interventions (see Chapter 6.2.). This chapter only deals with unauthorised unilateral humanitarian interventions by coalitions of the willing, in this thesis referred to as 'unilateral humanitarian intervention' (UHI).

UHI is controversial and was therefore not dealt with explicitly in the Outcome Document. Although some scholars interpret the Summit Document as not excluding more unilateral responses to protect people from genocide, ethnic cleansing, war crimes or crimes against humanity, the Outcome Document does not legalise UHI.2459 (See more on this in Chapter 4.6.)

7.2.2. General on R2P, UHI and IL

What is the legal status of UHI in international law? The predominant view among states and jurists is that UHI is unlawful, both by treaty law and customary law.2460 The ICISS proposal (or rather warning) that a coalition of the willing could take over the responsibility to protect when the Security Council and other actors fail to prevent or end large-scale loss of life or ethnic cleansing, is thus presently not in accordance with contemporary law.

As explained in Chapter 7.1.2. there are many who argue that there is no clear or unambiguous answer to the legality of unauthorised humanitarian intervention, since we are witnessing an emerging norm in customary law, albeit not yet fully crystallised.2461 In particular, the post-


Cold War developments on the African continent, as well as among Western states, are usually mentioned as new state practice and opinio juris supporting the development of a new customary norm. A still valid description of the lex lata situation on UHI (and CHI) would therefore be the following:

The best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.

In the following chapters, only the arguments for and against UHI will be presented and discussed in order to verify to what extent the norm of R2P by military means has been accommodated in international law by coalitions of the willing. The uncountable scholarly and state opinions on the different legal issues and arguments pertaining to UHI can be presented in many different ways and categorised by time periods, philosophical bases, legal issues, legal sources, scholars etc. Despite the many useful variants of groupings of arguments and scholarly views in the existing literature, the most appropriate categorisation for the sake of overviewing the legal arguments, is to account for them on the basis of the main legal sources upon which they are founded – treaty law, customary law, and general principles of law, since this study focuses the analysis on the different sources of law to ascertain the emergence of new norms.

For reasons of space I cannot do justice to all legal arguments pro and contra UHI formulated throughout history, but I shall focus on a few key arguments and contributions, primarily in the contemporary legal debate post R2P, in order to give a brief summary of the main legal positions on UHI.

### 7.2.3. Treaty law and UHI

In the post-UN Charter period the dominant lex lata argument on UHI is that it is an unlawful use of force that violates the prohibition of the use of force and Article 2 (4) of the UN Charter. UHI is not considered

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2462 The developments by regional organisations have been dealt with separately in Chapter 7.1.

2463 Gray, *International Law and the Use of Force*, p. 32. This author agrees to this main contention. Whether it is a good idea that this emerging practice becomes law or not, is another question, which is not dealt with in this chapter (see, however, a discussion on the legalisation of unauthorised humanitarian intervention in the concluding analysis in Chapter 9).


2465 The dominant understanding is that the only accepted exceptions to the prohibition on
by the majority of states and scholars to be a legal exception to the prohibition. Legal positivists holding this position have been called ‘restrictionists’, despite the fact that their interpretation of Article 2 (4) is an ‘extensive’ reading of the Article, meaning that the prohibition on the use of force is seen as an extensive prohibition with very few exceptions.

Support for the extensive interpretation of Article 2 (4) can be found in the travaux préparatoires of the UN Charter, and in the Corfu Channel Case. Chesterman asserted in 2001 that “[t]his is now the dominant view”, and Gill confirmed that this broad interpretation of Article 2 (4) is still the position of the clear majority of leading authorities on the use of force in international law in 2004. Their assertions still hold in 2008. There has been no new state practice since then on UHI that could have changed the law.


The phrase ‘against the territorial integrity or political independence of any state’ in Article 2 (4) was not part of the original Dumbarton Oaks Proposals. It was an Australian proposal for the protection of smaller states, which was adopted with the reassurances that the Article prescribed an absolute all-inclusive prohibition with no loopholes. For accounts of the travaux préparatoires and restrictionist interpretations, see *Ibid.*, pp. 266-268; and Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, pp. 48-52; Randelzhofer, *Article 2 (4)*, Simma (Ed.), *The Charter of the United Nations. A Commentary*, p. 126, paras. 35-36.

Corfu Channel Case, p. 35. The court concluded that the force used by the UK in the Corfu Channel to sweep it from mines, was not “a demonstration of force for the purpose of exercising political pressure on Albania”, but at the same time found the UK to have violated the prohibition on the use of force. Hence, this interpretation leaves little room for the argument that the use of force not directed against ‘the territorial integrity or the political independence of a state’, does not violate the prohibition on the use of force and would be legal. See also Brownlie, *International Law and the Use of Force by States*, pp. 265-266.


The minority position of counter-restrictionists argue for a legal basis to UHI by making a restrictive interpretation of Article 2 (4), in which the wording of the Article is read to allow for the use of force that is not directed at ‘the territorial integrity or political independence of a state’. This interpretation is especially influential in the United States among the supporters of the ‘policy oriented approach’ developed by Professors McDougal, Lasswell and Reisman at Yale University.

A debate between the ‘restrictionists’ and ‘counter-restrictionists’ in the 1960s and 1970s grew from the diametrically opposite positions and scholarly debate between Brownlie and Lillich on unauthorized humanitarian intervention. The arguments of both these strands are


2473 For authors who have made use of this argument, see Lillich, *Forcible Self-help by states to protect human rights*, p. 336; Reisman, Michael, in collaboration with Myres S. McDougal, *Humanitarian Intervention to Protect the Ibo*, Lillich, Richard B. (Ed.), *Humanitarian Intervention and the United Nations*, University Press of Virginia, Charlottesville, 1973, p. 177; Fonteyne, Jean-Pierre, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, California Western Law Journal, vol 4, 1973-1974, pp. 203-270, p. 242 et seq.; Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edition, pp. 192-202. The counter-restrictionist argument has been referred to as ‘Lillich’s argument’ by some scholars, (see e.g. Gill, *Humanitarian Intervention: Legality, Justice and Legitimacy*, pp. 57-58), but has in fact older roots and origins. This interpretation of Article 2 (4) was first formulated by Julius Stone in 1958, when arguing that Article 2 (4) could not only be interpreted narrowly (which he called the extreme view) but questioned whether it was the only possible interpretation and argued whether “in the light of the absurdities and injustice to which it would lead, it must not be regarded as an incorrect one”. See Stone, Julius, *Aggression and World Order. A critique of United Nations theories of aggression*, Stevens & Sons Limited, London, 1958, pp. 94-98. But Stone’s argument, which is mentioned by Lillich and Téson, is primarily directed towards the interpretation of the scope of the right to self-defence. Lillich also leans on the argumentation made by Thomas and Thomas, that emergency action in the form of ‘forceful self-help in defence of human rights of foreigners’ does not impair the territorial integrity or political independence of a state – “it merely rescues nationals from a danger which the territorial state cannot or will not prevent”. But the Thomases did not forward this as their own argument for UHI, it was merely mentioned as a possible counter-argument against the prohibition on the use of force in Article 2 (4), see Thomas Jr., A. J., Thomas, Ann Van Wynen Carey, John (Eds.), *The Dominican Republic crisis 1965: Background paper and proceedings of the Ninth Hammarskjöld Forum*, Oceana Publications, New York, 1967, p. 15, and Thomas and Thomas, *Non-intervention. The Law and its Impact in the Americas*, p. 384, where they state that they find it “doubtful if the Charter has made any extension of the general international law right to intervene for humanitarian purposes; as a matter of fact, by prohibiting intervention by force, [...] it has limited the general international law right to intervene for humanitarian purposes”. Cf. Lillich, Richard B., *Intervention to Protect Human Rights*, McGill Law Journal, vol 15, 1969, pp. 205-219, pp. 211-212.

2474 Also called ‘teleological interpretation’ by Gill when seen together with the argument that one of the main purposes of the UN is to promote human rights, see Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, pp. 56-57.

2475 Ibid., p. 57.

Belgium used the counter-restrictionist argument before the ICJ in the Legality of the Use of Force Cases, when justifying the NATO action in FRY 1999:

NATO has never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia – the Security Council resolutions, the NATO decisions, and the press releases have, moreover, consistently stressed this. Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO’s intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2 (4), of the UN Charter, which covers only intervention against the territorial integrity or political independence of a State.

Another closely connected argument read out of Article 2 (4) by the counter-restrictionists is that the use of force which is not “in any other manner inconsistent with the purposes of the United Nations” is legal. Hence the use of force in pursuit of other values enshrined in the UN Charter, such as freedom, democracy and peace, could justify a military intervention. This argument has been used to justify UHI by relying on the ‘duty to co-operate’ to promote human rights (in Articles 55 and 56) and the UN Charter purpose in Article 1 (3) to “achieve international co-operation […] in promoting and encouraging respect for human rights and for fundamental freedoms for all […]”.

This argument is based upon a contextual interpretation of the UN Charter where the human rights Articles are read together with Article 2 (4).

2477 The New Haven School has been in the forefront advocating the counter-restrictionist legal arguments to UHI. The US practice on intervention during the Cold War illustrates a rejection of the extensive interpretation of Article 2 (4) and according to some scholars holds the view of UHI as an extension of the right to protect its own nationals. See e.g. Thomas and Thomas, The Dominican Republic crisis 1965: background paper and proceedings of the Ninth Hammarskjöld Forum, p. 20.


2479 Hence, Jeane Kirkpatrick, the US Permanent Representative to the UN, advanced this argument in 1983 at the time of the Grenada intervention, see Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 52.

2480 Article 55 provides that “All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.” Article 56 states that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”; Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, pp. 192-202.
Also, other human rights instruments and obligations are argued to add on and strengthen the duty to co-operate to promote human rights.2481

A counter-argument which has been made towards the contextual interpretation is that the tensions between the human rights Articles in the UN Charter and Article 2 (4) are resolved by the subordination of human rights, since the promotion of human rights is the third purpose of the UN, and the primary purpose is to maintain international peace and security by the prevention and removal of threats to the peace, and to suppress acts of aggression and breaches of the peace.2482 No explicit right to use military force is embedded in the UN Charter’s ‘duty to co-operate’. This counter-argument also holds good for other human rights instruments, since none of them has any explicit reference to the use of force for the enforcement of human rights. (See Chapter 5.4.4)2483

Other treaty-based arguments in support of a right to UHI are to be found in the connection between the interpretation of Article 2 (4) and the success of the Security Council to maintain international peace and security. The acknowledgement of a subsidiary role and responsibility of states, or by some regional organisations, for protecting international peace and security when the Security Council for whatever reason is unable to fulfil its responsibilities, has been called the ‘link theory’.2484 Thus the argument is that Article 24 of the UN Charter only asserts the primary role of the Security Council for the maintenance of international peace and security, and that in the event of the Council failing to do so, other entities should be able to step in and assume this responsibility, including the preventing or ending of genocide and mass violations of human rights. The theory, however, has no legal basis in the UN Charter with respect to UHI.2485 The UN Charter only mentions the subsidiary roles of other UN organs to step in with limited mandates, and not for individual states or other organisations to do so.2486 To make Article 2 (4) conditional upon the ‘effectiveness’ of the Security Council and the collective security system under Chapter VII, has no legal foundation in

2481 However, no human rights or humanitarian law instrument or convention provides any explicit authority or right to use force for the implementation and enforcement of those rights, see e.g. Article 1 of the four Geneva Conventions on humanitarian law. On the legal obligation to prevent and punish genocide in Article I and VIII of the Genocide Convention, see Chapter 5.4.1.2.

2482 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp. 52-53.


2485 Rytter, Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond, p. 130.

2486 Lind, The Revival of Chapter VII of the UN Charter. Regional Organisations and Collective Security, p. 172; DUPI Report (1999), p. 82. See e.g. Articles 11 and 12 of the UN Charter providing a recommendatory mandate for the General Assembly to deal with peace and security issues.
7.2.4. Customary international law and UHI

7.2.4.1. General

As has been stated above, the predominant view is that there is yet no established customary international norm legalising UHI, because of lack of consistent practice and widespread acceptance of such a doctrine among states. Chesterman has shown that no customary right of UHI as a form of self-help survived the adoption of the Charter, and that no emerging customary norm has yet come to modify the UN Charter obligations. A minority of scholars argue for the existence of such a right, among them Lillich, Téson, and Greenwood. This alleged customary rule of law is said to have its roots partly in the just war doctrine and natural law theories of the founders of international law as well as in the practice of the European Great powers of the 19th century, and post-UN Charter state practice. Gill, however, concludes after a survey into the historical traditions, antecedents and influences on the human intervention doctrine, that such theory and practice is “of little or no legal significance” in contemporary international law today. The historical roots have some relevance in relation to discussions concerning the moral and ethical dimension and the political legitimacy of...
humanitarian intervention, but not its legality. These different aspects of a norm, however, may overlap, but not necessarily.

So what does the legal literature conclude on UHI and the emergence of new customary law? The ICJ considered in 1986 in the Nicaragua Case whether there were any exceptions to the customary prohibition on the use of force. In that case the court asserted that the existence of a customary norm on the prohibition on the use of force was parallel to Article 2 (4), and adjudicated on whether the US had violated this customary prohibition. The court concluded that human rights cannot be enforced with the use of force according to international law – at least not by the means employed by the US. It stated:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based upon the right of collective self-defence.

Those scholars claiming an exception to the prohibition on the use of force allowing UHI, argue that this dictum must be interpreted contextually and narrowly. For example, they argue that massive human rights violations did not take place in Nicaragua in the sense of a humanitarian emergency that would warrant UHI. Chesterman argues that the judgment can “(at best) be said to not be incompatible with a narrow right of humanitarian intervention”.

There is certainly a point in reassessing the relevance of the Nicaragua Case with respect to UHI and the R2P by military means.

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2495 See Clark, Legitimacy in International Society, pp. 207-226.
2496 Although no customary norm on UHI has yet emerged, many states and scholars regard the UN Charter as a flexible and living document, which is adaptable to subsequent developments through state practice or practice of the main organs of the UN. As shown in Chapter 2, a treaty may be informally modified by either subsequent practice inter partes of the treaty or by new customary law outside the treaty framework, having the consequence of informally modifying the treaty provision. This Chapter focuses on the latter customary process. It cannot, however, be strictly separated from the first because the rules on the use of force (which are the ones being subject to modification) pertain to the UN Charter, which has almost universal membership. This means that custom inter partes and state practice regarding a new customary norm will be drawn from the same cases. Hence, the state practice mentioned here will also have bearing on the assessment of the former process.
2498 Ibid., pp. 134-135, para. 268.
2500 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 62.
today. This case was adjudicated in 1986, and therefore does not reflect the post-Cold War practice of UHI, why it is important to reassess the status of UHI. This is why customary law through case studies of practice during this period. When the court spoke on the illegality of the method to ‘monitor and ensure’ respect for human rights by force in the Nicaragua Case, it was not referring to situations where states use force to ‘halt or prevent’ genocide or massive violations of human rights.

Three cases of unauthorised humanitarian interventions in the 1990s are usually mentioned as part of new state practice giving rise to an emerging ‘doctrine on humanitarian intervention’: the interventions in Liberia (1990), Northern Iraq (1991), and Kosovo (1999). Despite similarities between these three post-Cold War cases, it is in fact only the intervention in Northern Iraq that is properly classified as a UHI undertaken by a ‘coalition of the willing’, as defined in this thesis. The ECOMOG intervention in Liberia and that of the NATO in Kosovo properly belong to the category of unauthorised humanitarian intervention undertaken by regional organisations (RHI), and has therefore been dealt with in Chapter 7.1. This leaves us with very little practice of UHI during this time period for a new customary rule to emerge. One case of itself does not make new law.

7.2.4.2. Implied authority and ex post facto authorisation

The doctrine of implied authority is a controversial doctrine of legal justification for unauthorised military intervention. See more in Chapter 7.1.4.1.2. (with regard to RHI), where it was asserted that the doctrine has not yet developed into a legal customary norm informally modifying the UN Charter (Article 53).

In the only sole case of UHI that occurred during the post-Cold War period, the intervention states based their legal argumentation upon the doctrine of implied authority as a justification for their intervention. The US, UK and France, and some NATO states, resorted to this doctrine in the intervention there in 1991 and in their interventions in Northern Iraq.

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2501 Many scholars, but also states, mix these three cases together with Security Council authorised cases when assessing a new doctrine of humanitarian intervention, which is unfortunate for the assessment of these different processes of possible norm creation. See e.g. note 557. There are also those who make this distinction but treat all unauthorised cases alike, e.g. Hilpold's claim that Kosovo probably represents the first step towards the development of a customary law principle allowing acts of humanitarian intervention in an unilateral way – i.e. absence of a Security Council permission”, see Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, p. 459. I disagree with this contention and the case studies of state practice in this thesis explain why.

2502 *Cf.* Belgium’s argumentation in the Legality of Use of Force (Yugoslavivs v. Belgium), Provisional Measures, CR 99/15, 10 May (1999), p. 12, regarding the legal justifications for the NATO intervention in Kosovo, in which it referred to the interventions in East Pakistan, Uganda and Kampuchea, as well as the two ECOWAS unauthorised interventions in Liberia and Sierra Leone, as precedents of a doctrine of humanitarian intervention ascertaining a customary right. The first three Cold War cases are commented on in Chapter 7.2.4.4 and the two latter cases are considered as cases of RHI and can hence not be seen as giving support for UHI. This leaves us with the Northern Iraq Case.

2503 The legality of both these theories been further accounted for in * supra* Chapter 7.1.4.1.2. The same arguments could be argued to apply mutatis mutandis to UHI.
in the following years. Their argument was based upon the view that the military intervention to create safe havens for the Kurdish people in Northern Iraq was conducted in support of Security Council resolution 688 and the Council’s determination that the situation amounted to a ‘threat to international peace and security’. Also, the Gulf war resolution 678, authorising ‘all necessary means’ to force Iraq out of Kuwait, was resorted to as giving an implicit authorisation to use force in the aftermath of the Gulf war. Many states accepted tacitly or expressly the intervention in Northern Iraq, mainly because the primary motive and purpose behind the operation was humanitarian, but objections were also raised. China threatened to veto any resolution that actually authorised military action to relieve the plight of the Kurds, which went against that Council members were clear about and accepted that their action would be taken as an implicit authorisation (in this case the adoption of resolution 688). However, China remained silent when the intervention began.

Since the doctrine on implied authorisation is not accepted as lex lata other legal arguments such as the alleged right to unauthorised unilateral humanitarian intervention (UHI) in exceptional circumstances are necessary to examine in order to assess the legality of this intervention. Resolution 688 has been considered to be the first resolution marking a shift in Security Council practice and starting a trend of broadening the term ‘threat to the peace’ in Article 39 of the UN Charter, paving the way for humanitarian interventions. (See more on the Northern Iraq Case and UHI in 7.2.4.4.)

Thus state practice on implied authority for (unilateral) military intervention is insufficient to support a general customary norm on

2504 The states argued that their action to create no-fly zones over Iraq for the protection of safe havens for the Kurds, was made in support of S/RES/688 (1991); Gray, International Law and the Use of Force, p. 34. The implied authority argument was also employed by Belgium after Kosovo 1999, but this case is dealt with in Chapter 7.1. See e.g. the Belgian argumentation in the Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, CR 99/15, 10 May (1999), p. 11. On implied authorisation and RHI see Chapter 7.1.4.1.2.

2505 Resolution 866 was not adopted under Chapter VII and did not authorise the use of force. S/RES/688 (1991).


implied authority to informally modify the UN Charter (Article 2 (4) and Chapter VII). Most states regard the doctrine as a *lege ferenda* argument. It could possibly be asserted that the doctrine of implied authorisation might be easier to develop on a customary basis for UHI rather than for RHI because explicit demand in Article 53 on Security Council authorisation does not apply to these situations. However, it would appear reasonable to suggest that the burden of proof of evidence for the support of this doctrine should be heavier for unilateral military action than action by regional organisations.

The doctrine of *ex-post facto* authorisation by the Security Council justifying UHI when prior authorisation has not been possible to attain applies in the same way in relation to RHI, not yet part of *lex lata* (see Chapter 7.1.4.1.2.). State practice of valid cases where the Security Council has afterwards commended a regional organisation for an unauthorised military enforcement measure is insufficient to support a new and evolutionary interpretation of Article 53. There is no case of *ex post facto* authorisation of a unilateral intervention, and thus there is no support of this doctrine for UHI.

But in the case of regional military enforcement action the UN Commentary states (*lege ferenda*) that both the doctrines on *implied* and *ex post facto* authorisation could be accepted in exceptional circumstances if certain factors were to be present. This possibility of applying both these doctrines in exceptional circumstances may be further argued *de lege ferenda* to also be open for unauthorised humanitarian interventions by single states or coalitions of the willing (UHI). The evidence for such authorisations, however, should arguably be stronger in cases of unilateral interventions by a single state.

It could thus be argued (*de lege ferenda*) that in exceptional cases, the doctrine on *implied* authority would be conceivable for UHI under specific and limited circumstances: 1) if the Security Council resolution language points towards implied authority, 2) the resolution is passed with a concurring vote of the five permanent members and the majority of all Council members, and 3) it is clear to the members of the Council that their action will be taken as an implicit authorisation.

On the application of the doctrine of *ex post facto* authorisation for UHI it is up to the Security Council to evaluate and determine the presence of exceptional circumstances for a subsequent authorisation legalising such action. It could, however, only be applied to situations where prior authorisation would not and could not have changed the course of action. In both cases the application of the doctrines must be based upon 1) a need for urgent action, 2) the unanimity of permanent Security

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2512 Ibid., p. 865, para. 17.
Council members, and 3) sufficient evidence for tacit Council approval of the particular action.2513

In the case of Northern Iraq, the criteria for the doctrine on implied authorisation ‘in exceptional circumstances’ were not fully fulfilled. The US, Britain and France argued that the language of resolution 688 pointed to implied authorisation of the use of military force.2514 But since the resolution was not even adopted under Chapter VII and did not make an express “determination that the situation constituted a threat to the peace”, the interpretation of ‘humanitarian organisation’, ‘humanitarian assistance’ and ‘humanitarian relief effort’ in the resolution to include military forces, was an overly creative and excessive interpretation. Furthermore, the resolution was not adopted by a concurrent vote of the P5, since China abstained, there was no unanimity among the P5 that the resolution would implicitly authorise military force. Furthermore, Russia would have vetoed a resolution authorising military force.2515 The Security Council members were not clear on, or in agreement, that resolution 688 would give rise to the action and thereby give tacit approval to such action.2516

7.2.4.3. Opinio juris on UHI

Three main General Assembly resolutions/declarations that deal with the non-intervention principle and the prohibition on the use of force are often mentioned when ascertaining the existence or otherwise of opinio juris of states on UHI.2517 The resolutions do not mention UHI as an exception to the principle of non-intervention, and it is claimed that this evidences its non-existence in customary international law,2518 arguably at least up until the 1980s when the last of them were adopted. Later developments and state practice on UHI must therefore be consulted.

A further example on state positions on UHI (and CHI) is to be found in the UK guidelines for humanitarian intervention from 1999 to 2000, which have been integrated into the UK Manual of the law of Armed Conflict.2519 The UK has therefore formalised its opinion on this issue. It confirms its earlier legal argumentation and justifications in the cases of Northern Iraq and Kosovo that military intervention was justified as an ‘exceptional measure’ to ‘prevent an overwhelming humanitarian

2513 Ibid., p. 866, para. 25.
catastrophe. In the section on the ‘Use of force in international relations’, the Ministry of Defence lists three main exceptions to the prohibition on the use of force, one being unauthorised humanitarian intervention:

1.6 In addition, cases have arisen (as in northern Iraq in 1991 and Kosovo in 1999) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council’s express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases are in the nature of things exceptional and depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.

The justifications of states for their interventions are of major importance when assessing the opinio juris of states, according to the ICJ. The court asserted in the Nicaragua Case that

The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.

It is worth noting that the justifications made by intervening states during what has been classified in the literature as humanitarian interventions in the post-UN Charter period, have not relied on an explicit ‘legal doctrine of humanitarian intervention’, except for the Belgian pleadings in the Legality of the Use of force cases.

Despite the initiatives of the UK and other pro-UHI states promoting guidelines or frameworks for humanitarian intervention, more than 133 states (representing 80 per cent of the world’s population)

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2520 See also on the earlier UK position in Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, p. 213.
2522 Nicaragua Case (1986), p. 109, para. 207. See also *ibid.*, p. 134, para. 266, where the court concluded that the US did not justify the intervention as an ideological intervention (read i.e. humanitarian intervention) and the Court did not ascribe such a legal view on the US intervention since it was not entitled to do so. See also Chesterman, *Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention*, p. 49. Cf. Wheeler, *Saving Strangers. Humanitarian Intervention in International Society*, p. 37-38, who does not find the motives of states in an intervention of importance when classifying it as a precedent of humanitarian intervention. Instead, the humanitarian effects or outcomes are given more relevance in the assessments. Cf. also Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edition, pp. 113-114, who has been identified as belonging to the solidarist wing of the English School by Wheeler.
have since the millennium shift issued individual or joint statements rejecting the legalisation of unauthorised humanitarian interventions, irrespective of whether they were conducted by regional organisations or coalitions of the willing.\textsuperscript{2526} The debates on the new concept of R2P have shown continued resistance among states to UHI, by not only Russia and China but also by large parts of G77 and NAM. Universal \textit{opinio juris} of states on a right UHI is apparently lacking (see more on state responses to R2P in Chapter 4.8).

\subsection*{7.2.4.4. State practice on UHI}

\subsubsection*{The pre-UN Charter period}

With the possible exception of the French occupation of Syria in 1860-1861 to prevent massacres of Maronite Christians, most scholars contend that no ‘genuine’ case of humanitarian intervention occurred in the pre-UN Charter period.\textsuperscript{2527} Brownlie states in his early post-UN Charter deliberations on humanitarian intervention (1963) that it is extremely doubtful whether this form of intervention has survived the general prohibition on resort to the use of force in the UN Charter.\textsuperscript{2528} The majority view appears to support this conclusion.

\subsubsection*{The Cold War period}

The three most often cited interventions in articles and books on humanitarian intervention during this period are the cases of India’s intervention in East Pakistan (Bangladesh) in 1971,\textsuperscript{2529} Vietnam’s intervention in Kampuchea (Cambodia) in 1978-79\textsuperscript{2530} and Tanzania’s

\textsuperscript{2526} Goodman, \textit{Humanitarian Intervention and Pretexts for War}, pp. 108 (note 7), 112 (note 26); Gray, \textit{International Law and the Use of Force}, p. 45, see note 54.


\textsuperscript{2528} Brownlie, \textit{International Law and the Use of Force by States}, p. 342; see also Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 57. According to Brownlie, many authorities during this period either ignored humanitarian intervention or expressly denied that such a right existed. Among the most eminent jurists, however, who asserted the legality of humanitarian intervention was Lauterpacht, see Lauterpacht (Ed), \textit{Oppenheim, International Law: a treatise}, Vol I, Peace, 7th edition, pp. 279-280, but he held an opposite view in 1946, see Lauterpacht, \textit{The Grotian Tradition in International Law}, p. 46. For a more contemporary opponent to Brownlie and other scholars’ contention on this matter, see Téson, \textit{Humanitarian Intervention: An Inquiry into Law and Morality}, 3rd edition, pp. 201-202.

\textsuperscript{2529} The intervention in East Pakistan was a reaction by India towards West Pakistan’s massive violations of human rights to the citizens in East Pakistan because of their demands for autonomy developing into calls for independence. One million were killed and ten million fled to India.

\textsuperscript{2530} The intervention in Uganda had its background in the animosity between the Presidents Idi Amin and Julius Nyerere, the alleged support to Ugandan dissidents, and the Ugandan
intervention in Uganda in 1978-79. These cases have been classified and analysed in the legal literature as ‘forcible self-help in defence or for the protection of human rights’, and later on as cases of humanitarian intervention. But these interventions were in fact at the time not justified by the intervening states with the argument of a right to humanitarian intervention. There were clear humanitarian concerns present and the situations in these countries certainly amounted to humanitarian catastrophes, but the intervening states referred in all cases, but for different reasons, to the right of self-defence as the main basis of justification. The interventions, with the exception of Uganda, met with wide protests and condemnations from other states and the international community, despite the humanitarian concerns. Hence there is little evidence that opinio juris of states towards a right to UHI to protect human rights based upon these cases existed at the time. Because of mixed motives and other predominant elements present in these interventions, none was considered to be a good precedent for unauthorised unilateral humanitarian intervention.

