Some thoughts about the Report of the International Commission on Intervention and State Sovereignty (ICISS) entitled “The Responsibility to Protect”

Examensarbete med praktik
Folkrätt 20 poäng
Vårterminen 2003

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<tr>
<td>AIV</td>
<td>Advisory Council on International Affairs</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>ASIL</td>
<td>The American Society of International Law</td>
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<tr>
<td>CAVV</td>
<td>Advisory Committee on Issues of Public International Law</td>
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<td>Doc</td>
<td>Document</td>
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<td>DUPI</td>
<td>Danish Institute of International Law</td>
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<td>ECOMOG</td>
<td>Economic Community of West African States Cease-fire Monitoring Group</td>
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<td>ECOWAS</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>Abbreviation</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>NJIL</td>
<td>Nordic Journal of International Law</td>
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<td>NPFL</td>
<td>National Patriotic Front of Liberia</td>
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<tr>
<td>OAS</td>
<td>Organisation of American States</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>para./paras.</td>
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<td>Res</td>
<td>Resolution(s)</td>
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<td>SC</td>
<td>Security Council</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNOMIL</td>
<td>United Nations Observer Mission in Liberia</td>
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<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<tr>
<td>UNYB</td>
<td>United Nations Year Book</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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<td>Vol</td>
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1. Introduction

The Canadian Government launched in 2000 the International Commission on International State Sovereignty (ICISS) to discuss and promote a debate regarding the responsibility of the international community to protect civilians and the relating concept of state sovereignty. The Commission, chaired by Gareth Evans and Mohamed Sahnoun, presented its report “The Responsibility to Protect” a year later, in December 2001.¹

External military intervention for human protection purposes has been controversial both when it has happened - as in Somalia, Bosnia and Kosovo - and when it has failed to happen, as in Rwanda.² This controversy was brought to its most intense stage by NATO’s intervention in Kosovo in 1999. The UN Secretary-General Kofi Annan had pleaded to the international community at the 54th UN General Assembly in September 1999 to try to find a new consensus on how to approach these issues and it was in response to this challenge that the Canadian government together with a group of major foundations, established the ICISS, which has produced the report “The Responsibility to Protect”.³

The report focuses on three components, namely the responsibility to prevent, to react and to rebuilt. One of its main purposes is to develop universally accepted criteria for the so-called “right of humanitarian intervention”: the question of when, if ever, it is appropriate to take coercive - military - action against another state for the purpose of protecting people at risk in that other state. The kind of intervention that the report is concerned with is "action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective".⁴

The report seeks to generate new international consensus on this issue. For this reason, the report has been influenced by the roundtable discussions that ICISS had in Beijing, Cairo, Geneva, London, Maputo, New Delhi, New York, Ottawa, Paris, St Petersburg, Santiago and Washington with representatives from governments and inter-governmental organisations, from non-governmental organisations and civil society,

¹ Report of the International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, the International Development Research Centre 2001, Ottawa (hereinafter “The ICISS report”); See also The Responsibility to Protect - Research, Bibliography, Background, Supplementary Volume to the Report of the ICISS, the International Development Research Centre 2001, Ottawa (hereinafter “Background materials to the ICISS report”). The report can also be found at the UN homepage www.un.org, under the document number A/57/303.
² The ICISS report, p VII
³ The ICISS report, p VII
⁴ The ICISS report, para. 1.38
universities and research institutes.5

1.1 The purpose of the thesis

The report of the ICISS is multifaceted, embodying legal, political and moral aspects. The purpose of this thesis is by no means to cover all aspects of the report. The priority of the present author is to analyse the report from a legal perspective, although the political realities as well as the moral aspects are intertwined with the legal aspects and will therefore be taken into consideration as far as practicable.

This thesis’ main purpose is to analyse the responsibility to react, this being the most controversial part of the report, and the primary focus is on the question of authority. Secondly, the thesis analyses the conclusion that state sovereignty implies responsibility. Thirdly, the thesis examines the approach to view the responsibility to protect as being composed of the responsibility to prevent, to react and to rebuild.

The thesis does not examine the responsibility to prevent or to rebuild in particular, since these issues would require a separate thesis, but the author examines the total approach of the ICISS’ proposal, thus including the responsibility to prevent and to rebuild. The thesis does furthermore not deal with the operational principles put forward by the Commission, but it acknowledges the importance of the political will, when discussing the way forward of the ICISS report.

1.2 The structure of the thesis

The thesis starts with an introduction. Chapter two presents a general overview of the ICISS report, concentrating on the issues that will primarily be analysed in the present thesis.

Chapter three analyses the responsibility to react. Firstly, the question of authority is the focus of the chapter. As a comprehensive background and analysis of the question of authority, the chapter starts by dealing with the following: the UN Charter and the prohibition of the use of force, the role of the different UN organs, the interventions with and without the authorisation of the Security Council and the question of whether a rule of customary international law supporting unauthorised humanitarian intervention has or is on its way to be crystallised, and if such a rule is desirable. The chapter continues by

5 The ICISS report, p IX
analysing the ICISS’ approach to focus on the Security Council as the right authority, as well as the ICISS’ alternatives when the Security Council is unable to act, namely decisions by the General Assembly as well as actions by regional arrangements seeking subsequent authorisation from the Council. The thesis analyses therefore the reasons for the ICISS’ "limited" approach regarding authority, that is why it has not taken the opportunity to suggest criteria for unauthorised military intervention.

Secondly, chapter three contains an analysis of the ICISS’ suggested “just cause” threshold and the precautionary principles. Thirdly, chapter three examines whether a development of criteria for military intervention for humanitarian purposes is desirable.

Chapter four deals with the concept of the “responsibility to protect”, firstly by touching upon the reasons for this change of language, secondly by analysing the conclusion that sovereignty means responsibility and whether there is a duty to intervene in international law, thirdly by dealing with the consequences of the broad concept of “responsibility to protect” which includes the responsibility to prevent, to react and to rebuild, and fourthly by commenting on the way forward of the report. This chapter touches upon the requirements which the success of the ICISS report is depending on, such as the importance of mobilising political will. In chapter five, the present author’s summary and conclusion are presented.

2. Overview of the ICISS’ report “The Responsibility to Protect“

2.1 Responsibility to Protect - a new approach

2.1.1 Change of language

The Commission does not use the term "humanitarian" intervention, but prefers to call it either "intervention" or "military intervention" for human protection purposes. The reasons are the strong opposition expressed by humanitarian agencies, humanitarian organisations and humanitarian workers towards any militarization of the word "humanitarian", but also the suggestion from some political quarters that the word "humanitarian" tends to prejudge the question whether the intervention is in fact defensible.6

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6 The ICISS report, para. 1.39-1.40
The Commission suggests that the language of the debate should be changed, talking about "the responsibility to protect" rather than "a right to intervene". The Commission states that changing the language of the debate does not change the substantive issues which have to be addressed, but it would shift the focus of discussion to where it belongs: on the requirements of those who need or seek assistance, and not on those who may be considering an intervention; it would acknowledge that the state concerned has the primary responsibility to protect its citizens, but that it becomes the responsibility of the international community to act in its place when the state is unwilling or unable to act; it would lead to a concept where the responsibility is not only the "responsibility to react, but also the "responsibility to prevent" and the "responsibility to rebuild".  

2.1.2 Sovereignty as responsibility

The Commission starts by asserting that human rights have become a mainstream part of international law\(^8\) and respect for human rights is a central subject and responsibility of international relations. The respect for human rights is viewed versus the principle of sovereignty, which is for many states their only line of defence and a way of recognition of their equal worth and dignity.\(^9\)

The ICISS points out that the meaning of sovereignty has been of central importance for this report: during the Commission’s worldwide consultations, the fact that sovereignty implies a dual responsibility – externally to respect other states' sovereignty and internally to respect the basic rights of the people within the state – has been acknowledged.\(^10\)

The concept of sovereignty must be re-characterised, from *sovereignty as control* to *sovereignty as responsibility*, this being increasingly recognised in state practice.\(^11\) This line of thinking has following significance: state authorities are responsible for the functions of protecting the safety and lives of citizens; it suggests that the national political authorities are responsible to the citizens internally and to the

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\(^7\) The ICISS report, paras. 2.5, 2.29, 2.33
\(^8\) See the Universal Declarations of Human Rights; the 1949 Four Geneva Conventions and the two Additional Protocols on international humanitarian law in armed conflict; the 1948 Genocide Convention; the two 1966 Convenants relating to civil, political, social, economic and cultural rights; the ICC Statute (1998)
\(^9\) The ICISS report, para. 1.32
\(^10\) The ICISS report, para. 1.35-1.36
\(^11\) The ICISS report, paras. 2.14-2.15
international community through the UN; the agents of the state are responsible for their actions.\textsuperscript{12}

The ever-increasing impact of international human rights norms and the increasing impact in international discourse of the concept of human security strengthen this line of thinking. A parallel transition has gradually emerged from a culture of sovereign impunity to a culture of national and international accountability, where NGO:s, international organisations and civil society activists use the international human rights norms and instruments as the point of reference in order to judge state conduct.\textsuperscript{13} Also, the growing recognition worldwide that concepts of security must include human security (people’s 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) as well as the security of states has been an important shift in international thinking during the past decade.\textsuperscript{14}

2.1.3 The Responsibility to Protect - an emerging guiding principle

The ICISS is of the opinion that, although there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary law on military intervention for human protection, growing state practice and regional organisation practice as well as Security Council precedent suggest an emerging guiding principle – which in the Commission’s view should be termed “the responsibility to protect”.\textsuperscript{15}

The emerging principle is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unwilling or unable to end the harm, or is itself the perpetrator.\textsuperscript{16} Military intervention is moreover supported by a wide variety of legal sources, including sources that exist independently from Chapter VII of the UN Charter.\textsuperscript{17}

The ICISS believes, based on state practice, Security Council precedent, established norms, emerging guiding principles and evolving customary international law, that the UN Charter’s strong bias against military intervention is not to be regarded as

\textsuperscript{12} The ICISS report, para. 2.15
\textsuperscript{13} The ICISS report, para. 2.18
\textsuperscript{14} The ICISS report, para. 2.21
\textsuperscript{15} The ICISS report, para. 2.24
\textsuperscript{16} The ICISS report, para. 2.25
absolute when decisive action is required on human protection grounds; there is a large body of law and practice which supports the notion that members of the broad community do have a responsibility to protect both their own citizens and those of other member states as well.\textsuperscript{18}

Since there are considerable fears about a "right to intervene" being formally acknowledged, the ICISS stresses the importance of the development of consistent, credible and enforceable standards to guide state practice and intergovernmental practice, if intervention for human protection purposes is to be accepted.\textsuperscript{19}

\textbf{2.1.4 Responsibility to prevent, to react and to rebuild}

The concept of responsibility to protect is wider than that of “humanitarian intervention“, in that it also comprises a responsibility to prevent and to rebuild. The Commission underlines that the responsibility to prevent is the single most important dimension of the responsibility to protect - prevention options should always be exhausted before intervention is contemplated.\textsuperscript{20} The responsibility to rebuild means to help local authorities to build a durable peace, to promote good governance and sustainable development and to provide public safety and order.\textsuperscript{21}

\textbf{2.2 The Responsibility to React}

When preventive measures fail to resolve a situation and when a state is unable or unwilling to redress the situation, then interventionary measures by the broader community of states may be required. Less intrusive and coercive measures should always be considered before more coercive and intrusive ones are applied: states should firstly use measures short of military action, such as political, economic and military sanctions.\textsuperscript{22}

\begin{footnotesize}
\textsuperscript{17} fundamental natural law principles; the human rights provisions of the UN Charter; the Universal Declaration of Human Rights together with the 1948 Genocide Convention; the 1949 Geneva Conventions and the two Additional Protocols on international humanitarian law; the ICC Statute;
\textsuperscript{18} The ICISS report, para. 2.27
\textsuperscript{19} The ICISS report, para. 2.2
\textsuperscript{20} See Synopsis at p. XI of the ICISS report, Section 4 (A)
\textsuperscript{21} The ICISS report, para. 5.1
\textsuperscript{22} The ICISS report, para. 4.1-4.3
\end{footnotesize}
2.2.1 Military intervention

The responsibility to react may involve the need to resort to military action, but this should be done only in extreme and exceptional cases. The discussion is of course what an extreme case is and when a military intervention is, prima facie, defensible.\textsuperscript{23} The starting point is the principle of non-intervention, but the Commission argues that there is a broad international agreement on the need, in exceptional cases of human risk, for coercive military action across borders. The Commission bases these arguments on its consultations, where even the strongest opponents to infringements on sovereignty accepted that there must be limited exceptions to the non-intervention rule for certain emergencies, namely cases of violence which “shock the conscience of mankind“, or which present a clear and present danger to international security.\textsuperscript{24}

The Commission emphasises the need of a universally accepted single list of criteria for military intervention.\textsuperscript{25} The Commission concludes that military intervention for human protection purposes is an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur. The threshold criteria of \textit{just cause} is fulfilled if:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.\textsuperscript{26}

These conditions include thus not only genocide under the framework of the Genocide Convention, but also crimes against humanity under customary international law and the Statute of the International Criminal Court; violations of the laws of war as defined in the Geneva Conventions and the Additional Protocols and elsewhere; situations of state collapse and the resultant exposure of civil population to mass starvation and/or civil war; overwhelming natural or environmental catastrophes where the state concerned is unwilling or unable to cope, or call for assistance; different situations of “ethnic cleansing“ including acts of terror designed to force people to flee and systematic rape for political purposes of women of a particular group.\textsuperscript{27}

\textsuperscript{23} The ICISS report, para. 4.10  
\textsuperscript{24} The ICISS report, paras. 4.13-4.14  
\textsuperscript{25} The ICISS report, paras. 4.15-4.16  
\textsuperscript{26} The ICISS report, para. 4.19  
\textsuperscript{27} The ICISS report, para. 4.20
The Commission does not quantify “large scale“, because opinions may differ in marginal cases but most cases will not generate major disagreement. What the Commission makes clear is that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large scale killing, in order to avoid that the community is put in moral dilemmas of being required to wait until genocide begins before being able to stop it.\textsuperscript{28} The Commission also points out that if there is a failed or collapsed state situation, with no government effectively protecting its people, there is then no moral difference whether it is the state or non-state actors who are putting people at risk.\textsuperscript{29} There is also no difference between abuses occurring wholly within state borders and those that lead to cross-border consequences, since Security Council practice in 1990s shows that the Council is prepared to authorise coercive measures even in cases of internal conflicts.\textsuperscript{30}

The Commission excluded the following situations from the “just cause“ conditions regarding military intervention, since no large scale loss of civilian life or ethnic cleansing is taking place: human rights violations which do not involve outright killing or ethnic cleansing, such as systematic racial discrimination, systematic imprisonment or other repression of political opponents; the overthrow of a democratic elected government; the rescuing of its own nationals on foreign territory, since this is covered by existing international law and Article 51 of the UN Charter; intervention in response to a terrorist attack on a state’s territory or citizens, where military action could be supported by a combination of Article 51 of the UN Charter and the general provisions of Chapter VII.\textsuperscript{31}

The Commission also defines a number of precautionary principles for military intervention: right intention, last resort, proportional means and reasonable prospects of success.\textsuperscript{32}

\textsuperscript{28} The ICISS report, para. 4.21
\textsuperscript{29} The ICISS report, para. 4.22
\textsuperscript{30} The ICISS report, para. 4.23
\textsuperscript{31} The ICISS report, paras. 4.24-4.27
\textsuperscript{32} The ICISS report, para. 4.16
2.2.2 The question of authority

2.2.2.1 The Security Council’s role and responsibility

The Commission argues that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. The Commission points out that the overwhelming consensus it found in all its consultations around the world was that if international consensus is ever to be reached about when, where, how and by whom military intervention should happen, the central role of the Security Council will have to be at the heart of that consensus. The task is not to find alternatives to the Security Council as a source of authority, but to make it work much better than it has been.  

The Commission agreed that:

- Security Council authorisation must be sought in all cases prior to any military intervention action being carried out. Those calling for an intervention must 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; and

- 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.

There is no doubt that a reformation of the Security Council would help in building its credibility, but since it is unrealistic to imagine any amendment of the Charter any time soon, the Commission proposes that the five permanent members agree upon a “code of conduct“, which would result in them not applying 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.

Only the UN can authorise military action on the behalf of the entire international community, and for this to succeed, the world community must match the demands made on the UN with the resources given to it.

33 The ICISS report, para. 6.14
34 The ICISS report, para. 6.15
35 The ICISS report, paras. 6.19, 6.21
36 The ICISS report, paras. 6.26-6.27
2.2.2.2 When the Security Council fails to act - the General Assembly and international organisations

If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

- Consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure; and
- 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.\(^{37}\)

Regarding the regional organisations’ need of prior authorisation from the Security Council, it is important to look at the recent cases when approval has been sought \textit{ex post facto} (after the event), and this may give certain leeway for future action.\(^{38}\)

The Commission urges the Security Council to take into account that if it fails to discharge its responsibilities 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 UN may suffer thereby.\(^{39}\)

The Commission stresses the political reality that it would be impossible to find consensus for military intervention which acknowledges the validity of any intervention not authorised by the Security Council or the General Assembly.\(^{40}\)

2.3 The way forward

2.3.1. Mobilising political will and the possible next steps

The Commission has emphasised the need to get operational responses right, to identify the principles and rules that should govern military interventions for human protection purposes, but the Commission acknowledges that one must mobilise domestic and international political will, otherwise the debate will remain purely academic.\(^{41}\)

\(^{37}\) The ICISS report, paras. 6.29, 6.35  
\(^{38}\) The ICISS report, para. 6.35  
\(^{39}\) The ICISS report, paras. 6.38-6.40  
\(^{40}\) The ICISS report, para. 6.37  
\(^{41}\) The ICISS report, paras. 8.6-8.21
The Commission stresses the essential element of the report, namely to reconcile two objectives: to strengthen the sovereignty of states and to improve the capacity of the international community to react decisively when states are unwilling or unable to protect their own people.42

In its objective to generate a practical and concrete political impact through its report, the Commission makes certain recommendations. The General Assembly should adopt a draft declaratory resolution embodying the basic principles of the responsibility to protect.43 The Security Council should consider and seek to reach agreement on a set of guidelines to govern their responses to claims for military intervention for human protection purposes, and the permanent members should consider and seek to reach agreement not to apply their veto power, in matters in which their vital state interests are not involved.44 The Secretary-General should give consideration as to how the substance and action recommendations of this report can best be advanced in the security Council and the General Assembly, and by his own further action.45

The Commission finally calls on the community of nations, NGOs and citizens of states to embrace the idea of responsibility to protect as a basis element in the code of global citizenship, for states and for peoples: “…we must match rhetoric with reality, principle with practice. We cannot be content with reports and declarations. We must be prepared to act. We won’t be able to live with ourselves if we do not.” 46

3. The Responsibility to React

When I first read the ICISS report “The Responsibility to Protect“, I was very interested to see how the Commission had “solved“ the question of military intervention for humanitarian purposes - also known as humanitarian intervention - without prior Security Council authorisation.

