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HUMANITARIAN INTERVENTION IN AFRICA: THE ROLE OF INTERGOVERNMENTAL ORGANISATIONS

A dissertation submitted in fulfilment of the requirements for the degree Doctor of Laws (LLD) of the University of Pretoria, South Africa

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To my wife Joyce and daughter Hannah

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LIST OF ABBREVIATIONS AND ACRONYMS

ACUNS	–	Academic Council on the United Nations System
AFRC	–	Armed Forces Revolutionary Council
AMU	–	Arab Maghreb Union
AU	–	African Union
CAT	–	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	–	Convention on Elimination of All Forms of Discrimination Against Women
CERD	–	Convention on Elimination of All Forms of Racial Discrimination
COMESA	–	Common Market for Eastern and Southern Africa
CRC	–	Convention on the Rights of the Child
EAC	–	East African Community
ECCAS	–	Economic Community of Central African States
ECOMOG	–	ECOWAS Ceasefire Monitoring Group
ECOSOC	–	Economic and Social Council
ECOSOCC	–	Economic Social and Cultural Council
ECOWAS	–	Economic Community of West African States
EU	–	European Union
FLS	–	Front Line States
FRY	–	Federal Republic of Yugoslavia
ICC	–	International Criminal Court
ICCPR	–	International Covenant on Civil and Political Rights
ICESCR	–	International Covenant on Economic, Social and Cultural Rights
ICISS	–	International Commission on Intervention and State Sovereignty
ICJ	–	International Court of Justice
ICRC	–	International Committee of the Red Cross
ICTR	–	International Criminal Tribunal for Rwanda

ICTY	–	International Criminal Tribunal for the Former Yugoslavia
IGAD	–	Intergovernmental Authority on Development
IGADD	–	Intergovernmental Authority on Drought and Development
ILA	–	International Law Association
ILC	–	International Law Commission
IMF	–	International Monetary Fund
INTERPOL	–	International Criminal Police Organisation
ISDSC	–	Inter-State Defence and Security Committee
KLA	–	Kosovo Liberation Army
MAI	–	Multilateral Agreement on Investment
MNC	–	Multinational Corporation
MNF	–	Multinational Force
NATO	–	North Atlantic Trade Organisation
NGO	–	Non-Governmental Organisation
OAS	–	Organisation of American States
OAU	–	Organisation of African Unity
PCIJ	–	Permanent Court of International Justice
RPF	–	Rwandan Patriotic Front
RUF	–	Revolutionary United Front
SADC	–	Southern Africa Development Community
SADCC	–	Southern Africa Development Co-ordination Conference
SAPS	–	Structural Adjustment Programmes
UK	–	United Kingdom
UN	–	United Nations
UNAMIR	–	United Nations Assistance Mission in Rwanda
UNCED	–	United Nations Conference on Environment and Development
UNCHE	–	United Nations Conference on the Human Environment
UNCTAD	–	United Nations Conference on Trade and Development
UNIDO	–	United Nations Industrial Organisation
UNITAF	–	Unified Task Force

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UNMIH	–	United Nations Mission in Haiti
UNOSOM	–	United Nations Operations in Somalia
UNPROFOR	–	United Nations Protection Force
US	–	United States
WTO	–	World Trade Organisation
WSSD	–	World Summit of Sustainable Development

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CHAPTER 1: INTRODUCTION

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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

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[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).

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

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[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.

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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.

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.

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[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

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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

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[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.

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

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[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).

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

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[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.

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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.

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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.

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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]

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[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.

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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

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[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

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[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.

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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

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[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

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[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 .

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[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.

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

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[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

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[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.

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[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').

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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.

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[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

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[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.

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[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.

- 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

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[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

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[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

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[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

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

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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

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[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

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[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]

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[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

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[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.

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.

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[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).

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).

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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.

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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.

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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.

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[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.

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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.

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[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.

CHAPTER 2: THE LEGAL BASIS FOR HUMANITARIAN INTERVENTION

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2.1 INTRODUCTION

Humanitarian intervention has no clear and generally accepted legal foundation. This chapter is an exploration of the possibilities of legal support

for humanitarian intervention in international law, on the basis of the formal sources of international law as laid down in article 38(1) of the Statute of the ICJ. From the point of view of an international lawyer, the norm-setting aspects of the issue of humanitarian intervention have a particularly important role to play.

This chapter examines the place of humanitarian intervention in treaty and customary law as the main sources of international law. Judicial decisions and scholarly writings are also analysed, not separately, but in so far as they shed light on relevant treaty and customary law provisions. The overall aim of the Chapter is to investigate whether there is a sufficient legal foundation for humanitarian intervention.

2.2 THE SOURCES OF INTERNATIONAL LAW

A 'source' of international law in this context refers to where one may find the substantive content of international law. At international law, there is no international legislature or court to which all states compulsorily submit. Also, there is neither an international constitution, nor a world government. Despite these 'limitations', the sources of international law are well stated in article 38(1) of the Statute of the ICJ. This article lists the following as the sources of international law:

- International conventions, whether general or particular, establishing rules expressly recognised by the contesting states.
- International custom, as evidence of a general practice accepted as law.
- The general principles of law recognised by civilised nations.

- Subject to the provisions of article 59,[1] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

While not all nations use the identical list in article 38(1),[2] the result is typically the same and the article is accepted by many authors as identifying the sources of international law, although the article itself nowhere uses the word 'sources'.[3] The provisions are expressed in terms of the function of the Court, but article 38(1) is generally regarded as a complete statement of the sources of international law.[4]

One issue that arises from the sequential arrangement of sources within article 38(1) is whether there is an implicit hierarchy of sources. It is clear from the wording of the article that the first three sources - treaties, custom and general principles - are primary sources, while judicial decisions and scholarly writings are designated as subsidiary sources. With respect to the primary sources, some authors rank custom at the top and as the effective basis of the other sources.[5] Others characterise treaties as the most fundamental source.[6]

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[1] Art 59 provides that the decision of the Court (ICJ) binds only parties involved and only in respect of the particular case. This means that the doctrine of *stare decisis* does not apply to the ICJ.

[2] For instance, the US through its American Law Institute in its *Restatement*, has categorised sources in a somewhat different hierarchical manner. Also, s 102 of the *Foreign Relations Law* of the US (1987), the sources of international law are given as customary law, international agreements and general principles 'common to the major legal systems of the world'. Under s 103 of the same law, the following are evidence whether a rule has become international law: decisions of international judicial and arbitral tribunals, decisions of national tribunals, the writings of scholars, and pronouncements which are not challenged by other states.

[3] See, for instance, Shaw (1991); Wallace (1992); Brownlie (1998) and Njenga (2001).

[4] For an analysis of the different sources of international law in art 38, see generally, Danilenko (1993) and Brownlie (1998).

[5] See, for instance, Shaw (1991), 59.

[6] See, for instance, Wallace (1992) 3.

While article 38(1) does not stipulate that it is establishing a hierarchy, it is plausible to say that the article is establishing a hierarchy of procedure for application of international law in the settlement of international disputes, and by extension, for application in the search for legal certainty. When looking for the legal basis for a particular issue, existing relevant treaty provisions should be applied to it.

In the event of no relevant treaty provision, recourse may be made to a custom that is accepted as legally binding. Customary law and law made by treaty have equal authority as primary sources of law. However, if a treaty and customary norm exist simultaneously on an issue, then the provision of the treaty takes precedence, unless the customary rule in question constitutes *jus cogens*.[7] This was the position taken by the Permanent Court of International Justice (PCIJ) in the *Wimbeldon Case*.[8]

Despite this position, there exists a general presumption against the replacement of customary rules by treaty and *vice versa*[9] and a treaty seemingly in conflict with customary law will be construed so as to best conform to rather than derogate the custom or accepted principles unless it was clearly intended to do so. It is for this reason that in this study, it is preferred to examine, as far as possible, the legality of humanitarian intervention under each of these two main sources of law, separately and mutually independent on each other. If neither a treaty provision nor a custom

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[7] *Jus cogens* is a term usually used to denote a body of overriding or 'peremptory' norms of such paramount importance that they cannot be set aside by acquiescence or agreement of parties to a treaty. That treaty law cannot overthrow customary norms constituting *jus cogens* is enshrined in art 53, 1969 Vienna Convention on the Law of Treaties.

[8] PCIJ Rep Series A No 1 (1923). In that case the PCIJ upheld article 380 of the Treaty of Versailles, which provided that the Kiel Canal was to be 'free and open to vessels of commerce and war of all nations at peace with Germany'. This conflicted with customary international law rule that prohibited the passage of armament through the territory of a neutral state to the territory of a belligerent state. In stopping a vessel flying the flag of a state with which she was at peace, Germany, the Court maintained, was in breach of its obligations under the Treaty of Versailles.

[9] Shaw (1991) 60.

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can be identified, the 'general principles recognised by civilised nations' may be invoked. Finally, judicial decisions, the writings of authors and the teaching of publicists may be utilised as a means of identifying applicable rules of international law.

2.3 TREATY LAW AND HUMANITARIAN INTERVENTION

Article 38(1) does not mention 'treaties' but refers to 'international conventions, whether general or particular'. However, the term 'convention' is synonymous with treaties and both terms are usually used conterminously.[10] In examining the legal basis for humanitarian intervention in terms of treaty law, the UN Charter, the Genocide Convention and treaties adopted under the auspices of African intergovernmental organisations are discussed.

Apart from interventions based the above-mentioned treaties, there are other instances in which states have invoked treaties in a limited sense to justify claims of humanitarian intervention. A good example in this regard is the reliance by Russia, on the Kutchukainardji Treaty its 1827 intervention in Greece. This intervention is also briefly examined.

2.3.1 The United Nations (UN) Charter

The UN Charter was established as a consequence of the Conference on International Organisation held at San Francisco and was brought to force on 24 October 1945. Membership of the UN has reached 190 states.[11] The Charter has been the subject of a good deal of academic and judicial interpretation in the fifty seven years of its existence. Numerous UN resolutions of the organs of the UN have also helped clarify some of the provisions of the

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[10] See, for instance, Bierly (1963) 57.

[11] All states of the world are UN Members, with the exception of Nauru, a small island state in the Pacific off the Coast of Australia. It has a population of about 9 500 people. The latest UN member is Switzerland, which was formally admitted by the UN General Assembly on 21 September 2002. Before the admission, Switzerland had pursued a policy of 'neutrality'.

Charter. The following are some of the remarkable judgments of the ICJ touching on the interpretation of various provisions of the UN Charter: the *Reparation Case*,[12] the *International Status of South West Africa Case*,[13] and *Voting Procedure Case*.[14]

The Charter is a law-making treaty that creates obligations on both the parties to it and on non-parties.[15] The UN Charter upholds the doctrine of state sovereignty and its corollary, the concept of non-intervention.[16] It also prohibits the use of force.[17] Thus to some writers, articles 2(4) and 2(7) of the Charter preclude any intervention not expressly provided for under the Charter, and this exclusion applies to humanitarian intervention.[18] They rightly argue that the Charter also does not expressly provide for the right or duty of humanitarian intervention.

Nevertheless, other commentators have argued that humanitarian intervention can be supported under the UN Charter if the Charter is progressively interpreted. The progressive interpretation argument rests on the basic

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[12] ICJ Rep (1949) 174.

[13] ICJ Rep (1966) 6.

[14] ICJ Rep (1955) 67.

[15] See art 2(6) ('The organi[s]ation shall ensure that states which are not members of the [UN] act in accordance with these principles [of the Charter] so far as may be necessary for the maintenance of international peace and security'). For a general discussion on treaties creating obligations and rights for non-parties, that is, law making treaties, see Brownlie (1998) 620-630. Basically, law making treaties are treaties entered to be many state parties, such that they treaty then becomes law *per se*, extending obligations even to non-parties. These may be distinguished from 'treaty contracts', which, having been entered into by relatively few states, impose obligations on state parties only.

[16] See, for instance, arts 2(1) and 2(7) of the UN Charter.

[17] Art 2(4) of the UN Charter.

[18] For example, see Charney (1999) 1234 ('The use of force by bombing the territory of another state violates its integrity regardless of the motivation' and "... the phrases 'territorial integrity' and 'inconsistent with the purposes of the Charter' were added to [a]rticle 2(4) to close all potential loopholes rather than to open new ones').

argument that humanitarian intervention, apart from seeking to secure respect for human rights, which is a principal purpose of the UN, does not in principle threaten the independence or the territorial integrity of the country concerned.[19] It is only the use of force that threatens the territorial integrity and political independence of a state that is outlawed under article 2(4) of the Charter. Moore uses this argument to suggest that a threat of widespread loss of human lives would seem to be the clearest justification of humanitarian intervention on the basis of the UN Charter.[20]

Concerning the sovereignty and non-intervention principle in article 2(7) of the UN Charter, an argument could be made that despite the importance attached to sovereignty in the international legal system, developments in the last fifty years have gradually but inevitably changed the original conception of the doctrine.[21] The norm enshrined in article 2(7) has been modified and interpreted in light of developments in international relations. In its 1923 *Advisory Opinion on the Nationality Decrees in Tunis and Morocco*, the PCIJ made the following observation:[22]

> The question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.

Some critics argue that intervention is precluded in cases of grave human rights violations because under article 2(7), these are matters essentially within the jurisdiction of the state concerned.[23] However, it seems that state practice

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[19] See Moore (1969) 205 262; Kufuor (1993) 525 540 ("... It is clearly open to argument that humanitarian intervention does not threaten 'territorial integrity or political independence' [of states]").

[20] See Moore (1969) 264.

[21] Kwakwa (1994) 17.

[22] 1923 PCIJ (Series B) No 4 24.

[23] For a summary of such views, see Delbuck (1992) 887.

in relation to article 2(7) has departed from the erstwhile opinion prevailing at the San Francisco Conference in 1945 favouring a broad interpretation of the principle of non-intervention and a corresponding de-emphasis on the right of the UN to intervene in the domestic affairs of states.[24]

Both the Security Council and the General Assembly have consistently held that human rights violations within the borders of states are not 'matters which are essentially within the domestic jurisdiction' of such states.[25] In any case, the international legal concept of 'matters essentially within the domestic jurisdiction' of states is a legal concept whose substance changes as international law develops.

Indeed, an important purpose of the UN is to 'save succeeding generations from the scourge of war'[26] by 'maintaining international peace and security'.[27] However, it is also the UN's primary purpose to protect the fundamental rights and freedoms of the individual.[28] Therefore, interpretation of the Charter should aim at striking a balance between these two purposes. Nowhere does

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[24] Kwakwa (1994) 32. This view is shared by Tumoschat (1995) who states that 'the Charter is nothing else than the constitution of the international community', and constitutions may grow contingently. See also Poltak (2002) 9-12. (arguing that the role of international law and international lawyers is not to repeat 'the rhetoric of dead events' which no longer accord with reality).

[25] Kwakwa (1994) 32.

[26] UN Charter, preamble, para 1.

[27] UN Charter, art 1(1).

[28] Under art 1(2) of the UN Charter, protection and promotion of fundamental rights and freedoms of the individual is described as one of the principles of the UN. See also UN Charter, preamble para 1 (We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women); Art1(3) ([t]he purposes of the [UN] 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 ...) as read with arts 55, 56, 62 and 68.

the Charter provide that the one objective supersedes the other.[29] The argument, therefore, that the protection of human rights is subsidiary to the objective of maintaining international peace and security is untenable. Charney, himself a critic of the view that humanitarian intervention has a legal basis in international law, concedes that contemporary international law prohibits violations of human rights and humanitarian law committed by a state against its citizens.[30] He writes, and rightly so, that these duties are owed *erga omnes*, to the entire world.[31]

Under articles 55 and 56 of the Charter, member states pledge themselves to take joint and separate action in co-operation with the UN for the promotion of 'equal rights and self-determination of peoples' including 'universal respect for and observance of human rights.' It follows that situations of egregious violations of human rights can warrant unilateral or collective humanitarian intervention, so long as such action is taken in co-operation with the UN. This co-operation can take any form, including necessary lobbying leading to the invoking of the 'Uniting for Peace Resolution' by the UN General Assembly.[32] In this way, express authority of the Security Council for use of force may not be required.

The human rights theme in the UN Charter continues in article 68 under which the Economic and Social Council (ECOSOC) of the UN is required 'to set up

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[29] But see Charney (1999) 1234 ('The protection of human rights is also among the primary sources of the Charter, although subsidiary to the objective of limiting war and the use of force in international relations'); Similarly, see Independent Commission on Kosovo (2000) 168 ('[h]uman rights were given a subordinate and marginal role in the UN system in 1945, a role that was understood to be, at most aspirational'). However, there seems to be nothing in the Charter to support these assertions.

[30] Charney (1999) 1232.

[31] As above. The term 'obligations *erga omnes'* means obligations the fulfilment of which all states have an interest in. This interpretation of the term was given by the ICJ in the *Barcelona Traction Case (Belgium v Spain)* ICJ Rep 1970 53 para 33.

[32] Under the 'Uniting for Peace Resolution' UNGA Res 377 (V) of 3 November 1950, the UN General Assembly is empowered to authorise the use of force in the event of a deadlock within the Security Council as a result of the operation of the veto.

commissions ... for the protection of human rights'. Article 76(c) states that a basic objective of the trusteeship system is 'to encourage respect for human rights and for fundamental freedoms for all'. Under the UN human rights treaties enacted pursuant to the Charter provisions, human rights are now more clearly a justification for action than ever before, and norms are reaching a point at which they can be implemented and enforced. The enforcement machinery includes:

- The establishment of a variety of specialised mechanisms such as working groups and rapportuers (thematic and country specific).[33]

- The establishment and expansion of the activities of supervisory committees to monitor compliance with human rights treaties.[34]

- The substantial expansion of the advisory services program that provides technical assistance in human rights.[35]

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[33] For instance, most of the work of the UN Commission for Human Rights is discharged through an ever-expanding network of working groups and rapporteurs. The mandate of country specific rapporteurs (for example ther is one for Sudan) is restricted to a particular country. Thematic working groups or rapporteurs concentrate on defined human rights issues. To cite an example, there is a thematic rapporteur on extra-judicial executions. For details on country specific and thematic rapporteurs and working groups, see <htpp://www.unhchr.ch> (accessed on 30 September 2002).

[34] Each of the six main UN human rights treaties has a supervisory committee to monitor treaty compliance. These are: the International Convention on the Elimination of all Forms of Racial Discrimination, 1965 - (the 'CERD'); the International Covenant on Economic, Social and Cultural Rights, 1966 - (the 'ICESCR'); the International Covenant on Civil and Political Rights, 1966 - (the 'ICCPR'); the Convention on Elimination of all Forms of Discrimination Against Women, 1979 – (the 'CEDAW'); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 – (the 'CAT'); and the Convention on the Rights of the Child, 1989 - (the 'CRC'). For a discussion on the efficacy of UN treaty monitoring mechanisms, see generally, Bayefsky (2000) and Heyns & Viljoen (2001).

[35] These are mostly provided through the Office of the UN High Commissioner for Human Rights, whose mandate includes 'providing, through the appropriate mechanisms and institutions, advisory services and technical and financial assistance, at the request of the state concerned'. See UN General Assembly Res 48/141 of 20 December 1993, which establishes the High Commissioners mandate, para 4(d). While the programme for technical co-operation in the field of human rights existed long before the creation of the Office of the High Commissioner, it is clear that it has developed within a few years that the High Commissioner's Office has been involved in it. See Schimdt (1999) 169 173.

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- The development of a major initiative to expand UN public information on human rights in a world campaign designed to advance awareness of rights and of the UN machinery through which individuals can claim their rights.[36]

Ronzitti has argued that if, on the one hand, it can be shown that there is an overall increase in the protection of human rights, on the other hand, it should be noted that none of the instruments for the protection of human rights contemplates the use of force for their enforcement.[37]

This contention may be replied to in two ways. In the first place, article 56 calls on member states of the UN to 'take joint and separate action'.[38] This action is not defined, and may therefore involve forcible means. In the second place, humanitarian intervention is usually a response to rare and extreme circumstances involving widespread violations of core human rights. Humanitarian intervention does not seek to respond to violations of any human rights, such as the right to associate or to join a trade union.

Because of the gravity of the circumstances to which humanitarian intervention responds, the use of force is inevitable. This is so because widespread human rights violations that lead to massive loss of lives are most often than not

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[36] Under para 4(e) of UN Res 48/141 of 20 December 1993, the Office of the UN High Commissioner for Human Rights is empowered to co-ordinate relevant UN education and public information programmes in the field of human rights. The High Commissioner, in collaboration with the UN Educational, Scientific and Cultural Organisation (UNESCO) have developed joint programmes for ensuring the most effective way of achieving progress in human rights education. The High Commissioner has launched a programme of action with a view to encouraging the establishment and strengthening the existing networks, as well as the development of educational materials. See Schimdt (1999) 174.