Other cases of this period also frequently treated in the literature are the more limited interventions by Belgium in the Congo in 1960 and (the occupation of Northern Tanzania, which were seen as acts of war by President Nyerere. It resulted in the overthrow of Amin and the formation of a new government in Uganda.

2531 The intervention in Kampuchea had its background in the sporadic fighting along the Vietnamese-Kampuchean border but also in the flagrant human rights violations of Pol Pot regime. The Vietnamese army, together with a Kampuchean insurgent group (United Front for National Salvation of Kampuchea) captured Pol Pot and took control over most of the territory, but he managed to flee into the mountains were the Khmer Rouge continued a guerrilla resistance. Vietnam referred primarily to its right to self-defence, sovereignty rights and territorial integrity as justifications for the intervention.

2532 This terminology was applied during the early Cold War period and is the antecedent term for humanitarian intervention. See e.g. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, pp. 55-136.

2533 Other cases also referred to their right of self-defence, sovereignty rights and territorial integrity as justifications for the intervention. For an opposing assessment of these cases, see Téson, Humanitarian Intervention: An Inquiry into Law and Morality, 3rd edition, pp. 228-270; Lillich, Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives, pp. 114-122.

2535 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp. 73-79.

US) in 1964, the US intervention in the Dominican Republic in 1965, and the French intervention in Central Africa in 1979. Even the US interventions in Grenada 1983 and Panama in 1989 are sometimes also discussed in this context. These cases do not make good precedents of humanitarian intervention as defined in this thesis, which excludes so-called ‘in-and-out operations’ to rescue the interventionist’s own nationals, as well as pro-democratic interventions for the purposes of regime change.

THE POST-COLD WAR PERIOD

NORTHERN IRAQ (1991)

The ‘Operation Provide Comfort’, for the protection of Kurds in Northern Iraq against repression and armed attacks by the Iraqi army in the aftermath of the Kurdish uprising following the first Gulf War in 1991, was initially carried out by the US, the UK and France, and then with the ensuing support of 13 states in total. On 5 April 1991 the UN Security Council adopted resolution 688 (not under Chapter VII), by a margin of ten to three with two abstentions, condemning the repression leading to “a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region”. China had threatened to veto any resolution authorising military action to relieve the plight of the Kurds, and Russia would have vetoed such a resolution as well. On 10 April the US issued a warning to Iraq that any military operation above the 36th parallel would be met with force, and the area was declared a no-fly zone for the purpose of protecting the Kurds from further attacks. The first American troops landed in Northern Iraq on 13 of April. Almost 30,000 military and civilian personnel participated in the relief mission, and the US forces amounted to approximately 18,000 of these.

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2538 The early Congo cases were mainly concerned with rescue operations of Belgians and other Europeans, which took place in part with the consent of the Congolese government. France was the only country in the Security Council to speak of a principle of humanitarian intervention, Bring and Mahmoudi, *Sverige och folkrätten*, p. 139. The Dominican Republican Case dealt with the evacuation of US and foreign nationals and had clear political motives with regard to the future Dominican government. The Central Africa Case dealt with the deposing of President Bokassa and was not initially justified as a humanitarian intervention. The Grenada Case had pro-democratic elements and was explicitly not justified in terms of humanitarian intervention. The Panama Case dealt with the installation of a democratic regime.
2539 Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edition, p. 294. Almost 30,000 military and civilian personnel participated in the relief mission, and the US forces amounted to approximately 18,000 of these.
troops were dispatched to protect and feed up to 700,000 Kurds.\textsuperscript{2544} The UN Secretary-General, and the UN Legal Counsel expressed a quiet dissent. But there was no admonition either from the Security Council or the General Assembly.\textsuperscript{2545} Still, there has been and still is controversy over whether resolution 688 legally permitted the safe havens and no-fly zones.\textsuperscript{2546} The operation was intended to be temporary and the Western states withdrew as the 500-strong lightly armed UN Guard Contingent in Iraq was deployed, leaving Northern Iraq on 15 July, 1991.\textsuperscript{2547} On 26 August 1992, a second air exclusion zone in southern Iraq below the 32nd parallel was declared for the protection of the Marsh Arabs.\textsuperscript{2548}

The intervening states failed to offer full legal argumentation and gave contradictory legal justifications for the use of military force and the setting up of the no-fly zones,\textsuperscript{2549} such as consistency with Security Council resolution 688 but also resolution 678\textsuperscript{2550} (see more on implied authorisation in Chapter 7.2.4.2.). The UK, for example, admitted that resolution 688 was not adopted under Chapter VII but asserted nonetheless that the no-fly zone was justified in pursuance of the objects expressed in the resolution, or perhaps an independent customary international right to humanitarian intervention.\textsuperscript{2551} The US also emphasized the importance of Security Council resolutions, while Germany, the Netherlands, Spain and the UK stressed the existence of a ‘humanitarian catastrophe’. This latter justification has been interpreted in the literature as recalling the doctrine of humanitarian intervention.\textsuperscript{2552}

\textsuperscript{2544} Franck, Recourse to Force. State Action Against Threats and Armed Attacks, p. 153.
\textsuperscript{2545} Ibid., p. 153.
\textsuperscript{2546} Wheeler, Saving Strangers. Humanitarian Intervention in International Society, p. 166.
\textsuperscript{2547} The presence of the UN guards (armed only for self-defence) was based upon an agreement by the Secretary-General and Iraq concluded in May 1991, Franck, Recourse to Force. State Action Against Threats and Armed Attacks, p. 153. On the discussions on its legal basis, see Wheeler, Saving Strangers. Humanitarian Intervention in International Society, pp. 156-157. A multinational rapid-deployment force was, however, remained in Turkey, in case Iraq failed to respect the no-fly zones and begin a new wave of repression against the returning Kurds, ’Operation Poised Hammer’.
\textsuperscript{2549} The UK and US argued for implied authorisation referring to resolution 678 and the material breach of resolution 687 by Iraq, as well as subsequent resolutions dealing with the Iraqi obstructions of the work by UNSCOM and IAEA (resolutions 1154 and 1205), see Gray, International Law and the Use of Force, ICISS, The Responsibility to Protect. Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty, p. 88; Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 132.
\textsuperscript{2551} Gray, International Law and the Use of Force, p. 265; Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 132. However, the UK openly acknowledged that the legal justification or the patrolling of no fly zones did not rest on resolution 688, but that the resolution supported its position, see Gray, International Law and the Use of Force, p. 265.
\textsuperscript{2552} Chesterman, Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention, p. 51. The UK first used the formulation as one of a number of justifications for the no-fly zones over Iraq. See also Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp. 196-206.
Four states did not offer any clear legal justification at all. Many states acquiesced, or tacitly or expressly accepted the intervention in Northern Iraq, mainly because of the humanitarian objective of the operation.\textsuperscript{2553} But there were also strong objections raised by Russia and China to the US and UK military action in the no-fly zones taking place later.\textsuperscript{2554} The Arab League called for a halt on all acts not authorised by the Security Council.

The international community thus largely tacitly or explicitly accepted the intervention, but the most concerned states saw it as a special case closely linked to the Gulf war.\textsuperscript{2555} Under the specific circumstances prevailing in the aftermath of the expulsion of Iraqi armed forces from Kuwait and the bloody suppression of the Kurdish uprising against the Iraqi government, the Security Council was willing by a narrow majority to condemn Iraqi repression, and normally non-interventionist states were willing to condone Western intervention.\textsuperscript{2556}

Several scholars argue that this case represents a landmark precedent for unauthorised humanitarian intervention,\textsuperscript{2557} while others are more cautious about its precedential value in that respect because of the controversy surrounding the no-fly zones and the interpretation of resolution 688.\textsuperscript{2558} The circumstances present in the case could be argued to comply with many of the criteria for an external R2P by military means. The humanitarian situation at the time of the intervention had amounted to a crisis which warranted external action to prevent a humanitarian catastrophe. About two million civilian Kurds had left their homes in Northern Iraq after armed attacks from the Iraqi army, and almost one million of them were attempting to reach safety in Turkey. The Kurdish refugees were dying at the rate of 1,000 a day from disease, malnutrition, and cold in the camps. An estimated 10,000 to 30,000 people died.\textsuperscript{2559} Iraq, through its repression of the Kurds, was manifestly failing to protect the population from grave crimes, and the Security Council was not going to authorise the use of military force because of Chinese resistance and the reluctance of a few other member


\textsuperscript{2554} Gray, International Law and the Use of Force, pp. 264-265. Interventions were also made in 1993, 1996 and 1998.

\textsuperscript{2555} Gill, Humanitarian Intervention: Legality, Justice and Legitimacy, p. 60.

\textsuperscript{2556} Ibid., p. 60. He argues that this acceptance however cannot be inflated into an acknowledgement of a general right to humanitarian intervention.


states to erode the principle of non-intervention. The intervening states had a primary humanitarian motive and thus a ‘right intention’. It could, of course, be argued whether peaceful means were inadequate, and the intervention taken as a last resort. Its proportionality does not appear to have been questioned. The Memorandum of Understanding permitting 100 civilian-run humanitarian centres throughout Iraq, concluded between Iraq and the UN on 18 April, might have supported the assessment that the operation would have reasonable prospects of success. By end of April 1991 death rates among refugees had fallen to 60 deaths a day, and the intervention resulted in a humanitarian outcome of decreased human suffering, although the political root causes of the repression were not resolved.

THE POST-9/11 PERIOD

There were no genuine cases of UHI after September 11, 2001. The intervention in Afghanistan was based upon justifications of a right to self-defence against large-scale international terrorism. The illegal invasion of Iraq in 2003 was not fundamentally a humanitarian intervention but based primarily upon a right to pre-emptive self-defence against the illegal possession of weapons of mass-destruction, and essentially justified by a creative interpretation of the first Gulf war resolutions. (See more on the Iraq war in Chapter 3.6.3)

7.2.5. General principles of law

Franck argues that ‘necessity’ be considered as a mitigating circumstance in situations of UHI. He states that it is integral to most national legal systems that where an action might be illegal, the degree of illegality should be determined by mitigating factors, such as necessity. Without erasing the illegality itself, necessity for action mitigates the consequences of acting illegally. Gill further supports the idea of mitigating circumstances as a criterion for gaining legitimacy and determining the degree of illegality of an act of UHI. Among the examples, he lists the

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2565 Jacobsson, The Use of Force and the Case of Iraq, p. 373-407.
2566 Franck, Interpretation and change in the law of humanitarian intervention, pp. 212-213, 227, 230.
2567 Gill, Humanitarian Intervention: Legality, Justice and Legitimacy, p. 68 et seq.
factual circumstances relating to the particular act, the motivation of the parties and the moral and legal policy implications of the act in question.

The concept of mitigating circumstances must be considered as a general principle of law. The ICJ took it into account in the Corfu Channel Case in determining that Albania had contributed to the situation, and went on to consider other matters that constituted mitigating circumstances in relation to the UK’s culpability.\textsuperscript{2568} The process of applying mitigating circumstances, however, usually takes place within the setting of international relations and diplomacy rather than in a courtroom, but this should not hinder its application.

Gill argues in the same way, insisting that extra-legal factors such as morality and political acceptability for an act of UHI should be relevant to the assessment of legality and its acceptance.

Just war and R2P criteria could \textit{lege ferenda} hence be argued to serve as mitigating criterion in the assessment of a UHI. He holds that, to the extent a particular intervention meets these criteria, the legal situation would be that of an illegal act, but one to which no significant legal or political consequences should be attached as a result of such mitigating circumstances.\textsuperscript{2569}

Nonetheless, these arguments of mitigating circumstances do not and cannot alone legalise UHI but only form part of a discussion of the legitimacy of such action. There are no degrees of illegality, only legality or illegality, although these may overlap. An illegal action, however, can be legitimate from a political and moral perspective, as argued by the Kosovo Commission in the case of NATO’s intervention in 1999.

7.2.6. Conclusion – The R2P, UHI and IL

As demonstrated above, UHI is illegal according to both treaty law and customary law. To the extent that states are increasingly accepting UHI, such practice and accompanying \textit{opinio juris} would form part of a customary process in which states change or contribute to new customary law allowing UHI as a third exception to the use of force. At this moment, with the Northen Iraq Case as the only valid practice of UHI, the customary process of such a norm has not yet begun to evolve. Thus there is insufficient \textit{opinio juris}, and \textit{usus} is clearly lacking for a customary norm on UHI in international law.

It could be possible to argue for the legality of UHI under ‘exceptional circumstances’ when the doctrines of either implied authority or \textit{ex post facto} authority apply. (See Chapter 7.2.4.2.) The states and coalitions of the willing should in their risk assessment on deciding whether or not to intervene under such exceptional circumstances, weigh on the one hand the threat to the peace that the humanitarian crisis in

\textsuperscript{2568} \textit{Ibid.}, p. 69. Gill refers to the Corfu Channel Case, Judgment of April 9th, 1949, ICJ Reports, 1949, p. 4, p. 23. This passage, however, speaks of the international responsibility of Albania for its breaches of international law to notify the existence of a minefield in Albanian territorial waters.

\textsuperscript{2569} Gill, \textit{Humanitarian Intervention: Legality, Justice and Legitimacy}, pp. 73-74. Gill argues that this is the best description of what has actually transpired in a number of more or less recent examples of humanitarian intervention, resulting in a wide degree of acceptance.
question constitutes against on the other, the threats that a UHI would pose to the peace and the collective security system.

Unless exceptional circumstances are at hand legitimising a UHI under the doctrines of implied or ex post facto authorisation, the ICISS proposal that coalitions of the willing could take on R2P would hence constitute a violation of the UN Charter, and in particular the prohibition on the use of force, according to a traditional reading. Hilpold sees the ICISS report as a political document in this regard, and he argues, if successful, it is a self-fulfilling prophecy. Indeed, it is easy to agree that the ICISS report must be regarded as a lege ferenda document with regard to the responsibility to protect by military means of coalitions of the willing, aiming at contributing to a political and maybe also a legal development on the issue of unilateral humanitarian intervention and related questions. The report has as a matter of fact indeed come to influence an emerging opinio juris on a responsibility to protect (see Chapter 4.8.), although most states primarily support a responsibility of the Security Council to protect, at least when it comes to the use of military measures, rather than of coalitions of the willing.

The risks for abuse and misuse of the R2P doctrine in a customary process developing a customary right to unauthorised unilateral humanitarian intervention (UHI) jeopardises the collective security system and the prohibition on the use of force. It should therefore not be recommended that states encourage a customary development of this norm, and the R2P by military means should continue to be a moral and political norm for coalitions of the willing – possibly exercised in practice on an ad hoc basis where the moral duty is compelling.

7.3. Concluding remarks on Right Authority

The primary and internal responsibility to protect consists of legal obligations for each state to implement on its own territory, and this internal responsibility already reflects legal obligations lex lata. The external responsibility to protect consists of different legal rights and obligations under treaty and customary law, and should be seen as different legal rules in the R2P doctrine, based upon different legal grounds.

The question as to “who has the responsibility to protect by military means in international law?” addresses only the external responsibility to protect on the part of the international community, and the existing and emerging legal norms of different and relevant actors bearing such a responsibility. The international community of states has declared itself to be politically prepared to take collective action in different ways to protect all populations from grave crimes under international law. What are the legal implications of such a declaration?

The analysis above on ‘Right Authority’ and in Chapter 6 show that the external R2P by military means also holds several different legal norms, each pertaining to the respective actors purporting to carry such

2570 Hilpold, The Duty to Protect and the Reform of the United Nations, p. 52
a responsibility. Of the four actors (the Security Council, the General Assembly, regional organisations and coalitions of the willing) proposed to have an ‘external responsibility to protect’ when a state fails to protect its population, it is only the Security Council that has been found to have a legal right but not a legal obligation to protect by military means under international law proper. On emerging, legal norms of a responsibility to protect by military means, it has been argued that the present collective security system under the UN Charter prevents the emergence of such a legal obligation or duty for the Security Council. However, states have committed themselves morally and politically in the Outcome Document to act collectively through the Security Council to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, including with military means. It could therefore be argued that the Security Council through its member states is endowed with a moral and political responsibility to protect populations from grave crimes under international law by military means.

While the General Assembly has been rejected as a viable institution for military action to protect populations, the last two actors (regional organisations and coalitions of the willing) have been argued to be presumptive candidates for emerging external responsibility to protect by military means, through a legal right to undertake humanitarian interventions. But the practice by ‘coalitions of the willing’ is so far insufficient to be able to contribute to a customary process developing into ‘a legal right to protect’ by military means. The arguments in support of such unauthorised humanitarian interventions are still de lege ferenda. This conclusion, however, does not fully dispose of this possibility for states or coalitions of the willing to have a de lege ferenda right to protect by military means in ‘exceptional circumstances’ when certain factors are present that support the doctrines of implied or ex post facto authorisation (see Chapter 7.2.4.2.). Specific rules in the Commentary to the UN Charter on Article 53 have been argued to apply for regional organisations in ‘exceptional circumstances’ (see Chapter 7.1.4.1.2.), which is why it could also be contended to extend to states as well.

However, the practice of unauthorised humanitarian interventions by regional organisations has already begun to evolve into an emerging customary norm of ‘regional collective humanitarian intervention’ (RHI) outside the UN Charter framework. The customary process of regional organisations will therefore be studied more closely with regard to the R2P criteria and precautionary principles for military intervention, in order to ascertain to what extent this customary process is accommodating the emerging norm of external R2P by military means, and whether this emerging norm could develop into a legal right or obligation to protect populations from grave crimes under international law.

Thus in summary on the Right Authority to use military force for the protection of human security within a state, the examinations in Chapters 6 and 7 show that there exists one lex lata norm holding an external legal right to protect by military means pertaining to the Security
Council, and one emerging norm of responsibility to protect by military means for regional organisations *lex ferenda*.

Apart from these legal rules and emerging norms, the international community of states has committed itself generally to a moral and political external responsibility to protect when a state manifestly fails to protect its population from grave crimes under international law, through the UN and acting through relevant regional organisations when appropriate. The question as to whether such a general moral and political responsibility to protect also includes a moral and political responsibility to protect by *military* means has not formed part of the research questions to be considered by this thesis. My personal opinion, however, is that a moral responsibility may, and should, also embed military action on an *ad hoc* basis in exceptional situations (see concluding remarks in Chapter 9.2.2).

2571 The study shows that there is insufficient global norm convergence on the issue of unilateral humanitarian intervention but that regional norm convergence is more present and likely to develop further. There appears to be a moral convergence touching upon consensus among Western liberal states and other like-minded states on the moral right (but not duty) of unauthorised humanitarian intervention in extreme humanitarian emergencies. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, p. 34.
IV. Emerging norms on ‘R2P by military means – A customary process?
8. An emerging customary norm of R2P by military means for regional organisations?

What happens if the Security Council fails to act? The Global Centre for the Responsibility to protect argues that the goal of R2P is to take the kind of 'unilateral action' that occurred in Kosovo unnecessary by ensuring that the UN itself will work better and respond effectively: “By gaining consent to the principle of collective responsibility, and then by providing a set of responses leading up to the use of force, R2P may make the Security Council more willing to act.” The Global Centre for R2P states that the World Summit Outcome consensus on R2P was silent on the question of what would happen if the Security Council fails to act, and supports the opinion that even in a situation where peaceful means are inadequate and the precautionary principles are satisfied, it would be illegal for states to take military action in the absence of a Security Council resolution (or a General Assembly resolution under “Uniting for Peace”). Yet, in those situations, the question of how to protect the lives of those at risk still needs to be answered.

8.1. CIL in nascendi? Lex ferenda elements

It could be argued that there is an emerging customary norm of an external responsibility to protect by military means without Security Council authorisation for regional organisations. States have previously engaged in state practice of unauthorised humanitarian interventions through regional organisations, which suggests that there exists a customary process and development in the law.

The customary process with regard to this norm is developing, or may develop, on several different levels. Four aspects or situations of this development have been identified in previous chapters, some of which are argued leges ferendas: 1) future practice of prior treaty-based consented humanitarian interventions lacking concurrent consent, 2) the principle of necessity as a ground for precluding wrongfulness, 3) legalisation through ex post facto or implied authorisation in exceptional circumstances, which is up to the Security Council to determine, if a number of factors are present. These include the need for urgent action, unanimity of the permanent Security Council members, and sufficient evidence for tacit Council approval of the action, and 4) through

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2572 Global Centre for the Responsibility to Protect (Publ.), Frequently Asked Questions, see under the question “What happens if the Security Council fails to act?”
2573 Ibid., see under the question: “What happens if the Security Council fails to act?”
2574 Whether this emerging norm is primarily linked to regional organisations themselves or directly with regard to states (the international community of states) to act through regional organisations is another important question to consider.
general and consistent customary practice of unauthorised humanitarian interventions that comply with the R2P criteria (the precautionary principles for military intervention when the state manifestly fails to protect its population from genocide, ethnic cleansing, war crimes and crimes against humanity, and the Security Council is unable or unwilling to protect and where peaceful means are inadequate).

It could be held legi ferenda that any one of these grounds could be considered as legitimising or legalising an RHI. The first ground, however, has as yet no corresponding state practice to be analysed, and would only take place within the African context where such treaties exist. The principle of necessity was applied in the justifications of Belgium for the NATO intervention in the Kosovo Case, which will be analysed further in this chapter. The theory of ex post facto authorisation has been argued in the cases of Liberia and Sierra Leone, but only the Liberian Case will be studied in this chapter from an R2P perspective. The theory of implied authorisation was referred to in the cases of Kosovo and Northern Iraq. The latter case did not involve a regional organisation and could therefore not contribute to a customary process purporting to informal modification of Article 53 of the UN Charter. The Kosovo Case was 'considered illegal and a violation of Article 53', and has been rejected as a precedent for this theory (see Chapter 7.1.4.1.2.).

The fourth customary development is the issue of an emerging legal norm of R2P by military means for regional organisations. An external R2P as a justificatory case has not been argued in any of the above mentioned cases of RHI, but the practice itself should be studied in order to discern whether it in fact discloses a trend to this effect.

The following case studies will primarily focus on the state practice on RHI and the customary process of an emerging norm on R2P. The examination of the case studies will focus on the R2P criteria and precautionary principles in order to ascertain whether or not these have been complied with in state practice and whether the justifications and debates on it support the view that this practice is in fact contributing to a customary process.

2577 See also UK’s position and justification based upon implied necessity in the case of Northern Iraq (1991), Franck, Resource to Force, State Action Against Threats and Armed Attacks, p. 155.
2578 See Chapter 7.1.4.1.2.
2579 The Sierra Leone Case is a precedent for democratic intervention, but not considered as a precedent for unauthorised humanitarian intervention as defined by the R2P concept.
2580 See, however, Chapters 7.1.4.1.2. and 7.2.4.4.
8.2. The case studies on RHI – The R2P lens and structure

Recent developments during the new millennium have given indications that the legal regime on unauthorised humanitarian intervention by regional organisations may be subject to change in the coming years, arguably in the sphere of regional organisations. The cases of humanitarian intervention in the 1990s have been revisited by several scholars for this purpose. So in what ways does this study break new ground? It is to be hoped that this contribution will add new perspectives and insights into the cases and customary processes by bringing in the R2P formula and taking it as the point of departure. In many respects this study will show similarities with earlier ones and will therefore not be a completely different exercise – but it will in several other respects be different. By employing the R2P ‘lens’ and R2P criteria focal points for assessing the customary international law (CIL) criteria as to whether a new norm is emerging, this study formally takes a different point of departure compared with the previous case studies made by legal scholars. It will thus examine how the R2P criteria have been applied in these cases and make clear whether or not this practice contributes to a customary process on an emerging norm on R2P. When compared with IR scholars such as Bellamy and Wheeler, who have made similar case studies of humanitarian interventions on the basis of just war criteria that resemble the ICISS criteria, this study contrasts the findings with the legal positivist criteria for emerging norms of international customary law and therefore distinguishes itself from these previous assessments.

The two cases of unauthorised humanitarian intervention by regional organisations during the post-Cold War period, the ECOWAS (ECOMOG) intervention in Liberia and NATO in Kosovo, are analysed from an R2P perspective. So how does one go about applying an ‘R2P lens’ and then contrasting it with the CIL criteria? What R2P criteria are used, and why?

Paragraph 139 of the Outcome Document states that ‘the international community of states’ is “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis.”

2582 Byers, *High ground lost on UN’s responsibility to protect*, p. 112.
2584 Bellamy’s criteria differ from the ICISS criteria in that he also looks at ‘prudence’, ‘a calibration between means and ends’, and ‘just post bellum’, and leaves out what in the ICISS report has been described as ‘reasonable prospects of success’, see Bellamy, *Just Wars*, pp. 208–214.
2585 Wheeler used the four criteria ‘just cause’ or humanitarian emergency, last resort, proportionality, and the probability of achieving a positive humanitarian outcome. See Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, p. 34.
basis and in co-operation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide [...]” When considering military enforcement measures as a means of undertaking the responsibility to protect, the states expressed in the Outcome Document that they were prepared to bear this responsibility (primarily through the Security Council), but not that there was an obligation to do so (see Chapter 4.6.). It is notable that this part of the principle is not formulated with obligatory language in the form of a duty, but as a preparedness to act collectively in a timely and decisive manner. Thus the states indicated that they may use force to protect, and that this would be done collectively through Security Council authorisation under certain circumstances and on a case-by-case basis.

However, paragraph 139 also mentions the ‘co-operation with regional organisations as appropriate’. It is unclear in what forms such co-operation with regional organisations would take. Although the paragraph includes a reference to Chapter VIII, it was not made in relation to the phrase indicating co-operation between the Security Council and regional organisations, but was mentioned in the first phrase regarding the “use of appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter”. Since enforcement measures under Chapter VIII (Article 53) also need the application of Chapter VII (and the Council determination of a threat to the peace as well as an authorisation), this phrasing could therefore be interpreted to mean only peaceful measures and traditional peace-keeping operations under Chapter VIII (Article 52). But the latter phrase “in co-operation with relevant regional organisations as appropriate” could also be interpreted extensively, as some scholars have argued, to allow for military action based upon, for example, *ex post facto* or implied authorisation of humanitarian interventions by regional organisations. Even action based upon ‘state of necessity’ could be argued to be encompassed by this vague formulation.

The formulation regarding the responsibility to protect and regional organisations notably leaves out any explicit claim on a right for regional organisations to make unauthorised humanitarian interventions. The latter issue was far too controversial to be considered in the intergovernmental debates leading to the Summit, and whose focus was to improve, reform and strengthen the UN system rather than to consider alternative ways to operate outside the UN.2586 Supporting evidence for this interpretation is the placing of the R2P paragraph under Chapter IV of the Outcome Document, dealing with human rights and the rule of law, separate from the section on the use of force. But since the Outcome Document neither explicitly denies nor prohibits such action by regional organisations, the practice and customary process therefore needs to be examined to find out as a definite fact the extent to which this norm is developing.

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On the R2P criteria for military intervention relevant to the practice of unauthorised humanitarian intervention by regional organisations, both sets of criteria, in the Outcome Document and the ICISS report, need to be considered. The R2P criteria in the Outcome Document relevant for regional organisations would be that 1) the state is manifestly failing to protect its population, from 2) genocide, ethnic cleansing, war crimes or crimes against humanity (referred to as grave crimes of international law), and that 3) the Security Council is unable or unwilling to protect. The last criteria (the inadequacy of peaceful measures) is equivalent to the precautionary principle of last resort, which is why this criterion will only be discussed once as a principle that the regional organisation concerned has to comply with when deciding on a military intervention.

The ICISS report also raises the issue of regional organisations carrying out this responsibility when the Security Council is unable or unwilling to assume its responsibility of protection. The precautionary principles that would govern such military intervention have been suggested to be complied with by the ICISS Commission in order for such action to be executed in a legitimate way, thus avoiding that the concept of R2P being abused for other purposes. The set of principles for military intervention were also formulated for the purpose of reaching the necessary consensus for a decision to intervene, and it was argued that these must be met with as much precision as possible. These were not only addressed for the Security Council but argued to apply for states, although preferably through multilateral operations. These include a) right intention, b) last resort, c) proportional means, and d) reasonable prospects of success. The following case studies will therefore focus on the presence of these criteria and examine whether the interventions in question in fact complied with the precautionary principles in a general and consistent manner, in order to develop into an emerging customary norm.