I was expecting to see proposed criteria for unauthorised intervention, but to my initial surprise, the Commission had confined itself to propose criteria for such military intervention only with the authority of the UN Security Council or the General

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42 The ICISS report, para. 8.31
43 The ICISS report, para. 8.28
44 The ICISS report, para. 8.29
45 The ICISS report, para. 8.30
46 The ICISS report, paras. 8.33-8.34
Assembly, clearly stating that the purpose of the report was not to find alternatives to the Security Council as a source of authority.\textsuperscript{47}

This triggered the first set of questions that I will try to answer. Was it right of the Commission to limit its approach in such a way? What are the reasons behind such a “limited“ approach? Is there for example a rule of customary international law allowing unauthorised humanitarian intervention, and if not, should such a rule be developed? Is a broader approach than the one the ICISS has adopted recommended in the international doctrine? In order to answer all these questions, the present chapter starts, firstly, with an examination of the UN Charter and the prohibition of the use of force, of the Security Council’s as well as states’ practice regarding military intervention for humanitarian purposes. Secondly, the chapter analyses the ICISS’ approach to focus on the Security Council as the right authority, with the alternatives being the General Assembly or regional arrangements seeking subsequent authority from the Council.

I will then analyse the Commission’s suggested “just cause” threshold and precautionary principles. Finally in this chapter, I will touch upon the question whether it is desirable to develop criteria for military intervention for humanitarian purposes.

### 3.1 Military intervention for humanitarian purposes and the UN Charter

#### 3.1.1 The prohibition of the use of force and the role of different UN organs

The birth of the doctrine of “humanitarian intervention”, its father being Hugo Grotius (1583-1645), is associated with natural law and early international law. “Where a tyrant should inflict upon his subjects such treatment as no one is warranted in inflicting“, other states may exercise the right of humanitarian intervention.\textsuperscript{48} Grotius bases this right on the natural law notion of \textit{societas humana} - the universal community of humankind.\textsuperscript{49} This was during a time when a prohibition on the use of force was non-existing, but in the 20\textsuperscript{th} century international law on this matter was altered because of the establishment of the UN and its Charter in 1945.

The basic rule of international law concerning the prohibition on the threat or use of force in international relations is Article 2(4) of the UN Charter:

\textsuperscript{47} The ICISS report, para. 6.14
\textsuperscript{48} Grotius, \textit{De Jure Belli as Pacis}, Book II, ch. 25, sec. 8, vol II, p 584
\textsuperscript{49} Grotius, \textit{De Jure Belli as Pacis}, Book II, ch. 20, sec. 8, vol II, pp 472-473
“All members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

The UN Charter embodies two explicit exceptions to Article 2(4), that trump the domestic jurisdiction restriction embodied in Article 2(7) of the UN Charter, namely that the UN shall not intervene in matters which are essentially within the domestic jurisdiction of any state.

The first exception is the right to use force if exercising the right of individual or collective self-defence, in accordance with Article 51 of the UN Charter. The second exception is in situations when the use of force has been mandated by the Security Council in case of a threat to or a breach of international peace or an act of aggression, in accordance with UN Charter chapter VII, Articles 39 and 42. Since special forces agreements according to Article 43 of the UN Charter have never been concluded, the Council is competent under chapter VII of the UN Charter to authorise an enforcement action, including the use of force, to be carried out on a voluntary basis by member States. 50

The General Assembly’s role in matters of peace and security is subordinate to the Security Council’s. If the Council is unable or unwilling to authorise action, the matter can be considered by the General Assembly, in that the Assembly can make recommendations - thus not decisions - regarding the maintenance of international peace and security, in accordance with Article 11 of the UN Charter. The General Assembly can also make recommendations when the Security Council, although able to act, requests the Assembly to do so. 51 Decisions regarding the General Assembly’s recommendations on international peace and security have to be made by a two-thirds majority of the members present and voting. 52

Furthermore, the “Uniting for Peace“ Resolution from 1950 specifically authorises the General Assembly to make recommendations on enforcement action when the Security Council is unable to make a decision. 53 This procedure along with the ICISS’ recommendations regarding enforcement actions will be further examined later in this chapter.

The role for regional organisations and agencies in the maintenance of international peace and security is envisaged in chapter VIII of the UN Charter, which does not confer an independent competence of enforcement action. Regional organisations

50 This was implied by the ICJ in the Certain Expenses of the UN, Advisory Opinion, ICJ Reports 1962, p 167; See also Malanczuk, Akehurst’s Modern Introduction to International Law, pp 389-390
51 Article 12(1) of the UN Charter
52 Article 18(2) of the UN Charter
can only undertake enforcement actions, according to Article 53 of the UN Charter, under
the authority of the Security Council.

3.1.2 The Security Council’s practice - human rights violations as a threat to the
peace in accordance with Article 39 of the UN Charter

According to Article 24(1) the Security Council has the primary responsibility for the
maintenance of international peace and security, but it must act in accordance to the
purposes and principles of the UN.\(^{54}\) These are the only limits to the power of the Security
Council under the UN Charter.

It is argued that an expansive interpretation of art 39 of the UN Charter
supports humanitarian intervention. The original conception of what constitutes a “threat
to the peace“, in accordance with Article 39(1) of the UN Charter, could hardly have been
conceived as to take action on humanitarian grounds,\(^{55}\) but the drafters of the UN Charter
wanted the Security Council to have a wide discretion in determining the existence to any
threat to the peace.\(^{56}\) Each organ of the UN is authorised to interpret the Charter’s
mandate,\(^{57}\) and therefore the practice of the Security Council has lead to a widening
concept on what constitutes a “threat to the peace“, including situations of civil war, civil
strife and massive violations of human rights, even without international repercussions.\(^{58}\)
The Council declared in January 1992 that instability in the economic, social,
humanitarian and ecological fields could also constitute threats falling within its
purview.\(^{59}\)

During the Cold War, the Security Council considered violations of human
rights a threat to international peace in the case of Southern Rhodesia (1966), when the
black majority’s right to self-determination was violated.\(^{60}\) The Council also regarded the
apartheid-regime in South Africa as a threat to the peace.\(^{61}\)

\(^{51}\) GA Res. 377A (V) of 3 November 1950, Supp No 20, at 10; adopted by 52 votes to 5, with 2 abstentions
\(^{54}\) Article 24(2) of the UN Charter
\(^{55}\) Österdahl, Threat to the Peace, p 12
\(^{56}\) US Department of State, Charter of the United Nations: Report of the President on the Results of the San
Francisco Conference (1945), p 91
\(^{57}\) Higgins, The Development Of International Law through the Political Organs of the United Nations, p 66
\(^{58}\) For a comprehensive study see Österdahl, Threat to the Peace, ch 3; Danish Institute of International Law
(DUPI), Humanitarian Intervention - Legal and Political Aspects, pp 62-70 (also cited here as the Danish
report); Background materials to the ICISS report, pp 47-126
\(^{59}\) Security Council Summit Statement Concerning the Council’s Responsibility in the Maintainence of
\(^{60}\) UN SC Res 217 (1965) and UN SC Res 221 (1996)
\(^{61}\) UN SC Res 418 (1977)
After the Cold War, the Security Council was deeply involved in many cases, finding that the respective situations were a threat to the peace: Iraq, the former Yugoslavia, Liberia, Somalia, Haiti, Angola, Rwanda, Burundi, Zaire, Albania, the Central African Republic, Kosovo and East Timor. Only in few of these cases, the Council authorised the use of force for purely humanitarian reasons: the former Yugoslavia, Somalia, Rwanda, Zaire, Albania and East Timor.

In Iraq, the repression of the Kurds and the ensuing cross-border repercussions led to Security Council Resolution 688 (1991), which was motivated by the magnitude of the human suffering and condemned the Iraqi repression. This resolution can be regarded as the forerunner to authorisations for humanitarian intervention in subsequent cases.

The civil war and serious violations of international humanitarian law in the former Yugoslavia led the Security Council to authorise a humanitarian intervention for the first time and to establish the International Criminal Tribunal for the former Yugoslavia (ICTY). In Somalia, the Security Council determined the civil war and anarchy as a threat to the peace, without reference to cross-frontier implications of the humanitarian disaster in the country. The Council authorised a humanitarian intervention under chapter VII of the UN Charter, which did not succeed. In Rwanda, the Council authorised - too late - a humanitarian intervention triggered by the civil war, genocide and serious violations of international humanitarian law and human rights and established the International Criminal Tribunal for Rwanda (ICTR).

In Zaire (now the Democratic Republic of Congo), the Council cited the large-scale movements of refugees and internally displaced persons as a reason for the threat to the peace, and authorised a military intervention to adjust these problems - an intervention that eventually never happened since the refugees were returning to Zaire by their own efforts. In Albania, the Security Council considered that the country bordered the former Yugoslavia and that Albanians also lived in Serbia and Montenegro, in the province of Kosovo, and in Macedonia - thus the Council viewed the conflict as

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62 the intervention in Haiti was the most controversial, since the Council considered a military coup against the democratically elected government as a threat to the peace. See UN SC Res 940 (1994)
63 UN SC Res 1160 (1998); UN SC Res 1199 (1998) - the Council stated that it could consider further action to restore the peace - but did not. NATO intervened instead, without authorisation.
64 UN SC Res 770 (1992)
65 UN SC Res 827 (1993)
66 UN SC Res 794 (1992) - “the magnitude of the human tragedy”
67 UN SC Res 929 (1994)
68 UN SC Res 955 (1994)
70 UN SC Res 1080 (1996), para 3
threatening the peace and security in the region, and it authorised a multinational protection force to facilitate the delivery of humanitarian assistance. The authorisation of a military operation in East Timor, targeted by the terror acts against the civilian pro-independence population, had in fact been requested by the Indonesian government - after international pressure.

The practice of the Security Council shows that it takes into consideration as a “threat to the peace“ even situations without cross-frontier implications, but as professor Österdahl points out, these situations are sooner or later likely to constitute a threat to neighbouring countries, for ex. by generating flows of refugees. Also, the Council’s practice during the 1990s represents an innovation in that it authorises humanitarian interventions. Only in Somalia, Rwanda, Haiti, Zaire and East Timor did the Council authorise the use of force under chapter VII of the UN Charter, because in Bosnia and Albania, the legitimate governments had requested assistance from the international community.

The fact that the Security Council stressed the unique situations in Somalia, Haiti, and Rwanda shows the unwillingness of the Council to set precedents for humanitarian intervention in internal conflicts, maybe because it wants to maintain the option of a case by case assessment. I am of the opinion that, as it is argued in the Danish Report, the more often the Council authorises the use of force to cope with internal conflicts, the less convincing becomes the case-by-case rhetoric - thus the practice of the Council has set a precedent for authorising humanitarian intervention in internal conflicts. The Council appears to recognise this, since it did not refer to the unique character of the situation in the case of Zaire, but it simply stated that it “demands an urgent response by the international community“.

Despite these examples, one of the problems today is the inability or unwillingness of the Security Council to act, which has led to a number of interventions without the Council’s authorisation, for example ECOWAS intervention in Liberia and Sierra Leone, NATO’s intervention in Kosovo. This brings me to the essence of the next

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71 UN SC Res 1101 (1997), para 10 - threat to the peace; paras 2 & 4 - authorisation of the force
72 UN SC Res 1264 (1999)
73 Österdahl, Threat to the Peace, p 19
74 DUPI, Humanitarian Intervention - Legal and Political Aspects, pp 64, 70
75 See all the examples and the resolutions given above. See also DUPI, Humanitarian Intervention - Legal and Political Aspects, pp 70-71
77 DUPI, Humanitarian Intervention - Legal and Political Aspects, p 71
78 Resolution 1080 (1996)
79 Article 27(3) of the UN Charter allows the Permanent Members of the Council to veto any decision. This is and has been a major factor of the Council’s inaction, specially during the Cold War.
section, that is if unauthorised intervention is in fact permissible, if there is an emerging customary international law norm allowing humanitarian intervention when the Security Council can not act itself, and if there should exist such a norm.

3.2 Unauthorised military intervention for humanitarian purposes

3.2.1 Defending unauthorised military intervention for humanitarian purposes as lawful by arguing that it is compatible with the UN Charter

Proponents of unauthorised humanitarian intervention put forward arguments aimed at reconciling humanitarian intervention with the UN Charter, thus arguing that except for the two explicit exceptions to Article 2(4) of the UN Charter, the article should be interpreted as allowing certain implicit exceptions, such as for unauthorised humanitarian intervention.

Firstly, it is argued that Article 2(4) of the UN Charter only forbids the threat or use of force when directed against the territorial integrity or political independence of any state and that genuine humanitarian intervention does not result in territorial conquest or political subjugation.\(^80\) This approach is criticised by most international lawyers, who refer to the *travaux préparatoires* and argue that the drafters of the UN Charter clearly intended the phrase “territorial integrity or political independence of any state“ to reinforce rather than restrict, the ban on the use of force in international relations.\(^81\)

Secondly, it is argued that the phrase in Article 2(4) of the UN Charter “or in any other manner inconsistent with the purposes of the United Nations“\(^82\) permits unauthorised humanitarian intervention where the Security Council fails to realise one of its chief purposes - the protection of human rights.\(^83\) This interpretation has twice been rejected by the ICJ.\(^84\) The conjunction “or“ in the phrase “or in any other manner inconsistent with the purposes of the United Nations“ was meant to supplement, rather than qualify, the prohibition on the unauthorised use of force. The drafters of Article 2(4) intended to ban states from using force against both the territorial integrity and political

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\(^81\) eg Brownlie, *International Law and The Use of Force*, p 267. See also Higgins, *The Development of International Law through the Political Organs of the United Nations*, p 183; Schachter, *The Legality of Pro-democratic Invasion*, 78 AJIL (1984), at p 649

\(^82\) For the purpose of UN to protect human rights, see Articles 1(3), 55(c) and 56 of the UN Charter

\(^83\) Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, pp 151, 157-159

\(^84\) *Corfu Channel Case*, at p 35; *Nicaragua Case*, at p 97
independence of other states and in any other manner inconsistent with the promotion of human rights.\textsuperscript{85}

Thirdly, some present the “link theory”. Humanitarian intervention without a mandate from the Security Council is not incompatible with Article 2(4), since Member States have a subsidiary responsibility for the maintenance of international peace and security, which applies when the Security Council does not fulfil its primary responsibility according to Article 24 of the UN Charter.\textsuperscript{86} As Rytter points out, this argument is not convincing because when Article 24 confers “primary” responsibility upon the Security Council, it implies that other UN organs, not Member States, have a subsidiary responsibility. The ICJ has also rejected the “link theory” in the \textit{Corfu Channel Case}.\textsuperscript{87}

It is in this context important to emphasise that military intervention can not be justified by seeing it as a lawful countermeasure by an injured state, also traditionally called a ‘reprisal’. It is indeed true that under certain conditions even third states that are not directly affected by the illegal act of one state, may be entitled to react to a serious breach of international law if the obligation in question is an obligation \textit{erga omnes}, meaning that all states have a legal interest to protect that obligation.\textsuperscript{88} But such countermeasures are illegal under international law if they violate basic human rights or a peremptory norm of international law, a so called \textit{ius cogens} norm,\textsuperscript{89} such as the prohibition of the use of force in Article 2(4) of the UN Charter.\textsuperscript{90} In the case of gross human rights violations, legal countermeasures by other states of the international community are for ex. economic countermeasures. Military countermeasures are illegal since these are against the prohibition of the threat or use of force in the UN Charter.

In conclusion, humanitarian intervention without authorisation from the Security Council is incompatible with the UN Charter.

\textsuperscript{85} Brownlie, \textit{International Law and The Use of Force}, p 268, n 6; Murphy, \textit{Humanitarian Intervention: The United Nations in an Evolving World Order}, p 73; Even D’Amato, a notable proponent of humanitarian intervention, recognises that the drafters of the UNC intended Article 2(4) to ban forcible self-help in defence of human rights. See D’Amato, \textit{International Law: Process and Prospect}, p 54

\textsuperscript{86} Rytter, \textit{Humanitarian Intervention without the Security Council}, 70 NJIL 2001, at p 130

\textsuperscript{87} \textit{Corfu Channel Case}, at p 35

\textsuperscript{88} Malanczuk, \textit{Akehurst’s Modern Introduction to International Law}, p 271

\textsuperscript{89} Article 50(1) of the ILC Articles on State Responsibility, in GA Resolution on the Responsibility of States for internationally wrongful acts; Malanczuk, \textit{Akehurst’s Modern Introduction to International Law}, p 271

\textsuperscript{90} See Malanczuk, \textit{Akehurst’s Modern Introduction to International Law}, p 58
3.2.2 Unauthorised military intervention for humanitarian purposes justified as “a state of necessity“ or by retroactive consent?

The ILC’s Articles on State Responsibility enumerate six principles\(^91\) which may preclude wrongfulness of acts which normally constitute a violation of international law.

The state of necessity defence - Article 25 - merits consideration as regards humanitarian intervention without Security Council authorisation. The ICJ has stated that the state of necessity is a ground recognised by customary international law for precluding wrongfulness of an act not in conformity with an international obligation.\(^92\) But it is clear from the commentaries to the ILC Articles that the plea of necessity to excuse unauthorised military intervention for humanitarian purposes is not covered by Article 25, since necessity cannot be invoked to justify violations of peremptory rules of international law, such as the ban on the use or threat of force.\(^93\)

The same thing applies to consent in Article 20 of the ILC Articles on State Responsibility. If the new government of the target state retroactively gives its consent to the military intervention, this consent can not excuse the unauthorised intervention, since no circumstances precluding wrongfulness can be invoked to justify violations of peremptory rules of international law, \(^94\) such as the ban on the use or threat of force.

3.2.3 Unauthorised military intervention for humanitarian purposes as a norm of customary international law

The ICJ has confirmed that the principle of non-use of force has an existence under customary international law independent of Article 2(4) of the UN Charter, and is thus subject to dynamics of state practice like any other customary rule.\(^95\) The question is therefore if there is a possible legal basis for humanitarian intervention without

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\(^91\) The principles are consent, self-defence, reprisals, force majeure, distress and state of necessity. See Articles 20-25 of the ILC Articles on State Responsibility, in GA Resolution on the Responsibility of States for internationally wrongful acts

\(^92\) Gabčíkovo-Nagymaros Project case, at pp 40-41, paras 51-52

\(^93\) Article 26 of the ILC Articles on State Responsibility, in GA Resolution on the Responsibility of States for internationally wrongful acts; Crawford, The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries, p 185; For more information see also Rytter, Humanitarian Intervention without the Security Council, 70 NJIL 2001, at pp 133-136

\(^94\) Article 26 of the ILC Articles on State Responsibility, in GA Resolution on the Responsibility of States for internationally wrongful acts; Crawford, The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries, pp 187-188

\(^95\) Military and Paramilitary Activities Case, ICJ Reports, paras 176-178, 188
authorisation from the Security Council in customary international law. For this norm to be part of customary international law, it must be supported by general state practice and *opinio juris*\(^96\) – states’ belief that their conduct corresponds to a legal duty.

