

## RESPONSIBILITY TO PROTECT, HUMANITARIAN INTERVENTION, SOVEREIGNTY AND POLITICAL INDEPENDENCE OF STATES ON THE SCALE AND WAVELENGTH OF PRAGMATIC EXIGENCIES

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### Abstract

International law guards jealously the territorial integrity or political independence of states. Hence, it prohibits any action that will undermine this sacred principle. The law also has great respect for human rights and fundamental freedoms. The problem arises where there has to be a choice between safeguarding sovereignty or political independence for its sake, on the one hand, and violating sovereignty to protect human rights, on the other. This raises the issue of balancing the question of sovereignty with the imperative of protecting of human rights. This study analyzed the contending issues and challenged the absolutist doctrine of sovereignty, with specific focus on Africa. We concluded by holding that the dissonance between sovereignty and human rights could disappear if states protect and promote human rights the same way they guard their sovereignty. International organizations have a responsibility of ensuring that states promote and protect human rights. They should ensure that they aggregate the principles of responsibility to protect, of humanitarian intervention and of just war to make them binding norms of international law. Sovereignty and human rights ought to operate in accord.

Intervention in the territory of a sovereign state to prevent or halt genocide or other crimes violates the principle of territorial integrity and political independence of states as guaranteed under the Charter of the United Nations<sup>1</sup>, for instance. The General Assembly of the United Nations has condemned, in unmistakable terms, armed intervention and other forms of interference, thus: No State has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>2</sup>

The General Assembly justified its stance on intervention because it was a threat to universal peace, its being synonymous with aggression, and it threatened sovereign personality, territorial

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<sup>1</sup> See Arts 2 para 4 and 2 para 7 of the *Charter of the United Nations*, 1945.

<sup>2</sup> Resolution adopted by the United Nations General Assembly, Twentieth Session, Agenda Item 107, A/RES/20/2131, 21 December 1965: 2131(31), *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*. Available at <<https://www.ilsa.org/jessup/jessup15/Declaration%20on%20the%20Inadmissibility%20of%20Intervention%20in%20the%20Domestic%20Affairs%20of%20States%20and%20the%20Protection%20of%20Their%20Independence%20and%20Sovereignty.pdf>> accessed 29 July 2018.

integrity and political independence of states.<sup>3</sup> The exceptions to the territorial violation rule are individual and collective self-defence in the event of an armed attack;<sup>4</sup> action by the Security Council of the United Nations under Article 24 and Chapter VII of the Charter of the United Nations, and regional security action/arrangement with the authorization of the Security Council of the UN.<sup>5</sup>

Despite these Charter provisions, a practice has emerged in the international community whereby states or a group of states intervene in another state to stop the commission of serious crimes such as war crimes, crimes against humanity and genocide. A good example of that was the intervention by the North Atlantic Treaty Organization (NATO) in Kosovo in 1999 to end the genocide there. Interventions under those circumstances may be illegal, yet they are legitimate or justified on 'humanitarian' grounds. It is in realization of the (conditional) interventionist principle that the African Union (AU), successor of the Organization of the African Union (OAU), included a provision in Article 4(h) of its Constitutive Act.<sup>6</sup> That provision confers 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. A protocol amending the Constitutive Act adds immediately at the end of subparagraph (h) the following words: 'as well as a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council.'<sup>7</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Article 51 Charter of the UN (under Chapter VII). Chapter VII covers Arts 39-51. For instance, Art 39 of the Charter empowers and obligates the Security Council to determine the existence of any threat to the peace, breach to the peace, or act of aggression and make recommendations on it, or decide measures to take in accordance with Arts 41 and 42, to restore international peace and security. Art 41 is on non-military enforcement acts, while Art 42 is on military enforcement actions by air, sea, or land forces, including demonstrations and blockade, among others.

<sup>5</sup> Chapter VIII of the Charter of the UN (Arts 52-54).