[37] Ronzitti (1985) 16. For a similar argument, see Independent Commission on Kosovo (2000) 167-168 (' ... [T]he Charter provisions relating to human rights were left deliberately vague, and were not intended when written to provide a legal rationale for any kind of enforcement, much less a free-standing mandate for military intervention without [Security Council] approval').

[38] See art 56, UN Charter ('All member states pledge themselves to take joint and separate action in co-operation with the organi[s]ation for the achievement of the purposes set forth in article 55').

committed in the context of armed conflict. In such situations where the belligerents are armed, the practical way of ending the violations is by application of proportionate armed force.

If humanitarian intervention is understood to be a war in defence of human rights, then such a war is just. The entitlement of a state to sovereignty within its territory is derived from the presumption that the state will protect basic human rights. Further, any government that fails to provide the most fundamental rights for major segments of its population can be said to have forfeited its sovereignty and the international community can be said to have a duty in those instances to re-establish it.[39] Sovereignty will have collapsed by virtue of that government's incapacity to prevent gross human rights violations.[40]

Relevant here is the pronouncement by the ICJ in the case of *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* that there are certain rights in whose protection 'all states can be held to have a legal interest'.[41] According to the Court, the obligations involved here are obligations *erga omnes*. In this connection, one may also refer to the Declaration of the Second World Conference on Human Rights, adopted at Vienna in 1993, which states that 'the promotion of all human rights is a legitimate concern of the international community'.[42]

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[39] Newman & Weissbrodt (1996) 223.

[40] As above.

[41] ICJ Rep 1970 53, para 33.

[42] Vienna Declaration and Programme of Action 1993, UN Doc A/ CONF 157/23, Part 1, para 4.

On the basis of the above, the conclusion of the Dutch Advisory Council on International Affairs in their joint study with the Advisory Committee on Issues of Public International Law states:[43]

> The international duty to protect and promote the rights of individuals and groups has thus developed into a universally valid obligation that is incumbent upon all the states in the international community, both individually and collectively. This duty is having an increasing impact on the development and operation of international law, which originally had a largely inter-state character and was designed to serve *raison d'etat*. It is therefore desirable that, as part of the doctrine of state responsibility, efforts be made to further develop a justificatory ground for humanitarian intervention without Security Council mandate.

After considering the relevant provisions of the UN Charter, a preliminary conclusion is arrived at here that on a progressive interpretation of the Charter, humanitarian intervention may be defended in extreme and rare circumstances of gross human rights atrocities. Legally, it is difficult to logically argue that the human rights-related provisions of the Charter, coupled with the numerous human rights treaties that have been adopted since 1945, can be ignored in favour of sacrosanct principles of state sovereignty and non-use of force.

A case can be made that the Charter does not preclude humanitarian intervention. If the Charter does not expressly provide for humanitarian intervention, then it is also arguable that the same Charter does not specifically outlaw humanitarian intervention. With this in mind, the argument will turn on the understanding of the interpretation of articles 2(7) and 2(4) of the Charter in the context of the rest of the provisions of the Charter, especially the provisions relating to human rights and those of human rights treaties adopted under the auspices of the UN since 1945.

Institutionally, the UN Security Council is primarily responsible for the authorisation of the use of force under the UN Charter, and this includes force

[43] See Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 24.

used for humanitarian purposes.[44] However, in the particular resolution authorising the use of force, the Council should in addition to finding that the situation at hand is 'a threat to international peace and security', make references to 'humanitarian crisis', 'humanitarian emergency', 'widespread human rights violations' or 'massive loss of life' or other similar situations in the target state, as being the basis for the authorisation of the use of force.

Apart from the Security Council, humanitarian intervention under the UN Charter may be achieved through the General Assembly, which is one of the principal organs of the UN.[45] The Assembly is empowered by the UN Charter to play a secondary role in the maintenance of international peace and security.[46] The procedures to guide the Assembly in this role are contained in the 'Uniting for Peace Resolution' of 1950.[47]

The text of this resolution provides that where the Security Council, because of its lack of unanimity of the permanent members, fails to exercise its primary responsibility in any case where there appears to be a threat to or breach of the peace, the General Assembly *shall* consider the matter immediately with a view to making appropriate recommendations to UN member states, including the use of armed force where necessary.[48] Under the provisions of this resolution, the General Assembly is not procedurally required to establish that the situation in question is 'a threat to international peace and security'.[49]

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

[45] Art 7, UN Charter.

[46] Art 10, 11 and 12, UN Charter.

[47] See *The Uniting for Peace Resolution*, Res 377 (V) of 3 November 1950.

[48] Emphasis added.

[49] Although the Resolution mentions that the matter should relate to the 'maintenance of international peace and security', the Charter does not require the General Assembly to always determine that a matter is a threat to international peace and security before discussing it.

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If at the time in question the General Assembly is not in session, the General Assembly may be convened within 24 hours, either at the request of a majority of UN members or at the request of at least nine members of the Security Council. Since this is a procedural matter, the right of veto does not apply.[50] The involvement of the General Assembly in the manner described here is a logical step in view of both the secondary responsibility of this principal UN body for the maintenance of international peace and security (alongside the primary responsibility of the Security Council) and the General Assembly's repeated involvement in efforts to protect human rights in the past.[51]

2.3.2 The Genocide Convention

Besides the UN Charter, a treaty law basis for humanitarian intervention can be found in the Convention on the Punishment and Prevention of the Crime of Genocide ('Genocide Convention').[52] This Convention was adopted by the UN General Assembly on 9 December 1948, and entered into force on 12 January 1951. The extermination of Jews and members of other national, ethnic and religious groups during the Nazi Holocaust prompted the adoption of the Genocide Convention.[53]

The Convention obliges state parties to 'prevent and punish' genocide, which the Convention describes as an offence against international law, even when directed by a state against its own citizens.[54] It follows that in cases where

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[50] The veto power operates only in non-procedural matters. See art 17 and 18 of the UN Charter.

[51] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 26. Under the auspices of the General Assembly, numerous instruments for the protection of human rights have been adopted. Examples include the 1948 Universal Declaration of Human Rights and the two covenants of 1966, one on the protection of civil and political rights and the other on the protection of socio-economic rights.

[52] Adopted by UNGA Res 260 (III) A on 9 December 1948, 78 UNTS 1021 (1951).

[53] Buergenthal (1995) 58. For a critical view of the provisions and working of the Convention see Kuper (1982), especially 36-39 and 174-185.

[54] Art 1.

internal armed conflicts involve the commission of genocidal acts or intent, unilateral or collective humanitarian intervention may be legally justified on the basis of the Genocide Convention.

The Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:[55]

- Killing members of the group.

- Causing serious bodily harm or mental harm to members of the group.

- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

- Imposing measures intended to prevent births within the group.

- Forcibly transferring children of the group to another group.

Ronzitti has faulted reliance on the Genocide Convention to support the legality of humanitarian intervention in international law.[56] The basis of his contention is that under article 1 of the Convention, states are obliged to punish genocide within their own territories, and not within the territories of other states. He argues that in cases where a state does not punish genocide within its own territory, other states are not authorised to intervene by using force, but can only refer the matter to the competent organs of the UN so that they may take such action under the UN Charter, as they consider appropriate.[57]

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[55] Art 2.

[56] Ronzitti (1985) 17 ('It is absolutely useless to refer to article I of the Genocide Convention').

[57] This argument is based on the provisions of art 8 of the Genocide Convention. The article envisaged the creation of an international tribunal to prosecute genocide suspects. This was never done. However, this situation will be addressed when the ICC, establishment in 1998 to prosecute, *inter alia*, genocide offenders, starts operating.

While the above may be true, it is arguable that states do not have much choice when it comes to punishing genocide. The duty to prosecute genocide, which is an 'international crime', is owed *erga omnes*, and those accused of genocide may be punished by any state, not just by the state where the crime is committed.[58] Commission of genocide renders one *hostis humani generis*, that is, an enemy of all mankind.

Where a state is for one reason unable or unwilling to prevent or punish genocide, that responsibility shifts to the other states constituting the international community, who have a legal interest in the prevention and punishment of the crime of genocide. This reasoning can be supported by employing the intent of the framers of the Genocide Convention, and is further buttressed by the customary international law principle very much applicable to the issue of genocide, encapsulated in the maxim *aut dedere aut judicare* (prosecute or surrender for prosecution).

Briefly, this principle requires states, in the event of being unable or unwilling to prosecute a person suspected of committing an international crime such as genocide, to surrender that person to the authorities of another state or an international tribunal for prosecution. This is an extension of the doctrine of universal jurisdiction over international crimes.

The provisions of the Genocide Convention offer a legal basis for humanitarian intervention. For instance, in situations of ethnic conflicts, a strong *prima facie* case could be made against the state concerned under several headings within article 2 of the Genocide Convention. If, for instance, it can be shown that a particular ethic group has been targeted for *extermination* in a conflict, then such a group is entitled to protection under the Genocide Convention. However, in instances where states intervene forcible in others, invoking the

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[58] See Orentlicher (1991) 2537 2552 ("The term 'international crimes' in its broadest sense comprises offences which conventional or customary international law either authorises or requires states to criminalise, prosecute and punish").

right or duty of humanitarian intervention, the intervening states seldom invoke the Convention.[59]

2.3.3 Treaties adopted under the Auspices of African Intergovernmental Organisations

2.3.3.1 The Constitutive Act of the African Union (AU)

Perhaps the greatest effort towards the legalisation of humanitarian intervention in so far as the OAU is concerned is manifest in the adoption of the Constitutive Act of the AU. The Act is the founding treaty of the AU, the continental intergovernmental organisation that replaced the OAU in 2002. From the perspective of human rights, the AU Act represents an impressive departure from the OAU Charter, which has faced considerable criticism for its scant attention to human rights and its considerable and potentially regressive emphasis on the inviolability of state sovereignty.[60]

The Act places human rights squarely at the centre of the AU's activities. Its preamble underscores the AU's determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.[61] By way of article 3, the objectives of the AU include the promotion of peace, security and stability, the protection and promotion and protection of human and peoples' rights, the promotion of democratic principles and institutions, popular participation and good governance.[62] Many of the principles that are to guide the AU are relevant for the promotion and protection of human rights in explicit terms.

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[59] See, for instance, Mortimer (1998) 120 (arguing that a strong case could have been made against Iraq for acts of genocide against the Kurds in 1991. However, none of the intervening states invoked the Genocide Convention).

[60] For criticisms, see generally, Chanda (1989-1992); Naldi (1999) and Gutto (1996) 314.

[61] Preamble, para 9.

[62] Arts 3(f), 3(g) and 3(h) of the Act.

These principles are the respect for democratic principles and institutions, human rights, the rule of law and good governance, the promotion of social justice, respect for the sanctity of human life, and condemnation and rejection of impunity and unconstitutional changes of governments.[63] The Act guarantees the right of the Africans to participate in the affairs of the AU,[64] and the promotion of gender equality.[65] The AU shall also function with due regard to the principles of sovereign equality, inter-dependence and respect for borders in existence at the achievement of independence,[66] and shall pursue a common defence policy for the African continent.[67] Further, there shall be established a pan-African parliament, which introduces an element of representation.[68] Similarly, the Economic, Social and Cultural Council of the Union will be composed of different social and professional groups of the member states of the AU.[69]

Although the defence of the 'sovereignty, territorial integrity and independence' of the member states shall be one of the objectives of the AU, the Act provides, interestingly, for the defence of 'independence', and not 'political independence', which the OAU defended.[70] This is a clear normative departure form the OAU regime, and it may well suggest that the new AU will not, as the OAU did, shield leaders who commit human rights atrocities. Other provisions

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[63] Arts 4(m), 4(n), 4(o) and 4(p).

[64] Art 4(c).

[65] Art 4(l).

[66] See, art 4 (a) & (b).

[67] Art 4(d).

[68] See art 5(1) as read with art 17.

[69] Arts 5(h) and 22.

[70] See art 3(b) of the Act, Cf Arts 2 and 3 OAU Charter.

to the effect that the AU will not tolerate both impunity[71] and unconstitutional changes of governments lend credence to this suggestion.[72]

By an unprecedented provision,[73] the Act provides for the 'right' of the AU to 'intervene in a member state pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[74] The Act does not state what means of intervention the AU should employ, but considering that the grave situations listed usually occur within the context of armed conflicts, it is arguable that the Act envisages intervention by use of military force.

The above proposition that article 4(h) envisages military intervention is supported by the provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (the 'AU Peace and Security Council Protocol' or the 'Protocol'), which seeks to establish a peace and security council under the auspices of the AU.[75] Under the Protocol, the functions of the Peace and Security Council of the AU will include 'peace support operations and intervention, pursuant to article 4(h) ... of the [AU] Act'.[76] In order to enable the Council perform this responsibility, the Protocol envisages the establishment of an African Standby Force composed of

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[71] Art 4(o).

[72] Art 4(p).

[73] Neither the UN Charter nor the respective constitutive documents of other regional intergovernmental organisations (The Council of Europe, the Organisation of American States, the Arab League etc) has an equivalent provision, at least in its express formulation.

[74] See, art 4 (h) of the Act.

[75] The Protocol was adopted by the 1st Ordinary Session of the AU Assembly of Heads of State and Government, 10 July 2002, Durban, South Africa. See Decision ASS/AU/Dec 3 3(I), para 3.

[76] Art 6(d) of the Protocol.

multidisplinary conitgents, with civilian and military components, ready for rapid deployment at appropriate notice.[77]

Put into context, the insertion of article 4(h) into the AU Act is understandably a result of the lessons learned from the Rwandan genocide of 1994. The UN and the OAU was accused of watching on as civilians were massacred.[78] How article 4(h) is eventually interpreted and applied remains to be seen. Chapter 4 of this study examines, in more detail, the implications and practicalities for humanitarian intervention under the auspices of the Constitutive Act of the AU. Suffice it to say here that article 4(h) of the Act is one of a kind, and provides a major normative basis for humanitarian intervention on the African continent.

2.3.3.2 The Treaty Establishing the Economic Community of West African States (ECOWAS)

The 1975 Treaty establishing ECOWAS[79] had no explicit reference to human rights.[80] The founders of ECOWAS were particularly concerned with the wider concept of human security and not merely the military aspect of security. At its foundation, ECOWAS was concerned with the need to reduce the fear of hunger among the citizens of its member states by enhancing economic development through a collective effort.[81] However, it was soon realised that

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[77] Art 13(1) of the Protocol. The Protocol will enter into force immediately after it has been ratified by a simple majority of the member states of the AU, see art 22 of the Protocol.

[78] According to the then Head of the Legal Division of the OAU (and the chief drafter of the Act) Professor Tiyanjana Maluwa, article 4(h) was inserted into the Act on the night the Act was being adopted by the Heads of State and Government, mainly because on the same night, the Assembly had received the report of the eminent personalities regarding the causes of the 1994 Genocide in Rwanda. Information obtained from my interview with Professor Maluwa in Accra, Ghana, on 7 August 2000.

[79] The ECOWAS Treaty is reproduced in 14 (1975) 2000. Member states are Benin, Burkina Faso, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo and Cape Verde. Mauritania was a founding member of ECOWAS, but it has since withdrawn its membership. It is a member of the Arab Maghreb Union (AMU).

[80] Viljoen (1999) 187.

[81] Olonisakin (1998) 53.

the organisation could not realise economic security without first securing political stability and military security.[82] ECOWAS subsequently expanded its mandate by adopting two protocols supplementary to the 1975 Treaty.

In 1978, the Protocol on Non-Aggression was adopted.[83] The Protocol reiterates the rule on the prohibition of the use of force or aggression, or from employing any other means inconsistent with the charters of the UN and the OAU against the territorial integrity and political independence of member states.[84] The Protocol affirms that ECOWAS cannot 'attain its objectives save in an atmosphere of peace and harmonious understanding among member states of the Community'.[85]

The quest for regional security and stability did not end there. In 1981, the Protocol Relating to Mutual Assistance and Defence was adopted.[86] Under the Protocol, member states 'declare' and 'accept' that any armed threat or aggression against a member state constitutes a threat or aggression against the entire Community.[87] In terms of the Protocol, member states 'resolve to give mutual aid and assistance' to counter any armed threat or aggression.[88] Also, mutual aid and assistance are to be given in cases of armed conflict between two or several member states or an internal armed conflict within any

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[82] As above.

[83] See, ECOWAS Protocol on Non-Aggression, Lagos, Nigeria, 22 April 1978; reproduced in (Weller) (ed) (1994) 18.

[84] Art 1 of the Protocol.

[85] Art 1 of the Protocol, preamble.

[86] See, ECOWAS Protocol Relating to Mutual Assistance and Defence, Freetown, Sierra Leone, 29 May 1981; reproduced in Weller (ed) (1994) 19.

[87] Art 4.

[88] As above.

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member state engineered and supported actively from outside likely to endanger security and peace in the entire Community.[89]

In 1993, the ECOWAS Treaty was amended.[90] One of the principles of ECOWAS under the amended Treaty now relates to 'the recognition, promotion and protection of human and people's rights in accordance with the African Charter on Human and Peoples' Rights'.[91] Institutions provided for under the amended treaty include the ECOWAS Court of Justice and the Arbitral Tribunal. The powers and composition of these institutions are not regulated by the Treaty, but are to be set out in protocols.[92]

In the case of the Court of Justice, this has already been done.[93] The continued emphasis of human rights in the 'revamped' ECOWAS system may strengthen the basis for humanitarian intervention. This proposition is based on the argument that a culture of respect for human rights in the region is likely to cause states in the region to increasingly intervene to pre-empt or halt gross human rights violations leading to mass loss of lives.

The experiences of ECOMOG in Liberia and Sierra Leone promoted discussions among ECOWAS member states to develop an institutionalised mechanism for crisis prevention, management and resolution. However, even as early as 1993, the revised ECOWAS Treaty enjoined states to 'co-operate with the Community in establishing and strengthening appropriate mechanisms for the timely prevention of intra-state and inter-state conflicts'.[94] The Treaty

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[89] As above.

[90] See, 35 ILM 660 (1996). The revised treaty was done at Cotonou, Benin, 24 July 1993.

[91] See, preamble and Art 4 (g) of the revised ECOWAS Treaty.

[92] Viljoen (1999) 185 190.

[93] As above.

[94] See art 58(2) of the revised ECOWAS Treaty, 1993.

also declared the need to 'establish a regional peace and security observation system and peacekeeping forces where appropriate'.[95]

Only in 1997 was the process of establishing an elaborate regional security mechanism jump-started. During that year, the ECOWAS Assembly of Heads of State and Government agreed in principle to establish a formal mechanism to deal with the issue of conflicts.[96] In March 1998, ECOWAS Ministers responsible for foreign affairs, defence, internal affairs and security met in Yamoussoukro to establish the guidelines for the structure of such a mechanism. The Protocol establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace and Security was finally adopted in 1999.[97]

The Mechanism's main decision-making body is the Mediation and Security Council, consisting of nine member states elected for a two-year period.[98] The Council is 'empowered to take decisions on issues of regional peace and security on behalf of the Authority of Heads and States and Government'.[99] Through article 18 of the Protocol establishing the Mechanism, it is the function of the Council to authorise all forms of interventions, including the decision to employ political and military missions. The Protocol requires the Council to meet at the levels of committee of ambassadors (monthly), Ministers responsible for foreign affairs, defence, interior and security (quarterly), and

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[95] Art 58 (1) (f) of the revised ECOWAS Treaty, 1993.

[96] As above.

[97] Protocol reprinted in (1999) 11 African *Journal of International and Comparative Law* 148.

[98] Art 17 of the Protocol establishing the Mechanism.

[99] As above.

Heads of State and Government (biannually).[100] However, these organs may meet more often if circumstances so require.[101]

To enhance its capacity for both 'early warning' and 'early action', the Mechanism establishes a sub-regional security and peace observation system.[102] The system will assess economic, environmental, political, security and social factors in order to identify a situation of potential conflict with the ultimate aim of enhancing ECOWAS' capacity to prevent situations from degenerating into violent crises.[103]

The Mechanism envisages the role of eminent personalities in all initiatives that may precede actual military intervention. First, the Executive Secretary of ECOWAS is authorised to participate in an advisory capacity in all the deliberations of the Mediation and Security Council.[104] Second, the Protocol establishing the Mechanism allows for the creation of a council of elders, who may come from the ECOWAS region or beyond.[105] Article 24 states:

> Using African traditional practice as a guide, it is proposed that eminent persons should be constituted into a council of elders. The elders should be selected from among prominent and experienced personalities from the sub-region, the African region or the world at large. However, particular effort should be made to solicit the services of various segments of society such as women, traditional, religious and political leaders.