As regards custom in derogation of the most fundamental rules of international law, like the principle of non-use of force, the evidence of state practice and *opinio juris* would have to be overwhelming.\(^97\)

### 3.2.3.1 Examples of unauthorised military intervention for humanitarian purposes

It is not the purpose of this thesis thoroughly to examine state practice and practice of regional organisations using force for humanitarian purposes without authorisation from the UN Security Council. Such a thorough examination has been done by the ICISS in the background material to the report “The Responsibility to Protect”.\(^98\)

The Commission concluded that the pre-1990 interventions were mostly justified by self-defence and the interests of rescuing one’s nationals, but that several of the interventions justified as self-defence could have been based on humanitarian grounds: India’s intervention in East Pakistan in 1971 was in part justified on humanitarian grounds,\(^99\) but India was also concerned for the regional balance of power vis-à-vis Pakistan. Vietnam invoked humanitarian considerations as justification for its intervention in Pol Pot’s Cambodia in 1978, expelling the Khmer Rouge regime, but the intervention seems to have been motivated also by the numerous violations of the Vietnamese borders by Khmer Rouge forces.\(^100\) Tanzania did not invoke the doctrine of humanitarian intervention when it intervened in Idi Amin’s Uganda in 1979. The Commission argues that these three cases have in retrospect become clear examples of the necessity and the legitimacy of humanitarian intervention - and I tend to agree on this regard - but that state practice from 1945-1990 reveals little support for a right of humanitarian intervention.\(^101\) This view that there is little support for a right of unauthorised humanitarian intervention from state practice from 1945 to 1990 is widely recognised.\(^102\)

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\(^96\) See Article 38(1)(b) of The ICJ Statute. This double requirement was confirmed by the ICJ in the *North Sea Continental Shelf Cases*, para 77

\(^97\) Rytter, *Humanitarian Intervention without the Security Council*, 70 NJIL 2001, at p 137

\(^98\) Background materials to the ICISS report, pp 47-126


\(^100\) Rytter, *Humanitarian Intervention without the Security Council*, 70 NJIL 2001, at p 139

\(^101\) Background materials to the ICISS report, pp 67-68, 165

The interventions after the Cold War have turned the debate about humanitarian intervention into a very intense one, specially after NATO’s intervention in Kosovo in 1999. The unauthorised military intervention by ECOWAS in Liberia, in 1990, has been controversial, but set a precedent for humanitarian intervention by an African subregional organisation.103 The intervention can be said to have been retroactively accepted by the Security Council.104 As it has been pointed out in section 2.3.2, such a retroactive consent is frail from a legal point of view, and it makes ECOWAS’ action a questionable precedent for humanitarian intervention.105 The no-fly-zone in northern Iraq by the USA was established after the Security Council Resolution 668 (1991), condemning the repression of the Kurds. The General Assembly discussed the intervention, some states said it was a violation of Iraq’s sovereignty, others spoke out in its favour, but no resolution of condemnation was adopted.106 A no-fly-zone in the Southern Iraq, subsequent to the oppression of the Shiites, was declared by the USA, UK and France. The use of force in Iraq since 1991 is not a strong precedent for unauthorised intervention, since there have been great efforts to justify intervention on the basis of Security Council resolutions.107

But clearly, the 1999 intervention by NATO in Kosovo is and has been the most controversial and debated unauthorised intervention. The Security Council did not authorise any military intervention due to the stated intentions of China and Russia to veto such a decision, but the Council rejected in April 1999, by twelve votes to three, a draft resolution, sponsored by Russia, to condemn the intervention as violating Article 2(4) of the UN Charter.108 An agreement on the autonomy of Kosovo was signed in June 1999 and was welcomed by the Security Council, who also authorised under chapter VII an international security presence in Kosovo.109 NATO as an organisation did not make any effort to justify the military action on legal grounds, but referred exclusively to a “moral duty“ of the NATO members.110 But the NATO members gave different explanations for the legal justification of the intervention: only Belgium argued, before the ICJ, that NATO’s air strikes did not violate Article 2(4)

(CAVV), *Humanitarian Intervention*, The Hague, at pp 20-23 (also cited here as the Hague report)

103 Background materials to the ICISS report, p 84
104 UN SC Res 788 (1992); UN SC Res 866 (1993) - the Council welcomed the efforts of the ECOWAS to restore peace, and called for the creation of the UN Observer Mission UNOMIL
108 Press Release SC/6659 of 14 April 1999
109 UN SC Res 1244 (1999)
of the UN Charter; other states emphasised the relevance of Security Council resolutions, which fell short of authorising the use of force, or made reference to the existence of a “humanitarian catastrophe“, thus not invoking a doctrine of humanitarian intervention.\textsuperscript{111} Most NATO members took an ad-hoc approach, arguing that Kosovo should be treated as an exceptional case of humanitarian war, legitimised, but not legalised, by the overwhelming suffering in Kosovo.\textsuperscript{112}

The war in Iraq in 2003 is the most recent example of the inability of the US and the UN to work together, but in my opinion it cannot be seen as a precedent for military intervention for humanitarian purposes, and it has not pushed international law forward regarding these issues. “The coalition of the willing“, which relied almost exclusively on the armed forces of the United States and the United Kingdom, cited protection of the Iraqi population as a rationale for military action.\textsuperscript{113} But this argument was only in the background. The focus was the justification that it was a pre-emptive action against international terrorism and that previous Security Council resolutions were a legal ground for the present use of force, since Iraq had not complied with the duty not to develop weapons of mass destruction and let the UN inspections do their work with maximal access to the territory - but all these arguments are rejected by many international lawyers.\textsuperscript{114}


\textsuperscript{112} Rytter, \textit{Humanitarian Intervention without the Security Council}, 70 NJIL 2001, at pp 154-155


3.2.3.2 Has a norm of customary international law allowing unauthorised military intervention for humanitarian purposes emerged?

The debate on the matter is considerable. Some argue that state practice in the 19th century and early 20th century established such a right, a right that has not been terminated or weakened by the creation of the UN. Others reject this view. According to them, the few pre-Charter humanitarian interventions are insufficient to establish a customary right of humanitarian intervention, and there is little or no evidence that the international community considered such a right legally binding, thus there is no *opinio juris*. Even if a customary rule existed before the UN Charter, it did not survive after the creation of the UN and Charter’s Article 2(4). Unauthorised military intervention for humanitarian purposes is also rejected by UN General Assembly resolutions.

Unauthorised military intervention for humanitarian purposes undoubtedly lacks general observance and widespread acceptance that it is lawful, and it has been exercised in a highly selective fashion. States have not invoked a customary right of unauthorised humanitarian intervention to defend their actions, as for ex. India’s invasion of East Pakistan or NATO’s actions in Kosovo, because they felt that they could not appeal to a right of unauthorised humanitarian intervention to legitimise their actions. The general reluctance to rely on a doctrine of humanitarian intervention, and instead making reference to for example self-defence, is crucial when assessing the above mentioned cases as precedents. The ICJ has stated in the *Nicaragua Case* that

“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 act justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.

Thus, state practice supporting military intervention for clear humanitarian purposes after the Cold War has been sparse, and the *opinio juris* in international community is absent.

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115 Reisman & McDougal, *Humanitarian intervention to Protect the Ibos*, in Lillich, Humanitarian Intervention and the UN, p 171; For more writers of this opinion, see Holzgrefe, *The humanitarian intervention debate*, in Holzgrefe & Keohane, Humanitarian intervention, p 45, n 114.


117 Brownlie, *Principles of Public International Law*, pp 4-11

118 See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (1965), (1965); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970); Declaration on Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations (1991)


120 *Nicaragua case*, para 186

121 Rytter, *Humanitarian Intervention without the Security Council*, 70 NJIL 2001, at pp 143-144
Both the Danish report from 1999, the Hague report from 2000 and the ICISS report from 2001 conclude that state practice after the Cold War does not support a customary international rule for unauthorised intervention for humanitarian purposes, but that state practice in 1990’s may be seen as a greater acceptance of such interventions from a moral aspect.\(^\text{122}\) The moral and political arguments are touching upon the grey areas of international law, where legitimacy becomes increasingly important for those who accept that in certain circumstances humanitarian intervention should be undertaken even in the absence of authorisation from the Security Council. This question of legitimacy, rather than legality, is touched upon in the next section.

3.2.3.3 Unauthorised military intervention for humanitarian purposes should not be allowed

*Simma* argues that unauthorised humanitarian intervention does not exist in customary law, because there are too few cases, but also because of the risks for abuse. He says that the legal justifications for Kosovo are unsatisfactory, and that this intervention was a decision ad-hoc that is destined to remain singular – it must not be seen as a precedent and it must not be turned into a general policy.\(^\text{123}\) *Hilpold* argues that NATO’s actions in Kosovo cannot be justified and that necessity is unknown in international law.\(^\text{124}\) *Henkin’s* opinion is that the law is, and ought to be, that unilateral military intervention by a state or group of states without authorisation from the Security Council is unlawful.\(^\text{125}\)

Many writers argue that it is undesirable to have a new rule of unauthorised military intervention for humanitarian purposes, because it will lead to abuse – thus Security Council authorisation is the strongest safeguard against the dangers of unilateral intervention.\(^\text{126}\) As *Schachter* puts it, “It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.”\(^\text{127}\)

\(^\text{123}\) Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL (1999), at pp 5-6, 13-14
\(^\text{124}\) Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, EJIL(2001), Vol 12, No 3, at pp 449-450 & n 33; The Danish Report also concludes that the “state of necessity” doctrine cannot provide a legal justification for humanitarian intervention in violation of article 2(4) of the UN Charter. See DUPI, *Humanitarian Intervention - Legal and Political Aspects*, pp 85-87
\(^\text{125}\) Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AJIL (1999), at p 826
\(^\text{127}\) Schachter, *International Law in Theory and Practice*, p 126
Even recent doctrine is against unauthorised military intervention. Buchanan argues that the rule requiring Security Council authorisation is desirable under present conditions. The claim that this rule should be replaced with a new rule empowering regional defence alliances to engage in intervention at their discretion is dubious. “Perhaps the current rule of intervention ought to be rejected, but it is very implausible to hold that adopting this new rule would be an improvement.”

Byers and Chesterman seek to preserve art 2(4) of the UN Charter, prohibiting intervention not authorised by the Security Council. They fear that powerful states such as the US will poke loopholes in art 2(4) large enough to fly bombers and missiles through. They argue that the US may be seeking a degree of formal recognition for the greater influence of their actions and opinions of powerful states in the formation of customary international law, that the principle of sovereign equality is under attack and that the US makes more and more efforts to change all of international law as an effort to create new, exceptional rights for the US alone. They declare that if any justification is to be provided for NATO’s Kosovo intervention, it should be one of “exceptional illegality“ and they strongly defend the principle of non-intervention as firmly established in international law, arguing that if this principle is to be denigrated, it would lead to a radical and unsound change in the international legal system.

Not even NATO’s intervention in Kosovo can contribute to the development of a norm of unauthorised military intervention for humanitarian purposes: Russia, China and India were strongly against it, as was Namibia, who voted in the Security Council to condemn the bombings, and as were Belarus, Ukraine, Iran, Thailand, Indonesia, South Africa. The 133 developing states of G77 twice adopted resolutions after NATO’s intervention, unequivocally affirming that unilateral humanitarian intervention was illegal.

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128 Buchanan, Reforming the international law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at p 167
129 See Byers & Chesterman, Changing the rules about rules? Unilateral humanitarian intervention and the future of international law, in Holzgrefe & Keohane, Humanitarian Intervention, pp 177-203
130 Byers & Chesterman, Changing the rules about rules? Unilateral humanitarian intervention and the future of international law, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 192-195
131 Byers & Chesterman, Changing the rules about rules? Unilateral humanitarian intervention and the future of international law, in Holzgrefe & Keohane, Humanitarian Intervention, at p 179
under international law. One can hardly expect this opinion to change in the near future.

3.2.3.4 Unauthorised military intervention for humanitarian purposes should be allowed

The proposition that a right of unauthorised military intervention for humanitarian purposes is on its way to emerge or should emerge in customary international law is also well-supported, specially from moral aspects. Most international lawyers acknowledge that unauthorised intervention is against the UN Charter and that the NATO intervention in Kosovo was illegal, but they argue that it was nevertheless legitimate, or that similar cases in the future should be regarded as legitimate - thus having a de lege ferenda discussion.

It is at this point very important to note that most western states and most legal actors favouring unauthorised military intervention prefer an ad-hoc approach rather than a doctrine of unauthorised intervention, because a doctrine would undermine the legitimacy of the UN and it would weaken Article 2(4) of the UN Charter.

Wedgwood argues that there should be a right of collective humanitarian intervention, by an organisation, and that NATO’s intervention in Kosovo should have greater deference than purely unilateral action. Bring’s opinion is that NATO’s intervention in Kosovo may be seen as a precedent for collective and regional act for the use of force - which gives it higher legitimacy than unilateral actions - and that international law is not static but evolves due to precedents, but also because of the connection between law and morality. Thus, Bring says that a de lege ferenda

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133 See Ministerial Declaration, 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, 24 September 1999, available at http://www.g77.org/Docs/Decl1999.html, at para 69: “The ministers ...rejected the so called right of humanitarian intervention, which had no basis in the UN Charter or in international law”; Declaration of the Group of 77 South Summit, Havana, Cuba, 10-14 April 2000, available at http://www.g77.org/Docs/Declaration_G77Summit.htm, at para 54: “We reject the so called “right” of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law”. The 133 states in question included 23 Asian states, 51 African states, 22 Latin American states and 13 Arab states.

134 See for ex. Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 AJIL (1999), at p 834; Cassese, Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 EJIL (1999), at p 23; Bring, FN-stadgan och världspolitiken, pp 143, 311

135 For a discussion on the division between those who would like a doctrine approach and those who want merely an exception approach, see Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, pp 226-232; Wheeler, Saving Strangers, pp 33-51

136 Rytter, Humanitarian Intervention without the Security Council, 70 NJIL 2001, at pp 147-148

137 Wedgwood, NATO’s Campaign in Yugoslavia, 93 AJIL (1999), pp 828-834

138 Bring, FN-stadgan och världspolitiken, pp 311-314
discussion must be held so that public international law can evolve to develop a new doctrine for collective humanitarian intervention, when the Security Council is unable or unwilling to act, and in such a manner that the authority of the UN as organisation is maintained. Bring clearly argues that NATO should take the lead in formulating a doctrine on collective humanitarian intervention, when the Security Council has not given its authorisation.

Bazyler argues that humanitarian intervention should be exercised when necessary, both because of principles of justice and also because of practical reasons - inaction saws the seeds for future inaction. Also Falk argues that unauthorised use of force should be allowed as long as it is done in an appropriate manner. He rejects legalism and argues that it is politically and morally unacceptable to regard the textual barriers of the UN Charter as decisive in the face of genocidal behaviour. He argues that NATO was justified to act, but not in the manner undertaken.

Tesón is of the opinion that humanitarian intervention is morally justifiable in appropriate cases: a major purpose of states and governments is to protect and secure human rights, and when governments in power violate these rights, they must not be protected by international law, because they undermine the reason that justifies their political power. The liberal case for humanitarian intervention relies on principles of political and moral philosophy: if human beings are denied basic human rights, then others have a prima facie duty to help them.

Tesón criticises the non-interventionists when believing that legal analysis is conceptually autonomous and that political philosophy and other normative analysis have no place in legal reasoning. He argues that state practice is ambivalent on the question of humanitarian intervention, thus any interpretation of that practice has to rely on extra-legal values. Tesón does not dispute that international law prohibits the use of force
generally. But the cases which warrant humanitarian intervention disclose other serious violations of international law: genocide, crimes against humanity, etc. Whatever we do, if we intervene or not, will end up tolerating a violation of some fundamental rule of international law, and therefore Teson pleads to at least use this argument as a de lege ferenda discussion, trying to reform international law, so that law and morality are not separate.\footnote{Tesón, The liberal case for humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at p 110-111}

Franck believes that one can consider “necessity“ and “mitigation“ as justifications for what otherwise would be clear violations of law.\footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 212ff} He argues that the institutional practice in the UN of humanitarian intervention have often trumped abstract legal principles in the name of necessity and mitigation.\footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 225} In this light, NATO’s intervention is not obviously illegal. Although the Security Council failed to endorse the action in advance, it did reject a resolution condemning it, and engaged in “a form of retroactive endorsement“ through resolutions at the end of the conflict.\footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 216-226} Was NATO’s intervention illegal? Franck answers yes and no. It violated the art 2(4) but the illegal act produced a result more in keeping with the intent of the law (more legitimate) and more moral than would have been if no action had taken place to prevent another Balkan genocide. The unlawfulness of the act was mitigated in the circumstances in which it occurred.\footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 225}

Examining all the above writers’ opinions, it is clear that when one looks beyond the law, beyond the requirements of state practice and opinio juris, there are those who strongly defend the right of unauthorised humanitarian intervention because it is simply necessary, it is morally right. Cassese also looks at the question of necessity, and favours it, but unlike others he also makes legal analyses, examining whether states are accepting such a view.

Cassese argues that although NATO’s intervention in Kosovo is a breach of international law, this breach may gradually lead to the crystallisation of a general rule of international law supporting unauthorised military intervention for humanitarian purposes

\footnotesize{\begin{itemize}
\item \footnote{Tesón, The liberal case for humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at p 110-111}
\item \footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 212ff}
\item \footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 225 - Franck argues that for ex. UN responses to India’s invasion in the East Pakistan in 1971, Vietnam’s invasion of Cambodia in 1978 and Tanzania’s invasion in Uganda in 1978, all reveal that the UN has been willing to acquiesce in unilateral intervention under certain circumstances.}
\item \footnote{Franck, Interpretation and change in the law of humanitarian intervention, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 225}
\end{itemize}}
and when the situation constitutes a threat to the peace.\textsuperscript{152} He acknowledges that it is premature to say that a customary rule has emerged, because there is no \textit{opinio juris} for such an assertion, but on the other hand it may be submitted that such a rule in customary international law has in part materialised, because of the strong \textit{opinio necessitatis} that has followed NATO’s intervention - namely that it is politically, economically or morally necessary to act in such a manner.\textsuperscript{153} The reason why a norm of customary international law has not yet emerged is because \textit{opinio juris} is extremely limited and \textit{opinio necessitatis}, although widespread, does not fulfil the requisite conditions of generality and non-opposition.\textsuperscript{154}

In conclusion, opinions differ on whether a norm should emerge allowing unauthorised military intervention for humanitarian purposes. I agree with Hilpold that humanitarian intervention is a political concept, and it can be justified morally or politically, but not legally.\textsuperscript{155} Those in favour of unauthorised military intervention lean on moral and political arguments and I agree of the importance of these arguments. At the same time, as a lawyer, I have to conclude that only if \textit{opinio necessitatis} would fulfill the requirements of generality and non-opposition, would the world embrace such a stand. As the world is today, the great fear of opening Pandora’s box, the fear of abuse, impedes the requirement of generality and non-opposition of the \textit{opinio necessitatis} regarding unauthorised military intervention for humanitarian purposes. After all, international law is based on states’ consent, and a norm cannot be developed if it goes against the will of states. This would damage the international relations and the equilibrium of international peace and security.