<sup>6</sup> *Constitutive Act of the African Union*, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government 11 July, 2000 - Lome, Togo. Fifty-three African States participated in the adoption. Available at <<https://au.int/sites/default/files/pages/3202>> accessed 14 November 2017. Note that the Act preserves the core objectives and principles of sovereignty, territorial integrity and non-interference: Arts 3(b) and 4 (g); only that those things give way to the imperative of intervention for human protection purposes. This Protocol, also described as the Malabo Protocol (so called because it was drawn up in Malabo, the capital of the State of Equatorial Guinea, in the central part of Africa) was adopted on 27 June 2014. As at January 2018, less than 15 states had signed the treaty and yet none of those states had ratified it. Genocide is one of the crimes triable by the court. See Art 28A para 1. Although the Protocol is innovative in that it has introduced some crimes such as unconstitutional change of government, mercenaries, money laundering, trafficking in persons, drugs and hazardous wastes (Art 28E), in a rather ironical way, it grants immunities to a 'Security AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' See Art 46A bis of the Protocol. Under international law, the prevailing regime of criminal responsibility does not exempt anybody from prosecution while in office. Although the provisions of Art 46A bis of the African Protocol is a kind of procedural immunity (it lasts only during the period of office of the leader), it can send a wrong signal to the effect that the AU indirectly tolerates impunity, and this can scuttle any good intention that the AU might have set out to achieve.

<sup>7</sup> See Art 4 of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extra-Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia) 3 February 2003 and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003. Available at <<http://au.int/en/treaties/protocol-amen>> accessed 14 November 2017. The Protocol shall enter into force 30 days after the deposit of instrument of ratification by two-thirds majority of member states.

According to Kioko, questions as to whether the UN had inherent right to intervene other than through Security Council authorizations under Article 52 were rejected outright.<sup>8</sup> The decision by the AU to adopt that radical doctrinal approach was phenomenal. Kioko remarks that Article 4 'is the first international treaty to contain such a light. The provision stands in contrast to traditional notions of the principle of non-interference and non-intervention in the territorial integrity of nation states.'<sup>9</sup> African states were frustrated with the slow pace of reform of the international order, whereby the international community tended to focus attention more on other parts of the world at the 'expense of more pressing problems in Africa.'<sup>10</sup> Some of the violent conflicts and serious violations of human rights took place in Uganda, Eritrea, Somalia, Burundi and Rwanda.<sup>11</sup> Therefore, the AU adopted Article 4 (h) out of necessity, 'with the sole purpose of enabling the AU to resolve conflicts more effectively on the continent without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of member states.'<sup>12</sup> Apiko and Aggad describe it more aptly: 'This is a shift from non- interference under the Organization of African Unity (OAU) to the AU's non-indifference under Article 4(m).'<sup>13</sup> In other words, the AU was taking its destiny into its own hands. It saw itself bogged down by security-related problems, which needed immediate practical solutions.

However, beyond the doctrinal requirement to intervene in a member state, the treaty provision in question has not been realized, as cases of human rights violations are still prevalent in Africa, for example, Somalia, Sudan, South Sudan, and Central African Republic in addition to several others that have occurred sporadically across the African continent.<sup>14</sup> On the foreseeable challenges or obstacles of implementing or accessing the legal requirement of Article 4 of the Act, Kioko identifies them as follows: political will at the level of the Assembly of Heads of State and Government, as well as at the regional level; and high cost of intervention (vis-à-vis weak economics).<sup>15</sup> Even when there is some agreement or consensus on intervention, there may be no agreement on its form or objective, its mandate or duration.<sup>16</sup> Without strong political will and the financial 'muscle' needed to intervene, coupled with the modalities and resources for intervention, the provision of Article 4(h) and related provisions will yet remain largely unrealizable. African states have human and natural resources; but bad management of resources and scourge of war have made poverty inevitable in the majority of the states. This has far-reaching implications for the quest to prevent or end genocides and other heinous crimes on the continent and, by implication, in some other parts of the world.<sup>17</sup> Dyani-Mhanego has enumerated other impediments

<sup>8</sup> Ben Kioko, 'African Union's Constitutive Act: From Non-Interference to Non-Intervention' *ICRC Dec.* 2003 Vol. 85 No. 852, at 824 <<https://www-icrc.org/eng/assets/files/other/irrc>> accessed 12 October 2017. At the time Ben Kioko wrote this article, he was legal adviser to the AU.

<sup>9</sup> Ibid 820.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 812, 813, 814, 817, etc.

<sup>12</sup> Ibid 47-53. See also Paphite's commentary: Anthony Paphite, 'Intervention in the International Affairs of States' *E-International Relations* <[www.e-ire.info/2011/10/25/intervention-in-the-internal-affairs-of-states/](http://www.e-ire.info/2011/10/25/intervention-in-the-internal-affairs-of-states/)> accessed 7 September 2017.