For reasons of space, historical and factual backgrounds to the conflict will not be included in the analysis of the cases, and also because factual circumstances have already been illustrated at length in previous research on humanitarian intervention.

2587 Cf. also the discussion on the use of guidelines outside the UN Charter framework, Stromseth, Rethinking humanitarian intervention: the case for incremental change, p. 266.
2588 See e.g. the formulation: “[r]ight intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned”. See ICISS, The Responsibility to Protect, p. XII (2)(A).
8.3. The relevant customary law criteria

The same rules applicable for the emergence of customary rule based upon state practice should be assumed to ex analogia apply mutatis mutandis to the formation of customary rules on unauthorised humanitarian intervention by regional organisations (see the analysis on CIL in Chapter 2.4.). The ILA Statement asserts that the practice of intergovernmental organisations in their own right is a form of state practice. This means that the practice of humanitarian interventions by regional organisations should be regarded as state practice capable of contributing to a customary process. It could be argued that such practice should be considered to contribute to special custom ratione personae through special or regional custom rather than contributing to a development of 'general custom'.

But on the other hand, since this practice involves the possible amendment of the prohibition on the use of force (an erga omnes obligation) which concerns the whole international community (ratione materiae), the responses and protests by the whole international community, including third states which are not involved in the intervention, should be taken into consideration in assessing any emerging opinio juris on the matter. Therefore, the emerging norm could be argued to be developing into a general customary norm, although the practice is limited to member states pertaining to regional organisations.

At the same time, since we are dealing with a limited number of states participating in this practice (member states of certain regional organisations), some of the criteria specifically addressing general customary norms (generality, extensiveness, representativeness), may not be considered in the usual manner. The relevant customary criteria for the following study are thus: the consistency, internal and external uniformity, and duration of the state practice.


2590 See the findings of Chapter 2.
2592 Apart from the strict rule of burden of proof and the specific consent of states involved in special custom, the same criteria are presumed to apply with regard to special custom as to general customary law. It is necessary to prove that a particular custom has become binding on a specific state concerned through some form of participation or consent. Special custom by regional organisations could most likely easily be proved to become binding on all member states of the organisation by the founding treaty of the organisation.
2593 Cf. Stromseth’s assessment of the relevant CIL elements in cases of unauthorised humanitarian interventions: “[T]his approach assesses state practice, state legal justifications, and the responses of the Security Council and the broader international community in order
silence and acquiescence of states at the time of these interventions also form part of the assessment of customary law.

The customary law analysis in the chosen cases of RHI will focus on if and how the R2P criteria were employed, taking into consideration the customary law criteria for the emergence of new norms. The practice should ‘in general be consistent’ which means that the manifestations of state practice have to abide by the emerging customary rule sufficiently – that state practice on RHI comply with the same R2P norm (and criteria) for military intervention. The customary process allows for some inconsistencies, but not too many. A small amount of inconsistency does not prevent the creation of a rule, but it increases the amount of practice needed to establish the rule.\textsuperscript{2594}

Uniform practice means that the various instances of practice must essentially be similar and consistent acts, expressing the same customary rule. Because the scarce practice indicates that we are only dealing with a norm in development, some of the CIL criteria will not be possible to consider in these case studies. When it comes to the internal uniformity of each regional organisation in their practice of RHI, this may not be analysed since each of the relevant organisations has not repeated its practice on unauthorised humanitarian intervention (as defined in this thesis). NATO and ECOWAS have each only conducted one unauthorised humanitarian intervention, which means that only the ‘collective uniformity’ may be analysed. The study will thus show whether uniformity exists in these two cases in the application of the R2P criteria.\textsuperscript{2595} Too much inconsistency in their practice would prevent an emerging rule of R2P by military means.

It has traditionally been generally accepted that at least some time is required for the formation of a norm. But the ILA Committee states that there is no specific time requirement, and that it is all a question of accumulating a practice of sufficient density, denoting uniformity, extent and representativeness.\textsuperscript{2596} Customary developments having the purpose of modifying a conventional rule take more time.\textsuperscript{2597} There is a correlation between the time necessary for an informal modification and the number of parties to the convention. More time is needed for the customary process modifying a multilateral treaty such as the UN Charter, with many parties involved. The modification of ‘declaratory conventional rules’,\textsuperscript{2598} such as the prohibition on the use of force, is argued to take even longer, since the underlying customary rule beneath

to identify emerging elements of consensus – a process that should, over time, yield a clearer legal status for humanitarian intervention”, see Stromseth, \textit{Rethinking humanitarian intervention: the case for incremental change}, p. 254.

\textsuperscript{2594} Akehurst, \textit{Custom as a Source of International Law}, p. 20.

\textsuperscript{2595} This means that the practice of the different regional organisations will be compared with one another in order to verify whether the R2P criteria have been applied with collective uniformity by several actors.


\textsuperscript{2597} Villiger, \textit{Customary International Law and Treaties}, p. 223.

\textsuperscript{2598} ‘Declaratory conventional rules’ are treaty rules declaratory of customary law.
The evolving norm on responsibility to protect by military means cannot escape the problem of selectivity. This would mean that all cases where there is need of protection and the state concerned manifestly fails to protect, and the Security Council proves unable or unwilling to protect, may arguably be addressed by regional organisations. Therefore the emerging legal norm should more appropriately be viewed as a permissive rule of the use of force to protect rather than a duty or obligation to use force in certain situations to protect populations. The international political climate does not reflect a general interest or will in creating a rule demanding the use of force when certain conditions or criteria are met. Thus it will be assumed that it is more appropriate to consider an emerging norm of R2P by military means for regional organisations to embrace a permissive right rather than an obligation. For permissive rights the opinio juris may be inferred from state practice. More or less direct and express declarations or statements in abstracto by states, revealing the opinio juris for a responsibility to protect by military means, are hence not necessary at this stage. The fact that justifications based upon the concept of R2P expressing opinio juris for this norm could not have been uttered at the time of the interventions concerned, should not create obstacles for the formation of the rule. It is not only the justifications but also the ‘essence’ of the practice that should be examined to find the evidence of opinio juris (see Chapter 2.4.2.5). Furthermore, it has been confirmed that the opinio juris of states often lags behind. So state practice with an ‘essence’ expressing the norm of R2P in the 1990s could arguably be complemented by statements of opinio juris towards this norm in the 21st century.

But because the emergence of a permissive right to protect by military means without Security Council mandate for regional organisations would not develop into an independent permissive rule, but as an exception to a main rule (the prohibition on the use of force), it would involve an informal modification of this norm through customary law. Because of the presumption against legal change for the emergence of new customary rules that conflict with pre-existing customary rules, clear evidence supporting a new customary rule is needed to overcome the presumption, and proof of opinio juris is crucial in this respect. Express statements of the parties or, in the absence of such statements, consistent conduct manifesting a real intention to modify or terminate a treaty would be necessary. However, Villiger maintains that the notion of presumption becomes relative in cases of

2599 Villiger, Customary International Law and Treaties, p. 224. He concludes that a rule has been modified when the two rules cannot be applied simultaneously.
2600 Ibid., p. 215.
2601 See Chapter 2.4.5.
partial change, where only some components of a rule are modified informally.

Arguments, claims or assertions made *de lege ferenda* on the justifications for unauthorised humanitarian interventions by regional organisations need to be phrased as assertions or claims of *lex lata* and subsequently sufficiently supported or acquiesced in by the other states concerned for the norm to emerge.2603

8.4. Unauthorised humanitarian interventions by (sub-) regional organisations

8.4.1. Post-Cold War practice on RHI through an R2P lens

8.4.1.1. Africa

**LIBERIA (1990)**

The NATO intervention in Kosovo was not the first time in the contemporary period that a group of states acting without explicit Security Council authority defended a breach of sovereignty primarily on humanitarian grounds, as is often stated in the literature.2604 The ECOMOG intervention by ECOWAS in Liberia is the first post-Cold War case where this happened. But for various reasons this case by far has not received as much scholarly attention as that of Kosovo in the legal literature. It has even been omitted as a case study from several monographs on humanitarian intervention.2605 All the same, the ECOWAS intervention in Liberia has been considered to be one of the strongest of cases/precedents for regional collective humanitarian intervention (without Security Council mandate).2606

The use of force by ECOMOG lacked Security Council authorisation. Other legal bases have been considered to be unclear and are ruled out as legalising the intervention.2607 The Security Council resolution 788 adopted on November 1992 further confuses the legal

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2603 Akehurst, *Custom as a Source of International Law*, p. 5.
status of the ECOMOG intervention, according to Gray. There was no valid consent present since President Doe's government did not control the territory to the extent that it could issue a valid invitation, and among the warring parties (AFL, NPFL and INPFL), Taylor's NPFL did not assent to the ECOWAS intervention. Neither did the existing ECOWAS Constitution or Protocols provide the necessary legal basis for the military operation. The ECOWAS efforts in Liberia were seen as *ex post facto* authorised or legitimated through the subsequent commendations of the Security Council, and attained positive support or acquiescence from the international community. It was not until the Cotonou Peace Agreement in 1993 that the military operation received a firm legal basis. Thus the enforcement action used in the initial phases of the ECOWAS operations (during the autumn of 1990) could be argued to be contributing to the customary process of RHI, as well as to the theory of *ex post facto* authorisation.

**Grave crimes of international law?**

Civil war broke out in December 1989 when Charles Taylor’s rebel forces the National Patriotic Front of Liberia (NPFL), invaded Liberia from the Ivory Coast border. Taylor’s intention was to overthrow the Liberian president, Samuel Doe. The invasion and the ensuing civil war resulted in unimaginable brutality, tribalism and senseless killing. Mass atrocities, massacres and war crimes were committed by all sides to the conflict. In the carnage thousands of civilians were tortured or murdered. Thousands more faced starvation. The civil war developed into a large-scale inter-ethnic war between Doe’s Armed Forces of Liberia (AFL), the NPFL and its splinter rebel faction, the Independent National Patriotic Front of Liberia (INPFL). Government troops massacred hundreds of Gio and Mano civilians, who made up most of Taylor’s forces and who were accused of supporting the insurgency,

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2608 Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, pp. 136-137. Chesterman argues that the Council determination of the situation to constitute a threat to the peace, “particularly in West Africa as a whole”, together with the ambiguous preambular recollection of the provisions of Chapter VIII (see para. 8) contributes to the confusion.

2609 See Chapter 7.1.3. For an analysis on the consent of the host state in the case of Liberia, see also Gray, *International Law and the Use of Force*, pp. 303-305. The ECOWAS letter to the Security Council on 9 August did not mention consent.


2613 Wippman, *Enforcing the Peace: ECO/WAS and the Liberian Civil War*, p. 157. The NPFL had the support of Libya, and of Burkina Faso and Ivory Coast, see *ibid.*, p. 188.

2614 Ibid., p. 158.

2615 Ibid., pp. 163-164. The latter rebel force was formed in June 1990 when NPFL reached Monrovia, by Prince Johnson.
while the NPFL in turn attacked both the Krahn (to which Doe and many members of the army belonged) and Mandingo civilians (who were in alliance with the Krahn). By August 1990 the war had claimed 5,000 lives and created 500,000 refugees and 1,000,000 internally displaced persons (IDPs). Beginning in the Nimba County, the fighting spread rapidly throughout Liberia, and refugees fled to Ivory Coast and Guinea.

The humanitarian and security situation was alarming to the point that the US launched two evacuation operations for US and other foreign nationals on 5 and 19 August 1990. The decision by ECOWAS to intervene by military means was taken on 7 August and the ECOMOG forces were deployed on 24 August, in the midst of a full-scale civil war that had “reached near genocidal proportions; mass starvation and widespread disease was imminent”. Without exaggeration it could be argued that war crimes and crimes against humanity were being committed in Liberia at the time of the decision to intervene. The threshold was met.

**The state manifestly failing to protect?**

The civil war left the country in chaos and anarchy, and by July 1990 all civil authority within Liberia had ceased to exist. The total breakdown of law and order was seen as an illustration that ‘the state of Liberia had effectively collapsed’, and the Chairman of the OAU, President Museveni, argued that the intervention therefore did not violate the OAU rule of non-interference. The situation resembled the failed state situation in Somalia where no government was in position and where chaos and anarchy reigned.

The ECOWAS Standing Mediation Committee for Liberia cited in a final communiqué that “[…] there is a government in Liberia which cannot govern and contending factions which are holding the entire population hostage, depriving them of food, health facilities and other basic necessities of life”. President Doe, who did not control the

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2616 Ibid., pp. 163-164.
2617 Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, p. 135. *Cf.* other figures given: by July 1990, it was estimated that 20,000 people had lost their lives, half of the 2.5 million Liberian population had been displaced and up to 700,000 people become refugees, see Engdahl & Hellman (Eds.), *Responsibility to Protect - folkrättsliga perspektiv*, p. 33. See also Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, p. 163. *Cf.* Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, p. 202.
2618 Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, p. 135; Bring, *FN-studyn och världspolitiken. Om folkrättens roll i en förändrad värld*, p. 139. In the first instance a total of 74 foreigners, including 62 Americans, were evacuated, and in the latter, 800 foreigners of different nationalities (mainly Libanese and Africans).
2620 Ibid., pp. 158, 164.
2621 Ibid., p. 182.
2622 The Final Communiqué of the First Joint Summit Meeting of the ECOWAS Standing Mediation Committee and the Committee of Five, quoted in *ibid.*, p. 176. The five-member Committee was formed in June 1991 as an adjunct to the Standing Mediation Committee, responding to the concerns of the anglophone dominance of the process (Ivory Coast,
country, let alone Monrovia at the time of the intervention, welcomed the Standing Mediation Committee decision to deploy ECOMOG in Liberia. It could be well argued that the state was manifestly failing to protect its population.

**The Security Council unable or unwilling to protect?**

President Doe attempted without success to persuade the Security Council to address the situation in Liberia. Attempts to bring the matter before the Security Council in May, as well as in July 1990, had been frustrated by the Council members representing Zaire and Ethiopia, reportedly through fears that intervention in Liberia might serve as a precedent for other interventions in Africa. The Ivory Coast, which was sympathetic to Taylor, also expressed opposition towards Council action in Liberia. Another reason for the inaction of the Security Council which is often mentioned was the preoccupation with the Iraq-Kuwait war.

Moreover, the view of the US that the civil war was an internal problem for Liberia, and the attitude that there should be African solutions to African problems, was adopted by the Security Council. No action by the West or the UN in the case of Liberia could be expected in the late summer and autumn of 1990.

The Security Council did not consider the security situation in Liberia nor the military intervention until January 1991 – six months after the intervention and the civil war breaking out. The debate in the Council on 22 January resulted only in a note by the president commending the peace efforts of ECOWAS, despite the endeavours of the Liberian delegate to induce the Council to become involved in Liberia:

It will be recalled that seven months ago we made efforts to have the Council seized with the deteriorating situation in Liberia, which efforts were not approved. Today, after the displacement of nearly a half of Liberia’s population of 2.5 million, after the loss of thousands of innocent lives and the virtual...
destruction of the entire country, we meet here with one resolve: to address and support the peaceful resolution of Liberia’s tragic civil war.2631

After the debate the Council issued a note by the President commending the efforts of ECOWAS to “promote peace and normalcy in Liberia” and called on all parties to co-operate with the sub-regional organisation.2632 Another note from the Council President was issued in May 1992 in which he, again, on behalf of the Council, commended ECOWAS for its efforts “to bring the Liberian conflict to a speedy conclusion”.2633

Considering the attempts to engage the Security Council, and the opposition and passivity exhibited by its members in the case of Liberia in 1990 and onwards, it becomes obvious that the Security Council was unwilling or unable to protect the population of that country.

a) Right intention

The criteria or precautionary principle of ‘right intention’ for military interventions undertaken as a form of R2P implies that the primary intention is to halt or avert human suffering, according to the ICISS report.2634 Any use of military force that from the outset aims to alter borders or advance a particular combatant group’s claim to self-determination cannot be justified under this principle. But mixed motives behind an intervention, to the extent that they can be identified, should not in themselves preclude humanitarian intervention.2635 The Commission states that budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for an intervening state to be able to claim some degree of self-interest in the intervention. Apart from economic or strategic interests, understandable forms of state interest mentioned are concerns for avoiding refugee flows, and preventing safe havens for drug production or terrorism.

The Standing Mediation Committee agreed to (informally) establish on 7 August 1990 the ECOWAS Cease-fire Monitoring Group (ECOMOG) in Liberia ‘to institute a cease-fire, form an interim government and hold democratic elections’.2636 The tasks of the ECOMOG force were “to conduct military operations for the purpose of monitoring the cease-fire, restoring law and order to create the necessary conditions for free and fair elections.”2637 The letter to the

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2632 Note by the President of the Security Council, S/22133 (1991); Weller, Marc, Forcible Humanitarian Action: the Case of Kosovo, Bothe, Michael, O’Connell, Mary Ellen, Ronzitti, Natalino (Eds.), Redefining Sovereignty. The Use of Force After the Cold War, Transnational Publishers, New York, 2005; Gestri, ECOFAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, pp. 220-221.
2633 Note by the President of the Security Council, S/23886 (1992).
2634 More on these R2P principles, see Chapter 5.3.2. above.
2635 ICISS, The Responsibility to Protect, p. 36.
2637 Gestri, ECOFAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or
Security Council on 10 August 1990 from Nigeria, included the Standing Mediation Committee’s statement of its first session and expressing the purpose of the force:

[...]the ECOWAS Monitoring Group (ECOMOG) is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions. ECOWAS intervention is in no way designed to save one part or punish another.2638

The Committee furthermore expressed concern over “the wanton destruction of human life and property and the displacement of persons”.2639 A variety of justifications were thus offered by community members for the ECOWAS action in Liberia.2640 Parallel intentions and motivations for the intervention included the humanitarian purposes of stopping destruction to life and property, addressing the security threats to regional stability, restoring order, inducing a cease-fire, promoting free elections, protecting foreign nationals, and promoting national reconciliation in Liberia.2641

The intervention by ECOWAS was nonetheless controversial, primarily among African states. There was initial suspicion from the francophone states,2642 in particular Burkina Faso and the Ivory Coast, of the Nigerian dominance in the ECOMOG forces, and the risks that Nigeria would unduly extend its influence in the region.2643 The colonial heritage of the ECOWAS states had left a principal fault line between the francophone states on the one hand and the anglophone states on the other hand, traditionally led by Nigeria.2644 But Burkina Faso and the Ivory Coast supported Charles Taylor, and saw the ECOMOG intervention first and foremost as a Nigerian effort to block Taylor’s drive to oust Doe.2645 Nigeria was supportive of President Doe but gave assurances in the Security Council debates on Liberia that the intervention did not mask any territorial interests that country.2646
Notwithstanding those assurances, Togo and Mali, members of the Standing Committee, initially refused to contribute troops to the force, and joined by the Ivory Coast and Senegal, expressed the view that the Committee had overstepped its bounds. Burkina Faso, whose President was Taylor’s most open supporter, denounced the ECOWAS decision and argued that consent by all parties was required. Wippman explains that all of the francophone states, except Guinea, questioned the Committee’s peace plan, mainly due to their sympathy for Taylor and concern over possible extension of Nigerian influence. The objections did not stop the majority of the Committee from moving on with the plan.

The primary reason for the ECOMOG deployment has been regarded by commentators to be predominantly humanitarian, aimed at ending the carnage. Furthermore, ECOWAS did not impose a government on Liberia, but instead pressed for free elections, gathering together 18 political parties of Liberia at the All Liberia Conference on 27 August where Amos Sawyer was appointed interim president.

b) Last resort

The R2P concept as proposed by the ICISS report stipulates that every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored before military force is deployed. There must be reasonable grounds for believing that, in all the circumstances, if peaceful measures had been attempted, they would not have succeeded in preventing further atrocities.

The civil war, the state of anarchy and lack of civil authority in that country demanded forceful action when the attempts to stop the fighting through negotiations and other peaceful means failed. The US and various African leaders had in the early stages of the conflict unsuccessfully encouraged the parties to reach a negotiated settlement. The heads of states of ECOWAS established in late May 1990 a Standing Mediation Committee (made up of Gambia, Nigeria, Ghana, Togo and Mali), which was entrusted with the task of achieving a settlement of the Liberian crisis. Their mandate was to induce a cease-fire, stop to the destruction of life and property and ensure that all
parties accepted free and fair elections. When the peace talks collapsed in Sierra Leone, multiple calls for military intervention emerged, primarily by Liberian politicians and interest groups with regard to the US.

The position of Washington disappointed the Liberians in that the US saw the disintegration of Liberia as an internal affair, and that any intervention should be undertaken with the consent of all parties. Since the Security Council adopted the same position as the US and refused to even get the conflict on its agenda (Zaire and Ethiopia opposing, and other Council members declining to press the issue), the international response was limited to the evacuation of foreign nationals by US marines. No further action by the West, not even a decision by the Security Council to resort to peaceful measures under Chapter VII, could be expected.

The initial deployment of approximately 2,000 to 3,000 ECOMOG forces on 24 August 1990 in Liberia was therefore well timed, according to Wippman. ECOWAS recognised that delay would result in the imminent danger of disintegration and loss of life. By August the situation in Monrovia was desperate. Tens of thousands of Liberians, and hundreds of other nationals of various ECOWAS member states, became trapped without food, water, medicine, or shelter. The use of force by ECOMOG could therefore be argued to have been taken as a measure of last resort.

c) Proportional means

As stated in the ICISS report, the scale, duration and intensity of the planned military intervention was required to be the minimum necessary to secure the ‘humanitarian objective’ and to be proportional to the threat that it sought to address:

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

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2653 Ibid., p 164.
2654 Ibid., p. 164.
2655 Wippman argues that intervention in Liberia did not advance any post-Cold War strategies for the US, which furthermore regarded all three factions as undesirable and did not wish to incur blame for assisting any of them into power, see ibid., p. 165.
2656 Ibid., p. 165.
2657 Troop-contributing states were mainly Nigeria and Ghana, but Gambia, Guinea, and Sierra Leone also contributed. Nigeria played the lead role in forming, deploying and supplying most of the diplomatic, financial and military support to ECOMOG. Nigeria was a friend of Samuel Doe, see ibid., pp. 168, 191; ICISS, The Responsibility to Protect. Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty, pp. 81-82; Murphy, Humanitarian Intervention. The United Nations in an Evolving World Order, p. 158; Chesteman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 135.
2658 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 196.
2659 Ibid., p. 165.
country targeted should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention.2660

Furthermore, the ICISS report proposed that even higher standards of respecting the rules of humanitarian law should apply in these cases.2661 The R2P (jus ad bellum) precautionary principle of proportionality, however, should not be confused with the (jus in bello) humanitarian law principle of proportionality, although there appears to be some overlap in application. (See Chapter 5.3.2.e.)

From the outset, Taylor saw ECOMOG as an effort to prevent him from taking power and denounced the proposed intervention as illegal in advance of the August Summit of ECOWAS.2662 The ECOMOG forces consequently faced military attacks by NPFL forces upon their arrival to Liberia.2663 When it was created, ECOMOG’s mission was described as that of “keeping the peace, restoring law and order and ensuring that the cease-fire is respected”.2664 But the use of force by ECOMOG in the ensuing armed engagements with the NPFL has been argued not to constitute circumstances of self-defence on the part of a traditional peace-keeping force “obliged to fire back and attack”, since it was not operating with the full consent of the warring parties.2665 Nevertheless, between 24 August and 10 September 1990, ECOMOG was purporting to be acting as a traditional peace-keeping force, impartially and only in self-defence, but it could rather more accurately be characterised as adopting a “limited offensive” strategy.2666

Although ECOMOG was formally denominated as a cease-fire monitoring or peace-keeping force, it was clear from the start that it would have to establish a cease-fire by force before it could begin to monitor it. Within a month, its strategy had evolved into a conventional offensive, aiming at driving NPFL out of Monrovia.2667 After Doe was killed by Prince Johnson while visiting the ECOMOG headquarters on 10 September 1990, ECOMOG began a full-scale offensive to drive the NPFL from Monrovia.2668 It fully abandoned its purported peace-keeping posture and neutrality in the civil war and went into combat against Taylor’s forces. Its efforts were supported by INPFL and AFL forces. By November 1990 ECOMOG controlled Monrovia, and the interim government was installed.2669 The ECOMOG offensive in the

2660 ICISS, The Responsibility to Protect, p. 37, para. 4.39.
2661 Ibid., p. 37, para. 4.40. Cf. an opposing view in Greenwood, Essays on War in International Law, pp. 644-649.
2662 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 167.
2663 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 135.
2664 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 177.
2665 Ibid., pp. 177-178; Gray, International Law and the Use of Force, p. 303 et seq.
2666 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 177.
2667 Ibid., p. 177.
2668 Ibid., pp. 168-169.
2669 Ibid., pp. 158, 169. Taylor refused to acknowledge the interim government and insisted that on his entitlement to the presidency based upon his control over 90 per cent of the territory.
autumn of 1990 has been regarded as enforcement action. No state claimed that ECOWAS needed Security Council authorisation, and the Security Council never demonstrated concern over ECOMOG went beyond legitimate peace-keeping.

After the cease-fire, also agreed on in November, ECOMOG was accepted as the monitoring force, and its claim to be a peace-keeping force achieved greater credibility during the following two years. The cease-fire was not respected and the conflict entered a political impasse where subsequent negotiations and agreements resulted in non-compliance over disarmament by Taylor and the NPFL. Several cease-fires and peace-agreements were adopted and signed during the course of following years of the civil war. Taylor’s refusals to accept the ECOWAS peace and disarmament plans left Liberia effectively partitioned, with the NPFL controlling the major parts of the country. Also the Yamoussoukro Agreement IV of 29 October 1991, considered the strongest and most credible peace agreement, was not honoured because Taylor’s forces refused to disarm. The fighting spread to Sierra Leone, when NPFL soldiers joined insurgent forces there in March 1991, as a form of retaliation for Sierra Leone’s support of ECOMOG operation. But the war then further widened when the United Liberation Movement of Liberia for Democracy (ULIMO) was formed in late May 1991 by Krahn refugees and former AFL soldiers. Fighting increased between ULIMO and NPFL and posed new security threats.

After the hostage taking of 500 ECOMOG soldiers by Taylor in early September 1992 in response to what Taylor believed to be ECOMOG support to ULIMO, ECOMOG resumed a more robust approach involving enforcement action directed at pushing the NPFL back. Relations between ECOMOG and the NPFL further deteriorated. ECOMOG’s credibility as a neutral and impartial peace-keeping force was questioned again in the autumn of 1992 as demands for UN intervention increased by the francophone states. These states

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2670 Ibid., p. 186; Gray, International Law and the Use of Force, p. 304. Gray argues that the UN Secretary-General stated in his March 1993 report on Liberia that “the NPFL attack had obliged ECOMOG to adopt a peace-enforcement model to defend and protect the capital”. But these are not the exact words used in the report, however. See Report of the Secretary-General on the question of Liberia, S/25402, 12 March 1993, UN Doc S/25402, 1993, para. 17.


2672 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 178.

2673 Ibid., p. 170.

2674 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 171; Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 195.

2675 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 170.

2676 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 172.


2678 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 172; Gray, International Law and the Use of Force, pp. 304-305. Non-military sanctions into NPFL territory were imposed by ECOWAS and the Security Council also adopted an arms
opposed a major ECOMOG offensive against the NPFL forces. But Taylor launched a major offensive against the capital in November 1992, which ECOMOG succeeded in repelling after two weeks of heavy combat, thanks to rapid reinforcement and support of AFL and ULIMO. Wippman argues that on this occasion ECOMOG could justifiably defend its drive to oust Taylor’s forces as an act of self-defence on the part of a peace-keeping force. This was acknowledged by the Security Council, which referred to ECOMOG as a peace-keeping force and did not condemn the vigorous armed response. The fighting, however, resulted in thousands of additional civilian casualties and tens of thousands more of refugees. The enforcement action by ECOWAS came to an end with the signing of the Cotonou Peace Agreement in July 1993, and the ECOMOG force entered again into a more traditional peace-keeping phase. The Security Council resolutions passed after the 1993 Agreement clearly assumed its legality as a peace-keeping force.

