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"THE RESPONSIBILITY TO PROTECT"
A USEFUL CONCEPTUAL FRAMEWORK FOR
HUMANITARIAN INTERVENTION?

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ABSTRACT

Rwanda, Kosovo, East Timor, Sudan – the list of places where humanitarian crises broke out in the last decades is long. The pictures of genocide, mass starvation, murder, rape and other forms of human suffering accompanying those crises have become firmly fixed in our memories. The difficult question that inevitable arose was if and how the international community should react to such internal state conflicts. Heated debates were fought under the catchword 'humanitarian intervention', leading to the unfortunate result that the international community sometimes reacted too late, as in Rwanda, and sometimes with questionable authorization, as in Kosovo.

To solve the dilemma, the Canadian government set up the International Commission on Intervention and State Sovereignty (ICISS). The ICISS developed a new legal framework - the 'Responsibility to Protect' – which is at the centre of this paper. By applying the novel concept to past humanitarian crisis the strengths and weaknesses of the Responsibility to Protect are identified. The paper concludes that despite its shortcomings, the ICISS's framework is an outstanding contribution in the field of international human rights politics. Its success, however, largely depends on a change in political attitude.

WORD LENGTH

The text of this paper (excluding footnotes, abstract, table of contents and bibliography) comprises 13,781 words.

I INTRODUCTION

In the post-September 11 world, the 'war on terror' and the threat against which it is directed dominate the international public policy agenda. The debates of the 1990's, however, have been concerned with different global security issues. Not the combat of Al Qaeda, the danger of weapons of mass destruction and homeland security have been the urgent problems of the last decade, but the question if and how the international community should react to internal state conflicts, characterized by murder, rape, mass starvation and other human suffering. Under the catchword 'right to humanitarian intervention', national governments, international organizations and legal scholars have controversially discussed whether it can ever be legitimate for the outside world to intervene in the internal affairs of a sovereign country for the purpose of protecting people at risk, in particular if it is appropriate to take coercive military action, under what conditions intervention should be exercised, and under whose authority.[1]

The cases around which the debate centred – both where intervention happened and where it has failed to happen - have become firmly fixed in our memory.[2] While Rwanda in 1994 stands for the shameful and devastating neglect of the international community in the face of genocide, the NATO-intervention in Kosovo in 1999 "highlights the deficiencies of international legal mechanisms and raises the question of the right of states to intervene for humanitarian purposes without the authorization of the UN Security Council"[3]. The inconsistent response to humanitarian dilemmas, such as intervention in East Timor in 1999 but inaction in other desperate places like Chechnya, clearly shows that the international community does not treat all instances of humanitarian crisis similarly. The selectivity with which states intervene in some cases of brutal violation of human rights, but stand by and watch in others, reveals that humanitarian considerations are not the only factors taken into account when deciding whether or not to take up arms. The different conditions under which intervention takes place also prove that interventions for

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[1] Speech Gareth Evans "The Responsibility to Protect: Rethinking Humanitarian Intervention" to the American Society of International Law, 98th Annual Meeting, Panel on "Rethinking Collective Action", Washington DC, 1 April 2004, International Crisis Group <http://www.icg.org> (last accessed 22 December 2004).

[2] Evans, above n 1.

[3] Penelope C Simons "Humanitarian Intervention: A Review of Literature", Project Ploughshares <http://www.ploughshares.ca> (last accessed 22 December 2004).

humanitarian purposes are decided on a case-by-case basis and that "the rules of the game" are still unclear.[4] The international community lacks a consensus on humanitarian intervention.

Deeply concerned by this situation, United Nations (UN) Secretary General Kofi Annan in 1999, and again in 2000, made compelling pleas to the international community to find, once and for all, universal rules on how to approach the issue of humanitarian interventions, to "forge unity" around the basic questions and process involved.[5] He stated:

> The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority. [...] To avoid repeating such tragedies in the next century, I believe it is essential that the international community reach consensus – not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom.[6]

> If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every percept of our common humanity?[7]

It was this appeal of the Secretary General that prompted the Government of Canada to set up the International Commission on Intervention and State Sovereignty (ICISS) in September 2000.[8] The challenging task of the ICISS was to compose a comprehensive report on the issues raised by Kofi Annan and to come up with a new

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[4] e.g. in East Timor intervention only came with the assent of the host power Indonesia while in Kosovo intervention was undertaken without the consent of the host government Serbia.
[5] *The Responsibility to protect - Report of the International Commission on Intervention and State Sovereignty (ICISS)* (International Development Research Centre, Ottawa/Canada, 2001) VII, hereafter cited as "Report, para".
[6] "Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict", UNSC Report 957 (8 September 1999).
[7] Millennium Report of the Secretary General to the General Assembly "We the Peoples: The Role of the United Nations in the 21st Century", UNGA Report 54 (2000).
[8] Not only Canada set up a commission on the subject of Humanitarian Intervention after Kosovo. The governments of Denmark and the Netherlands commissioned studies (*Humanitarian Intervention: Legal and Political Aspects*, Danish Institute of International Affairs, Copenhagen/Denmark, 1999; *Humanitarian Intervention,* Advisory Committee on Issues of Public International Law and Advisory Council on International Affairs, The Hague/NL, 2000). There has also been published a report of an independent commission (*The Report of the Independent International Commission on Kosovo*, Oxford University Press, Oxford/UK, 2000). This research paper, however, only looks at the ICISS-Report.

plan on how to reconcile state sovereignty with the need to respond to severe violations of human rights and thereby to resolve the long-standing dilemma of humanitarian intervention. Entitled "The Responsibility to Protect", the result of the Commission's work was published in December 2001.[9] The report of the ICISS will be the centre of this research paper.

Part II of this paper gives an overview of the problematic nature of humanitarian interventions and the major legal, moral, political and practical concerns it raises. Part III then presents the ideas of the ICISS as a new conceptual framework for humanitarian interventions. This is followed with an application of the ICISS' principles to past crisis in part IV of the paper in order to assess the capability of the concept to solve some of the long standing dilemmas that have surrounded the humanitarian intervention debate in the past. The analysis focuses on three specific cases, Rwanda in 1994, Kosovo in 1999, and Iraq in 2003. Part V presents a critical in-depth analysis of the Commission's work outlining the strengths and weaknesses of the ICISS concept that have not been identified in Part IV. Chapter VI describes the reactions of the UN and states to the 'responsibility to protect'- idea and explores the question whether it is likely that the international community will agree on the ICISS guidelines. It further examines the impact of September 11 and the 'war on terror' on the future of humanitarian interventions in general and the ICISS concept in particular. The paper concludes that despite its shortcomings "The Responsibility to Protect" is an outstanding contribution in the field of international human rights politics. The success of the ICISS framework, however, depends on a change in political attitude.

II   THE HUMANITARIAN INTERVENTION DEBATE

Pictures and news of the misery of persecuted ethnic groups, streams of refugees, and genocide, again and again evoke the call for intervention. When parts of a population are at the mercy of a despot or a hostile group, it goes against the grain of democratic states that do not want to risk being complicit by turning a blind

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[9] The ICISS not only published the report, but also a supplementary volume containing background information, research essays and a comprehensive bibliography of the topic: *The Responsibility to protect – Research, Bibliography, Background – Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa/Canada, 2001) hereafter cited as Supplementary Volume, p .

eye to the human suffering. Thus, the international community has responded to at least some of the humanitarian crises of the last decade with military intervention in sovereign states[10] each accompanied and followed by heated debate. These debates reached a climax in 1999, when NATO made the unprecedented move of engaging in a 78-day air war in Kosovo against the government of Yugoslavia on account of the atrocities perpetrated against Kosovo-Albanians without a UN Security Council (SC) resolution authorizing the use of force.[11]

At the heart of the controversy over humanitarian interventions lies the tension between the principle of state sovereignty, a defining pillar of the UN system and international law[12], and the desire to ensure respect for fundamental human rights. It is against this background that humanitarian interventions evoke a range of passionate and often contradictory views, both with regard to legal, moral, political and practical issues. After defining the term 'humanitarian intervention' for the purpose of this research paper, this part of the essay seeks to give an overview of the different positions on these matters.

A   Defining 'Humanitarian Intervention'

For the purpose of the subsequent discussion 'humanitarian intervention' is

> the use of military force, across state borders, to prevent or alleviate egregious and widespread human rights abuses, without the consent – and against the wishes – of the state in which human rights abuses are taking place.[13]

In defining the term in this way, the discussion is explicitly limited to military interventions as the most intrusive and therefore the most controversial form of humanitarian intervention.[14]

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[10] The 1991-intervention in Northern Iraq by Allied Forces, and the interventions in Somalia in 1992, Rwanda in 1994 and Sierra Leone in 1997, were all justified on humanitarian grounds.
[11] Kwek Ju-Hon "Sovereign Rights and International Obligations: The Future of Humanitarian Intervention after Kosovo" (2001) 27(2) Journal of the Singapore Armed Forces, The Mission of the Singapore Armed Forces <http://www.mindef.gov.sg> (last accessed 22 December 2004).
[12] Jennifer N Welsh "From right to responsibility: Humanitarian Intervention and international society" (2002) 8(4) Global Governance 503, 503.
[13] Edward Newman "Humanitarian Intervention, Legality and Legitimacy" (2002) 6(4) The International Journal of Human Rights 102, 103.
[14] Ju-Hon, above n 11.

B   *The Legal Debate*

The law on the use of force is one of the most controversial areas of international law.[15] The UN-Charter and it seemingly conflicting provisions are the starting point for any legal discussion of humanitarian intervention.

Article 2(4) of the Charter constitutes the basic prohibition on the use of force by states.[16] It provides that:

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

Article 2(7) further strengthens the principle of state sovereignty[17] by stating that the UN is not legally permitted to interfere in affairs "which are essentially within the domestic jurisdiction of any state".

Articles 39 and 42 are concerned with threats to international peace. They give the UNSC the power to determine the existence of any such threat and to "decide which measures shall be taken [...] to maintain or restore international peace and security". This includes the ability to authorize an armed intervention.