### 3.2.4 Different approaches in recent reports

The dilemmas concerning the issue of humanitarian intervention has lead to different efforts to reconcile the legal, political and moral issues involved, and to produce different frameworks for the future, including the ICISS’s report “The Responsibility to Protect“.

\textsuperscript{151} Franck, \textit{Interpretation and change in the law of humanitarian intervention}, in Holzgrefe & Keohane, Humanitarian Intervention, at p 226  
\textsuperscript{152} Cassese, \textit{Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?}, 10 EJIL (1999), at p 28  
\textsuperscript{153} Cassese, \textit{A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis}, EJIL (1999), Vol 10, No 4, at p 797  
\textsuperscript{154} Cassese, \textit{International Law}, p 321  
\textsuperscript{155} Hilpold, \textit{Humanitarian Intervention: Is There a Need for a Legal Reappraisal?}, EJIL(2001), Vol 12, No 3, at p 454 (for abuse) and at p 465 (can’t be justified legally)
The report of the DUPI from 1999 brings forward four different legal-political strategies on humanitarian intervention. The first one, the *status quo strategy*, reflects the exclusive reliance on the Security Council to authorise humanitarian intervention, thus preserving the present regime and leaving the victims of atrocities without international help if the Security Council is blocked. The Danish Institute rejects this theory, but is more positive to the *status quo plus strategy*, which aims at establishing a higher degree of consensus in the Security Council than at present.

The second approach is the ad-hoc strategy, working as an “emergency-exit“ from the norms of international law. This approach justifies humanitarian intervention in extreme cases without Security Council authorisation, on moral and political grounds only, thus preserving the Council as the sole centre for authoritative decision-making on humanitarian intervention. The goals of this strategy is in the short-term to escape from an adverse effect of failure of the Security Council, and in the long-term to reinforce the efficiency of the Security Council and the existing legal order, thus making this “emergency-exit“ strategy superfluous.

The third approach is the *exception strategy*, thus establishing a subsidiary right of humanitarian intervention under international law. It is acknowledged that this strategy, undermining the authority of the Security Council and weakening the existing international order pertaining the use of force, would attract opposition from China, Russia, and other countries and would bring forward the differences of opinions in a manner which could jeopardise the possibility of averting human suffering.

The fourth approach is the *general right strategy*, namely to establish a general right of humanitarian intervention under international law outside the Security Council on a par with the right of self-defence in Article 51 of the UN Charter, for example by amending the UN Charter. It is emphasised that this approach is not feasible in the near future, since it would meet fierce opposition in the General Assembly and the Security Council, it would give room for great abuse, and it has few, if any, political and moral advantages for the protection of individuals.

The Danish Institute’s goal is to reinforce the existing international legal order and to strengthen the UN Security Council. It concludes that a combination of the *status quo plus*
strategy and the ad hoc strategy is preferable to the last two alternatives.\textsuperscript{164} This combination recognises that in extreme cases, humanitarian intervention may be necessary and justified on moral and political grounds even if it lacks Security Council authorisation, while at the same time confirming the exclusive legal authority under international law of the Security Council to take decision on humanitarian intervention. It provides for a "safety valve" outside the Council, but enhances the existing international order and the efficiency of the Security Council, thus being a status quo regime.\textsuperscript{165}

In the Hague Report from 2000, it is argued that although there is no sufficient legal basis for unauthorised humanitarian intervention and no clear evidence of such a legal basis emerging, the international duty to protect and promote fundamental human rights forms renders it desirable that efforts are made to develop a justification ground for humanitarian intervention without a Security Council mandate, as part of the doctrine of state responsibility.\textsuperscript{166} The CAVV and the AIV believe one should consider humanitarian intervention admissible in extreme cases and as an "emergency exit", thus the same approach as the Danish Institute’s ad-hoc strategy.\textsuperscript{167}

The Kosovo Commission’s report from 2000 concluded that NATO’s actions were illegal but legitimate and it called for the applicable international law to be interpreted in order to make it more congruent with "an international moral consensus" and to bridge the gap between legality and legitimacy.\textsuperscript{168} The Kosovo Commission feels that the moral imperative to protect vulnerable people should not be lightly cast aside by adopting a legalistic view of international responses to humanitarian catastrophes.\textsuperscript{169}

The Kosovo Commission therefore argues that the best way to close the gap between legality and legitimacy is to conceive of an emergent doctrine of humanitarian intervention, through for ex. the adoption by the General Assembly of a Declaration on the Right and Responsibility of Humanitarian Intervention, accompanied by the Security Council’s interpretations of the UN Charter and the amendment of the Charter to incorporate these changes in the role and responsibility of the UN and other collective actors to implement this declaration.\textsuperscript{170}

The Commission’s proposed contextual principles are focused on assessing whether the intervention was justifiable – thus the legitimacy question – and the principles

\textsuperscript{163} DUPI, \textit{Humanitarian Intervention – Legal and Political Aspects}, p 120
\textsuperscript{164} DUPI, \textit{Humanitarian Intervention – Legal and Political Aspects}, p 127
\textsuperscript{165} DUPI, \textit{Humanitarian Intervention – Legal and Political Aspects}, p 128
\textsuperscript{166} AIV & CAVV, \textit{Humanitarian Intervention}, The Hague, at pp 23-24
\textsuperscript{167} AIV & CAVV, \textit{Humanitarian Intervention}, The Hague, at pp 27-28
\textsuperscript{168} Independent International Commission on Kosovo, \textit{Kosovo Report}, pp 185-187
\textsuperscript{169} Independent International Commission on Kosovo, \textit{Kosovo Report}, p 176
can be applicable to coercive humanitarian intervention either by the UN, or by a coalition of the willing acting with or *without* the approval of the UN. Thus, recourse to the UN Security Council, or the lack thereof, is not conclusive, and the threat or use of force should not be unilateral but collective, and it must not be censured or condemned by a principle organ of the UN, especially by the ICJ or the Security Council.

As it is shown in the next section, all the factors discussed above, including state practice, the divergent opinions on whether a customary rule has emerged or should emerge allowing unauthorised military intervention, as well as the strategies in the recent reports, are important in the assessment of the ICISS’s approach to military intervention for humanitarian purposes.

### 3.3 The ICISS’s approach regarding the right authority for military intervention for humanitarian purposes

#### 3.3.1 The Security Council

The ICISS clearly states that Security Council authorisation must be sought in all cases prior to any military intervention being carried out and that those calling for an intervention must 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.

Thus the approach of the ICISS is concentrated on the central role of the Security Council, and it is not aiming at diminishing the role of the Council and the legitimacy of the UN. This becomes clear when the ICISS explains that it does not want to find alternatives to the Security Council as a source of authority, but it seeks to make it work better than it has. This approach has certain similarities to the *status quo plus strategy* of the Danish Institute since it aims at establishing a higher degree of consensus in the Security Council than at present. The difference from the *status quo plus strategy* is that the ICISS’s approach does not envisage an exclusive reliance on the Security Council to authorise humanitarian intervention, but it also gives an alternative to the authority of the Council, namely the General Assembly. This will be discussed in the next section.

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170 Independent International Commission on Kosovo, *Kosovo Report*, pp 187, 190
The ICISS’ approach aims at improving the work of the Security Council through the so-called “code of conduct”. The five permanent members of the Council should reach a more formal, mutually agreed practice not to apply their veto power, in matters in which their vital state interests are not involved. The achievement of such an agreement would of course be ideal, since the amendment of the UN Charter in the near future is not feasible. From a legal aspect, there is nothing that hinders the permanent members of the Council to adopt such a code of conduct. According to Article 30 of the UN Charter, the Council shall adopt its own rules of procedure.

Henkin indirectly supports the ICISS’ approach. He argues that there is a need of modification in the law and practice of the veto, and that NATO’s intervention in Kosovo and the proceedings of the Security Council should be regarded as part of the quest for developing a form of collective intervention beyond a veto-bound Security Council. This can be achieved without formal amendment of the UN Charter, by a “gentlemen’s agreement” among the permanent members, or by wise self-restraint and acquiescence. This is a desirable and perhaps even an inevitable change, and proponents of a “living Charter” would support an interpretation of the law and an adaptation of the UN procedures that rendered them what they ought to be.

The immediate consequence of reaching such an agreement would thus be fewer situations of a veto-blocked Security Council when dealing with military intervention for humanitarian purposes. It would achieve broader consensus within the Council and a higher legitimacy for the UN. Hopefully, countries would no longer be deterred from turning to the Council for authorisation simply because they anticipate a veto, since it would be harder to anticipate the outcome in the Council in a situation which requires military intervention for humanitarian purposes. Of course, this consequence is probable only if the Council shows that such a code of conduct is actually applied and that the permanent five are prepared to follow it. The political will is essential.

The question is if the permanent five will ever consider such a code of conduct and also how “vital interests” should be defined. The proposal about a code of conduct can face great unwillingness from the permanent five, who may not be prepared to lose such power. In the Hague Report from 2000, for example, it is argued that the permanent members of the Council are not only unwilling to accept an amendment to the UN Charter, but they are also not open to “softer options” such as a statement that they

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173 The ICISS Report, para 6.21
174 Henkin, Kosovo and The Law of Humanitarian Intervention, 93 AJIL (1999), at p 828
175 Henkin, Kosovo and The Law of Humanitarian Intervention, 93 AJIL (1999), at p 828
will refrain from using their vetoes in matters that do not concern Chapter VII of the Charter (international peace and security).\textsuperscript{176} Since gross violations of human rights are now part of the notion “a threat to international peace and security“, it is even more apparent that the probable outcome will be even stronger unwillingness to consider “softer options” in a matter of military intervention for humanitarian purposes. Stromseth argues that the prospects of commitments of the Council members not to use their veto are slim, since the permanent five are unlikely to tie their hands in advance in this way.\textsuperscript{177}

The Hague Report also emphasises that greater Security Council effectiveness does not necessarily depend on the abolition or limitation of the right of the veto. On the contrary, such changes could mean that the permanent members come to see the Security Council as an increasingly unsuitable forum for agreeing on possible intervention. It is uncertain what impact the limitation of the right of veto would have on the Security Council’s effectiveness.\textsuperscript{178}

If the permanent members of the Council will refuse to agree on a code of conduct, following question is a very legitimate one:

\textit{“Can an intellectually coherent or morally consistent argument be advanced for any one or several of the permanent five to lead such a coalition [of the willing] when faced with an actual or apprehended Security Council veto, if they are not prepared to give up the veto right?”}.\textsuperscript{179}

The consequence is thus that action outside a veto-paralysed Council framework is less defensible by those who refuse to accept any dilution of the veto power as a matter of general principle.\textsuperscript{180}

If the permanent five would agree on such a code of conduct, a discussion about what vital interests are is inevitable, but it may be hard to reach consensus on when the vital interests are damaged, since the meaning of these words is open for interpretation. One country can always argue that its interests are at stake although the other countries greatly disagree. Therefore, the question is really a question of willingness – this approach will only work if the permanent five are truly willing to take responsibility for what happens in the world, which goes back to what the ICISS has said: the approach

\textsuperscript{176} AIV & CAVV, \textit{Humanitarian Intervention}, The Hague, at p 17
\textsuperscript{177} Stromseth, \textit{Rethinking humanitarian intervention: the case for incremental change}, in Holzgrefe & Keohane, \textit{Humanitarian Intervention}, at p 265
\textsuperscript{178} AIV & CAVV, \textit{Humanitarian Intervention}, The Hague, at pp 17, 34; See also p 16, for the conclusion that the use of veto during the 1990s has been very limited, while the number of Security Council resolutions rose, but that even so, the prospects for greater effectiveness are not promising
\textsuperscript{180} Thakur, \textit{Intervention, Sovereignty and the Responsibility to Protect: Experiences from the ICISS}, Security Dilaogue, Vol 33, No 3, september 2002, at p 336
will remain academic if the states are not willing to comply and if the will is not
mobilised.

Enhancing the capacity of the Council to act through a code of conduct could render the discussion about allowing unauthorised military intervention less important, but not superfluous. There may still be cases where one country’s vital interests are at stake. The country would then use its veto, although the human suffering that calls for intervention is enormous. For this scenario, the ICISS has given other alternatives that will be examined in the next section. It is important in this context to remember that the Security Council’s refusal to authorise intervention may have numerous reasons other than a situation when a country vetoes intervention. The Council may for example conclude that the human rights deprivations are not of a sufficient magnitude to justify intervention, or that less intrusive means of resolving the crisis have not yet been pursued, and this must not always be seen as the Council being defective, but rather that, by not acting, it is an authoritative decision maker.\footnote{Murphy, \textit{Humanitarian Intervention – The United Nations in an Evolving World Order}, p 381}

### 3.3.2 When the Security Council fails to act – the General Assembly as an alternative

The ICISS proposes that if the Security Council rejects a proposal regarding military intervention for humanitarian purposes, or fails to deal with it in reasonable time, an alternative option is that the General Assembly considers the matter in the Emergency Special Session under the “Uniting for Peace” procedure.

Firstly, it not specified by the ICISS what reasonable time might be, but of course this must vary depending upon the circumstances. Large scale loss of life may occur in one country very quickly, or it may take longer time before the Council feels the criteria are met in order for it to act.

Secondly, the question arises whether the “Uniting for Peace“ procedure can be used regarding the issues involved. The key passage of the Uniting for Peace resolution reads as follows:

"The General Assembly 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, 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 or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. Such emergency special session
shall be called if requested by the Security Council on the vote of any nine members, or by a majority of the Members of the United Nations." 182

The General Assembly must then adopt a resolution recommending action by at least two-thirds majority. 183 Thus, in case of a breach of peace or act of aggression, the measures available were said to include the use of armed force.

The resolution was adopted on the initiative of the United States as a response to vetoes by the Soviet Union in the Security Council during the Korean War. During the 1950s when the Council was deadlocked, the General Assembly assumed the task of peacekeeping by summoning special sessions, calling for withdrawal of troops etc, but there were never any recommendations on the basis of the Resolution to take collective military measures. 184

The legal status of the capacity of the General Assembly to do more than authorise peacekeeping is questionable, 185 but different resolutions were passed recommending all states to lend every assistance to the UN action in Korea, 186 in relation to the Suez crisis in 1956 187 and in Congo in 1960. 188 In the course of the Kosovo crisis, it might seem surprising that the Uniting for Peace procedure was not considered. In fact, Bring has argued that NATO could have appealed to this resolution before taking action in Kosovo, and that a qualified majority supporting and legitimising NATO action might well have been possible. 189 The possibility of going to the General Assembly had indeed been suggested when the first Rambouillet negotiations broke down by Professor Adam Roberts, but the UK Foreign Office though it was a bad advice. According to Adam Roberts, the reasons were the following:

"Because I think they clearly took the view (a) that it was uncertain that they would get anything like two-thirds majority which I believe is what it is required under 'Uniting for Peace', and (b) that the General Assembly is a somewhat cumbersome instrument, in that it does not meet continuously, it cannot continuously develop its policy, once you have an agreement in the General Assembly you will be absolutely stuck with whatever the agreement is, and it is not the kind of flexible instrument that the Security Council is." 190

182 GA Res 377 (V), 3 November 1950
183 Article 18(2) of the UN Charter
185 Brownlie, Principles of Public International Law, pp 700-701
186 GA Res 498 (V), 1951
187 GA Res 997 (ES-I), 1956; GA Res 1000 (ES-I), 1956
188 SC Res 157 (1960); GA Res 1474 (ES-IV), 1960
189 Bring, Should NATO take the lead in formulating a doctrine on humanitarian intervention?, NATO Review, No 3, 1999, p 26
It was also unclear whether the General Assembly would deliver the desired legitimacy.\textsuperscript{191}

In general, it is questionable whether the General Assembly is capable of sufficiently decisive and rapid action to fulfil a constructive role in every humanitarian crisis.\textsuperscript{192} These are the political aspects of an approach in accordance with this resolution.

It is also argued that the Uniting for Peace Resolution is no legal basis for the authorisation of humanitarian intervention.\textsuperscript{193} The Security Council’s practice has, as I have shown in section 3.1.2, expanded the notion a “threat to the peace“ in Article 39 of the UN Charter by encompassing also humanitarian emergency, including situations of massive violations of human rights, even without international repercussions. The Uniting for Peace Resolution, on the other hand, only assumes competence for the General Assembly to recommend military action in case of a “breach of the peace“ or an “act of aggression“, and not also in case of a “threat to the peace“. In case of a threat to the peace, the General Assembly may recommend non-military measures only, and the dominant view is that it may only recommend military measures that states are in any event entitled to take in the exercise of collective self-defence.\textsuperscript{194}

The General Assembly can make recommendations, not decisions, regarding the maintenance of peace and security,\textsuperscript{195} but it has no subsidiary competence to authorise humanitarian intervention and thus, a recommendation from the Assembly gives no legal basis for an otherwise unlawful use of force.\textsuperscript{196} It is argued that for states to be authorised to engage in enforcement actions, it appears that something more than a “recommendation” is needed, since Article 11(2) of the UN Charter draws a distinction between “recommendations” and “actions” on issues of international peace and security; “actions” require referral by the General Assembly to the Security Council.\textsuperscript{197} This is also supported by the ICJ in the Certain Expenses case, where the Court interpreted the term “action” in Article 11(2) as meaning “enforcement action”, implying that the General

\textsuperscript{192} AIV & CAVV, Humanitarian Intervention, The Hague, at p 27
\textsuperscript{193} DUPI, Humanitarian Intervention – Legal and Political Aspects, pp 61, 73; Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 300
\textsuperscript{194} DUPI, Humanitarian Intervention – Legal and Political Aspects, p 61
\textsuperscript{195} Article 11 of the UN Charter
\textsuperscript{197} Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 300
Assembly could not undertake enforcement action on its own, even through the use of recommendations.\(^{198}\)

As I mentioned before, the legal status of the capacity of the General Assembly to do more than authorise peacekeeping is questionable,\(^{199}\) and in the Danish Report it is emphasised that there is a general agreement, among the UN organs, that the Security Council has exclusive competence with regard to taking or authorising action involving the use of force which would otherwise be unlawful under international law.\(^{200}\)

Also, the Uniting for Peace Resolution has always been somewhat tenuous, its basis within the UN Charter is not clear, and its limited contextual use casts some doubt on its continued vitality.\(^{201}\)

### 3.3.3 When the Security Council fails to act – regional or sub-regional organisations as an alternative

Another option put forward by the ICISS when the Security Council rejects a proposal of intervention or fails to deal with it in a reasonable time, is that regional or sub-regional organisations under Chapter VIII of the UN Charter take action within their area of jurisdiction. This must be subject to their seeking subsequent authorisation from the Security Council. The ICISS argues that, although the UN Charter requires that regional organisations receive prior authorisation from the Security Council before they act, there are recent cases when approval has been sought \textit{ex post facto} and this may be regarded as giving some leeway for future action.\(^{202}\)

### 3.3.3.1 Regional or sub-regional organisations under Chapter VIII of the UN Charter

As I mentioned in section 3.1.1, Article 53 of the UN Charter allows the Security Council to utilise regional arrangements or agencies for enforcement action, by authorising their actions. The first question is which organisations can be characterised as regional or sub-regional organisations under Chapter VIII of the UN Charter, also referred to as Chapter VIII organisations. The Charter lacks a definition of what counts as “regional arrangement or agency” in Article 52(1) of the UN Charter. According to the UN Secretary-General,

\(^{198}\) Certain Expenses of the United Nations, at 153-156
\(^{199}\) Brownlie, Principles of Public International Law, pp 700-701
\(^{200}\) DUPI, Humanitarian Intervention – Legal and Political Aspects, p 61
\(^{201}\) Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 300
\(^{202}\) ICISS Report, para 6.35
the reason for this absence is that the Charter has anticipated the need for flexibility by not giving any precise definition of regional arrangement or organisation, thus enabling diverse organisations to contribute to the maintenance of peace and security.\textsuperscript{203} One can deduce from Article 52(1) of the Charter that a regional organisation has the task of taking care of the peaceful settlement of disputes within its own region and amongst its own members.\textsuperscript{204}

The OAS has proclaimed in Article 1 of the OAS Charter to be a regional organisation,\textsuperscript{205} and the UN has accepted OAS as a regional organisation under Chapter VIII, by allowing it to assist as an observer at General Assembly sessions through Resolution 253. The Arab League,\textsuperscript{206} which does not claim to be a regional organisation under Chapter VIII in its constituent treaty but it has passed resolutions claiming this status, has also been accepted by the UN as a regional organisation although it is not open to all the states in the region – thus making the concept of region flexible.\textsuperscript{207} The OAU\textsuperscript{208} and the Arab Conference\textsuperscript{209} were granted observer status in the General Assembly as regional organisations in 1965 and 1975 respectively.\textsuperscript{210} After the Cold War, the CSCE and the CIS have been recognised as regional organisations.\textsuperscript{211} An example of a sub-regional organisation is ECOWAS\textsuperscript{212}, which was established in 1975 of fifteen members and was concerned with economic matters, until it expanded its concerns to peacekeeping operations.\textsuperscript{213} I will examine ECOWAS’ practice in Liberia and Sierra Leone when dealing with the matter of \textit{ex-post facto} authorisation.

