University of Pretoria etd – Kindiki, K (2005)

CHAPTER 1: INTRODUCTION

1.1 Background
1.2 Aims of the Study
1.3 Conceptual Clarification
1.3.1 'Humanitarian Intervention'
1.3.1.1 'Intervention' Generally
1.3.1.2 Who May Intervene?
1.3.1.3 The Means of Intervention
1.3.1.4 The Aim of Intervention: Humanitarian Intervention Distinguished from Related Concepts
(i) Humanitarian Intervention Differs from Intervention to Protect Nationals Abroad
(ii) Humanitarian Intervention Differs from Intervention to Facilitate Self-determination
(iii) Humanitarian Intervention Differs from Pro-democratic Intervention
1.3.1.5 Humanitarian Intervention Differs from Intervention with Consent
1.3.1.6 Humanitarian Intervention Differs from Individual or Collective Self-defence
1.3.1.7 Humanitarian intervention Differs from Peacemaking, peacekeeping and Peace Enforcement
1.3.1.8 Statutorily Authorised Humanitarian Intervention versus Humanitarian Intervention Under Customary International Law
1.3.1.9 Working Definition of 'Humanitarian Intervention'
1.3.2 'Intergovernmental Organisations'
1.4 Importance of this Study
1.5 Work Already Done in this Field
1.6 Research Methodology and *Modus Operandi*
1.7 Overview of the Chapters
1.8 Limitations of the Study

1.1 BACKGROUND

In 1994, an estimated 800 000 people were killed in Rwanda in one of the worst cases of genocide in world history since the holocaust.[1] During the genocide, gross violations of human rights were committed against civilians, many of whom were tortured before being murdered with crude weapons like machetes and nail-studded clubs. Despite the publicity given to the genocidal

[1] The exact number of those who were killed during the 1994 Rwandan genocide has never been known. Estimates range from 500 000 to 1 000 000 persons. See *Final Report of the Committee of Experts Established Pursuant to UN Security Council Resolution 935* (1994), S/1994/1405 of 9 September 1994; and the 1995 and 1996 *Reports of the United Nations Special Rapporteur on the Situation of Human Rights in Rwanda*, UN Docs E/CN.4/1995/7 and E/CN.4/1996/68.

activities in both print and electronic media world-over, the international community largely failed to protect the Rwandan people from the atrocities.[2]

The Rwandan genocide, its devastating effects and the inability of the international community to prevent, limit or halt the atrocities came at a time when many African countries were, and still are, engulfed in deadly armed conflicts, most of which are intra-state in origin.[3] It also came at an extraordinary time in history when many ideas, relationships and institutions, which hitherto seemed solid, had began to 'dissolve' rapidly.[4] In the aftermath of the Rwandan genocide, debate has persisted regarding whether there are emerging norms on when and how the international community can justifiably intervene to prevent or ameliorate internal conflicts and widespread human rights abuses.[5]

Until very recently, the question whether it is permissible for other states to intervene with military force in the internal affairs of a sovereign country would

---

[2] The failure of the international community to forestall the genocide was described in the *Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, CM 12048 (LXVII) 29 May 2000. See also International Panel of Eminent Personalities (2000) *Rwanda: The Preventable Genocide* U/IPEP/PANEL, reproduced in (2001) 40 *ILM* 141, also available online at <htttp://www.oau-oua.org/Document/ipep/rwanda-e/EN.htm> (accessed on 1 August 2002). UN Secretary-General Kofi Annan, during a visit to Rwanda in 1999, acknowledged that the international community failed Rwandans and that the genocide could have been prevented by early action. The Secretary-General's 'apology' is also contained in United Nations (1998) para 7.

[3] For a detailed account of international armed conflicts in Africa and their impact, see Mekankamp *et al* (1999), generally. See also Solomon (1999) 34 (stating that "of the 48 genocides and 'politicides' registered throughout the world between 1945 and 1995, 20 took place in Africa, the vast majority of them being intra-state in origin"); According to the 1998 *Report of the UN Secretary-General Regarding the Causes and Effects of Armed Conflicts in Africa,* 14 out of the 53 African countries were involved in armed conflicts at the time, accounting for more than half of all war-related deaths and resulting to more than eight million refugees, returnees and internally displaced persons. See United Nations (1998) para 13.

[4] Farer (1991) 185.

[5] Reed & Kaysen (1993) 5. Some of the writings of the post-Rwandan genocide period, relating to the issue of humanitarian intervention, include Harriss (1995), Reisman (1997), Kritsiotis (1998) and Abiew (1999).

University of Pretoria etd – Kindiki, K (2005)

have struck many as a non-issue.[6] Such intervention would be seen as violating international law. A lawful armed conflict, according to proponents of classical international law, is one by which a country seeks to defend itself, or to defend a friend and ally, against an attacking enemy.[7] In 1999, it began to look as if views were changing. In that year an armed conflict was messily but successfully fought over Kosovo, as a result of which the Balkans are a rather better place than they had been before.[8] A near-conflict of a similar nature triumphantly achieved its purpose in East Timor, freeing a captured people from the rule of the Indonesian Army.[9]

The terrorist attacks on New York and Washington on 11 September 2001 have in no small measure added impetus to the debate on the legality of intervention in sovereign states. These attacks have, more than ever before, led to more agreement that the 'state-centred' doctrines of state sovereignty, non-intervention and non-use of force should not be invoked to shield atrocities. It is increasingly agreed that horrendous acts such as indiscriminate bombings are in any circumstances unjustifiable, whatever the

---

[6] See *The Economist* (New York) 6 January 2001 17. For views that intervention in 'internal affairs' is not permissible even for humanitarian reasons, see Dugard (2000) 423, who declares that intervention in internal affairs is a cardinal rule of both customary and treaty international law, and argues that with regard to humanitarian intervention, 'the weight of authority is against the recognition of [such a right]'. See also Brownlie (1974) 217 223 and Chigara (2000) 58 62.

[7] For an analysis of this traditional doctrine of international law, see, for instance, Brownlie (1974), Verwey (1986) and Kritsiotis (1998).

[8] On the intervention in Kosovo, see generally, Simma (1999), Cassese (1999), Independent Commission on Kosovo (2000) and Kritsiotis (2000).

[9] *The Econonist* (New York) 6 January 2001 17; Weisburd (2001) 225 241. In July 1999 after the inhabitants of East Timor had voted overwhelmingly against remaining a part of Indonesia, militia groups favouring continued Indonesian control of the area began a campaign of great violence. Many were killed and hundreds of thousands were displaced. The Indonesian military not only failed to prevent the violence, but also apparently provided the militia groups with various kinds of support.

considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[10]

This study examines the myriad dilemmas posed by collective international intervention, weighing the issues of state sovereignty, non-intervention and non- use of force against the perceived need for collective action to stop conflicts that often lead to bloodshed and human suffering. The study inquires if the so-called right or duty of humanitarian intervention has a basis in contemporary international law, and if so, when, how and by whom the right or duty may be invoked.[11] The study is also alive to the fact that finding a consensus about intervention is not simply a matter of deciding who should authorise it and when it is legitimate to intervene. It is also a matter of figuring out how to do it so that noble objectives are not tarnished by inappropriate means.[12] The present study proceeds with the following assumptions:

- It is, at least, implicit from contemporary norms of international law that collective (as opposed to unilateral) humanitarian intervention on the basis of treaty or customary international law is permissible in extreme and rare circumstances of gross violations of human rights, such as

---

[10] The consensus was demonstrated, for instance, by the expressions of many countries of the world, pledging their solidarity with the US in the fight against Afghanistan to reportedly root out *Al Qaeda* networks. The *Al Qaeda* Islamic extremist group members are widely believed to have masterminded the attacks.