Based on these Articles of the UN-Charter, the legality of humanitarian intervention, with or without UNSC sanction, is highly disputed.[18]

The anti-interventionists contend that Article 2(4) unambiguously prohibits the use of force by member states except in self-defence[19]. An intervention by the UN itself is, with certain exceptions, said to be precluded by Article 2(7). It is claimed that no article of the Charter specifically mentions or even provides an exception for humanitarian intervention and that in fact, international legal

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[15] Christine Gray "The Use of Force and the International Legal Order" in Malcolm D Evans (ed) *International Law* (5ed, Oxford University Press, Oxford/UK, 2003) 589, 589.
[16] Gray, above n 15, 591.
[17] David Vesel "The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World" (2003) 18 BYO J. Pub. L. 1, 9.
[18] Vesel, above n 17, 10.
[19] see United Nations Charter, article 51.

instruments subsequent to the Charter have reinforced the strict principle of non-intervention.[20] The 1970 General Assembly *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter*[21] proclaimed "the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter." Furthermore, the judgement of the International Court of Justice in *Nicaragua v United States*[22] is relied on, in which the Court stated that "the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference". The anti-interventionists thus conclude that international law does not provide a vehicle for either UN authorized, or unauthorized humanitarian interventions, as the sovereignty of the state must be respected to the utmost.[23]

Those who support humanitarian intervention submit that Article 2(7) of the Charter has "never been interpreted by the General Assembly and the Security Council as preventing action by the UN in serious cases of human rights violation"[24]. To legitimate UN interventions, they choose an expansive interpretation of Articles 39 and 42 UN Charter.[25] By giving the SC jurisdiction over any "threat to *the* peace", rather than over any threat to *international* peace, the provisions would permit intervention to end human rights violations no matter if the conflict is inter- or intra-state.[26] Thus, UN-sanctioned humanitarian interventions are said to be lawful exceptions to the Charter's general prohibition of forcible self-help in international relations.[27] Others argue that humanitarian interventions constitute an acceptable form of interference within the scope of Article 2(7), as the violation of rights protected by the UN-Charter does not fall "within the domestic jurisdiction of any

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[20] T Modibo Ocran "The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping" (2002) 25 B.C. Int'l & Comp. L. Rev. 1, 15.

[21] UNGA Resolution 2625 (XXV) (24 October 1970).

[22] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, 106.

[23] Jennifer L Czernecki "The United Nations' Paradox: The Battle between Humanitarian Intervention and State Sovereignty" (2003) 41 Duq. L. Rev. 391, 396.

[24] Ocran, above n 20, 19 cites the statement of Rossides, the representative of Cyprus in the discussions of the 6th Committee of the UN General Assembly in 1963 who said: "Article 2 paragraph 7 of the Charter has repeatedly been interpreted by the General Assembly as allowing the United Nations to intervene in the internal affairs of a state in case of a flagrant violation of human rights or the prohibitions of the Charter." (A/[6]/[SR806]).

[25] J L Holzgrefe "The humanitarian intervention debate" in J L Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention – Ethical, legal, and political dilemmas* (Cambridge University Press, Cambridge/UK, 2003) 15, 40 and 41.

[26] Holzgrefe, above n 25, 40 and 41.

[27] Holzgrefe, above n 25, 43.

state".[28] The contention that the UNSC is empowered to authorize humanitarian interventions is supported by the practice of the Council itself, which used its right under Articles 39 and 42 to sanction the UN interventions in Somalia, Rwanda, and Haiti.[29]

The interventionists further argue that Article 2(4) does not contain a general and comprehensive prohibition on the use of force by member states, but that it merely regulates conditions under which force is prohibited.[30] As humanitarian interventions, in principle, are neither directed against "territorial integrity nor political independence" of a state, Article 2(4) does not forbid them.[31] This reasoning is rejected by many international lawyers[32], firstly on the ground that with the wording of Article 2(4) the drafters of the Charter clearly intended to reinforce, rather than restrict the ban on the use of force in international relations[33] and secondly on the ground that an armed intervention necessarily interferes in domestic politics.[34] To reconcile humanitarian intervention with the UN-Charter interventionists also argue that such interventions would not be "inconsistent with the Purposes of the United Nations", but would instead promote them, as the protection of human rights is one of the primary goals[35] of the UN.[36] Thus, it is argued that Article 2(4) permits unauthorized humanitarian intervention by member states where

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[28] See for example Felix Ermacora "Human Rights and Domestic Jurisdiction" (1968) 124 Recueil des Cours 375, 436 who states that "the right to self-determination and the protection of human rights in matters of discrimination as far as 'gross violations' or 'consistent patterns of violations' are concerned are no longer essentially within the domestic jurisdiction of states."; see also W Michael Reisman and Myres S MacDougal "Humanitarian Intervention to Protect the Ibos" in Richard B Lillich (ed) *Humanitarian Intervention and the United Nations* (University of Virginia Press, Charlottesville/USA, 1973) 189.

[29] Holzgrefe, above n 25, 41.

[30] Ju-Hon, above n 11.

[31] Reisman and MacDougal, above n 28, 171.

[32] Ian Brownlie for example writes in *International Law and the Use of Force by States* (Clarendon Press, Oxford/UK, 1963) 267: "If it is asserted that the phrase may have a qualifying effect then the writers making this assertion face the difficulty that it involves an admission that there is an ambiguity, and in such a case recourse may be had to the *travaux préparatoires*, which reveal a meaning contrary to that asserted.".

[33] Holzgrefe, above n 25, 38.

[34] Oscar Schachter "The Legality of Pro-Democratic Invasion" (1984) 78 A.J.I.L. 645, 649; Vesel, above n 17, 11.

[35] Article 1(3) of the UN Charter states: "The Purposes of the United Nations are [...] to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion".

[36] Fernando R Tesón *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers Inc., Irvington-on-Hudson/New York/USA, 1997) 151.

the SC fails to meet one of its key tasks – the protection of human rights.[37] This assertion is countered by others who state that the drafting history of the Charter proves that the reference to the purposes of the UN in Article 4(2) was "meant to supplement, rather than qualify, the prohibition on the unauthorized use of armed force"[38] and was added to guarantee that there would be no loopholes.[39]

One pro-interventionist response to the alleged illegality of unauthorized or so-called unilateral humanitarian interventions under the UN-Charter is that a customary international law[40] supporting a right to intervene on humanitarian grounds either has emerged or is emerging.[41] Some scholars[42] argue that state practice in the 19th and early 20th [43] century established a customary right of unauthorized humanitarian intervention which continues to exist until now.[44] It has been put forward that, even if one acknowledges that such right ever existed, it did not legally survive the creation of the UN and the passing of the UN Charter.[45] However, it is said, that this does not rule out the possibility that a customary right of unauthorized intervention is emerging or could develop in the future.[46] The increased occurrence of unilateral interventions with stated humanitarian goals, for example in Kosovo, supports the view that unauthorized interventions may in time become law.[47]

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[37] W Michael Reisman "Criteria for the Lawful Use of Force in International Law" (1985) 10 Y.J. Int'l L. 279, 279 and 280.

[38] Holzgrefe, above n 25, 40.

[39] Brownlie, above n 32, 268; see also Hans Wehberg "L'Interdiction du Recours a la Force" (1951) 78 Recueil des Cours 7, 70.

[40] A customary international law requires firstly state practice, and secondly "opinion juris", i.e. a sense of legal obligation under which a state acts; see Vesel, above n 17, 13 and 14.

[41] Vesel, above n 17, 13.

[42] Richard B Lillich "Forcible Self-help by States to Protect Human Rights" (1967) 53 Iowa L. Rev. 325, 334; Jean-Pierre L Fonteyne "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter" (1974) Calif. West. Int'l L. J. 203 et seqq.

[43] e.g. Britain, France, and Russia in Greece 1827-1830/ France in Syria 1860-1861/ United States in Cuba 1898.

[44] Holzgrefe, above n 25, 44 and 45.

[45] Holzgrefe, above n 25, 45.

[46] See for example Antonio Cassese "Ex iniuria ius oritur: Are we moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 23, 29.

[47] Vesel, above n 17, 14.

C   *The Moral Debate*

The debate about the legality of humanitarian intervention continues. The situations, in which interventions are considered however, clearly show that a solely legal approach falls far short of the issue. A legal action is not necessarily legitimate and an illegal action may well be justified on moral grounds. Thus, the controversy about humanitarian interventions inevitably involves moral and ethical questions.

The moral argument for the doctrine of humanitarian intervention is compelling.[48] People in misery deserve help, no matter which countries' nationals they are. As one writer puts it: "[t]he right of people not to be killed should not depend on whether the state of which they are citizens is in a position to protect them, wants to protect them, or is itself the source of the danger"[49].

The desire to help those in need, however, faces an ethical dilemma. Ending human suffering can only be achieved with military force, thus with means that inevitably bring about harm and devastation themselves. Use of force necessarily involves taking life, both as the direct result of combat, and as the indirect result of the destruction of roads, shelter, water supplies, and other basic necessities.[50] Thus, critics of humanitarian intervention raise valid questions over the morality of force to "prevent" loss of life.[51] They further challenge the proportionality of the deployment of certain weapons for humanitarian purposes. Even if there is an imperative to intervene, can a high level bombing campaign like occurred in Kosovo amount to humanitarian action?[52]

The moral debate also revolves around the perceived irreconcilability between the notion of intervention and state sovereignty. One of the defining features of the modern international system is the idea that each state is sovereign and free to

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[48] John J Merriam "Kosovo and the law of humanitarian intervention" (2001) 33 Case W. Res. J. Int'l L. 111, 115.
[49] Malvina Halberstam "The Legality of Humanitarian Intervention" (1995) 3(1) Cardozo J. Int'l & Comp. L. 1, 2.
[50] Merriam, above n 48, 115.
[51] Merriam, above n 48, 115.
[52] Gray, above n 15, 597.

act as it desires within its own borders.[53] Consequently, some scholars put forward the idea that a state has no right to interfere in the domestic sphere of politics of another state[54] and thus can never be allowed to affect another state's autonomy and self-determination by intervening for moral (or humanitarian) reasons. The state is the only sphere of morality.[55] In the words of Walzer: "[t]hough states are founded for the sake of life and liberty, they cannot be challenged in the name of life and liberty."[56] Least of all have states and their citizens an obligation to the citizens of other states to intervene. "Men and Women are protected and their interests represented only by their own government."[57]

Others reject these arguments. Sovereignty is said to be conditional.[58] "It is linked to internal legitimacy and requires governments to respect at least minimally the well-being and human rights of their citizens."[59] According to Smith[60] "it follows then, that a state that is oppressive and violates the autonomy and integrity of its subjects forfeits its moral claim to full sovereignty". Fernando R Teson takes a similar view and argues:[61]

> that because the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.

In challenging the view that moral obligations end at the states border, natural law theorists[62] introduce the idea of a global morality. They argue that human beings

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[53] Francis Kofi Abiew *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International, The Hague/NL, London/UK, Boston /USA, 1999) 23.
[54] Tesón, above n 36, 26.
[55] Simons, above n 2.
[56] Michael Walzer *Just and Unjust Wars: A moral Argument with Historical Illustrations* (Basic Books Publishers, New York/USA, 1977) 61.
[57] Walzer, above n 56, 61.
[58] Simons, above n 2.
[59] Simons, above n 2.
[60] Michael J Smith "Humanitarian Intervention: An Overview of the Ethical Issues" in Joel H Rosenthal (ed) *Ethics and International Affairs: A Reader* (Georgetown University Press, Washington DC/USA, 1999) 271, 289.
[61] Tesón, above n 36, 15 and 16.
[62] Terry Nardin "The Moral Basis of Humanitarian Intervention" (2002) 16(1) Ethics and International Affairs 57 et seqq. ; Joseph Boyle "Natural Law and International Ethics" in Terry Nardin and David R Mapel (eds) *Traditions of International Ethics* (Cambridge University Press, Cambridge/UK, New York/USA, 1992) 112, 123.

have certain moral duties by virtue of their common humanity.[63] These moral duties are said to be universal. In the words of Joseph Boyle: "Our moral obligations to others are not limited to people with whom we are bound in community [...]. We are obliged to help whoever we can [...]."[64] Thus, there is no justification to deny people protection and help just because they live somewhere else.