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[100] Art 19.

[101] As above.

[102] Art 25.

[103] As above.

[104] Art 20.

[105] Art 24.

The provisions of three treaties adopted under the auspices of ECOWAS provide a normative framework for humanitarian intervention. These treaties are the 1993 ECOWAS Treaty, the Protocol on Mutual Assistance and Defence and the 1999 Protocol establishing the ECOWAS Mechanism. This argument is based on the fact that these treaties provide for a proactive role by ECOWAS in the promotion of human rights, peace and security in the West African region.

The connection between humanitarian intervention on the one hand and human rights on the other arises from the fact that humanitarian intervention responds to gross human rights violations leading to mass loss of lives. Also, peace and security have a bearing on humanitarian intervention because gross human rights violations to which humanitarian intervention responds usually are a breach of peace and security.

2.3.3.3 The Treaty Establishing the Southern Africa Development Community (SADC)

Southern Africa began its experiment in regional co-operation on the political front with the creation of the Front Line States (FLS) in 1974. The FLS an association of states committed to spearheading support for those who were still fighting for independence in Southern Africa.[106] The FLS convened a conference in 1979. The meeting's resolution led to the establishment, in April 1980, of the Southern Africa Development Co-ordination Conference (SADCC).[107] SADCC was essentially a loose co-operative of states rather than a supra-national entity. It was not established through a treaty nor was there an institution to make decisions binding on member states. The objectives of SADCC were to reduce economic dependence, forge links for equitable

[106] Berman & Sams (2000) 11.

[107] The nine founding members of SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. Namibia joined in 1990,

regional integration and mobilise resources to promote the implementation of national and regional policies.[108]

In 1992, it was decided to revamp SADCC. On 17 July that year, the ten SADCC member states signed the treaty establishing the South African Development Community (SADC).[109] South Africa subsequently joined the Organisation in August 1994, followed by Mauritius in August 1995, as well as the DRC and Seychelles in September 1997.[110] The SADC Treaty creates a number of formal institutions. These are the Summit of Heads of State and Government, the Council of Ministers, and the Sectoral Commission.[111] Others are the Standing Committee of Officials, the Secretariat and the SADC Tribunal.[112]

Although economic independence was the primary aim behind the creation of SADC, human rights, peace and security concerns were also deemed important.[113] This is evident in the declaration of the Heads of State and Government, which states as follows:[114]

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[108] Zacharias (1997) 5.

[109] (1992) 32 ILM 267.

[110] Therefore, the members of SADC at present are: Angola, Botswana, DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[111] See (1992) 32 ILM 267; (1993) 5 *African Journal of International and Comparative Law* 418.

[112] See art 13 of the SADC Treaty.

[113] SADC's 1993 Programme of Action recommended a strategy for enhancing sub regional security that included adopting a wider definition of security, establishing a forum for mediation, arbitration, and reducing military expenditures. See SADC 'Southern Africa: A Framework and Strategy for Building the Community' SADC Secretariat 24-25.

[114] 'Towards the Southern African Development Community' *Declaration of the Heads of State and Government of Southern Africa* 17 August 1992, SADC Secretariat, Gaberone.

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> Good and strengthened political relations among the countries of the region, and peace and mutual security, are critical components of the total environment for regional cooperation and integration. The region needs, therefore, to establish a framework and mechanisms to strengthen regional solidarity, and provide for mutual peace and security.

The SADC Treaty identifies pursuit for 'solidarity, peace and security' as one of the principles to guide the actions of SADC.[115] One of the objectives of SADC is to 'promote and defend peace and security'.[116] Further all member states are enjoined to 'co-operate in the area of politics, diplomacy, international relations, peace and security'.[117] Article 22 provides for the conclusion of protocols in such areas as of cooperation.

Prior to the creation of SADC, the Inter-State Defence and Security Committee (ISDSC), a sub-structure of the FLS, dealt with issues of defence and security in the sub-region.[118] In July 1994, SADC member states took the first concrete step to move beyond the ISDSC and create a new regional and security framework.[119] A ministerial workshop on democracy, peace and security adopted the 'Windhoek Resolutions'. The resolutions recommended the establishment of a sector on conflict resolution and political cooperation.

Various suggestions were made in a debate regarding the proposals of the 'Windhoek Resolutions'. Eventually, SADC ministers in charge of foreign affairs, defence and security recommended the creation of the SADC Organ for Politics, Defence and Security. The Organ was ultimately established under

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[115] Art 4.

[116] Art 5.

[117] Art 22.

[118] Berman & Sams (2000) 160.

[119] See SADC Heads of State Declaration (note 113 above) 24-25.

the 1996 Protocol on Politics, Defence and Security.[120] The Protocol lists among the objectives of the Organ, the protection of people and safeguarding, development of the region against instability arising from the breakdown of law and order and interstate conflict;[121] the promotion of political cooperation among member states and the evolution of common political value systems and institutions;[122] and full cooperation of member states in matters of regional security and defence through conflict prevention, management and resolution.[123]

The Organ is also enjoined to mediate inter-state and intra-state conflicts,[124] and to use preventive diplomacy to pre-empt conflict in the region through an early warning system.[125] Where conflict inevitably occurs, the Organ is required, apparently as a matter of procedure, to seek to end this as quickly as possible through diplomatic means. In case such diplomatic means fail, the Organ may recommend that the SADC Summit should consider punitive measures,[126] and these measures may arguably include forcible alternatives. It is also worth noting that under the Protocol,[127] intra-state conflicts that could be justified for regional intervention, include:

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[120] Reprinted in (1999) 11 *African Journal of International and Comparative Law* 197. For fuller analysis of the Protocol, see Chigara (2000) 58.

[121] Art 2 (a).

[122] Art 2(b).

[123] Art 2(d).

[124] Art 2(e).

[125] Art 2(f).

[126] Art 2(g).

[127] Art 5(2)1.

- Large-scale violence between sections of a population of a state, or between a state or its armed or paramilitary forces and sections of the population.

- A threat to the legitimate authority of the government (such as a military *coup d'état* by the armed or paramilitary forces).

- A condition of civil war or insurgency.

- Any crisis that could threaten the peace and security of other member states.

According to article 2(h) of the Protocol, the Organ is called upon to endeavour to promote and enhance the development of democratic institutions and practices between member states, and to encourage the observance of universal human rights as provided for in the Charters and Conventions of the OAU and the UN. Finally and quite significantly, it is the objective of the Organ to address extra-regional conflicts which impact on peace and security on Southern Africa.[128] Application of this provision would provide a basis for humanitarian intervention, but the provision, as we will see shortly, has not been invoked in the few instances of intervention where the regime of the Organ was invoked.

Unfortunately, the Organ's operation has been hampered, principally due to a stalemate between South Africa and Zimbabwe regarding the level of attachment of the Organ to the general SADC structure.[129] Despite this hitch,

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[128] Art 2(p).

[129] A disagreement between South Africa and Zimbabwe on the autonomy of the Organ has stalled its operation. South Africa, on the one hand, has maintained that the Organ should be a SADC sub-structure that should report directly to the SADC Summit. Zimbabwe on the other hand, has maintained that the Organ should operate under a separate chair, as essentially a parallel structure to SADC. See, for instance See, for instance, Zacharias (1996) 1-2 and Neethling (2000) 287ff.

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SADC has been involved in initiatives for the restoration of peace in member states, notably in Lesotho[130] and in the DRC[131] during 1998.

With regard to human rights, the preamble of the SADC Treaty declares that the member states are 'mindful of the need to involve peoples of the region centrally' in development and integration, 'particularly through the guarantee of democratic rights, observance of human rights and the rule of law'. The role of the individual in the yet to be established SADC Tribunal,[132] is subject to speculation, but proposals have been made for individuals to be standing before the Tribunal.[133]

The 1994 'Windhoek Resolutions' called for the creation of a SADC Human Rights Commission and a SADC Bill of Rights.[134] One of the stated objectives of the SADC Organ on politics, Defence and Security is to 'promote and enhance the development of democratic institutions and practices within member states, and to encourage observance of universal human rights as provided for in the Charters and Conventions of the OAU and the United Nations'.[135]

In 1997, a SADC Parliamentary Forum was set up. Its membership is open to national parliaments of the member states.[136] The Forum, to have its seat in

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[130] The military intervention in Lesotho was occasioned by tensions between the country's elected Prime Minister, Ntssu Mokhehle and Monarch, King Letsie III.

[131] See generally, Chigara (2000).

[132] Establishment of the Tribunal is provided for under Art 9, SADC Treaty.

[133] The proposals came out in the recommendations of the panel of experts established in 1997 to make proposals relating to the establishment of the SADC Tribunal. See Viljoen (1999) 197 200.

[134] A Ministerial Workshop on Democracy, Peace and Security, July 1994 adopted the Windhoek Resolutions.

[135] See Art 2 & 3 of the SADC Protocol on Politics, Defence and Security.

[136] See Viljoen (1999) 205.

Windhoek, Namibia, will be integrated as an institution of SADC. Its mandate includes the advancement of the rule of law and human rights in the sub-region.[137] Fair representation of women and political parties is guaranteed in the composition of the Forum.[138]

The provisions of the SADC Treaty discussed above, as well as those of the SADC Protocol on Politics, Defence and Security, permit SADC to intervene in member states to uphold human rights, the rule of law, peace and security. Therefore, SADC can, on the basis of these provisions, invoke humanitarian intervention in cases of gross human rights violations leading to mass loss of life.

2.3.4 Instances in which Treaties have been Invoked to Justify Humanitarian Intervention

2.3.4.1 The United Nations (UN) Charter

After the entry into force of the UN Charter in 1945 claims of states concerning the lawfulness of humanitarian intervention continued.[139] However, these claims were few and far in between, despite repeated gross human rights violations, on the one hand, and notwithstanding the fact, on the other hand, that the standard of international protection of human rights had acquired a wider scope than it had in previous centuries.[140]

Notwithstanding the above, states have, since the promulgation of the UN Charter, undertaken a number of military interventions, which have been

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[137] Viljoen (1999) 206.

[138] As above.

[139] That is, claims of states based either solely or partially on humanitarian intervention.

[140] Ronzitti (1985) 92.

justified on grounds of humanitarian intervention.[141] Five instances that are commonly cited as examples of UN Charter-based humanitarian interventions are discussed below, with a view of establishing whether or not they constitute treaty-based humanitarian interventions. These interventions were in Iraq (1991), Somalia (1992-1993), Bosnia (1992) Rwanda and Eastern Zaire (1994-1996), and Haiti (1994-1997).

(i) Iraq (1991)

The repression of the Kurdish people of Iraq predates the 1991 Gulf War and its aftermath.[142] After the dissolution of the Ottoman Empire at the end of World War I, the Treaty of Sevres (1920) provided the Kurds with the prospect of an independent Kurdish state.[143] The provisions of this Treaty were never implemented, and were ignored in the Treaty of Laussane of 1923, which divided the Kurdish territory between Iran and Iraq.[144] Successive Kurdish revolts against Baghdad were ruthlessly crashed, and the oppression intensified in the aftermath of the Gulf War in February 1991.

The magnitude of Iraq's repression of its Kurdish population and the mass exodus of refugees into Turkey and Iran led the UN Security Council into action and decidedly placed strains on the policy of non-intervention in the internal affairs of states.[145] Through Resolution 688 of 1991, the Security Council condemned Iraq's repression as a threat to international peace and security, demanded that Iraq end the repression, and insisted that Iraq allow

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[141] For a fairly detailed analysis of state practice relating to humanitarian intervention, see Tanca (1993), generally.

[142] Abiew (1999) 145. The Kurds are found in different proportions in Turkey, Iran, Iraq and Syria.

[143] As above.

[144] As above.

[145] Barrie (2001) 157.

immediate access by international humanitarian organisations to those in need of assistance in all parts of Iraq.[146]

Intervention in Iraq to protect the Kurds was undertaken by troops from the US, Britain, France, and other countries, and was known as 'Operation Provide Comfort'.[147] Britain, France and the US declared a 'no-fly zone' in the north and 'Operation Southern Watch' in Southern Iran.[148] The basis for Security Council authorisation of military intervention in Iraq was the finding that the situation in Iraq to be a 'threat to international peace and security'. In addition, Resolution 688 referred to the humanitarian crisis in Iraq.[149] For this reason, the Iraq intervention is an instance of humanitarian intervention under the auspices of the UN Charter.

(ii) Somalia (1992–1993)

The international response to the tragedy in Somalia was a more complex undertaking than the intervention in Northern Iraq, since Somalia had no functioning government.[150] Events in Somalia have clearly established that ethnic homogeneity is no guarantee of stability.[151] Although Somalia is one of

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[146] China, however, abstained from resolution 688, with its Ambassador expressing concern that the draft resolution should not violate article 2(7) of the UN Charter, see Wheeler (2000) 144. The ten Security Council members that supported Resolution 688 relied crucially on the argument that the transboundary implications of Iraqi's repression posed a threat to international peace and security, thereby legitimating Security Council action. See Wheeler (2000) 144.

[147] Barrie (2001) 157.

[148] As above.

[149] But see Bourloyannis (1992) 335 353-354 (asserting that Resolution 688 was merely declaratory of the Kurds within Iraq, and that it was only later that the US, responding to public pressure, interpreted the resolution to authorise the use of force, although the Resolution does not mention Chapter VII).

[150] Abiew (1999) 158.

[151] Kwakwa (1994) 27.

the most ethnically homogenous countries in Africa,[152] it has been in a state of civil strife since 1990, and throughout this period the country has gone through the most traumatic experience suffered by any independent African country.[153]

The humanitarian tragedy that engulfed the Somali people in 1991-1992 was as a result of a protracted civil war and subsequent disintegration of the state that followed the fall of the government of Said Barre in 1991. Barre came to power in the 1960s and had ruled Somalia in a brutal and discriminatory fashion.[154] The suppression of critics, detention and military reprisals against his opponents, manipulation of clan interests and rivalries, and the occasional buying out of opposition groups with cash sustained Barre's hold on power.[155]

The end of the Cold War diminished superpower influence in Somalia, and resulted in bitter inter-clan fighting that destabilised the Horn of Africa.[156] Barre's 21-year old dictatorship came to an end in January 1991 and created a power vacuum in the country.[157] His ouster resulted in anarchy, looting, pillaging and rape of women.[158] Given this grim situation, the UN Security Council adopted Resolution 733 of 1992, directing the Secretary-General to undertake necessary action to increase humanitarian assistance to the people of Somalia.[159]

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[152] Somalis are ethnically and linguistically homogenous, and have a strong sense of superiority *vis-à-vis* other cultures. See Lewis & Mayall (1996) 101-103.

[153] As above.

[154] Wheeler (2000) 173-174.

[155] Abiew (1999) 160.

[156] Abiew (1999) 161.

[157] As above.

[158] Knight & Gebremariam (1995) 2.

[159] See UN Doc S/Res/733 (1992).

In March 1992, the major factions in the civil conflict agreed to a UN-mediated ceasefire, which led to the establishment in April of the UN Operations in Somalia (UNOSOM I).[160] UNOSOM I had a mandate to restore peace and support humanitarian relief operations. Despite the truce, the situation continued to deteriorate, and this led to Security Council Resolution 794 of 3 December 1992.[161] This Resolution went beyond a mere insistence on providing access to humanitarian assistance. The Council recognised the 'unique' situation in Somalia and declared that it fell under Chapter VII of the Charter.[162] The Resolution authorised a US-led military force to 'use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.[163]

The above determination by the Security Council resulted in the establishment of the US-led Unified Task Force (UNITAF), which was to create a secure environment for the delivery of food and medicine to the people of Somalia.[164] UNITAF was largely successful. Resolution 814 of 1993 established UNOSOM II to complete the work of UNITAF.

In particular, UNOSOM II was mandated to use all necessary means, including force, to restore peace, stability and order in Somalia. In June 1993, 24 members of the Pakistani UN peacekeeping force and in October of that year twelve soldiers of the US were killed, 75 were wounded and 6 were missing in

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[160] The ceasefire involved General Farah Aideed of the United Somali Congress and the interim President Ali Mahdi Mohamed.

[161] UN Doc S/Res/794 (1992).

[162] Abiew (1999) 163.

[163] Art 1. Further, the Resolution noted that impediments to humanitarian relief violated international humanitarian law. It stated that the people of Somalia had a right to receive assistance from the international community, and that anyone interfering with humanitarian assistance would be held responsible for such acts.

[164] Establishment of UNTAF marked the beginning of 'Operation Restore Hope', characterised by extensive operations of NGOs in delivering food and medical care in Somalia.

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action.[165] The US, France, Italy and other western nations pulled out of Somalia, leading to the crumbling of UNOSOM II.

The tragedy in Somalia presented a real opportunity for humanitarian intervention. As the international community was confronted with media images of starving men, women and children, which had replaced pictures of wicked gunmen fighting each other, public opinion was swayed in favour of taking some kind of action.[166]

Like the Iraq case, the human rights and humanitarian concerns in the various Security Council resolutions is clear. Resolution 733 of 1992 particularly emphasised the 'grave concern' of the Council at the 'deterioration of the situation in Somalia' including 'heavy loss of human life' and the attendant consequences on the stability of the region.[167] This focus on the humanitarian crisis leads me to the conclusion that the intervention in Somalia constitutes humanitarian intervention on the basis of the UN Charter.

This view is shared by Hutchison, who argues that, although the primary justification for 'Operation Restore Hope' was Chapter VII of the UN Charter, the situation is Somalia was a threat to international peace and security, and humanitarian considerations were also invoked.[168] In particular, the Security Council highlighted violence against UN relief workers and other violations of international humanitarian law as further justifications for its military action.[169]

(iii) Bosnia (1992)

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[165] Barrie (2001) 158.

[166] Abiew (1999) 168.

[167] S/RES/733 (1992).

[168] Hutchison (1993) 624 625, note 7.

[169] See preamble to Res 794 of 1992.

International intervention in Bosnia in the mid 1990s closely followed the Somalia 'debacle'. The death of President Marshal Tito of Yugoslavia in 1980 led to cracks within the Yugoslav Republic.[170] The post-Tito period led to the rearrangement of the governmental structure that was designed to balance competing ethnic groups and interests.[171] The fall of communism coupled with an increased Serb nationalism led to a couple of states forming the Yugoslav Federation declaring their independence from the Belgrade government. The declaration of independence by Slovenia and Croatia in 1991 led to other states in the federation pressing for succession. The result was an outbreak of warfare in all the states forming the federation, including Bosnia-Herzegovina.

The outbreak of civil unrest in Bosnia-Herzegovina in 1991 was inevitable, due to the unstable ethnic mix in the region.[172] The Serbian population in the region boycotted a referendum held in 1992, and the scene was set for ethnic cleansing, genocide and forced evacuations.

In response to the unending atrocities, the UN Security Council passed Resolution 713 of 1991, which expressed concern that the continuation of the war constituted a threat to international peace and security.[173] Through Resolution 743 of 21 February 1992, the Council established the UN Protection Force (UNPROFOR). UNPROFOR was mandated to consolidate the ceasefire, which was then in effect, and to facilitate the negotiation of a comprehensive settlement.[174]

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[170] Abiew (1999) 175.

[171] Abiew (1999) 175. This balancing was done by rotating the presidency among the six republics that made up the Former Yugoslavia, namely Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro and Macedonia. In addition the Former Yugoslavia consisted of two 'autonomous' regions-Kosovo and Vojvodina.

[172] In 1991, Bosnia's population was estimated at 4 364 000, of which 43.7% were Muslims, 31.3 Serb and 17.2% Croat. See Abiew (1999) 176.

[173] See UN Doc S/Res/713 (1991).

[174] Abiew (1999) 180. UNPROFOR was created after a recommendation by the UN Secretary-General. See UN Doc S/Res/ 743 (1992); and Economides & Taylor (1996) 62.