Through Security Council resolution 866, adopted on 19 November 1992, the UN Observer Mission in Liberia (UNOMIL) was created to complement and co-operate with ECOMOG forces in restoring order, disarming rival factions and preparing for free and fair elections. In August 1995 a final peace agreement was reached. The UN-observed election in July 1997 was won by Charles Taylor with 75 per cent of the votes.

The final result of this internal armed conflict, beginning in 1989 and ending with the peace accord signed on August 1995, was that of Liberia’s 2.5 million citizens at least 200,000 of them were killed, and

2679 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law p. 172.
2681 S/PV.3138 (1992), p. 73 et seq. (USA), p. 79 (UK), p. 92 (Mauritius); Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 178.
2682 The Agreement provided that ECOMOG was to function as a neutral peace-keeping force. According to Gray, it included a heading ‘peace-enforcement powers’ but she argues that this made no express provision for the use of force except in self-defence. Gray, International Law and the Use of Force, pp. 306-307. Troops from Uganda, Tanzania and Zimbabwe also joined the 4,000 troops comprising ECOMOG forces. See also ICISS, The Responsibility to Protect. Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty, p. 83.
2686 Ibid., p. 84.
785,000 made became refugees.\textsuperscript{2687} In total 9,000 ECOMOG troops were deployed there.\textsuperscript{2688}

Whether the intensity, duration and scale of the military efforts of ECOMOG exacerbated and prolonged the civil war is open to discussion, in particular in relation to the periods of combat with the NPFL, which caused many civilian casualties. At the same time its initial mandate as a peace-keeping force was frustrated from its inception. It could be argued that the means employed by ECOMOG were commensurate with the ends, and in line with the magnitude of the original provocation. Wippman contends that the intervention was proportionate to the humanitarian crisis and that minimum force was used to end the fighting and create order and security where relief supplies could be delivered.\textsuperscript{2689} The efforts contributed to several cease-fires, peace agreements, an interim government and ultimately elections, and ending the worst of crimes committed against civilians during the civil war. But the accusations of ECOMOG officers exploiting Liberia’s timber, diamond, rubber, and gold resources as well as its forces looting in Monrovia’s suburbs, clearly went beyond the humanitarian objective and proportionality of the mission.\textsuperscript{2690} Its proportionality could therefore be questioned.

d) Reasonable prospects of success

Military action for protection purposes under the responsibility to protect doctrine can only be justified if it stands a reasonable chance of success –halting or averting atrocities or suffering that triggered the intervention. If the outcome is likely to be worse than if no action were taken, for example, by touching off a larger regional conflagration, involving major military powers, it should be avoided. The question as to whether it would have been better not to have acted at all than to intervene without a Security Council mandate, is difficult to answer and will necessarily be speculative.

The above mentioned material does not reveal how ECOWAS leaders reasoned with regard to the reasonable prospects of success for its military operation, but it must be assumed that the majority of member states came to such a conclusion despite the opposition of some francophone states to the decision to use force in Liberia. The opposition appears to have mainly been concerned with sub-regional politics rather than humanitarian necessity or the risks of a negative outcome of the operation in terms of inducing a cease-fire and restoring order.

Chesterman speculates whether the ECOMOG intervention ultimately exacerbated the security situation in Liberia to the extent that it contributed to the civil war becoming a ‘real’ international threat to the

\textsuperscript{2687} Ibid., pp. 83-84.
\textsuperscript{2688} Wippman, \textit{Enforcing the Peace: ECOWAS and the Liberian Civil War}, p. 168.
\textsuperscript{2689} Ibid., p. 179.
\textsuperscript{2690} Murphy, \textit{Humanitarian Intervention. The United Nations in an Evolving World Order}, p. 160.
peace.2691 The development of the civil war, in terms of spreading and widening, could possibly have been avoided if Taylor had been allowed to take the position of power in Monrovia. The question as to whether ECOWAS succeeded in halting the atrocities and imposing and restoring order could therefore be questioned. But it could be argued that the AFL, INPFL and ULIMO would have been able to continue the war without the ECOMOG forces on their side and worsened the humanitarian situation even with Taylor in power. Gray states that the intervention may be seen as either a success that helped to secure a cease-fire and a political settlement, or as a Nigerian-inspired operation that merely prolonged and postponed the coming to power of Charles Taylor.2692

Claims/justifications and responses

The responses of the international community to the ECOWAS intervention in Liberia have been, “for the most part”, one of “guarded approval”.2693 Wippman summarises the positions of the Security Council, the EU and the OAU as periodically encouraging ECOWAS in its efforts, while most states said little or nothing about the intervention, except Burkina Faso, which supported Taylor’s NPFL. Also, the initial protests expressed by a few francophone states in ECOWAS were not of such proportion to preclude the precedence of this case, since the sub-regional organisation decided to act anyway. The people of Liberia also welcomed ECOMOG for the most part throughout the country.

The Security Council notes by the President in 1991 and 1992 commended the efforts of ECOMOG. It was not until adopting resolution 788, on 19 November 1992, that the Security Council determined the situation in Liberia to constitute a threat to the peace, and officially declared its formal support for the ECOWAS role in Liberia: “Commends ECOWAS for its efforts to restore peace, security and stability in Liberia”.2694 This has been interpreted to constitute an ex post facto authorisation by the Security Council.2695

The Council thus tacitly accepted, acquiesced in or even encouraged the unauthorised military presence of ECOWAS in Liberia for more than two years.2696 Gray observed that members of the Council neither distinguished between the actions of ECOMOG, in terms of

2691 Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 137.
2693 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 175; Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention, p. 204.
2694 S/RES 788 (1992), op. 1. The resolution also imposed a general and complete arms embargo on Liberia under Chapter VII.
2696 Gestri, ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, pp. 224-225. No member raised any express objections concerning the legality of the operation. See also Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 185.
enforcement action under Article 53 or peaceful regional measures under Article 52, nor between the use of force taken in self-defence or pre-emptively as enforcement action. They simply characterised it as a peace-keeping force.

The international community’s response to the intervention appears to have been one of tacit approval. The US and the international community accepted and supported the intervention. The OAU gave its support to ECOMOG and rejected the claim that it constituted a violation of the OAU Charter.

8.4.1.2. The West/Europe

KOSOVO (1999)

The NATO intervention in Kosovo and FRY in March 1999 has provoked numerous and extremely divergent interpretations as to its legality, legitimacy and moral imperatives. The case is controversial and it has been questioned as to whether it represents a good precedent for unauthorized humanitarian intervention at all. It is therefore difficult, if not impossible, to make one authoritative restatement of the assessments made. I have for these reasons relinquished any attempt to display all the various perspectives and views on the case in the analysis that follows, and the ensuing assessment has focused on a selection of scholarly work that has concentrated its analysis of the Kosovo Case with a just war perspective, utilising similar principles as the R2P criteria as a point of departure.

Grave crimes of international law?

When the NATO bombings on the Federal Republic of Yugoslavia (FRY) began on 24 March 1999, the situation in Kosovo was developing into a humanitarian catastrophe. Though not of the same magnitude as the humanitarian crises in Somalia, Rwanda or Darfur, it was appalling enough for FRY’s European neighbours and their transatlantic allies to feel a moral imperative to act, including to prevent further atrocities. There were first-hand reports of over 500 civilians killed and 400,000 Kosovo Albanians expelled from their homes and displaced in neighbouring states. The repressive Serb policy on the Kosovo

2697 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, pp. 185-186.
2699 Wippman, Enforcing the Peace: ECOWAS and the Liberian Civil War, p. 159.
2700 Ibid., p. 175.
2701 Ibid., pp. 181, 187.
2703 Wheeler, Saving Strangers. Humanitarian Intervention in International Society, p. 269; Bellamy, Just Wars, p. 216. Reports of a new wave of systematic ethnic cleansing and mass murder began to emerge on 20 March 1999. Some 60,000 Kosovo Albanians had been subject to ethnic cleansing in the preceding days. The Secretary-General’s report on 5 October 1998 already witnessed of mass-killings of civilians. Another massacre was committed in Račak in January 1999. See Wheeler, Saving Strangers. Humanitarian Intervention in International Society, p.
Albanians under the Milosević government was condemned as ethnic cleansing. There were also massacres and widespread acts war crimes. Security Council resolution 1199 adopted on 23 September 1998, already confirmed the violations of human rights and humanitarian law and the rapid deteriorating humanitarian situation in Kosovo as constituting a threat to peace and security in the region:

Deeply concerned about the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the impending humanitarian catastrophe as described in the report of the Secretary-General, and emphasising the need to prevent this from happening.

Deeply concerned also by reports of increasing violations of human rights and of international humanitarian law, and emphasising the need to ensure that the rights of all inhabitants of Kosovo are respected. […]

Affirming that the deteriorating situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to the peace and security in the region.

The continuing grave humanitarian situation, the impending humanitarian catastrophe and the need to prevent recurrence was re-emphasised by the Council in resolution 1203 in October. At the Security Council debate following the NATO intervention on 24 March 1999, Slovenia made an indicative statement of the humanitarian situation saying that:

The situation in Kosovo is defined by the Security Council as a threat to international peace and security in the region. This defines that situation as something other than a matter which is essentially within the domestic jurisdiction of a State. In other words, Article 2, paragraph 7, of the Charter does not apply.

By March 1999 approximately 1,000 civilians had been killed and more than 400,000 ethnic Albanians had fled their homes, while another 90,000 had left the country. But some states and commentators did not consider the humanitarian situation in March 1999 to have met the threshold test demanding military intervention. Some commentators therefore describe the NATO intervention as an ‘anticipatory’ measure, because of the belief that the humanitarian need was not present at the time of the intervention. Anticipatory measures, however, were still considered to be justified in this case in light of what had happened in Bosnia in 1992-1995, and the lack of confidence in the Milosović
government. In particular Greece, France and Italy among the European allies, were reluctant to consider the threshold crossed and they were of the opinion that there remained scope for negotiation up until the very last days before the intervention. But, Russia, China, India and Belarus, and a significant number of states outside of the Security Council, failed completely to agree with NATO that the threshold was met in the Kosovo Case (see more below on Claims/justifications and responses).

On 22 May 1999, President Milosevic and four senior political and military leaders in FRY were indicted at the ICTY by the Prosecutor for war crimes and crimes against humanity. It thus appears there was an abundance of evidence indicating that most, if not all, the grave crimes enlisted in the Outcome Document formulation on R2P, ethnic cleansing, war crimes and crimes against humanity were present in the case of Kosovo.

The state manifestly failing to protect?

The question must be answered in the affirmative in this case. Grave violations of human rights and humanitarian law were being committed by Serb forces in Kosovo. Although the government in Belgrade justified the use of force as a necessary retaliation for the terrorist strikes of the secessionist UCK forces, the attacks were not merely directed at fighting the UCK and hitting back for their assaults. The government itself was carrying out the ethnic cleansing of civilian Kosovo Albanians based upon a systematic and widespread policy plan for their expulsion from Kosovo. The state was not only unable but unwilling to protect its population in Kosovo. It was itself responsible for the oppression that forced hundred of thousands from their homes, and which included mass killings.

The Security Council unable or unwilling to protect?

The Security Council was criticised for not being willing to act in accordance with its special responsibility for the maintenance of international peace and security by, among others, the Slovenian Ambassador during the Council debate on 24 March 1999.

Bellamy, *Just Wars*, pp. 216, 218. Holbrooke had been sent to Belgrade to seek a political settlement and pressure Milosevic to accept the Rambouillet agreement. The Rambouillet negotiations in Paris had been initiated after the massacre in Racak on 15 January 1999, but broke down in the middle of March due to Milosevic's opposition to accepting the presence of NATO troops in Kosovo.

Ibid., 219. For example, China and India believed the conflict in Kosovo to be an internal affair of FRY, which the international community should leave to the parties to resolve, and Russia and Belarus stressed peaceful solutions to the conflict, including further attempts at negotiation. See statements made at the Security Council, S/PV.3937, 24 October 1998, UN Doc S/PV.3937, 1998; S/PV.3988, 24 March 1999.


We regret the fact that not all permanent members were willing to act in accordance with their special responsibility for the maintenance of international peace and security under the United Nations Charter. Their apparent absence of support has prevented the Council from using its powers to the full extent and from authorising the action which is necessary to put an end to the violations of its resolutions.

Slovenia’s argument has been interpreted as a veiled statement that Russia and China had abused the power of the veto by refusing to pass a resolution authorising military action against FRY in late 1998.2715 Others, however, have argued that the non-decision by the Council should not be interpreted as a failure of the Council, but a result of the present collective security system being restricted by the powers of the five permanent members. The argument would otherwise be that one could claim a right to the use of force outside the UN Charter framework whenever the Security Council was unable to decide on military enforcement measures under Chapter VII in a security crisis.

What was clear, however, was that the Security Council was not going to authorise the use of force in FRY owing to Russian and Chinese resistance.2716 By September 1998 the deadlock on this issue had become apparent.2717 China was of the view that the international community should try to promote a peaceful solution to Kosovo, and regretted that NATO had taken the decision of military actions against FRY without consulting the Security Council or seeking its authorisation. The NATO decision of an activation order for airstrikes against Serb targets on 13 October 1998 had violated the UN Charter and international law and, according to China, had created a challenge to the authority of the Security Council by way of an “extremely dangerous precedent in international relations”.2718

The request by some states to the Security Council to authorise such a military operation resulted in resolution 1203. Although adopted under Chapter VII, at the end the resolution was stripped of explicit authorisation of military enforcement measures.2719 Russia and China abstained from voting and made clear statements that they did not see the resolution directly or indirectly authorising the use of force in

2716 See S/PV.3937 (1998), p. 11. Russia stated: “Enforcement elements have been excluded from the draft resolution, and there are no provisions in it that would directly or indirectly sanction the automatic use of force, which would be to the detriment of the prerogatives of the Security Council under the Charter”; China made a similar statement: The Chinese delegation put forward its amendments during the Council’s consultations, among which the request to delete those elements authorising the use of force or threatening to use force was accommodated. “We believe that the resolution just adopted does not entail any authorisation to use force or to threaten to use force against the Federal Republic of Yugoslavia, nor should it in any way be interpreted as authorising the use of force or threatening to use force against the Federal Republic of Yugoslavia”, ibid., p. 14.
FRY. By March 1999 Russia and China had not changed their positions, and the possibilities open for the Security Council to protect the Kosovo Albanians from the present human security threats by military means were non-existent.

a) Right intention

In the case of Kosovo, the NATO intervention has been referred to as ‘the first human security war’, because humanitarian imperatives were considered to be the *casus belli* for the intervention. Apart from purporting to be a truly humanitarian intervention, it was certainly not the first post-UN Charter unauthorised humanitarian intervention. The claim is an illustration of how the ECOWAS intervention in Liberia is often forgotten.

NATO’s Secretary-General Solana stated in a press release on 23 March 1999 that the organisation had a moral duty to end the unfolding humanitarian catastrophe, but that it was not waging a war against FRY:

Let me be clear: NATO is not waging war against Yugoslavia. We have no quarrel with the people of Yugoslavia who for too long have been isolated in Europe because of the policies of their government. Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo. […] We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo. We know the risks of action but we have all agreed that inaction brings even greater dangers. We will do what is necessary to bring stability to the region. We must stop an authoritarian regime from repressing its people in Europe at the end of the 20th century. We have a moral duty to do so.

Solana furthermore explained that the triggering factors for the military intervention were threefold, covering FRY’s refusal of the international community’s demands to accept the Rambouillet political settlement negotiated in March 1999, FRY’s disregard of the limits on the Serb Army and Special Police Forces agreed on 25 October (the

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2720 S/PV.3937 (1998), for Russia, see pp. 11-12; “Enforcement elements have been excluded from the draft resolution, and there are no provisions in it that would directly or indirectly sanction the automatic use of force, which would be to the detriment of the prerogatives of the Security Council under the Charter.”; for China, see p. 14; “We believe that the resolution just adopted does not entail any authorisation to use force or to threaten to use force against the Federal Republic of Yugoslavia, nor should it in any way be interpreted as authorising the use of force or threatening to use force against the Federal Republic of Yugoslavia.”

2721 S/PV.3988, 24 March 1999, for Russia, see pp. 2-4, *i.e.* stating: “NATO’s decision to use military force is particularly unacceptable from any point of view because the potential of political and diplomatic methods to yield a settlement in Kosovo has certainly not been exhausted.”; for China, see pp. 12-13, *i.e.* stating: “[the question of Kosovo, as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic of Yugoslavia themselves.”


October/Holbrooke Agreement) and the excessive and disproportionate use of force in Kosovo.

Although other security interests were involved, NATO's clearly humanitarian intention in Kosovo was demonstrated not only by its justifications, but also by its commitment to post-conflict reconstruction, according to Wheeler.\textsuperscript{2724} The justifications offered by individual NATO member states all established that it was the impending humanitarian catastrophe that motivated military action.\textsuperscript{2725} The US representative at the Security Council declared on 24 March 1999:

We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade’s brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo — all of which foreshadow a humanitarian catastrophe of immense proportions.\textsuperscript{2726}

President Clinton also emphasised the US interests in preventing a potentially wider war if action were not taken, apart from the humanitarian concerns.\textsuperscript{2727} The US argued that there were two triggers for the intervention: the non-acceptance of the proposed settlement and the cease-fire violations by the Yugoslav government.\textsuperscript{2728} Apart from the moral responsibility to stop the atrocities, national security interests for the US in defending European security interests were also invoked to justify the intervention.\textsuperscript{2729} France confirmed the presence of wider security interests in the Kosovo intervention: “[w]hat is at stake today is peace, peace in Europe — but human rights are also at stake”.\textsuperscript{2730}

Nonetheless, it has been argued that it was the ‘immediate humanitarian crisis’ that forced reluctant NATO states to finally agree to the bombing campaign.\textsuperscript{2731} The UK stressed the need for exceptional measures to prevent an overwhelming and imminent humanitarian catastrophe and argued that such action is legal:

We have taken this action with regret, in order to save lives. It will be directed towards disrupting the violent attacks being perpetrated by the Serb security forces and towards weakening their ability to create a humanitarian catastrophe. […] The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic

\textsuperscript{2725} See S/PV.3988, 24 March 1999.
\textsuperscript{2726} \textit{Ibid.}, p. 4.
\textsuperscript{2727} ICISS, \textit{The Responsibility to Protect}, p. 112.
\textsuperscript{2728} Bellamy, \textit{Just Wars}, p. 216.
\textsuperscript{2729} Wheeler, \textit{Saving Strangers: Humanitarian Intervention in International Society}, p. 266. President Clinton stressed that the US and Europe’s security were indivisible and that the US had a strategic interest in a stable and democratically ordered Europe.
\textsuperscript{2730} S/PV.3988, 24 March 1999, p. 9.
\textsuperscript{2731} Bellamy, \textit{Just Wars}, p. 216.
of Yugoslavia would cause further loss of civilian life and would lead to
displacement of the civilian population on a large scale and in hostile conditions.
Every means short of force has been tried to avert this situation. In these
circumstances, and as an exceptional measure on grounds of overwhelming
humanitarian necessity, military intervention is legally justifiable. The force now
proposed is directed exclusively to averting a humanitarian catastrophe, and is
the minimum judged necessary for that purpose.2732

It was Prime Minister Tony Blair and Foreign Minister Robin Cook who
took the lead in initiating and arguing that Britain and the Alliance
should be prepared to use force to stop the ethnic cleansing in
Kosovo.2733 Cook argued in the House of Commons on 25 March 1999
that inaction would have been far worse than the result of action by
NATO. He asked: “What credibility would NATO have the next time
our security is challenged if we did not honour that guarantee?”

Furthermore, it was pointed out that NATO had no territorial
ambitions or intentions of supporting the cause of the secessionist forces
in Kosovo, which is why the intervention should not be seen as a
challenge to the territorial integrity of FRY.2734 To summarise, one could
argue that despite the many parallel security and national interests
present in the Kosovo Case, the overwhelming humanitarian concerns
for the persecuted Kosovo Albanians dominated the rationale behind the
military intervention. This aspect was highlighted in the justifications by
the NATO member states in the oral pleadings at the ICJ in the Legality
of the Use of Force Cases.2735

b) Last resort

The NATO Secretary-General Solana stated on 23 March 1999, the day
before the intervention,2736 that the military alliance acted because all
diplomatic avenues had failed: “All efforts to achieve a negotiated,
political solution to the Kosovo crisis having failed, no alternative is
open but to take military action.”2737 The UK confirmed this assessment
in the Security Council debate the following day in stating:

NATO has been forced to take military action because all other means of
preventing a humanitarian catastrophe have been frustrated by Serb behaviour.
[...] Every means short of force has been tried to avert this situation.2738

2734 Ibid., p. 260. This was also declared by Foreign Secretary Cook on 25 March, and later
on 22 April 1999 by Prime Minister Blair in a speech to the Economic Club of Chicago.
2735 Weller, Forcible Humanitarian Action: the Case of Kosovo, p. 306; see e.g. Belgium’s
argumentation, Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, CR
2736 The NATO Operation Allied Force began on 24 March 1999 with limited aerial
bombardment in Kosovo and later on in Serbia. The campaign continued for 11 weeks, and
13 out of 19 NATO members contributed to the operation.
After the second round of peace talks between 15 and 18 March 1999 in Paris had broken down, Serbian forces began a new campaign in Kosovo of ethnic cleansing. Holbrooke was sent to Belgrade to persuade Milosević to accept the Rambouillet agreement. The reports of a new wave of ethnic cleansing, coupled with Holbrooke’s report on March 22 that no progress with Milosević was likely, caused Italy, Greece and France to withdraw their opposition to immediate airstrikes in the face of the rapidly escalating humanitarian crisis. They had long pursued the view that there remained an opportunity for peaceful negotiations to reach a solution, but came to change their opinions.

Bellamy argues that the humanitarian urgency, which arose after the unfolding new wave of ethnic cleansing following the breakdown of the Paris negotiations, proved that the terror in Kosovo would have happened whether or not NATO had intervened. When the visit by Holbrooke on 22 March failed in persuading Milosević to co-operate and comply with the negotiated agreement, no other peaceful means were considered to be left open to prevent ethnic cleansing. Some commentators state that Milosević appears to have calculated with the military responses and used them as an opportunity to expel the Kosovo Albanians from Kosovo. Weller discusses the possibility of Belgrade deciding to ride out NATO’s military campaign in exchange for a permanent changing of the population balance in Kosovo.

c) Proportional means

Compliance with the precautionary principle of proportionality during the NATO bombing campaign has been widely debated and contested. Considerable doubt was raised on whether NATO properly calibrated its means (the bombing campaign) and the ends (protecting Kosovo Albanians).

The FRY, international organisations and scholars also claimed that humanitarian law was violated by NATO during the war, in particular the principles of proportionality and distinction in humanitarian law. Human Rights Watch and Amnesty International both condemned the NATO conduct of the airstrikes, accusing it of committing war crimes during its bombing campaign. They furthermore criticised the choice

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2740 Bellamy, Just Wars, p. 216.
2741 Ibid., pp. 218-219.
2742 Ibid., p. 216.
2743 Weller, Forcible Humanitarian Action: the Case of Kosovo, p. 300.
2745 Bellamy, Just Wars, p. 216.
of certain weapons, such as depleted uranium and cluster bombs. The ICTY also received complaints by FRY of NATO violations of international humanitarian law, but decided in June 2000 not to investigate complaints about NATO’s conduct of the campaign against FRY. The Prosecutor for the International Tribunals for the Former Yugoslavia and Rwanda, Carla Del Ponte, declared that there was no basis on which to investigate allegations of crimes by NATO. Although that organisation had made some mistakes “it had not deliberately targeted civilians”. The ICTY decision has been criticised for being biased and not applying its case law consistently.

The targets of NATO airstrikes were initially Serb military installations in Kosovo and later in other parts of FRY. But targeting subsequently came to be transferred to ‘dual use’ objects forming part of FRY’s economic, political and governance infrastructure, such as bridges, industries, oil refineries, fuel depots, and political buildings considered vital to military efforts in Kosovo. The strategy of attacking targets throughout much of FRY was to bring about a change of policy on the part of the Serbian government. But it led to an increasing number of civilians killed, and civilian property destroyed, owing to the fact that NATO classified a wider range of objects as

Human Rights Watch argued in a letter to Secretary-General Javier Solana the following with respect to the targeting of ‘dual use’ objects: “In the words of Article 52 of Protocol I additional to the 1949 Geneva Conventions (Protocol I), these may legitimately be targeted only if, by their nature, location, purpose and use, they make an “effective contribution to military action”, and their capture, neutralization or destruction, “in the circumstances ruling at the time, offers a definite military advantage”. A definite military advantage is one that is concrete, not potential or indeterminate. It does not encompass a purpose such as demoralizing the enemy’s civilian population by, for example, silencing propaganda broadcasts or darkening the lights of its residential areas. It also does not include undermining an enemy leader’s political, as opposed to military, supporters. Moreover, even assuming that all care has been taken to verify that a target is serving a military purpose at the time of attack, the attack is still forbidden under Article 57 of Protocol I if it can be expected to cause incidental death, injury or loss to civilians that would be excessive in relation to the “concrete and direct” military advantage anticipated. We question with respect to several types of attacks whether NATO has been living up to these requirements”.

Greenwood, Essays on War in International Law, p. 658; Bellamy, Just Wars, p. 216.


Voon, Closing the gap between legitimacy and lawfulness of humanitarian intervention: lessons from East Timor and Kosovo. Harvard Law School thesis, p. 48. The findings were arguably geared by the tribunal’s dependency of funding from several NATO member states; Benvenuti, The ICTY’s Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia, who argues that the ICTY Review Committee’s assessment of general issues (damage to environment, legality of weapons, target selection, proportionality) shows a poor grasp of legal concepts, and deviates from well-established ICTY’s case law.

Most of NATO’s effort against tactical targets was aimed at military facilities, fielded forces, heavy weapons, and military vehicles and formations in Kosovo and southern Serbia, and included air defences, command and control facilities, Yugoslav military and police forces headquarters and supply routes. Fenrick, Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia, p. 2.


Greenwood, Essays on War in International Law, p. 643.
constituting military objectives than had traditionally been the case, in particular the Radio Television Serbia (RTS) broadcasting station headquarters in Belgrade. The targeting of 'dual use' objects, such as the RTS station hit on 23 April, were controversial and the airstrikes were questioned as to whether they were proportionate in relation to the mission’s humanitarian objective.2753 Stray bombs also hit accidentally civilian targets, such as the Chinese Embassy on 7 May. However, it has been asserted that NATO never deliberately targeted civilians and avoided as much collateral damage as possible through use of the latest precision-guided weapons.2754

Also, the means of conducting the intervention with the airforce flying at 15,000 feet was highly criticised because of its failure to prevent further atrocities, and adequately distinguish between civilians and military objects on the ground.2755 The case demonstrated the limits of air power as a means of executing a humanitarian rescue.2756 As ethnic cleansing, mass murder and expulsions continued to escalate during the first weeks of the air campaign, Serb forces expelled more than a million Kosovo Albanians from their homes.2757 In total some 10,000 Kosovo Albanians were killed during the NATO intervention, the vast majority of them Kosovo Albanians murdered by FRY forces. Approximately 863,000 sought refuge outside Kosovo, while 590,000 were internally displaced.2758 The ICISS report affirmed that the bombing initially exacerbated the humanitarian problems in Kosovo.2759 The low-risk war and unwillingness to put ground troops into Kosovo was questioned. It was seen as conflicting with the mission's humanitarian objective, undermining its credibility as a humanitarian intervention.2760 NATO had moral and legal obligations to minimise the indirect harm to the civilian population in Kosovo.2761 But Bellamy counter-argues this conclusion by

2753 16 people were killed and 16 injured. One of the injured and relatives of some of those killed brought an application against the 17 NATO states that were also part of the European Convention on Human Rights (1950) to the European Court of Human Rights, see Banković and Others v. Belgium and 16 Other Contracting States (application no. 52207/99); see also a brief summary of the application, which was found inadmissible because it fell outside the scope of the convention since it could not be applied with extra-territorial effects, ibid., pp. 662-665.
2754 Fenrick, Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia, p. 11; Wheeler, Saving Strangers. Humanitarian Intervention in International Society, p. 271; Roberts, NATO’s ‘Humanitarian War’ in Kosovo, p. 115.
2755 See the analysis in Roberts, NATO’s ‘Humanitarian War’ in Kosovo, p. 115; Fenrick, Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia, p. 13.
2757 Bellamy, Just Wars, p. 217.
2759 ICISS, The Responsibility to Protect, p. 113.
2761 Bellamy, Just Wars, pp. 218-219.
claiming that the risks to non-combatants in ground invasions are much higher than in aerial campaigns.\(^{2762}\)

The NATO air raid campaign lasted 78 days (11 weeks) until 9 June 1999, involving 38,004 sorties, including 10,484 strike sorties.\(^{2763}\) During the bombings 23,614 air munitions were released, amounting to a total of 6,303 tons of munitions. Of the 23,000 bombs and missiles discharged in the operation only 35 per cent of them were precision-guided, according to Fenrick. On 2 May Milosević accepted a peace agreement, and NATO began negotiating a military technical agreement with FRY, which was agreed on 9 June.