D   *The Political and Practical Debate*

The third strand of the debate about humanitarian intervention leaves behind the question if, and under which circumstances, military force is legally/morally desirable or acceptable and focuses on the practical and political problems that arise in connection with humanitarian interventions. One of these problems relates to the decision making process concerned with interventions. States act in their national interest and are often only willing to intervene where the action serves that interest. This attitude has been painfully displayed in the past, which bore many situations of brutal violations of human rights that required intervention, but where intervention did not take place.[65] The reality is that the decision to intervene or to keep out of the conflict usually combines a mix of altruistic humanitarian considerations, self-serving policy motives, media attention and pressure of the public opinion, rather than being a pure reflection of the humanitarian crisis in question. This is particularly fatal in view of the present power structure within the UN. A UN intervention can only take place when the SC, the main source of authority for interventions, enacts a corresponding resolution.[66] The permanent five members of the SC - Russia, France, China, the USA and the UK - however enjoy veto rights and therefore have the possibility to inhibit UN authorized intervention even if the human rights violations

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[63] Holzgrefe, above n 25 , 25.

[64] Boyle, above n 62 , 123

[65] On p 296 of his book *Humanitarian Intervention - The United Nations in an evolving world order* (University of Pennsylvania Press, Philadelphia/USA, 1996) Sean D Murphy enumerates 30 states, among these Afghanistan, Sierra Leone and Guatemala, where the internal situation demanded intervention, but intervention failed to happen.

[66] The UN General Assembly has resolved in UNGA Resolution 377(V) (3 November 1950) "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." However, the Assembly's decisions are not binding and only have the status of "recommendations".

and the need to interfere are obvious. In other words: international security is dominated by the will of only five states and if only one of these states is reluctant to agree on the use of force, the SC is incapable of action. This structure of the SC has the potential to affect the fates of millions of people and thus has evoked many demands for reform.

The discussion further centres on the problems that emerge once the decision to use military force has been made. A central theme in this context is the need to ensure that interventions are carried out effectively. This can only be achieved if the necessary financial and military resources are provided. The UN's limited budget and the lack of an UN army are the most problematic aspects in this context. The actual implementation of an intervention depends on the readiness of so-called "coalitions of the willing" to carry out and also finance the planned operation. The unpleasant reality is that such willingness is not always existent and, again, strongly hinges upon the degree of self-interest involved. The failure of some missions, and especially the cases in which intervention did not take place at all, numerously resulted out of the lacking political will of governments to risk the lives of their own soldiers. Improved strategies for intervention, not only with regard to planning, but also with regard to logistics and coordination, could save lives on both sides, and are widely called for and debated.

III "THE RESPONSIBILITY TO PROTECT"

In the light of the legal, moral, political and practical difficulties raised by humanitarian interventions, it becomes obvious that a uniform, globally accepted position on the issue is more than desirable. In regard to the numerous internal conflicts of the 1990 s and the resulting humanitarian disasters[67], completely rejecting the idea of intervention is not an acceptable option. As much as one hopes otherwise, it is likely that sooner or later reports will emerge again from somewhere in the world of massacres, mass starvation, rape and ethnic cleansing.[68] This time the international community has to offer better answers to these situations than the ad

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[67] According to Gareth Evans "The responsibility to protect: a new approach to humanitarian intervention" (2002) Princeton University <http://www.princeton.edu> (last accessed 28 October 2004) 53 of the 56 armed conflicts arising between 1990 and 2000 were intra-State.
[68] Gareth Evans and Mohamed Sahnoun "The Responsibility to Protect" (2002) 81(6) Foreign Affairs 99, Global Policy Forum <http://www.globalpolicy.org> (last accessed 28 October 2004).

hoc, and often ineffective or counter-productive reactions of the past.[69] The challenge, thus, is to develop agreed rules for handling cases such as Somalia, Bosnia, Rwanda, and Kosovo[70] and to lay down a universally accepted legal and political framework for the use of force for humanitarian purposes. The Report of the International Commission on Intervention and State Sovereignty responds to this challenge and has the ambitious aim to reconcile the different and often opposing claims relating to interventions[71] by suggesting a new approach to action – 'The Responsibility to Protect'.[72]

A   *The Establishment of the ICISS and its Goals*

The story of the ICISS began at the UN Millennium Assembly in September 2000. Canadian Prime Minister Jean Chrétien there announced the establishment of an international working group which would be concerned with military interventions motivated by humanitarian purposes and whose task would be to develop a way to deal with them consistent with current international law.[73] In launching the ICISS, the then Canadian Foreign Minister Lord Axworthy expressed his hope that the Commission would promote a comprehensive debate on the issues and would foster global political consensus on how to move from polemics, and often paralysis, toward action within the international system.[74]

The twelve-member international Commission, consisting of weighty and respected figures[75] from five continents, and from many intellectual and cultural backgrounds, was co-chaired by two highly experienced statesmen, Gareth Evans,

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[69] Supplementary volume, VI.

[70] Evans and Sahnoun, above n 68 .

[71] Edward Newman, above n 13, 105.

[72] Eduardo Posada "The Responsibility to protect", Ideas para la paz <http://www.ideaspaz.org> (last accessed 28 October 2004).

[73] The ICISS was set up by the Canadian Government. The funding for the Commission's work however was not only provided by Canada but also by the governments of Switzerland and the UK as well as by major international foundations, e.g. the Carnegie Corporation of New York, the William and Flora Hewlett Foundation, the Rockefeller Foundation etc.; see Supplementary Volume, 344.

[74] Supplementary Volume, 341; It was suggested that the Commission completes its work within a year, enabling the Canadian Government to present the ICISS's findings to the UN and its member states in the 56th session of the General Assembly.

[75] Gareth Evans (Australia), Mohamed Sahnoun (Algeria), Gisèle Coté-Harper (Canada), Lee Hamilton (US), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel V Ramos (Philippines), Cornelio Sommaruga (Switzerland), Eduardo Stein Barillas (Guatemala) and Ramesh Thakur (India).

former foreign minister of Australia, and Mohamend Sahoun, senior Algerian diplomat and former UN special representative in Somalia.[76]

It approached its task with three basic objectives: "first, it should produce something intellectually satisfying that would be taken seriously by the policy and academic community".[77] Secondly, its recommendations had to be acceptable in principle by governments around the world and not easily rejected out of hand.[78] Finally, the recommendations should not remain theoretical considerations, but should present practical guidelines that significantly affect international political practise and are "capable of actually motivating action".[79]

In its efforts to capture as many views as possible, the Commission held consultations around the world.[80] The consensus found during these meetings has been presented to the public in the Commission's final report "The Responsibility to Protect" which main findings and recommendations are summarized below.

B   *Summary of the Commission's Findings and Recommendations*

The ICISS report turns the traditional debate about humanitarian interventions on its head. Rather than revisiting the 'right to intervene', it focuses on the responsibility of states to protect vulnerable populations at risk from civil wars, insurgencies, state repression and state collapse.[81] At the heart of this conceptual approach is a shift in thinking about the essence of sovereignty from control to responsibility.[82] The report acknowledges that:[83]

> Sovereignty implies a dual responsibility: externally – to respect the sovereignty of other
> states, and internally, to respect the dignity and basic rights of all the people within the state.
> In international human rights covenants, in UN practice, and in state practice itself,

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[76] Adam Roberts "One Step Forward in the Search for the Impossible" (2003) 7(3) The International Journal of Human Rights 142, 143.

[77] Simon Chesterman "Responsibility to Protect – discussed at New York Seminar" (2002) International Peace Academy <http://www.ipacademy.org> (last accessed 29 October 2004).

[78] Chesterman, above n 77.

[79] Chesterman, above n 77.

[80] Chesterman, above n 77; the Commission met in Ottawa, Geneva, London, Maputo, Washington DC, Santiago, Cairo, Paris, New Delhi, Beijing and St. Petersburg.

[81] Chesterman, above n 77.

[82] Evans and Sahnoun, above n 68.

[83] Report, para 1.35.

sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.

As the respect for human rights is seen as an essential component of a sovereign state, for the Commission, it logically follows that a sovereign state has a responsibility to protect its own citizens from avoidable catastrophe. If, but only if, it fails, the broader community must shoulder that responsibility.[84] The ICISS report summarizes these two core principles as follows:

1. State sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself.

2. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

Seen in this way, coercive external engagement inside a state no longer appears illegitimate.[85] It is not the exercise of a right to intervene, but the fulfilment of a subsidiary obligation to help those in need. An intervention therefore does not contradict the notion of state sovereignty, but complements it.

By relying on the 'responsibility to protect' – principle, the ICISS not only seeks to rephrase the concept of sovereignty, but also to achieve a shift in the terms and the perspectives of the debate. The Commission is of the opinion that the debate should get away from the claims of states for a 'right to intervene' and focus on "the requirements of those who need or seek assistance".[86] In response to the very strong opposition expressed by humanitarian agencies and organizations towards any militarization of the word 'humanitarian', the Commission further suggests a terminological change from 'humanitarian intervention' to 'intervention for human protection purposes'.[87]

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[84] Joelle Tanguy "Redefining Sovereignty and Intervention" (2003) 17(1) Ethics & International Affairs 141, 142.
[85] Jennifer Welsh, Carolin Thielking and S Neil MacFarlane "The Responsibility to protect – Assessing the report of the International Commission on Intervention and State Sovereignty" (2002) 57(4) International Journal 487, 491.
[86] Report, para 2.33.
[87] Report, para 1.39 and 1.40.

According to the ICISS report, the responsibility to protect has three integral and essential components: not only is it the responsibility to react to an actual or apprehended human catastrophe, but to prevent it, and the responsibility to rebuild after the event.[88]

1 The responsibility to prevent

The Commission emphasizes that in its view "prevention is the single most important dimension of the responsibility to protect"[89]. Thus, prevention options should always be exhausted before intervention is contemplated.[90] In an unmistakable way the Commission directly challenges the international community to finally "close the gap between rhetorical support for prevention and tangible commitment"[91].

According to the ICISS, effective prevention "depends on disparate actors working together strategically"[92]. These institutions must, in accordance with the findings of the Carnegie Commission on Preventing Deadly Conflict[93], address both the root causes of internal conflicts (e.g. poverty and political repression), and the more immediate triggers, the so called direct causes of internal conflict[94]

2 The responsibility to react

The most extensive part of the report revolves around the issue of reaction. The Commission states that:

> [w]hen preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required. These coercive measures may include

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[88] Report, para 2.32.
[89] Report, synopsis XII.
[90] Report, synopsis XII.
[91] Report, para 3.1.
[92] This includes states, the UN, the international financial institutions, regional organizations, NGO's, religious groups, the business community and the media, see report, para 3.36.
[93] *Preventing Deadly Conflict: Final Report* (Carnegie Corporation of New York, New York/USA, 1997).
[94] Report, synopsis XI.

political, economic or judicial measures, and in extreme cases – but only extreme cases – they may also include military action.[95]

In an attempt to define what constitutes an "extreme case" the ICISS relies on the traditional 'just war' framework. The Commission identifies six criteria that have to be satisfied to justify military intervention: the 'just cause' threshold, four precautionary principles, and the requirement of 'right authority'.