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Despite these resolutions, the situation deteriorated and the Security Council passed Resolution 752 of 1992, calling on parties to stop fighting.[175] This was followed by Resolution 757 of 1992, calling for economic sanctions against Serbia whose forces had taken control of large portions of Bosnia-Herzegovina's territory.[176] By way of Resolution 770 of 1992, the Council determined the situation in Bosnia as a threat to international peace and security and authorised states to use all necessary measures to facilitate the delivery of humanitarian assistance in Bosnia-Herzegovina.[177]

Faced with the failure of several attempts at protecting the Bosnian Muslims, the Security Council passed Resolution 781 of 1992, which directed the imposition of a 'no-fly zone' over Bosnia to prevent Serbian attacks from hindering the delivery of humanitarian relief supplies.[178] As it turned out that the 'no-fly zones' became anything but safe, the Council, under Resolution 816 of 1992, authorised member states to take all necessary measures in the airspace of the Republic of Bosnia and Herzegovina in the event of further violations to ensure compliance with the ban of flights.[179] Despite the steps taken by the Security Council, the brutalities continued, culminating in the massacre at Srebrenica of July 1995.

Acting under authority of these resolutions, the Northern Atlantic Treaty Organisation (NATO) fighter jets embarked on a series of bombing campaigns against Bosnian Serb positions that violated the 'safe-havens' designated by the UN to deter further attacks.[180] NATO's use of force may have ended the

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[175] UN Doc S/Res/752 (1992), adopted on 15 May 1992, reprinted in (1992) 31 ILM 1451.

[176] UN Doc S/Res/757 (1992), reprinted in (1992) 31 ILM 1453.

[177] UN Doc S/Res /770 (1992). Through the Resolution, the Security Council expressed 'deep concern' over reports of human rights atrocities especially those committed in prisons and detention camps. The Resolution also expanded UNPROFOR's mandate.

[178] UN Doc S/Res/770 (1992).

[179] UN Doc S/Res/816 (1992).

[180] Abiew (1999) 181.

commission of further atrocities and facilitated more realistic proposals towards ending the war.[181] In November 1995, agreements known as the Dayton Peace Accords were signed, bringing the war in Bosnia to an end.[182]

Actions taken subsequently to the above Security Council Resolutions placed more emphasis on the delivery of humanitarian assistance than the need to protect those in need.[183] Nevertheless, humanitarian considerations played a prominent role in getting international response to the conflict situation.[184] For instance, Resolution 752 of 1992 called on 'all parties and all concerned to ensure that conditions are established for the effective and unhindered delivery of humanitarian aid to the victims of the conflict'.[185]

The humanitarian basis for the intervention in Bosnia came out most strongly in a number of other resolutions. In Resolution 757 of 1992,[186] the Council deplored that its call for an immediate cessation of forcible expulsions and attempts to change the ethnic composition of the population in Bosnia had not been heeded.[187] It then reaffirmed 'the need for the effective protection of human rights and fundamental freedoms, including those of ethnic minorities'.[188] In Resolution 758 of 1992,[189] the Council deplored the continuation of fighting in Bosnia and Herzegovina, which had rendered

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181 As above.

182 For a discussion on the Dayton Agreements, see Gaeta (1996), generally.

183 Barrie (2001) 160; Jackson (1993) 579.

184 Weiss (1994) 1.

185 Art 8.

186 13 votes in favour and 2 (China and Zimbabwe) abstensions.

187 Preambular para 4.

188 As above.

189 Adopted unanimously on 8 June 1992, reprinted in (1992) 31 ILM 1459.

'impossible the distribution of humanitarian assistance in Sarajevo and its environs'.[190]

In Resolution 770 of 1992,[191] the Council emphasised the need to halt the violations of human rights and humanitarian law. It expressed 'deep concern' over reports of 'abuses against civilians imprisoned in camps, prisons and detention centres'.[192] It demanded that unimpeded and continuous access to all camps, prisons and detention centres be granted immediately to the ICRC and other relevant organisations, and that all detainees therein receive humane treatment, including adequate food, shelter and medical care.[193] And in Resolution 771, adopted on the same day, the Council 'strongly condem[ed] violations of international humanitarian law',[194] and demanded 'an immediate cessation of those violations'.[195]

Finally, the Council in resolutions 780 and 787 of 1992 defended the intervention in Bosnia on the need to put an end to large-scale violations of fundamental human rights.[196] The Council expressed its 'grave alarm at continuing reports of widespread violations of human international humanitarian law occurring … [in Bosnia] … including reports of mass killings …'[197]

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[190] Preamble, para 5.

[191] Adopted on 13 Aug 1992, reprinted in (1992)31 ILM 1469.

[192] Preamblular para 9.

[193] Art 3.

[194] Art 2.

[195] Art 3.

[196] See UN SC Res 780 of 6 Oct 1992 (reprinted in (1992) 31 ILM 1476) and UN SC Res 787 of 16 November 1992 (reprinted in (1992) 31 ILM 1477.

[197] Preambular para 3 of Res 780.

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It also noted 'with grave concern, the report of the Special Rapporteur appointed following a special session of the [UN] Commission on Human Rights to investigate the human rights situation in the Former Yugoslavia, [which concluded that there were] massive and systematic violations of human rights and gross violations of international humanitarian law ... [Bosnia]'.[198] The above analysis leads us to conclude that the intervention in Bosnia is an instance of humanitarian intervention, as defined in this study because of the repeated references in the relevant Security Council resolutions, of massive human rights violations in Bosnia.

(iv) Rwanda and Eastern Zaire (1994-1996)

The 1994 Rwandan genocide presented another splendid opportunity for humanitarian intervention, although whether or not the opportunity was utilised remains to be seen in the discussion that follows. Fighting broke out on 6 April shortly after President Juvenal Habyarimana was killed in a plane crash near Kigali Airport. The wave of terror unleashed resulted in the most brutal and systematic slaughter of civilians ever witnessed on the African continent.[199] In the wake of the tragedy, the Uganda-based rebel group, the Rwandan Patriotic Front (RPF) launched a fresh offensive, took over Kigali and unilaterally declared a ceasefire.[200]

The initial international response to this humanitarian crisis of unprecedented magnitude was muted, to say the least.[201] However, the UN Assistance Mission to Rwanda (UNAMIR) was set up at the height of the tensions in 1993. By Resolution 912 of 21 April 1994, a few days after the Rwandan genocide broke out, the UN Security Council suddenly reduced the number UNAMIR

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198 Preambular para 10 of Res 787.

199 See UN Doc E/CN.4/1994/7 (1994); Wheeler & Morris (1996) 150.

200 Abiew (1999) 192.

201 Barrie (2001) 160.

troops in the wake of murders of members of the troops.[202] However, the Security Council later enhanced the UNAMIR's capacity through Resolution 918 of 17 May 1994, increasing the troops to 5 500 and calling, *inter alia*, for the creation of secure humanitarian areas and for support for humanitarian relief operations.[203] The support sought by the Security Council under Resolution 918 was not forthcoming, as no UN member states made commitments to provide the requisite number of troops.[204]

France consequently unilaterally undertook a UN-authorised intervention, 'Operation Turquoise', under Security Council Resolution 929 of 1994, and set up a security zone in south-western Rwanda.[205] The French troops later withdrew, handing over control of the security zone to a UN peacekeeping force (UNAMIR II), which largely failed to suppress the genocide.[206] 'Operation Turquoise' nevertheless served a significant humanitarian purpose, by providing security and logistical support to humanitarian assistance operations both within Rwanda and in the refugee camps in Zaire.

France defended 'Operation Turquoise' on humanitarian grounds. Having floated the idea on *Radio France Internationale*, Foreign Minister Alain Juppé wrote in the daily *Liberation* that France had 'a real duty to intervene in Rwanda ... to put an end to the massacres and protect the populations threatened with extermination'.[207] Later President Francois Mitterand of France claimed that the French intervention had rescued 'tens of thousands of

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[202] See UN Doc S/Res/912 (1994).

[203] See UN Doc S/Res/918 (1994).

[204] Barrie (2001) 160.

[205] See UN Doc S/Res/929 (1994).

[206] Barrie (2001) 160.

[207] Quoted in Prunier (1995) 280. See also, Wheeler (2000) 231.

lives'.[208] However, Prunier, who was brought into the decision-making on the implementation of 'Operation Turquoise, considers that at best, the operation might have saved 13 000 or 14 000 people.[209] Nevertheless, the humanitarian considerations in 'Operation Turquoise' makes the intervention in Rwanda an instance of humanitarian intervention under the auspices of the UN Charter.[210]

(v) Haiti (1994-1997)

The case of Haiti, although distinct in many aspects from the earlier cases examined, shares with them the ingredient of massive human rights violations.[211] The ouster of President Jean-Bertrand Aristide in a military *coup d'état* in September 1991 and subsequent human rights violations by the military rulers precipitated the crisis.[212] Aristide was Haiti's first democratically elected president after nearly two decades of dictatorial rule.[213]

The immediate international response came from the OAS Foreign Ministers, who adopted a strongly worded resolution demanding the full restoration of the rule of law and the immediate reinstatement of President Aristide.[214] The initial UN Security Council response to the *coup d'état* was to consider it as a

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208 Prunier (1995) 297.

209 Prunier (1995) 297. See also Wheeler (2000) 232 ('The Problem was that the French safeguarded those Tutsi refugees who were in large concentrations, such as the 8 000 near Cyangugu, but ther did very little for the Tutsi being hunted in the bush').

210 Prunier, above thinks that France was led to intervene largely due to political reasons. However, the position adopted in this study is that the fact that humanitarian reasons for intervention coincide with other reasons does not rob the intervention its validity as an example of humanitarian intervention.

211 Abiew (1999) 212.

212 Abiew (1999) 212-213.

213 Haiti has had a long tradition of dictatorial regimes since its independence in 1804.

214 Barrie (2001) 162.

domestic jurisdiction issue.[215] However, the UN General Assembly condemned the illegal replacement of Aristide.[216]

Invoking Chapter VII of the UN Charter, the Security Council unanimously adopted Resolution 841 in June 1993, imposing wide-ranging sanctions on Haiti.[217] In July of the same year, a UN-brokered accord known as the 'Governors Island Agreement' was reached. By Resolution 940 of July 1994, the Security Council authorised member states to form a multinational force and to use all necessary means to facilitate the departure from Haiti of the military leadership.[218] This was followed by US warships being positioned off the Haitian coast, and a subsequent settlement that saw the reinstatement of Aristide.

The US-led Multinational Force in Haiti (MNF) was replaced with the UN Mission in Haiti (UNMIH) in March 1995 charged with a mandate to assist Haiti in sustaining a secure and stable environment, protecting international personnel and key installations, creating the conditions for holding elections, and establishing a new professional police force.[219] Rene Preval, a close associate of Aristide, won presidential elections held in December 1995.[220]

The UN-authorised, US-led multilateral involvement in Haiti could signal a precedent in support of collective humanitarian intervention, except that the authorisation of the Council was based on Chapter VII, which obliged the

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215 Despite castigation by Haitian Officials of the Security Council's inaction, the Council at first maintained that the crisis in Haiti was purely internal, and that it did not in any way jeopardise international peace and security.

216 Barrie (2001) 1962.

217 See UN Doc S/Res/841 (1993).

218 See UN Doc S/Res/940 (1994).

219 Abiew (1999) 217.

220 Abiew (1999) 217; Barrie (2001) 163.

Security Council to first determine that the situation constituted a threat to international peace and security. For some commentators, the intervention was based on an emerging principle of 'pro-democratic intervention'.[221] Nevertheless, humanitarian considerations played a role in Resolution 940 of 1994 in that it expressed grave concerns regarding a significant further deterioration of the humanitarian situation in Haiti.

All the above five instances of military intervention under the auspices of the UN Charter are examples of treaty-based humanitarian intervention. Regarding each of the instances, the relevant UN Security Council Resolution was based on a finding that the situation in the target state was a threat to international peace and security. In addition the Council referred to gross violations of human rights, massive loss of lives, humanitarian crisis or humanitarian emergency in the target state.

2.3.4.2 Treaties Adopted under the Auspices of African Intergovernmental Organisations

(i) Liberia (1990-1998)

In the late 1980s, the Liberian government of President Samuel Doe was becoming unpopular due to its poor performance.[222] Ethnicity, state terror, corruption and the violation of human rights became its hallmarks. Charles Taylor, then in exile, slipped back to Liberia and launched a rebellion involving 150 fighters who invaded Liberia from Ivory Coast on Christmas eve, 1989.[223] By May 1990 the rebels were in control of about 75% of Liberian territory.

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[221] The paradigm of pro-democratic intervention, which is beyond the scope of the present study, presupposes legitimate interference in the internal affairs of a state for purposes of restoring democracy and human rights. This paradigm is related to that of 'intervention to facilitate self determination'. For a fuller discussion see section on humanitarian intervention and related concepts in chapter 1 (section 1.2.1.8) of this study.

[222] The Doe regime is remembered for its atrocities against Liberian citizens. See, Olonisakin (2000). For a chronological account of ECOWAS intervention in Liberia, see Kufuor (1993).

[223] See, Kufuor (1993).

Taylor also laid siege on Monrovia including the Executive Mansion. The national armed forces of Liberia were in total disarray. The hostilities that continued led to the loss of life and gross violations of human rights.[224] The escalation of violence and the massacre of both Liberians and foreigners, several whom had sought in churches, hospitals, diplomatic missions and other places, considered as *hors de limit* to combatants, became a matter of concern within ECOWAS.[225]

On 24 August 1990, while the global community was still stunned by Iraq's invasion of Kuwait,[226] a significant and unprecedented development took place in West Africa that was largely overshadowed by events in the Persian Gulf.[227] ECOWAS Heads of State and Government, meeting in Banjul, adopted a plan for the restoration of peace in Liberia. This course of action was decided upon in the terms of the Protocol on Mutual Assistance and Defence.[228]

It entailed the creation of the ECOWAS Cease-fire Monitoring Group (ECOMOG), a multi-national military force comprised of troops from ECOWAS member states. ECOMOG was tasked with the enforcement of peace in Liberia, monitoring a cease-fire among the warring factions, disarming and encamping them, and providing humanitarian services.[229]

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[224] Olonisakin (2000) 81-82.

[225] As above. See also Kannyo (1995) 51 59.

[226] On 2 August 1990, Iraq invaded Kuwait and claimed it as its 19th province.

[227] Conteh-Morgan (1993).

[228] At the 13th Summit of ECOWAS, Heads of State and Government adopted a proposal tabled by Nigeria for the setting up of the ECOWAS Standing Mediation Committee. See, Decision Dec/ A/ Dec 9/ 5/ 90. See also, Decision of the ECOWAS Standing Mediation Committee, Decision A DEC/ 1/ 8/ 90 on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group (ECOMOG) for Liberia, Banjul, The Gambia, 7 August 1990; reproduced in Weller (ed) (1994) 67; ECOWAS Regulations for ECOMOG in Liberia, Banjul, The Gambia, 13 August 1990, reproduced in Weller (ed) (1994) 77.

[229] ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90 on the Ceasefire and Establishment of an ECOWAS Ceasefire Monitoring Group for Liberia, Banjul, Republic of the Gambia. 7 august 1990, reprinted in Weller (1994) 74 77. For details of ECOMOG's operations in Liberia, see generally, Olonisakin (2000).

On 27 August 1990, having informed the UN Secretary-General and through him the Security Council, but without approval expressed by any UN organ and without the consent of any of the parties in Liberia, except Doe, ECOMOG troops landed in Liberia. Despite the notification and the fact that ECOMOG did not wait for Security Council authorisation to start the intervention, the Security Council did not respond until 22 January 1991, when it met and decided to commend ECOWAS for its efforts to end the Liberian conflict.[230]

A note recommending ECOWAS also came from the Council President on 7 May 1992.[231] On 19 November 1992, the Council adopted Resolution 788 in which it commended ECOWAS's endeavour to promote peaceful resolution of the Liberia crisis and called upon the member states to implement the agreements sponsored by ECOWAS.[232] On 22 September 1993, the Council passed another resolution again commending ECOWAS for all its activities in Liberia, and not only its peaceful actions. The UN resolutions mentioned above have been interpreted to grant *ex post facto* authorisation to the ECOWAS intervention in Liberia.[233]

Although some member states of ECOWAS opposed the establishment of ECOMOG on the ground that it amounted to interference with the domestic affairs of a member state, the Assembly of Heads of State and Government endorsed a decision to establish ECOMOG.[234] In 1991, the Yamoussoukro Agreement was reached, giving rise to a ceasefire and elections in Liberia.[235]

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[230] UN Doc S/22133 (1991).

[231] UN Doc S/23886 (1992).

[232] UN Doc S/Res/788 (1992).

[233] See, for instance, Levitt (1998) 247 ff. For contrary views, see Kufuor (1993) 539-540.

[234] See Berman & Sams (2000) 88-93.

[235] Viljoen (1999) 185.

The UN Security Council became involved by mandating the UN Secretary-General to appoint a Special Representative in Liberia, and by endorsing ECOWAS-imposed sanctions against the National Patriotic Front of Liberia (NPFL) for breach of the ceasefire reached under the Yamoussoukro Accord.[236] The Secretary-General's Representative facilitated the signing of the 1993 Cotonou Agreement under which ECOWAS was assigned the primary responsibility to oversee implementation of the Accord.[237]

The ECOMOG's mandate in Liberia ended in March 1998, and a crowd of jubilant Monrovians bade farewell to the force, shouting in praise of the troops.[238] The UN Security Council worked together with ECOMOG for the duration of the mission, making it the first co-operation between the UN and a regional body on security matters.[239] ECOMOG's intervention in Liberia was defended on a number of grounds, including humanitarian intervention.[240] Speaking on behalf of Nigeria's and indeed ECOWAS's decision to intervene, President Ibrahim Babangida of Nigeria said that:[241]

> We are in Liberia because events in that country have led to ... the massacre of innocent children some of whom had sought sanctuary in churches, mosques, diplomatic missions, hospitals and under the protection of the Red Cross, contrary to all recognised standards of civilised behaviour and international ethics and decorum.

Elsewhere, President Babanginda stated that the ECOWAS intervention was precipitated by the fact that Liberia was rapidly degenerating into a virtue state

236 Berman & Sams (2000) 98-99.

237 Viljoen (1999) 198.

238 Posthumus (1999) 312.

239 Support by UN Security Council of ECOWAS intervention was expressed in Res 788 of 19 November 1992 (S/Res 788), reproduced in Weller (1994) 273.

240 See Kufuor (1993) 529; Olonisakin (2000) 99.

241 Babangida, I 'The Imperative Features of Nigerian Foreign Policy and the Crises in Liberia' (press briefing, 31 October 1990, 12), quoted in Kufuor (1993) 99.

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of anarchy, almost attaining the proportions of genocide.[242] He said that ECOWAS believed 'that it would have been morally reprehensible and politically indefensible to stand by and watch while citizens [of Liberia] decimate[d] themselves'.[243] ECOWAS also intervened because of the spill-over effects of the war in the region: the massive refugee problem created by the war threatened security and stability in the region.[244]

According to Abbas Bundu, the ECOWAS Secretary-General at the time, ECOWAS took on a military role due to a realisation among its member states that they had an international duty to do put an end to the atrocities in Liberia. He said of the motivation to intervene:[245]

> It was just the reali[s]ation that here was a problem from which everyone else was running away. If everyone else was running away from the problem, the leaders in the sub-region felt that they had responsibility to the people of Liberia and indeed to the wider international community to try and find a solution to the problem.

The Gambian President reiterated the humanitarian reasons for the intervention when he emphasised that ECOWAS was not sending an invasion force, but rather its mission was strictly humanitarian and that the force would help people caught in the crossfire[246] get food and medical supplies.[247] In this study the delivery of food and medical supplies will amount to humanitarian intervention if armed force is used, as was the case in this intervention. ECOWAS itself justified the establishment of ECOMOG referring to the members' fear that for various reasons violence might spread across and the

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[242] *West Africa,* 4-10 February 1991 140.

[243] As above.

[244] Conteh-Morgan (1993) 37. Guinea, Ivory Coast and Sierra Leone received most refugees.

[245] *West Africa*,2-8 March 1992 386.

[246] See, for instance, Levitt (1998) 347.

[247] Costa (Magazine) 13-19 August 1990, 2289, cited in Kufuor (1993) 529.

conflict could endanger the stability of the sub-region.[248] This may be interpreted to mean that ECOWAS was trying to pre-empt a trans-border conflict which would result in massive loss of lives.