It can be concluded that compliance with the *jus in bello* principle of proportionality may be challenged, although the international community through the ICTY did not find NATO responsible for violations of humanitarian law. Compliance with the *jus ad bellum* principle of proportionality in the Kosovo Case, being of relevance for the R2P analysis but also dependent on the observance of humanitarian law, could from the above be arguably found to be inconclusive.

d) Reasonable prospects of success

Bellamy makes two arguments in support of the intervention, stating that the political progress made prior to March 1999 was achieved thanks to the threats of NATO to use force, and secondly, that there are good reasons to believe that Milosević would have continued to unleash a new wave of ethnic cleansing whether or not NATO had intervened.\(^{2764}\) Failure to use force would have undermined NATO’s credibility and capacity for future coercive diplomacy to change Serb behaviour.

The reasoning by the member states of NATO was evidently that there were reasonable prospects of success and that the intervention would not trigger larger security complications or exacerbate the humanitarian crisis, despite opposition by several other states, such as Russia.\(^{2765}\) One explanation could be that they relied strongly on the humanitarian rationale as a justification for the operation. The post-Cold War weakened military powers of Russia also contributed to this assessment.

Whether or not the intervention actually succeeded in its objectives is another question and can be assessed in retrospect. The analysis of the case above shows that NATO failed to protect the Kosovo Albanians at the outset by exacerbating the humanitarian crisis with the bombing campaign.\(^{2766}\) But despite the negative consequences of contributing to

\(^{2762}\) *Ibid.*, p. 218. He compares the ground invasion in Iraq where 3,750 non-combatants were killed during the initial phases of the American-led invasion, with the 500 non-combatants who died during the whole of the Kosovo air raid campaign.

\(^{2763}\) Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, p. 1.

\(^{2764}\) Bellamy, *Just Wars*, pp. 218-219.

\(^{2765}\) See, for example, Russia’s statement on 24 March 1999 in the Security Council: “If the military conflict increases, then Russia reserves the right to take adequate measures, to ensure its own and common European security”. S/PV.3988, 24 March 1999, p. 4.

\(^{2766}\) ICISS, *The Responsibility to Protect*, p. 113; Voon, *Closing the gap between legitimacy and
the humanitarian disaster, the operation managed to contribute to ending the atrocities and the persecution of the Kosovo Albanians, when the Serbs abandoned Kosovo. The NATO intervention also led to restoring to the Albanians civil and political rights, although these needed to be sustained through a UN interim administration. The positive outcome, however, relied on certain other factors, and it continues to be questioned as to whether or not it represents an example of a success story.

**Claims/justifications and responses**

Among the states that participated in the NATO action, few asserted a legal basis for the use of force at the emergency session of the Security Council convened on 24 March. Only the Netherlands and the UK offered more elaborate legal justifications, while the US, Canada and France referred merely to legal violations by FRY covered by previous resolutions of the Security Council. The Netherlands stated:

If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate.

The UK unfolded the argumentation even further when declaring the view that:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. [...] Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.

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2768 Wheeler, *Saving Strangers. Humanitarian Intervention in International Society*, who mentions 1) the signals by NATO in late May of seriously considering ground forces, 2) the decline of support from Russia towards the Serbs, 3) and the fact that Russia had in early June accepted NATO’s demands for a full Serb withdrawal from Kosovo, as key reasons that prompted Milosević to accept NATO’s terms.
2772 Ibid., p. 12.
At the emergency session, Russia, China, Belarus and India firmly opposed the use of force by NATO in FRY and considered it an act of aggression.2773 Despite these objections, Wheeler argues that a majority of Security Council members legitimated or acquiesced in NATO’s action.2774 Brazil, Bahrain, Malaysia, Gabon and Argentina did not challenge the action, according to him.2775 This might have been an excessively positive interpretation of their declarations on 24 March. In fact the statements by Gabon, Brazil and Malaysia revealed a feeling of unease towards the NATO intervention.2776 Also Gambia was more cautious in its support to the action.2777 Slovenia and the EU, speaking through Germany, on the other hand clearly and expressly supported the NATO intervention, the latter declaring that the international community will not tolerate crimes against humanity.2778

Two days later, Russia, India and Belarus presented a Draft resolution at the Security Council condemning the NATO intervention as a flagrant violation of the UN Charter, in particular Articles 2 (4), 24 and 53, and demanding the immediate cessation of hostilities.2779 Only Russia, China and Namibia voted in favour, and the other 12 member states voted against (India and Belarus were not members of the Council at the time). The other states, which had been more reluctant to the NATO action in the previous debate on the 24 March, although not condemning it outright, came to acquiesce or more expressly to support the NATO action on 26 March.2780 Brazil, Gabon and Gambia remained silent and made no statements, while the statements of Bahrain and Malaysia disclosed more open acquiescence. Argentina expressly supported the intervention.2781 Other states, not members of the Council, made declarations after the voting. Among them, Bosnia-Hercegovina expressly supported the action,2782 Ukraine acquiesced,2783 and Belarus,

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2773 Ibid, see (Russia) pp. 2-4, (China) pp. 12-13, (India) pp. 15-16, and (Belarus) p. 15.
2775 Ibid, p. 278.
2776 Gabon said that in principle it was opposed to the use of force to settle local or international disputes, and Malaysia demanded the immediate cessation of the ongoing military action and the exhaustion of all possible avenues for a peaceful resolution of the conflict, see S/PV.3988, 24 March 1999, p. 10. The Brazilian government regretted that the escalation of tensions resulted in recourse to military action, ibid, p. 8.
2777 “It must be noted, though, that at times the exigencies of a situation demand, and warrant, decisive and immediate action. We find that the present situation in Kosovo deserves such a treatment. The action started today by the international community could have been avoided, for the action could still be prevented”. Ibid, pp. 7-8.
2778 Germany stated that “[...] we are ultimately responsible for securing peace and cooperation in the region which will guarantee the respect of our basic European values, i.e., the respect of human and minority rights, international law, democratic institutions and the inviolability of borders.” Ibid, p. 17. Slovenia, see S/PV.3988, 24 March 1999, pp. 6-7.
2781 S/PV.3989, 26 March 1999, p. 7: “[...] Argentina’s negative vote was based upon the vital need to contribute to putting an end to the extremely grave violations of human rights that are taking place in the province of Kosovo”.
2782 Ibid, p. 14: “Unfortunately, though, on the basis of events in Kosovo over the last
FRY, Cuba and India all expressed disappointment and condemned the negative vote of the draft resolution.\textsuperscript{2784} The NATO states offered justifications for the action, but these were rejected by the sponsors of the draft resolutions.\textsuperscript{2785} The FRY deplored the ‘flagrant aggression’. Despite the opposing views expressed on the 26\textsuperscript{th}, Wheeler claims that this vote was historic in that seven members of the Council either legitimated, or acquiesced in the unauthorised use of force for humanitarian purposes.\textsuperscript{2786}

In written communications to the Security Council, several states pronounced their positions through groups and like-minded states.\textsuperscript{2787} The Commonwealth of Independent States, the Rio Group and the Non-Aligned Movement could not find justification in international law for the NATO campaign, while the Organisation of Islamic States endorsed the need for international action to prevent a humanitarian catastrophe.

On 29 April 1999 FRY instituted proceedings before the ICJ against 10 of the NATO member states involved in the NATO air campaign, and requested provisional measures demanding the cessation of the use of force on the ground that the NATO air campaign violated the principles of \textit{jus ad bellum}, the UN Charter and humanitarian law.\textsuperscript{2788} Belgium was the only state to present an elaborate legal justification for the action “relying variously on Security Council resolutions, a doctrine of humanitarian intervention (as compatible with Article 2 (4) of the UN Charter or based upon historical precedent), and the argument of necessity”.\textsuperscript{2789} (See analyses on the Kosovo Case and implied authority in Chapter 7.1.4.1.2., on RHI in Chapter 7.1.5.2. and on state of necessity in Chapter 5.4.1.2.2.) In the cases of Spain and the USA, the court published orders rejecting the FRY claim on the basis that it lacked jurisdiction to entertain the case.\textsuperscript{2790} The remaining cases were dismissed on 15 December 2004 after the court found that it had no jurisdiction to entertain the claims made by Serbia and Montenegro.\textsuperscript{2791}

\textit{couple of days, we can only come even more surely to the conclusion that military force sometimes is the only alternative left.”

\textsuperscript{2783} \textit{Ibid.}, p. 10.
\textsuperscript{2784} \textit{Ibid.}, (India) p. 16, (Belarus) p. 12, (Cuba) p. 13.
\textsuperscript{2786} \textit{Ibid.}, p. 281.
\textsuperscript{2788} Greenwood, \textit{Essays on War in International Law}, pp. 659-662.
\textsuperscript{2789} Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law}, p. 213.
The case of Kosovo revealed major divisions on the issue of the existence of a right to unauthorised humanitarian intervention in general international law. A sufficient number of states formally and directly opposed the justifications for NATO’s use of force, to diminish its precedential value and contribution towards a customary process of RHI.2792

8.5. An emerging norm of R2P for regional organisations?

Both cases expose situations where grave crimes of international law were present at the time of the humanitarian interventions. Both states were manifestly failing to protect their respective populations, in Liberia and Kosovo. President Doe had lost control of 90 per cent of the country and had no chance of providing security. The Kosovo Albanians were persecuted and oppressed by the government itself. In Kosovo, the debates in the Security Council show that the Council was unable or unwilling to take military measures to protect, and in case of Liberia the Council would not even consider peaceful measures.

With regard to the precautionary principles, these were generally applied in both cases, except for the principle of proportionality which was disputed in NATO’s air campaign, but could also be questioned to some extent with regard to ECOMOG’s use of force in Liberia. Although there were various parallel intentions and motivations behind the interventions, both have been interpreted to hold primary and predominant humanitarian purposes, particularly in Kosovo, but also claimed in the case of Liberia. The principle of last resort was most likely complied within both cases, even though some states questioned this in the Kosovo Case.

The most controversial aspect of these was the application of proportionality, and in both cases the use of force rather exacerbated the humanitarian crisis. But it could also be argued in both cases that although the results were not immediate in either case, they had a positive impact on the outcome in the long run and were therefore proportional and necessary to halt the commission of atrocities. Both NATO and ECOWAS were accused of having violated humanitarian law, but apparently not to the extent completely undermining their precedential value.

Further discussions and research are warranted on the scale, duration and intensity required of a particular operation for it to fall within the principle of proportionality for humanitarian interventions. What type and degree of force is proportional and reasonable? Where is the limit

2792 Weller, Forcible Humanitarian Action: the Case of Kosovo, p. 313. Cf. the view of some scholars that the case confirmed the right to unauthorised humanitarian intervention, Greenwood, Essays on War in International Law, p. 628, and Reisman who has argued for this right since 1973, Reisman with McDougal, Humanitarian Intervention to Protect the Izos. Both have been referred to in Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 215.
drawn, and which actions fall outside the principle? There is nothing inherent in the concept of humanitarian intervention that demands keeping an operation within the bounds of traditional peace-keeping. In many cases combat operations have taken place, albeit sometimes followed by protests. When accepted as being necessary for the operation concerned to meet its humanitarian objectives, the use of force should be seen as falling within the ideational limitations of the concept. In order to clarify these boundaries, future state practice on RHI by regional organisations should be focused on executing operations in ways that do not overstep these boundaries in order to contribute to a customary process of RHI which strengthens humanitarian values.

It is clearly difficult to make an assessment on ‘reasonable prospects of success’ because it builds on speculations by the intervening parties and even more so in any subsequent analysis. The fact that NATO and ECOMOG went ahead could reasonably be seen as being based upon the assumption that they reached a positive answer to the question. Thus both cases of RHI appear to have generally complied with the R2P criteria and precautionary principles. The only principle with some inconsistency is that of proportionality. But a small amount of inconsistency does not prevent the creation of a rule. The customary process allows for certain inconsistency, but not too many or too flagrant. Moreover, the same R2P criteria on the whole appear to have been complied with similarly in both cases. The various instances of practice must be essentially similar and consistent acts (external collective uniformity), when comparing different regional organisations, and even the practice of the same regional organisation, and thus express the same customary rule. The state practice in both cases appear to express and support the norm of R2P in military means in conscious-shocking situations.

The existence of *opinio juris* for this norm, however, is a different matter. It has been argued that as long as the criteria for *usus* is complied with (uniform and consistent), an inferrable *opinio juris* is possible from the state practice (the classical synthetical approach). But where there is insufficient practice, as in this case, and a few inconsistencies (although small), as well objections and opposition as in the case of Kosovo, more practice is required to confirm the norm, exposing a general acceptance of unauthorised humanitarian interventions by regional organisations. The case of Kosovo has less precedential value because of persistent objectors by specially affected state – principally China and Russia – which is why more state practice is necessary and important to assert this emerging norm.\(^{2793}\)

The question as to whether an R2P norm is emerging, holding a legal duty to consider the precautionary principles for unauthorised humanitarian interventions, could be answered in the affirmative for such action carried out by regional organisations. Chapter 8 shows this customary process as holding wide compliance with these principles and

\(^{2793}\) If China and Russia were not to be viewed as specially affected states the customary norm may crystallise even with their opposition since international customary law does not require universal consent and allows a certain amount of persistent objectors.
the other R2P criteria. The legal duty to consider these criteria, however, is limited to this aspect, and does not impose a legal duty to intervene by military means. This is a contribution by the R2P doctrine to the doctrine on a right to humanitarian intervention. It could, however, be argued that the doctrine on humanitarian intervention has been guided by similar just war criteria or principles for military intervention. Since these principles have only been confirmed by state practice and not yet expressly endorsed by states, the customary process has not yet hardened into a legal norm.

8.6. Gender considerations and the emerging norm of R2P

The international policies on gender mainstreaming of peace support operations and gender-sensitised definitions of grave crimes in international law arguably have a practical relevance for the Security Council’s implementation of R2P by military enforcement measures. However, not only the Council, but also individual member states are legally, politically and morally bound to implement the gender policies and to integrate gender perspectives, especially when contributing with troops for international peace support and enforcement undertakings, including humanitarian interventions or R2P operations.

It has also been argued that resolution 1325 goes beyond member states and that there is an evolving role for intergovernmental and regional organisations, and non-UN peace-keeping forces, such as the AU and NATO, to implement gender considerations in their operations. Resolution 1325 is directed towards both UN entities and member states but is silent on the role of regional organisations in the implementation of the resolution. However, similar resolutions and guidelines on gender considerations in conflict prevention, management and resolution have been passed by other multilateral organisations, including the G-8, the European Union, the Organization of American States and the Organization for Security and Cooperation in Europe. The EUFOR in the Democratic Republic of Congo, for example, was informed by gender considerations, and is considered to be the first truly gender-mainstreamed peace-keeping operation.

It could be argued that resolution 1325 not only sets up gender policies and guidelines for UN peace support operations, but through its direct address to member states, also urges them to incorporate gender components in all of its work on conflict prevention, management and resolution. The gender considerations on peace and security issues would

2796 See the EU Operation Headquarters Potsdam, Final Report on Gender Work inside EUFOR DR Congo, 15 December, 2006.
therefore extend to intergovernmental organisations as well. Although the resolution does not express any normative guidance on its implementation in unauthorised humanitarian intervention, RHI and UHI, such interventions undertaken by states and regional organisations are also to be informed by international gender policies.

The R2P doctrine and state practice on humanitarian intervention may not yet fully reflect and support this normative development. But this lack of implementation of gender considerations in humanitarian interventions during the 1990s should not cloud the policy developments of the 21st century based upon the international criminal case law of the post-Cold War period. The emerging norm of R2P may not at this stage fully reflect these developments, but there are no obstacles to the incorporation of these components in the future development and evolution of the doctrine. The trends are in fact already pointing to the merging of these two normative ‘regimes’ or doctrines. The emerging norm of R2P by military means outside the UN Charter framework has little international normative support on gender to lean on, unless it could be argued that 1325 also applies implicitly for these cases, or by extension *ex analogia* and *mutatis mutandis*.

The general literature on humanitarian intervention used for the two case studies in this chapter generally lacks gender-sensitivity and gender awareness. Gendered analysis on peace support operations and studies on humanitarian intervention appears to be widely seen and treated as separate enterprises. Gender perspectives are not (or have not been, but will hopefully increasingly be) integrated or mainstreamed into mainstream research on R2P and humanitarian intervention (see feminist literature in this area in Chapter 4.9.). Feminist literature and research points to the need for, and presents insights into, the relevant gender facts and figures. These need to be integrated, not only in the implementation of the norm of R2P, but also in the scientific analysis and literature on this emerging norm. More research, however, is needed, in particular more of it integrated into mainstream research on international security and peace-operations.

This chapter has been concerned with case studies on RHI with respect to R2P criteria in order to find out whether state practice complies with the criteria and thus contributes to a customary process on an emerging norm of R2P. Since these criteria lack specific gender considerations (apart from the post-Cold War gender-sensitised interpretations of grave crimes), criteria or measurements, a gender analysis of the emerging norm has not been made. The case studies, however, show a compliance with this criterion despite the lack of a gender analysis of such crimes in these particular cases. This does not preclude the need to consider these gender-sensitised interpretations of grave crimes in other cases and humanitarian situations, for the application of the R2P norm. Such an inclusion in the security assessments would support the development of a more gender-sensitised R2P norm.
8.7. Conclusions

The practice of unauthorised humanitarian interventions by regional organisations has begun to evolve into an emerging customary norm of ‘regional collective humanitarian intervention’ outside the UN Charter framework. This process is to a large extent accommodating the R2P criteria and precautionary principles for military intervention. But this emerging customary norm will probably never develop into a legal duty to protect populations from grave crimes under international law, but rather as a permissive legal right when the state itself manifestly fails to protect and in circumstances where the Security Council is unable or unwilling to protect.

Future customary developments on R2P by military means will most likely take place in the regional context when the Security Council is unable or unwilling to act. R2P advocates and others supporting the development of this norm should arguably push for capacity building in this regard, primarily strengthening Africa’s regional military capacity, but also promoting and strengthening the West’s political will to act in humanitarian situations that cry out for action. It is important in this context to anchor and root an R2P political mindset among the broader political masses and in public opinion in the West, for this project to develop beyond its ‘elitist’ heritage in order to grow into a sustainable norm. The R2P concept is still unknown to the masses, and could be charged as representing an elitist project from its inception.

9. Concluding summary and remarks

9.1. Concluding summary on the emerging norms on R2P by military means

9.1.1. The primary research questions

9.1.1.1. Human security and R2P accommodation in IL?

This is the general research question that has informed the overall construction of this thesis. It has been answered by the legal analysis in Chapter 5.4, focusing on whether the external responsibility to protect by military means may be accommodated in international law, but also by way of the legal analysis and case studies on humanitarian intervention in Chapters 6 to 8. (The conclusions from the first analysis are set out below, and regarding the state practice on humanitarian intervention, in the following Chapter 9.1.1.2.) The structure of the legal analysis in the thesis, however, builds on the wider contextual background given by the constructivist IR approach on human security.

My interest has been in examining to what extent the changing security environment in the post-Cold War period, the broadening of the security concept, the development of the human security concept and subsequently a doctrine on R2P have influenced and impacted on the international legal order – especially on humanitarian intervention.
Suitable grounds for exploring the concepts of human security and R2P, so as to gain a better understanding of these parallel developments, needed a theoretical basis which was identified in the so-called constructivist theory of international relations (IR). Taking an interdisciplinary approach, the IR part of the thesis exploring the human security paradigm as a basis for the R2P doctrine provided a novel entry point for the legal analysis on humanitarian intervention. The human security and R2P frameworks for analysis helped delimit, structure and systematise the legal arguments and material. The constructivist approach and analysis in the thesis has thus informed, inspired and provided a wider context for the legal analysis. By applying an R2P ‘lens’ to the study of the customary processes of humanitarian intervention the legal analysis on humanitarian intervention was taken a step further.

An examination of the existing legal rules and regimes that could possibly hold or support an emerging or present legal norm on R2P by military means revealed that several separate rules and regimes exist in support of the norm of R2P. The Genocide Convention’s legal obligations to prevent genocide, the law on state responsibility providing a duty to co-operate in order to end serious breaches of peremptory norms, as well as granting a right to take lawful counter-measures when a state violates international law, the duty to co-operate to promote human rights, and the legal obligation to ensure respect for humanitarian law – all accommodate or support this norm in different ways. When it comes to the specific use of military force, these regimes provide that military measures to protect human security within a state may be lawfully undertaken when authorised by the Security Council. The specifics of each of these will be briefly summarised below.

The Genocide Convention’s legal obligation to prevent genocide does not imply a legal obligation under the Genocide Convention in the sense of a ‘legal duty’, for states, or the UN, to use “military means” to prevent it in the territory of another state. The legal obligation for states under the Genocide Convention to prevent genocide does not expressly vest member states with a ‘legal right’ under Article I to use military force in another state. The recent ICJ case of Bosnia v. Serbia (2007) did not rule that the Genocide Convention’s (limited) obligation to prevent genocide on another state’s territory extend to a right to use military force in another state for that purpose, even if there were links to the perpetrator. The court’s reference to ‘all reasonable measures’ did not expressly rule out the use of force, but since such action would involve the transgression of territorial borders, the use of force on another state’s territory must comply with the regulation on the use of force in international law in general. There is no indication that the court intended to interpret the Genocide Convention to grant an individual legal right or duty for states to use military force outside the state’s own territory for the purpose of preventing genocide, which is why the general rules on the use of force in international law have to be complied with. Thus states would have to seek a Security Council authorisation or develop a customary rule for unauthorised interventions for such protection under the Genocide Convention.
The legal right and obligation of the UN (when called upon by a state) to take appropriate measures to prevent and suppress genocide under Article VIII of the Genocide Convention, does not directly grant an express treaty-based legal right or duty for the UN to use force for the prevention and suppression of genocide. But neither does Article VIII exclude the legal right of the Security Council to authorise military enforcement action under Chapter VII if the situation in question is considered to constitute a ‘threat to the peace’ and warrants the prevention of genocide by military means. Thus the UN, through the Security Council, has a legal right under the Genocide Convention and the UN Charter to take military enforcement measures to prevent and suppress genocide. This legal regime, however, does not accommodate an external responsibility to protect against other grave crimes apart from genocide. Furthermore, the authoritative but restrictive interpretation of the Security Council powers under the UN Charter made in the Commentary to the UN Charter supports the view that Article 39 determinations limit Council enforcement measures under Chapter VII to security threats to the peace emanating from armed conflicts or involving violent threats (international armed conflicts or internal armed conflicts). Such an interpretation, however, runs counter to the power and legal right of the Council to authorise the use of force to prevent genocide in situations short of armed conflicts. The Genocide Convention grants the Security Council a legal right to take necessary measures to prevent genocide also in peacetime. A wider interpretation of the Council’s powers under the UN Charter that includes such situations is thus warranted.

Moreover, neither states nor the UN have a customary erga omnes ‘obligation’ to prevent genocide ‘by military means’ in another state. The same limitations on the right to use military force to prevent genocide under the Genocide Convention arguably apply to the customary erga omnes obligation to prevent it on the part of states and the UN. States would have to seek a Security Council authorisation or develop a customary rule for unauthorised interventions by military means for such protection. (See Chapter 5.4.2.)

The doctrine on an external R2P is somewhat mismatched with the general rules on state responsibility in general to fully hold and support such a norm by military means, since such grave crimes need to be attributable to the state itself for other states to be able to invoke a right to undertake counter-measures. Furthermore, military counter-measure against a state’s violations of its primary responsibility and legal obligations to protect its population from international crimes would be lawful only when in the form of authorised enforcement measures by the UN Security Council under lex lata. It could thus be argued that lex lata supports that military counter-measures authorised by the Security

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2797 Frowein/Kitsch, Article 39, Simma (Ed.), The Charter of the United Nations. A Commentary, pp. 723-724. A minority position argues for a restrictive interpretation where humanitarian crises in internal armed conflicts needs to have international effects, or flowing from a failed state situation, to constitute a threat to the peace under Article 39 of the UN Charter.
Council may be undertaken against a state that is manifestly failing to protect its population against grave crimes under the law on state responsibility. (See Chapter 5.4.3.3.)

The legal analysis also concludes that the concept of an external R2P could partly be subsumed under the regime of ‘aggravated state responsibility’ and the ensuing ‘duty to co-operate to end serious breaches of peremptory norms’ under the ILC Articles on State Responsibility. But several aspects of the R2P doctrine are mismatched with the law on state responsibility in this context. Only action to protect against genocide and crimes against humanity, but not the full range of war crimes would fall under this regime – not all war crimes are considered to be breaches of peremptory norms. Furthermore, the duty to co-operate is dependent on these grave crimes being attributable to the state. However, in situations where a state is grossly and systematically failing to fulfil its international obligations to prevent genocide and crimes against humanity, Security Council authorised military enforcement to put an end to such crimes would be considered lawful with regard to the duty to co-operate under the ILC Articles. Non-institutionalised forms of co-operation to terminate such offences would be considered lawful only in the form of non-military measures. Moreover, aggravated responsibility and the ‘duty to co-operate to end serious breaches of peremptory norms’ represent lex ferenda rather than lex lata. An external R2P for the Security Council is thus not yet supported by a legal ‘duty to co-operate’ on the part of states through the UN, including with military means, in order to protect populations from genocide and crimes against humanity under the law on state responsibility. (See Chapter 5.4.3.2.)

The legal literature does not give clear guidance on whether the rules on ‘state of necessity’ under the law of state responsibility may be invoked as a justification for the use of military force to protect people from grave crimes, precluding the wrongfulness of using military force in another state without Security Council authorisation. However, the ILC Articles and Commentary on the law of State Responsibility (2001) do not deny or block the possibility of state practice being based upon such justifications. Current state practice on ‘state of necessity’ as forming a legal basis for unauthorised humanitarian intervention is currently insufficient and a customary process has not yet evolved into law supporting such a conclusion. But it could be argued that states or regional organisations might de lege ferenda find a legal basis in the principle of necessity when the use of force outside the UN framework is applied to protect people against genocide, crimes against humanity, ethnic cleansing and war crimes, if taking the position that it is only the prohibition on aggression which is part of jus cogens.2798 (See Chapter 5.4.3.1.)

For the doctrine on an external R2P by military means to be accommodated within human rights law and the duty to co-operate to

2798 Security Council mandated action under the responsibility to protect, however, has no connection to this principle, since such action derives its justifications directly from Chapter VII of the UN Charter.
promote human rights, it is to be directed towards and dependent on Security Council discretion and decision-making under Chapter VII of the UN Charter. There is thus no general legal duty in international human rights law or in the UN Charter that would independently accommodate a right or duty for states to use military means to protect human rights. However, if the Security Council finds that gross and systematic violations of human rights amount to a threat to the peace under Chapter VII, the practice of the Council has shown that it may authorise the use of military enforcement measures to protect human security within a state against such grave violations. (See Chapter 5.4.4.)