<sup>13</sup> Ibid 817, 818.

<sup>14</sup> Phelomena Apiko, and Fatten Aggad, 'The International Criminal Court, Africa and the African Union: What Way Forward?' *Discussion Paper European Centre for Development and Policy Management* No. 201, November 2016 <[www.ecdm.org/dp201](http://www.ecdm.org/dp201)> accessed 18 November 2017.

<sup>15</sup> Kioko (n 8) 823.

<sup>16</sup> Ibid.

<sup>17</sup> Ntombizozuko Dyani-Mhanego, 'Reflections on the African Union's Rights to Intervene' *Brooklyn Journal*

to exercising the right of intervention. The author says there is ‘the need to clarify the meaning of the right to intervene, which is not currently defined in the AU treaties, decisions or resolutions.’<sup>18</sup> Furthermore, the author thinks, ‘the principles of sovereignty, non-interference, and territorial integrity of the AU member states are interpreted restrictively.’ We agree with this author on these points. Moreover, we think that at the centre of all these is the political will to act.

Article 4 (h), of the Constitutive Act of the AU potentially puts the AU in a collision course with the UN Charter and the UN Security Council. Massingham points out that the application of this provision ‘could be contrary to the United Nations Charter, as it seems to suggest that the African Union could take a decision to authorize intervention without resort being had to the Security Council.’<sup>19</sup> This argument seems convincing; but it collapses when we look at the provision of Article 4(h) in terms of the ‘mischief’ it could have cured in a Security Council dominated by polarized interests, even at the expense of security expediency or human rights concerns. Inaction by the UN Security Council and wield of veto power by the permanent members of the Council could frustrate or encumber timely action to prevent genocide and other crimes across the world. For instance, Dyani-Mhanego observes that ‘had the international community acted in (sic: on) time, the genocide and massive sexual violence against women in Rwanda would not have occurred.’<sup>20</sup>

A ‘kindred’ concept to humanitarian intervention is the ‘responsibility to protect’ (shortened as ‘R2P’). It originated in response, by Canada, to the pleas by the then Secretary General of the United Nations, Kofi Annan in 1999 and 2000 for the international community to take practical measures to prevent gross and systematic violations of human rights. At that time, the international community was already familiar with the developing concept of ‘humanitarian intervention’ as well as the controversy and challenges it had caused conceptually and practically. On one occasion, Annan said:

While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community.

It has cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. The inability of the international community to reconcile these two equally compelling interests- universal legitimacy and effectiveness in defence of human rights - can only be viewed as a tragedy.<sup>21</sup>

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*of International Law* [2012] 38 (1) 48.

<sup>18</sup> Ibid. For more information on the challenges of the AU, see pp 28, 33-48.

<sup>19</sup> E Massingham, ‘Military Intervention for Humanitarian Purposes: Does Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?’ *International Review of the Red Cross* [2009] 91 (876) 814. The author notes that the covenant of the League of Nations and the Kellogg- Briand Pact did not mention the concept of humanitarian intervention and that the latter expressly prohibit war: Massingham, *ibid*.

<sup>20</sup> Dyani-Mhanego (n 17) 7.

<sup>21</sup> See, United Nations, *Secretary - General Presents His Annual Reports to General Assembly Press Release SG/SM/7136/GA/9596* <<https://www.un.org/pres/en/1999>> accessed 15 November 2017.

Anan recognizes the imperative of intervention in the event of ‘gross and systematic of violations of human rights’ but cautions, ‘intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world’s people.’<sup>22</sup> He sees intervention in a state to protect civilians from ‘wholesale slaughter’ as a ‘developing international norm’, but comes with profound challenges as well.<sup>23</sup> Given that such evolutionary norm pits ‘state sovereignty’ against ‘individual sovereignty’, it is bound to bring about distrust, skepticism, and even hostility in some quarters. Yet, Anan asserts that this is ‘an evolution we should welcome’ because ‘despite its limitations and imperfections, it is testimony to a humanity that cares more, not less, for the suffering in its midst, and humanity that will do more, and not less to end it.’<sup>24</sup>

On another occasion, Annan said:

... If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violations of human rights that offend every precept of our common humanity?<sup>25</sup>