(ii) Sierra Leone (1997 – 2000)

The Liberian crisis was soon to spill over to Sierra Leone, a small country wedged between Liberia, Guinea-Conakry and the Atlantic Ocean.[249] In March 1991, the first incursion took place, allegedly by Taylor's forces in retaliation to the fact that Sierra Leone had participated in the Nigerian-led ECOMOG intervention, which at the time was an anti-Taylor army in Liberia. President Joseph Momoh of Sierra Leone enlisted the aid of Guinea-Conakry, as a rebel movement calling itself the Revolutionary United Front (RUF) set up base at Pendembu.[250]

Valentine Strasser, a young army captain 27 years of age, successfully staged a *coup d' état* on 29 April 1992.[251] However, the RUF continued its insurgency. The conflict escalated from 1993 and in February 1996, his second-in-command, General Brigadier Julius Maade Bio, ousted Strasser. Bio opened direct talks with Foday Sankor, the RUF leader, a process culminating in the elections of February 1996 won by Ahmed Tejan Kabbah, a retired UN official.[252]

Kabbah and Sankor entered into a peace agreement in Abidjan, Ivory Coast on 30 November 1996. On 25 May 1997, Major Johnny Paul Koroma staged a *coup d'état*. Koroma invited the RUF into Freetown and for the first time, the

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248 Deen-Racsmany (2000) 314.

249 On the factual background to the Sierra Leonean conflict, see Olonisakin (2000) 97ff.

250 Abdullah (1997) 45 provides an analysis of the character and analysis of the RUF.

251 See Richards (1996) 40.

252 Sesay (2000) 193.

rebels visited their brand of terrorism on the capital, putting thousands to flight. The RUF and Koroma's Armed forces Revolutionary Council (AFRC) were dislodged by ECOMOG in February 1998, bringing Kabbah back to power.[253]

ECOMOG's action had the backing of the OAU.[254] The RUF and AFRC force went back to the bush, pursued by ECOMOG and the Kamajors, a group of traditional hunters surrounded by a degree of mythology of their invulnerability. Back in power, Kabbah's regime had Sankor arrested in Nigeria and deported to Sierra Leone where he was tried for treason, convicted and sentenced to death. Sankor was later ranted amnesty under the Lome Peace Accord, reached after a series of negotiations aimed at restoring peace in Sierra Leone. Owing to continued violations of human rights by RUF rebels Sankor was arrested in June 2000 by UN troops, which have now replaced the ECOMOG mandate.

ECOWAS has played a pivotal role in efforts to bring the conflict to an end, using a mixture of military and non-military means. Following the May 1997 *coup*, for instance, ECOWAS adopted a three-pronged strategy to restore the elected government to power: The imposition of regional sanctions against the *junta* in Freetown, continued support for the ECOMOG forces that were enforcing the ban and occasional talks with the *junta*. The Nigerian contingent in ECOMOG has also been engaged in training what should eventually become the new Sierra Leonean army.

On 8 October 1997, the Security Council passed Resolution 1132 on Sierra Leone.[255] In it, the Council expressed 'its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone' and encouraged it

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[253] As above.

[254] See, Kufuor (1993) 525; Naldi (1999) 33.

[255] Resolution 1132 of 8 October 1997, UN Doc S/RES/1132 (1997).

'to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations'.[256]

While in the resolution the Council determined the situation as a threat to international peace and security, it did not comment on the use of force by ECOMOG troops, thus it fell short of authorising the military intervention. Instead, the resolution mandated ECOWAS to enforce an embargo against the regime in Sierra Leone, but without specifying the means available to ECOWAS for the purpose. Due to its lack of clarity, the resolution has been interpreted by some to sanction ECOWAS to use all means necessary (impliedly, including forcible means) to restore order in Sierra Leone.[257]

Another Security Council decision that is apparently in support of the intervention by ECOWAS is Resolution 1162 of 1998, which 'commend[ed] [ECOWAS and ECOMOG for Sierra Leone], on the important role they [were] playing in support of the objectives related to the restoration of peace and security...[in Sierra Leone]'.[258] Similar statements were made in Resolution 1181 of 1998.[259] These resolutions have been interpreted by some authors as the Council's *ex post facto* authorisation of the ECOWAS intervention.[260]

The contrasting view is that the Security Council was careful not to be seen as sanctioning ECOWAS' use of force. In Resolution 1132 mentioned above, the Council merely commended ECOWAS for its efforts 'towards the *peaceful* resolution of the crisis'. Further, it encouraged ECOMOG 'to proceed in its efforts ... *in accordance with the relevant provisions of the Charter of the*

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[256] Para 4.

[257] See, for instance, Levitt (1998) 236.

[258] UN Doc S/RES/1162 (1998).

[259] UN Doc S/RES/1181 (1998).

[260] See, for instance, Levitt (1998) 366.

UN'.[261] The use of force was not mentioned either in this decision or in the subsequent Resolution 1156.[262] The latter did not even mention the role played by ECOWAS in Sierra Leone. This lends credence to the suggestion that the Council never intended to authorise the ECOWAS military intervention *ex post facto*, albeit tacitly.[263]

Justification of ECOWAS intervention in Liberia and Sierra Leone has been sought from some of the permissible grounds of intervention. Yet, neither the resolutions of the Security Council nor the records of the Council meetings show any discussions on the legality of the two interventions. That the Council did not condemn these operations warrants a conclusion that the Council did not consider the interventions unlawful.

The fact that it expressed support for the role of ECOMOG in the *peaceful* resolution of the crisis initially might have been a way of expressing the preference of peaceful means of dispute resolution and that such means take precedence over the use of force. This view gains support from the fact that the Council later entrusted ECOMOG with the supervision of UN sanctions acting under Chapter VIII. This indicates that the Council may indeed have intended to provide a tacit authorisation - short of outrightly suggesting that lack of condemnation amounts to approval.[264]

The references by ECOWAS to human rights atrocities in justifying the two operations suggest that the interventions amount to humanitarian intervention on the basis of the 1993 ECOWAS treaties and its protocols. The authority of the Security Council can also be inferred from the Council's tacit approval or acquiescence.

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[261] N Doc S/PRST/5 (1995). Emphasis added.

[262] UN Doc S/RES/1156 (1998).

[263] See Levitt (1998) 369, 372-373.

[264] As above.

(iii) Democratic Republic of Congo (1998)

On 2 August 1998, a loose coalition of Banyamulenge Tutsis from East Congo, troops from the late Mobutu Sese Seko's army, Kinshasa based politicians, and former members of President Laurent Kabila of the DRC rebelled against the DRC government.[265] SADC became the focus of international attention when Angola, Zimbabwe and Namibia intervened in the DRC, which had joined SADC in 1997. The intervention was based on requests from President Kabila for military assistance against advancing rebel forces.[266] Still, the intervention was *ad hoc* and was not organised under SADC auspices, although it did receive retroactive endorsement from SADC.[267]

South Africa declined to send troops,[268] but Rwanda and Uganda joined on the side of the rebels, while Chad and Sudan were drawn into the conflict on the side of Kabila. Zimbabwe and Angola were most criticised. It was claimed that Zimbabwe's main aim was to promote Zimbabwean business interests in the Congo, while Angola interest was to prevent the Angolan rebels from using the DRC as a springboard for attacks.[269]

According to Namibian President Sam Nujoma, the presence of the troops in the DRC was in accordance with agreements reached in SADC, and that those agreements compelled SADC members to assist another state if requested to

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[265] See Chigara (2000) 58.

[266] Hough (1998) 36; Chigara (2000) 58 64 ('At the break of hostilities against his government Kabila requested external help first from Cuba and later from SADC').

[267] Berman & Sams (1998) 9.

[268] South Africa favoured the exhaustion of peaceful solutions, and insisted that its participation in sending troops could only come in the context of a peacekeeping operation authorised by the UN through a resolution. However, it was subsequently reported that President Mandela later joined other SADC leaders to praise the assistance given to Kabila. See Hough (1998) 36.

[269] See *The Star* 6 September 1998; Neethling (2000) 313.

do so.[270] On his part, President Robert Mugabe of Zimbabwe argued that SADC and the OAU viewed the rebel attack on Kinshasa as a 'rebellion' that required immediate action.[271]

The UN Security Council called for a ceasefire in the DRC and a withdrawal of all foreign forces.[272] The Council also called for an international conference on peace and security in the region to be held under the auspices of the UN and the OAU.[273] Despite these calls, SADC Heads of State and Government at their 18th Summit held in Mauritius on 13 and September 1998, welcomed 'initiatives by SADC and its member states intended to assist in the restoration of peace, security and stability in the DRC'.[274] They also referred to the need to oppose attempts to overthrow 'legitimate' governments by force.[275]

It is difficult to find a legal foundation of the intervention in the DRC on the basis of the UN Charter, mainly because the UN Security Council had not prior to the intervention ruled the DRC situation as a threat to international peace and security under article 51 Of the Charter. Instead, the Council merely called for an end to the hostilities. The US, Denmark, the European Union castigated the SADC intervention, but none of the criticisms cited breach of international

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270 *The Star* 3 September 1998.

271 Hough (1998) 37.

272 Cornwell & Potgieter (1998) 77.

273 As above.

274 SADC *Final Communique of the 1998 SADC Summit of Heads of State and Government* Mauritius, 19 September 1998.

275 As above.

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law as their basis for opposing the intervention.[276] At the same time, none of the intervening states invoked the doctrine of humanitarian intervention.

It is plausible to conclude that the four nations intervention in the DRC was based on the customary international law principle of consent to intervention by other states in the consenting state's internal affairs. Under this principle, intervening states do not incur international responsibility where the target state gives its consent, as such consent is an exercise of sovereign authority and not a breach of it.[277] However, if it is considered that the DRC government of Laurent Kabila failed to satisfy the premises subsuming the right of a target state to consent to external intervention, the legality of the SADC intervention on the basis of 'consent' is also subject to criticism.

Exercise of the sovereign right of the target state to consent to external intervention is increasingly conditional on the human rights record of the target state itself.[278] Nujoma's reference to the 'legitimacy' of the Kabila regime is problematic, in view of accusations of corruption, authoritarianism and nepotism against Kabila, and taking into consideration his ascent to power through a military *coup*.[279]

The DRC under Laurent Kabila may only represent many others in Africa eager to invoke sovereignty yet lacking in their political and moral authority to govern. As Chigara argues, the right of states to consent to intervention of other states in their domestic jurisdiction may, if not checked, serve as a

[276] See Chigara (2000) 58 62. ('Peter Longworth, British High Commissioner is quoted as saying [that]... the European Union members want an immediate end to hostilities, withdrawal of all foreign forces, and peace talks before catastrophic developments swept Africa; The [US] demanded disengagement in the DRC of the SADC forces...Denmark warned that Western donors had become restless with aiding states embroiled in the conflict, while the Zimbabwe Roman Catholic Commission for Justice and Peace denounced what it perceived as extraordinary haste in the resort to military force both in the DRC and in Lesotho').

[277] See Chigara (2000) 58 64; Morgenthau (1965) 356-351; and Varouxakis (1997) 57.

[278] Chigara (2000) 65.

[279] Hough (1998) 37.

'rescue trigger' for governments that in the judgment of their populations may have lost political and moral authority to govern.[280] My conclusion here is that the SADC intervention, although involving the use of force, is not an instance of humanitarian intervention. The intervention was based on the consent of the DRC.

(iv) Lesotho (1998)

Shortly after Kabila's request for assistance, a SADC-related intervention was undertaken in Lesotho to help the Lesotho government restore law and order restore law and order following election-related unrest.[281] The seven-month long operation of the SADC in an effort to deal with the deteriorating security in the mountainous Kingdom of Lesotho began on 22 September 1998, when the early morning silence of Lesotho was shattered by the sounds of 'operation Boleas' involving 800 soldiers, 600 South African and 200 from Botswana.[282]

The operation resulted primarily from the dissatisfaction of the opposition parties who demanded that King Letsie III use his powers to dissolve the parliament, since they believed that its members had been fraudulently elected.[283] The army mutinied, seized arms and expelled or imprisoned their commanding officers. Neethling explains the state of affairs in Maseru immediately following the mutiny as follows:[284]

> Government vehicles were hijacked, the broadcasting station was closed, the Prime Minister and other ministers were virtually held hostage and the Lesotho police had

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[280] Chigara (2000) 66.

[281] For a detailed discussion on the intervention in Lesotho and its basis in international law, see Barrie (1999), generally.

[282] See Neethling (2000) 287.

[283] Neethling (2000) 287; *Sowetan* (Johannesburg) 22 September 1998.

[284] Neethling (2000) 287-288.

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> lost control of the situation. The demonstrators congregated at various locations, denying workers entry and threatening to occupy government offices...The situation preceding the intervention could really be considered nothing less than a *coup d'etat*.

The mission of the intervention was 'to prevent any further anarchy' in Lesotho and to 'restore law and order'.[285] The reasons advanced for the intervention were somewhat ambiguous and contradictory. South Africa maintained that the military intervention did not constitute an invasion,[286] but rather a proper SADC mandate based on a request to intervene received from Mr Pakalitha Mosisili, the Prime Minister of Lesotho. This request, it was argued, had been forwarded to four countries; namely Botswana, Mozambique, South Africa and Zimbabwe, but in the end only South Africa and Zimbabwe were able to help. The request was reportedly based on the following grounds:[287]

- Agreements reached in the ISDSC that military *coups d'état* in SADC countries will not be tolerated.

- All attempts at peacefully resolving the dispute had failed.

- A military *coup d'état* was imminent or had already been partially executed.

- South Africa, specifically, had intervened to protect certain South African interests such as the Katse Dam forming part of the Lesotho highland water scheme and to secure the South African High Commission in Maseru.

- The OAU had made a decision that *coups d'état* would no longer be tolerated.

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[285] See <http://www.mil.za/SANDF/archives> (Accessed on 1 August 2002).

[286] *The Star* 25 September 1998.

[287] Hough (1998) 23 38.

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Of these justifications, only the arguments for 'request by the legitimate government of the state' and the 'protection of interests' would seem to have clear existence in international law. Intervention in a purely internal conflict as was the case in Lesotho is not permissible under the UN Charter, save in the recognised exceptions of individual or collective self-defence, protection of nationals abroad or enforcement mechanisms under chapters VII and VIII of the UN Charter.[288]

Humanitarian intervention was also alluded to as a possible basis for the intervention.[289] President Nelson Mandela of South Africa raised human rights abuses in Lesotho as a justification for the intervention, and warned that SADC would in future intervene militarily in member states where human rights were perceived to be grossly violated by their governments.[290]

However, this position was vehemently opposed by President Fredrick Chiluba of Zambia who, in a veiled attack on Mandela's speech, admonished African leaders with intentions to intervene militarily in other states on the pretext of sustaining human rights.[291] Although Mandela made reference to human rights, the fact that the government of Lesotho had invited the SADC forces means that the intervention was not based on humanitarian intervention as defined in this study. Based on the above analysis, I reach the conclusion that the intervention was based partly on the request of the target state and partly on the protection of South African nationals who may have been in its High Commission in Maseru. Nevertheless, Mandela's speech appears to suggest a weakening perspective on state sovereignty humanitarian intervention in the region and may be confirmed by future state practice.

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288 For discussion on these exceptions, see chapter 1 of this study.

289 See Hough (1998) 38.

290 *Pretoria News* 17 September 1997.

291 As above.

2.3.4.3 *Conclusion*

From the above discussion, it is concluded that there is treaty basis for humanitarian intervention. The under the provisions of the UN Charter, five military interventions have been undertaken in the 1990s. The interventions were in Iraq, Somalia, Bosnia, Rwanda and Eastern Zaire, and Haiti. The interventions in Liberia and Sierra Leone are examples of humanitarian intervention based on the 1993 ECOWAS Treaty and protocols thereto. Although the DRC and Lesotho interventions were justified by invoking the Treaty establishing the SADC and its 1997 Protocol on Politics, Defence and Security, they are not instances of humanitarian intervention because in both cases, the respective government of the target state had consented to the intervention.

2.4 A CUSTOMARY INTERNATIONAL LAW BASIS FOR HUMANITARIAN INTERVENTION?

The customary practice of nations is the oldest source of international law. In the absence of an international executive and legislature, custom has exercised an influential role in the formation of international law. Custom ought to be distinguished from mere usage, such as behaviour that may be done out of courtesy, friendship or convenience rather than out of a sense of legal obligation. Thus a rule of customary international law must meet two broad criteria:[292]

- There must be state practice supporting the existence of the rule (*usus*).

- A belief among states that the rule is legally binding, the *opinio juris et necessitates* doctrine, must be evident in the state practice.[293]

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[292] Shaw (1991) 59-60; Wallace (1992) 3-4.

[293] Sources of international law, of which custom is one of them, are discussed earlier in this study. See Chapter 1, section 1.3.1.8 and Chapter 2,section 2.2.

An assessment of the validity of humanitarian intervention must be predicted on these two criteria. As of requirement, state practice in respect of a rule of customary international law, consistency and generality of a practice must be proved.[294] Although no particular duration in respect of the existence of a custom,[295] the passage of time will usually be part of the evidence of generality and consistency. Thus Brownlie concludes as follows:[296]

> ... a long (and much less, an immemorial) practice is not necessary, and rules relating to airspace and the continental shelf have emerged from quick maturing of practice.

This section explores whether there is a legal basis for humanitarian intervention under customary international law by first examining instances of state practice and thereafter examining the existence of *opinio juris*.

2.4.1 State Practice (*usus*)

This sections analyses instances that are often quoted as situations where force has been used for humanitarian purposes on the basis of customary international law. These military interventions were in Syria (1860-1861), Cuba (1998), Macedonia (1903-1912), Bohemia and Moravia (1939), Congo (1964), the Dominican Republic (1965), Pakistan (1971), Cambodia (Kampuchea) (1978), the Central African Republic (1979), Uganda (1979) and Kosovo (1999). Each of these instances is now discussed briefly, concluding whether or not they are examples of state practice in humanitarian intervention as defined in this study.

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[294] Brownlie (1998) 4.

[295] *The Continental Shelf Cases*, ICJ Rep 3 (1969). In Para 22, the Court (ICJ) stressed that although the length of time during which a custom has been in existence may not be relevant, generality or practice is 'an indispensable' requirement.

[296] Brownlie (1998) 4.

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2.4.1.1 *Syria (1860–1861)*

The Syrian intervention (1860-1861) is generally regarded as state practice in humanitarian intervention.[297] Syria, which was part of the Ottoman Empire from the sixteenth century until World War I, was militarily invaded by the armed forces of France, which were acting on behalf of the Concert of Europe.[298] The French intervention in Syria was authorised by both the Concert of Europe and by Turkey.[299] Since Turkey, as the governing authority over the Ottoman Empire had permitted the intervention, the legal basis of the intervention was the consent of the target state, despite the stated aim of the intervention was to end the persecution of Maronite Christians by the Muslim population.[300] Therefore, Syrian intervention of 1860-1861 is not an example of state practice of humanitarian intervention.

2.4.1.2 *Cuba (1898)*

The intervention by the United States in Cuba in 1898 is also a relevant instance. Intervention took place, in Stowell's words, 'to put an end to the shocking treatment which the military authorities were inflicting upon the non-combatant population in their futile efforts to suppress insurrection'.[301] This intervention substantially succeeded in halting the barbarities attributed to the Spanish colonial rule, and therefore amounts to state practice of humanitarian intervention.

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[297] Brownlie (1963) 339-340.

[298] The Concert of Europe was a military coalition of European states. At the time France was intervening in Syria, the members of the Concert of Europe were Austria, Britain, France, Prussia and Russia.

[299] See Ronzitti (1985) 90.

[300] Abiew (1999) 49.

[301] Stowell (1921) 120. See also Franck & Rodley (1973) 278.

2.4.1.3 *Macedonia (1903–1912)*

The intervention in Macedonia originally by Austria, Hungary and Russia and later by Greece, Bulgaria and Serbia (1903-1912) constitutes a relevant precedent for humanitarian intervention. According to the justification given by Greece, these states resorted to force in order to put an end to the alleged mistreatment of the Christian populations in Macedonia.[302]

In an attempt to convert the Christian population in Macedonia, Turkish troops had reportedly committed atrocities by attacking the civilian population and destroying villages.[303] The intervention culminated in the 1913 Treaty of London in terms of which Turkey ceded the greater part of Macedonia for partition among the Balkan allies.[304] The Macedonian intervention is an example of humanitarian intervention on the basis of customary international law. The Treaty of London was concluded at the end of the intervention, and was not invoked as a basis for the military action.

2.4.1.4 *Bohemia and Moravia (1939)*

During the period following the entry into force of the Covenant of the League of Nations and of the Kellog-Briandt Pact in 1919 and 1928 respectively, states did not invoke the right or duty of humanitarian intervention to justify the use of force.[305] The only exception is the reason given by Germany for its occupation of Bohemia and Moravia in 1939 and for setting up a protectorate over them.[306] In the proclamation made by Hitler on 15 March 1939, he stated that

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302 Ronzitti (1985) 91.