(a)   The 'just cause' threshold

In the Commission's view, exceptions to the principle of non-intervention should be limited to instances in which serious and irreparable harm occurs to human beings or is imminently likely to occur.[96] Thus, according to the ICISS, military intervention is only justified in two broad sets of circumstances, namely in order to halt or avert:[97]

- 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.

The ICISS recommends utilizing existing institutions, such as UN organs and agencies, other international organizations and NGO's, and on occasion the media, to determine whether events do in fact meet the 'just cause' – criterion.[98]

(b)   Precautionary principles

The Commission lays down four other conditions that must be met to justify intervention.

The first condition is 'right intention'. The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or

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[95] Report, para 4.1.
[96] Report, para 4.18.
[97] Report, para 4.19.
[98] Report, para 4.30.

avert human suffering.[99] Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.[100]

The second precautionary principle is 'last resort'. All non-military options for the prevention or peaceful resolution of the crisis must be explored before force is used.[101] This does not necessarily mean that every such option must literally have been tried and failed; but it does mean that there must be reasonable grounds for believing that lesser measures would not have succeeded.[102]

The Commission further makes clear that military action can only be justified if it is carried out with 'proportional means'. The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.[103]

Finally, according to the ICISS, the operation must have a 'reasonable chance of success', with the consequences of action not likely to be worse than the consequences of inaction.[104]

(c)   Right authority

The question of who has the right to determine whether a military intervention for human protection purposes should be carried out is by far the most important issue in the debate about humanitarian interventions. Accordingly, the last criterion of the ICISS framework for justified military action is that of 'right authority'. The ICISS' general position on this issue is spelled out clearly: "There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes."[105] Thus, SC authorization should in all cases be sought prior to taking any military action.[106]

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[99] Report, synopsis XII.
[100] Report, synopsis XII.
[101] Report, para 4.37.
[102] Report, para 4.37.
[103] Report, synopsis XII.
[104] Report, synopsis XII.
[105] Report, synopsis XII.
[106] Report, synopsis XIII.

While affirming the primacy of the UNSC, the ICISS, however, recommends that the 'Permanent Five' members should agree not to apply their veto power in matters where their vital state interests are not involved, so that the passage of resolutions authorizing intervention for which there is otherwise majority support is not obstructed. If the SC rejects a proposal for intervention or fails to deal with it in a reasonable time, alternative options are needed. The Commission recommends that in such a case intervention could be decided either by the General Assembly in an Emergency Special Session under the "Uniting for Peace" procedure, or by regional organizations under Chapter VIII of the UN-Charter, subject to their seeking subsequent authorization from the SC.

When an intervention meets the six criteria described above, the military action is legitimate in ICISS's view.

3   The responsibility to rebuild

Finally, the responsibility to protect implies the responsibility to rebuild. This means that if military action is taken, the interveners should not run off, leaving destruction and instability behind, but should help to "build a durable peace, and to promote good governance and sustainable development"[107]. This commitment should ideally include full assistance with recovery, reconstruction and reconciliation of hostile groups, and should seek to address the causes of the harm the intervention was designed to halt or avert.[108]

4   Operational principles

The ICISS report also lays down additional 'operational principles' for military actions to guide decision makers contemplating interventions.[109] Some of the Commission's considerations will be outlined in the analysis of the ICISS report in chapter V of this paper.

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[107] Report, para 5.1.
[108] Evans, above n 1.
[109] S Neil MacFarlane, Carolin J Thielking and Thomas G Weiss "The Responsibility to Protect: is anyone interested in humanitarian intervention?" (2004) 25(5) Third World Quarterly 977, 978.

IV   APPLICATION OF THE ICISS' PRINCIPLES TO PAST CRISES

One of the ICISS' declared aims was to produce guidelines for military intervention for humanitarian purposes that are not only of theoretical value, but first and foremost of practical usefulness. If the Commission's framework for humanitarian interventions is capable of guiding the international community in the future in its difficult task of deciding how to respond to humanitarian disasters can be determined best by applying the Commission's principles to past crisis. Only if the new framework is able to solve past dilemmas can it be a useful tool for the future.

The humanitarian catastrophe in Rwanda in 1994 is one of the darkest chapters of UN history and global policy post World War II. It laid bare the full horror of inaction in the face of genocide.[110] Kosovo, where intervention did take place, raised totally different questions, but was not less controversial. The US led invasion of Iraq in 2003 and its justification on both moral and humanitarian grounds was reminiscent of another long standing dilemma: the vague nature of the doctrine of humanitarian intervention, giving powerful states a licence to use force and making it subject to abuse.

The following section applies the ICISS framework to these specific cases and asks if the ICISS approach provides adequate answers to the difficulties that arose in the context of each of them.

A   Rwanda – 1994

The genocide which took place in the Central African country of Rwanda in 1994 was one of the most intensive killing campaigns - possibly *the most* intensive - in human history.[111] In just one hundred days 800,000 people were killed. Most of the dead were members of Rwanda's minority Tutsi ethnic group; most of those who perpetrated the violence were extremist elements of the country's majority Hutus. The killings were long planned – the trigger for their implementation however was the shooting down of the airplane carrying Rwanda's Hutu president Habyarimana

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[110] Report, para 1.1.
[111] "Case-Study: Genocide in Rwanda – 1994" Gendercide watch <http://www.gendercide.org> (last accessed 2 November 2004).

and his Burundian counterpart on 6 April 1994. Both presidents were killed.[112] Within an hour of the plane crash, the Presidential Guard, the Rwandan armed forces and the Interahamwe[113] militia set up roadblocks and barricades and began the organized slaughter, starting in the capital Kigali.[114] The first targets were the decision makers of the country and the intellectuals. Shortly after, the Hutus began executing ordinary Tutsi citizens as well as Hutu moderates. Victims were hacked to death, burned alive, thrown dead or alive into pits or latrines, forced to murder their own friends or relatives.[115] In a nutshell, in only 4 months, over half of Rwanda's total population estimated at 8.1 million before the genocide, had either been killed, annihilated by epidemics, or internally displaced as a result of the civil war.[116]

Despite the fact that the UN had received accurate information about the planning of the genocide more than three months before the outbreak of the actual conflict[117], and despite the unprecedented magnitude of the humanitarian disaster following, the international response to Rwanda was less than enthusiastic.[118] The UN did not take any measures to prevent the foreseeable catastrophe. Its reaction when the disaster finally commenced was similarly weak. On 21 April 1994, in the middle of the crisis[119], the Security Council passed Resolution 912[120], reducing the number of the UN peacekeepers stationed in Rwanda from 2,500 to a tiny force of only 270 soldiers for the entire country. It thereby "sent an unmistakable message to the genocidal forces that there was little or no international resolve to stand in their way"[121]. The atrocities continued and it was not until 17 May 1994 that the Security Council adopted Resolution 918, which imposed an arms embargo and authorized an

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[112] Until today it is not clear who is responsible for the assassination. There are hints that not the Tutsis, as often alleged, but the Hutu military leadership assassinated Habyarimana in order to take over power and perpetrate the long planned genocide of the Tutsis.

[113] Interahamwe means "Those who stand together".

[114] Holzgrefe, above n 25, 15.

[115] "The Rwanda Genocide – 10 years later: What happened in Rwanda in 1994" Oxfam Canada <http://www.oxfam.ca> (last accessed 2 November 2004).

[116] Abiew, above n 53, 193.

[117] The "Report of the Independent Inquiry into United Nations actions during the 1994 Rwanda genocide" (Ingvar Carlsson, Han Sung-Joo and Rufus M Kupolati , 1999, available online at <http://www.un.org>) revealed that head of the UN peacekeepers in Rwanda General Romeo Dallaire had received information about the planned genocide in January 2004. He immediately warned the Department of Peacekeeping Operations, which head at the time was Kofi Annan, of the risk of genocide. The critical information was only forwarded to the embassies of the US, France and Belgium in Rwanda. The UN Security Council was not told.

[118] Abiew, above n 53 , 193.

[119] Supplementary volume, 98.

[120] UNSC Resolution 912 (21 April 1994).

[121] Supplementary volume, 98.

expansion of the UN troops to 5,500 soldiers to stop the massacres.[122] However, one months later, these troops were still not deployed, the reason being that members states made no commitments to provide the requisite number of soldiers for such an undertaking.[123] Given the absence of multilateral action, France finally expressed its preparedness to intervene unilaterally in Rwanda. The UN-authorized "Operation Turquoise" began on 22 June 1994. Approximately one month later a cease-fire was reached, which effectively ended the civil war.[124] The outcome of the humanitarian tragedy of Rwanda, however, reveals a painful truth: the response of the international community of states was "too little, too late"[125].

In its report the ICISS states: "There must never again be mass killing or ethnic cleansing. There must be no more Rwandas."[126] But does "the Responsibility to Protect" proffer a solution for a case like Rwanda? Does it provide a viable answer to the inability of the international community to protect civilians in need?

The ICISS gives priority to the task of prevention. Against the background that an early warning had been received by the UN three months prior to the outbreak of the crisis, it would doubtlessly have been possible to take preventive measures. Given the immediacy to take action after the early warning, root-cause prevention was no longer an option in Rwanda. However, there would have been sufficient time to launch a direct prevention campaign. The ICISS identifies a number of potential means in its direct prevention toolbox. In the Rwandan case, it would have been appropriate to employ proper conflict management strategies to de-escalate the situation between Hutu and Tutsi groups. Additionally, the international community could have taken direct prevention measures of a military nature, such as consensual increasing of the number of UN peacekeeping troops already stationed in the country. The sole presence of such troops might have served as a deterrence to carry out the planned genocide. Had the ICISS framework been universally accepted in 1994, and had the international community undertaken the preventive measures recommended, the Rwanda tragedy could possibly have been avoided.

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[122] Supplementary volume, 98.
[123] Abiew, above n 53, 193.
[124] Supplementary volume, 100.
[125] Abiew, above n 53, 194.
[126] Report, para 8.7.