Regional organisations are distinguished from regional ‘defence’ organisations, such as NATO, that are governed by Article 51 of the Charter.\textsuperscript{214} But the constitution of an international organisation is a living instrument that may adapt to changes occurring in practice,\textsuperscript{215} and the ICJ has acknowledged this dynamic nature of the

\begin{thebibliography}{99}
\bibitem{203} 1995 UNYB 116
\bibitem{204} de Wet, \textit{The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter VII of the United Nations Charter}, 71 NJIL 2002, at p 7
\bibitem{205} 119 UNTS 48; 33 ILM (1994) 981
\bibitem{206} Established in 1945, 70 UNTS 248
\bibitem{207} Gray, \textit{International Law and the Use of Force}, pp 204-205
\bibitem{208} Established in 1963, 479 UNTS 70
\bibitem{209} Established in 1972, 914 UNTS 111
\bibitem{210} Gray, \textit{International Law and the Use of Force}, p 205; See also Murphy, \textit{Humanitarian Intervention – The United Nations in an Evolving World Order}, p 340
\bibitem{211} For more information, see Gray, \textit{International Law and the Use of Force}, p 205 & n 24-27
\bibitem{212} The Economic Community of West African States
\bibitem{213} 35 ILM (1996) 660; See Gray, \textit{International Law and the Use of Force}, p 208
\bibitem{214} de Wet, \textit{The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter VII of the United Nations Charter}, 71 NJIL 2002, at p 8
\bibitem{215} Blokker and Muller, \textit{NATO as the UN Security Council’s Instrument: Question Marks from the Perspective of International Law?}, 9 Leiden Journal of International Law, 1996, p 419
\end{thebibliography}
constitution of an international organisation. The member states of NATO have amended the constitution through practice and the military concept of the organisation will now serve as a broad concept of collective security that will include defence and crisis management. There are different opinions on whether NATO has evolved into a regional organisation in terms of Chapter VIII of the Charter. It is argued that the fact that NATO’s activities go beyond the borders of its members is evidence of a broader definition of its security role, but is not evidence of NATO’s evolution into a regional organisation.

On the other hand, there are those that regard NATO’s evolution as sufficient for its qualifying as a regional organisation. Others emphasise that the Security Council has implicitly referred to NATO as regional organisation in its resolutions on the former Yugoslavia, and that the crucial factor is not the nature of the organisation but the type of action that is undertaken and the attitude of the Security Council. The ICISS acknowledges that it is much more controversial when a regional organisation such as NATO acts against a non-member. This shows that the ICISS views NATO as a regional organisation.

Even if NATO is considered as being a chapter VIII organisation, the Council cannot rely on Article 53(1) of the Charter when authorising a regional organisation to engage in military action that is not within its own region and/or against a non-member state. In such a case, it is Article 42 in conjunction with Article 48(2) of the UN Charter that enables military utilisation of a regional organisation outside its territory and/or against non-members, as well as the utilisation of other organisations such as regional defence organisations. One of the reasons for NATO to characterise itself as

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216 See for example Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, p 174
217 Blokker and Muller, NATO as the UN Security Council’s Instrument: Question Marks from the Perspective of International Law?, 9 Leiden Journal of International Law, 1996, p 421
218 See the “Declaration on Peace and Co-operation issued by the Heads of State and Government participating in the meeting of the North Atlantic Council of 8 November 1991”, available at www.nato.int
220 Blokker and Muller, NATO as the UN Security Council’s Instrument: Question Marks from the Perspective of International Law?, 9 Leiden Journal of International Law, 1996, p 420
221 See Gray, International Law and the Use of Force, p 205; See also Simma, The Charter of the United Nations: A Commentary, p 730
222 The ICISS Report, para 6.34
a collective self-defence alliance was to avoid the obligation in Article 53(1) to seek prior permission from the Security Council before it could act in a case.  

The ICISS’ efforts to introduce a way of using regional and sub-regional organisations for military interventions gives rise to the question why we should be more willing to allow intervention from an organisation compared to an individual state. The answer is, I believe, that collective decisionmaking leads to more consensus and thus greater legitimacy. The consequence is that it leaves less room for individual abuse.

3.3.3.2 Consequences of *ex post facto* authorisation and the requirement of explicitness

I will now assess whether a practice of the Security Council’s authorisation *ex post facto* should be supported, by firstly considering the reasons for the Charter’s request for prior authorisation and what can be jeopardised if a subsequent authorisation is to be allowed. Secondly, one must assess whether the action must be authorised explicitly or if it can be authorised implicitly.

The authorisation by the Security Council of a regional organisation to take military enforcement action under Chapter VIII represents the delegation of Chapter VII powers by the Council. According to Article 53(1) of the UN Charter, regional arrangements are not empowered to take enforcement actions without prior Council authorisation, namely without a delegation by the Council of its Chapter VII powers.

The Security Council must be able to remain in overall authority and control of the military intervention, thus the intervention must be prior and explicitly authorised through a resolution. If no such authorisation exists, a regional intervention would be illegal unless it concerns a situation of self-defence.

Regional organisations do not have a residual power to adopt military measures where the Security Council fails to act in situations of gross human rights violations, because this would totally undermine the notion of centralised use of force, which is inherent in the Charter. A complete delegation of command and control of a

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military operation to a regional organisation, without any accountability to the Security Council would lack the degree of centralisation necessary to designate a military action as a UN operation; the Council cannot absolve itself from its collective responsibility, it cannot allow a regional organisation to decide independently how and when to use military force.\textsuperscript{231} The prohibition of a total delegation of powers is a general principle of the law of international organisations.\textsuperscript{232}

The Council cannot delegate the determination that a threat to, or breach of, the peace has come into existence, and it cannot delegate an unrestricted power of command and control over a military enforcement force.\textsuperscript{233} These matters are solely for the Council, and a regional organisation cannot decide when a matter constitutes a threat to international peace and security, and/or to decide whether it could take enforcement actions on this basis.\textsuperscript{234} Moreover, the Council must at all time retain overall authority and control over the exercise of its delegated Chapter VII powers in order to ensure that this is in accord with the interests of the UN.\textsuperscript{235}

For the Council to retain overall authority and control at all time, it must logically be involved in the intervention from the beginning. If a practice of ex post facto authorisation is emerging, then an initially illegal intervention will be legalised retroactively. This means that the Council will not be able to have authority and control at all times. Even if the Council itself decides that the situation in a country is a threat to international peace and security, the ICISS’ proposal means that a regional organisation can decide to undertake enforcement action without prior authority of the Council, thus deciding independently how and when to use military force. The actual decision to intervene, as well as the whole intervention is outside the Council’s authority and control.

The Council regains authority and control only at the time of the retroactive authorisation of the intervention. This means of course that the Council embraces both the initial decision to intervene and all the decisions during the intervention. The reality is still that the whole intervention would be outside the factual control or authority of the Council for a long time, a time during which the Council is not able to ensure that the intervention is in accord with the interests of the UN. On the other hand, if the intervention is not in accordance with UN purposes, the Council can at any time condemn the intervention.

\textsuperscript{231} de Wet, The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter VII of the United Nations Charter, 71 NJIL 2002, at pp 11-12
\textsuperscript{232} Meroni v High Authority, Case 9/56, (1958) ECR 133
\textsuperscript{233} Sarooshi, The United Nations and the Development of Collective Security, pp 32-33
\textsuperscript{234} Sarooshi, The United Nations and the Development of Collective Security, pp 33-34
Thus, the biggest problem with a retroactive authorisation seems to be that the Security Council is unable to remain in control of a military intervention and that the regional organisation makes the actual decision to undertake enforcement action. A retroactive authorisation cannot be seen, in my opinion, as a delegation by the Council of its Chapter VII powers. As I indicated before, a delegation by the Council of its Chapter VII powers requires prior Council authorisation.

On the other hand, it could be argued that the organisation’s knowledge that it must receive the Council’s retroactive authorisation makes the organisation to carefully consider its decisions. The organisation is still accountable towards the Security Council, which ultimately decides upon the legality of the intervention, and this may be seen as a fulfilment of the necessary degree of centralisation.

The ICISS’ proposal of a retroactive authorisation leads to the legalisation of an initially illegal intervention by a regional organisation. Even if this does not have any textual basis in the Charter, it cannot be excluded that the Council could develop a practice of *ex post facto*, retroactive authorisation.\(^{236}\) De Wet argues that as in the case of the prior authorisation, the retroactive authorisation must be given through a resolution by the Security Council, in unambiguous terms, in order to prevent states from acting unilaterally and then claiming implicit authorisation from unclear language in subsequent Council resolutions, or by arguing that the Council has not condemned the intervention.\(^{237}\) Implicit authorisation would create major legal uncertainty.\(^{238}\) The fact that the use of force must be authorised explicitly flows indirectly from Article 42 of the UN Charter, since the substantive principle that force must only be used as a last resort carries with it a procedural requirement that the body authorising force must do so explicitly.\(^{239}\) It must be emphasised that there is no qualitative difference in the nature of a delegation of powers to Member States as opposed to a regional arrangement.\(^{240}\)

### 3.3.3.3 Security Council’s practice of *ex post facto* authorisation

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I will now examine interventions of regional or sub-regional organisations that fall under the ICISS’ proposal. This proposal focuses on interventions undertaken on humanitarian grounds and within the area of jurisdiction of the organisation, namely within the organisation’s region and against a member of the organisation. I will concentrate on the examples that the ICISS mentioned, namely ECOWAS’ interventions in Liberia and Sierra Leone,\(^{241}\) in order to analyse whether these cases can be evidence of the Security Council’s *ex post facto* authorisation. I am not assessing NATO’s intervention in Kosovo, since this was undertaken against a non-member of the organisation. The intervention was undertaken outside NATO’s area of jurisdiction and falls therefore outside the ICISS’ proposal.\(^ {242}\)

ECOWAS invested ECOMOG (ECOWAS Cease-fire Monitoring Group) with a mandate to monitor the cease-fire, restore law and order and create the necessary conditions for free and fair elections in Liberia in August 1990.\(^ {243}\) While other reasons also were present, the intervention was predominantly humanitarian in nature.\(^ {244}\) There was no prior authorisation from the Security Council. Some argue that the intervention can be seen as evidence of an *ex post facto* authorisation,\(^ {245}\) especially since the intervention cannot be legitimised through the state’s consent because the lack of President Doe’s effective control at the time the invitation was extended,\(^ {246}\) and because of all the presidential statements that followed and the fact that the Secretary-General created a Special Emergency Fund to assist countries that contributed to this ECOWAS intervention.\(^ {247}\) The President of the Security Council issued statements where it ‘recognised’ the ECOMOG action.\(^ {248}\) The Council ‘commended’ ECOWAS for its efforts to restore peace, security and stability in Liberia in its Resolution 788.\(^ {249}\) In 1993, the UN Observer Mission in Liberia (UNOMIL) was created to complement ECOMOG and the

\(^{241}\) See ICISS Report, para 6.35

\(^{242}\) It is argued that the SC Res 1244 cannot be seen as retroactive authorisation by the Council of NATO’s intervention in Kosovo, since China and Russia did not support the air-campaign at any time – see de Wet, *The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter VII of the United Nations Charter*, 71 NJIL 2002, at p 34

\(^{243}\) Wallace-Bruce, *Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law*, 47 Netherlands International Law Review 2000, p 62

\(^{244}\) Murphy, *Humanitarian Intervention – The United Nations in an Evolving World Order*, p 160

\(^{245}\) Österdahl, *Threat to the Peace*, p 57; Greenwood, *International Law and the NATO intervention in Kosovo*, 49 International and Comparative Law Quarterly 2000, p 929


\(^{247}\) Background materials to the ICISS report, p 83

\(^{248}\) See UN Doc S/22133 (1991) and UN Doc S/23886 (1992)

\(^{249}\) SC Res 788, 19 November 1992, para 1; See also SC Res 813, 26 March 1993, para 2; SC Res 856, 10 August 1993, para 6

51
fact that it would not engage in enforcement measures has been interpreted as implying that ECOMOG could undertake enforcement action, but this was not an express authorisation for enforcement action.

There are also arguments that ECOMOG’s intervention was not explicitly or implicitly authorised by the Council. Even if the statements by the President of the Council may have given the intervention a symbolic UN blessing, the Council never authorised ECOMOG to “use all necessary means” to restore peace and security in Liberia, even if it commended ECOWAS’ efforts. ECOMOG’s actions in 1992 went beyond peacekeeping, when ECOMOG went onto the offensive against the NPFL. It is highly questionable if the ECOWAS had legal grounds to establish ECOMOG as a peacekeeping operation, but not much attention was paid in the Security Council to the question of legality of the operation under the UN Charter. ECOWAS did not seek UN authorisation for the ECOMOG actions because it did not regard them as enforcement actions for which Article 53 authorisation was necessary, and the Council did not demonstrate concern that ECOMOG had gone beyond legitimate peacekeeping.

It is also argued that it is unlikely that the vague language in the presidential statements and Council resolutions would amount to a retroactive authorisation of military enforcement action, since the language is broad enough to only apply to those aspects of the intervention that were classic peace-keeping; the question to what extent or degree the Security Council has supported the ECOMOG remains unanswered.

The successful coup d’état against the democratically elected President Kabbah of Sierra Leone was universally condemned and the OAU appealed to the leaders of ECOWAS to assist the people of Sierra Leone and immediately restore the constitutional order in the country. ESOWAS issued a communique in June 1997, saying that its objectives were to reinstate the legitimate government by force if necessary, to restore peace and security, and resolve the serious refugee problem. In August 1997,
ECOWAS officially mandated ECOMOG to enforce economic sanctions and restore law and order in the country. The Security Council stated in July 1997 that it was concerned with the atrocities committed by the junta, it welcomed ECOWAS’ mediation efforts, and said that it was ready to consider appropriate measures if the order was not restored. Gray argues that the Council’s language endorsing ECOWAS’ attempts at peaceful settlement was very cautious and it stopped far short of an authorisation of the use of force.

The Security Council adopted Resolution 1132 in October 8, 1997, in which the Council imposed arms and oil embargoes and a freeze on travel by, and financial assets of members of the military junta. The Council also invoked Chapter VIII, as well as Chapter VII, and it expressly authorised ECOWAS to ensure the strict implementation of this resolution by halting inward shipping, this being the first time the Council gave any express legitimation to the use of force by ECOWAS. It has been argued that this resolution served as a post de jure authentication of ECOMOG actions, but the counterargument put forward is that the language of the resolution was cautious and did not amount to an authorisation for enforcement action apart from that needed to implement the sanctions. ECOMOG did not justify its actions of extensive force as being authorised by the Council. Instead it claimed in its reports to the Council under Resolution 1132 that it had acted in self-defence or in enforcing the arms and oil embargo.

ECOWAS continued to operate in advance of its Council mandate, by for example launching a military assault in February 1998 that led to the removal of the junta from power and expulsion from Freetown, an action that was commended both in a presidential statement, and later also in Resolution 1162 which commended ECOMOG for restoring peace to Sierra Leone. It is argued that ECOMOG had difficulties in

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259 Background materials to the ICISS report, p 107
260 S/PRST/1997/36
261 Gray, International Law and the Use of Force, p 228
262 Gray, International Law and the Use of Force, pp 228-229
263 Background materials to the ICISS Report, p 107
264 Gray, International Law and the Use of Force, p 229
266 Fifth Report of the Secretary-General on UNOMSIL, S/1999/237
268 SC Res 1162, 17 April 1998, para 2
maintaining the requirement of impartial peace-keeping and that no concern was expressed about the ECOMOG action.269

In Resolution 1231, the Council once again commended the efforts of ECOMOG to restore peace, security and stability,270 and called on all members to provide ECOMOG with financial and logistical support. There was clear support for ECOWAS and apparent acceptance of the legality of its actions, but without any discussions of their legal basis.271 Subsequent resolutions also commended the role of ECOMOG in restoring security and stability in Sierra Leone, the protection of civilians and the promotion of a peaceful settlement of the conflict.272

It is argued that none of these statements were made under Chapter VII or VIII, or contained language that would ex post facto authorise ECOMOG to engage in enforcement actions.273 Moreover, the circumstances surrounding the Council’s statements could weaken claims that it is convincing evidence of an ex post facto authorisation by the Council to use force.274

ECOWAS interventions in Liberia and Sierra Leone may be examples of the UN’s unwillingness to stand a rigorous interpretation of Article 53 of the UN Charter, but instead to allow regional organisations to proceed without Security Council involvement, at least in some circumstances.275 “If such practice continues, at some point it may be said that a gloss on Article 53 exists, although at this stage the practice is too episodic.”276 The Security Council could thus develop a practice of ex post facto authorisation, but such a practice has not yet emerged. There are too few cases supporting such a practice, and the cases that may support this practice, such as the case of Liberia and Sierra Leone, are ambiguous and unclear.