The legal obligation of states to ensure respect for humanitarian law does not expressly grant a general legal right or duty for states to apply military force in the territory of another state (which is not party to an international armed conflict) for that purpose. An ‘external’ responsibility to protect civilians in an internal armed conflict against violations of humanitarian law by military means would have to be authorised by the Security Council for it to be lawful. The humanitarian law provisions for non-international armed conflicts do not directly endow the Security Council with a legal right to take forceful enforcement measures to ensure respect for humanitarian law. But in situations of serious violations of humanitarian law constituting a threat to the peace, Security Council practice evidence and manifest the lawfulness of military enforcement measures to protect human security against such violations (cf. Article 89 of the Additional Protocol I to the Geneva Conventions on humanitarian law).2799 (See Chapter 5.4.5. and 6.3.3.)

To summarise, the norm of an external R2P by military means could thus be argued to have been accommodated in international law to a certain extent, limited to Security Council authorised enforcement measures for protection against grave crimes in international law. Several legal regimes allow for the authorisation of the use of force, although not directly granting the UN a legal right to protect human security within a state by military means. The legal obligations for the prevention of genocide support a legal right of the Security Council to authorise military enforcement measures under Chapter VII to protect people against this crime when the situation concerned amounts to a ‘threat to the peace’. Also the regime on counter-measures in the law on state responsibility supports such a right, including against other grave crimes under international law, when the offences are attributable to the state. The human rights and humanitarian law do not directly grant any such right to use military force, but Security Council practice evidence that it may lawfully authorise military enforcement measures for protection against gross violations of human rights and humanitarian law (see Chapter 6.3.3).

2799 Article 89 reads: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.” Additional Protocol I (1977).
The ‘principle of necessity’ is not under current lex lata able to support an external R2P by military means without Security Council authorisation, but the ‘principle of necessity’ has begun to be invoked in state practice of humanitarian intervention and clearly shows that there may be a window open for development of the law through a customary process. The state responsibility rule of a ‘duty to co-operate to end serious breaches of a peremptory norm’ is not yet part of lex lata and at this point might not contribute with legal support to the emerging norm on R2P.

On the legal rules applicable to the doctrine on humanitarian intervention and the extent to which these have or are accommodating an external R2P, see the next Chapter 9.1.2.2.

9.1.1.2. Who has an external R2P by military means, and when?

9.1.1.2.1. Introduction – several legal norms on external R2P?

The legal analysis in this dissertation has focused primarily on the standing of the external R2P by military means in international law. On the basis of the human security and R2P frameworks of analysis developed in Chapters 3 and 4, it has in Chapters 6 o 8 structured the legal material and arguments on humanitarian intervention on the basis of “Right Authority” for military intervention as the organising principle, with the objective of seeking to answer the question: “Who has a legal external responsibility to protect human security with military means, and when?”

As long as the ‘norm on R2P’ is spoken of in a general manner as being applicable to the international community as a whole, no party may be charged with accountability for failing to implement the responsibilities in the R2P doctrine, unless in violation of other legal obligations. It has therefore been important in this thesis to identify the relevant actors and separate the respective legal rules endowing permissive legal rights or imposing legal obligations to protect by military means for each specific actor, to avoid the problem of no party being ultimately responsible or accountable.

Lack of a legal obligation to use military means to prevent and protect, does not obliterate existing legal obligations imposing duties to take other, ‘non-military measures’ to protect people, nor does it preclude the existence of legal ‘rights’ to use military force to protect. The legal rules concerning the rights and obligations relevant for the responsibility to protect have in this thesis been systematised and structured according to the specific actors listed in the ICISS report: the Security Council, the General Assembly, regional organisations, ‘coalitions of the willing’ (also including individual member states).

The emerging norm of an ‘external R2P’ therefore holds several separate legal norms pertaining to each respective actor. The claim of one emerging legal norm on R2P is simply rhetoric, and one legal norm may not encompass the whole of the R2P doctrine as formulated by the ICISS nor in the Outcome Document, as long as the concept holds for
both non-military and a military measures linked to several different actors, involving a plethora of international legal rules and regimes.

Instead, there are several different external legal norms on R2P – one set of legal obligations and rights with respect to the adoption of non-military measures to protect populations when a state is manifestly failing to, and a separate set of legal norms regulating permissive rights to use military means to protect in the same situation. Since the rules regulating the use of military force in international law are highly dependent on the specific actor, the external R2P norm comprises separate legal norms for the military protection of human security for the respective actor.

There are at least two legal norms on the external R2P by ‘military’ means: one norm of R2P for the Security Council, which is already part of lex lata and the other an emerging norm of R2P for regional organisations. There is not really any emerging legal norm on R2P endorsing such rights for individual states or coalitions of the willing owing to insufficient practice and opinio juris, nor for the General Assembly, which has been rejected as a viable institution for military action to protect populations because of a lack of sufficient political will on the part of the majority. The ‘emerging legal norm of the external R2P doctrine’ concerning protection with military means does in fact only refer to the emerging legal right for regional organisations to use military means to protect populations from genocide, crimes against humanity, and war crimes when a state is manifestly failing to protect, when the Security Council is unable or unwilling to do so and where peaceful means are found inadequate.

Thus on the question of ‘who’ has a legal responsibility to protect human security by military means, among the four actors suggested in the R2P doctrine of the ICISS it is only the Security Council that has such a legal right under international law at the present time. The emerging legal right for regional organisations has not yet developed into customary law. There are two separate regional developments: the African practice and treaty developments supporting further regionalisation in this area, but lacking sufficient military and operational capacity and resources, and the policies and practice of the West, which has the capacity and resources, but not the same firm official political commitments on external R2P by regional organisations outside the UN Charter framework as among (sub-) regional organisations on the African continent. The policy differences are partly explained by the African treaty developments.

On the question of ‘when’ these actors may use military means to protect human security within a state, the ICISS R2P doctrine proposed a just cause threshold involving large-scale loss of life or large-scale ethnic cleansing and a set of precautionary principles. The international

2800 Constant and uniform practice of sufficient generality is not present to support a customary rule of an external R2P by military means for a specific actor, apart from the Security Council. Although there appears to be ample evidence of emerging opinio juris, there are also many states opposing any development outside the UN Charter framework, and some even for its development at the Security Council.
community did not endorse these in the Outcome Document (2005) but instead adopted a formulation comprising grave crimes defined in international law (genocide, crimes against humanity, ethnic cleansing and war crimes), that the state must be ‘manifestly failing’, peaceful means be found inadequate in order for the R2P to be considered on a case-by-case basis through the Security Council.

International law provides that the Security Council may authorise the use of military force for the protection of populations when the humanitarian situation in question is considered to constitute a ‘threat to the peace’. Practice by the Security Council authorising humanitarian intervention in the post-Cold War period reflects and manifests the criteria of the R2P doctrine: The R2P threshold amounting to several of the listed grave crimes, the state manifestly failing to protect its population and peaceful means were found inadequate in all instances (see Chapter 6.3.3.). The R2P criteria would thus arguably neither limit nor enable more Security Council enforcement action than before (see Chapter 9.2.2.).

The state practice on unauthorised humanitarian intervention by regional organisations and the corresponding emerging opinio juris show similarly that the emerging norm on a right to use military means to protect human security within a state is based upon the existence of the commission of any of the grave crimes, the state manifestly failing to protect, and in addition the Security Council is being passive or unable to protect. The practice also shows that the precautionary principles for military intervention proposed by ICISS are relevant in the formation of this customary norm and has been highly complied with by the regional organisations in their practice on unauthorised humanitarian intervention (see Chapter 8).

9.1.1.2.2. The Security Council’s external R2P by military means

This thesis asserts that the Security Council already has a permissive right according to international law to authorise humanitarian/military interventions to protect populations within a state from grave crimes, such as genocide, ethnic cleansing, crimes against humanity and war crimes, when the humanitarian situation in question is considered to constitute a threat to the peace. Earlier Council practice confirms that this may be done in situations where there is an internal armed conflict with or without international effects, in a failed state situation, but also in a wider range of situations.

The practice of the Council by which it has authorised states and regional organisations to intervene militarily for humanitarian purposes in the post-Cold War period (Bosnia (1992-1994), Somalia (1992), Rwanda (1994), East Timor (1999)) shows that it has assessed its legal right (and possibly evidencing a moral and political responsibility) to protect people in need from gross and systematic violations of human rights and humanitarian law. The Council’s practice is also built on the fact that the states themselves were manifestly failing to protect their populations and peaceful means were considered inadequate due to the presence of armed conflicts. (See Chapter 6.3.3.)

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But it has been argued in the literature that this permissive legal right has a double qualifier in that the R2P-situation needs to comply with the UN Charter provisions regulating the powers of the Security Council. It has been authoritatively claimed that Chapter VII somewhat limits the Council in its determination of a ‘threat to the peace’ to a humanitarian crisis linked to a present or impending armed conflict.\textsuperscript{2801} It would thus be questioned whether the Council could exert an external R2P by military means in humanitarian crises lacking a military element – for example genocide or crimes against humanity committed in peacetime – without further extensive reinterpretation of the UN Charter. Other cases of Council action (apart from humanitarian intervention) appear to confirm that the Council is empowered to make determinations under Article 39 also in peacetime situations. Future extensive interpretation and practice of authorised humanitarian intervention in peacetime humanitarian crises would confirm this development of evolutionary interpretation of the UN Charter.

The R2P doctrine with respect to the external responsibility of the Security Council thus reflects \textit{lex lata}. The question arises whether this legal right has evolved through evolutionary interpretation of the UN Charter, in accordance with Article 31 (3)(b) of the VCLT, or by informal modification \textit{contra legem} through subsequent practice within the treaty framework. The answer depends on whether this practice of extending the interpretation of a ‘threat to the peace’ is considered to be within the ordinary meaning of, or contrary to, the wording of Article 39 of the UN Charter. Scholars appear to support the view that the development of this right has become part of \textit{lex lata} by evolutionary interpretation by the Council, \textit{sub legem}.

In summary, the external responsibility to protect on the part of the Security Council endorsed by states in the Outcome Document 2005 confirms the legal right of the Council to protect human security by military means, as well as the lack of a legal obligation to do so. States are prepared to act collectively through the Security Council on a case-by-case basis under certain circumstances. Furthermore, paragraph 139 establishes a moral and political responsibility for the Security Council to consider protecting populations by both non-military and military means in certain circumstances. The Security Council’s responsibility to protect by military means corresponds to a legal right to authorise military interventions to protect under certain circumstances. Thus from a legal point of view the external responsibility as in ‘obligation’ to protect for the Security Council may be seen as a misnomer. But from a political point of view the wording reflects reality to the extent that the Council is able to act.

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9.1.1.2.3. An external R2P for the international community when the Security Council fails?

Although the Security Council has failed to protect human security in many of the post-Cold War humanitarian crises, the state practice of military interventions on the basis of Council decisions has made progress towards a legal right of the Security Council to authorise humanitarian interventions.\(^{2802}\) Other cases where the Council failed or was unable to take action (Liberia (1990), Northern Iraq (1991) and Kosovo (1999)), however, created a ‘schasm’\(^{2803}\) between this norm and Security Council practice. Therefore numerous attempts to articulate alternatives in humanitarian situations when the Council fails to protect has emerged. The R2P doctrine, as formulated by the ICISS, proposed several actors to take on a subsidiary responsibility to protect. Their legal rights to use military force to protect human security within a state is summarised below.

**The General Assembly and R2P – Uniting for Peace**

The legality of a General Assembly recommendation for states to use military force to protect populations from grave crimes in international law under the Uniting for Peace procedure is debatable, but such a General Assembly decision would most probably attain high levels of legitimacy if widely endorsed by governments. There is, however, no R2P practice on the issue yet, and there are currently little chances of seeing any. Firstly, because most of the states in the General Assembly today, compared with the situation in the 1950s and 1960s when the General Assembly issued recommendations to use military force under the Uniting for Peace Procedure, are non-interventionist and resist developments that support a right to humanitarian intervention.\(^{2804}\) Secondly, a humanitarian crisis within a state which is not the result of a ‘breach of the peace’ or ‘aggression’ does not fall under the Uniting for Peace procedure. Most humanitarian crises leading to humanitarian interventions have been determined to constitute a ‘threat to peace’ by the Security Council, and such cases may thus not be considered under the procedure.

This ICISS proposal to apply the Uniting for Peace procedure for the purpose of institutionalising a mechanism for R2P when the Security Council is unable or unwilling to protect is unfortunately not convincing, and currently not politically viable. But it could possibly be considered in

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\(^{2802}\) Bellamy, however, argues that this is a ‘weak’ norm, see Bellamy, *Just Wars*, p. 205.

\(^{2803}\) See Brunnée and Toope, *The Use of Force: International Law After Iraq*, p. 800.

\(^{2804}\) The Uniting for Peace procedure appears to have fallen into disuse due to lack of a majority in the political will. It was not even seriously contemplated during the Kosovo crisis, reportedly due to fears that support from the necessary two-thirds majority, according to Article 18 (2) of the UN Charter, would not have been possible to attain. See Chesterman, *Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention*, pp. 48, and 57, note 18. The same reason lies behind the fact that it was not mentioned in the 2005 Outcome Document.
the future if a humanitarian situation amounts to a breach of the peace, and the Council does not take sufficient measures for the protection of human security, and where peaceful means are found to be inadequate. In such circumstances the procedure could possibly be utilised to boost support for Council unauthorised humanitarian intervention if sufficient opinio juris could be gathered for such action in the Assembly.

**Regional organisations and R2P – RHI**

The customary process on an emerging norm on external R2P by military means involves military intervention by regional organisations to protect human security. Such unauthorised, so-called, regional collective humanitarian intervention (RHI), holds the most developed customary process of an emerging norm of an external R2P outside the UN Charter framework. At present, and since the NATO intervention in Kosovo, RHI continues to constitute a violation of Articles 2 (4) and 53 of the UN Charter. Thus regional organisations do not have an independent subsidiary responsibility for peace and security matters under the UN Charter. The cases of RHI in Liberia (1991) and Kosovo (1999) are as yet insufficient in terms of consistency and uniformity to support a new legal norm, but they contribute to a customary process of an emerging norm of RHI. The endorsed formulation of an external R2P, including by military means, in the Outcome Document may unfortunately not be too helpful as evidence of opinio juris for the formation and crystallisation of an emerging customary norm on RHI, since it does not spell out any express acceptance of an external R2P by ‘unauthorised’ military force by regional organisations.

The customary process of an emerging norm of RHI outside the UN Charter framework to a large extent accommodates the R2P criteria and precautionary principles for military intervention. But this emerging customary norm, however, will never develop into a legal duty to protect populations from grave crimes under international law, and could only develop into a permissive legal right to use military force to protect human security when the state itself manifestly fails to do so, and where the Security Council is unable or unwilling to protect, and peaceful means are found to be inadequate.

The practice of RHI forms part of, and contributes to, a customary process outside the UN Charter framework that may informally modify Articles 53 (contra legem) and 2 (4) of the UN Charter, but also modify the underlying customary prohibition on the use of force by creating a new exception. More constant and uniform practice on RHI is still needed. The need to also modify the jus dispositivum elements of the underlying customary norm prohibiting the use of force makes the customary process more complex and possibly more time consuming. The formation of general and widespread practice on RHI would be confined

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2805 The invitation in the case of Liberia cannot be regarded as a valid consent for the intervention or as a legal basis for the intervention. Österdahl, *Preach What You Practice. The Security Council and the Legalisation ex post facto of the Unilateral Use of Force*, Gestri, ECOWAS operations in Liberia and Sierra Leone: Amnesty for past unlawful acts or progress toward future rules?, p. 228.
to a limited group of states on a regional basis belonging to a regional organisation, which is why this development may take more time.

It has furthermore been argued lege ferenda, in line with the Commentary to the UN Charter, that the theories of ex post facto and implied authorisation could legalise RHI in exceptional circumstances if a number of factors fall into place – but more state practice is needed to confirm this legalising ground.2806 Thus, the doctrine of implied authority would be conceivable for RHI under specific and limited circumstances: 1) if the Security Council resolution language points towards implied authority, 2) the resolution is passed with a concurring vote of the five permanent members and the majority of all Council members, and 3) it is clear to the members of the Council that their action would be taken as an implicit authorisation.2807 On the application of the doctrine of ex post facto authorisation for RHI it is up to the Security Council to evaluate and determine the presence of exceptional circumstances for a subsequent authorisation legalising the action concerned.2808 It could, however, only be applied to situations where prior authorisation would not, and could not, have changed the course of action. In both cases the application of the doctrines must be based upon 1) a need for urgent action, 2) the unanimity of the permanent Security Council members, and 3) sufficient evidence of tacit Council approval for the action.2809

RHI could also de lege ferenda find a legal basis in the principle of necessity for the use of military force outside the UN framework to protect people from genocide, crimes against humanity, ethnic cleansing and war crimes, through a customary process if the position is taken that it is only the prohibition on aggression that is part of jus cogens.2810 The action must be considered as the only way for the state(s) to safeguard an essential interest against a grave and imminent peril and not seriously impair an essential interest of the state towards which the obligation exists, or of the international community as a whole. It may not be considered as a ground precluding wrongfulness if the intervening state(s) themselves has/have contributed to the situation of necessity.

The treaty developments of (sub-) regional organisations in Africa with prior treaty-based consent have opened the way for a new legal basis for military interventions for humanitarian purposes when given concurrent consent at the time of the humanitarian intervention. These interventions, however, should be viewed as peace-keeping operations under Article 52 rather than as an RHI, due to the prior and concurrent consents. However, should concurrent consent not be obtained, such interventions by regional organisations should be considered as RHI. (See Chapter 7.1.4.2.1.) There is as yet no such practice, but it could be

2807 Ibid., p. 866, para. 24.
2808 Ibid., p. 865, para. 17.
2809 Ibid., p. 866, para. 25.
2810 Security Council mandated action under the responsibility to protect, however, has no connection to this principle, since such action derives its justifications directly from Chapter VII of the UN Charter.
argued that it under certain circumstances (when lacking legal basis) it would contribute *mutatis mutandis* to the customary process of RHI and subsequent informal modification of the UN Charter in the future. Such RHI could also in exceptional cases, when lacking a legal basis under the regional treaty, be legalised through any of the theories of *ex post facto*, implied authorisation or the principle of necessity if the relevant criteria are present.

It is unclear whether or not this process of customary practice has stopped temporarily or permanently, and whether military capacity and political will are the key issues to its continuation. Future customary developments on external R2P by military means will most likely take place within the regional context when the Security Council is unable or unwilling to act.

‘Coalitions of the willing’ and R2P – UHI

There is as yet insufficient *usus*, and *opinio juris* is clearly lacking in support of a customary norm on (unauthorised) unilateral humanitarian intervention (UHI) in international law. The warning by ICISS that coalitions of the willing could take on an external R2P when the Security Council and other actors fail to protect populations from grave crimes and atrocities would thus constitute a violation of the UN Charter (Article 2 (4)) and the customary prohibition on the use of force, according to a traditional reading of international law. There is insufficient state practice contributing to a customary process on UHI and the right to UHI, merely constitutes a *lege ferenda* argument. The only post-Cold War case is the intervention in Northern Iraq in 1991 by the US, the UK, and France initially, and then by a few more states.

I would argue that the doctrines on implied authorisation and *ex post facto* authorisation by the Security Council, as well as the principle of necessity, would not only apply to RHI but also *de lege ferenda* to individual states or coalitions of the willing in exceptional circumstances. A UHI for the protection of human security within a state in an acute humanitarian emergency could arguably be legalised on such grounds if the state is manifestly failing to protect, the Security Council is unable or unwilling to protect, peaceful means are inadequate, and the relevant factors are present for these doctrines to apply (see the previous chapter on RHI and Chapter 7.2.4.2.). There are not as yet no strong cases of state practice to support this view. The case of Northern Iraq did not meet these specific factors for implied authorisation in exceptional circumstances (see Chapter 7.2.4.2.). The evidence for these exceptional circumstances must arguably be stronger in cases of unilateral interventions by a single state.

9.1.2. The secondary research questions

In order to answer the above mentioned main purpose or prime research question, the study has had to consider several general topics. Here follows a summary of those findings.
9.1.2.1. The CIL process and R2P

The legal rules on the source of customary law and the emergence of new legal customary rules were examined in Chapter 2. The study also presented the relevant rules on evolutionary interpretation of treaties, and informal modification of treaties by subsequent practice and by customary law. The modification of the customary prohibition on the use of force and its *jus cogens* character was discussed with regard to the emerging norm of R2P.

In short, the rules provide that state practice must be general, consistent, uniform and have some duration (although a little duration can be sufficient). ‘General practice’ implies extensive and representative practice, involving specially affected states. It does not have to be universal but all major participants or groups of participants should take active parts in (or acquiescing in) this practice. Rigorous conformity with the rule is not required and some inconsistencies are acceptable. ‘Virtual uniform’ means that the separate acts of states as a collective have to be essentially similar, but also the internal practice of each individual state. The same would apply for regional organisations *mutatis mutandis*.

The amount of practice needed to establish a new rule that conflicts with a prior customary rule is greater than that needed to establish a new rule *in vacuo*. When it comes to changes in existing customary international law, inconsistent practice with a customary rule should generally be treated as a breach of the old rule rather than as an indication of recognition of a new rule. It is, however, the justifications of states that will be of guidance as to the intention of the custom. The more inconsistencies in state practice, the greater the number of states required to take part in the activities, as well as longer duration of time, for it to develop into a customary rule.

The subjective element may be inferred from state practice, but evidence of *opinio juris* can be found in many different sources, including soft law instruments. The *opinio juris* must be widespread, with not too many states dissenting or protesting as persistent objectors. The number of protests, their intensity and strength, as well as silence, must be taken into consideration. Protests are to be regarded as both the qualitative element of state practice and to constitute evidence of *opinio juris*. Isolated protests, however, cannot prevent an emerging norm and the number of protests acceptable may vary according to the extent to which the acts or claims affect the interests of other states. If a state that is specially affected by the emerging norm remains silent and fails to protest, it will be considered as ‘qualified silence’ by ‘passive conduct’ – acquiescing in the norm. Emerging rules of an *erga omnes* character imply that every other state would potentially be affected by this rule and therefore constitute specially affected states. Failure to protest against statements *in abstracto* is less significant than doing so in relation to a material act of state practice.

Furthermore, it has been acknowledged that *opinio juris* often lags some way behind state practice,2811 and that there is no requirement that

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a specific expression of opinio juris should be accompanied by simultaneous practice. The ILA Committee distinguishes the different stages in the life of a customary rule, and claims that the will to change the law must be present in the initial practice, while opinio juris that the practice is truly binding will appear at later stages of repeated custom. The justifications of state practice should at least reveal some form of will to change or create new law through the practice at initial stages. The justifications by states are important to examine, but the subjective element can also be inferred from the state practice itself – when general, uniform, and consistent. Whether this means that justifications by states can be disregarded and the ‘essence’ of the practice itself be a guiding principle for an assessment of emerging customary norms, is probably too hasty a conclusion. A middle position where both aspects (justifications and the essence of practice) are discussed would most probably represent a balanced position. State practice with an ‘essence’ expressing a norm of external R2P in the 1990s could possibly be complemented by statements of opinio juris towards this norm in the 21st century.

‘Evolutionary interpretation’ of a treaty takes into account not only the relevant rules of international law applicable between the parties at the time of the conclusion of the treaty, but also subsequent development and evolution of the law. Modification of a treaty can also take place ‘informally’ by subsequent practice of member states within the treaty framework, if the states parties develop a ‘consistent practice’ and ‘as a whole’ give their ‘common consent’ to the modification of the application of the treaty, involving more than a majority of the state parties but not a qualified majority.

According to uncodified customary law, informal treaty modification can also take place as a result of the emergence of ‘a new rule of general customary law’ relating to provisions in a treaty (but developing outside the treaty framework). Scholars uphold different theories on the scope and conditions of how this modification takes place and there is a presumption against legal change by the emergence of a new customary rule which conflicts with a treaty provision, as well as with old customary rules. Clear evidence is therefore needed, in particular proof of opinio juris to the effect, for example, express statements of the parties concerned or in their absence, that such a customary norm through represents consistent conduct manifesting a real intention to modify or terminate a treaty. This presumption, however, becomes relative in cases of partial modification of a treaty rule. Only later (posterior) and special customary rules (ratione personae or ratione materiae) can modify a treaty rule, according to the rule ‘lex posterior generalis non derogat legi priori special’. Compared with the normal formation of new customary rules, the process of informal modification of treaties by customary law usually takes more time. The more parties to the treaty the longer the time needed. If there is an

2813 Ibid., p. 30.
2814 YILC, vol II (1966).
underlying customary rule to the treaty rule this will also add to the time duration since it may involve non-party states affected by the modification of the underlying customary rule.

_Jus cogens_ norms can in theory be modified (Article 53 of the VCLT) but exactly how such a process takes place is unclear. These rules, however, would not apply to the modification of the prohibition on the use of force with respect to a responsibility to protect by military means (humanitarian intervention). Hannikainen and many other scholars maintain that a peremptory norm has a limited sphere of application and that only its core prohibiting aggression is non-derogable, while its outer core area is part of customary law and therefore allows for modification by _jus dispositivum_, such as customary or treaty law. I subscribe to this theory in the subsequent elaboration of a modification to the prohibition on the use of force in Article 2 (4) of the UN Charter and in customary international law.

The study of the rules on customary international law shaped my position on the emergence of new customary law. I chose a ‘modern approach’ to customary law (holding the view of the two elements of customary law as being aggregational rather than in synthesis), and an ‘inclusive approach’ with regard to custom (in that statements in _abstracto_ and verbal acts of states may be considered as state practice). However, in the case of state practice short of military force in the form of statements _in abstracto_, such practice will carry very little weight as state practice in the analysis on custom contributing to a customary process on humanitarian intervention.2815 Even if such statements were to be clear and unequivocal, they could not alone, neither considered in the form of practice nor as _opinio juris_, compensate for physical acts of military intervention, and thus not of themselves create a new customary norm on R2P by military means. It is primarily state practice consisting of physical acts of military intervention and the approval, protests or acquiescence to these which have been treated as state practice in this thesis. Protests towards such practice are counted as a form of state practice contributing to inconsistency in the application of the emerging norm, and if substantial hindering its development.

### 9.1.2.2 A human security and R2P framework for analysis

Having taken a humanitarian working definition on human security, a framework for analysis to be used on R2P was elaborated on the basis of four questions on security (for whom, by whom, for what and by which means). The human security framework built on these constructivist questions guided and structured the R2P framework of analysis, involving four similar questions (the responsibility to protect for whom, by whom, from what, and by military means). These two frameworks were discussed in Chapters 3 and 4 and have the purpose of being an entry point for the legal analysis on humanitarian intervention.

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2815 These two different forms of state practice will therefore be separated in the presentations in Chapters 7 and 8.
Constructivist, and to some extent critical, perspectives on security were applied in the formulation of a human security framework. The constructivist parts of the thesis (Chapter 1.3.3.2. and 3.5.) were not given a specific research question to resolve but had the purpose of giving the contextual background and understanding of the broadening and deepening perspectives on security, and input for the formulation of a human security framework for analysis of the (military) doctrine on R2P. Relating this shift in perspective on security to the issue of humanitarian intervention contributed with a new entry-point to the legal analysis, and the R2P framework for analysis helped delimit and structure the subsequent legal analysis in the thesis. Two questions in the R2P framework appeared self-evident and required no further consideration, while the remaining two questions (who has the R2P by military means and in what situations?) emerged to be the most crucial in the legal analysis.

Since the relevant actors, suggested by the ICISS to carry an external responsibility to protect human security, are connected to different legal rights and obligations in international law on the use of military force, the actors (or the so-called question of ‘Right Authority’) therefore became the organising principle for the systematisation of the legal material, arguments and analysis on an emerging norm of R2P by military means. The separate examinations of the relevant legal rules for these actors (the Security Council, the General Assembly, regional organisations, and coalitions of the willing) identified the respective lex lata and lex ferenda elements of the emerging external R2P doctrine by military means. The actors also determine different sets of thresholds or situations for ‘when’ the external R2P by military means may find support in international law.