Even if the UN had failed on the stage of prevention, there would have been the option to avert or at least to curb the Hutu atrocities by resorting to military action. Although the ICISS does not quantify the term 'large-scale', the situation in Rwanda certainly would have met the Commission's "just cause"- threshold of "large-scale ethnic cleansing". Just as little doubts exist that an intervention force would have satisfied the ICISS precautionary principles. Albeit tardily, the Security Council also passed a resolution authorizing military action. As the Rwandan State was incapable to exercise its responsibility to protect its own citizens from genocide, under the ICISS concept it would have been the obligation of the international community of states to pick up this responsibility. Thus, in the Rwandan case, "the Responsibility to Protect" would have clearly imposed a duty on the outside world to intervene. This conclusion demonstrates the benefit of the ICISS framework: it allows for an assessment of a crisis situation and provides clear instructions as to when military intervention in a sovereign state is not only appropriate but even a duty. It is not clear, however, if this approach would have been enough to solve the Rwandan dilemma. The real problem in the Rwandan context was not the disagreement of the international community over the existence of a right to intervene, but rather a lack of political willingness on the part of states to risk their soldiers' lives in a military action and also a lack of willingness to take sides in Rwanda's civil war.[127] The UN's leading members, in particular the US, were not prepared to make any substantial commitment to stop the atrocities.[128] Even after the Security Council decided to act to try and stop the killing, and reversed its decision to reduce the UN peacekeeping troops, the key member states were reluctant to supply the necessary personnel and materiel resources.[129]

The ICISS does not miss out the problem of lacking political will. In the last chapter of its report, the Commission stresses the importance to get the necessary political commitment right and acknowledges that the most compelling task "is to work to ensure that when the call goes out to the community of states for action, that call will be answered"[130] The following recommendations of how to approach this

[127] Adam Roberts "Intervention: One Step Forward in the Search for the Impossible" (2003) 7(3) The International Journal of Human Rights 142, 147.
[128] Abiew, above n 53, 197.
[129] "Report of the Independent Inquiry into the Actions of the United Nations during the 1994 genocide in Rwanda", above n 117 .
[130] Report, para 8.7.

task however, fall somewhat short. The ways suggested by the Commission to mobilize political will and to encourage state authorities to act on their responsibilities may be promising in theory – but their prospect of success in real life is doubtful, given that "international priorities continue to be relegated to national self-interest"[131]. The ICISS, thus, should not have stopped its considerations here, but should have asked how human protection can be achieved even without the necessary political will of individual states to intervene in certain cases. The UN has no military or police forces of its own. It relies on its member states to contribute personnel and equipment to support operations.[132] Resolutions therefore can not be enforced unless members commit their own troops. This fact has paralyzed the UN in many situations. Unfortunately, the ICISS report does not even attempt to find solutions for this dilemma. In this respect, the report therefore has to be regarded as incomplete.

The ICISS framework meets its goals by clearly determining that in a Rwanda-like situation there is a duty to intervene. However, this cannot be enough, given the sometimes lacking political will of states to take action. Under the ICISS concept a repetition of the Rwandan catastrophe, thus, cannot be completely ruled out.

B   *Kosovo – 1999*

The history of ethnic conflict in Kosovo dates back over 600 years.[133] Serbs and Albanians had both long regarded Kosovo as their own historical space and the tension between the two groups occasionally erupted into major violence.[134] The communist government led by Tito, which came to power in 1945, systematically repressed nationalist manifestations throughout Yugoslavia, seeking to ensure that no Yugoslav republic or nationality gained dominance over the others.[135] After Tito's death in 1980, a long period of political instability followed and the ethnic rivalries

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[131] "An overview of the Responsibility to Protect – Civil Society Project" World Federalist Movement- Institute for Global Policy <http://www.wmf.org> (last accessed 2 November 2004).
[132] "Canada and Peacekeeping" Government of Canada – Foreign Affairs <http://www.dfait-maeci.gc.ca/peacekeeping/actors-en.asp> (last accessed 2 November 2004).
[133] Vesel, above n 17 , 41.
[134] "Kosovo war" Wikipedia <http://www.wikipedia.org> (last accessed 7 November 2004).
[135] above n 134.

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began to rise again.[136] In 1989, President Milosevic removed Kosovo's autonomy and replaced it with direct rule from Belgrade.[137] "Ethnic Albanian politicians in Kosovo responded by declaring independence in July 1990"[138] and by coordinating a largely non-violent protest campaign from 1989 until 1997.[139] The conflict between Serbs and the ethnic Albanians over Kosovo, however, came to a head when war broke out between Serb forces and the Kosovo Liberation Army (KLA) in February 1998.[140] A few months later, Milosevic commenced a systematic displacement of Kosovo-Albanians out of Kosovo. Villages were burned and thousands of Kosovo-Albanians fled from their homes to escape Serb attacks, creating a threatening destabilization in Macedonia and Albania, where most of the refugees resorted.[141] This presented a potentially catastrophic strategic dilemma for NATO and the European Union. It was feared that if civil war broke out in Macedonia between that country's Slavs and Albanians, the security interests of all neighbor states would be jeopardized.[142] "Both organizations, plus the US and the Organization for Security and Co-operation in Europe decided that something had to be done"[143] and expressed their will to take military action.

The international community tried to resolve the conflict peacefully on the diplomatic level.[144] Between March and October 1998 the UNSC passed three resolutions[145], which condemned the events in Kosovo and requested the Serbian leadership to cease the violent acts, to allow for the refugees to return home and to reinstall Kosovo's autonomy. Neither of the resolutions authorized the use of force to stop the atrocities. Russia and China both made unmistakable clear that they would veto any SC resolution to support military intervention.

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[136] above n 134.

[137] Supplementary volume, 109.

[138] Supplementary volume, 109 and 110.

[139] Eleanor Lumsden "An uneasy peace: multilateral military intervention in civil wars" (2003) 35 N.Y.U. J. Int'l L. & Pol. 795, 828.

[140] Vesel, above n 17, 42.

[141] Vesel, above n 17, 42.

[142] above n 134.

[143] above n 134.

[144] Laura Geissler "The law of Humanitarian Intervention and the Kosovo crisis" (2000) 23 Hamline L. Rev. 323, 336.

[145] UNSC Resolution 1160 (31 March 1998), UNSC Resolution 1199 (23 September 1998) and UNSC Resolution 1203 (24 October 1998).

"The issue simmered for some months, until the massacre of 45 civilians in Racak in January 1999 led to a NATO warning that it remained willing to intervene militarily."[146] On 24 March 1999, after negotiations in Rambouillet[147] between the NATO and the Federal Republic of Yugoslavia (FRY) to peacefully resolve the matter had failed, the NATO commenced air strikes against FRY. The intervention was based on the premise "that the atrocities performed were on such a broad scale and done with such cruelty against innocent civilians, that intervention was necessary"[148] even without Security Council sanction. After a 78-day bombing campaign, Serbian military forces withdrew from Kosovo and NATO peacekeepers were deployed.

The NATO-intervention in Kosovo was and continues to be more controversial than any other previous intervention. Were the human rights violations in Kosovo serious enough to justify the use of force? Was there a reasonable prospect of success or did the intervention make things even worse? Is a high-level bombing campaign without ground troops an adequate means to stop human atrocities? Can a military action, albeit for human protection purposes, ever be legitimate without UN Security Council authorization? What happens if the UN Security Council fails to sanction military intervention because one or more of the permanent members exercise their veto right? Does that mean that the rest of the world has to stand by and watch in face of genocide, rape or displacement?

The following analysis seeks to determine if the ICISS concept provides adequate answers to these issues raised by the Kosovo crisis.

1   Was there a 'just cause' for the Kosovo intervention?

The reason for the intervention in Kosovo was unquestionably the suppression and expulsion of the ethnic Albanian population by the Serbs. If the circumstances in Kosovo at the time of the commencement of the military action constituted a 'just cause' for intervention, however, was subject to great controversy.

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[146] Supplementary volume, 112.

[147] The negotiations in Rambouillet concluded with the FRY's refusing to sign the agreement that required freedom of movement for NATO throughout the whole of FRY and a referendum on Kosovo's independence in three years; see Supplementary Volume, 112.

[148] above n 134.

The ICISS poses the question in its introductory chapter: "Were the human rights abuses committed or threatened by the Belgrade authorities sufficiently serious to warrant outside involvement?"[149]

Undoubtedly, ethnic displacement took place prior to NATO's bombing campaign. The UN refugee agency UNHCR estimated that there were 410.000 Kosovo-Albanians internally displaced as a result of Serb operations, and another 90.000 across the border.[150] It is further estimated that between 2.000 and 3.000 individuals, most of them ethnic Albanians, had been killed in Kosovo before NATO's launching of war. Whoever expects that the ICISS principles provide a definite answer whether this was "sufficient" justification for military action, however, will be disappointed. The ICISS establishes the "large scale loss of life" and "large scale ethnic cleansing" thresholds to determine whether there is a 'just cause' for intervention. But it leaves open whether "ethnic cleansing" includes displacement of certain ethnic groups as it occurred in Kosovo. It further does not attempt to quantify the term "large scale loss of life". In determining whether the death of 2.000 to 3.000 people is enough, one therefore is left on its own. For the difficult question whether the happenings in Kosovo have justified a military intervention, the ICISS framework, thus, unfortunately lacks clarity.

The reason for the ICISS not to further specify "large scale" explains the Commission by asserting that in most cases there is unlikely to be major disagreement in interpretation of the term. This assumption, however, misconceives reality. Consensus may exist in a clear-cut situation like the Rwandan genocide, but not in borderline cases. The controversy and the different positions that have been taken to Kosovo, e.g. the western states took the view that the situation demanded action, whereas China, India, and Russia strictly objected to intervention, support this. In defining only rough indications of when military action is necessary and justified, the Commission also grants the states' too much discretion and thereby leaves the door open for applying double standards as it occurred in the past. Chechnya, for example, has not crossed the intervention threshold for anyone

[149] Report, para 1.2.
[150] Supplementary volume, 113.

although the level of human rights violations was much higher than it was in Kosovo.[151]

With regard to the ICISS efforts to establish a clear threshold for military intervention it therefore has to be concluded that the Commission oversimplified the matter. It would certainly have been a toll order to require the Commission to address every single possible case in its report. But to combat the issue of selectivity that has dogged humanitarian interventions in the past more detailed guidelines would have been desirable.

2   Was there a reasonable prospect of success?

One of the requirements the ICISS poses is that every intervention has to have reasonable prospect of success. The difficulties connected with this criterion can well be shown by means of the Kosovo-example. Critics argue that the NATO bombings intended to stop human suffering have actually worsened the situation for the civilian population in Kosovo. Indeed, most of the displacement and killing of Kosovo-Albanians took place after NATO action had started. But how can decision-makers know what would have happened without NATO intervention?[152] Maybe even more displacement and killing would have taken place. In addition to that, critics claiming that things were made worse only take the short-term effects into consideration. Of course one could put forward that "in the short-run the negative humanitarian consequences of the Kosovo action exceeded the positive ones".[153] But from a long-term perspective, the benefits achieved through the NATO intervention might just as well exceed the agony caused in the first instance. How does one balance short-term effects against long-term ones?[154] For these questions the ICISS cannot provide an answer. Thus, the 'reasonable prospect of success'-criterion confronts decision makers with considerable problems that question its practicability.

[151] Welsh, Thielking and MacFarlane, above n 85, 496.
[152] Welsh, Thielking and MacFarlane, above n 85, 501 and 502.
[153] Welsh, Thielking and MacFarlane, above n 85, 502.
[154] Welsh, Thielking and MacFarlane, above n 85, 502.