[11] Both the concepts of 'duty' and 'right' in respect to humanitarian intervention are subject to academic controversy. See, for instance, Kratochwil (1995) 21 35 (stating that a 'right' to intervention cannot be construed from the point of view of misuse of power by a government, because 'the violation of a right does not automatically vest a third person with either a duty or the right to correct the infraction'). However, some authors make reference to the 'right' of humanitarian intervention. See, for instance, Kritsiotis (1998), generally. In this study, the term 'duty' is preferred because human rights law creates a duty to protect, promote and fulfil fundamental rights. This duty is primarily on the state where the infraction occurs and in the event of failure by that state to guarantee the rights, the duty shifts to the international community of states acting, for example, through international human rights monitoring mechanisms, or through armed force by intergovernmental organisations in rare circumstances of serious violations of human rights, as is argued in this study. Also, as the intent of humanitarian intervention is to protect human rights, it is not conceivable that states have 'rights' in international human rights law. Instead, the general view is that states have duties or obligations.

[12] ICISS (2001a) 5.

situations where genocide, war crimes and crimes against humanity are being committed.

- In the post-cold war era, fundamental human rights are re-defining the absolutist perception of the traditional paradigms of state sovereignty, non-intervention and the prohibition of the use of force in international law and relations.

- Norm-setting and norm-enforcement in international law are increasingly influenced by the need to achieve the greatest benefit for the largest proportion of the international community.

1.2 AIMS OF THE STUDY

This study seeks to contribute to the scholarly debate regarding the values that should prevail when widespread human rights deprivations occur within the domestic jurisdiction of states. On the one hand are the 'state-system values' of state sovereignty, non-intervention and the prohibition of the use of force. These principles are said to constitute the bedrock of contemporary international law.[13] On the other hand are other equally legal norms engrained in international human rights and humanitarian law.

One of the main issues that the study attempts to tackle is: Which of the two sets of values should prevail in the face of mass and atrocious violations of human rights? In addressing this issue, the study will highlight the dilemma of the competing interests of humanity *vis-à-vis* the need to adhere to traditional paradigms that constitute basic international law. Ultimately, the study will define when, if at all, the international community acting in concert may exercise the right or duty to intervene forcibly for humanitarian purposes, and if such a right or duty exists, how and by whom it may be exercised. The study attempts to challenge some of the deeply held assumptions about the efficacy,

[13] See, for instance Chigara (2000) 58 62.

University of Pretoria etd – Kindiki, K (2005)

legality and legitimacy of collective humanitarian intervention. Key in the discussion will be the role intergovernmental organisations could play.

The study aims at investigating the place of humanitarian intervention in contemporary international law. A primary issue that will be dealt with is whether or not there is any legal support for humanitarian intervention, based on treaties or customary international law. Also, the study will assess the role, if any, of intergovernmental organisations in facilitating collective humanitarian intervention in Africa. Of particular concern in this regard will be the newly launched African Union (AU), whose founding treaty specifically permits intervention in member states in grave situations of genocide, war crimes and crimes against humanity.[14]

The specific aims of the study are to:

- Provide a theoretical analysis of the concept of humanitarian intervention.

- Examine the legal status of humanitarian intervention under treaty law.

- Establish the position of humanitarian intervention under customary international law, by exploring the relevant state practice and *opinio juris*.

- Clarify the current international law relating to humanitarian intervention and thereby contribute to legal certainty.

---

[14] The AU, which replaced the Organisation of African Unity (OAU), was launched on 9 July 2002 in Durban, South Africa, with President Thabo Mbeki of South Africa as its first Chairman; See, 'Decisions on the Implementation of the Sirte Summit Decision on the African Union' <www.oau-uou.org> (accessed on 15 September 2002); see also, 'Leaders Usher in Africa Union' *East African Standard* 10 July 2002 15, 'It's a New Start as OAU is Disbanded' *Daily Nation* 9 July 2002 13, 'From an OAU to a USA?' *Daily Nation* 9 July 2002 11. The Constitutive Act of the African Union (CAB/LEG/23.15), which established the AU was adopted in Lomé, Togo on 11 July 2000 and it entered into force on 26 May 2001. The Act is reproduced in (2000) 11 *African Journal of International and Comparative Law* 629 and in (2001) 1 *African Human Rights Law Journal* 315.

- Examine the extent to which international law-making in different fields has been influenced by the concept of 'public good', and to explore the relevance of the concept of 'public good' to humanitarian intervention.
- Establish clearer procedures and criteria relating to when and how intervention should take place.
- Assess the role, if any, of intergovernmental organisations in facilitating humanitarian intervention in Africa.
- Make recommendations regarding legal and institutional issues requiring consideration if the right or duty of humanitarian intervention were to be exercised.

1.3 CONCEPTUAL CLARIFICATION

The study employs two terms that need elaboration. These are 'humanitarian intervention' and 'intergovernmental organisations'. These terms are discussed below.

1.3.1 'Humanitarian Intervention'

The term 'humanitarian intervention' consists of two elements. The one element, that is, 'intervention', focuses on the form of interference and the means used. The other element, 'humanitarian', refers to the aim or motive of the action, or to the situation prompting the response. These two concepts are now considered here in detail.

1.3.1.1 'Intervention' Generally

Despite its salience and description of an age-old phenomenon, the concept of intervention suffers from ambiguity and lack of definitional clarity.[15] The general notion of intervention is derived from the Latin verb *intervenire*, meaning to 'step between', 'to disrupt' or 'to interfere'.[16] In international law, Vattel first defined intervention in 1758 as 'a breach of the sovereignty of the target state'.[17] Oppenheim, also viewing intervention as an invasion of state sovereignty defined it as:[18]

> [the] dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual conditions of things.

Based on the definitions of various scholars in international relations, Geldenhuys defines intervention as:[19]

> [T]he calculated action of state, a group of states, an international organi[s]ation or some other international actor[s] to influence the political system of another state including its structure of authority [and] its domestic policies ...

A definitive notion or a universally acceptable definition of the term 'intervention' is singularly absent,[20] making most attempts to define the term

---

15 Rosenau (1969) 155.

16 Du Plessis (2000) 4.

17 See Otte & Dorman (1995) 3, citing Vattel (1758) *Les Droit des Gens ou Principe de la Loi Naturalle* London 1 para 3.

18 Oppenheim (1905) 272.

19 Geldenhuys (1998) 6.

20 But see *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (1986) ICJ Rep 14 para 205 where attempts are made to articulate a general conceptualisation of the term.

somewhat static and futile.[21] In addition, the concept covers an ever-widening spectrum of phenomena and field of activity. Thus the concept has been regarded as the 'twilight area' where power, self-interest, international law and morality meet as constitutive elements of the international system.[22] In this study, 'intervention' will be taken to mean armed interference by an external authority in the sphere of jurisdiction of a sovereign state.[23]

Having discussed the meaning of 'intervention', we now turn to the concept of 'humanitarian intervention', which, as stated earlier, is a particular type of intervention. Definitions of 'humanitarian intervention' can be classified into two broad categories: the traditional (classical, narrow) and the liberal (wider) definitions. These approaches provide answers to two questions relating to who may intervene and the means for intervention.

1.3.1.2 Who May Intervene?

With respect to the entities entitled to intervene, classical definitions ascribe the right or duty of humanitarian intervention to states only. Teson adopts this definitional scope and defines humanitarian intervention as follows:[24]

> [It is] the proportionate transboundary help, including forcible help, *provided by governments* to individuals in another state who are being denied their basic human rights and who themselves would be rationally willing to revolt against their oppressive government.

The liberal definitions encompass humanitarian activities by entities other than states. A good example of activities viewed by some as constituting

---

[21] Du Plessis (2000) 5; for a discussion of this 'problem of definition' or 'intervention puzzle', see Bull (1984) 1- 6 and Reed & Kaysen (1993) 65-68.

[22] Du Plessis (2000) 5.

[23] This definition draws from that in Bull (1984) 'Introduction'; and that in Teson (1988) 5.

[24] Teson (1988) 5. Emphasis added.

University of Pretoria etd – Kindiki, K (2005)

humanitarian intervention is the administration of relief supplies by international organisations. Understood in this sense, humanitarian intervention becomes any humanitarian action by any international agency or authority, so long as a humanitarian impulse is the sole authoritative basis for the action in question.[25]

In this study, the narrow definition is preferred, one that restrict humanitarian intervention to the use of force by states. Thus activities of relief organisations and other non-forcible actions that may ostensibly be carried out on humanitarian grounds are not within the purview of this study.