9.1.2.3. The R2P doctrine and international law proper

This thesis analysed the main tenets and criteria of R2P doctrine with relevance for the question of humanitarian intervention from a legal positivist perspective (see Chapter 5). Several of its components were found to be part of lex lata while other elements of the R2P doctrine constituted part of lex ferenda. (See Chapters 5.1. to 5.3.) The R2P doctrine’s view on ‘sovereignty as responsibility’ corresponds to the modern interpretation of sovereignty, conceived to have a dual meaning, containing both the relationship of the government to that of its citizens within a state (internal sovereignty) and the relationship of the state itself towards other states (external sovereignty). Internal sovereignty as responsibility today reflect lex lata as regulated by international human rights covenants, UN practice and state practice, while the external sovereignty as responsibility is based upon the respect of the sovereignty, equality and territorial integrity of other states as asserted in Article 2 (1) of the UN Charter. The legal consequences of breaches of internal sovereignty by states when ignoring or violating human rights law is still

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under development, and the theory on forfeiture of the sovereignty of states or conditional sovereignty is part of a contemporary _lege ferenda_ debate, gaining more acceptance through state practice in the post-9/11 era.

With regard to the precautionary principles for military intervention, the principles of ‘last resort’ and of ‘proportionality’ could be argued to already be part of _lex lata_ and embedded in Article 42 of the UN Charter.2817 The criteria of a ‘right intention’ to halt or avert human suffering, could be presumed to be indirectly implied in the work of the Security Council. The principle of ‘reasonable chance of success’ in terminating human suffering, could to some extent also be presumed as an existing in-built mechanism in the system of collective security. The Council could be expected to avoid taking action in situations where such measures would lead to security consequences that would worsen the particular situation. However, such a result may in reality not always be possible to avoid, even though, the outlook might appear to hold a reasonable chance of success.

On the question of whether the emerging norm of external R2P, including by military means, could be accommodated in the legal order as formulated today, different answers were found for different legal regimes. (These latter conclusions have been presented above in Chapter 9.1.2.1.)

9.1.2.4. The ‘Right Authority’ for humanitarian interventions

The research in Chapters 6-8 focused on the ‘Right Authority’ – the four proposed actors to undertake an R2P by military means (the Security Council, the General Assembly, regional organisations and coalitions of the willing), and the respective treaty and customary rules in international law regulating their rights to use military force to protect human security within a state. The post-Cold War practice on humanitarian intervention has been examined in order to ascertain the kind of human security threats have been addressed and when such humanitarian interventions may be conducted and whether these cases correspond with the doctrine of R2P. Brief summaries of these findings have been set out above in Chapter 9.1.2.2., answering the primary research question: “Who has a legal external responsibility to protect human security by military means, and when?”

2817 The principle of last resort could be argued to be already binding on the Council due to the wording in Article 42: “[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate […]”. The principle of proportionality can be found in the wording “as may be necessary”. The principle of proportionality is also part of customary law in both _jus ad bellum_ and _jus in bello_, however with a slight difference in content. Frowein/Krisch, _Article 42_, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 753, paras. 7-8; McLemore, _The Responsibility to Protect: A Legal Perspective_, p. 18; Murphy, _Humanitarian Intervention. The United Nations in an Evolving World Order_, pp. 311-312.
9.1.2.5. An emerging norm on external R2P for regional organisations?

The emerging legal customary process on a responsibility to protect by military means for regional organisations was analysed in more depth from an R2P ‘lens’ in Chapter 8. The cases of unauthorised humanitarian intervention by regional organisations in Liberia (1990) and Kosovo (1999) were re-examined to see whether the external R2P criteria and precautionary principles on military intervention were applied consistently and uniformly. The findings show that this practice is in fact contributing consistently and uniformly to a customary development in support of an emerging norm of an external R2P for regional organisations to use military means to protect human security within a state, without Security Council authorisation, when the state itself manifestly fails to protect, and where the Security Council is unable or unwilling to protect, and peaceful means are found to be inadequate. The practice has begun to evolve into an emerging customary norm of unauthorised ‘regional collective humanitarian intervention’ (RHI). But this emerging customary norm will never develop into a legal duty to protect populations from grave crimes under international law by military means, but rather as a permissive legal right to use military force to protect human security within a state under specific circumstances.

9.1.2.6. Gender and human security protection in armed conflicts

The gender analyses in Chapters 3.4. and 4.9. have examined whether the gendered human security realities in, primarily, armed conflicts are reflected in the normative developments of the R2P doctrine. The ICISS report as well as the Outcome Document formulations on R2P reveals gender blindness and insensitivity towards the structural discrimination of women, both in peace and in war, and in relation to human security and the different security needs and experiences of men and women.

Threats to the human security of women in armed conflicts, in particular during internal armed conflict, have traditionally been invisibilised and neglected in international law, but in recent times, since the end of the Cold War, they have become increasingly acknowledged and addressed by progressive interpretation and treaty developments within international criminal law, and placed on the international security agenda through Security Council resolutions 1325 (2000) and 1820 (2008). The international community has enhanced its efforts to address more seriously and systematically the issue of men’s gender-based violence against women in armed conflicts. These gender-sensitised normative developments should consequently also be influential in relation to how the international community’s responsibility to protect is further developed and implemented, in particular by the Security Council when carrying out its responsibilities to maintain and restore international peace and security.

Resolution 1820 supports the development of viewing men’s sexual and gender-based violence against women in armed conflicts as grave crimes under international law, and when widespread, systematic, or
committed as a tactic in warfare, these human security threats may be viewed as affecting international peace and security and thus influencing the Security Council’s decisions and the measures it takes.

Despite this positive normative evolution, the weak and vague formulations in IHL linked to honour instead of a direct prohibition on sexual gender-based violence by men against women, still persist in the Geneva conventions – possibly creating implementation problems of humanitarian law for the protection of women caught up in armed conflict. The strengthening of the IHL by amended provisions prohibiting these forms of serious and systematic violations, particularly when sexual violence is apply as a widespread and systematic tactic of warfare, is therefore still required. IHL needs to be modernised and normatively strengthened to reflect the recent visibilisations of the pervasive gendered threats and crimes of sexual nature being committed against women in war. The law should reflect an advanced and modern understanding of men’s violence against women. Sexual violence is the only crime for which a community’s response is more often to stigmatise the victim, rather than the perpetrator. The UN’s zero tolerance of sexual violations by peace-keepers should become legally binding for states to implement, and be strongly enforced through national criminal law. This is necessary in order to change this malevolent culture and impunity present at the national level as well as in peace-keeping practices, so that peace support operations are not only able to significantly improve women’s security, but be able to address the sexual violence already present in the conflict.

The gender analyses on human security, international humanitarian law and international criminal law, the R2P doctrine and the gender mainstreaming of peace support operations all show that the international community is still struggling with inadequate legal protection for women in armed conflicts. The regimes and policies are incomprehensive and incoherent, and lack implementation at both UN and national level, despite the positive developments and achievements of the post-Cold War period in the area of international criminal law and ‘women, peace and security’. More research and a strengthening of the normative framework, primarily within IHL, but also in the area of R2P and international security are necessary. Resolution 1325 could also be further developed and its scope expanded to expressly encompass peace-enforcement measures under Chapter VII, including the external R2P by military means.

9.1.3. Gender and the emergence of an external norm on R2P

The R2P doctrine as formulated in the ICISS report is almost entirely gender-blind, but does in a few instances take into consideration specific security threats to women in relation to armed conflict.2818 However, the

2818 See e.g. the analysis in Bond and Sherret, United Nations International Research and Training Institute for the Advancement of Women (Publ.), New Voices, Perspectives. A Sight for Sore Eyes: Bringing Gender Vision to the Responsibility to Protect Framework. No other academic articles or papers were found on this topic and it appears that there is very little research
report takes a narrow and discriminating gender approach to security in its formulation of the just cause threshold, by including rape only if it occurs as a means of ‘ethnic cleansing’. Systematic rape, but also other forms of gender-based violence against women, may constitute grave crimes and are also worthy of protection without the connection or nexus to ethnicity and membership of a particular group. Similar gender critique could be directed to the Outcome Document from the UN Summit (2005), which did not deliver any formulations on gender aspects with regard to R2P. However, the endorsement that any of the listed grave crimes under international law (war crimes, crimes against humanity, genocide and ethnic cleansing) activates R2P, would consequently entail a broader gender approach to R2P than the original ICISS proposal. The R2P doctrine as formulated in the Outcome Document also allows for an integration of the progressive gender interpretations and developments in international criminal law through the case law of the ad hoc tribunals and in the Rome Statute.

These developments have been recognised by the Security Council in resolution 1820 (2008), which asserts that “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide”. This logically should also have gendered consequences for the R2P doctrine, and the international community’s commitment and responsibility, primarily through the Security Council, to protect people from such crimes including by military means. The Security Council’s political and moral responsibility to protect human security within a state may also encompass military measures as a last resort when such raw and brutal sexual and gender-based violence is used as a weapon of war and found to constitute crimes against humanity, war crimes, or genocide. Pervasive sexual and gender-based violence by men against women in armed conflicts therefore may (and arguably should), influence the Council’s implementation of its external R2P by military means. When widespread or systematic sexual or gender-based violence is being committed, the international community through the Security Council must also consider its responsibility to protect by military means as a last resort, if the state itself is unable or unwilling to protect women from such atrocities.

It has also been contended that the R2P doctrine could be further enhanced if it was more effectively integrated with and informed by Security Council resolution 1325 (2000) and the models and guidelines developed from the efforts to develop and implement this resolution. Not only the Security Council, but also individual member states are legally and politically bound to implement the gender policies of resolutions 1325 and 1820, and integrate gender perspectives when contributing with troops to UN authorised peace support operations.

Resolution 1325 is directed towards both UN entities and member states but is silent on the role of regional organisations in the

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implementation of the resolution. However, it could be reasoned that resolution 1325 not only sets up gender policies and guidelines for UN peace-support operations, but also through its direct address to member states, urges them to incorporate gender components in all of its work in conflict prevention, management and resolution, as member states in regional organisations. Gender considerations on peace and security issues would therefore be transmitted to intergovernmental organisations as well. Even though the resolution does not express any normative guidance on its implementation in unauthorised humanitarian interventions (RHI and UHI), such interventions undertaken by states and regional organisations should also be informed by resolution 1325. The emerging norm of an external R2P by military means for regional organisations (RHI) would not lack normative guidance for gender mainstreaming, and the global gender policies and guidelines on peace support operations should ex analogia be integrated into this customary process and norm development of R2P. The emerging legal norm of R2P by RHI may not at this stage fully reflect normative gender developments, but there are no obstacles to enhancing gender sensitivity in the future development and evolution of the R2P doctrine. The trend is in fact already pointing to the merging of these two normative ‘regimes’ or doctrines of ‘gender, peace and security’ and R2P.

The positive global gender developments have unfortunately not had express and direct recognition by, and influence on, the R2P doctrine, but should arguably, with strong support and commitment from the Security Council and the Secretary-General, combat sexual violence against women in armed conflicts, and be considered for the continuing advocacy and implementation of the emerging norm of an external R2P.

9.1.4. ‘Executive Summary’ – A brief overview of main conclusions

What is the standing of R2P in international law? Authoritative statements affirm that it is an emerging ‘norm’ but that it has not yet become law or a reality. Secretary-General Ki-Moon expressed in a statement in July 2008 that he believed “the responsibility to protect is a concept, not yet a policy; an aspiration, not yet a reality”.2821 The Global Centre for the Responsibility to Protect explains its view on the topic in a recently released document (June 2008):

R2P is not yet a rule of customary international law, but it can certainly be described as an international “norm.” A norm is a standard of behavior; a norm of international conduct is one that has gained wide acceptance among states – and there could be no better demonstration of that acceptance in the case of R2P than the unanimously adopted language of the World Summit Outcome Document. Once a norm has gained not only formal acceptance but widespread usage, it can become part of what is known as “customary international law.” While R2P has moved rapidly within the international arena, it has only recently begun to be invoked in specific situations and does not have the degree of

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acceptance that would justify its description as “law.” R2P continues to evolve and will look very different in a decade from now.2822

The international ‘norm of R2P’ as referred to in these statements speaks of the whole of the R2P doctrine comprising various political, moral, social and legal norms and rules, of which some norms and rules are already part of international law proper – that is, lex lata. Others constitute lex ferenda but appear to aspire to become law. Thus several legal norms are embedded in the international ‘norm of R2P,’ or rather ‘doctrine of R2P.’

Stahn asserts in his legal research on the norm of R2P that the concept currently encompasses a spectrum of different normative propositions that vary considerably in their status and degree of legal support.2823 For example, the internal responsibility for every state to protect its population from gross and systematic human rights violations and atrocities, constituting crimes against humanity, war crimes, genocide and ethnic cleansing, is already accepted as a legal obligation under current international legal instruments.2824 The internal responsibility to protect by each state should, however, be distinguished from the external responsibility to protect, and the two should thus be seen as different sets of rules in the R2P doctrine based upon different legal grounds.

On the external responsibility to protect populations by military means, the legal analysis in this thesis has shown that there exists no independent positive legal obligation or duty for external actors to act with military means when a state fails to protect its own people.2825 This conclusion is supported by other commentators.2826 But this conclusion

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2822 Global Centre for the Responsibility to Protect (Publ.), Frequently Asked Questions.

2823 Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, p. 102. Stahn asks the important question whether the notion of R2P is so indeterminate that it does not yet meet the requirements of a legal norm. His legal analysis of the concept tries to verify four legal propositions arising from this norm. These are: 1) The host state has a duty to protect citizens on its territory, 2) states failing in the duty to protect have a weak sovereignty defence, 3) foreign entities may intervene non-forcibly, 4) foreign states may intervene forcibly, and 5) foreign entities have a positive duty to act. These propositions are different from the research questions that this thesis has focused on: who has a legal external responsibility to protect human security by military means? Stahn’s questions 4 and 5 are thus complemented in this thesis by the supplementary questions whether entities other than states may intervene forcibly, and whether foreign entities have a permissive right to act.

2824 The internal responsibility of states was acknowledged and accepted by all states in World Summit Outcome Document, 15 September 2005, para. 138. This responsibility entails the prevention of genocide, war crimes, crimes against humanity and ethnic cleansing, including their incitement, through appropriate and necessary means. Paragraph 138 of the Outcome Document states: “We accept that responsibility and will act in accordance with it.”

2825 It has been argued in this thesis that the present collective security system under the UN Charter prevents the emergence of such a legal responsibility as a legal duty or obligation for the Security Council. See Chapter 6.3.4.

2826 See e.g. Stahn, Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?, p. 118-120; Brunnée and Toope, Slouching Towards New ‘Just’ Wars: International Law and the Use of Force After September 11th, p. 381; The House of Commons, Darfur, Sudan: The Responsibility to Protect. Fifth Report of Session 2004-5. Volume I (2005), p. 57. The report asserts that there is no ‘legal obligation’ on any supra-state organisation, or state for that matter, to prevent another
does not mean that there are no ‘legal obligations’ to take action, including non-military measures, to protect populations suffering from such atrocities constituting grave crimes under international law. The Genocide Convention and the Geneva Conventions on humanitarian law impose legal obligations on states to take active measures to prevent and punish the crime of genocide, as well as to ensure compliance with humanitarian law. It could, moreover, be debated that there is an evolving general collective legal duty for states, the Security Council and other international intergovernmental organisations, to act by humanitarian, political, diplomatic, economic, and other means short of military force to prevent, suppress and protect populations from genocide, crimes against humanity, war crimes and ethnic cleansing, when a state is considered to be manifestly failing to protect its own population.

Furthermore, the lack of legal ‘obligations and duties’ to use military force for the protection of populations from such atrocities within a state does not mean that there are no ‘legal rights’ to use military force to protect people from grave crimes and to prevent genocide, war crimes and crimes against humanity. The findings of the examination of whether the international legal order may accommodate an external R2P by military means show that the legal rules for the prevention of genocide support a legal right of the Security Council to authorise military enforcement measures under Chapter VII to protect people against genocide.

Moreover, the law on state responsibility regulating the right to recourse to legal counter-measures supports an external R2P when a state is manifestly failing to protect its population from grave crimes. Lex lata supports military counter-measures channelled through the Security Council when the state has incurred state responsibility for not protecting its population from international crimes, when the situation is determined a ‘threat to the peace’ by the Council under Chapter VII.

Although human rights and humanitarian law do not directly grant any legal rights to use military force, Security Council practice on humanitarian intervention in the post-Cold War period evidence the fact that it may lawfully authorise military enforcement measures for the protection of civilians against gross violations of human rights and humanitarian law in situations of internal armed conflict.

The R2P doctrine with respect to the external responsibility of the Security Council thus reflects lex lata in a permissive legal right of the Council to authorise humanitarian intervention. Authoritative government from committing war crimes against its own citizens; Alvarez, ASIL (Publ.), The Schizophrenias of R2P. Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, p. 14.

2827 The Genocide Convention Article I imposes a legal obligation to use ‘all means reasonably available’ to prevent genocide, according to the Bosnia v. Serbia Case (2007). The obligation encompasses the use of non-military and military force within the territory of the state concerned but when acting on another state’s territory, the use of military force needs to comply with general international law and would thus need a Security Council authorisation.
interpreters of the UN Charter challenge this claim by arguing that this right is conditional upon and only partly supported by the UN Charter. It is thus debatable whether this legal right is limited under the UN Charter provisions on the powers of the Security Council to only apply to the prevention of and protection against grave crimes under international law linked to armed conflicts or situations otherwise affecting the stability of a region.\footnote{2828}

But also other actors, such as regional organisations, coalitions of the willing, or even individual states, would, arguing \textit{de lege ferenda}, have a legal right to use military force to protect human security within a state in exceptional circumstances when the specific criteria of the doctrines of implied or \textit{ex post facto} authorisation, (or involving the principle of necessity according to the law on state responsibility) are present.

It has been contended in this thesis, on the basis of authoritative argumentation in the Commentary to the UN Charter, that the doctrine on \textit{implied} authority would be conceivable for unauthorised humanitarian interventions under specific and limited circumstances; 1) if the Security Council resolution language points towards implied authority, 2) the resolution is passed with a concurring vote of the five permanent members and the majority of all Council members, and 3) it is clear to the members of the Council that their action would be taken as an implicit authorisation.\footnote{2829} For the application of the doctrine of \textit{ex post facto} authorisation, it is up to the Security Council to evaluate and determine the presence of exceptional circumstances for a subsequent authorisation legalising the action.\footnote{2830} It could, however, only be applied to situations where prior authorisation would not, and could not, have changed the course of particular action. In both cases, the application of the doctrines must be based upon 1) a need for urgent action, 2) the unanimity of the permanent Security Council members, and 3) sufficient evidence for tacit Council approval of the action.\footnote{2831} Unauthorised humanitarian intervention could also \textit{de lege ferenda} find a legal basis in the principle of necessity, when military force is used to protect people from genocide, crimes against humanity, ethnic cleansing and war crimes to “safeguard an essential interest against a grave and imminent peril”, which “does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole”.\footnote{2832} This doctrine is only possible to invoke if taking the position that it is only the prohibition on aggression that is part of \textit{jus cogens}.\footnote{2833}

\footnote{2828} A traditional and narrow interpretation of Article 39 of the Charter, partly confirmed by Council practice, limits the Council enforcement measures under Chapter VII to security threats linked to armed conflicts (international armed conflicts or internal armed conflicts) or otherwise affecting the stability of the region concerned. Frowein/Krisch, \textit{Article 39}, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 725, para. 18.


\footnote{2830} \textit{Ibid.}, p. 865, para. 17.

\footnote{2831} \textit{Ibid.}, p. 866, para. 25.

\footnote{2832} Article 25, ILC Draft Articles on State Responsibility (2001). See Chapter 5.4.1.2.2.

\footnote{2833} Security Council mandated action under the responsibility to protect has, however, no
The results of the legal analysis on the question “who has an external R2P by military means and when” has furthermore revealed the existence of one lex lata norm holding a qualified (under Chapter VII of the UN Charter) legal right for the Security Council to use military force to protect human security from grave crimes within a state when the situation in question constitutes a threat to the peace, and where there are two lex ferenda norms on external R2P to protect, of which one of these is subject to a customary process of an emerging norm on unauthorised humanitarian intervention in international law. State practice by regional organisations undertaking unauthorised collective humanitarian interventions to protect populations from grave crimes within a state when the state concerned manifestly fails to protect, and the Security Council is unable or unwilling to protect, is forming a customary process of an emerging customary norm on RHl. The hypothesis that the ‘emerging norm of R2P’ in fact holds several legal emerging or existing norms regulating the external R2P by military means has thus been borne out (see Chapter 1.2.3).

Thus in summary, the thesis has firstly asserted that there already exists a legal permissive right for the Security Council to authorise the use of force to protect populations within a state from grave crimes committed in an internal armed conflict constituting a ‘threat to the peace’. The Council practice of authorised humanitarian interventions reflects the external R2P doctrine in that the Council has imposed military enforcement measures in certain situations where states have manifestly failed to protect their populations and peaceful means have been considered to be inadequate for the humanitarian protection of civilians. However, if accepting a narrow interpretation of the UN Charter and a necessary link between armed conflicts and the collective security system, the external R2P of the Council to protect by military means is to be considered qualified or partially supported by international law in this respect.

Secondly, the thesis has furthermore identified an emerging legal right primarily for regional organisations to protect populations from genocide, war crimes and crimes against humanity when the state concerned is considered to be manifestly failing and the Security Council is unable or unwilling to protect and peaceful means are inadequate. Thirdly, the thesis has found authoritative support and legal argument for a small possibility of de lege ferenda for regional organisations to intervene by military means to protect people in humanitarian crises in ‘exceptional circumstances’, when in accordance with the theories on ex post facto or implied authority, or involving the principle of necessity. These exceptional circumstances would de lege ferenda and mutatis mutandis also apply to coalitions of the willing and individual states.

The thesis does not examine the question of the moral and political rights and duties to protect human security with military means within connection to this principle, since such action derives its justifications directly from Chapter VII of the UN Charter.

2834 Ress/Bröhmer, Article 53, Simma, Simma (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, p. 866, para. 25. (See Chapters 7.2.4.2. and 7.1.4.1.2.)
another state, but only confirms that the 2005 endorsement of the R2P constitutes a moral and political commitment to a responsibility by the international community (states, through the UN and particularly through the Security Council, and when relevant through regional organisations) to protect populations on a case-by-case basis from genocide, war crimes, crimes against humanity and ethnic cleansing when a state is manifestly failing and peaceful means are inadequate. This moral and political responsibility to protect arguably involves both non-military and military measures to be taken in accordance with the UN Charter. (See, however, a wider discussion on the legal, political and moral aspects of R2P by military means in Chapter 9.2.)

9.2. Concluding remarks

9.2.1. Rethinking security and implications for IL – A new balance?

9.2.1.1. The state and the individual – Shifting of focus?

Are we witnessing a shift of focus or movement towards ‘a new balance’ between the ‘state’ and the ‘individual’ not only in international security but also in international law? The ongoing (albeit slower after 9/11) shift from state security to human security, and from state sovereignty to human rights has created tension in the international political community in trying to find a new balance between these points of reference on the issue of humanitarian intervention through reinterpretation and developments of many of the foundational principles of the international legal order. The concept of ‘sovereignty as responsibility’ and the expansion of what may constitute a ‘threat to the peace’ are but a few examples of this evolution now taking place in international law. The debate after the Kosovo intervention in 1999 reflected a lack of consensus in the international community over how to achieve a proper equilibrium in the relationship between state sovereignty and human rights on the use of unauthorised military force. This new balance was identified by the ICISS Commission in its suggested (and subsequently in 2005 endorsed by all states) reconception of state sovereignty into responsibilities, and not only rights. In particular, this involved respect for human rights and humanitarian law as a state responsibility. This reconception expanded the role and place of human rights and humanitarian law in the international legal order, at the expense of state sovereignty.

The incorporation of human rights and humanitarian law into the conception of ‘state sovereignty’ has not yet reached the formal status of a fourth criterion of statehood or state sovereignty, but the reconception and new balance has begun to entail legal consequences in the form of limited forms of sovereignty forfeiture when these responsibilities are not fulfilled.

A continued ‘securitization’ of gross human rights violations and also international crimes enhances the role of legal rights for the protection of human security in international law also by military means within states. This development is contributing to the evolution of the legal order, expanding its application beyond primarily interstate relations within the field of international security. The increasing concerns and incorporation of human security on the international security agenda is slowly reconstituting not only international relations but also international law.

9.2.1.2. Human security and R2P – Implications for IL

By studying the customary process on the emerging norms on R2P, the legal problems and difficulties arising in trying to accommodate this doctrine, is in my view, partly based upon a theoretical clash between the different ontological underpinnings of the human security paradigm and the international legal order. On one side there is the international legal order based upon the state centric principles and cornerstones, and on the other non-state centric perspectives on security. The tensions between state security and human security, between state sovereignty and human rights, arise due to these different underpinnings of the traditional legal order and a broadened security view. The international legal order has not fully adapted to the new security perspectives and needs of a globalised world.

At the same time, the R2P doctrine is not as radical as it may seem by advocating state centric solutions where states have the primary responsibility of protecting human security and where they are seen as the entities best equipped as security providers. The limited ‘humanitarian approach’ to human security underlying the R2P doctrine does not fully challenge the Westphalian system, although there are elements in the doctrine that depart from its foundations. It is in the doctrine on an external responsibility to protect where the Westphalian system begins to erode. In attempting to answer the questions of ‘who is the recipient of security’ and ‘who is the security provider’, the human security and R2P paradigms suggest that entities other than states could become both the referent object (recipient) of security (individuals or peoples) and the security provider (the international community primarily represented by the Security Council, or possibly by other actors).

The accommodation of the external responsibility to protect including by military means certainly poses challenges to the state centric legal order, the R2P norm as endorsed in 2005 less so than the R2P doctrine formulated by the ICISS. International law will still need further reformulations or reconstructions of various legal rules and regimes, such as, for example, the law on state responsibility, the principle of necessity as a ground for precluding the wrongfulness of an act, the responsibility of international organisations, the collective security system and Article 39 of the UN Charter and, in order to fully

2836 The wider conceptions of human security may have the capacity to reach further but not the R2P doctrine. See Chapter 3.3.
accommodate the R2P doctrine on external R2P, for actors other than the Security Council. (See Chapter 9.1.1.1.)

The important question arises of whether these different perspectives can be reconciled in the present legal order through reinterpretations of the fundamental principles of international law without any changes being made in the ontology of law – that is, what is international law? A legal order between states? This touches upon larger questions that have not been discussed in this thesis. Will changes in the norms on the use of force based upon a human security approach also require a change in the way we look at international law, one that would entail a system-change of the international legal order from a state based legal system to a multiple subject legal order with new legal relationships between various actors in the international arena, and not only states? Does the legal order stand expanded in relation to legal subjectivity, responsibility and accountability for non-state actors, organisations and individuals, in terms of rights, obligations and responsibilities without a reconception of the ontology of the legal order as such?

The gradual shifting of perspectives on human security on R2P would arguably not create a ‘Copernican Revolution’ in international security and international law taking us into a post-Westphalian order. The implementation of the R2P doctrine would not result in a full paradigm-shift to a post-Westphalian stage where states are permeable and have lost their political, legal and institutional roles in international society.2837 The humanitarian approach to human security embedded in the R2P doctrine does not obliterate the state system, but complements and further develops it. The R2P proponents advocate a moderate approach to human security as a complement to state security, not in opposition to it. The R2P is launched as a reconciliative norm where the tension between human rights and state sovereignty are merged into sovereignty as responsibility. R2P is not to be seen as a revolution but a piecemeal evolution moving beyond the perceived tensions between state and individual, sovereignty and human rights.

9.2.2. Security Council authorised ‘R2P interventions’

The criteria of the R2P doctrine demanding the presence of grave international crimes and the state manifestly failing to protect its population from such crimes, set up a qualifier for which situations the Security Council may authorise humanitarian interventions. The criteria appear to limit the Council in its future deliberations on humanitarian interventions, but Council practice of such interventions in the 1990s has included all these factors.