3   Was the modality of NATO's intervention proportionate?

Not only the question "if" the threshold for intervention was met in the Kosovo crisis but also "how" NATO's military action was carried out was highly disputed. NATO's intervention consisted of a 78 days high- level bombing campaign with wide ranging, also civilian-used, targets. Ground troops which possibly would have been even more effective to stop the atrocities and at the same time presumably would have entailed less victims and less destruction were not deployed. Therefore many argued that the manner in which NATO's intervention was conducted was inconsistent with humanitarian aims.[155]

The ICISS stresses in its report that military intervention must be carried out with proportional means. This requires that the nature of the force used must be proportionate to the humanitarian objective and limited in scale and intensity.[156] It can be assumed that NATO's military action would have been more effective and would have achieved better results for both Serb and Albanian civilians if ground troops would have been deployed.[157]   This suggests that NATO's intervention does not satisfy the ICISS' "proportionate means"-criterion. However, it would have been desirable if the Commission had paid more attention to the role of military technology in ascertaining the reasonable means principle.[158]

4   The 'right authority' dilemma

The most controversial issue in the debate surrounding the Kosovo intervention is the issue of "right authority". Article 53 of the UN Charter states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council", making the latter the first port of call to authorize intervention.[159] "The difficult question – starkly raised by Kosovo – is whether it should be the last."[160] On the one hand, the decision of the NATO members to intervene single-handedly was strongly condemned. On the other

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[155] Gray, above n 15, 597.
[156] Welsh, Thielking and MacFarlane, above n 85, 494.
[157] Vesel, above n 17, 50.
[158] Jeremy I Levitt "The Responsibility to Protect: A Beaver without a Dam?" (2003) 25 Mich. J. Int'l L. 153, 169.
[159] Tanguy, above n 84 , 145.
[160] Evans and Sahnoun, above n 68.

hand, many claimed that as Russia and China, two of the permanent five members of the Security Council, had made unmistakable clear that they would veto any resolution initiating military action in Kosovo, NATO had no other choice but to intervene without UN mandate, if it didn't want to sit back idly in face of the Serbian atrocities.

How does the ICISS deal with this dilemma?

The Commission reaffirms that the UN Security Council is the most appropriate body to authorize intervention for human protection purposes. In doing so "the Commissioners are well aware of the objections to such a recommendation: the slowness of Security Council decision-making, the under-representation of key regions, and the political nature of vetoes of the five permanent members"[161]. To combat the latter problem, the ICISS suggests that the "Permanent Five" should agree on a "code of conduct", whereby, in a humanitarian crisis, they would not use their veto right in matters where their vital national interests are not involved.

This proposal might be useful in theory, but is very unlikely to be realized in practice.[162] It fails to take into account how strongly the "Permanent Five" cling to their veto-rights which give them the power to decide about what should and what should not be done on the international security stage. The veto was an essential component of the original 1945 deal with Russia, France, China, the USA and the UK leading to the passing of the UN Charter.[163] Since then, the "Permanent Five" have resisted any reform, and hoping that they will be open for a change in the future seems to be an illusion. Even if the permanent SC members would agree on an ordinance recommended by the ICISS, there remain two clear difficulties. "First, if a permanent member is engaged in an act that might occasion intervention, this would not preclude that member's use of the veto."[164] One is tempted to think of Russia's engagement in Chechnya.[165] Secondly, the permanent five members might disagree

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[161] Welsh, Thielking and MacFarlane, above n 85, 502.
[162] Welsh, above n 12, 32.
[163] Thomas G Weiss "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era" (2004) 35(2) Security Dialogue 135, 145.
[164] Welsh, Thielking and MacFarlane, above n 85, 502.
[165] Welsh, Thielking and MacFarlane, above n 85, 502.

on what constitutes a "vital national interest".[166] China, for example vetoed the "extending peacekeeping operations in Guatemala and Macedonia because it objected to the decisions of both countries to establish diplomatic relations with Taiwan"[167]. Even in the unlikely case that the "Permanent Five" agree on the proposed "code of conduct", situations in which the Security Council is paralyzed, thus, can not be ruled out.

The question remains: What happens if the Security Council is unable or unwilling to act as in the Kosovo crisis? The Commission acknowledges that there must be alternative sources of authorization if the SC fails to act although human rights issues are significantly at stake. As such alternatives, the ICISS suggests UN General Assembly support or authorization by regional organizations under chapter VIII UN Charter.

Had the Commission's first proposal been commonly accepted in 1999, there would have been a great chance to find a General Assembly majority for NATO's intervention in Kosovo. However, one should remember that the assembly's decisions are not binding and only have the status of "recommendations".[168]

The reasons given by the Commission to explain its second alternative to SC authorization are convincing. Indeed, many humanitarian disasters have significant impact on neighbouring countries and it is plausible that "countries within the region are more sensitive to the issues and context behind the conflict headlines"[169]. The proposal that regional organizations could take military action, despite the Security Council failure to give authorization therefore appears to be a wise idea. One thing, however, has to be taken into consideration. A regional organization capable and willing to intervene does exist in Europe and North America with the NATO. But Asia does not have a comparable institution at all and Africa's African Union (AU; formerly OAU) might not only be too weak but also reluctant to act. Nevertheless the ICISS' proposal to include regional organizations is a step into the right direction.

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[166] Welsh, Thielking and MacFarlane, above n 85, 502.
[167] Welsh, Thielking and MacFarlane, above n 85, 502.
[168] Welsh, above n 12, 29.
[169] Report, para 6.32.

The Commission states that an intervention carried out by a regional organization without prior SC sanction is "subject to their seeking subsequent authorization from the Security Council"[170]. As to what the legal position is, if such a subsequent authorization is not given, in particular whether or not sanction by a regional organization can serve as a substitute for Security Council mandate, the Commission does not give an answer. This produces a sense of disappointment.

The ICISS explicitly mentions NATO as a regional organization.[171] But it makes clear that an intervention carried out by a regional organization without prior Security Council authorization can only be legal if it takes place within the defining boundaries of the organizations. Although not expressly mentioned, it thereby intimates that it in its view NATO's "out-of-area" intervention in Kosovo was illegal.

All in all, one has to conclude that the Commission provides useful approaches to some questions surrounding the Kosovo intervention, though it does not provide a panacea for all facets of the dilemma.

C   *Iraq – 2003*

After the devastating terrorist attacks on the World Trade Center in New York and the Pentagon in Washington in September 2001, US President Bush spoke about a "war against civilization" and appealed for a campaign to repay the attacks. The Bush-created term "axis of the evil" also included Iraq. After almost a year of rhetorical and logistic preparation of the war against Iraq and months of trying to gain international support for a military action, the United States finally commenced its combat operation in March 2003. Three weeks of intense fighting followed until Iraq's Ba'athist government was toppled and a U.S.-led occupation of Iraq began. The US government justified the invasion of Iraq on a variety of grounds, the major being purported Iraqi weapons of mass destruction (WMD) and an alleged link of Iraq to the terror group Al Qaeda. However, as no evidence was found for WMD's and no connection between Iraq and international terrorism had been discovered, the

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[170] Report, synopsis XIII.
[171] Report, para 6.34.

pre-war justifications gave way to the rationale of human protection.[172] The Bush administration's dominant remaining justification for the war now is that the Iraqi population had to be freed from the oppressive dictator and tyrant Saddam Hussein – an argument of humanitarian intervention.[173]

As humanitarian concerns were clearly not America's primary motive for intervening in Iraq, the retrospective humanitarian justification fuels many people's worst fear. The fear that the vague nature of humanitarian intervention gives powerful states a justification to intervene in the affairs of weaker states, hiding its selfish political purposes behind arguments of humanitarian necessity. The ICISS seeks to overcome this dilemma and to reduce the danger of abuse by laying down clear principles as to under which circumstances an intervention can claim itself to be humanitarian and to be legitimate. If the Commission meets this self-imposed goal can be examined by applying the ICISS guidelines to the US-led invasion in Iraq.

The ICISS criterion of "just cause" requires "large scale loss of life" or "large scale ethnic cleansing". There were times in the past where this criterion might have been met. During the 1988 Anfal genocide, for example, the Iraqi government slaughtered some 100,000 Kurds.[174] But at the time of the US invasion in 2003, "no one contends that the Iraqi government was engaged in killing of anywhere this magnitude"[175]. As brutal as Saddam Hussein's reign had been, the scope of Iraqi government's killing in March 2003 did not satisfy the ICISS' threshold.[176] This is itself sufficient to conclude that the US war was not a legitimate humanitarian intervention according to the ICISS concept. As the initial justifications for the military action were not humanitarian, the US invasion further did not meet the ICISS "right intention" criteria. The question whether the military action satisfied the "last resort", the "proportional means" and the "reasonable prospects" requirements does not even arise as there was no humanitarian crisis in Iraq in 2003. Moreover, the

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[172] Ken Roth "War in Iraq: Not a Humanitarian Intervention" (2004) Human Rights Watch <http://www.hrw.org> (last accessed 5 November 2004).
[173] Roth, above n 172; in a speech at the American Enterprise Institute in 2003 for example, President Bush stated: "The first to benefit from a free Iraq would be the Iraqi people, themselves. Today they live in scarcity and fear, under a dictator who has brought them nothing but war, and misery, and torture. Their lives and their freedom matter little to Saddam Hussein -- but Iraqi lives and freedom matter greatly to us.", White House <http://www.whitehouse.gov/news/releases/2003/02/20030226-11.html> (last accessed 29 December 2004).
[174] Roth, above n 172.
[175] Roth, above n 172.
[176] Roth, above n 172.

intervention came without UNSC authorization and thus did not meet the ICISS "right authority" standard. The war in Iraq therefore clearly fails to fulfil the ICISS criteria for justified military intervention for human protection purposes.

This result proves that the ICISS concept could in the future serve as an effective safeguard against "non-humanitarian intervention dressed in humanitarian garb"[177] and could, on the basis of its set of criteria for the justified use of force successfully eliminate the danger of the abuse of the doctrine of humanitarian intervention.

V   ANALYSIS

The foregoing application of the ICISS principles to the cases of Rwanda, Kosovo and Iraq has already revealed some of the strengths and weaknesses of the ICISS concept. One advantage of the framework is its clear set of criteria which curbs the danger of the abuse of the humanitarian intervention-idea. Positive are also the Commission's thoughtful remarks on the different preventive tools. However, the ICISS fails to provide convincing proposals how to generate sufficient political will to respond consistently to those cases that meet the ICISS criteria for intervention. The report also lacks precision as to the question when exactly the ICISS threshold for military intervention is satisfied. With regard to the 'right authority' dilemma the Commission's proposals leave a mixed mark. Its suggestion for a 'code of conduct' for the use of the veto rights is useful in theory but unlikely to be realized in practice. The Commission's exploration of alternative procedures if the Security Council fails to act, however, is well thought. The following analysis of the ICISS framework seeks to complement this list of strengths and shortcomings, focusing first on the Commission's underlying 'responsibility to protect'- idea before moving on to a detailed examination of its several elements.