1.3.1.3 The Means of Intervention

Classical and liberal definitions also differ with regard to what type of action constitutes humanitarian intervention. The classical view is that the intervention has to involve the use of force. Even within this school of thought, some writers confine the concept of humanitarian intervention to those protective activities that involve the use of military force.[26] Others, while agreeing that humanitarian intervention involves coercive and forcible measures, argue that the intervention may be effectuated not only through military action, but also through non-forcible means such as political or economic pressure.[27]

In contrast, liberal definitions view any form of intervention as humanitarian, so long as the purpose of the intervention is to protect human rights in the target

---

[25] For various 'liberal definitions' see, Kwakwa (1994) 9 15, Harriss (1995), generally; and Reisman (1997) 432.

[26] See Verwey (1986) 57 59.

[27] Verwey (1986) 75; see also Farer (1991) 185 (Humanitarian intervention is 'the threat or use of force by one state against another for the purpose of terminating the latter's abuse of its own nationals'). The report by the Commission on Intervention and Sate Sovereignty notes that (' ... [p]art of the controversy over [humanitarian] intervention derives from the potential width of activities this term can cover, up to and including military intervention'), see ICISS (2001).

University of Pretoria etd – Kindiki, K (2005)

state.[28] Kwakwa, for instance, takes this viewpoint and argues that humanitarian intervention may take various forms, ranging from 'very mild and non-violent means' such as 'public criticisms and persuasion, direct satellite broadcasting, the financing of political parties, to forcible means [involving] the use military instruments'.[29]

In line with the approach in this study to adopt a narrow definition, humanitarian intervention refers to the use of military force. Non-military measures such as economic sanctions, and attachment of conditions on donor funds fall outside the scope of humanitarian intervention in the narrow sense.

1.3.1.4 The Aim of Intervention: Humanitarian Intervention Distinguished from Related Concepts

The aim of humanitarian intervention is to forestall, limit or halt large-scale human rights violations leading or likely to lead to massive loss of lives in the target state. The rights violated should be the 'core' or 'fundamental' rights, those rights that are 'non-derogable'.[30] Derogation clauses in international

---

[28] See Kwakwa (1994) 9 15; Harriss (1995), generally; Reisman (1997) 432.

[29] Kwakwa (1994) 11-12; see also Damrosch (1989) 1, where she discusses intervention by governments in the internal affairs of others by granting financial assistance to influence the outcome of elections; ICISS (2001a) 16 ('Some would regard any application of pressure to a state as being [humanitarian] intervention, and would include in this conditional support programmes by major international financial institutions whose recipients often feel that they have no choice but to accept. Some others would regard almost any non-consensual interference in the internal affairs of another state as being [humanitarian] intervention-including the delivery of emergency relief assistance to a section of the country's population in need').

[30] In time of public emergency which threatens the life of the nation, (for instance, international armed conflict, civil war, other serious cases violent internal unrest, natural or man-made disasters), states may take measures derogating from their human rights violations. In order to prevent the misuse of derogation clauses, human rights instruments often subject the derogation to a number of restrictions and limitations. For instance, art 4(1) of the International Covenant on Civil and Political Rights (the 'ICCPR'), adopted on 16 December 1966, entry into force 23 March 1976, reprinted in United Nations (1994a) 20, provides that a state party can only derogate from its obligations under the Covenant if it officially declares a state of emergency. The state must inform the UN Secretary-General the reasons for the derogation and the particular rights derogated. Also, the article provides that derogation measures are only permitted to the extent strictly required by the exigencies of the situation, and shall be consistent with their obligations under international law.

human rights instruments or in domestic bills of rights permit the suspension of rights, except in respect of a few 'core' civil and political rights.[31] International instruments on socio-economic rights do not contain derogation clauses,[32] nor do derogation clauses in national bills of rights prohibit the suspension of socio-economic rights.[33] The non-prohibition of suspension of socio-economic rights through derogation clauses may be the reason why many writers take the position that humanitarian intervention is a response to widespread and gross violations of 'core' or 'fundamental' civil and political rights, on a scale at which genocide, war crimes or crimes against humanity can be inferred.[34]

However, it is arguable that violations of socio-economic rights in a magnitude that leads or is likely to lead to 'massive loss of lives' may warrant humanitarian intervention. Examples of situations involving violations of socio-economic rights that may lead to massive loss of lives are extensive inaccessibility to food by the population in the case of famine or other natural disasters, or lack of basic health care resulting or likely to result in widespread deaths. If threat or use of force is used to secure access to food or healthcare in a country where the government is unwilling to allow local or international humanitarian assistance, such application of force would constitute humanitarian intervention.

---

[31] See, for instance, art 4, ICCPR; art 15(1) of the European Convention on Human Rights (the 'ECHR'), adopted on 4 November 1950, entry into force, 3 September 1953, reprinted in United Nations (1994b) 7; s 85, Constitution of Kenya, Act 5 of 1969, reprinted in Heyns (ed) (1996) 175; and s 34 of the South African Constitution, Act 200 of 1993, reprinted in Heyns (ed) (1996) 339.

[32] For instance, the International Covenant on Economic, Social and Cultural Rights (the 'ICESCR') [adopted on 16 December 1966, entry into force on 3 January 1976, reprinted in United Nations (1994a) 8], does not have a derogation clause.

[33] Non-derogable rights include the right to life, prohibition of torture, slavery, servitude, detention for debt and retroactive criminal laws, as well as recognition.

[34] See for instance, Verwey (1986) 57 58-59;Teson (1988) 5; and Charney (1999) 1231 1245-1246. In these and other studies, there seems to be consensus that humanitarian intervention should respond to genocide, war crimes and crimes against humanity.

The role of the government of the target state may in 'entertaining' the violations may be in the form of perpetuating or condoning the violations. It may be that the government itself is perpetrating the violations, is unable to stop them, or is not able or willing to allow local or international action to end them. Thus humanitarian intervention should fall within these theoretical parameters and is not just any action by external actors to relieve a humanitarian crisis for which the territorial authorities are responsible or with which they are unable to cope.

On the basis of the above understanding, Franck and Rodley define humanitarian intervention as the use of force so as to protect the inhabitants of another state against 'treatment that is so arbitrary and persistently abusive as to exceed' the 'limits of reason and justice'.[35] Similarly, Baxter is of the view that for an intervention to be deemed humanitarian, there ought to be 'egregious violations of human rights' taking place in the target state.[36]

Humanitarian intervention differs from related concepts, such as 'humanitarian action', 'humanitarian operations' or 'humanitarian assistance'.[37] Humanitarian action or operations reflect a whole spectrum of humanitarian responses to conflict and crisis situations, and many of those responses may not necessarily involve the use of force.[38] Humanitarian assistance on its part is the act of providing aid to the government or population of a state, in order to alleviate human suffering.[39]

---

[35] Franck & Rodley (1973) 275 305.

[36] Baxter (1973) 53.

[37] These terms were adopted by participants of a workshop under the auspices of the Academic Council on the UN System, Windhoek, Namibia 5-18 August 2001. See ACUNS (2001) (copy with the author).

[38] ACUNS (2001) para 4.

[39] As above.

University of Pretoria etd – Kindiki, K (2005)

The assistance may be in the form of famine relief, disaster relief, sanctuary of refugees or providing for the population's needs for food, shelter and health care.[40] Although in all the cases presented by these concepts the reason for intervening is that the lives of large groups of people are threatened, there are great differences in the manner of intervention and in the legal grounds on which such intervention is, or could be, based.[41]

Humanitarian intervention also differs from intervention based on other aims like the need to protect nationals abroad, to restore democracy or to assist an oppressed people to achieve self-determination. These aims relate to the concepts of rescuing nationals abroad, self-determination and pro-democratic intervention respectively, which are briefly explained below.

(i) *Humanitarian Intervention Differs from Intervention to Protect Nationals Abroad*

Where a state's citizens are being wrongfully treated abroad, it is justifiable for that state to intervene in order to stop the maltreatment.[42] This type of intervention differs from humanitarian intervention. It is invoked where the nationals are in immediate danger of losing their lives or are threatened with

---

[40] As above. However, if military force were used to ensure an uninterrupted delivery of food and relief supplies to the non-combatant population, such application of force would constitute humanitarian intervention. See Kwakwa (1994) 15. Although 'humanitarian assistance' is outside the scope of this study, it is felt that the rules on enhancing the co-ordination of UN humanitarian emergency assistance laid down in General Assembly Resolution 46/182 should be further developed into a convention on humanitarian emergency assistance. See GA Res 46/182 of 19 December 1991, entitled 'Strengthening of the Co-ordination of the Humanitarian Emergency Assistance of the United Nations'.