The Government of Canada constituted a commission of experts in the year 2000 to study this thorny issue. The Committee came up with a comprehensive report,<sup>26</sup> which the United Nations and other international organizations can adopt as a template for guidance, to prevent or halt genocide and the other gross violations of human rights. The foreword to the report starts with a controversial term: ‘humanitarian intervention.’ It states:

This report is about the so-called “right of humanitarian intervention”: The question of when, if ever, it is appropriate to take coercive - and in particular military - action against another state for the purpose of protecting people at risk in that other state. At least until the horrifying event of 11 September 2011 brought to center stage the international response to terrorism, the issue of intervention for

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Kofi Annan, *Millennium Report to the General Assembly, 2000*. Mr. Annan made the statement on 16th December 1997, on receiving a report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda. He had expressed a similar concern and made a plea in an address to the 54th Session of the UN General Assembly in 1999.

<sup>26</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty December 2001*. Available at <responsibility to protect. org/ICISS Report. Pdf> accessed 14 November 2017. They also refer to the Commission as the ‘Evans Commission’; so called after a co-chair of the Commission, Gareth Evans; the other co-chair was Mohamed Sahnoun: see, e.g. p IX of the Report. The Evans Commission Report (on R2P) has been regarded as one of the five documents from which the responsibility to protect has been articulated. The other ones are (1) *The Secretary-General’s High Level Panel’s Report on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility* <[https://www.un.org/...](https://www.un.org/)>; (2) the Secretary - General’s Report: *In Larger Freedom: Towards Development, Security and Human Rights for All* <<http://www.un.org/>>; (3) the outcome document of *2005 World Summit A/RES/60/1* <[www.un.org/development/desa/population ...](http://www.un.org/development/desa/population...)>; (4) UN Security Council Resolution 1675: S/RES/1675 (2006), adopted at its 5431st meeting, on 28 April 2006 – that resolution extended the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO) to 31 October 2006; (5) Report of the Secretary-General, *Implementing the Responsibility to Protect* <[http://www.un.org ...](http://www.un.org...)> A substantial part of this information is taken from Kioko (n 8) 809.

human protection purposes has been seen as one of the most controversial and difficult of all international relations questions.<sup>27</sup>

The new approach to the question of responsibility to protect (R2P) recommended by the commission included the responsibility to prevent,<sup>28</sup> the responsibility to react,<sup>29</sup> and the responsibility to rebuild.<sup>30</sup> The preventive measures include early warning and analysis, identification of root causes and direct preventive measures. The responsibility to react refers to measures short of military measures, if the threshold criteria exist, such as just cause. The responsibility to rebuild has to do with post-intervention obligations under the administrative authority of the UN. On the responsibility to react, Mbera says it has to do with 'legitimacy criteria borrowed from the just war tradition outlining precautionary principles.'<sup>31</sup>

The Commission recommended six criteria for military intervention: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.<sup>32</sup> On the 'just cause' element, the Commission explains as follows:

large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state act, or state neglect or inability to act, or a failed state situation; or large scale "ethnic cleansing" actual or apprehended, whether carried out by killing, forced expulsion, act of terror or rape. If either or both of these conditions are satisfied, it is our view that the "just cause" component of the decision to intervene is amply justified.<sup>33</sup>

The primary role to intervene to protect is that of the UN Security Council. However, where the Security Council rejects a proposal or fails to intervene in the face of conscious-shocking situations, alternative options become necessary 'to meet the gravity and urgency of the situation'. Those options are action by the General Assembly in an emergency special session under the 'Uniting for Peace' procedure; intervention by a regional or a sub-regional organization under Chapter VII of the Charter. When this happens, it will be an indictment to the stature and credibility of the UN itself.<sup>34</sup> As remarked in the foreword of the Report, the 'central theme' of R2P is 'the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, from mass murder and rape, from starvation, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.'<sup>35</sup> Accordingly, Mbera remarks that

... R2P represents a conceptualization of both the concept of sovereignty (reframing it as conditional) and the concept of responsibility (outlining a three-

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<sup>27</sup> Ibid VII.

<sup>28</sup> Ibid 19-23.

<sup>29</sup> Ibid 21-35.

<sup>30</sup> Ibid 39-44.