303 Abiew (1999) 49; see also Ezejiofor & Quashigah (1993) 36 42.

304 Abiew (1999) 50.

305 Ronzitti (1985) 91.But see Brownlie (1963) 341-342 where the author argues that neither the Kellog-Briandt Pact nor the Charter of the UN (and by extension the Covenant of the League of Nations) expressly condemned the institution of humanitarian intervention.

306 Ronzitti (1985) 91.

'wild excesses' were taking place in Czechoslovakia to the detriment of the population of German origin.[307] As stated in the proclamation, the action was further aimed at removing this 'threat to peace' once and for all and at laying the foundations 'for the necessary reorgani[s]ation' of a 'vital area' for Germany.[308]

The purpose of entry of German troops was purportedly to disarm 'the terrorist bands and the Czech troops', which were 'in connivance' with these bands.[309] It was also Hitler's claim that the entry of the German troops in Czechoslovakia a year earlier was necessary to protect ethnic Germans resident in Czechoslovakia who had been "subject[ted] to the 'brutal will [of] destruction [by] the Czechs' and whose behaviour was 'madness' [that had] led to over 120 000 refugees being forced to flee the country ... while the 'security of more than [three million] human beings' was at stake".[310]

Despite Hitler's justifications, Germany's occupation of Moravia and Bohemia cannot be regarded as humanitarian intervention, because Germany itself was subsequently involved in large-scale violations of human rights that resulted in World War II. Therefore, although the intervention may qualify as humanitarian intervention subjectively, it fails the objective test of motives, which, as stated in our discussion of the definitional elements of humanitarian intervention, should be the guiding factor.[311]

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[307] As above.

[308] See Franck & Rodley (1973) 278-279.

[309] As above.

[310] Franck & Rodley (1973) 284, citing the official justification given for the use of force in the letter from Chancellor Hitler to Prime Minister Chamberlain in The Crisis in Czechoslovakia, April 24-October 31, 1938; (1938) 44 *International Conciliation* 433.

[311] See Chapter 1 of the study, section 1.3.1.9.

2.4.1.5 Congo (1964)

The intervention in Congo by Belgium in 1964 occurred when insurgents fighting the Congolese government took two thousand foreign residents as hostages in Stanley Ville (now Kinshasa) and Paulis, with the objective of extracting certain concessions from the central government.[312] When the government rejected their demands, the insurgents killed 45 of the hostages and threatened further executions. Belgian forces with the aid of US airplanes and using British military facilities intervened in the Congo and evacuated the endangered persons on a rescue mission that lasted four days.[313] Although the Congo intervention is often quoted as an instance of humanitarian intervention, the facts suggests it was more of an instance of rescuing nationals abroad.[314]

The humanitarian motivation of the intervention can be seen in the statement from the US Department of State, which reads as follows:[315]

> This operation is humanitarian, not military. It is designed to avoid bloodshed - not to engage the rebel cases in bloodshed. Its purpose is to accomplish its purpose quickly and withdraw - not to seize or hold territory ... They will depart from the scene as soon as their evacuation mission is accomplished.

Despite the humanitarian motives, the 1964 intervention in Congo was very much an instance of protecting nationals abroad as explained above. Also, it is worth noting that this intervention was undertaken with the consent of the *de facto* government of Congo.[316] Thus this instance may be regarded as one

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[312] Lillich (1967) 339.

[313] As above.

[314] Most of the hostages were foreign nationals from the three intervening states, and they were evacuated mainly on grounds of their nationality. See Abiew (1999) 104 ('...even as the operation went on-with the rescue of the white foreign residents-innocent blacks were being killed in the process, which smacked of racism').

[315] US Department of State Bulletin (1965), quoted in Lillich (1967) 340.

[316] Lillich (1967) 340.

based on both consent of the target state and the doctrine of protection of nationals abroad.

2.4.4.6 Dominican Republic (1965)

The events preceding and following the Dominican Republic intervention are more complicated than the Congo situation.[317] Briefly, an interim military government, which ousted the constitutional government of President Bosch in 1963, was subsequently challenged by a revolt on 24 April 1965.[318] As a result, civil strife erupted which left the Republic without an effective government, followed by a breakdown of law and order.[319] On 28 April 1965, US marines landed in Santo Domingo in what appears to be the protection of US nationals and those of other countries in the wake of the unfolding events.[320]

A purported or possible basis for the justification of the Dominican intervention has been on the right to protect nationals abroad.[321] The US also declared, inconsistently with earlier stated objectives, that its aim was to prevent a communist take-over.[322] Therefore, the Dominican intervention is not a precedent for humanitarian intervention, as it is an illustration of protecting nationals abroad or possibly of pro-democratic intervention.

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317 Abiew (1999) 108.

318 As above.

319 As above.

320 As above.

321 Fenwick (1966) 64.

322 Nanda (1967) 225.

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2.4.4.7 Pakistan (1971)

On 3 December 1971, following Pakistan's attack on airfields in Western India, Indian forces launched an integrated ground, air and naval offensive against Eastern Pakistan in the Bengali area.[323] India's justification of the intervention was that the people of Eastern Pakistan had sought 'assistance to receive freedom' and that the intervention also aimed at halting 'the genocide [which was] being perpetrated by the Western Pakistani troops against the Bengalis'.[324] The Indian intervention in East Pakistan resulted in the creation of the independent state of Bangladesh. Many writers have cited the instance as the archetypal example of circumstances justifying humanitarian intervention.[325]

Teson, for instance, characterises the Indian intervention in Pakistan as a clear instance of humanitarian intervention. He sees the intervention partly as one of rendering foreign assistance to a people struggling for their right to self-determination - a collective human right - and partly as intervention with the objective of ending acts of genocide, that is humanitarian intervention proper.[326] With regard to this intervention, Fonteyne declares that '... the Bangladesh situation probably constitutes the clearest case of forcible humanitarian intervention in [the twentieth] century'.[327] India itself did invoke

[323] Tanca (1993) 164; cf Franck & Rodley (1967) 275 and Wheeler (2000) 55-77.

[324] Tanca (1993) 167.

[325] See, for instance, Ronzitti (1985) 95 ('Indian intervention in East Pakistan is usually quoted as a very significant precedent by writers who declare themselves in favour of the lawfulness of humanitarian intervention').

[326] See Teson (1988) 206-207.

[327] Fonteyne (1979) 204. But cf Frank & Rodley (1973) 275 276 ('[T]he Bangladesh case...does not constitute the basis for a definable, workable, or desirable new rule of law which, in the future, would make certain kinds of unilateral military interventions permissible').

humanitarian reasons for the action in Pakistan. In a statement to the UN General Assembly, India's representative said that:[328]

> The reaction of the people of India to the massive killing of unarmed people by military force has been intense and sustained ... There is intense sorrow and shock and horror at the reign of terror that has been let loose. The common bonds of race, religion, culture, history and geography of the people of East Pakistan with the neighbouring Indian state of West Bengal contribute powerfully to the feelings of the Indian people.

India also addressed the UN Security Council on the issue. Although neither India nor Pakistan was a member of the Council, the Council allowed them to participate in its proceeding pursuant to article 31 of the UN Charter.[329] Ambassador Sen told the Security Council that 'the military repression' in East Pakistan was on a sufficient scale to 'shock the conscience of mankind'.[330] He asked, 'what has happened to our conventions on genocide, human rights, self-determination and so on'?[331] He also pointed out that Security Council members were 'shy about speaking of human rights', again posing a question: 'What happened to the justice part [of the UN Charter]'?[332]

If one brings into focus the entirety of the 1971 India-Pakistan crisis, it can be concluded that given the massive scale on which human rights were being violated, India's action could be looked upon as intervention to stop the human rights atrocities that were being committed.[333] The fact that the UN did not

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[328] See UN GAOR 2002th, UN Doc A/PV 2002 (1971) 14.

[329] Art 31 of the UN Charter provides that any state is allowed to participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that member are specially affected.

[330] UN SCOR, 1606th Mtg, 4 Dec 1971, cited in Wheeler (2000) 60.

[331] As above.

[332] As above.

[333] Abiew (1999) 119.

condemn the intervention could be interpreted as an implied recognition of humanitarian intervention.[334]

Given the extraordinary circumstances in Eastern Pakistan, which some writers view as being of genocidal proportions, this case is a clear precedent for humanitarian intervention. This intervention was apparently accorded express or tacit approval by the international community.[335] India's 'humanitarian intervention' claim can also be justified in relation to the UN's inability to deal with the situation over the period in which these massacres were going on.[336]

2.4.4.8 Cambodia (Kampuchea) (1978)

In 1978, there were clashes along the Cambodia (Kampuchea)-Vietnam border. After a spate of counter accusations, Vietnam intervened militarily and overthrew the Khmer Rouge regime of Pol Pot, which Vietnam accused of having 'genocidal policies'. Within three years of assuming power, the Khmer Rouge regime had, through its 'reorganisation programme,' perpetrated massive human rights violations against the Cambodian citizens. During that period, an estimated two million people, out of a total population of seven million, were reported dead as a result of starvation, disease and slaughter.[337]

During the US hearings on the Cambodian situation, the government of Cambodia was particularly censured for committing human rights atrocities.

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[334] See Abiew (1999) 119 quoting Sornarajah ('the absence of condemnation of the Indian intervention by the international community amounts to a condonation of [humanitarian] intervention').

[335] The only two states that condemned India as being an aggressor were China and Albania. See 26 UNGAOR Plenary Meetings, 2003rd Meeting, 7 Dec. 1971, para 311 and 112 for the opinions of China and Albania respectively.

[336] Abiew (1999) 119.

[337] Ronzitti (1985) 98.

Senator McGovern specifically called for the use of force to bring down the Cambodian government. He said:[338]

> I am wondering under those circumstances if any thought is being given, either by our Government or at the United Nations or anywhere in the international community of sending in a force to knock out this Government out of power, just on humanitarian grounds.

Vietnam eventually used force, because the UN failed to do anything but pass resolutions. Although the justification given by Vietnam's intervention was given in somewhat contradictory terms, some authors contend that a possible basis for justifying this intervention on humanitarian grounds was the existence of large-scale atrocities.[339] Also, they argue that the international community's mixed reaction to this case did not constitute a negation of the doctrine of humanitarian intervention since Cold War rivalries shaped opinion either in support or against the intervention.[340]

Other writers argue that Vietnam at no point advanced humanitarian claims to justify its use of force. Wheeler, for instance, remarks that the evidence points in the opposite direction and that Vietnam repudiated human rights as a legitimate basis for the resort to force.[341] He cites the example of the Vietnamese Foreign Minister, Nguyen Co Thach, who stated that Vietnam was primarily concerned with its security and that human rights were the concern of

338 Indochina: Hearings Before the Subcommittee on East-Asian and Pacific Affairs of the Senate Committee on Foreign Relations, 95th Congress, 2d Session, quoted in Ronzitti (1985) 98.

339 See, for instance, Liefer (1993) 145 and Abiew (1999) 130.

340 See Wolf (1988) 352. See also Abiew (1999) 128-129 ('In the Security Council, the Soviet Union, Cuba, Czechslovakia, the German Democratic Republic, Hungary, Mongolia, Poland and Bulgaria supported the Vietnamese position ... Other members of the Security Council challenged these representations. China did not comment ... The non-Aligned countries held Vietnam responsible for violating Kampuchea's territorial integrity').

341 See Wheeler (2000) 88.

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the Cambodian people.[342] Wheeler concludes that the closest Vietnam came to appealing to humanitarian norms was in its description of the 'inhuman policies of the Monstrous regime of Pol Pot-Leng Sary' that had led to 'the revolutionary war of the Kampuchean people'.[343]

Liefer also argues that human rights violations elicited Vietnam's condemnation only when it became politically expedient,[344] and the Vietnamese ambassador was trying to exploit the widespread revulsion against Pol Pot to lend credibility to the justification. According to Wheeler:[345]

> [The Vietnamese Ambassador] emphasised the suffering of the Khmer people in an effort to persuade the [Security] Council that the fall of Pol Pot had been caused by a mass uprising ... and stressed the improved human rights situation and security benefits for the region that had arisen from the change of government in Phnom Penh.

From the foregoing, it is seen that Vietnam's intervention cannot qualify as humanitarian intervention based on Vietnam's subjective justifications. As stated in the part of the study dealing with the definition of humanitarian intervention, an objective test as opposed to a subjective one should be applied in determining whether or not a military intervention amounts to humanitarian intervention.[346] Applying a subjective test on Vietnam's intervention in Cambodia (Kampuchea) leads me to conclude that it was an instance of humanitarian intervention, since it was a response to large-scale human rights violations.

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[342] Klintworth (1984) 14 and Wheeler (2000) 88.

[343] Wheeler (2000), citing *trauvaux préparatoires*, UN SCOR 2108th Mtg, 11 Jan 1979 12-13.

[344] Liefer (1993) 140.

[345] Wheeler (2000) 89.

[346] See Chapter 1, section 1.3.1.9.

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2.4.4.9 *Uganda (1979)*

The brutal dictatorship of President Idi Amin came to an end in April 1979, with his overthrow by Ugandan rebels aided by Tanzanian army units.[347] Relations between the two countries had soured due to cross-border incursions that culminated in the occupation, by Uganda, of a 710 square mile strip of Tanzania territory North of the Kagera River.[348] Tanzania's invasion was explained in somewhat confusing terms,[349] but a reference was made to the gross violation of human rights perpetuated by Amin's government.[350]

At the commencement of the conflict Tanzania grounded its intervention as a reaction to the aggression against it at the end of October 1978, pointing specifically to the occupation of the Kagera salient.[351] Considering the lack of goodwill between Tanzania and Uganda at the time, it is not difficult to imagine that other objectives were on the Tanzanian agenda during the conflict.[352] Whilst it may be moot whether or not Tanzania did specifically invoke the doctrine of humanitarian intervention, it is important to note that Tanzania did not seek any territorial enlargement. As Abiew suggests, even if its objective was to remove Amin from power, that aim by itself is not inconsistent with the doctrine of humanitarian intervention.[353]

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[347] Abiew (1999) 120-121; Wheeler (2000) 111. After seizing power in 1971, Amin imposed a eight-year dictatorship. His rule reportedly perpetuated mass executions, rape, torture and arbitrary arrests.

[348] For a discussion on relations between Uganda and Tanzania at the time of the intervention, see Umozurike (1982) 301.

[349] Tanca (1993) 174-175.

[350] See Government of the United Republic of Tanzania (1979), generally.

[351] Ronzitti (1985) 102.

[352] Abiew (1999) 122.

[353] Abiew (1999) 123.

The international community expressed relief regarding the overthrow of Amin. Strong support for Tanzania's action was received from the US, the UK, Zambia, Ethiopia, Angola, Botswana, Gambia and Mozambique.[354] Rwanda, Guinea, Malawi, Canada, and Australia quickly recognised the new government under Yusuf Lule.[355] Kenya remained neutral initially but later offered its cooperation to the new Ugandan government.[356] At the 1979 OAU Summit, almost all African states (with the exception of Sudan and Nigeria) remained silent on the issue.[357]

According to Thomas, the general African consensus seemed to settle at the level of tacit approval of the Tanzanian action, with open praise withheld due to the knowledge that such actions could be abused.[358] However, Abiew states that even if one put aside considerations of the fear of abuse of the doctrine, it seems that African states at the time refused to openly endorse the Tanzanian action for fear of becoming targets of intervention given the appalling human rights record of some of the governments.[359]

After the capture of Kampala, the Tanzania foreign minister intimated at the humanitarian basis of the intervention by saying that the fall of Amin was a 'tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity'.[360] Tanzanian President Julius Nyerere

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354 As above.

355 Ronzitti (1985) 105.

356 Teson (1997) 165.

357 Sudanese President Jaffer Numeiry took the view that it was not possible for the OAU to condemn Uganda.Nigerian President Olusegen Obasanjo did not accept the claims of the Tanzanian Government. He accused it of aggression saying that Tanzania had been the first to invade Uganda. See ICISS (2001b) 62; and Wheeler (2000) 125-127. However, Wheeler terms Obasanjo's claim as a distortion of history.

358 Thomas (1985) 111.

359 Abiew (1999) 124.

360 Ronzitti (1985) 103.

said that the intervention was a response to Amin's killing and destruction, and that it was a blood debt that had to be settled.[361] Humanitarian intervention offers a cogent explanation for the Tanzanian intervention in Uganda, as a response to large-scale violations of human rights by Amin's regime. As Teson comments, the widespread feeling that the human rights cause had been served made the international community to refrain from criticising the Tanzanian intervention.[362]

2.4.4.10 Central African Republic (1979)

On 20 September 1979, French troops invaded the Central African Republic, then known as the Central African Empire and overthrew the self-proclaimed Emperor Jean-Bedel Bokassa while he was on a state visit to Libya.[363] The catalyst for the French intervention was the regimes' murder of about 200 secondary school children, and other human rights violations leading to mass loss of lives, summarised as follows:[364]

> In January [1979] Bokassa issued an imperial decree making it compulsory for secondary school children to wear a special uniform, manufactured in a factory owned by one of Bokassa's wives. The children held a public demonstration, and rioting later ensued. The army moved in to quell the disturbances and ultimately opened fire on some of the demonstrators ... About ... 200 children were killed. [As opposition intensified] ... Bokassa ordered a roundup of dissidents, and the students were brought to Ngaragba prison, where ... they were tortured and then murdered over the next few days.

The French intervention is an instance of humanitarian intervention, considering that it responded to human rights violations leading to massive

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[361] Wheeler (2000) 125.

[362] Teson (1997) 167.

[363] ICISS (2001b) 63.

[364] See ICISS (200b) 63-64.

loss of life. According to O'Toole, France at first tried to make it appear that the new government of David Dacko, the former president, whom Bokassa had himself toppled, invited the troops.[365] However, he concludes that the reason behind the military intervention was the murder of the school children and Bokassa's deteriorating human rights record, which had 'assumed grotesque proportions'.[366]

2.4.4.11 Kosovo (1999)

The origins in the crisis in the Kosovo province of the former Yugoslavia have to be understood in terms of a new wave of nationalism that led to the rise to the Presidency of Slobadan Milosevic and the official adoption of an extremist Serbian agenda under him.[367] The revocation of Kosovo's autonomy in 1989 was followed by a Belgrade policy aimed at changing the ethnic composition of Kosovo and creating an apartheid-like society.[368] From the early 1990s, it was clear that a crisis in Kosovo was eminent. The armed conflict between the Kosovo Liberation Army (KLA) and the Federal Republic of Yugoslavia (FRY) began in 1998.

The crisis was essentially provoked by a pattern of Serb violations of human rights in Kosovo during the decade of the 1990s, although the turn to armed struggle with unwavering secessionist aims by the Albanian opposition in Kosovo exacerbated the Serbian response.[369] This Serbian-orchestrated oppression included numerous atrocities that appeared to have the character of crimes against humanity in the sense that this term has been understood since the Nuremberg judgment in 1945.

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[365] O'Toole (1986) 55. See also Rousseau (1980) 361-365.

[366] As above.

[367] Independent Commission on Kosovo (2000) 1. Milosevic took power in 1987 and began forging an alliance with Serb nationalists who dreamed of a 'Greater Serbia'.

[368] As above.

[369] Independent Commission on Kosovo (2000) 164.

By Resolution 1199 of 23 September 1998, the UN Security Council called for the withdrawal of the Serbian forces from Kosovo following the humanitarian crisis in the region that saw refugees pouring out of Kosovo to neighbouring countries.[370] In March 1999, NATO, purporting to be acting under authority of Resolution 1199, launched a 78-day bombardment targeting the positions of the Belgrade government in Kosovo.[371] Participation by the UN after the NATO intervention in the arrangements negotiated to end NATO's use of force added a sense of *ex post facto* UN legitimacy to the operation.[372]

The question of the use of force by NATO in its air campaign was submitted to the ICJ by the FRY.[373] The FRY alleged that the NATO attack and the subsequent bombing were violations of international law, and appealed to both the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY) for formal legal action against the responsible NATO governments. The Court declined to make a decision on jurisdictional grounds.

The legality of NATO's 1999 military intervention in Kosovo is somewhat shaky, given the decision to proceed with an armed intervention without obtaining, or even seeking, a clear UN Security Council authorisation, and without making any sort of secondary appeal to the General Assembly's Uniting for Peace Resolution mandate.[374] Cassese argues that his legal

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370 See Resolution 1199 of 23 September 1998, UN Doc S/Res/1199 (1998). The other resolutions that the Security Council passed in connection with Kosovo are Resolution 1160 of 31 March 1998, UN Doc/S/ Res/1160 (1998); Resolution 1203 of 24 October 1998, UN Doc S/Res/1203 (1998); Resolution 1239 of 14 May 1999, UN Doc/S/Res/1239 (1999) and Resolution 1244 of 10 June 1999, UN Doc S/Res/1244 (1999).