[41] See Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 6.

[42] On self-defence and protection of nationals abroad in international law, see generally, Green (1976).

serious injury.[43] The need to protect the nationals' property abroad may also be advanced as a justification of intervening in another state.[44]

By intervention for the protection of nationals abroad, it is meant the use of armed force by one state against another, in whose territory the citizens of the intervening state are located, in order to secure the liberty or rights of those citizens.[45] The reason for the distinction between humanitarian intervention and protecting nationals abroad lay in the nationality of those protected. In the first case, the individuals protected are nationals of the intervening state, while in the latter, it is the citizens of the target state that are accorded protection form their own government.

(ii) *Humanitarian Intervention Differs from Intervention to Facilitate Self-determination*

Nineteenth and early twentieth century doctrine already distinguished between humanitarian intervention and intervention on behalf of an oppressed nation, the latter being the historical forerunner of the intervention for facilitating self-determination.[46] Implementation of the principle of self-determination would seem to be a prerequisite for the enjoyment of the other human rights; the enjoyment of the other rights would not be possible without self-determination. It follows that since the aim of humanitarian intervention is to restore basic human rights, intervention to facilitate self-determination would seem to be a

---

[43] Barrie (2000) 94.

[44] Barrie (2000) 94. The argument of protecting the property of nationals was put forward when the UK landed forces in Egypt in 1976. It was also advanced by South Africa in 1976 when it sent forces into Angola to protect the Calueque Dam and construction site which was regarded as being vital to the economy of Namibia (then under the control of South Africa).

[45] Ronzitti (1985) xiv.

[46] Ronzitti (1985) xv.

sub-species of humanitarian intervention, with self-determination as the most elementary and fundamental human right.[47]

Though it may seem hard to draw a definite line between humanitarian intervention and intervention aimed at facilitating self-determination, the two phenomena should be treated as being separate. This is because the right of resistance, which peoples fighting for their self-determination are be entitled to, is a right granted to peoples under colonial and racist or alien domination, but such a right is not granted to people being mistreated by the established government.

Despite the need for such distinction between self-determination and humanitarian intervention, it is noteworthy that the operation of the terms could overlap in the in some particular instances. For instance, racism is a broad term that may entail discrimination on the basis of ethnicity. Understood in this sense, it is plausible to argue that the victims of the 1994 genocide in Rwanda – who were largely of Tutsi ethnicity - were entitled to self-determination as victims of racism. At the same time, their systematic destruction as an ethnic community falls within the meaning of genocide as defined in international law, and warranted humanitarian intervention.

(iii) *Humanitarian Intervention Differs from Pro-democratic Intervention*

More closely linked to humanitarian intervention is pro-democratic intervention, that is, intervention to put in place a democratic government in the target state. The aim of this kind of intervention is to depose an undemocratic, colonial or racist regime. In the mid-1980s, when the end of the Cold War was not yet in sight, debate raged over the legitimacy of proactive uses of force to assist oppressed populations in attaining the right to democratic self-government.[48] Pro-democratic intervention differs from humanitarian intervention principally

47 Ronzitti 1985) xvi.

48 Damrosch (1993) 97.

on the ground that the targets of pro-democratic intervention are usually not engaged in wholesale systematic violations of the human rights of the populations under their control but rather in lesser (or less obvious) repression.[49]

In 1986, the opportunity arose for an authoritative clarification of the principles of international law governing the pro-democratic intervention. Nicaragua, perceiving itself as a victim of illegal forcible and non-forcible intervention, brought a case against the United States (US) before the International Court of Justice (ICJ), which is the judicial organ of the United Nations (UN).[50] The Court explicitly rejected both the claim of legitimacy of pro-democratic intervention or pro-human rights intervention, and the claim that US support for the Nicaraguan insurgency was justified on a counter-intervention rationale.[51] Pro-democratic intervention differs from humanitarian intervention and will not de discussed further in this study.

1.3.1.5 Humanitarian Intervention Differs from Intervention with Consent

Humanitarian intervention also differs from intervention with the consent of the legitimate government of the target state. It is permissible in international law for a state, in exercise of its sovereignty, to request assistance from another state or group of states.[52] Such consent can be given on an *ad hoc* basis or by treaty. The requests in many instances relate to assistance by means of armed forces or the supply of military equipment. The only condition would be that the

---

[49] As above.

[50] See *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) (merits)* (1986) ICJ Rep 14, (1986) 25 *ILM* 1023.

[51] In para 206, the Court rejected that there exists a right of pro-democratic intervention, stating that ' ... For such a general right to come into existence would involve a fundamental modification of the fundamental modification of the customary principle of non-intervention').

[52] See Barrie (1999) 46, Barrie (2000) 89- 90; and Chigara (2000) 62 64.

government that responds to such a request for assistance would have to satisfy itself that its response is proper and will have to accept that its actions will come under close scrutiny by the international community.[53]

There are a number of cases where a state entered into a treaty with others for military assistance. For example, Turkey entered into a treaty with Great Britain, France and Russia, pursuant to which Turkey agreed that the three countries could intervene in her domestic affairs to restore the rule of law.[54] A similar treaty is the 1960 Treaty of Guarantee[55] relating to Cyprus by which Greece, Turkey and Great Britain reserved the right to take intervene militarily in order to maintain the rights of the people of Cyprus. Treaties of this nature often specify a particular issue in respect of which intervention is allowed.[56] At other times, however, a treaty will give the right to intervene on the basis of a wide scope of subject-matters, although according to Ronzitti, this kind of treaty is rare.[57]

A recent example of military intervention based on the consent of the target state expressed in a treaty is in the AU Act.[58] The AU member states, by ratifying the Act have consented that the AU can intervene in a member state in order to secure peace and security in the target state .

---

[53] Barrie (2000) 94.

[54] See the Treaty of London, 1863, reprinted in (1918) 12 *American Journal of International Law* 312.

[55] UK Treaty Series No 5 1961.

[56] To give an example, the agreement (no longer in force) between the US and Mexico of 29 July 1882 gave the right of hot pursuit in the other state's territory to catch bands of Indians who were raiding along the border.

[57] Ronzitti (1985) 94.

[58] Art 4(j) of the AU Act.

University of Pretoria etd – Kindiki, K (2005)

1.3.1.6 Humanitarian Intervention Differs from Individual or Collective Self-defence

Under article 51 of the UN Charter, individual or collective self-defence of states is permissible. Collective self-defence may be undertaken under the auspices of the UN, or in the framework of regional organisations. Article 52 of the UN Charter provides that nothing precludes regional 'arrangements or agencies' from dealing with matters of regional international peace and security. Thus on the basis of these provisions, individual or collective self-defence is lawful, and it differs from humanitarian intervention. The ICJ accepted in the *Nicaragua case*[59] that self-defence could justify action that would otherwise constitute unlawful intervention.[60]

1.3.1.7 Humanitarian Intervention Differs from Peacemaking, Peacekeeping and Peace Enforcement

Humanitarian intervention differs from the related concepts of peacemaking, peacekeeping and peace enforcement. Conceptually, peacekeeping entails the prevention, containment, moderation and termination of hostilities between or within states through the medium of a peaceful third party intervention, organised and directed internationally, using multinational forces of soldiers, police and civilians to restore and maintain peace.[61] Peacekeeping, unlike humanitarian intervention, is not intended to defeat the aggressor. Instead, it is

---

[59] ICJ Rep (1986) 14.

[60] See para 193 ('The general rule prohibiting force allows for certain exceptions. ... With regard to the existence of the right [of self-defence] [the Court] notes that in the language of [a]rticle 51 of the [UN] Charter, the inherent right which the state possesses in the event of an armed attack covers both individual and collective self-defence. Thus the Charter itself testifies to the existence of the right of self-defence in customary international law'). However, what constitutes self-defence is open to interpretation. For instance, states have attempted to justify the pursuit of fugitives across a frontier as being action in self-defence. The same claim may be made where a state is responding to an act of aggression.