<sup>31</sup> Faith K Mbera, *The African Union and the Responsibility to Protect: Lessons Learnt from the 2011 United Nations Security Council Intervention in Libya* (Being a dissertation, submitted in fulfilment of the requirements for the degree Magister Artium (International Relations) Development of Political Sciences, Faculty of Humanities, University of Pretoria) 5.

<sup>32</sup> ICISS (n 26) 33.

<sup>33</sup> Ibid 32.

<sup>34</sup> Ibid 47-53. See also Paphiti (n 12).

<sup>35</sup> ICISS (n 26) VIII.

... tied framework of distribution between the state and the international community).<sup>36</sup>

Having discussed the arguments for the concept of ‘humanitarian intervention’, Massingham moves on to distinguish between that concept and R2P.<sup>37</sup> The author argues that there is a difference between intervention (which the former stands for) and protection (which the latter stands for). Thus, R2P avoids the language of a ‘right to intervene’. We however, disagree with Massingham’s view, because in practical terms, the goals of intervention, whether as a ‘responsibility’ or as a ‘right’ do not change the human protection regime that is at the centre of the scenario. In any event, ‘R2P’ can be invoked to justify an otherwise unwarranted interference. The sentiments (as expressed, for instance, by humanitarian agencies) could have motivated the shift in language<sup>38</sup> rather than any substantive existential concern. More fundamentally, R2P also contains the template or elements of the ‘just war’ (*jus bellum justum*) doctrine that Saint Augustine of Hippo formulated and Saint Thomas Aquinas revised. The ICISS alluded to this, as we saw above. The ‘just war’ doctrine has the characteristics of both the *jus ad bellum* (the law on the conditions for war or the right to go to war) and *jus in bello* (law regulating the conduct of hostilities). The components or categories of the *jus ad bellum* are just (competent) authority, just cause, just intention, and last resort. The *jus in bello* has proportionality, discrimination and responsibility.<sup>39</sup> However, Heraclides and Dialla remark that the just war doctrine originally did not include intervening in other states for humanitarian reasons; instead it rested on ‘providing just reasons for resorting to an inter-state war.’<sup>40</sup> The authors add that it was only in the 16th century (a period that coincided with the advent of international law – then known as *jus gentium*, the law of nations - ‘that support for those suffering from tyranny and maltreatment was seen as one of the reasons for a just war.’<sup>41</sup> We think that the ICISS made implicit reference to just war within the broadened sense it took from the 16th century. In the final analysis, there may be no significant difference, after all, between/among R2P, humanitarian intervention, and just war. It is only, essentially, a question of semantics and convenience naming.

Barbar looks at R2P from a different perspective - forcible intervention in another state for the purposes delivering humanitarian assistance to victims of ‘massive human rights violations’<sup>42</sup>, which she specifically identifies as situations of genocide, war crimes, ethnic cleansing and crimes

<sup>36</sup> Mabera (n 31) 5.

<sup>37</sup> Massingham (n 19) 824. The reasons advanced to justify intervention are: that the Charter of the UN does not prohibit the use of force to ensure the realization of the Charter values, such as protection of human rights; that it is reflective of a new customary norm; it is a form of self-help that has survived the adoption of the Charter; it is lawful if it relates to ‘failed states’ because there is no sovereignty to breach in the circumstances, and that it is ethically justified although it is in breach of international law.

<sup>38</sup> Apart from the need to respond to the preference of humanitarian agencies, one other factor that prompted the Evans Commission to use the concept ‘R2P’ rather than ‘humanitarian intervention’ was, according to Kioko, ‘the controversy and lack of precision or common understanding of the term [‘humanitarian intervention’] ...’:

Kioko (n 8). The words in parenthesis are ours, to resolve likely ambiguity.

<sup>39</sup> Jon Dorbolo, ‘Just War Theory’

<[https://oregonstate.edu/instruct/phl201/modules/just\\_war\\_theory/criteria\\_intro.html](https://oregonstate.edu/instruct/phl201/modules/just_war_theory/criteria_intro.html)> accessed 29 July 2018.

<sup>40</sup> Alexis Heraclides, and Ada Dialla, *Humanitarian Intervention in the Long Nineteenth Century* (Manchester University Press 2015) Available at <<https://www.jstor.org/stable/pdf>> accessed 29 July 2018.

<sup>41</sup> Ibid.