Does the R2P doctrine on military intervention change the Council’s action in humanitarian crises, or is it more or less the same thing as

2837 Cf. Brunnée and Toope, Slouching Towards New ‘Just’ Wars: International Law and the Use of Force After September 11th, p. 382, speaking of a fundamental shift in international law if the R2P was endorsed; see also Alvarez, ASIL (Publ.), The Schizophrenia of R2P, Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, p. 14 who argues that the R2P challenges the legal order by re-orienting a state-centric system of rules away from its statecentricity.
humanitarian intervention? Would it be necessary to distinguish future Council practice authorising humanitarian interventions for the protection of human rights from military ‘R2P authorisations’, depending on whether or not the R2P criteria are present?\textsuperscript{2838} May the Council authorise humanitarian interventions in situations where the R2P criteria are not present?\textsuperscript{2839} The recent decline in authorised humanitarian interventions does not point to a broadening of the conception. Should it occur, then ‘R2P interventions’ could arguably constitute a specific or qualified form of ‘humanitarian intervention’. The utility of a more elaborate distinction between ‘R2P intervention’ and ‘humanitarian intervention’, however, appears unnecessary at present.

Moreover, if the Security Council trend of including civilian protection mandates in its peace support operations using double legal basis under Chapter VII and host state consent, becomes a permanent model for the future, the traditional cases of authorised humanitarian interventions that seen in the first half of the 1990s may not reappear on the scene again. With such an institutionalisation of the protection of human security we might need to reformulate the concept of humanitarian intervention or find a new category for describing enforcement action with protection mandates including consent, possibly dropping the ‘intervention’ element in the terminology. Future consented UN authorised peace-enforcement measures having a dominant humanitarian purpose and extensive civilian protection mandates could be referred to as ‘humanitarian peace-enforcements’ or ‘civilian protection peace operations (or peace-enforcements)’. It is possible that in here, only unauthorised humanitarian interventions would be referred to as ‘humanitarian interventions’.

On the other hand, the legal literature and case studies on humanitarian intervention confirm that there are few legal limitations for a Council decision to authorise military enforcement measures where it finds the commission of such crimes. The only legal barrier to such military action is that the Council must find the humanitarian situation concerned constitutes a ‘threat to the peace’ under Article 39, and that peaceful means are found to be inadequate under Article 42. Also human security threats amounting to grave crimes under international law commissioned or imminent to occur in peace would arguably also fall under the Council powers to act.

The claim that the external R2P norm for the Security Council is subsumed under a double qualifier under the Chapter VII requirements for military enforcement action could thus be challenged. Nonetheless, the R2P criteria for military intervention are only necessary but not sufficient criteria for the Security Council to take on its external responsibility to protect when military means are necessary. The question is whether the R2P criteria therefore in fact limit or inhibit Council powers to act.

\textsuperscript{2838} Cf. ICISS, \textit{The Responsibility to Protect}, p. 33, para. 4.20.
\textsuperscript{2839} Cf. \textit{idem}, p. 34. The ICISS report excludes, for example, systematic racial discrimination, systematic imprisonment or other repression of political opponents, cases where the population is denied its democratic rights by a military take-over, and rescue operations of a state’s own nationals on foreign territory.
action for the protection of human security, instead of enabling or triggering such action.

I would suggest that, legally speaking, the R2P criteria do not legally enable but possibly politically enable military enforcement action for the protection of human security within a state in new situations. The criteria do not legally enable the Council to take more action in new circumstances now than it had before the 2005 endorsement. However, it could be argued that they would morally and politically enable and trigger the Security Council to gather support or to press the Security Council for such action when such international crimes are being committed in intrastate humanitarian crises not emanating from internal armed conflicts, or from internal armed conflicts not having international effects. It should be politically easier to argue and push for action by the Council due to the criteria.

On rape and other sexual gender-based crimes committed in a widespread or systematic manner as a weapon of war, the Security Council has now made the necessary connection by resolution 1820 (2008) to connect these crimes to the external responsibility to protect and subsequent enforcement action under Chapter VII. This assertion and the R2P criteria may contribute as an enabling factor for more forceful action to combat such gender-based crimes in armed conflict on the part of the Security Council. The non-deadly sexualised violence which women are exposed to during and after armed conflict must be given higher and equal attention and redress. The re-evaluation of human security threats based on gender is important for a more gender equal provision of security by states and the UN.

Scholars have argued that the criteria may inhibit the Council by becoming a subject of controversy, whether fulfilled or not. Although one could argue that the criteria would not limit the Security Council in situations where they have already been applied through earlier Council practice, it would still constitute a double qualifier for the Council to consider. It is possible that the Council determines a situation where grave crimes are being committed to constitute a ‘threat to the peace’, but would find itself deadlocked in terms of imposing enforcement measures owing to controversy over whether or not the state concerned is manifestly failing to protect its population.

The Darfur Case reveals an inherent problem in the collective security system affecting the implementation of the R2P norm. The weakness and incompleteness of the system’s lack of Article 43 agreements impact on the Security Council’s capacity to carry out its political and moral responsibility to protect by military means. The Darfur Case shows that even when the Security Council has taken the necessary decision to authorise the use of force for protection purposes, without and with consent (resolutions 1706 and 1769), the implementation and enforcement of its resolutions has not been met by corresponding commitments from the international community to contribute with the necessary resources, troops and equipment. Since the implementation of the Council’s military enforcement decisions depends and relies upon individual states contributing with troops and other
resources on their co-operation in implementing the Council resolutions, the external R2P of the Council is not an affair, or in the control, of the Security Council alone. This is another reason why the R2P could not develop into a legal obligation for the Council, carrying international accountability if it fails to protect, when the actual implementation in fact lies in the hands of individual member states. An interesting question therefore arises of whether the external responsibility of the Security Council in fact should be seen to be shared with the international community and whether the state practice of the authorised humanitarian interventions of the 1990s could be viewed as such state practice contributing to a customary legal norm which could bind UN member states to implement Security Council resolutions authorising military force for the protection of human security. It may be difficult to argue that the state practice is legally binding on member states, but member states are nonetheless legally bound to implement Chapter VII decisions, according to Article 25 of the UN Charter. The 2005 Outcome Document is also a manifestation of states acknowledging that they have a moral and political responsibility to protect and “are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter”.

Another difficulty and paradox in the implementation of the R2P doctrine for the Security Council is illustrated by the Darfur Case. The implementation of this doctrine is more difficult in situations where a militarily strong regime is unwilling to protect its population and is reluctant to co-operate with the UN and the international community. Failed state situations on the contrary, where a state is unable to protect, may represent easier cases in which to implement the norm. This was not the original intention with the doctrine on external R2P, which was to be activated when a state was unable or unwilling to protect. The question is whether this is a difficulty inherent in the doctrine or in its implementation.

The implementation problems of the R2P doctrine in the case of Darfur is an issue of disagreement, if depending on deficiencies inherent in the concept of R2P or based in political reality and power structures. An anonymous writer with experience of humanitarian work in Darfur maintains that this case illustrates the embryonic features of R2P as a doctrine that is by no means self-executing, and at present lacks the dexterity to overcome real world politics, but should nevertheless not be seen as a failure.\footnote{Anonymous, Ensuring A Responsibility to Protect: Lessons From Darfur, p. 26.} He or she argues that with time the doctrine will evolve, as diplomats and politicians learn how to use the doctrine and operationalise it, and that the shortcomings are not in the doctrine but in the failure to implement it. As discussed above, the implementation of the R2P doctrine is not solely reliant on the Security Council in order to function due to the lack of Article 43 agreements. It could therefore be asserted that one important fault line in fact lies in the construction and weakness of the collective security system, and not in the R2P doctrine. There are, of course, many factors affecting the capacity of the world to
fully implement the R2P doctrine, such as the US military constraints owing to the war against terrorism, Europe’s slow development of an independent military capacity, sufficient resources in the African regional context, and an overall lack of political will and commitment to the implementation of the norm.

9.2.3. The legalisation of ‘unauthorised’ external R2P?

The question is whether the R2P criteria for military intervention would enable and trigger, or instead inhibit and limit, the unauthorised collective use of force for human protection outside the UN Charter framework. It has been argued that the Iraq Case (2003) suggests that the R2P criteria could provide a significant constraint on the use of force for human protection. The R2P criteria for military intervention are arguably most important and necessary limitations on the use of military force for military action taken outside the UN Charter framework. Without such criteria for an emerging norm on external R2P, the use of military force for protection purposes by actors other than the Security Council as a third exception to the use of force would otherwise not be further regulated or specified than that provided for in Article 2 (4) of the UN Charter, prohibiting force against the territorial integrity or political independence of states, or in any manner inconsistent with the UN Charter.

State practice on an emerging norm for regional organisations is on the whole manifesting these criteria. The continuing confirmation of these criteria in the customary process of the R2P norm is therefore of the utmost importance for the formation of an external norm of R2P stipulating a legal right to unauthorised military force, and limiting other forms of unauthorised military intervention.

The criteria would be equally important for a customary process on unilateral humanitarian interventions by coalitions of the willing or individual states, but such a process has not yet taken off. The legalisation of unauthorised humanitarian interventions by regional organisations (RHI) in exceptional circumstances has thus been argued to be less difficult to achieve than unauthorised humanitarian interventions by individual states or coalitions of the willing (UHI). I have in this thesis also argued de lege ferenda that not only RHI but also UHI could be found to be legal on an exceptional basis if certain factors are met, such as the criteria for the doctrines on implied and ex post facto authorisation in exceptional circumstances, or if the principle of necessity evolves as a customary norm for unauthorised humanitarian interventions.

Notwithstanding these developments and arguments, there is as yet no fully developed legalised global security governance on external R2P human security within states for actors other than the Security Council.

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2841 See e.g. MacFarlane, Thielking and Weiss, The Responsibility to protect: is anyone interested in humanitarian intervention?, p. 986.
One should not merge the state practice of different actors (regional organisations and individual states or in coalition) in an attempt to add up more state practice in order to support a more general customary norm on unauthorised humanitarian intervention. Despite the endorsed R2P doctrine and increasing role of international human rights and humanitarian law in the international legal order, the international community lacks a general and common global normative culture on the moral basis for the protection of human security within a state outside the UN Charter framework. Regional developments where common normative cultures have evolved regional security governance structures for the protection of human security with unauthorised military enforcement measures have begun to take shape. Such developments would perhaps be more difficult to evolve at the global level, which is why regional solutions could open the way for the first external R2P norm in this area. It is more feasible that a common regional, moral and normative culture settles around these issues. These developments do arguably not affect the legal status of unilateral humanitarian interventions by individual states, or in coalition.

It could, however, be contended that the acceptance of Kosovo’s declaration of independence in December 2007 has contributed to a backlash in the customary process on an emerging norm of R2P. Due to this precedent it will be more difficult to argue that humanitarian interventions will have no effect on the political independence and territorial integrity of a state. The recent Russian intervention in Georgia in August 2008 may be asserted to reflect a development where states may instead increasingly merge the idea of a responsibility to protect populations from repression with a demand for secessation. Such a development of the norm of an external R2P entangled with the principle of self-determination may in fact, just as in the case of Iraq (2003) when merged with other justifications for the use of force, strangle the norm and slow down or stop its customary development.

Such misapplications of the norm illustrate the difficulty in legislating new norms on a customary basis. Legislating by customary law is a less controlled form of legislating where the interpretations and application of the norm by states may differ greatly, as a zig-zag road from point A to B, without guarantee that the emerging norm does not change on the way into a point D. The formation of a norm by a customary process implies legislation by *sauvage* manners, where not only the interpretation and the application of the R2P doctrine and criteria by states may differ greatly, but also risk abuse and misapplication. Such developments take the norm far off the track that was initially formulated by its founders or endorsed in the Outcome Document. The legalisation of UHI may even be a more hazardous project than what is the case for RHI. The inclusion and mainstreaming of gender perspectives in the state practice may be difficult to uphold and sustain in this process.

MacFarlane, Thielking and Weiss argue that it is in fact politically impossible to codify criteria for humanitarian interventions in
contemporary international relations. Despite this, they acknowledge evidence of a quiet long-term movement towards institutionalisation of the protection of civilians in international society.

A majority of legal scholars are negative and against legalising unauthorised humanitarian intervention and warnings have been issued against turning the norm of R2P from political rhetoric to a legal norm. However, the objection against legalising unauthorised humanitarian intervention due to risks of abuse by states using the pretext of humanitarianism to launch wars for ulterior motives is discredited by Goodman. But instead of advocating legalisation, he argues that the pretext objection be removed in order to improve the discussions on legalisation. He contends that legalising unauthorised humanitarian interventions should instead discourage wars with ulterior motives. The British and others proponents of humanitarian intervention have argued that criteria for humanitarian interventions without Security Council authorisation would provide a basis for evaluating and justifying non-authorised action and for minimising abuse. Whether or not this proves to be true is evidently a controversial matter.

According to Chesterman and Byers, legalisation of unauthorised humanitarian intervention would have to assume a radical change in the international legal system which is unwarranted and unsound, and this is why they prefer to adopt an alternative approach of exceptional illegality, where legitimising factors may mitigate the action. They contend that the greatest threat is not in the occasional breach of the law, but in “attempts to mould law to accommodate the shifting practices of the powerful”. Whether it is indeed occasional ad hoc breaches of the law or the misuse or abuse of a legalised right to unauthorised humanitarian intervention which creates the great risks, challenges and dangers towards the legal order and the Rule of Law principle is difficult to assertain. It appears that no matter what one chooses, either alternative will undermine the respect for the legal order or the particular legal rule. A rule which is abused also loses its legitimacy and credibility, just as a legal order which is ignored loses its force for adherence and compliance.

Unauthorised humanitarian interventions by regional organisations without the consent of the state but based upon prior treaty-based consent for such interventions could be a middle-way forward for

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2844 Ibid., p. 990.
2847 Stromseth, *Rethinking humanitarian intervention: the case for incremental change*, p. 266.
2849 Ibid., p. 203.
military enforcement action for protection purposes on a regional basis, if a customary norm on RHI were not to crystallise.2850

9.2.4. Concluding words

The R2P doctrine as formulated by the ICISS Commission did not solely rely on the Security Council in order to function but also included the proposal that other actors may have an external responsibility to protect when the Council is unable or unwilling to take action, also with military means. But the proposals on an expanded Right Authority have not been fully acknowledged by the international community. It may be argued that this is an impediment to the full realisation of the original intention of the R2P to fill the ‘gap’ between the legitimacy and legality of humanitarian intervention identified after the NATO intervention in Kosovo. This ‘gap’, between what is seen as ‘legitimate’ but ‘illegal’ humanitarian interventions, refers to ‘unauthorised’ humanitarian interventions. The purpose of the R2P doctrine was to formulate criteria and principles that could support the legalisation of such unauthorised humanitarian intervention, thus filling the gap.

The lack of global acceptance for the R2P solution to close the gap between the legitimacy and legality of unauthorised humanitarian intervention appears to make the Gordian knot of humanitarian intervention persist. It is possible that the codification or legalisation of unauthorised humanitarian intervention may not be achieved, possibly not under the R2P doctrine. Perhaps, simply it is not feasible to merge (international) law and (global) morality on the issue of unauthorised humanitarian intervention.

My opinion is that it is difficult, if not impossible, to make this merging of law and morality on the issue of unauthorised humanitarian intervention, and I am not even sure that it should be an aim of the international community to try to regulate this gap by law. As long as there is no common global morality on how to protect human security within a state, no global legislation will be able to bridge this gap.

Not everything can be regulated by law, and should not be either. Law is not always the only or best solution to every problem. It has been argued that hard cases make bad law.2851 Certain hard cases which are very context related, such as unauthorised humanitarian intervention, should preferably not be regulated by law but continue to be solely a moral duty or responsibility that could be exercised in extreme emergencies contra legem. If an external R2P holding a right to unauthorised military force to protect human security within a state is accepted as legal rights for actors other than the Security Council through customary processes, such rights run the risk of being misused and abused because of the difficulties in creating a regulation through this source of law. There will most likely be less cases of ‘real’


humanitarian interventions than cases where the R2P language is misused or abuse, why the need actually regulate these few real cases by a customary process that is vulnerable to abuse seems less attractive and unnecessary. Few occasional unauthorised humanitarian interventions do not undermine the international order, nor (most likely) the legal order.2852

To have a moral and political ‘responsibility to protect’ when possible to be exercised, but not legal responsibility for situations outside the UN Charter framework, is perhaps the best solution (to this knot). Such a position would correspond with the ‘ad hoc strategy’ as identified in the DUPI 1999 Humanitarian Intervention report. This strategy on humanitarian intervention suggests that unauthorised humanitarian intervention should be seen as an emergency exit without aims to challenge the existing legal order, and that the Security Council is preserved as the sole centre for authoritative decision-making on humanitarian intervention.2853

Thus instead of aiming at filling the gap between the legality and legitimacy of humanitarian interventions with legal regulation based upon an external responsibility to protect by military means involving legal rights to conduct unauthorised humanitarian interventions, this gap should be filled with non-legal norms of an external responsibility to protect. Such non-legal norms that should fill it would be global or regional moral, political, social and cultural norms on an external responsibility to protect human security within a state when a population is facing genocide, ethnic cleansing, war crimes and crimes against humanity.

It may be better to have an extensive application of the prohibition on the use of force so that the external R2P by military means outside the UN Charter is considered to be illegal, but that a moral obligation or duty to protect by military means is kept for exceptional situations, contra legem. It may be preferable to have a discussion on whether or not an illegal unauthorised humanitarian intervention was ‘legitimate’ than if it was ‘legal’ or not, and thus confined to controversial debates on whether it complied with a ‘correct’ interpretation and application of the R2P criteria for military intervention in the specific case. The question is thus whether we want to have a discussion of the ‘legality’ or the ‘legitimacy’ of a future case of unauthorised humanitarian intervention post hoc, mindful of the implications of choosing one or the other approach. These are possibly not great.

It has been argued that cases of unauthorised interventions undermine the international order, but at the same time that if the R2P

2852 Bellamy, Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit, p. 5; cf. Evans, The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All, pp. 147-146. Evans argues that the position that there are certain circumstances that justify the Security Council being bypassed seriously undermines the whole concept of a rules-based international order. He, however, appears to endorse the ‘plea of mitigation’ approach to this dilemma forwarded by Thomas Franck and supported by Byers and Chesterman.

doctrine is misapplied as in the Iraq Case (2003), it may have negative consequences and repercussions on unforeseen areas and levels. Whether it is in fact the occasional *ad hoc* breaches of the law or the misuse or abuse of a legalised right to unauthorised humanitarian intervention which creates the greatest risks, challenges and dangers towards the legal order and the Rule of Law principle is thus controversial and appears to be a subjective interpretation. The morality held by the specific interpreter is decisive of the position taken. Since the doctrine lacks a common global morality, the positions will continue to diverge. Dworkin states:

If there is no right answer in a hard case, this must be in virtue of some problematic type of indeterminacy or incommensurability in moral theory.  

However, I lean towards the position that occasional unauthorised interventions do not undermine the international order, based on the view that there will most likely be less cases of such practices than potential cases of abuse of the R2P or humanitarian intervention doctrines. Moreover, if such practice comply with the R2P doctrine well and the intervention is regarded as being ‘legitimate,’ such state practice may contribute to customary processes of emerging legal norms if the practice is subsequently accepted as law. The future ‘practice’ of states will indicate whether this process will continue or whether states will find other means to settle the issue without further attempts to legalise unauthorised humanitarian interventions. The tensions in the law, the ethical dimensions and political reality on unauthorised humanitarian intervention may best be resolved in practice, rather than in a doctrinal formulation abstractly and in advance.

The whole debate and analysis on humanitarian intervention in this thesis has not questioned or discussed whether in fact humanitarian intervention is the best solution to prevent and stop genocide, crimes against humanity, war crimes and other grave atrocities and violations of human rights and humanitarian law. Although this assumption has of course been criticised by others, and the debate on R2P is moving more towards a focus on the preventive aspects and non-military measures of the doctrine, the discussions on the military aspects of the R2P doctrine are generally based upon the assumption that there is sometimes no alternative in many situations to military coercion for humanitarian purposes. It would be interesting to consider incorporating research...

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2854 Dworkin, Ronald, *A Matter of Principle*, Harvard University Press, Cambridge, Massachusetts, 1985, p. 144. It may be possible that this is a case which Dworkins describes as a situation where there are two theories which differ sufficiently to demand different answers and provide indeterminacy in moral theory “which makes it plausible to suppose that neither of such theories can be preferred to the other on grounds of political morality.” In this case, neither alternatives provide a best justification in terms of the dimensions of ‘fits’ and of ‘political morality’. Ibid., pp. 143-145.


2857 See e.g. MacFarlane, Thielen and Weiss, *The Responsibility to protect: is anyone interested in
based upon theories of non-violent resistance into the analysis on the means of ending a humanitarian crisis where non-military measures are found to be inadequate. More forceful but non-violent measures would be interesting to consider for discussion in cases where the R2P doctrine is difficult to implement by military means.2858

2858 What would happen if 10,000 or 20,000 unarmed voluntary civilians from other countries (including journalists and broadcast companies) were flown in to live with the population in threatened villages in Darfur as human shields en masse? Would the attacks continue in front of the eyes of these witnesses present in masses and with the whole world watching? Would attacks be directed against the human shields en masse? The question may seem utopian since few people may voluntarily want to do so, but the question may still be interesting to discuss for the exploration of alternative means of addressing the issue.
Appendix I – Terminology

Aggregationist theory – Modern theories of customary law make a separation between the two elements, usus and opinio juris, as distinct elements based upon D’Amato’s separation of state practice as acts and opinio juris as statements. Customary law then becomes an aggregate of the two elements, which are perceived as being radically separate. One of the elements can be more predominant than the other.

Anti-foundational theories – These hold that objective knowledge is not perceived to be realisable since there are no neutral grounds for making truth claims Therefore, all meta-theoretical grounds are rejected as reflecting only a particular view of epistemology. Truth claims are relative, contextual and historical and according to anti-foundational approaches, it is denied that such claims can be made through the empirical testing of hypotheses against evidence of facts.

Belief theory – This theory on the subjective element of international customary law holds that opinio juris is constituted by the “belief of states” that an act is legally binding, and that such act is considered to be a necessary element for the formation of customary law

Constitutive theory – A constitutive theory in international relations rests on the belief that our theories help construct the world and views language and concepts as contributing factors to the perception of reality. Constitutive theories tend to be anti-foundational.

Constructivism – The notion of a heterogenous theoretical perspective or theory in international relations having certain factors in common such as the valuing of normative and ideational structures as well as the material, the interlinkage of identity, interest and action, and the mutual constitution of structures and agents. Constructivist perspectives on international relations focus on analysis where the elements of agents, identity, interests, norms, structures and institutions in the international society are seen to be mutually constitutive. Social constructivism portrays itself as occupying the middle ground between foundationalism and anti-foundationalism, but also between rationalist (neo-realism, neoliberalism and Marxism) and reflectivist (post-positivist/alternative) theories.

Epistemology – The theory of knowledge. The study of how we can claim to know something. It concerns itself with the question: ‘How is knowledge acquired?’ For example, how do we know the content of the law?

Essentialism – This subscribes to the belief that a specific entity has a fixed ‘essence’ or set of characteristics or properties all of which any entity of that kind must possess. This view is contrasted with non-
essentialism which states that for any given kind of entity there are no specific traits that similar entities must possess.

Exclusivist (narrow) theory – A theory on custom/state practice in international customary law, where statements in abstracto of states are not considered part of state practice. Only concrete acts of state are accepted as, or properties of valid state practice.

Explanatory theory – This views the social world as separate and external from theory, which can be studied in the same manner as the physical world. Explanatory theories tend to be foundational.

Foundational theories – Foundational theories uphold the belief that the world can be tested or evaluated against any neutral or objective procedures and that truth claims can be judged true or false.

Inclusivist theory – A theory on custom or state practice in international customary law, where statements in abstracto of states are considered to be part of state practice.

Legal positivism – The principal claims of legal positivism are that laws are rules made by human beings and that there is no inherent or necessary connection between the validity conditions of law and ethics or morality. Legal positivism stands in opposition to the tradition of natural law which asserts that there is an essential connection between law and justice/morality. Legal positivism is said to be a descriptive theory of ‘law as it is’ (lex lata), as opposed to ‘law as it should be’ (lex ferenda), and may be used to describe valid law or law proper.

Ontology – The study of the nature of being, existence, or reality in general and of its basic categories and their relations. It gives particular emphasis to questions on what entities exist or can be said to exist, and how such entities can be grouped and related within a hierarchy, subdivided according to similarities and differences. It seeks answers to questions on ‘what is XX?’ For example, what is law? What is international relations?

Rationalist theories – These are mainly embodied in neo-realism, neoliberalism and Marxism. They hold that the major actors, states, are believed to be rationalist in their actions, selecting strategies to maximise benefits and minimise losses. The rationalism applied by the neo-realist and neo-liberalist theories is informed by the assumption of rational choice theory and the logic of rationalist economic theory to international relations.

Reflectivist theories – These include several alternative and post-positivist approaches such as feminism, post-modernism, and critical theory, and they oppose realism and more generally, positivism. Such
theories emphasize the ‘interpretation’ of events rather than empirical data.

‘Relative foundationalism’ or ‘minimal foundationalism’ – This theory holds that a rejection of objective knowledge, and so-called ‘Big-T’ truth claims, does not preclude making small-t truth claims as long as the claims are admitted to always be “contingent and partial interpretations of a complex world”.

Positivism – In social science this embodies a foundational epistemology where the only authentic and objective knowledge is that which is based upon empirical testing of hypotheses against evidence of facts. Such knowledge can only come from affirmation of theories through strict scientific method. All truth claims are believed to be judged true or false.

Post-modernist theories – These reject or are sceptical of foundationalism and meta-narratives, and depending on the various branches, are concerned with deconstruction, double reading and the relationship between power and knowledge.

Synthetical theory – Classical theory on international customary law does not accept a separation between the two elements, usus and opinio juris, and regards them as being mutually constitutive and inseparable. According to this view, the elements are not cumulative or aggregational and cannot be weighed against one another. A customary rule is hence seen as a synthesis between the two elements.

Voluntarism – A theory on the subjective element in international customary law, opinio juris, where the ‘will of states’ is considered to be the source of legal obligation in customary law. The consent of states to a customary rule is emphasised.
Appendix II – The Rome Statute

Article 7

Crimes against humanity
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (f) Torture;
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
   (i) Enforced disappearance of persons;
   (j) The crime of apartheid;
   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:
   (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
   (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
   (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
   (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
   (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

**Article 8**

**War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seize be imperatively demanded by the necessities of war;
(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(iii) Taking of hostages;
(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court,
affording all judicial guarantees which are generally recognized as indispensable.

d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place
in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.
Appendix III – Latin terminology

ab initio – from the beginning
ad hoc – for this particular purpose only
actus reus – guilty act

bona fide – good faith; acting or done in good faith
causus belli – an event or action that justifies or allegedly justifies a war or conflict
contra legem – against the law

de facto – in fact
de jure – according to the law; as a consequence of the law; rightfully
de lege ferenda – according to the law as it should be
de lege lata – according to the law as it is
desuetude – obsolete; a state of disuse
dictum – statement that forms a part of the judgment; an expression of opinion by a judge/court

erga omnes – towards all (states)
et al. – and others
et seq. – and the following (et sequens)
expressis verbis – in express terms
ex post facto – after the fact

ibid. – the same place/person
in abstracto – in the abstract
in nascendi – emerging
inter partes – between the parties
intra vires – within powers or legal authority of
ipso facto – by the fact itself; by that very fact or act

jus ad bellum – law concerning the right justifications to use armed force
jus cogens – compelling law (peremptory law)
Jus dispositivum non-scriptum – dispositive non-written law (customary law)
Jus in bello – law applicable in war

lacunae – gaps
lex ferenda – law as it ought to be
lex generalis – general law
lex lata – the law as it is
lex posterior – later law
lex specialis – special law
lex specialis derogat generali – general law yields to special law
lex superior – superior/higher-ranking law

mens rea – criminal intent (guilty mind)
motus mutandi – the necessary changes having been made
opinio juris – an opinion of law/the conviction that a certain conduct is required by international law

per se – by or in itself
prima facie – at first sight

ratione materiae – with regard to the material content
ratione personae – with regard to person

sine qua non – an indispensable action or condition (without which it could not be)
sub legem – under the law
sui generis – one of a kind; of its own kind; unique

tertium genus – third kind/category

ultima ratio – the last reason or argument; the final sanction
ultra vires – exceeding powers; beyond the powers or legal authority of usus – state practice
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