[61] Dieh (1989) 487; Keith (2000) 1 5.

aimed at the prevention of fighting, the provision of a buffer, and the keeping of order and the maintenance of a ceasefire.[62]

Although peacekeeping forces may use their weapons in self-defence, their mission is to keep the peace by using methods short of armed force.[63] A condition for the effectiveness of peacekeeping is that the presence of the forces should obtain the consent of the protagonists, or at least one of them, and a toleration of the other.[64] In humanitarian intervention consent of the parties is not necessary. Also, while peacekeeping forces should remain impartial in their relationship with the combatants,[65] military forces involved in humanitarian intervention primarily aims at fighting the forces of the party perpetrating the large-scale human rights violations until the violations end.

Peacekeeping and enforcement (which together constitute peace-creation) along with other strategies are part of an overall peacemaking process.[66] Peacemaking is a broader process, and peacekeeping is only an activity which stops or contains hostilities thus helping to create conditions in which peacemaking can prosper.[67]

1.3.1.8 Treaty-based Humanitarian Intervention versus Humanitarian Intervention under Customary International Law

An important conceptual distinction relates to treaty-based intervention, on the one hand, and humanitarian intervention under customary international law, on

---

[62] Bennett (1991) 140.

[63] See Cox (1968) 1 and United Natiions (1990) 8.

[64] Keith (2000) 5.

[65] Keith (2000) 6.

[66] Onlonisakin (2000) 1.

[67] United Nations (1990) 8.

the other. The UN Security Council may, pursuant to the provisions of Chapter VII of the UN Charter, authorise action (including military action), where it makes a finding that the situation in the target state constitutes 'a threat to international peace and security'.[68]

In many of its resolutions authorising the use of force, the Security Council goes beyond the mere determination that a situation is 'a threat to international peace and security'. It also makes references to 'gross human rights violations', 'massive loss of lives', 'humanitarian crisis', 'humanitarian emergency' or other similar determinations concerning the situation in the target state.[69] This means that in the view of the Security Council, force should be used because the situation is not only a threat to international peace and security but because the force is also aimed at saving lives and protecting the masses from gross human rights violations. When force is used after such determinations as these, then that amounts to humanitarian intervention under the auspices of the UN Security Council.[70]

Therefore, a Security Council-authorised humanitarian intervention comprises of two elements. First, there must be an authorisation of the use of force against a state, after necessarily finding that the situation in the target state is a threat to international peace and security. Second, the specific Security Council resolution authorising the use of force must make conspicuous references to the humanitarian crisis, humanitarian emergency or massive human rights violations, loss of lives or similar situations in the target state.

---

[68] See UN Charter, arts 24 and 39.

[69] For instance, UN Security Council Resolution 688 of 1991, relating to Iraqi's invasion of Kuwait, was seen to be legally binding because it referred to the situation in Iraq as 'a threat to the peace'.

[70] However, see generally, Barrie (2000) (arguing that once the Security authorises the use of force in a state after determining that the situation in that state is 'a threat to international peace and security', the legal basis for such use of force is not humanitarian intervention. Rather, he argues that the legal basis for the use of force is that the situation in the target state is 'a threat to international peace and security').

i 16235162
b 15681130

The source of authority for the Security Council when authorising the use of force in the circumstances described above is the UN Charter. Considering that the UN Charter is a treaty, and that force is authorised to address a humanitarian crisis involving large-scale human rights violations, such use of force can be termed as treaty-based or institutionally authorised humanitarian intervention. This study explores the possibility of treaty-based humanitarian intervention under the auspices of the UN Security Council. In addition, it examines if humanitarian intervention can take place on the basis of the UN Charter but outside the Security Council framework. In particular, the role of the UN General Assembly and of regional organisations in humanitarian intervention based on the UN Charter will be examined.

The powers the Security Council to authorise the use of force are shared with regional organisations such as the Organisation of African Unity (OAU) - now the AU - and with sub-regional organisations like the Economic Community of the West African States (ECOWAS).[71] So long as regional and sub-regional organisations authorise the use of force in compliance with article 53 of the UN Charter - that is, with the approval of the Security Council - then their action has a clear legal (treaty) basis.

If the resolutions authorising forcible interventions also consistently use terms such as 'humanitarian crisis', 'humanitarian emergency', 'gross human rights violations' or 'massive loss of lives', then such use of force amounts to UN Charter-based humanitarian intervention under the auspices of the regional or sub-regional organisation, as the case may be. In addition, where forcible intervention by a regional or sub-regional organisation is based not explicitly on article 53 of the UN Charter but on a specific 'statute' of the intervening organisation,[72] it is plausible to argue that such intervention amounts to statutorily based humanitarian intervention at the regional or sub-regional level.

---

[71] See art 52 and 53, UN Charter.

[72] Such as art 4(h) of the AU Act, which grant the AU the right to intervene in member states where genocide, war crimes and crimes against humanity are being committed.

In addition to the UN Charter, this study examines the constitutive treaties of African regional and sub-regional organisations that have a claimed history or potential of humanitarian intervention, with a view to establish whether there is what can be termed as 'statutorily authorised humanitarian intervention'. To assist in reaching a supportable conclusion, some of the commonly cited examples of humanitarian intervention by the above-mentioned organisations will be analysed, in light of the relevant resolutions of the competent organs of the respective organisation, and in the context of the enabling treaty.

Treaty-based humanitarian intervention is distinguishable from humanitarian intervention based on customary international law. In the latter case, what ought to be established is that there exists a residual law to be found in custom, over and above law deriving from treaty or other form of statute, which allows a state or states to intervene in others where there are gross human rights violations leading to massive loss of life.

In order to establish such custom, which must exist independent of treaty provisions, two elements must be satisfied: state practice *(usus)*, and *opinio juris*, that is, the requirement that the state practice must have arisen from the belief by the those states that humanitarian intervention is a requirement of the law, and not of moral, political or ethical propriety.[73] Humanitarian intervention on the basis of customary international law is in this study alternatively referred to as 'unauthorised humanitarian intervention'.

1.3.1.9 Working Definition of 'Humanitarian Intervention'

A narrow conceptualisation of 'humanitarian intervention' is adopted in this study, in adherence to the classical conceptualisation of humanitarian intervention as explained above. The term as used here means the threat or use of armed force by a state or states in a state which has not consented to such threat or use of force, in order to prevent, limit or end widespread human

---

[73] The *opinio juris* element of customary international law is enshrined in the maxim *opinio juris et necessitatis*.

rights violations, especially those leading to massive loss of lives, in the target state.

In this study, the term 'humanitarian intervention' has the following definitional elements:

- It involves the threat or use of armed force by a state or group of states, usually (but not necessarily) acting through an intergovernmental organisation.[74] Non-forcible means such as the recalling of diplomats, economic sanctions, refusal to grant credit and transnational funding to influence the outcome of elections fall outside the purview of humanitarian intervention.

- It is targeted at a sovereign state.

- It may take place on the basis of treaty law or customary international law.

- It is aimed at preventing, limiting or stopping serious human rights violations on a large scale leading to massive loss of lives in the target state, where the government of that target state is perpetrating the violations or is unable or unwilling to stop the violations or to allow local or international action to end them.

- The intervention should be motivated by humanitarian considerations, although the humanitarian motive may coincide with other motives, such as the need to maintain international peace and security. Motives should be tested objectively, and not subjectively, because while some state may put forward humanitarian justifications for their use of force,

---

[74] The use of force referred to here entails the actual use of military personnel and military hardware.

- there may be evidence that the real reasons for the intervention are different.[75]

There are two types of humanitarian intervention. The first is unilateral intervention (intervention by a single state) and the second is collective intervention, which is effected through a group of states. This study focuses on collective humanitarian intervention. For one, collective humanitarian intervention has been spared most of the criticisms accorded to unilateral intervention.[76] Moreover, the collective humanitarian intervention is favoured in the study because relatively few states have the capacity to intervene unilaterally with the necessary combination of skill, surprise, speed and sufficient force to accomplish the aim with minimal collateral damage.[77]

1.3.2 'Intergovernmental Organisations'

An intergovernmental organisation is an association of states established on the basis of a treaty in accordance with international law in order to achieve specific objectives.[78] One may refer to the following as attributes or elements of such an organisation:[79]It is treaty-based.