<sup>42</sup> Rebecca Barber, ‘Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law’ *Review of the Red Cross* [2009] 91 (874) 371-397.

against humanity. The case studies of study were Darfur (in Sudan) and Somalia. She argues that states have ‘an obligation to consent to and actively facilitate humanitarian assistance’,<sup>43</sup> recognized in both customary international humanitarian law and international human rights law (the realization of economic, social and cultural rights). The bottom line is that ‘sovereignty implies responsibility’,<sup>44</sup> ‘to safeguard and promote the welfare of a population, including where necessary through the active facilitation of international humanitarian assistance.’<sup>45</sup>

Furthermore, Barber says that the legal regime of protection of humanitarian assistance applies in both international and non-international armed conflicts. According to her, in the armed conflicts in question (Darfur and Somalia), the parties are bound by common Article 3 to the Geneva Conventions 1949 (that being the minimum, and given that Somalia is not a High Contracting Party),<sup>46</sup> and with respect to Sudan by Additional Protocol II (Articles 14 and 18).<sup>47</sup> Parties to a conflict are under obligation to adhere to customary international law,<sup>48</sup> for example, the obligation to respect and protect relief personnel and objects, and to allow and facilitate the free and rapid passage of humanitarian relief devoid of impartiality and adverse distinction (save the state’s right of control).<sup>49</sup> The relevance of Barber’s work is that the stemming of international crimes requires the activities of neutral humanitarian bodies whose work involves saving of lives. Addressing the emotional challenges of victims of war can help to reduce the casualties of killings and the mental and psychological torture on victims. In relation to R2P, humanitarian activities could come under *jus post bellum* (‘justice after war’) doctrine: post-war reconstruction, rehabilitation, and compensation, rights vindication, peace treaties, proportionality and publicity, war crimes trials, and war reparations.<sup>50</sup>

The Evans Commission Report and related documents are, essentially, a source of soft law; thus, none of them ‘can be considered as a source of binding international law in terms of Article 38, paragraph 1 of the Statute of the International Court of Justice, which lists the classic sources of international law.’<sup>51</sup> This, however, does not discount their strong moral weight, which may well be an expression of developing rules of customary international law or of *jus cogens*. Human

<sup>43</sup> Ibid 397.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid. e.g. 383.

<sup>47</sup> Ibid 385-387. Common Article 3 has to do with obligation of parties to a conflict to apply minimum standard of humane treatment during the conflict.

<sup>48</sup> Ibid 387-388.

<sup>49</sup> Ibid 387.

<sup>50</sup> See, ‘Summary of Just War Theory’ *Reason and Meaning* 8 May 2015

<<https://reasonandmeaning.com/2015/05/08/the-essence-of-just-war-theory/>> accessed 29 July 2018; Joe Carter, ‘A Brief Introduction to the Just War Tradition: Jus Post Bellum’ <<https://erlc.com/resource-library/articles/a-brief-introduction-to-the-just-war-tradition-jus-post-bellum>> accessed 31 July 2018; Carsten Stahn, and Jann K Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press 2008) Available at <<http://www.elac.ox.ac.uk/downloads/Rodin%20%20Two%20Emerging%20Issues%20of%20Jus%20Post%20Bellum.pdf>> accessed 31 July 2018.

<sup>51</sup> Office of the President of the General Assembly, *Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing, and Crimes against Humanity* <[www.un.org/ga/president/63/interactive/prote](http://www.un.org/ga/president/63/interactive/prote)> accessed 15 November 2017. See also, Prevent Genocide, ‘The Responsibility to Protect’ *Outreach Programme on the Rwandan Genocide and the United Nations* <[www.un.org/en/preventgenocide/rwanda/pdf](http://www.un.org/en/preventgenocide/rwanda/pdf)> accessed 15 November 2017.

protection (from mass atrocities) is, indisputably, at the centre of national sovereignty. *Prevent Genocide* amply captures this fact, thus:

The International Community cannot remain silent in the face of genocide, ethnic cleansing, war crimes, and crimes against humanity. But the UN response should be predictable, sustainable and effective without undermining the UN's credibility based on consecrated cornerstone values enshrined in the UN Charter. Therefore, it is the preventive aspects of responsibility to protect that are both important and practicable but these need both precise understanding and political will.<sup>52</sup>