In conclusion, for a rule of ex post facto authorisation to emerge, there is a need for more Security Council practice. The ideal way in establishing such a practice, if it is found desirable, is to have a practice of explicit retroactive authorisation, in order to

269 Gray, International Law and the Use of Force, p 231
270 SC Res 1231, 11 March 1999, para 10
271 Gray, International Law and the Use of Force, p 231
274 See arguments regarding the intervention occurring on the invitation by the government, de Wet, The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter VII of the United Nations Charter, 71 NJIL 2002, at p 26; The argument regarding invitation by the government is also supported by Gray, International Law and the Use of Force, p 233
275 Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 345
276 Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 346
sustain clarity and prevent abuse. It is at this point worth mentioning that Murphy argues that it is desirable that the international community encourages action by regional organisations under Article 53 when conditions arise calling for humanitarian intervention, but that the prospects for greater use of regional organisations in such cases are not favorable since such actions remain in the near term beyond the capabilities of regional organisations.\footnote{Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, pp 348-354}

\subsection*{3.3.4 Reasons for ICISS’s “limited" approach}

Proposing criteria for military intervention for humanitarian purposes is nothing new. The recent attempts to do so differ in one sense from the ICISS approach. Both the criteria suggested by the Kosovo Commission,\footnote{Independent International Commission on Kosovo, Kosovo Report, pp 192-195} the Danish Report,\footnote{DUPI, Humanitarian Intervention – Legal and Political Aspects, pp 116-120} the Hague Report,\footnote{AIV & CAVV, Humanitarian Intervention, The Hague, at pp 27-32} as well as those criterias suggested by different writers\footnote{See for example Cassese, Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 EJIL (1999), at p 27; Bazyler, Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 Stanford Journal of International Law (1987), at pp 598-607; Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 AJIL (1999), at pp 838-839} envisage criteria for unauthorised military intervention. If an intervention is not authorised by the Security Council, the intervention can still be regarded as lawful and/or legitimate, if certain criteria are met.

The ICISS on the other hand has suggested criteria for military intervention for humanitarian purposes only for such interventions that have been authorised by the Security Council – even retroactively - or by the General Assembly. It has been shown that the alternative of the General Assembly and the “Uniting for Peace” procedure is questionable from a legal point of view, and that a norm of retroactive authorisation for regional arrangements’ interventions needs more comprehensive Security Council practice in order to emerge. Nevertheless, the important point is that the ICISS is trying to maintain the authority within the UN, denying the right of unauthorised intervention.

I believe that the ICISS’ approach, somewhat “limited” in comparison to other proposals, is a wise one both from a legal and a political perspective, The Commission stresses the political reality that it would be impossible to find consensus for military intervention that acknowledges the validity of any intervention not authorised by the Security Council or
the General Assembly. The Commission tries to present this as a political rather than a legal problem, but I believe the problem being as much a legal one.

International law is built upon consent and there are therefore no positive prospects in approaching a matter in a way that will not be accepted by the majority of states. As international law stands today, there is no consensus supporting military intervention for humanitarian purposes without authorisation from the Security Council. Such a doctrine does not attract the requisite, very widespread, support in the international community, and thus does not establish customary international law. This is clearly supported by the arguments in section 3.2. State practice has been sparse and often justified by other grounds than humanitarian, and as Cassese argues, opinio juris is extremely limited and opinio necessitatis, although widespread, does not fulfil the requisite conditions of generality and non-opposition.

Even though every one of us acknowledges the weaknesses of the present system, I believe that allowing unauthorised interventions is not the ideal path to solve the problem. It is emphasised that such an alternative would lead to total chaos, and that the moral outrage provoked by humanitarian atrocities must always be tempered by an appreciation of the limits of the power, a concern for international institution-building and a sensitivity to the law of unintended and perverse situations. One should furthermore not forget the human suffering, effort and time it has taken to establish the prohibition on the use of force, which together with the role of the Security Council would be weakened if a doctrine of unauthorised intervention would be allowed.

There is a great disagreement in the doctrine among those supporting a right for unauthorised military intervention, regarding whether one must have a doctrine allowing unauthorised interventions, or if this must be limited to an ad-hoc approach, a so-called “emergency exit” as presented in the Danish Report and the Hague Report. Not even the “emergency exit” strategy can be supported. As mentioned before, the proponents for unauthorised intervention use moral and political arguments, not legal ones. The “emergency exit” is based on moral and political grounds only, thus preserving the Council as the sole centre for authoritative decision-making on humanitarian intervention. It is important that one does not confound a unilateral attempt to justify politically and morally an act of intervention with legally relevant elements of state

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282 The ICISS Report, para. 6.37
practice: unilateral interventions are not part of *lex lata*, and efforts supporting unauthorised interventions are counterproductive as they blur one’s perception of the applicable law, creating hopes that cannot be fulfilled and leading to the growth of disaffection with international law.\footnote{Rytter, *Humanitarian Intervention without the Security Council*, 70 NJIL 2001, at pp 147-148}

The ICISS’ approach does put an emphasis on collective actions, emphasising the possibility of using regional arrangements, and the proposal of retroactive authorisation seeks to enable organisations to act in grave situations when initial authorisation is impossible. The ICISS has therefore not taken the path that has been suggested by some, namely that unauthorised intervention is legitimate, and should therefore be legal as long as it is collective, since multilateralism matters morally.\footnote{Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, EJIL (2001), Vol 12, No 3, at pp 465-466} I want to reiterate in this context the opinion of Buchanan. “Perhaps the current rule of intervention ought to be rejected, but it is very implausible to hold that adopting this new rule [a new rule empowering regional defence alliances to engage in intervention at their discretion] would be an improvement.”\footnote{Farer, *Humanitarian intervention before and after 9/11: legality and legitimacy*, in Holzgrefe & Keohane, *Humanitarian Intervention*, at pp 74-76}

The ICISS’ purpose to strengthen the Security Council’s work and not to find alternatives to the Council, as well as the fact that when the Council fails to act, the only alternatives are authorisation from the General Assembly or actions of regional arrangements seeking subsequent authorisation, shows in my opinion the Commission’s wish to strengthen the legitimacy of the UN in its quest for multilateralism.

I believe that the ICISS has taken the only feasible path that is available today, in order to push the international community forward. The ICISS does not accept unauthorised intervention. At the same time, the ICISS is trying to improve the current system by formulating principles for military intervention authorised by the UN. This in itself is a difficult task, as will be shown in section 3.6, because there is no certainty that one can reach consensus on the matter and that states will actually embrace criteria for military intervention, even if it is under UN authority. Therefore, if the ICISS had chosen to formulate principles for unauthorised intervention, the prospects of success would have been minimal, since it would have been an even more difficult task than trying to find consensus for interventions authorised by the UN.

\footnote{Buchanan, *Reforming the international law of humanitarian intervention*, in Holzgrefe & Keohane, *Humanitarian Intervention*, at p 167}
By keeping the authority within the UN and by trying to improve the current system, the ICISS proposal tries to minimise the risks of abuse that many lawyers have emphasised. Although the ICISS opens Pandora’s box by proposing that intervention for humanitarian purposes may for example be undertaken by regional arrangements by seeking subsequent authorisation from the Council, the ICISS proposal limits the use of Pandora’s box by keeping the authority within the UN and emphasising that any other interventions without authorisation from the Security Council and the General Assembly would be illegal. It must be kept in mind that although limitations like this proposal are seen as negative from a moral point of view from proponents of unauthorised intervention, the same limitations can help protect people against violence.289

We must not lose sight of what we are trying to achieve and which is the best way to do it. All the diverse opinions regarding intervention for humanitarian purposes are born from the wish to set up a mechanism so that the international community can answer more effectively to gross violations of human rights, such as the genocide in Rwanda. The ICISS’ proposal regarding authority may seem like a small steps towards this goal, but remembering that many states still value the non-intervention principle very high, the ICISS report is an important step towards improvement. If consensus regarding a norm of military intervention for humanitarian purposes can be reached within the UN system, and if consensus can be reached in order to make the UN system more effective, that is a first step. If the ICISS had proposed criteria for unauthorised intervention, then most certainly, this would have been met with hostility from many states. Such hostility would be counterproductive and it would lead us further away from our goal. The matter is delicate enough as it is.

3.4 The ICISS’ just cause threshold

I have in section 2.2.1 summarised the ICISS’ criteria for the just cause threshold, what it includes and excludes. I will here only comment on some aspects of this threshold, and I will not analyse each requisite, but concentrate on some issues that are of importance for the next sections.

The Commission does not quantify “large scale” loss of life or ethnic cleansing, because opinions may differ in marginal cases, but it is argued that most cases

will not generate major disagreement.\textsuperscript{290} It is hard to say at this stage if this may or may not be accurate. However, civil society representatives, who have been consulted regarding the ICISS Report, argue that wording such as “large scale” is considered vague and difficult to apply cleanly to real situations. Some of them had proposed that the threshold should be narrowed to a potential genocide as defined in the Genocide Convention, others felt that the scope must be broadened by applying a human rights framework.\textsuperscript{291}

I agree on the fact that “large scale” is a vague wording, this being open to interpretation, which may lead to different opinions and possible abuse. On the other hand, I acknowledge the fact that if attempts were made to quantify “large scale” loss of life, then one would disregard that the circumstances differ in different situations. Thus, no exact number can be given.\textsuperscript{292} If criteria are too specific, they may constrain desirable interventions in other urgent circumstances.\textsuperscript{293} Moreover, the ICISS states that the threshold includes actions defined by the framework of the Genocide Convention.\textsuperscript{294} It is important to observe that the Convention itself does not specify either the number or the percentage of a national, ethnic, racial, or religious group that must be killed.\textsuperscript{295}

I believe the ICISS is absolutely right in excluding racial discrimination, the overthrow of a democratic elected government, the rescuing of its own nationals, or the response to a terrorist attack from its threshold.\textsuperscript{296} If consensus will emerge on principles for military intervention for humanitarian purposes, it will only emerge for protection purposes in extraordinary and exceptional circumstances, thus trying to limit the use of Pandora’s box and minimise the risks for abuse. This is supported by the practice of the Security Council,\textsuperscript{297} which shows that the international community must be able to act when gross and systematic violations of human rights or international humanitarian law threaten the lives and dignity of a large proportion of the civilian populations within a state.\textsuperscript{298} Although the different proposals for criteria for military intervention differ

\textsuperscript{290} The ICISS’ Report, para 4.21
\textsuperscript{293} Stromseth, Rethinking humanitarian intervention: the case for incremental change, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 258-259
\textsuperscript{294} The ICISS’ report, para 4.20
\textsuperscript{295} See Article 2 of the Genocide Convention (1948); Bazyler, Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 Stanford Journal of International Law (1987), at p 600
\textsuperscript{296} ICISS’ report, paras 4.24-4.27
\textsuperscript{297} See session 3.1.2
\textsuperscript{298} DUPI, Humanitarian Intervention – Legal and Political Aspects, p 70
somewhat, they clearly show the wish to restrict criteria to the most exceptional circumstances. In the Hague Report for example, the threshold is *fundamental* human rights that are violated in a *large scale*, including for example rape – as did the ICISS – and crimes against humanity.\footnote{AIV & CAVV, *Humanitarian Intervention*, The Hague, at p 29; See also Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forceable Humanitarian Countermeasures in the World Community?*, 10 EJIL (1999), at p 27- he argues that intervention should be allowed when gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity. Again, it seems hard to quantify how many people should be involved.}

Since we are talking about exceptional situations, the question rises whether there are any large scale losses of life going on today, where a military intervention for human protection purposes should be undertaken/authorised. I believe that when taking a close look at the different conflicts in the world, there are few situations today that fall under the “just cause” threshold of the ICISS. Situations where I believe urgent help is needed from the international community may be situations like those in Sudan and North Korea, where thousands of people are reported starving and the respective governments are not redressing the situations. Of course, an intervention in North Korea would have great negative consequences, bearing in mind that the country is in possession of nuclear weapons. Such consequences would be taken into consideration according to the precautionary principles that will be examined in the next section.

If one would allow criteria for military intervention to be used when breaching all human rights, then every country in the world, including Sweden, would be a possible target for military intervention because of for example discrimination accusations. It would render chaos and the equilibrium of peace and security would definitely be in danger. It is therefore important to distinguish between what we might call the ordinary routine abuse of human rights that unfortunately occurs every day, and those extraordinary acts of killing and brutality such as crimes against humanity.\footnote{Wheeler, *Saving Strangers*, p 34}

Another important aspect is that the ICISS’ proposal includes military action as an anticipatory measure in response to clear evidence of likely large scale killing, in order to avoid situations where one has to wait until genocide happens before trying to stop it.\footnote{The ICISS report, para 4.21} This possibility of anticipatory measures, which is supported by other reports and writers,\footnote{AIV & CAVV, *Humanitarian Intervention*, The Hague, at p 29; Wheeler, *Saving Strangers*, p 34; Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 Stanford Journal of International Law (1987), at p 600} is from a moral point of view admirable, since it gives the possibility to act quickly and avert human suffering, instead of only being able to stop the atrocities that are
already happening. It is argued that in many cases, military intervention has come too late to protect civilians from their killers.\(^{303}\) Thus, “the intervening nation or nations need not wait for the killings to start if there is clear evidence of an impending massacre.”\(^{304}\) On the other hand, intervention for imminent threats may lead to abuse and consensus on this matter may be difficult to achieve. Bazyler gives the example of Hitler, who used the pretext of an imminent threat to ethnic Germans to invade both Czechoslovakia and Poland.\(^{305}\) In order to avert abuse, there is a need of fair and accurate evidence,\(^{306}\) but the question is who should decide what counts as “clear evidence”.

Lastly, I believe that it is accurate to apply the principles without making any distinction between abuses occurring wholly within state borders and those with wider repercussions.\(^{307}\) As showed in section 3.1.2, the Security Council has expanded the notion of a threat to international peace and security to include situations of civil war, civil strife and massive violations of human rights, even without international repercussions.

### 3.5 The ICISS’ precautionary principles

I will here only shortly comment on the four precautionary principles of the ICISS. As I mentioned before, the ICISS views prevention as the single most important dimension of the responsibility to protect.\(^{308}\) It is recognised that military coercion should only be used as a “last resort”, when other peaceful means have been exhausted, or when there are reasonable grounds for believing that prevention, if attempted, would not have succeeded and would result in irreparable harm, for example when killings occur so rapidly and on such a massive scale that no time exists to try alternative, peaceful methods.\(^{309}\) If politicians have doubts on whether they have explored all peaceful avenues that are likely to stop the violence, they are morally obliged to continue their efforts through non-

\(^{303}\) Wheeler, *Saving Strangers*, p 34
\(^{306}\) See The ICISS report, paras 4.28-4.31
\(^{307}\) The ICISS report, para 4.23; This is also supported by AIV & CAVV, *Humanitarian Intervention*, The Hague, at p 30
\(^{308}\) The ICISS report, Section 4 (A)
violence means, since the use of force can promote good as well as harmful consequences.\textsuperscript{310}

The criteria of the “right intention” means that the primary purpose of the intervention must be to halt or avert sufferings, since mixed motives are a fact of life.\textsuperscript{311} It is argued that other motives must be clearly subordiate to the humanitarian objective of the intervention,\textsuperscript{312} but ideally that the upholding of human rights and national interests should coincide, since the world is interdependent and it is in every country’s interest to contribute to the resolution of such problems.\textsuperscript{313}

If one would require purely humanitarian motives, thus condemning an intervention because there were also political, economic or social motives involved, then I believe unfortunately that too few, or no states would be prepared to act. As the ICISS emphasises, there are great budgetary costs and risks to personnel in such military actions.\textsuperscript{314} Since today’s reality does not envisage purely humanitarian motives, this may lead to abuse. On the other hand, by only allowing interventions mandated by the UN, one hopes that the ICISS’ criteria, although open for interpretation, will minimise abuse.

I agree with the Commission that a collective rather than singular intervention is a way to ensure the right intention,\textsuperscript{315} but I cannot say the same about that one should look at whether the intervention is supported by the victims, simply because this may not be possible. Also, taking into account whether the other countries in the region are supportive of the intervention\textsuperscript{316} may be positive since it must be assumed that these countries want to achieve what is best for the region, and avoid regional disturbance. This cannot on the other hand be taken as a general rule.

The requirement of “proportional means” is also recognised. The scale, duration and intensity of the planned intervention should be the minimum necessary to secure the humanitarian objective in question.\textsuperscript{317} Bazyler sees the intervention as a surgical operation; the intervenor enters the diseased organism, removes the disease, and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{310} Wheeler, Saving Strangers, p 35
\item \textsuperscript{312} AIV & CAVV, Humanitarian Intervention, The Hague, at p 30
\item \textsuperscript{313} The ICISS report, para 4.36; AIV & CAVV, Humanitarian Intervention, The Hague, at p 30
\item \textsuperscript{314} The ICISS report, para 4.35
\item \textsuperscript{315} The ICISS report, para 4.34; Independent International Commission on Kosovo, Kosovo Report, pp 194-195; Bazyler, Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 Stanford Journal of International Law (1987), at pp 602-604
\item \textsuperscript{316} The ICISS report, para 4.34
\end{itemize}
\end{footnotesize}
then withdraws. If the intervening forces remain after accomplishing the humanitarian objective, this indicates that the excuse of humanitarian intervention was a pretext for other nonhumanitarian objectives.\textsuperscript{318} Thus, the use of force must be discontinued as soon as the atrocities have been stopped.\textsuperscript{319}

Wheeler says that the criterion of proportionality requires that the destruction and loss of lives resulting from the intervention must be proportionate, and certainly not exceed the good that it is supposed to achieve. He emphasises the problems of determining what counts as a legitimate military target, since sometimes civilian death are unintended but foreseeable. Moreover, the politicians never know in advance if the intervention will produce a surplus of good over harm, or whether non-violent alternatives might have achieved the same result at less costs.\textsuperscript{320}

The dilemma is that the use of force must be firm enough to produce the desired effect, but also controlled enough in order to avoid destabilising conditions in the region, which can lead to a greater loss of life than that which led to the intervention.\textsuperscript{321} Again, the balance is delicate. I believe that the issue of proportionality may be controversial since it is open for interpretation and the outcome can always be criticised, either for using too little force and not saving enough lives, or for using too much force, leading to greater negative consequences.

The criteria “reasonable prospects”, which is open for interpretation, means that a military intervention stands a reasonable chance of success to halt or avert the atrocities, and that an action cannot be justified if it triggers a larger conflict.\textsuperscript{322} According to Stromseth, this criteria should include that the means used be reasonable and consistent with the law of armed conflict, and that the costs and risks of the intervention must be reasonable and acceptable in relation to the urgency of the situation.\textsuperscript{323} As it will be shown in chapter four, these reasonable prospects of stopping the atrocities should be complemented with efforts to achieve a durable peace, in accordance with the responsibility to rebuild. This would lead in total to attempts to address the underlying

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\textsuperscript{317} The ICISS report, para 4.39; AIV & CAVV, \textit{Humanitarian Intervention}, The Hague, at pp 30-31; For a more detailed discussion on whether violent means can ever serve humanitarian purposes, see Wheeler, \textit{Saving Strangers}, pp 35-36
\textsuperscript{319} Cassese, \textit{Ex initia ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?}, 10 EJIL (1999), at p 27
\textsuperscript{320} Wheeler, \textit{Saving Strangers}, pp 35-37
\textsuperscript{321} AIV & CAVV, \textit{Humanitarian Intervention}, The Hague, at p 31
\textsuperscript{322} The ICISS report, para 4.41
\textsuperscript{323} Stromseth, \textit{Rethinking humanitarian intervention: the case for incremental change}, in Holzgrefe & Keohane, \textit{Humanitarian Intervention}, at pp 268-269
\end{flushleft}
causes that produced the abuses. Moreover, Wheeler’s opinion as addressed above must be re-emphasised. Even if there are reasonable prospects for the intervention, politicians can never be sure of the outcome. The prospects may be reasonable from the beginning but the circumstances can change, thus affecting the positive prospects.