- It has a specific purpose.
- It has an organisational structure.
- It has independent rights and duties.

---

[75] A case in point is the by German occupation in Bohemia and Moravia in 1939. Hitler issued proclamations to the effect that the occupation was based on the need to prevent gross human rights violations in Bohemia and Moravia. This could have been the case since Hitler's government was itself responsible for gross human rights violations, and was to commit worse atrocities during the World War II. The German occupation and Moravia is discussed in Chapter II of this study, section 2.4.1.4.

[76] As above.

[77] Barrie (1999) 46.

[78] See Tunkin (1982) 183, although he (Tunkin) uses the terms 'interstate' or 'international organisation'.

[79] Tunkin (1982) 183.

University of Pretoria etd – Kindiki, K (2005)

- It is created in accordance with international law.

Each of these elements are now discussed in turn.

The treaty basis means that an interstate agreement is the constituent instrument of the intergovernmental organisation.[80] With very few exceptions, the interstate agreement is expressed in a treaty.[81] This treaty is the 'constitution' of the organisation, and should be governed by the normal requirements of treaties.[82] Additionally, the Vienna Convention on the Law of Treaties applies to these organisations without prejudice to any relevant rules of the organisation itself.[83]

However, some intergovernmental organisations are a creature not of a treaty, but of corresponding resolutions by organs of other organisations.[84] The UN Conference on Trade and Development (UNCTAD) and the UN Industrial Development Organisation (UNIDO) are examples of organisations established in this manner within the framework of the UN.[85]

Intergovernmental organisations are established to pursue objectives. The objectives are often set out in the constitutive instrument of the organisation. Organisational structure refers to a system of standing organs constituting the mechanism through which states co-operate within the framework of the

---

[80] Schermers (1991) 68.

[81] The treaty may be called an 'Act,' a 'Protocol', or an 'Agreement'.

[82] The requirements of treaties are found in customary international law and in the 1969 Vienna Convention on the Law of Treaties, 8 *ILM* 679 (1969).

[83] Art 5 of the Vienna Convention on the Law of Treaties.

[84] Tunkin (1982) 183.

[85] These organisations were established in accordance with the power of the UN General Assembly, under Art 22 of the UN Charter, to establish subsidiary organs.

organisation.[86] All intergovernmental organisations have a supreme organ in which all member states are represented.

The name of the supreme organ in the organisational structure varies. In some organisations, it may be called the 'assembly' while in others it may be called the 'council' or 'conference'.[87] Intergovernmental organisations also have specialised organs to deal with technical subjects.[88] They may also have parliamentary or jurisdictional organs. An effective functioning of an intergovernmental organisation also requires a secretariat to prepare the meetings of other organs and the day-to-day running of the organisation.[89]

The independent rights and duties of an intergovernmental organisation are distinct from the rights and duties of member states. In the constituent instruments of intergovernmental organisations, some provisions are addressed directly to member states while others are addressed to the particular organisation.[90] The ability of an intergovernmental organisation to have rights and duties distinct from those of individual states establishes it as a juridical person possessing its own will.[91]

Independent rights and duties also make the organisation a derivative subject of international law, provided that the rights and duties are linked with its international legal personality.[92] The rights of intergovernmental organisations

---

[86] Tunkin (1982) 184.

[87] Schermers (1991) 92.

[88] As above.

[89] Schermers (1991) 93.

[90] Tunkin (1982) 184.

[91] Schermers (1991) 72. See also Bowett (1982) 4.

[92] Bowett (1982) 4.

include treaty-making capacity, the right to privileges and immunities,[93] to establish diplomatic relations, to bring international claims,[94] to representation and to act under international law.[95] Their duties include contractual liability under the relevant municipal law and liability under international law to compensate for damages caused to individual citizens.[96] Their duties include contractual liability under the relevant municipal law and liability under international law to compensate for damages caused to individual citizens.[97]

Creation in accordance with international *law* refers to the legitimate character of the intergovernmental organisation. It also refers to the correspondence of its charter and activities to the generally recognised principles and norms of international law, and especially those of *jus cogens*.[98]

Some intergovernmental organisations, such as the UN, are universal, meaning that their membership is as open to as many countries of the world as possible.[99] Others, such as the OAU - now the AU - are closed, and address

---

93 See, for instance, Art 105 of the UN Charter, giving the UN the right to 'enjoy within the territory of each of its [m]embers such privileges and immunities as are necessary for the fulfilment of its purposes'. Art 104 generally provides that the UN shall enjoy within the territories of member states, 'such legal capacity as may be necessary for the exercise of its purposes'. These provisions have been supplemented by the Convention on the Privileges of the UN which is in force between the UN and each of its member states and provides for functional privileges of the UN, see 1 UNTS 15.

94 In the case of *Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep 179, the UN General Assembly had requested the ICJ's opinion on whether the UN had the capacity to espouse an international claim in respect of injuries sustained by a UN official while on duty. The Court ruled in the affirmative, stating that the UN could not only initiate an international claim caused to its interests, but could also initiate claim for reparation for injury caused to a UN official or agent or to persons entitled through him.

95 Schermers (1991) 72-73.

96 Schermers (1991) 73.

97 Bowett (1982) 5-6.

98 The term *jus cogens* in international law refers to peremptory norms from which no derogation is permissible.

99 Though there are no intergovernmental organisations of which all states of the world are members, some organisations aim at making rules for the entire world and try to expand their

University of Pretoria etd – Kindiki, K (2005)

themselves to a particular region.[100] Only states from the particular region can be members.[101] These are sometimes known as regional organisations. Organisations covering part of a region are known as sub-regional organisations. Examples of the latter category that are relevant to the present study include the ECOWAS, the Southern Africa Development Community (SADC), and the East Africa Community (EAC).

General intergovernmental organisations, which are the focus of this study, ought to be conceptually distinguished from other kinds of international organisations. These other kinds include international non-governmental organisations, functional international organisations and supra-national organisations.

Under international law, all organisations established by individual citizens are classified as non-governmental, even if they perform important governmental tasks.[102] The International Criminal Police Organisation (INTERPOL), for example, fulfils important governmental functions, and the International Committee of the Red Cross (ICRC) operates under international law, but both are non-governmental organisations established by individual citizens.[103]

Functional international organisations operate within a narrowly defined field.[104] They may try to improve international relations and to take new

---

membership as widely as possible. Almost all the states of the world today are members of the UN.

[100] For instance, the membership of the Organisation of American States (OAS) is geographically restricted to the states within the Americas.

[101] However, some intergovernmental organisations are closed not to states outside a particular region but to those of a given group or category. The Organisation for Economic Co-operation and Development (OECD), for example, is an organisation of which only industrialised states can be members.

[102] Schermers (1991) 67-68.

[103] Schermers (1991) 68.

[104] As above.

initiatives in fields such as telecommunications, meteorology, labour or health. A good example of such organisation is the International Telecommunications Union (ITU). At the regional level, an example would be the African Development Bank (ADB).[105]

On their part, supra-national organisations have real powers above the level of the state.[106] Their primary aim is not to encourage co-operation between member states, but is to make legislation applicable to the territory of member states.[107] Their clearest characteristic is that sovereignty, or power of government, has been transferred from the member states to the organisation. Supra-national organisations are always functional organisations, for the reason that an international organisation competent to exert supra-national powers in all, or almost all, fields would be a federal state.[108]

The term 'intergovernmental organisation' as employed in this study refers to those international organisations - universal, regional or sub-regional - which have a general political purpose. Their task is general, and they can discuss any matter in as far as it has not been excluded.[109] The best and arguably the only example of such organisation at the universal level is the UN. In Africa, focus will be on intergovernmental organisations at the continental and sub-regional level.[110] Regarding the last category of organisations, a greater analysis of two organisations whose practices on several occasions have

---

[105] As above.