A   The "Responsibility to Protect" – Idea

The ICISS puts forward a new idea for reconciling the conflicting principles of state sovereignty and intervention. Rather than revitalizing the question of a "right

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[177] Weiss, above n 163, 148.

to intervene" it refers to the "responsibility to protect". Is this really a substantive step forward?[178] Or is it no more than a clever twist of vocabulary?[179] The truth, as often, lies somewhere in between. Changing the language does, of course, not change the underlying issues of the debate: "it still amounts to the use of military coercion to protect human rights without the consent of the sovereign authority"[180]. "There still remain to be argued all the moral, legal, political and operational questions – about need, authority, will and capacity."[181] So why, asks Newman "does [the responsibility to protect] constitute a 'new approach' as the report claims"? The answer is simple. It changes perspectives and thereby offers an alternative lens through which to view the issues that have so long surrounded the humanitarian intervention debate.

The notion of a "right to intervene" is tainted with the negative experiences of the past. "It conjures up in many non-Western minds historical memories of the strong imposing their will on the weak [...]"[182] using their right to intervene as an instrument of inconsistent, cruelly selective intervention policies, hijacked by their national interests.[183] The 'responsibility to protect' – idea allows for leaving these negative connotations behind and for opening up a new basis of discussion. Not the rights and prerogatives of the potentially intervening states are at the focus of the attention, but the urgent needs of those in misery.[184] This approach helps to overcome the deadlocked positions of the past and to bridge the divide between the different sides. By accepting the possibility of intervention in a sovereign state in a situation where the state itself failed to fulfil its responsibility to protect, the ICISS does not intend to weaken the non-intervention principle. Quite the contrary: the Commission explicitly restates its value and affirms that military intervention is only a last resort option. This attitude shows that the ICISS rightly acknowledges the weight the non-intervention principle still has in international law.

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[178] Newman, above n 13, 108.
[179] MacFarlane, Thielking and Weiss, above n 109, 980.
[180] Newman, above n 13, 108.
[181] Report, para 2.5.
[182] Ramesh Thakur "Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS" (2002) 33(3) Security Dialogue 323, 328.
[183] Tanguy, above n 84, 143.
[184] Thakur, above n 182, 328.

The ICISS justifies its new understanding of sovereignty as responsibility, among other things, with the increasing relevance of the notion of 'human security' in international law. Traditionally, the major security threats a state had to cope with were assumed to come from the outside.[185] That is why security issues were discussed in the context of 'state security'. The protection of the state, its boundaries, people and institutions from external attacks were at the centre of this discussion.[186] In the last decades, however, the nature of conflict has undergone a change. Inter-state conflicts have diminished and the sources of danger have largely turned internal.[187] The state which was traditionally perceived as the protector of its people frequently played ineffective roles in shielding its citizens from danger and often even constituted the source of danger itself.[188] It thus became clear that conventional state security alone cannot protect people and that the international community has to come up with a new paradigm. In recent years, many states and international organizations have therefore begun to broaden the traditional concept of security and to include perspectives of 'human security'. In the 'human security' domain the security of individuals is paramount.[189] To achieve this security, new effective means and mechanisms need to be found. The ICISS takes up this challenge and argues that when the well-being of people is seriously at stake there is a trans-boundary obligation for the outside world to interfere. This marks a watershed in the theory and practice of 'human security'. By imposing the subsidiary responsibility for human security on the international community, the ICISS shows that in its view states that violate fundamental human rights are no longer protected by the principle of sovereignty. The ICISS-concept elevates "the people's sovereignty, rather than the sovereign's sovereignty"[190] and thereby prepares the ground for a more human-rights-centred interpretation of international relations. This approach needs to be regarded as one of the most important contributions to the human security debate of the last years.[191]

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[185] Sadako Ogata "State Security – Human Security" The Fridtjof Nansen Memorial Lecture Organisation <http://www.humansecurity-chs.org/activities/outreach/Nansen.html> (last accessed 12 November 2004).

[186] Ogata, above n 185.

[187] Ogata, above n 185.

[188] Ogata, above n 185.

[189] The ICISS defines human security as "the security of people – their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms", see Report, para 2.21.

[190] W Michael Reisman "Comment – Sovereignty and Human Rights in Contemporary International Law" (1990) 84 Am. J. Int'l L. 866, 869.

[191] <http://www.ligi.ubc.ca> (last accessed 12 November 2004).

The 'responsibility to protect'- concept is ethically convincing and successfully debilitates normative scepticism towards interventions for humanitarian purposes. Unfortunately, the ICISS fails to provide persuasive arguments to substantiate that the purported "emerging guiding principle" of a "responsibility to protect" has already become firmly established in international law. This is regrettable but does not cloud the overall picture of the "responsibility to protect" – idea. The ICISS approach is innovative and refreshing. It helps to address the humanitarian intervention dilemma from a totally new angle and thus deserves the highest acknowledgement.

Two other major contributions of a general nature need to be mentioned. The Commission's proposal to relabel humanitarian intervention as "intervention for human protection purposes" seeks to satisfy different humanitarian organizations that were strongly opposed towards any militarization of the word "humanitarian". Indeed, the terms "humanitarian" and "intervention" do not match. The word humanitarian is marked by humanitarian values and a devotion to human welfare, the word intervention in contrast stands for the use of military force and the loss of human life this entails. An adoption of the Commission's proposal, thus, would be a welcome improvement. Whether the new term will succeed in replacing its long-established predecessor, however, has yet to be seen.[192]

Even more valuable is the ICISS' second contribution: its focus on a spectrum of action. According to the Commission, the responsibility to react never stands alone. It is part of a comprehensive responsibility to protect and needs to be seen in the context of an integral responsibility to prevent and a responsibility to rebuild.[193] This notion of a continuum of action makes the international community aware that there are more alternatives than simply invasion or inaction[194] and makes the ICISS concept a useful tool for guiding states' action at every stage of a (potential) humanitarian crisis.

The different elements of the ICISS' "responsibility to protect" are discussed below.

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[192] Roberts, above n 76, 145.
[193] Newman, above n 13, 108.
[194] Welsh, above n 12, 33.

B   *The Responsibility to Prevent*

One can only agree with the ICISS attitude towards prevention. It should be the top priority of the international community to address conflicts as early as possible, to settle them peacefully and thus make military intervention dispensable. In placing the emphasis on prevention rather than reaction the ICISS is well aware of the biggest dilemma arising in this context. Taking preventive measures requires enormous economic engagement by states and international organizations – an engagement that many are not willing to take in the absence of a full-scale crisis.[195] That the ICISS cannot provide a magic bullet for this problem is understandable. Its compelling plea to the international community to finally change "from a 'culture of reaction' to that of a 'culture of prevention'"[196], however, could have been even more effective had it been linked with concrete demands and recommendations for action.

C   *The Responsibility to React*

The ICISS identifies six criteria for the justified use of force for human protection purposes. The elements of the Commission's list are not entirely new. Many have already attempted to establish clear guidelines for humanitarian interventions in one form or another. The special strength of the ICISS' approach, however, lies in its effort to combine these individual views. This gives the report an unprecedented comprehensiveness. In establishing the set of criteria the ICISS relies on the "just war"-framework. Taking "just war" thinking as a starting point deserves support. The "just war"- theory does have limitations, but it nevertheless constitutes the most sophisticated framework for thinking about moral action in the context of war.[197] It has roots in the ethics of all the great world religions and has been a vital source of international law for centuries. It therefore has to be regarded as an appropriate foundation for developing principles that are capable of finding consensus around the world.

The set of criteria devised by the Commission on the basis of the "just war" framework, however, is not without its shortcomings. Some of these have already

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[195] Welsh, Thielking and MacFarlane, above n 85 , 500.
[196] Report, para 3.42.
[197] Welsh, above n 12, 29.

been outlined in the previous chapter. Therefore only two additional aspects will be the focus of the discussion here. Firstly, the narrow formulation of the ICISS' 'just cause' threshold and secondly the criticism of legal scholars of the criterion of 'right intention'.

1   Just cause

The ICISS sets a very high bar for military intervention. It explicitly states that the threshold is not satisfied in cases of systematic racial discrimination, massive human rights abuses and the overthrow of democratically elected regimes. It is difficult to comprehend that the Commission excludes these situations. Systematic racial discrimination and massive human rights abuses are jus cogens norms for most international lawyers.[198] Given the experiences of the last decade the preclusion of intervention after the toppling of a democratic government appears just as puzzling. "The Security Council-approved and US-led effort in Haiti in 1994 had already set the precedent of outside pressure [...] to restore an elected government."[199] The condemnation of the overthrow of the government in Sierra Leone in 1997, by the UN, and the subsequent UN sanctioned ECOWAS[200] intervention affirmed that the use of force for the purpose of restoring a legitimate government is an emerging norm in international law.[201] The ICISS is aware that it excludes situations that some have argued are a 'just cause' for intervention. It appears all the more incomprehensible that the Commission does not give any reasons to justify its decision.

2   Right intention

The second disputed ICISS' criterion for military intervention is the criterion of "right intention". The Commission states that the "primary purpose of the intervention must be to halt or avert human suffering"[202]. In doing so, the ICISS presents itself refreshingly realistic. It acknowledges that "mixed motives, in

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[198] Weiss, above n 163, 139.
[199] Weiss, above n 163 , 139.
[200] ECOWAS stands for "Economic Community of West African States".
[201] Levitt, above n 158, 166.
[202] Report, para 4.33.

international relations [...] are a fact of life"[203] and that "the budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention"[204]. The Commission thereby makes clear that for satisfying its "right intention"-standard a purely humanitarian motive is not mandatory. It is sufficient if the *primary* purpose is humanitarian. Despite this liberal approach, many scholars reject the ICISS "right intention" criterion. Wheeler, for example, argues that the problem with relying on motive "is that it takes the intervening state as the referent object for analysis rather than the victims who are rescued as a consequence of the use of force"[205]. A better approach, thus, would be to eliminate the "right intention" requirement and to concentrate solely on the prospects for a humanitarian outcome instead. This idea is supported by others. Welsh, Thielking and MacFarlane state that "as long as the motives and means do not undermine [a humanitarian] result, then a military intervention may be consistent with the responsibility to protect [...]"[206]. This viewpoint disregards two important arguments in favour of the "right intention" requirement. Firstly, a primary altruistic motive makes acceptance of the intervening states' actions by local civilians and support of the foreign troops by local groups much more likely. Secondly, the criterion curbs the danger of the abuse of the humanitarian intervention doctrine for solely selfish purposes. The Commission therefore is perfectly right in making the right intention criterion an inherent part of its concept.

D   *The Responsibility to Rebuild*

The Commission is certainly right to call upon intervening states to commit to a long-term process of rebuilding. The help of the international community is imperative to ensure sustainable reconstruction and rehabilitation of the target country. By stating this, one should, however, not underestimate the risks associated with the responsibility to rebuild. "There is growing concern that the international community, by taking on expanded reconstruction responsibilities, is entering into

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[203] Report, para 4.35.

[204] Report, para 4.35.

[205] Nicholas J Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford/UK, New York/USA, 2001) 38.