371 According to the then NATO Secretary-General Javier Solana, Resolution 1199 gave NATO the right to use force. See Barrie (2001) 163. On NATO's application of armed force against the Federal Republic of Yugoslavia, see Kritsiotis (2000) 49 ff; Burger (2000) 129.

372 See UN Security Council Resolution 1244 of 10 June1999, UN Doc S/Res/1244 (1999), reproduced in Independent Commission on Kosovo (2000) 325.

373 *The Case Concerning Legality of the Use of Force Yugoslavia v United States of America* ICJ Press Communiqué of 2 June 1999.

374 Under the Uniting for Peace Resolution 1950, the General Assembly is authorised to act in the event that the Security Council cannot meet its obligations to address threats to international peace and security.

training permits him to say nothing else about the intervention except that it was illegal when it was undertaken.[375]

He bases his contention on the fact that the action had not received express authorisation of the Security Council, and that the illegality remains notwithstanding the gross violations of human rights upon which the intervention was predicated, and the Security Council's determination that the situation in Kosovo constituted a threat to international peace and security.[376] Simma supports the view that the Kosovo intervention was illegal and rules out the possibility of bending the law 'simply to follow humanitarian impulses'.[377]

Similarly, the study conducted by the Independent Commission on Kosovo found in the main that the intervention was illegal.[378] However, it found that the intervention was legitimate, and could be supported on moral grounds considering the brutalities that the NATO troops managed to end.[379] The study based the latter finding on the default factor in relation to the UN Charter and its global security mechanism, noting that:[380]

> The Charter framework is obsolete in the current era of intra-state conflicts and that the moral priority of preventing genocide and severe crimes against humanity justifies action even when the UN Security Council cannot find a political consensus. This geopolitically grounded argument suggests that a coalition of like-minded states or 'enlightened' states excluding the blocking [p]ermanent [m]embers [of the Security Council] can still wield sufficient moral authority for the international community to .justify bypassing a parali[s]ed Security Council when circumstances demand it.

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[375] Cassese (1999) 23 24.

[376] As above.

[377] Simma (1999) 1 22; see also Charney (1999) 1234 generally.

[378] Independent Commission on Kosovo (2000) 186.

[379] As above.

[380] Independent Commission on Kosovo (2000) 176.

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Zacklin also explains the legal implications of NATO's use of force as follows:[381]

> NATO's actions in Kosovo presented a serious threat to the [UN] and the conception that had prevailed since 1945: that as the only prevailing universal political organi[s]ation, it represented the international community of states, and that the principles contained in its Charter formed the cornerstone of international relations.

History and state practice will determine whether NATO's action in Kosovo amounts to humanitarian intervention or not. What is clear, however, is that the whole NATO eleven-week air war on Yugoslavia, to force Milosevic to end a crackdown in Kosovo, must be judged in the context of forcible humanitarian intervention.[382] NATO's military operations in the Kosovo conflict, which were not expressly sanctioned by the Security Council under Chapter VII of the UN Charter, might have established an important precedent for humanitarian intervention based on customary international law.

2.4.4.12 Conclusion

Of the eleven instances of military intervention discussed in this section, four are not instances of humanitarian intervention. These are: The intervention in Syria, which was based on consent of the target state; the intervention in Bohemia and Moravia, which amounted to forced occupation, the intervention in Congo, which was based on consent of the target state and the doctrine of protection of nationals abroad; and the Dominican intervention, which was based on the doctrine of protection of nationals abroad.

The other seven, the interventions in Macedonia, Cuba, Pakistan, Cambodia, Uganda, Central African Republic, and Kosovo are examples of state practice in humanitarian intervention on the basis of customary international law. This

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[381] Zacklin (2001) 923 925.

[382] Barrie (2001) 164.

leads to the conclusion that there is sufficient state practice on humanitarian intervention. However, in order to establish a customary law legal foundation for humanitarian intervention, there is need also to establish the *opinio juris*.

2.4.2 Opinio Juris

The second criterion for the validity of a rule of custom, *opinio juris*, can be best explained in terms of the express or tacit approval or acquiescence that states accord acts of humanitarian intervention. *Opinio juris* is the psychological element that is required for formation of a rule of customary international law. The requirement of *opinio juris*, according to Brownlie, obliges that states must recognise that the practice in question is obligatory, and that it is required by or is consistent with current international law.[383] The sense of legal obligation as opposed to motives of courtesy, fairness or morality must be real enough.[384]

In determining whether or not there exists the necessary *opinio juris* in respect of humanitarian intervention, one must critically consider that states continue to apply armed force for humanitarian purposes without the formal authorisation of the UN Charter or other treaty. Moreover, the express or tacit approval that follows acts of humanitarian intervention may be the basis for an argument that states are increasingly manifesting the necessary *opinio juris*. Kritsiotis advances this argument by saying that states continue to intervene in other states by military force without any condemnation or censure. Instead, he adds, the interventions have been greeted by the 'apparent approval and applause of states'.[385]

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383 Brownlie (1998) 6.

384 As above.

385 As above.

India's invasion of Pakistan was approved by the international community, as evidenced in the admission into the UN of a new member state, Bangladesh, whose establishment was a direct result of the intervention.[386] In the case of Tanzania's invasion of Uganda, the international community accepted Idi Amin's overthrow without protest, indeed, for the most part, with relief.[387] In the case of Vietnam's invasion of Cambodia, the UN refused to recognise the new regime installed by the intervening power,[388] but even then, a substantial number of states supported the intervention.

Even the Pre-UN Charter intervention in Cuba received acquiescence, because, as Franck and Rodley put it, 'no person can take exception to a rule in the absence of an effective international system to secure human rights, permits disinterested states to intervene to protect lives wherever the need may arise'.[389] Similarly the intervention in Bohemia received acquiescence 'because the humanitarian motive' as well as other motives were advanced.[390]

The ICJ did emphasise in the *Nicaragua* case (merits)[391] that the conduct of states is an important indicator of *opinio juris*. In that case the Court stated that either the states taking action or other states in a position to react to the act must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[392] The conduct of intervening states (in terms of continued interventions even after the coming into force of the UN Charter) and that of the rest of the world

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386 Mortimer (1998) 120.

387 As above.

388 As above.

389 Franck & Rodley (1973) 278.

390 Franck & Rodley (1973) 278-279.

391 (1986) ICJ Rep 14.

392 (1986) ICJ Rep 77.

(relating to express or tacit approval or acquiescence) supports the view that there exists the necessary *opinio juris* for humanitarian intervention.

2.4.3 The Link Theory, State of Necessity and Distress: Can they offer Customary International Law Basis for Humanitarian Intervention?

In the literature, what is known as the 'link theory' has also been invoked as a possible basis for unauthorised humanitarian intervention under current law.[393] The theory presumes that there was a basis for humanitarian intervention under customary international law before the entry into force of the UN Charter, but this basis did not survive the UN Charter and can only be 'linked' to the post-Charter era by proving that the Charter mechanism on the use of force has failed to work.

According to this theory, the failure of the system of collective security enshrined in the UN Charter revives a presumed rule of customary international law from the period before the UN was established concerning the legality of humanitarian intervention.[394] The link theory effectively entails applying the *rebus sic stantibus*[395] rule to the provisions of the UN Charter concerning the promotion and protection of international peace and security, thereby creating a new exception to the ban on the use of force as laid down in article 2(4) of the Charter alongside the existing exceptions.[396]

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[393] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 19.

[394] As above.

[395] The principle of *rebus sic stantibus* in the international law of treaties permits parties to a treaty to deviate from the treaty in cases where circumstances occurring after the party committed itself to the treaty in question do not make it practical for the party to honour any of the treaty obligations. In Applying this principle to the UN Charter, some commentators argue that the failure of the Charter system for the maintenance of international peace and security means that member states of the UN may, despite article 2(4) of the UN Charter, invoke the pre-Charter customary norm permitting humanitarian intervention.

[396] However, the link theory has been faulted, mainly on the ground that even if it was accepted that a presumed rule of customary international law existed before 1945, such a rule

The link theory may be used to support the existence of a rule of custom permitting humanitarian intervention, except that it is a default mechanism; one that can only be invoked after the collective security system of the UN has been tried without success. The link theory proposes that in the absence of a functioning UN collective security system, individual states by default have a right to intervene on humanitarian grounds.[397]

Moving away from the link theory, it is noteworthy that the customary international legal norms of 'state of necessity' and 'distress' may be invoked as possible justificatory grounds for humanitarian intervention. It has long been acknowledged in customary international law that there are circumstances in which the wrongfulness of certain action by states may be precluded or under which states may not be held legally responsible for such actions. This principle is summed up in the saying 'necessity knows no law'.[398] This preclusion under customary international law has been elaborated upon in the draft articles by the International Law Commission (ILC) as part of the doctrine of state responsibility.

The first such ground is referred to as 'state of necessity', contained in article 33 of the ILC Draft Articles on State Responsibility. According to this article, 'a state of necessity' may be invoked by a state as a ground of precluding the

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did not survive the UN Charter of 1945. Further, critics have argued that there exists no good examples from state practice before 1945, nor is there the necessary *opinio juris* on the subject. See Advisory Council on International Affairs & International Committee on Issues of Public International Law (2000) 19. Ronzitti (1985) 16-17 similarly rejects the 'link theory' ('In the first place, the lawfulness of humanitarian intervention was already contested by certain scholars writing at the end of the nineteenth century and at the beginning of the twentieth. In the second place, in the period between the creation of the League of Nations and the beginning of the Second World War, the doctrine of humanitarian intervention seemed to be already obsolete and state practice shows how nations have turned to it to justify their aggressive policies. In the third place, even if it were assumed that a right to use armed force continued to exist immediately before the entry into force of the Charter, there is nothing to show that states included such right amongst the exceptions to the prohibition of the use of force').

[397] See Bazyler (1987) 546 574-581 and Teson (1997) 127-142.

[398] Advisory Council on International Affairs & Advisory Committeee on Issues of Public International Law (2000) 19.

wrongfulness of an act of that state not in conformity with an international obligation of the state if the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril.[399] A state may also claim necessity where the act in question did not seriously impair an essential interest of the state towards which the obligation existed.[400]

It is arguable that the protection and promotion of fundamental human rights in any state is the concern of all states, and forms an 'essential interest' for them. Invariably, where egregious violations of human rights are taking place in a country, say in the context of an intra-state conflict, the use of force may turn out to be the only obvious means of intervening to end the repression, and thereby to safeguard the essential interest in the protection of human rights and the maintenance of international peace and security. Such intervention, it is submitted, does not 'seriously impair an essential interest' of the state towards which the intervention occurs, thus it passes the criterion established by article 33(1)(b).

The doctrine of 'state of necessity' has been attacked on the ground that since the ban on the use of force is a peremptory norm of customary international law (*jus cogens*), the doctrine of 'state of necessity' cannot be invoked where the act in question (humanitarian intervention) violates such a principle as the prohibition on the use of force.[401] This argument derives support from article 33(2)(a) of the very ILC Draft Articles, which states that in any case, a state of necessity may not be invoked by a state as a ground for precluding wrongfulness if the international obligation with which the act of the state is not in conformity arises out of a peremptory norm of general international law.[402]

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[399] Art 33(1)(a).

[400] Art 33(1)(b).

[401] See, for instance, Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 19-20.

[402] See art 33(2)(a).

On the strength of the above argument, it is not plausible to conclude that humanitarian intervention can be justified on grounds of the doctrine of state of necessity.

A question also arises whether the principle of 'distress' as referred to in article 32 of the ILC Draft Articles on State Responsibility could provide justification for humanitarian intervention.[403] However, the applicability of the doctrine of distress to justify humanitarian intervention has been challenged on the ground that the field of application of article 32 (particularly with regard to ships and aircraft) as it has evolved historically, cannot be extended too far beyond that specific context, and certainly not into the general field of humanitarian intervention.[404] This study concurs with this finding. For the reasons stated above, it is therefore concluded that humanitarian intervention cannot be expressly supported on the customary law grounds of 'state of necessity' and 'distress', but it may be based on the 'link theory'.

2.4.4 Is There an Emerging Norm of Custom Regarding Humanitarian Intervention?

Next, one may consider whether it is possible to speak of a newly emerging norm of humanitarian intervention under customary international law. In 1999, UN Secretary-General Kofi Annan while addressing the annual session of the UN Commission on Human Rights stated that emerging 'slowly but surely' is an international norm against the 'violent repression of minorities that will and

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[403] Article 32 reads as follows:
1. The wrongfulness of an act of a state not in conformity with an obligation of that state isprecluded if the author of the conduct which constitutes the act of that state had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.
2. Paragraph 1 shall not apply if the state in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril'.

[404] See the Report of the Special Rapporteur of the ILC on the Draft Articles on State Responsibility Doc A/AC.4/498/Add.21 para 272.

must take precedence over concerns of state sovereignty'.[405] And in his address to the General Assembly in the same year, he amplified his proposition, stating that:[406]

> This *developing international norm* in favour of intervention ... will no doubt continue to pose profound challenges ... Any such evolution in our understanding of state sovereignty and individual sovereignty will, in some quarters be met with distrust, sceptism [sic] and even hostility. But it is an evolution we should welcome.

A factor to be taken into account in addressing the issue whether or not there is an emerging norm of humanitarian intervention is the relationship between the UN Charter and general international law. The ICJ in the *Nicaragua case*[407] made an important pronouncement '... that the [UN] Charter ... by no means covers the whole area of the regulation of the use of force in international relations'. The Court acknowledged that when 'customary international law is comprised of rules identical to those of treaty law', in no way does it mean that the latter 'supervenes' the former so that the customary international law has no further existence of its own.[408]

In Paragraph 178 of its judgment, the Court made the following observations:[409]

> A state may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what the state regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus if that rule parallels a rule of customary international law, two rules of the same

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405 See Press Release HR/CN/899 (1999).

406 Report of the Secretary-General on the Work of the Organi[s]ation, UN GAOR, 54th Session, 4th Plenary Mtg, 1, UN Doc A/54/PV.4 (1999). Emphasis added.

407 ICJ Rep (1986) 14 94 para 176.

408 ICJ Rep (1986) 14 95 para 177.

409 ICJ Rep (1986) 14 98 para 178.

content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules.

Thus one may seek the existence of a customary international law norm on humanitarian intervention independent of the UN Charter. This we have done, and have found that while humanitarian intervention cannot be justified on the basis of 'state of necessity' or 'distress', it may be supported by state practice in both the periods before and after 1945, and the attendant express or tacit approval or acquiescence that states have accorded the practice of humanitarian intervention. Admittedly, this position is open to controversy, owing to the possibilities of other convincing arguments to the contrary. For this reason, it is worth exploring whether, even if it were accepted that existing customary international law is unclear on the subject of humanitarian intervention, one may talk of an emerging norm based on recent state practice.

Increased frequency of interventions may lead to the change of current international law. Thus even if it is accepted that humanitarian intervention has no basis under current international law, the increasing frequency of interventions sets the stage for the development of new law. International law is not static; it may change through breach of the existing law coupled with the development of new practice and *opinio juris* supporting the change.[410]

One may speak of an emerging norm of customary international law on humanitarian intervention. The increasing significance of the international duty to promote and protect human rights forms the basis for the further development of a customary law justification for humanitarian intervention without Security Council mandate.[411]

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[410] As far back as 1951, the ICJ supported this view in the *Anglo-Norwegian Fisheries case (UK v Norway)*, ICJ Rep 116 (1951). The case involved an illegal departure by Norway from certain alleged rules of customary international law of the sea. The Court stated, 'presumably, if a substantial number of states asserts a new rule, the momentum of increased defection complemented by acquiescence, may result in a new rule ...'. The ICJ stated similarly in the *Nicaragua case*. See (1986) Rep 14 para 109.

[411] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 23.

Pursuant to article 2(2) of the UN Charter, states are enjoined to comply in good faith with obligations arising from the Charter. These obligations are spelt out in greater detail in the Charter, on the basis of which a large number of UN treaties and resolutions have been drawn up. These human rights instruments - and the enforcement procedures laid down in them - have, together with the rules of customary law, introduced an essential and irreversible limitation to the principle of respect by the UN for matters that are essentially within the domestic jurisdiction of states.[412]

2.5 CONCLUSION

The analysis in this Chapter leads me to conclude that there is a treaty legal basis for humanitarian intervention in international law. This basis can be inferred form the human rights provisions of the UN Charter, as well as the provisions of the Genocide Convention. At the African regional level, there is a treaty law basis for humanitarian intervention on the basis of a progressive interpretation of the Constitutive Act of the AU, the 1993 ECOWAS Treaty, the 1997 Protocol establishing the ECOWAS conflict mechanism, the SADC Treaty and the SADC Protocol relating to politics, security and defence.

I also arrive at the conclusion that there is a customary international basis for humanitarian intervention. This conclusion is based on the ground that from the analysis in this Chapter, I have established that there exists substantial *usus* (state practice) in respect of humanitarian intervention. This assertion is based on the analysis in this Chapter, which shows that the interventions in Cuba (1898), Macedonia (1903-1912), Pakistan (1971), Kampuchea (1978), Cambodia (1978), Central African Republic (1979), Uganda (1979) and Kosovo (1999) constitute *usus* in respect of humanitarian intervention. The *opinio juris* in these interventions may be inferred from the express or tacit approval or acquiescence that these interventions received from the international community.

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[412] See art 2(7), UN Charter.

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However, the justifications for intervention given in the various instances of state practice in humanitarian intervention examined in this Chapter reflect that humanitarian intervention has been invoked as just one of the bases for the interventions, among other justifications. The customary international law doctrines of 'state of necessity' and 'distress' do not provide a sufficient legal basis for humanitarian intervention. But the 'link theory' can be a basis for humanitarian intervention where it is shown that the UN has been able to prevent or stop gross violations of human rights in the target state.

CHAPTER 3: ADDRESSING THE LEGAL AND POLICY OBJECTIONS TO HUMANITARIAN INTERVENTION

3.1	Introduction
3.2	Legal Objections to Humanitarian Intervention
3.3	Policy Objections to Humanitarian Intervention
3.3.1	Humanitarian Intervention is Prone to Abuse and is Selectively Applied
3.3.2	Humanitarian Intervention has Short-Term Complications and Lacks Long-Term Benefits
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3.5	The Concept of 'Public Good' in General International Law-Making
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3.5.4	International Law of the Sea
3.5.5	Law of International Watercourses
3.5.6	What Public Good Does Humanitarian Intervention Serve?
3.6	Conclusion

3.1 INTRODUCTION

International lawyers, being interested in the legality of all international state pursuits, are particularly concerned with the legal basis for humanitarian intervention. Thus, the doctrine of humanitarian intervention has been seen by some as illegal and unacceptable in international law. The objections to a legal endorsement of humanitarian intervention are embedded in two categories of issues: The one category is legal and the other is policy. The legal objections are that humanitarian intervention violates the cardinal principle of state sovereignty, and that it contravenes the ancillary norms of non-intervention, and non-use of force, which themselves stem from the doctrine of state sovereignty. The policy objections may be summarised as follows:

- Humanitarian intervention is prone to abuse, and it is selectively applied.

- Humanitarian intervention has short-term complications and lacks long-term benefits.
- Humanitarian intervention contradicts itself conceptually by providing that human rights can be protected through military force.

The most vigorous adherents of a policy of non-intervention have been the weaker states, mostly Third World states, apprehensive of severe limitation on their sovereign rights by the more powerful states in the international system.[1] The concerns of the countries of the Third World are buttressed by the fact that most military interventions in the last century have been by the richer countries of the North in the poorer states of the South.[2]

This Chapter explains the arguments usually contained in these objections and then moves on to discuss the responses that can be given in respect of the objections. The responses revolve around two points. First, it is argued that the doctrine of state sovereignty has gone through gradual erosion over the years, and today it cannot be conceived in the same manner as it was when it was codified in the UN Charter in 1945.

Consequently, it is argued that sovereignty is best seen as a responsibility on the part of the state. A state should not be able to invoke the doctrine of sovereignty unless it can be shown that the state meets minimum criteria of responsibilities to protect its citizens. Second, it is contended that within general international law-making, there is an increasing tendency to incorporate the idea of 'public good', and that humanitarian intervention is justified because it serves the public good.

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[1] According to Helman & Ratner (1992-1993) 10, states that attained independence after 1945 greatly value the concept of sovereignty, and they view an unqualified doctrine of sovereignty as a shield 'against the predatory designs of the stronger states'.

[2] Kwakwa (1994) 30.