[106] There is no generally accepted definition of a 'supra-national organisation'.

[107] The organisation can take decisions by majority vote which bind even the states which are in the minority. Also, the organisation has some powers to enforce its decisions.

[108] There are very few supra-national organisations. The European Union is the clearest example of such organisation.

[109] Exclusion of subjects can be express, as in the case of the Council of Europe, where defence matters are expressly excluded – or implicit – as in the case of the UN, which should not discuss matters expressly attributed to the UN specialised agencies.

[110] At the continental level the OAU (AU) will be discussed, while sub-regionally the actual or potential role of the seven sub-regional organisations on the continent will be discussed.

arguably amounted to humanitarian intervention (albeit not without controversy), will be done. These organisations are ECOWAS and SADC.[111]

1.4 IMPORTANCE OF THIS STUDY

Although 'humanitarian intervention' as a concept has been a subject of scholarly debate for many years, its status in international law is still a matter of great controversy.[112] The main reason for this state of affairs is that the current 'world order' theory is still substantially sustained by the 'the law of nations' and its attendant emphasis on state sovereignty, non-intervention and the non-use of force. Being inherently in contradiction of these normative values, humanitarian intervention is bound to raise, as it has, legal controversy. The legality of humanitarian intervention has therefore received considerable attention and engendered even more intellectual debate but continues to defy conclusive determination.[113]

The controversy continues to take on greater proportions with the continuous shift of international affairs from the nation-state centred perspective to one in which the protection of human rights as a matter of international concern is increasingly emphasised. Notwithstanding the controversy, humanitarian intervention could play an important role in the alleviation of human suffering and the ending of human rights atrocities.

This study focuses on collective humanitarian intervention in Africa. In his 1998 report to the Security Council regarding causes and effects of conflicts in Africa, UN Secretary-General Kofi Annan decried that too many instances of 'appalling violations of fundamental rights' were the main obstacles to

---

[111] Other organisations with potential to exercise collective humanitarian intervention will also be briefly discussed.

[112] Fonteyne (1979) 203.

[113] Daniel & Musungu (2002) 83.

economic progress on the continent.[114] Annan was merely restating the concern of the Assembly of Heads of State and Government of the OAU way back in 1993 when the Assembly noted as follows in its 'Cairo Declaration':[115]

> No single factor has contributed more to the present socio-economic problems in the continent than the scourge of conflicts within and between our countries. They have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood [and] human dignity …

After reiterating the sentiments of the OAU leaders, Annan went on to underscore that nowhere is a global commitment to prevent gross human rights violations needed more than in Africa, because 'no region of the world has endured greater human suffering'.[116] In another document in 1999, Annan concluded that time is now ripe for the international community to reach a 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.[117] This study takes on the challenge posed by the Secretary-General.

The study is also inspired by the changes taking place in the world today. The end of the Cold War in the last decade has focussed attention on international law, especially in areas that hitherto seemed to elude legal control.[118]

---

[114] United Nations (1998) 13.

[115] *See, The Declaration […] on the Establishment, Within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution* (Decl AHG/Decl.3 XXIX Rev 1 of 29 June 1993, reproduced in (1994) 6 *African Journal of International and Comparative Law* 158; see Para 9 of the Declaration.

[116] United Nations (1998) 9.

[117] Secretary-General's Speech to the 54th Session of the General Assembly, 20 September 1999, SG/SM/7136 GA/9596, Para 147.

[118] Damrosch & Scheffer (1991) "prefix" IX.

Momentous events of recent years have shown the tremendous potential for developing and applying international law even in areas that have presented the greatest challenge - such as the use of force.[119]

The study capitalises on these changes to examine the means of improving the international community's reaction time and effectiveness to avoid a repetition of 'Rwanda' elsewhere, including the possible reforming of the UN Security Council and other actors, and examining alternative courses of action concerned states may take when the Council is deadlocked, specifically through the General Assembly and the regional and sub-regional intergovernmental organisations.[120]

The unending problem of armed conflicts in Africa needs a sustainable solution, if the alluring dream of economic, social and political stability in Africa is to be realised. Conflicts, in particular their resolution, are arguably the top priority in Africa today. Armed conflicts abound throughout Africa, and even where they have abated, conflict-related complications persist. An example in this regard is Rwanda, where the international community should do more than repent about its failures. The dynamics that ignited the genocide in Rwanda today continue to play a role in neighbouring Burundi and the Democratic Republic of Congo (DRC).[121]

The latest incident or armed conflict took place in the Ivory Coast in mid September 2002, as this study was being finalised. Rebel soldiers – who now call themselves the Patriotic Movement of the Ivory Coast – staged an uprising on 19 September 2002 against the government of President Laurent

---

[119] As above.

[120] The General Assembly may, for instance, intervene through a "Uniting for Peace Resolution". Regional and sub-regional organisations are sometimes most suited to intervene militarily because a breakdown of law and order in the target state is most likely to affect neighbouring states, for instance, through refugee flows.

[121] See, Independent Commission on Kosovo (2000) 15.

University of Pretoria etd – Kindiki, K (2005)

Gbagbo, holding areas in the North of that country, including the cities of Bouake and Korhogo.[122]

Nigeria and Ghana immediately put their soldiers on standby as they prepared to rallied to help the Ivory Coast government put down the bloody uprisings that has increasingly taken on the dimensions of a civil war.[123] The skirmishes between the government forces and the rebels resulted in the deaths of about two hundred civilians by 27th October 2002.[124] These deaths are an indication that worse human rights violations of a larger scale may be committed if prompt action is not taken to pre-empt a full-blown civil war.

The AU Mechanism for Conflict Prevention, Management and Resolution met at ambassadorial level on 24 September 2002, and discussed the situation in the Ivory Coast. The Mechanism condemned the uprising, calling for dialogue and reconciliation in order to restore peace and stability in the country and the West African region.[125] Coming barely two months after the launch of the AU, the conflict in the Ivory Coast is a sign that the new Organisation must put the problem of armed conflicts as one of its main agenda.

In particular, it is important that ways be found to tackle the problem of armed conflicts, from the prevention stage to the post-conflict measures aimed at ensuring that conflicts do not recur. Humanitarian intervention, which is the focus of the present study, is a response to gross violations of human rights.

---

[122] See 'Temporary Truce Clinched in Ivory Coast' *Pretoria News* 27 September 2002 10.

[123] By the end of September 2002, Former colonial power France and the US had sent troops to the Ivory Coast to help get their citizens to safety in the capital Yamoussoukro and the main city of Abidjan. On 27 September 2002, France also announced that it would start evacuating all foreigners who wanted to leave the Ivory Coast. Information obtained on the internet, at <http://www.bbc.co.uk/africa/2290919.com> (accessed on 27 September 2002).

[124] Information obtained from the website <http://www.bbc.co.uk/africa> (accessed on 27 October 2002).

[125] See 'Communiqué of the Eighty-Fourth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level' 24 September 2002, available at <http://www.africa-union.org/en/news.asp?newssid=19> (accessed on 10 October 2002).

University of Pretoria etd – Kindiki, K (2005)

Invariably gross violations of human rights occur in the context of armed conflicts. Therefore, this study is relevant to Africa and its problem of armed conflict.

1.5 WORK ALREADY DONE IN THIS FIELD

The attempt to review the available literature on humanitarian intervention is a formidable task, given the many articles, papers, reports and books that have been written on every aspect of the intervention debate in the last decade alone.[126] This section will highlight only the major writings on the topic, and as far as possible point to the gaps in the available literature.

Many of the publications on humanitarian intervention seem to be devoted to the responses of the UN to crises in countries outside Africa.[127] Furthermore, there has been little inquiry on the role of African intergovernmental organisations in collective humanitarian intervention. The study supplements the existing literature by focussing on humanitarian intervention in Africa.

The literature on humanitarian intervention can be divided into three categories. First, there are those who espouse the concept of humanitarian intervention from a classical point of view. These include Oppeinheim,[128] Brownlie,[129] Verwey,[130] Kritsiotis[131] and Barrie.[132] They understand

---

[126] The topic has drawn scholarly interest from many perspectives: International law, international relations, political science, military science *etc*.