Although it seems obvious that there must be reasonable prospects if one should decide to intervene, otherwise there would be no point even trying, this criteria poses a practical limitation that is emphasised by the ICISS. An intervention against one of the permanent members or another major power would probably lead to a major conflict, thus precluding actions against such powerful states. Thakur argues that this is not a double standard but a prudential consequentialism: humanitarian goals would not be advanced by launching a military intervention against Russia in order to for example protect the people of Chechnya. The Commission takes the position that the reality that interventions cannot be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case.

The Commission recognises therefore that intervention can not always occur. This brings up two questions. Firstly, how can one talk about a responsibility, not a right to intervene, when one acknowledge at the same time that intervention is not possible in all cases, even if warranted? On the other hand, as I have pointed out on page 60, it may be discussed whether there are many situations today where an intervention is warranted. The issue of ‘right’ versus ‘responsibility/duty’ will be discussed under chapter four. Secondly, it shows the importance of political and economic power, and the question is whether such a criteria of “reasonable prospects” is in fact desirable, or if it will bring forward more hostility from smaller countries.

All the principles envisaged in this and the previous section shows that there are many political considerations involved in the asseessment on how and when an intervention should take place, and that the assessemnt is open for interpretation. The next section will analyse whether criteria such as those envisaged above are desirable or not.

3.6 Is a development of criteria for military intervention for humanitarian purposes desirable?

324 See also Wheeler, Saving Strangers, p 37
325 The ICISS report, para 4.42
327 The ICISS report, para 4.42
The ICISS stresses that if intervention for human protection purposes is to be accepted, including the possibility of military action, it is important to develop consistent, credible and enforceable standards to guide state and intergovernmental practice. The Commission’s Report regarding the responsibility to react is in fact setting up criteria for military intervention, by trying to establish a just cause threshold, precautionary principles and the right authority, thus establishing how and when to intervene. The question whether it is desirable to have such criteria is uncertain, and I will limit the discussion by simply elaborating the pros and contras for the establishment of such criteria.

As I mentioned in section 3.3.4, the Kosovo Commission, the Danish Report, the Hague Report, as well as different writers have suggested criteria for military intervention. Even if these applied to unauthorised intervention, most of the principles would apply to interventions mandated by the Security Council as well. This shows that apart from the ICISS, there is a widespread wish to develop criteria for military intervention for human protection purposes. It is argued that conventional wisdom calls for the elaboration of criteria by which the legitimacy of the UN humanitarian intervention may be judged, and that the academic community and NGOs must take the initiative since most states can be expected to show little interest in such an exercise. The benefits arising from developing criteria are said to be that a clear guide for determining whether interventions are humanitarian should minimise the risks for abuse, and that a clearly defined doctrine should deter rulers from abusing their subjects. An internationally agreed checklist can serve to inhibit selectivity and perceptions of selectivity.

Some argue that the development of criteria is not desirable since we are living in a time of rapid change. Malanczuk supports this view and argues the following, regarding unauthorised intervention:

“I see no need de lege ferenda to formulate such criteria for unilateral humanitarian intervention. Nor do I see a clear reason...to ask the General Assembly to adopt criteria in a resolution to guide collective humanitarian enforcement measures. The development should be better left to practice on a case by case basis.”

This argument is not only sustained regarding unauthorised intervention, but also for intervention for human protection purposes within the UN. Stromseth argues that

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328 The ICISS report, para 2.2
329 Stromseth, Rethinking humanitarian intervention: the case for incremental change, in Holzgrefe & Keohane, Humanitarian Intervention, at p 255

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it is problematic, premature and counterproductive to codify criteria for a right of humanitarian intervention, irrespective of whether the criteria govern Security Council action or non-authorised interventions.³³⁴ The historical record of humanitarian interventions is ambiguous, thus humility is required when efforts are made in advance to specify when states should use force. It would be easier to codify criteria if there was a solid foundation of consensus developed through a process of incremental change.³³⁵ It is argued that uncertainty of the legal status of humanitarian intervention is good for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making.³³⁶

Furthermore, Stromseth argues that codification does not necessarily halt abuse, but it can just as well encourage more frequent resource to the practice in less compelling situations than at present by creating an additional doctrinal basis for justifying the use of force.³³⁷ Many fear that any codification of the rules of intervention would relegitimise the use of force in international relations, this being a major step backwards since the international community and the UN during the 20th century have worked hard in order to moderate the use of force.³³⁸

It is argued that the criteria one establishes can be on one hand general and vague, thus limited in utility, and opportunistic states would use them to justify undesirable interventions. Any guidelines acceptable to the whole Security Council would likely to be general and vague, thus providing little concrete guidance. On the other hand, if they were too specific, they would constrain desirable interventions in other urgent circumstances.³³⁹ Of course, due to the ICISS approach to retain the authority within the UN, interventions by opportunistic states that do not fulfil the criteria would not get the Council’s authorisation and would thus be illegal. But when one looks at the criteria of the ICISS, it is clear that vagueness cannot be avoided and that there is room for interpretation in certain circumstances, for example when establishing serious and irreparable harm, right intention and reasonable prospects.

³³³ Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, p 31
The formalisation of a legal right can be counterproductive since states that otherwise might support humanitarian interventions in concrete cases (tacitly or otherwise) would actively oppose any formal adoption of such a doctrine. Nevertheless, the value of the efforts to identify criteria is that they evaluate and contribute to a greater international consensus on when intervention for humanitarian purposes is warranted. Such efforts contribute to a longer-term project of shaping political attitudes, public expectations and diplomatic possibilities and encouraging more effective protection of human rights.

Civil society representatives have been consulted regarding the ICISS Report. These representatives overwhelmingly held the view that the development of principles for military intervention is very important, but that the process should be a long-term goal and it must be allowed sufficient time to evolve. It was emphasised that the time does not appear ripe to move towards the development of principles for military intervention. The reason for this is said to be that the development of principles for military intervention remains controversial among both governments and NGOs and the ICISS Report is “too tidy”, in that it implies that there can be consensus on the application of the principles. It is easy to achieve agreement on paper about basic principles, but extremely difficult to reach consensus on their application, which will almost always be controversial and challenging, with governments, NGOs and individuals reaching a variety of conclusions and even holding contradictory perspectives themselves. The danger in moving too quickly lies in the compromises that can result; for example weak legislation that will be difficult to modify significantly, or the possibility of ending up with a document that does not even reflect the current state of evolution of the doctrine.

Another concern of the civil society representatives was that the ICISS’ principles could be “highjacked” and manipulated, in order to reinforce the interests of the world’s major powers. The representatives expressed concern that the ICISS’ agenda will

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339 Stromseth, Rethinking humanitarian intervention: the case for incremental change, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 258-259
340 Stromseth, Rethinking humanitarian intervention: the case for incremental change, in Holzgrefe & Keohane, Humanitarian Intervention, at p 260
341 Stromseth, Rethinking humanitarian intervention: the case for incremental change, in Holzgrefe & Keohane, Humanitarian Intervention, at pp 260-261, 266-267
342 An example of legal norms that have been developed successfully in a long-term are the development of guidelines for Internally Displaced Persons (IDPs) by Francis M. Deng; See The World Federalist Movement-Institute for Global Policy in New York, Civil Society Perspectives on the Responsibility to Protect – Final Report, pp 3-4, 23, available at www.wfm.org
be complicated by the current international political climate, including the war on terrorism, the recent war in Iraq, and the attempt to redefine “self-defence” to justify pre-emptive military measures.345

The question is what juridical status the criteria would have if developed. Are they potential legal norms or merely policy recommendations?346 The ICISS seems to view these criteria as emerging guiding principles. The Commission says that although there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary law on military intervention for human protection, the growing state practice, regional organisation practice as well as Security Council practice suggest an emerging guiding principle called “the responsibility to protect”.347 I believe the criteria envisaged by the Commission are at this stage guiding principles, thus only recommendations, but if state practice would follow these principles, they may during time develop into customary law or, if recognised by states they may become general principles of law.348 Thakur maintains that the main achievement of the ICISS is the establishment of the foundations for a new normative and operational consensus on the role of military intervention for humanitarian purposes.349

In conclusion, there are intertwined legal and political arguments against the development of criteria for military intervention. The major concerns are the uncertainty on how the principles will be used, if the inherent vagueness in the language can lead to potential abuse, if the time is right for the development of such principles and whether there will be consensus on the matter. I want to re-emphasise what the Commission pointed out, namely that without the political will, the debate will remain purely academic. The formulation of international consensus is not just a problem of drafting cogent criteria. It is an issue involving impartiality, political consensus building and establishing effective mechanisms, so that sound principles on paper can be transferred into good military practice and “missions accomplished” on the ground for the protection of ordinary people.350

347 The ICISS’ Report, para 2.24
348 See Article 38(1) of the ICJ Statute for the different sources of international law
4. The responsibility to protect

Kofi Annan has praised the report of the ICISS, saying that it represents the most comprehensive and carefully thought-out response on intervention that we have seen to date and that a central accomplishment of “The Responsibility to Protect” is its title – its restatement of the core issues at the heart of the debate of intervention. It suggests a constructive shift from debates about a “right to intervene” towards a “responsibility to protect”.351

I will in this chapter analyse the concept of the “responsibility to protect”, firstly by touching upon the reasons for this change of language, secondly by analysing the conclusion that sovereignty means responsibility and whether there is a duty to intervene in international law, thirdly by dealing with the consequences of the broad concept of “responsibility to protect” which includes the responsibility to prevent, to react and to rebuild, and fourthly by commenting on the way forward of the report.

I want to clearly emphasise that the analysis in this chapter is by no means a comprehensive one. It does not cover all the different aspects of the issues involved. It only represents some of my thoughts regarding the overall approach of “The Responsibility to Protect”.

4.1 Change of language

The ICISS sugests that the term “humanitarian” intervention should be replaced by “intervention” or “military intervention” for human protection purposes, because of the strong opposition expressed by humanitarian agencies, humanitarian organisations and humanitarian workers towards any militarization of the word "humanitarian", but also the suggestion from some political quarters that the word "humanitarian" tends to prejudge the question whether the intervention is in fact defensible.352 “Humanitarian intervention” is what humanitarian agencies as the ICRC and the UNHCR are doing.353

Kofi Annan agrees on the need of changing the language, saying that “of course military intervention may be undertaken for humanitarian motives”, but “let’s get

351 Annan, Press Release SG/SM/8125, Secretary-General addresses International Peace Academy Seminar on ‘The Responsibility to Protect’, p 1
352 The ICISS report, para. 1.39-1.40
right away from using the term ‘humanitarian’ to describe military operations.”

Even in the Hague report, it is emphasised that although the term “humanitarian intervention” is used in the political debate for the use of force with Security Council authorisation, the term “enforcement action for humanitarian purposes” is preferred.

But there are two other reasons for the change of language of the debate. Firstly, the ICISS wants to reconceptualise sovereignty as responsibility. Secondly, the formulation “the responsibility to protect” takes into account the prevention and follow-up assistance components of external action, thus being a broader concept than the term “humanitarian intervention”. These two reasons for the change of language will be analysed in the next two sections.

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4.2 Sovereignty as responsibility

4.2.1 The erosion of the concept of sovereignty

The ICISS argues that sovereignty must be re-characterised, from *sovereignty as control* to *sovereignty as responsibility*, with following significance: the state has the primary responsibility for protecting the safety and lives of its citizens; the national political authorities are responsible to the citizens internally and to the international community through the UN; the agents of the state are responsible for their actions, as well as their omissions.

The definition of sovereignty as responsibility is said to be “*that national governments are duty bound to ensure minimum standards of security and social welfare for their citizens and be accountable both to the national body politic and the international community*”. If a state fails the responsibility to protect, it cannot legitimately complain against external intervention. The international community is the ultimate guarantor of the universal standards that safeguard the rights of all human beings, thus having a corresponding responsibility to provide innocent victims of internal conflict and gross violations of human rights with essential protection and assistance. Sovereignty as responsibility is as much a national obligation as it is a global imperative.

The concept of sovereignty has a long history during which it has been given different meanings. Traditionally, going back to the Roman Empire, the emperor personified the law and he was above the law. After the war between Catholics and Protestants, the Treaty of Westphalia separated the powers of church and state. The nation-state inhereted the pedigree of sovereignty and a position above the law that has since been frozen in the structure of international relations. During time, the sovereignty of the sovereign became the sovereignty of the people, so called popular sovereignty based on human rights. It is today said that sovereignty has been eroded and has become more porous particularly relating to areas of human rights and now

356 The ICISS report, paras. 2.14-2.15
357 The ICISS report, para. 2.15
358 Deng, Kimaro, Lyons, Rothchild & Zartam, *Sovereignty as Responsibility*, p 211
359 Deng, Kimaro, Lyons, Rothchild & Zartam, *Sovereignty as Responsibility*, pp XIII, XVI,
362 Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 1990, at pp 867, 870
possibly humanitarian intervention,\textsuperscript{363} due to the amount of human rights instruments that have been created, as well as the possibilities of external scrutiny and the global interdependence of today.\textsuperscript{364}

The Nuremberg Trials and the mounting humanitarian and human rights movement after World War II represent a clear demarcation line for the erosion of sovereignty. Since then, the international response system, although not fully developed, is normatively grounded in the fundamental values of human dignity.\textsuperscript{365} Many principles involved have become universal and virtually all states agree that the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights provide an authoritative list of internationally recognised human rights.\textsuperscript{366} All the rights in these documents recognises the inherent dignity and equality of all human beings.\textsuperscript{367} The right to life,\textsuperscript{368} for example, is a very important right in relation to the subject of this thesis.

In accordance with Article 2(1) of the UN Charter, the world organisation is based on the principle of sovereign equality of all member states. The UN is not allowed to interfere in the affairs that are in the domestic jurisdiction of states, according to Article 2(7) of the UN Charter. As I mentioned before, the exception is enforcement measures under Chapter VII, but state sovereignty may be limited by customary and treaty obligations in international relations and law.

The question is if human rights are to be seen as falling exclusively in the domestic jurisdiction of states. It is argued that it cannot, since Article 1(2) of the UN Charter recognises the UN as a centre for harmonising the actions of states, elevating humanitarian problems as well as human rights, to the international sphere.\textsuperscript{369} Moreover, the concept of domestic jurisdiction is not fixed, but it changes with the evolution of international law.\textsuperscript{370} Since the world community has expanded international law to protect fundamental human rights and it has accepted responsibility for the protection of these rights by clearly taking a stand that severe violations cannot be tolerated, it is argued that

\textsuperscript{363} Statement of Rosalyn Higgins, in Ponzio, Theme Panel IV: The End of Sovereignty? Roundtable, ASIL Proceedings of the 88\textsuperscript{th} Annual Meeting, Washington D.C., April 6-9, 1994, pp 71-87, at pp 73-74
\textsuperscript{364} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, pp 2-8; Chopra & Weiss, Sovereignty Is No Longer Sacrosant, in Humanitarianism and War Project, p 6-7, available at http://hwproject.tufs.edu/publications/electronic/e_sinls.htm
\textsuperscript{365} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, p 4
\textsuperscript{366} For a comprehensive list of these rights see Table I in Donnelly, State Sovereignty and International Intervention: The Case of Human Rights, in Lyons & Mastanduno ed, Beyond Westphalia?, at p 117
\textsuperscript{367} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, p 4
\textsuperscript{368} Article 3 of the UDHR; Article 9 of the ICCPR
\textsuperscript{369} Background materials to the ICISS report, p 8
\textsuperscript{370} Aegean Sea Case, p 32
neither the total prohibition of intervention, nor the unlimited right of a government to stay in power can be maintained. International law on the protection of human rights has developed to such an extent that it now entails international solidarity and an international obligation to enforce the law. Thus, in order to be effective, the law must be enforced.\textsuperscript{371}

Three explanations are given for potential coercive action: the nature or extent of the violations of human rights may threaten the international peace and security and chapter VII enforcement action can be undertaken; the notion of intervention has changed so as to exclude non-coercive action; serious human rights violations have become over the years matters of internationally concern and no longer within the domestic jurisdiction of states.\textsuperscript{372}

I believe that fundamental human rights are matters of international concern. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Charter as well as other human rights instruments provide the normative code that should guide international actions in accordance with the concept of sovereignty as responsibility.\textsuperscript{373} The concept of shared responsibility, namely a complementary international responsibility when the state itself fails to fulfill its primary responsibility, comes from the mutual interests grounded in the fact that both causes and consequences of a conflict always affect others, specially at the regional level.\textsuperscript{374} However, countries like China, Sudan, Cuba are against the narrowing of the concept of sovereignty, arguing that the universality concept is a Western ploy to interfere in the internal affairs of other countries.\textsuperscript{375}

Although sovereignty has been eroded, it is premature to say that the international society has moved beyond Westphalia and has overcome the idea of state sovereignty. It is controversial to say that the primary purpose of the state is to protect the individuals’ interests, but the normative principles of governance should emphasise state protection for the individual. The state system endures, and as long as it endures, policies to help a population must aim at winning the cooperation of states.\textsuperscript{376}

\textsuperscript{371} Schermers, The Obligation to Intervene in the Domestic Affairs of States, in Delissen A & Tanja G Eds, Humanitarian Law of Armed Conflict: Challenges Ahead, at p 589
\textsuperscript{372} Rodley, Collective intervention to protect human rights and civilian populations: the legal framework, in Rodley ed, To Loose the Bands of Wickedness, at p 23
\textsuperscript{373} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, p XIII
\textsuperscript{374} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, p 215; DUPI, Humanitarian Intervention – Legal and Political Aspects, p 56
\textsuperscript{375} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, p 11; For a general view on how to persuade the developing world that a genuine world community is being formed, see Joffe, Sovereignty and Intervention – The Perspective of the Developing World, in Heiberg ed, Subduing Sovereignty – Sovereignty and The Right to Intervene, pp 62-95
\textsuperscript{376} Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, pp XVII, 5, 221-223

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In conclusion, the principle of sovereignty has been eroded over time due to the enormous work on humanitarian law and human rights, and there are moral and political arguments supporting the responsibility to protect, including the notion ‘sovereignty as responsibility’. The Commission states that changing the language of the debate does not change the substantive issues which have to be addressed, but I disagree. The ICISS talks about sovereignty as responsibility. The debate regarding humanitarian intervention was focused on whether there exists a ‘right’ of intervention, whilst the ICISS’ proposal raises the question whether there exists a ‘duty’ to intervene, and also a duty to prevent and to rebuild. These issues will be analysed in the next section.