There is a political economy of intervention. Thus, where intervention will not serve the strategic interests of the superpowers, they may likely not be willing to intervene. A typical case was the genocide in Rwanda, where 'The explanation for the failure to intervene to prevent or halt genocide was because Rwanda was not considered as worthy of the resources an intervention would require.'<sup>53</sup> The cold response of the international community to the Rwandan genocide in 1994 has evinced regrets that in turn prompted and justified suggestions for more proactive measures. In this connection, O'Donnell (reviewing and using the argument in, Barnett's book), argues that the UN refrained from intervening in Rwanda out of its self interest and self preservation.<sup>54</sup> O'Donnell locates this in the context of human rights to examine whether 'absolute rights' exist in contemporary international law. The author describes absolute rights as those that may not be transgressed; they are non-derogable or inalienable, for example *jus cogens* or customary international law.<sup>55</sup>

O'Donnell's formulates a five-part syllogism (a syllogism is an argument based on logical reasoning) to evaluate the UN's behaviour in Rwanda. This analysis proceeds from the assumption that Barnett's argument is valid and that the UN's failure to protect the Rwandan people was a conscious decision by the Secretariat that institutional interests should trump humanitarian interest (utilitarianism verses absolutism).<sup>56</sup> The syllogism is segmented, thus:

If A) genocide violated an absolute right, and B) it is the UN's duty to prevent such violation, and C) there were available legal mechanisms by which the UN could have acted, and D) the UN, aware of the situation, did not act to protect the absolute

<sup>52</sup> Ibid 2.

<sup>53</sup> John-Mark Iyi, *Humanitarian Intervention and AU-ECOWAS Intervention Treaties under International Law: Towards a Theory of Regional Responsibility to Protect* (Springer International Publishing 2016) 114.

<sup>54</sup> Michael J O'Donnell, 'Genocide, the United Nations, and the Death of Absolute Rights' *Boston College Third World Law Journal* [2008] 23 (2) 402, 411 – 412. The book he reviewed is: Michael N Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Cornell University Press, 2002). In his book, Barnett had held the UN (and not its members) morally accountable for failing or refusing to stop the genocide (the blame was not actually on UN's inability to predict the genocide). Rather, that it was the Secretariat and the Secretary-General in particular who failed to act on two vital pieces of information in which the United Nations Assistance Mission in Rwanda (UNAMIR) Commander Romeo Dallaire had conveyed: 1. Characterization of the event as ethnic cleansing and genocide. 2. Plea for more troop reinforcement: see pp 109 – 110, 169 -170 of the book and 401, 407, 411 of O'Donnell's article. UNAMIR was set up pursuant to Security Council Resolution 872, October 5, 1993. However, it was too weak to foil the 1994 genocide. Eventually, the UN withdrew the peacekeeping force. See O'Donnell, Ibid 400.

<sup>55</sup> Ibid. pp 404, 405. The author cites Art 4 of the International Covenant on Civil and Political Rights (ICCPR) 1966, Art 1, para 3 and Arts 51 and 42 of the Charter of the United Nations.

<sup>56</sup> Ibid 405, 411-412. See also p 113 of Barnett's book.

right, choosing instead another course of action, *then* E) the UN's behaviour is evidence of a failure to protect absolute rights.<sup>57</sup>

The A to C parts of the syllogism were answered in affirmative, but the D part was answered in the negative,<sup>58</sup> with consequence of part E being in the positive. Part D constitutes a 'weak link' in the syllogism because it is reflective of the UN's actual understanding of the events in Rwanda and its failure to intervene based on a subjective judgment of the need to protect itself from destruction even though at the risk of protection of absolute rights.<sup>59</sup> The UN rationalized its inaction by assuming that it was a mere ethnic violence, which had become the hallmark of the country since 1960.<sup>60</sup>

According to O'Donnell, absolute rights do not exist in reality; rather they are merely theoretical ideal,<sup>61</sup> which states should strive to attain by giving them 'more prominent position on the diplomatic and political scales of decision making if such rights are to maintain their relevance in human rights discourse.'<sup>62</sup> He further points out that 'western states and inter-governmental organizations have a moral obligation to do so.' We may also argue that the UN and, in particular, the permanent members of the Security Council, the superpowers of the world, had a legal duty to protect the Rwandans from that unprecedented destruction in African history.