[127] See for instance Otte & Dorman (1995); Abiew (1999); and Ronzitti (1985).

[128] (1905).

[129] (1963) and (1984).

[130] (1986).

[131] (1998).

[132] (1999), (2000) and (2001).

University of Pretoria etd – Kindiki, K (2005)

humanitarian intervention to mean the use of armed force by states for the protection the most basic human rights.[133] Second, there are the writers who conceptualise humanitarian intervention more liberally. They include Kwakwa,[134] Harriss[135] and Reisman.[136] This category of authors include, within the purview of humanitarian intervention, forcible and non-forcible measures by states or international organisations, aimed at protecting human rights or addressing a humanitarian catastrophe in a sovereign state.

The final category of available literature consists of the reports by commissions of expert appointed by governments to carry out studies on the legal foundations of humanitarian intervention. Such commissions have been on the increase in recent years. Since Kofi Annan's challenge in 1999, a number of countries have commissioned studies on humanitarian intervention. The United Kingdom, for example, produced a paper in 2001, recommending specific criteria to guide the Security Council in its deliberations on intervention.[137] Similar recommendations have been made in a study commissioned by the government of Denmark,[138] and by Sweden through its International Commission on Kosovo,[139] chaired by Richard Goldstone and Carl Tham.

---

133 See, for instance, Verwey (1986) (stating that humanitarian intervention involves 'the protection by a state or a group of states of fundamental human rights, in particular the right to life, of nationals of, and residing in, the territories of other states, involving the use or threat of force, such protection taking place neither upon the authorisation by the relevant organs of the [UN] nor upon the invitation by the legitimate government of the target state').

134 (1994).

135 (1995).

136 (1997).

137 UK Foreign Secretary Robin Cook referred to the six central principles contained in this paper in a speech to the American Bar Association on 19 July 2000. The paper is available online at <http://www.fco.gov.uk/news/newstext.asp> (accessed on 18 January 2001).

138 See Danish Institute of International Affairs (1999), generally.

139 See Independent Commission on Kosovo (2000), generally.

In 2000, the Netherlands Advisory Council on International Affairs, together with the Advisory Committee on Issues of Public International Law published a detailed report on legal and moral dimensions of humanitarian intervention,[140] while at the close of 2001, a report of the study by the Commission on Intervention and State Sovereignty sponsored by the Canadian government was released.[141] The proliferation of state-sponsored studies is clear testimony to the increasing desire of nations to tackle the question on humanitarian intervention with a lasting finality. The present study will draw from some of the findings made in these studies.

Within the literature, opinion on the legal basis for humanitarian intervention is sharply divided. However attempts will be made in this study to make independent conclusions based not only on the writings of authors, but also on my own interpretations of relevant international legal materials such as the UN Charter and other treaties. Also, this study affords an opportunity for an interpretative analysis of recent treaty law such as the 1997 SADC Protocol establishing the Organ on Politics, Defence and Security and, perhaps most remarkably, the 2000 Constitutive Act of the AU. There has not been much writing on these recent treaties, especially the AU Act, and this study aims at filling the lacuna in the literature in this regard.

1.6 RESEARCH METHODOLOGY AND *MODUS OPERANDI*

In this study, data was obtained from primary and secondary sources. Relevant primary sources such as treaties, resolutions of intergovernmental organisations and reports were analysed to enable the present researcher to interpret them. The secondary sources used include books, journal articles, conference papers and information obtained from the internet.

---

[140] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000), generally.

[141] The report is in two volumes, (ICISS (2001a) and ICISS (2001b).

In analysing both primary and secondary data, quantitative and qualitative research techniques were used. Documentary analysis provided insights into the conceptual, historical and empirical issues on the subject under inquiry. In-depth, semi-structured interviews were conducted with legal experts from the UN, OAU, AU, SADC, ECOWAS and the EAC.

The study is both descriptive and prescriptive. The descriptive part of the study analyses the doctrinal aspects of humanitarian intervention - its legal and moral foundations, and the main legal and policy objections to humanitarian intervention. Due to the African focus of this study, each time a topic is discussed, matters of relevance to Africa and Africans are identified and discussed in detail. The sections of the study dealing with the role of intergovernmental organisations, the criteria for intervention, the question of codification and the recommendations are more prescriptive in nature.

The following practical procedure, or *modus operandi*, was followed in conducting the research:

- An initial literature search was made, and major publications on the subject were consulted. Law libraries at the University of Pretoria (South Africa), Moi University (Kenya), University of Namibia, University of Ghana, Institute of Human Rights at the Abo Akademi University (Finland) and the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, were used.

- On various dates in 2001 interviews were held with legal experts from the UN, OAU and EAC. Electronic mail exchanges were also made with legal experts from SADC and ECOWAS.

- On two occasions in 2001, I visited the secretariat of the EAC in Arusha, Tanzania, to conduct interviews and review primary documents.

- Between 5 and 18 August 2001, I participated in an international workshop of scholars at the University of Namibia in Windhoek, under

the auspices of the Academic Council on the UN System (ACUNS). A policy brief entitled 'Humanitarian Intervention and the Role of International Organisations' was drafted, and later presented to the UN General Assembly in New York on 20 November 2001.

1.7 OVERVIEW OF CHAPTERS

Chapter 1 of this study lays the foundation for the entire work. It introduces the problem to be investigated, sets out the aims and clarifies key terms frequently used in the study. The Chapter also provides a working definition of the term 'humanitarian intervention' and distinguishes it from related concepts. It describes the study methodology, reviews the available literature on the topic and outlines the problems encountered in the study.

Chapter 2 discusses the legal basis for humanitarian intervention in international law. To this end, it examines the legal foundation of humanitarian intervention under both treat and customary international law. **Chapter 3** looks at how the legal and policy challenges to humanitarian intervention can be addressed by viewing state sovereignty as an evolving concept and by invoking the concept of 'public good' in the interpretation of the relevant normative legal framework.

Chapter 4 analyses the practice of the UN and African intergovernmental organisations with regard to humanitarian intervention in historical perspective. Also, the Chapter discusses the possible future role of these organisations in humanitarian intervention. In this regard, interventions by these organisations that appear to be instances of humanitarian intervention either on the basis of statute or of customary international law will be discussed, in order to shed light on prospects for future practice.

Chapter 5 looks at possible legal criteria for humanitarian intervention and makes propositions for institutional reforms. Finally, **Chapter 6** summarises the main conclusions of the study and its recommendations.

University of Pretoria etd – Kindiki, K (2005)

1.8 LIMITATIONS OF THE STUDY

The topic of humanitarian intervention has been a subject of much scholarly writing in recent years. The abundance of reference materials, however, does not extend to the African context, which is the focus of the study. The absence of publications on humanitarian intervention in Africa has meant that the study had to rely on limited secondary sources.

Also, the lack of adequate funding for research meant that the study in some instances had to rely on email exchanges between the researcher and the interviewees. Were it not for the problem of funds, it was initially planned to visit and carry out interviews at the secretariats of all the intergovernmental organisations whose practices and potential in relation to humanitarian intervention forms the focus of the study.

A further limitation of the study is that new institutional and normative developments continue to take place in the world. Norms and institutions are in a state of flux. The implication of this state of affairs is that it is difficult to accurately assess the role of fledgling institutions such as the newly-launched AU.[142] Some aspects of the study's assessment of the role of these institutions can only be speculative at this stage.

It is also worth noting that the study has a time deadline. All data and events are updated as on 30 September 2002. This means that occurrences after 30 September 2002 may diminish the relevance of aspects of the study. The study should be seen as a continuous project that can be updated by other studies in the future. In any case, deadlines are inevitable in all human endeavours.

---

[142] The AU was launched on 10 July 2002 in Durban, South Africa. President Thabo Mbeki of South Africa was elected its first Chairman.

Finally, the topic of humanitarian intervention can be approached from the point of view of international law, international relations or politics, as well as military science. All these perspectives are important, and are intertwined. For instance, it would be interesting to find out from a political science view, why armed conflicts or gross human rights violations occur. However, this study focuses on international law, international legal instruments and international legal developments and their relevance to humanitarian intervention. This approach is bound to limit this study, but is inevitable in a study as this, which is in the field of international law.