[206] Welsh, Thielking and MacFarlane, above n 85, 501.

the next generation of imperialism."[207] The continued presence of the intervening states in the country not only evokes the feeling of being still invaded among citizens but may in particular cases effectively entail undermining that states right to self-determination. This is irreconcilable with the notion of state sovereignty and may weaken a countries identity for years. The challenging task, thus, is to find the right balance between leaving too early and staying too long or to say it in the words of one of the commissioners: "Taking responsibility without confiscating is the balance international administrators have to strike."[208] It is not possible to establish an ever fitting time-frame for this. It rather has to be decided on a case-by-case basis when the time for leaving has come. The ICISS therefore fulfils its task by clearly spelling out the danger of the responsibility to rebuild and thereby making intervening states aware of the fact that engagement in a country in the follow-up period to an intervention needs to be limited.

E   *Operational Principles*

The Commission devotes one chapter of its report to operational principles. This section discusses the practical dimension of the spectrum of military operations available to states to protect people at risk, from preventive deployments on the front-end of the gamut and robust military action to post-conflict reconstruction at the back end.[209]

One of the Commission's principles with regard to the operational dimension is that a "clear and unambiguous mandate is one of the first and most important requirements of an operation to protect"[210]. As sensible as this suggestion might be, it is "difficult to square with the ICISS earlier discussion of the political obstacles to getting any resolution at all within the Security Council in some situations"[211]. Mandate and authorization go hand in hand and thus it is puzzling that the ICISS addresses the authorization dilemma in its "right authority"-chapter, but totally ignores it on the operational stage.

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[207] Welsh, above n 12, 33.
[208] Michael Ignatieff "State Failure and Nation Building" in J L Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention – Ethical, legal, and political dilemmas* (Cambridge University Press, Cambridge/UK, 2003) 299, 321.
[209] Levitt, above n 158, 173.
[210] Report, para 7.15.
[211] Welsh, Thielking and MacFarlane, above n 85 , 505.

Another principle laid down by the Commission is "unity in command". There is little doubt that the ICISS is right in stating that "unity of command is essential for the successful conduct of operations". However, it is disappointing that the Commission does not give any recommendations as to under what command interventions should preferable take place. Should United Nations force commanders be in charge or should the intervention take place under the command of a certain country? The Commission further does not face up to the challenge that "the major powers have [in the past] shown little willingness to put their national forces under the exclusive command of others"[212]. The USA, for example, has more military resources than any other country in the world and thus possesses a powerful tool to claim the command for itself. Unfortunately, the ICISS fails to address these issues.

"There is one area where the ICISS, [however], deserves particular praise: its recommendations that intervening nations establish codes of conduct for the behaviour of their troops."[213] The terrible pictures of the happenings in the Iraqi prison Abu Ghurayb have shown the world how atrocious interveners sometimes treat the civilian population and have painfully affirmed the need for clear standards for the behaviour of soldiers and effective accountability mechanisms when those are not met. As one writer puts it: "Nothing would delegitimize the enterprise more quickly than situations in which civilians are perceived to need protection from the protectors."[214] An adoption of the ICISS' proposal to establish codes of conduct and to ensure justice and accountability in the exercise of the responsibility to protect, thus, would be a very welcome development.

VI A NEW CONSENSUS ON HUMANITARIAN INTERVENTION?

In Kofi Annan's view, the ICISS has succeeded in its striving for finding a new way of reconciling the seemingly irreconcilable notions of interventions and state sovereignty:[215]

> How to protect individual lives while maintaining and even strengthening the sovereignty of States has become clearer with the publication of this report. You are taking away the last

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[212] Welsh, Thielking and MacFarlane, above n 85, 505.
[213] Welsh, Thielking and MacFarlane, above n 85, 505.
[214] Welsh, Thielking and MacFarlane, above n 85, 505 and 506.
[215] Welsh, Thielking and MacFarlane, above n 85, 506.

excuses of the international community for doing nothing when doing something can save lives. I can offer no higher praise.[216]

But how did the rest of the world react to the ICISS-concept? Was it received favourable or negative? Is a consensus on "the responsibility to protect" likely or rather an utopia? And how do the appalling attacks of 11 September 2001 and the subsequent 'war on terror' affect the future of the ICISS' framework? This part of the research paper seeks to explore these questions.

A   The Impact of 'September 11' on "the Responsibility to Protect"

Three months before the ICISS presented its report to the UN Secretary General, the dreadful events of 11 September 2001 shattered the world. There can be little doubt that these events deflected attention from the Commission's efforts to develop a new conceptual framework for humanitarian interventions.[217] Only two years earlier, after NATO's intervention in Kosovo, humanitarian interventions were the central issue on the public policy agenda – but by late 2001, the 'war on terror' was on and immediately occupied the first division of the international debate.[218] If there is today a discussion about intervention, it is seldom about protection of human rights but mainly about the September 2002 National Security Strategy of the USA, in which the Bush administration invoked what is perceived as a right to pre-emptive or even preventive intervention on a wide range of mainly security-related grounds.[219] The new doctrine and the US-led wars in Afghanistan and Iraq significantly affect the way in which the concept of "The Responsibility to Protect" is perceived and pursued.[220] First of all, they "reinforce the already widespread suspicion of states that interventions for humanitarian protection purposes may conceal, or lead on to, some broader and more power-political agenda"[221]. The US policy of pre-emptive or even preventive self-defence is regarded by many states as a serious threat.[222] Thus, under the current circumstances these states are more likely to

[216] Kofi Annan, address to the International Peace Academy Seminar on "The Responsibility to Protect" (15 February 2002) Government of Canada – Foreign Affairs <http//www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp> (last accessed 13 November 2004).
[217] Welsh, above n 12 , 33.
[218] Roberts, above n 76, 150.
[219] Roberts, above n 76, 150.
[220] MacFarlane, Thielking and Weiss, above n 109 , 983.
[221] Roberts, above n 76, 151.
[222] MacFarlane, Thielking and Weiss, above n 109, 984.

plead for a strict non-intervention rule than to adopt a set of criteria to justify intervention as proposed by the ICISS.[223] Secondly, the USA's preoccupation with the 'war on terror' may limit its willingness and also capacity to engage in situations that satisfy the ICISS' threshold for intervention.[224] Without the support of the USA as one of the world major powers "The Responsibility to Protect", however, is unlikely to be formally adopted and to be effectively enforced in practise.

As always, timing is everything. The publication of the ICISS' report came in an inauspicious moment.

B   *The International Response to the ICISS-Concept*

The Commission's objective from the outset has been that its report will have a practical and concrete political impact.[225] So how did the international community of states respond to the ICISS' concept?

The UN Security Council devoted two days in May 2002 to the ICISS findings.[226] During this meeting the USA showed no enthusiasm about "The Responsibility to Protect" and made clear that it "does not and will not accept the substance of the report or support any formal declaration or resolution about it"[227]. This reluctance can not only be attributed to the US preoccupation with the 'war on terror' but needs to be perceived as a sign for a general unwillingness to adopt standards which might compel to intervene although national self-interests are not directly concerned.[228] But not only the USA, but also other Security Council members raised concerns about committing to any criteria and were reluctant to give up the practise of case-by-case decision making about whether to intervene or not.[229] The British and French ambassadors even reported that there was widespread agreement in the meeting that if new situations emerge – e.g. in Burundi or the Congo – the 'Permanent Five' and broader Council would lack the political will to

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[223] MacFarlane, Thielking and Weiss, above n 109, 984.
[224] Roberts, above n 76, 151.
[225] Report, para 8.24.
[226] Welsh, Thielking and MacFarlane, above n 85, 509.
[227] MacFarlane, Thielking and Weiss, above n 109, 983.
[228] MacFarlane, Thielking and Weiss, above n 109, 983.
[229] MacFarlane, Thielking and Weiss, above n 109, 983.

deliver troops and would restrict themselves to condemnatory resolutions.[230] To say it in the words of one writer: "There is very little appetite in the Council to commit to principles that would force its hand."[231] The accuracy of this statement is affirmed by Russia's reaction to the ICISS' proposed code of conduct for the use of veto rights. It strictly resisted any idea of restraint in its veto power.[232]

Canada has pursued the ICISS' proposed adoption of a General Assembly resolution which embodies the basic principles of "The Responsibility to Protect" – an according resolution, however, has yet not been passed.

The reactions to the ICISS' framework outside the UN network were similarly disappointing. In July 2003, at the Progressive Governance Summit, Canadian Prime Minister Jean Chrétien and British Prime Minister Tony Blair spoke up for a quotation of the basic ICISS' principles in the final communiqué.[233] The reaction of the other participants was hostile and when Argentina, Chile and Germany expressed their strong objections to the suggestion, a supportive passage was removed.[234]

Given the above incidents one cannot but conclude that, as desirable as it might be, a formal adoption of the ICISS framework in the near future is unlikely to happen.

VII   CONCLUSION

When the International Commission on Intervention and State Sovereignty took up work in September 2000, it had an ambitious goal – to solve the long-standing dilemma of humanitarian interventions. It did not completely achieve this goal, but the Commission's report nevertheless needs to be regarded as an outstanding contribution in the field of international human rights politics.

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[230] Welsh, Thielking and MacFarlane, above n 85, 509.
[231] Welsh, Thielking and MacFarlane, above n 85, 509.
[232] Welsh, Thielking and MacFarlane, above n 85, 509.
[233] Weiss, above n 163, 143.
[234] MacFarlane, Thielking and Weiss, above n 109, 983.

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The key message of the ICISS report, the imposition of a responsibility to protect, is innovative and ground-breaking. It shifts the focus of the humanitarian intervention debate from the rights of the interveners to the rights of people at risk and the duty of states to protect them.[235] By doing so, it establishes a new basis for discussion that overcomes the familiar and often deadlocked standpoints of the past and paves the way for "redefining the legitimacy and legality of interventions made in the name of human rights and humanitarianism"[236]. The uniqueness of the ICISS report lies in its comprehensiveness, providing not only new guidelines for a responsibility to react to humanitarian crisis, but also developing concepts for a responsibility to prevent and to rebuild.

But despite these achievements, the report is not without shortcomings. One had wished more clarity at several points where the report stayed rather vague, e.g. in defining the 'just cause' threshold for intervention or in measuring the 'reasonable prospect of success' criterion. The report's major weaknesses, however, lie in its incapability to resolve the issues of political will and right authority. The Commission's considerations concerning the difficulty in obtaining appropriate authorization of the use of force for human protection purposes sound well in theory, but are unlikely to function in practice. The report also fails to provide a solution for the problem of generating sufficient political will to take action. In fact, this lack of political will might lead to the ICISS concept's own downfall. So far, important states like the USA have shown a clear reluctance to adopt the ICISS framework which would impose a duty to intervene although national interests might not be involved. Without a change in attitude of political decision makers, 'the Responsibility to Protect' will fail just as so many other concepts for humanitarian interventions before. The "test case" Sudan unmistakably shows that the international community has not yet acknowledged its responsibility to protect. Once again, the UN struggles with definitions and lengthy debates about whether or not Darfur constitutes a threat to 'international peace and security'.[237] Meanwhile, the people in Sudan continue to suffer.

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[235] Levitt, above n 158, 175.
[236] Tanguy, above n 84, 148.
[237] Paul Martin, address at the United Nations (22 September 2004) Government of Canada Foreign Affairs <http//www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp> (last accessed 14 November 2004).

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