4.2.2 Is there a duty to intervene?

The argument that there exists a moral ‘right’ to intervene for human protection purposes is well-supported, as has been shown in section 3.2.3.4. Some argue that there exists a moral ‘duty’ to intervene even through unilateral action, while others are of the opinion that a moral duty to intervene is a more compelling argument if the intervention is undertaken through the UN.

An equally important question is whether there exists a legal duty to intervene for human protection purposes in extreme cases. In chapter three, I came to the conclusion that the Security Council could undertake such military intervention under chapter VII of the UN Charter if the situation was a threat to the peace. The Council has therefore a ‘right’ to authorise intervention. Moreover, I came to the conclusion that military intervention for such purposes has not developed into a norm of customary international law, thus individual states do not have such a right to intervene and they cannot have a legal duty either.

It has been suggested that the UN has not only the right to intervene for human protection purposes, but also a legal duty to do so. Schermers argues that the international community bears responsibility for the protection of fundamental human

378 Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 297
379 Schermers, The Obligation to Intervene in the Domestic Affairs of States, in Delissen A & Tanja G Eds, Humanitarian Law of Armed Conflict: Challenges Ahead, at p 592; Rodley, Collective intervention to protect human rights and civilian populations: the legal framework, in Rodley ed, To Loose the Bands of Wickedness, at p 35
rights and that this international responsibility “entails a right, in extreme cases even a duty, to intervene when States severely infringe human rights.”

Murphy, on the other hand, argues that the notion of a “duty to intervene” by the UN, regional organisations, or states does not appear present in international law to date. The common factors for this duty to exist can be derived from national laws containing the duty for persons to act when another is endangered. These factors are: some form of immediate or imminent danger to life, a rescuer is near to and aware of the danger and the rescuer has the ability to act effectively at minimal risk. Murphy argues that on the international scene, this duty to intervene can arise either from these national laws as a general principle of international law, or such a duty might be seen as corollary to the obligation of states under customary international law to punish those states or individuals that commit “crimes against humanity” or grave breaches of the 1949 Geneva Conventions, including common Article 3 on internal conflicts.

To date, such a duty does not exist in international law. Firstly, even if some countries’ national laws envisage this duty, it cannot be said to be a general principle of law “recognised by civilised societies”, since the duty does not exist in all the principal legal systems of the world, such as among common-law states. Secondly, there is no consensus among states that the UN, regional organisations or states have such a legal duty under customary international law, thus there is no opinio juris. Thirdly, the practice of organisations and states do not reflect such a duty, specially in view of the long list of places where the international comunity has not forcibly intervened in recent years, despite the magnitude of the human tragedies.

It must be noted that although no state shall recognise as lawful a situation brought about by a violation of a jus cogens norm, for example a situation where genocide is occurring, this does not mean that a state can undertake military intervention against the state where the genocide is occurring. The obligation not to recognise the

380 Schermers, The Obligation to Intervene in the Domestic Affairs of States, in Delissen A & Tanja G Eds, Humanitarian Law of Armed Conflict: Challenges Ahead, at p 592
381 Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 295
382 Feldbrugge F, Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue, 14 Am. J. Comp. L. 630 (1965-66) - See the Appendix for different European Countries’ criminal code provisions, such as the French Penal Code.
383 Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 295
384 Article 38(1) of the ICJ Statute
385 Murphy, Humanitarian Intervention – The United Nations in an Evolving World Order, p 296
386 Article 41(2) of the ILC Articles on State Responsibility, in GA Resolution on the Responsibility of States for internationally wrongful acts
situation as lawful applies to all states and merely means that other states shall not recognise or sustain the unlawful situation arising from the breach.\footnote{Crawford, The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries, p 251, para 9}

It is also argued that military intervention for human protection purposes cannot be a duty, since that would terminate the primary obligation of states’ to protect their own citizens. This is an operational dilemma, since intervening forces suffer casualties.\footnote{Jackson, International Community beyond the Cold War, in Lyons & Mastanduno ed, Beyond Westphalia?, at p 75} In my opinion, this argument is not entirely successfull. If some human rights are seen as universal and as concerning the whole international community, then it can be argued that states have equal responsibility for the lives of their citizens, as they have for the lives of citizens in other parts of the international community when for example genocide is occuring.

The ICISS seems to acknowledge the fact that there is no such legal duty in international law, since the Commission states that there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary law on military intervention for human protection, but that growing state practice and regional organisation practice as well as Security Council precedent suggest an emerging guiding principle termed “the responsibility to protect”.\footnote{The ICISS report, para. 2.24} However, a “duty to intervene” may emerge in international law over time, since both national laws and international law develop constantly. This means that the ICISS aproach is morally defensible, and that the report, if introduced properly, may in time make the international community more prepared to accept the notion of the “responsibility to protect”, and to act accordingly, leading to a possible emergence of a norm of customary international law. The main challenges will be to mobilise the political will and make available the necessary resources, but the duty to intervene may be impossible to accomplish in all necessary situations.

Nevertheless, the ICISS seems more eager to introduce the concept of “the responsibility to protect” as an emerging guiding principle. It is argued that although the obligation of the state to preserve life-sustaining standards for its citizens must be recognised as a necessary condition of sovereignty, this normative principle is not yet fully or consistently recognised in practice, but it is becoming increasingly recognised as the centerpiece of sovereignty. Therefore, the formulation of guiding principles may be as important as the promulagation of legally binding standards.\footnote{Deng, Kimaro, Lyons, Rothchild & Zartam, Sovereignty as Responsibility, pp XVIII, 28}
I wish to draw a parallel to the remarkable work of Francis M. Deng, with his Guiding Principles on Internal Displacement. These have been introduced as guiding principles and a great deal of work has been and is being done to move towards the transformation of the principles into norms of customary international law. Fortunately, more and more states are now applying the principles. As Dr. Deng said himself, a new concept must be introduced at the right time and cautiously, in order for states to accept it and start acting upon it. He emphasised that if one introduces a legal duty to protect, without giving it time to be acknowledged and accepted, it would generate fear if states are not prepared to fullfill that duty to protect and it would therefore be counterproductive.

4.3 The responsibility to prevent, to react and to rebuilt

The ICISS must be admired for the work it has done and the fact that the concept “the responsibility to protect” includes not only the responsibility to react, but also the responsibility to prevent and to rebuild. At the same time, this approach, being a broad one and envisaging a great deal of responsibility – as it should – on the international community, may have some difficulties to be fully embraced by states.

I agree on the fact that if this concept is to be introduced in international relations and international law, simply to forcibly intervene is not enough. I also agree on the fact that the responsibility to prevent must be the single most important dimension of the responsibility to protect - prevention options should always be exhausted before intervention is contemplated. This is in fact in line with the UN and the international community’s work to become more prevention oriented and to discover the potential threats to the peace before they actually happen. Unfortunately, although prevention is repeatedly endorsed in international fora, national-security documents and academic analyses, in practice conflict prevention has remained underdeveloped, undervalued, ephemeral and largely elusive. There is thus still a great gap between rhetorical support and tangible commitments. The ICISS report re-emphasises this great responsibility of

391 For more information about his work see for ex. Cohen & Deng, Masses in flight – the global crisis of internal displacement; Cohen & Deng, The forsaken people – case studies of the internally displaced
392 Deng, Seminar at the Swedish Ministry for Foreign Affairs, 18th June 2003
393 See Synopsis at p. XI of the ICISS report, Section 4 (A)
394 See for ex Carnegie Commission on Preventing Deadly Conflict, Preventing Deadly Conflict, 1997 – for the responsibility of the UN see pp 36ff
395 Background materials to the ICISS report, pp 27-28
the international community, but it cannot in itself change the gap between rhetorics and actual commitments – again this is depending upon the political will of the states.

I also agree on the importance of the responsibility to rebuild, in that military intervention may be fruitless if nothing is done to redress the situation, in order to prevent that the same human rights violations that led to the military intervention in the first place will start again as soon as the military forces are redrawing. A case where the realisation that international response requires substantially more than the use of force is Somalia, where the UN did not participate in nation-building, but there was hardly a better case for UN trusteeship than Somalia, since the state ceased to exist in everything but name.\textsuperscript{396} The fact that reconstruction is necessary is emphasised by the Kosovo Commission:

\textit{“After the use of force has achieved its objectives, there should be energetic implementation of the humanitarian mission by a sufficient commitment of resources to sustain the population in the target society and to ensure speedy and humane reconstruction of that society in order for the whole population to return to normality.”}\textsuperscript{397}

This shows, again, the importance of political will and commitment, since a responsibility to rebuild means great costs for the intervenors, which in turn may lead to cautiousness from the part of the intervenors when deciding whether or not to try to get authorisation from the Security Council to intervene.

\textit{Keohane} also argues that sustained involvement after intervention is necessary in order for the intervention to be effective. Economic and political reconstruction is essential if the purposes of the military intervention are to be achieved, and therefore the decisions before the intervention should depend to some extent on prospects for institution-building after the intervention. Keohane refers to an institution-building that leads to a non-abusive, self-sustained structure of political authority, so that domestic sovereignty can be restored in the target state.\textsuperscript{398}

Also \textit{Ignatieff} argues for more vigorous and sustained intervention and he is in favour of the ICISS’s approach "the responsibility to protect", which also implies a responsibility to prevent and a responsibility to follow through. Ignatieff argues that action lacks legitimacy unless every effort has been made to avert the catastrophe; once action is undertaken, its "\textit{legitimacy is depending on staying the course until the situation is on the mend}".\textsuperscript{399} Ignatieff is of the opinion that the responsibility to protect provides a rationale

\textsuperscript{396} Background materials to the ICISS report, pp 94-97, 199-200
\textsuperscript{397} Independent International Commission on Kosovo, \textit{Kosovo Report}, p 195, para 11
\textsuperscript{399} Ignatieff, \textit{State failure and nation-building}, in Holzgrefe & Keohane, \textit{Humanitarian Intervention}, at p 320
for constructive engagement by rich countries through an intervention continuum that begins with prevention and ends with sustained follow-up.\textsuperscript{400}

Ignatieff also argues that it is important to force responsibility for security and co-existence back onto local elites, but he emphasises the great difficulties therein. The most successful transitional administrations are the ones that try to do themselves the job, but this is not always possible. The bitterness and hate in places like Kosovo and Bosnia is so intense that international administration has to remain in place to protect minorities of vengeance from the victorious victimised majority. This usually takes longer time than most modern exit strategies envisage. It takes time to create responsible political dialogues, even more time to create shared institutions of police and justice, and the longest time to create social trust that enables economic development and community co-existence. Even if nation-building takes time, "its ultimate purpose is to create the state order that is the precondition for any defensible system of human rights and to create the stability that turns bad neighbourhoods into good ones."\textsuperscript{401}

4.4 The way forward of the report

I agree with all the moral and political arguments in the previous section about the importance of the concept of “the responsibility to protect” to be composed of the responsibility to prevent, to react and to rebuilt. However, I must emphasise, from a legal point of view, the great sensibility and great difficulties of the issues involved.

The time-needing experience of intervention follow-up, which is part of the ICISS’s approach, is the very one that might deter states from intervening. The longer the time the intervention and the rebuilding of the target state takes, the higher the costs for the intervention, in terms both of casualties and economic costs. This fear may therefore deter states from embracing the concept of “responsibility to protect”, or even if they embrace it they may not want to admit that they are acting upon it, thus making it hard for the concept of the responsibility to protect to someday move from being a guiding principle to become part of customary international law.

The ICISS seems to be aware of this fear and of the sensitivity of the issues, since the Commission recognised that the concept of the responsibility to protect is an emerging guiding principle, and not customary international law. The Commission states

\textsuperscript{400} Ignatieff, \textit{State failure and nation-building}, in Holzgrefe & Keohane, Humanitarian Intervention, at p 321
clearly that its objective is to generate a practical and concrete political impact through its report, by making certain recommendations. The General Assembly should adopt a draft declaratory resolution embodying the basic principles of the responsibility to protect. The Security Council should consider and seek to reach agreement on a set of guidelines to govern their responses to claims for military intervention for human protection purposes, and the permanent members should consider and seek to reach agreement not to apply their veto power, in matters in which their vital state interests are not involved. It is too early to tell exactly how successful this report will be in achieving its goals. However, the ICISS has been the subject of discussions at the international level. Canada made an attempt in the fall of 2002 to introduce to the UN General Assembly a procedural resolution allowing for the findings of the report of the ICISS to be discussed among the UN member states. The language of the draft resolution was vague, merely saying that the General Assembly invites governments, regional organisations and relevant civil society actors to consider the contribution made by the ICISS report, and it requested the Secretary-General to facilitate a dialogue within the UN system and with interested member states to discuss the report. Sweden strongly supported the Canadian initiative and is actively working so that the UN-system is observing the ICISS report. Unfortunately, the draft resolution failed due to massive resistance from countries like India, Cuba, Egypt, Sudan, China and Russia, and Canada decided to redraw its draft resolution. The Canadian Government, however, is continuing its efforts to promote the concept of the responsibility to protect through conferences and seminars. The Commission also presented and discussed the report with the UN Security Council at an informal retreat. Canada was initially preparing for a more substantive resolution in this year’s General Assembly sessions, but such an attempt has not and will not be made. A substantive resolution would definitely have been even harder to introduce than the

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401 Ignatieff, State failure and nation-building, in Holzgrefe & Keohane, Humanitarian Intervention, at p 321
402 The ICISS report, para. 8.28
403 The ICISS report, para. 8.29
404 The Responsibility to Protect the Vulnerable: The Response of the Member States and the UN System, Draft Resolution (Item 44), Canada, 11 November 2002
405 GF 57: Resolutionsförslag om “Responsibility to Protect”, Telefax from Schori 2002-11-12, Swedish Ministry for Foreign Affairs, dnr 2186, at pp 1-2; The international community’s responsibility to protect, promemoria by Blomberg, the Division for Global Security, Swedish Ministry for Foreign Affairs, 2003-02-25, p 1
406 The international community’s responsibility to protect, promemoria by Blomberg, the Division for Global Security, Swedish Ministry for Foreign Affairs, 2003-02-25, p 1
407 The international community’s responsibility to protect, promemoria by Blomberg, the Division for Global Security, Swedish Ministry for Foreign Affairs, 2003-02-25, pp 1-2
procedural resolution that met massive resistance in the fall of 2002. To change the emphasis from ‘sovereignty as control’ to ‘sovereignty as responsibility’ is in the short run sensible for political reasons. Maybe the time is not right to introduce such a resolution – yet!

5. Summary and conclusion

In my opinion, the ICISS must be commended for its excellent work with the report “The Responsibility to Protect”, in trying to achieve consensus on these delicate matters regarding intervention for human protection purposes.

As it has been shown in chapter three, there is no rule of customary international law allowing states to unilaterally intervene in such extreme situations without the authorisation from the Security Council. The Council on the other hand can authorise states to intervene under chapter VII of the UN Charter, if the situation can be regarded as a “threat to the peace”. It has been argued in this thesis that the Council’s practice has led to interventions for human protection purposes even when the conflict has been entirely internal. The fact that there is no rule of customary international law supporting unilateral/unauthorised intervention and since the opinions diverge greatly on whether such a right should exist, I commend the ICISS’ more “limited” approach to confine the right to undertake military intervention only in those cases when the UN has authorised the actions. By limiting the right authority to the UN, the ICISS is trying to strengthen the legitimacy of the UN in its quest for multilateralism.

When examining the different alternatives for the right authority and the wish to improve the ability of the UN to authorise interventions, I have envisaged some difficulties with the ICISS’ approach, both from a political and a legal view. The recommendation that the permanent members of the Security Council should agree on a “code-of-conduct” so that they do not apply their veto power in matters in which their vital state interests are not involved is of course ideal, but it is questionable if the permanent five are likely to tie their hands in advance in such a way, and it is also uncertain what impact the limitation of the right of veto would have on the Council’s effectiveness.

The proposal that the General Assembly should act under the “Uniting for Peace” procedure when the Security Council fails to act is posing some legal problems.

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The legal status of the capacity of the General Assembly to do more than authorising peacekeeping operations is questionable and it is argued that the Uniting for Peace Resolution is no legal basis for the authorisation of military intervention for human protection purposes. The resolution only gives the Assembly the competence to recommend military action in the case of a “breach to the peace” or an “act of aggression”, and not in case of a “threat to the peace”. Furthermore, the Assembly is authorised to make recommendations, not decisions, regarding the maintenance of peace and security.

The recommendation that regional or sub-regional organisations should intervene when the Security Council fails to act, subject to subsequent authorisation from the Council, is an alternative. A rule of *ex post facto* authorisation can emerge, however it needs more Security Council practice, since the cases of for example ECOWAS in Liberia and Sierra Leone are not enough for such a practice to emerge, and some are also questioning their validity as clear cases of retrospective authorisation. It is also argued that an *ex post facto* authorisation must be explicit in order to avoid abuse, but that such an authorisation deprives the Security Council from retaining overall authority and control at all times. Therefore, such an intervention cannot be seen as a delegation of the Security Council of its chapter VII powers, but it is in fact an illegal intervention that becomes legal by the retrospective authorisation.

The ICISS’ just cause threshold and its precautionary principles are of course of vital importance and they are sustained by other writers and previous reports. The main problem is that they must be somewhat vague in order to be able to be applied in different circumstances, which gives room for interpretation and possible abuse. This is one of the reasons for the opposition against a development of criteria for military intervention for human protection purposes. It is also argued that the development of criteria is problematic, premature and counterproductive, and that there is a fear that any codification of intervention would re legitimise the use of force in international relations. While some argue that the development should be left to a case-by-case basis, others sustain the importance of the development of clear criteria in order to minimise abuse, to inhibit selectivity and to deter rulers from abusing their subjects.

When looking at the broader concept of the responsibility to protect, it is obvious that the change of language is a way of trying to change the attitudes of the international community, in order to focus more on the rights of the individuals and on the states’ responsibility to protect their own citizens. It is acknowledged that the notion of sovereignty has been eroded due to the immense work in the humanitarian law and human rights fields, but there are still many countries who are against the narrowing of the notion
of sovereignty, since they view sovereignty as their only defence against rich and powerful states. At the same time, it is emphasised that the responsibility to protect represents in fact a duty/an obligation to protect. Although from a moral point of view, there is a duty to protect and to intervene, it is clear that such a legal duty of the UN, regional organisations, or states does not appear present in international law to date.

The fact that the responsibility to protect is composed not only of the responsibility to react, but also the responsibility to prevent and to rebuild is, I believe, the right approach. It is a matter of course that prevention is the most important stage and that hopefully there will be a time when we can stop at the prevention stage, without the need for military intervention. But as the world is today, military intervention is a fact of life, and by including the responsibility to rebuild, the ICISS is taking a stand in what it views as necessary in order for the intervention to be effective. It is argued that economic and political reconstruction is essential if the purposes of the military intervention are to be achieved, but at the same time I have emphasised that this extremely desirable approach of the ICISS may deter states from intervening because of the great costs involved.

The report touches upon sensitive ground and has been met with hostility when Canada tried to introduce it in the General Assembly. I do not know the exact reasons that made several countries to protest against the draft resolution, but I believe that this is only the beginning of a long process. The Canadian government as well as others who support the core purpose of the “Responsibility to Protect” report have a lot of work to do in order to reach consensus on these issues.
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