The basis for O'Donnell singling out western nations and international organizations might be due to the resources at their disposal, which they could pool and deploy to protect or prevent human rights violations. They are the backbone of the UN, as it were. In the specific context of the genocide in Rwanda, powerful nations of the world did not use their resources to prevent the genocide from taking place. The United Nations did not demonstrate the will power to act either; therefore, the genocide became ineluctable.<sup>63</sup> The UN could have acted by reinforcement of the UNAMIR with more personnel or Security Council action under Chapter VII of UN Charter.<sup>64</sup> Furthermore, O'Donnell draws attention to the havoc that incisive human rights violations could 'wreak on prospects for economic development, and regional and global stability.'<sup>65</sup> Finally, O'Donnell takes on the question of absolute rights and the need to accept them as 'meaningful and enforceable' rights.<sup>66</sup> That given the numerous important human rights protection that have been ratified by two thirds of the world's nations,<sup>67</sup> what is needed to protect absolute rights is the political will power to apply them. He gives an example of an instance of 'preventive rather than reactive, absolute rights protection' to underscore the hope for entrenching this principle: the North Atlantic Treaty Organization (NATO) 1999 bombing campaign against targets in Kosovo, Montenegro, and Serbia to prevent genocides against Albanians in Kosovo. Although

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<sup>57</sup> Ibid 402, 405 - 406.

<sup>58</sup> Ibid 406 - 412. See also pp 411 - 412.

<sup>59</sup> Ibid 411 - 412.

<sup>60</sup> Ibid 402, esp. footnote 9. See also pp 409 - 410.

<sup>61</sup> Ibid 412

<sup>62</sup> Ibid 412 - 413.

<sup>63</sup> See, for example, *Security Council Report of the Independent Inquiry into the Action by the UN during the 1994 Genocide in Rwanda* UN. Doc.S/1999 11257(1999).

<sup>64</sup> O'Donnell (n 54) 410 - 411. See also Art 42 of the UN Charter.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid 414.

the campaign took place without Security Council authorization and therefore a violation of law of state sovereignty, it marked a watershed in state practice on humanitarian intervention. In other words, 'absolutism' of state sovereignty can give way in extreme circumstances to the imperative to protect 'absolute rights'. This argument is plausible because in modern international law and in state practice, the phenomenon of sovereignty does not exist in iron cast impregnable terms of unconditional absolutism. This is the more so when it comes to the question of prevention of human rights abuses. However, the objection of human rights pundits to military intervention lies more on the risk of many or more human rights violations taking place in the process of the intervention.<sup>68</sup> This dilemma beckons the necessity for preventive rather than reactive measures. There is a need to fill the gap between theoretical absolute human rights rhetoric (the law as written) and rights enforcement in practice (i.e. the law as enforced).<sup>69</sup> Conclusively, O' Donnell does not want absolute rights dead.<sup>70</sup> Hence,

In order to prevent future human rights catastrophes like the Rwandan genocide, absolute rights must be accorded primacy by decision makers. This would reflect their moral and practical importance, as well as their venerable status in the eyes of citizens of the world...<sup>71</sup>

O' Donnell's review is very helpful in the sense that it stresses the benefit of proactive measures in addressing the troubling scourge of genocide. However, where such actions are not forthcoming, the default action will be the extra-Charter intervention frameworks by regional and sub-regional organizations, for instance, the ECOWAS<sup>72</sup>. Of course, humanitarian intervention may be an option too; so also is 'just war.'

The dissonance between sovereignty and human rights could disappear if states protect and promote human rights the same way they guard their sovereignty. By so doing, they will make forcible intervention unnecessary as well as legally and morally unjustifiable.

1. International organizations should ensure, through diplomatic and other lawful means, that states protect and promote human rights. That way, sovereignty and human rights will operate in accord.
2. The international community should ensure that it aggregates the principles of responsibility to protect, of humanitarian intervention, and of just war and make them binding norms of international law.

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<sup>68</sup> Ibid 415.

<sup>69</sup> Ibid 416- 418, 399.

<sup>70</sup> Ibid 399.

<sup>71</sup> Ibid 418.

<sup>72</sup> See Art 58, para 1, 2 f) of Treaty of ECOWAS (ECOWAS Revised Treaty) 1993. See also the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Article 21 sets up the ECOWAS Cease-fire Monitoring Group (ECOMOG) and Article 22 defines its missions (functions). See also Chapter VI (Art s 28 – 35), which is on Conflict Management.