3.2 LEGAL OBJECTIONS TO HUMANITARIAN INTERVENTION

The legal objections to humanitarian intervention revolve around the question of state sovereignty. This is because a defining feature of the modern international system is the division of the world into sovereign states.[3] Most of the basic norms, rules and practices of international relations have thus rested on the premise of the autonomy and sovereignty of the state.[4] Also, the contemporary system of international relations is built on the assumptions that the nation-state is the primary actor in international life.

According to Paasivirta, the original meaning of the word 'sovereignty' in legal and political theory is related to the idea of superiority of the state.[5] In international law, the idea of sovereignty relates to the idea of independence and non-intervention in internal affairs.[6] The right to be independent assumes the right of state autonomy in issues pertaining to its internal affairs and the carrying out of its external relations. Judge Max Huber gave a classic definition of sovereignty in the *Island of Palmas case* in 1928, stating that:[7]

> Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.

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[3] Abiew (1999) 23.

[4] As above.

[5] Paasivirta (1990) 315 331. See also Abiew (1999) 23.

[6] According to Damrosch, the norm against intervention in international law was first defined by Vattel in 1858, although the doctrine existed hitherto in unwritten custom. 'Non-intervention' means the prohibition of 'improper interference by an outside power with the territorial integrity,or political independence of states'. See Damrosch (1993) 93. The concepts of 'state sovereignity' and 'non-intervention' are often conterminous with each other, and are used in this study interchangeably. On this point see Kwakwa (1994) 9 12.

[7] Permanent Court of Arbitration, 4 April 1928, 2 UNRIAA 829 838.

The doctrine of state sovereignty and its concomitant principle of non-intervention enjoy a high prominence in international law.[8] Brownlie refers to sovereignty as 'the pillar of international law',[9] while Chigara refers to it as 'the bedrock' upon which modern international law has been raised.[10] Henkin argues that sovereignty is concomitant to state autonomy of each state.[11] State autonomy, he adds, 'suggests that a state is not subject to any external authority unless it has voluntarily consented to such authority'.[12]

The doctrine of state sovereignty and the concomitant principle of non-intervention have found expression in numerous international documents, aptly illustrated in the 1993 Montevideo Convention on the Rights and Duties of States, which declared that 'no state has a right to intervene in the internal and external affairs of another'.[13] The same principles are expressed in the Charter of the Organisation of American States in quite absolute terms, as follows:[14]

> No state or group of states has a right to intervene directly or indirectly, *for any reason whatsoever*, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the state or against the political, economic and cultural elements.

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[8] For an analysis regarding the 'prominence' of the principles of sovereignty and non-intervention in international law, see Kritsiotis (1998) 1005 1008-1013.

[9] See Brownlie (1998) 287.

[10] Chigara (2000) 58 62.

[11] Henkin (1995) 11.

[12] As above.

[13] 165 LNTS 19, art 8.

[14] 119 UNTS 3, art 3. Emphasis added.

Non-intervention and state sovereignty principles are also enshrined in article 8 of the Pact of the League of Arab States (1945),[15] article 3 of the OAU Charter 1963),[16] article 3 of the International Law Commission Draft Declaration on the Rights and Duties of States (1949)[17] and part I and II of the Helsinki Final Act (1975).[18]

The UN Charter itself states that the organisation (UN) is founded on, *inter alia*, the principle of sovereign equality of its members.[19] The Charter also affirms the principle of equal rights and self-determination of peoples.[20] Both these principles are a corollary of every state's right to sovereignty, territorial integrity and independence that the sovereignty and non-intervention rules seek to advance. Article 2(7) of the Charter specifically provides that nothing in the Charter authorises intervention in matters that are 'essentially within the jurisdiction of any state'.

The principles of state sovereignty and non-intervention are reflected firmly in post-UN Charter declarations. In 1965, the UN General Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (commonly referred to as the Declaration on Non-intervention).[21] The Declaration specifically spells out that states should refrain from acts that are by their very nature capable of violating the sovereignty and independence of other states.[22]

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[15] Adopted 22 March 1945; 70 UNTS 234.

[16] Adopted 25 May 1963; 2 ILM 768.

[17] Yearbook of the International Law Commission (1949) 286.

[18] Adopted 1 August 1975; 14 ILM 1292.

[19] Art 2(1).

[20] Art 1(2).

[21] UNGA Res 2131 (XX) of 21 Dec 1965.

[22] Art 3.

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In 1970, the same principle was embodied in the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (the 'Friendly Relations Declaration'), which provides explicitly that:[23]

> No state or group of states has a right to intervene directly or indirectly ... in the internal or external affairs of any state. Consequently, armed intervention and all other forms of interference, or attempted threats against the personality of a state against its political, economic and cultural elements are a violation of international law.

Noteworthy more recent texts embodying the principle of non-intervention are the 1981 Algiers Accord where the United States pledged that it would not intervene in Iran's internal affairs;[24] and the Agreement signed by five Central American presidents in 1987, affirming the right of all nations to determine freely and without outside interference of any kind on their economic, political and social models.[25]

Apart from treaties and declarations, international case law is also averse to state intervention in the internal affairs of other states. In the *Corful Channel case,*[26] the UK had entered the territorial waters of Albania in order to sweep mines planted there by the Albanian government, with a view to present the mines as evidence in an international tribunal. The ICJ observed that:[27]

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[23] *The Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation in Accordance with the Charter of the United Nations* UNGA Res 2625 (XXV) of 24 Oct 1970.

[24] Reproduced in (1981) 75 *American Journal of International Law* 418.

[25] Reproduced in (1987) 26 ILM 1164.

[26] (1949) ICJ Rep 4 35.

[27] (1949) ICJ Rep 4 35.

> [T] the alleged right of intervention as a manifestation of a policy of force such as has, in the past, given rise to most serious abuses and as such cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for from the nature of things it would be reserved for the most powerful states, and might easily lead to preventing the administration on international justice itself.

The Court, in rejecting UK's argument that the use of force in Albanian waters did not infringe on state sovereignty, maintained that 'to ensure respect for international law ... the court must declare that the action of the British Navy constituted a violation of Albanian sovereignty'.[28] After analysing this case, Hassan is of the opinion that it reaffirms the unassailability of state sovereignty as an essential foundation of international relations.[29]

The ICJ reaffirmed this position in *The case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V USA)*[30] by holding as follows:

> The principle of non-intervention involves the right of every state to conduct its affairs without outside interference. The existence in the *opinio juris* of states of the principle of non-intervention is backed by established and substantial practice ... In view of generally accepted formulations, the principle [of non-intervention] forbids all states or groups of states to intervene directly or indirectly in the internal and external affairs of other states.

In the often-quoted words of a separate opinion in the *Nicaragua* case above, Judge Sette-Camara had the following to say:[31]

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[28] As above.

[29] Hassan (1980/81) 859.

[30] (1986) ICJ Rep 14 para 168.

[31] (1986) ICJ Rep 14 Para 177.

> I firmly believe that the non-use of force and non-intervention – the latter as a corollary of equality of states and self-determination – are not only cardinal principles of customary international law but could in addition be recognised as peremptory rules of customary international law which imposes obligations on all states.

One of the issues before the Court in the *Nicaragua* case was whether states have a general right to intervene directly or indirectly, with or without force, in order to support an internal opposition in another state, if the cause appeared particularly worthy by reason of the political and moral values with which it was identified. The court held that such right does not exist, stating that 'no such right of intervention ... exists in contemporary international law'.[32]

From the foregoing discussion, it can be concluded that the principle of state sovereignty and non-intervention are cardinal in international law. On this basis, those who view humanitarian intervention to be illegal argue that military intervention is a deviation from the internationally acknowledged norm of non-intervention. They maintain that the deviation is an affront to the Westphalian order, of which cornerstone is state sovereignty.

Starke, for instance, argues against legal sanction of humanitarian intervention, saying that the modern system of international law remains dominated with concepts such as national and territorial sovereignty, and the perfect equality and independence of states.[33] On their part, Dorman and Otte maintain that despite increasingly liberal attitudes towards intervention, state sovereignty remains a crucial underpinning of international law, as exemplified by the worldwide reaction to Iraq's forcible annexation of Kuwait.[34] These writers also find that humanitarian intervention is an assault on state sovereignty.

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[32] Para 208.

[33] Starke (1984) 7, cited in Symes (1988) 581.

[34] Otte & Dorman (1995) 197.

Legally, humanitarian intervention has also been challenged on the ground that it violates article 2(4) of the UN Charter, which is seen as an extension of the norm on the protection of states against any assault on their sovereignty. Article 2(4) 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 manner inconsistent with the purposes of United Nations.

For some scholars, article 2(4) indicates a total and complete prohibition of force in international relations, save for the exceptions expressly mentioned in the UN Charter itself. According to Schachter, a lawyer's view of the UN Charter and practice reveals only five legal categories for the use of force.[35] These are:

- Armed force as an enforcement measure taken by the Security Council under Chapter VII, particularly article 42.
- Individual and collective self-defence in accordance with article 51.
- Enforcement measures under regional arrangements or by regional agencies under article 53.
- Peacekeeping forces of the UN authorised by the Security Council or General Assembly and deployed with the consent of the state concerned.
- Joint action by the five permanent members of the Security Council pursuant to article 106 of the Charter.

Similarly, British scholar Ian Brownlie finds that force may be used in the grounds stated by Schatcher above, and also in the following three cases:

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[35] Schatcher (1991) 63 65.

- Action against former enemy states, pursuant to article 53 and 107 of the Charter.
- Where a single state is mandated to use force on behalf of the UN.[36]
- Action within the territory of a state with the express consent of the government of that state.

Ruling out the possibility of finding a legal basis for humanitarian intervention under the UN Charter system and wider international law, Brownlie goes on to declare thus:[37]

> [T]he language of article 2 (4) emphasises the general prohibition of action by individual states and no amount of inelegant casuistry (sic)can prove otherwise. Justifications for the use of force by individual states must, in the framework of the Charter, be specific and in a strict sense exceptional. Such a conception of public order is natural and well suited to the era of missiles and nuclear weapons.

Support by states for adherence to a broadly formulated principle of non-use of force non-intervention can be found in their reading of the UN Charter and other international legal documents. In other words, the legal objections to humanitarian intervention are usually more often invoked in comparison to policy objections. For example, Franck and Rodley use the legal criteria to conclude that 'humanitarian intervention belongs to the realm not of law but of moral choice which nations, like individuals, must make'.[38]

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[36] As in the case of SC Res 221 adopted 9 April 1966, 5 ILM 534 (1966), which called upon the Government of the UK 'to prevent by the use of force, if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia'.

[37] Brownlie (1989) 22.

[38] Franck & Rodley (1973) 285.

3.3 POLICY OBJECTIONS TO HUMANITARIAN INTERVENTION

Within the literature, criticisms against humanitarian intervention are not solely predicated on legal principles. The line of attack also comprises a series of policy objections that have been used to argue against any formal endorsement of humanitarian intervention as a matter of principle.[39] Although these objections in and of themselves should not be regarded as a substitute *modus operandi* for determining the status of humanitarian intervention in international law,[40] the role that such policy considerations have in the legal process cannot be denied. What is required when according significance to these considerations is moderation: 'their application and impact require balanced judgment as well as a full appreciation of the normative context in which such considerations operate'.[41]

The balance required in this regard calls, on the one hand, for appreciation that when state practice is not definitive on a given matter - as is with humanitarian intervention – and that policy considerations of the nature discussed in this article cannot be brushed aside, nor can they be ignored.[42] On the other hand, it should be borne in mind that 'as will become apparent, these policy objections as they have been advanced over the years are neither

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[39] Kritsiotis (1998) 1014.

[40] See Kritsiotis (1998) 1015, according to whom lawyers should base their judgment regarding the legality or otherwise of humanitarian intervention on the formal sources of international law as formulated in article 38(1) of the Statute of the ICJ ('Loyal to [A]rticle 38(1) of the Statute of the International Court of Justice our first port-of-call as scholars-acting as authorities and arbiters of the law or in our quasi judicial capacities [we must] locate evidence of a general practice accepted as law').

[41] Kritsiotis (1998) 1015.

[42] Before the ICJ in the *Barcelona Traction, Light & Power Co. (Belgium v Spain)* 1970 ICJ Rep 3 (Feb 5), policies were built into legal arguments in an area where there was 'no clear authority [and] no express judicial decision'. See Kritsiotis (1998) 1015 n 30. See also, Brownlie (1963) 323 (arguing that such objections to any departures from the principle of non-intervention become important when the authorities are ambiguous). However, policy-based arguments in English municipal law were rejected by the House of Lords in the case of *McLoughlin v O'Brian* [1983] 1 App Cas 410, because they were not 'of sufficient plausibility or merit'.

conclusive nor sustainable grounds of objection to intervention on humanitarian grounds'.[43]

Each of these objections have themselves become deserving targets for criticism.[44] To put it in Kritsiotis' words, each objection to humanitarian intervention has, 'somewhat like Newton's third law of motion in physics', attracted 'an equal and opposite counter-objection'.[45] Therefore, the objections cannot be relied upon to provide a definitive answer to the difficult question of the status of humanitarian intervention in modern international law. Below is an outline of the five main policy objections to humanitarian intervention.

3.3.1 Humanitarian Intervention is Prone to Abuse and is Selectively Applied

Those scholars who view humanitarian intervention as illegal in international law often argue that its practice enhances 'opportunities for abusive use of force, the long-term effect of which is to bring the international normative system into disrepute'[46]. According to Franck and Rodley, humanitarian intervention is unacceptable, since its advocates would not be able to 'devise a means which is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarian intervention from the herds of goats which can too easily slip through'.[47] If humanitarian intervention was accepted, states would then, to use Falk's words, embark on 'heroic missions' to save and protect what they deem persecuted populations, but would, in actual fact,

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[43] Kritsiotis (1998) 1016.

[44] As above.

[45] As above.

[46] Kritsiotis (1998) 1020.

[47] Franck & Rodley (1973) 284.

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only use the cover of altruism to use force to realise alternative and suspect ambitions.[48]

Abuse of the process, according to Henkin, thrives partly because 'humanitarian reasons are easy to fabricate'.[49] Consequently, history has shown that 'every case of intervention has been justified on some kind of humanitarian ground'.[50] Elsewhere, Henkin has argued that should humanitarian intervention be liberally tolerated in law, there would be a floodgate of interventions, considering that violations of human rights are indeed all too common.[51] In essence it would almost be a potential situation of every other state intervening in the other.

Further, it has been argued that if humanitarian intervention is accorded recognition in law, it 'would introduce endless opportunities for the selective use of force in cases of humanitarian need and this in turn would endanger the crucial kinship between international law and the rule of law'.[52] Also linked to the abuse of humanitarian argument is the proposition that states are unlikely, if ever, to engage their forces in authentic altruistic interventions. This view sees the preparedness of states to act as being more often than not based on self-interest, making the so-called right or duty of humanitarian intervention nothing more than a lingering, even self contradictory, legal convenience.[53] This contention relies on 'the historical record' in which 'the humanitarian motive [in such cases] is at least balanced, if not outweighed, by a desire to

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[48] Falk (1959) 163 167.

[49] Henkin (1972) 96.

[50] As above.

[51] Henkin (1979) 145, cited in Kritsiotis (1998) 1021.

[52] Kritsiotis (1998) 1026; see also Brownlie (1989) 25-26.

[53] See Kritsiotis (1998) 1034, quoting Walzer, M (1992) *Just and Unjust Wars: A Moral Argument with Historical Illustration* 102 ("the lives of foreigners 'don't weigh heavily in the scales of domestic decision-making'").

protect alien property or to re-enforce socio-political and economic instruments of the *status quo*'.[54]

This objection to humanitarian intervention can be replied to by pointing out that it presupposes a 'puritan' criterion for assessing the innermost motivation of action rather than taking the legal reasoning that states, through their agents, advance. The problem with the approach that emphasises the primacy of motives 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'.[55] The motives of the intervener should not be given primacy, unless it can be shown that the motives for the intervention are inconsistent with a positive humanitarian outcome.[56]

I agree with Teson when he challenges the motives-first approach, arguing that this approach is predicated on a flawed methodology.[57] He writes as follows:[58]

> ... Unless other motivations have resulted in further oppression by the interve[nors] ... they do not necessarily count against the morality of the intervention ... The true test is whether the intervention has put an end to human rights deprivations. That is sufficient to meet the requirement of disinterestedness, even if there are other, non-humanitarian reasons behind the intervention

It follows that on occasions where political expediency coincides with the existence of humanitarian grounds for intervention, as was the case in the

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[54] As above.

[55] Wheeler (2000) 38.

[56] As above.

[57] See Teson (1988) 106-108.

[58] As above.

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Vietnamese intervention in Cambodia, it could be taken that the ingredients of humanitarian intervention have been satisfied.[59]

3.3.2 Humanitarian Intervention has Short-Term Complications and Lacks Long-Term Benefits

Opponents of humanitarian intervention also argue that intervention is easier said than done; it is invariably much easier to get in than it is to get out.[60] The Somalia intervention lends credence to this argument. Another related reason why some are opposed to humanitarian intervention is that it only raises the levels of violence in the short run, and makes reconciliation of the parties more difficult in the long run.[61]

According Weiss, the use of outside military forces for humanitarian intervention also makes the task of the affected country's own civilian authorities more difficult to manage.[62] The continuation of the conflict in Somalia, notwithstanding the US-led intervention with over 300 000 troops, adds strength to the argument that international intervention is a short-term measure fraught with difficulties and which has no long-term beneficial effects.

The problem with this objection to humanitarian intervention is that it suggests that humanitarian intervention should not be endorsed simply because it may complicate the situation in the target state. However, the objection fails to recognise that the use of force, whether for the purposes of protecting nationals abroad or for self-determination would result in complications. Despite these complications, international law still recognises these grounds for the use of force because of the utilitarian purpose that they serve. Equally,

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[59] As above.

[60] Kwakwa (1994) 31.

[61] As above.

[62] Weiss (1994) 59 62.

international law should tolerate humanitarian intervention, and ways should be found to minimise the complications that that arise from humanitarian intervention.

3.3.3 A 'Humanitarian War' is a Contradiction in Terms

To some, an armed conflict and its consequences - bombing and maiming people - cannot be instruments of protecting human rights.[63] Douzinas, for instance, argues that a destructive war is by definition a devastating negation of human rights, and is regarded as 'humanitarian' because 'human rights have been hijacked by governments, politicians and diplomats and entrusted in the hands of those against whom they were invented'.[64]

He cites the example of NATO's use of force in Kosovo in 1999 which, although regarded as successful in so far as there were no NATO casualties, was nevertheless a huge failure because of the many civilians that were killed in the course of the bombing. Sidiropoulos takes a similar view, but argues that the Kosovo intervention was partially successful. He writes:[65]

> The intervention was only partially successful in halting the suffering of Kosovar Albanians. Some one million Albanians had become refugees, and around 10 000 had lost their live by the time the Yugoslav forces withdrew.

The claim that 'humanitarian intervention' is a contradiction in terms views humanitarian intervention in terms of the collateral damage it may cause. While it is true that humanitarian intervention may lead to accidental casualties, the intervention is still humanitarian if one considers that it ends up saving lives, often more lives than those lost as a result of the intervention.

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63 See, for instance, Douzinas (2000) 129-141; Roberts (2000) 3 32.

64 Douzinas (2000) 130-131.

65 Sidropuolos (2001) 'Introduction and Acknowledgments' XI; See also, Independent Commission on Kosovo (2000) 97.

Besides the counter arguments in relation to the legal and policy objections to humanitarian intervention discussed above, the objections may be addressed in two by examining the concept of state sovereignty, which forms the main basis for the legal objections, in light of the prevailing circumstances in the world today. With regard to policy objections, these may be addressed further by surveying the concept of 'public good' and how it influences norm-setting in international law generally.

3.4 THE CHANGING NATURE OF STATE SOVEREIGNTY

3.4.1 Sovereignty Versus Humanity: The Dilemma

In his speech to mark the opening of the 54th UN General Assembly in 1999, Secretary-General Kofi Annan presented the representatives of the UN community of nations with the following dilemma:[66]

> To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo, but in the context of Rwanda: if in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt [Security] Council authorisation, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one may ask, is there not a danger of such interventions undermining the imperfect yet resilient security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?

After analysing the competing interests exposed in the part of speech quoted above, Annan went on to suggest that the classical legal concept of state

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[66] For full text see Kofi Annan 'Secretary-General's Speech to the 54th Session of the General Assembly, 20 September 1999, SG/SM/7136 GA/9596.

sovereignty might however have to yield in some circumstances to the 'sovereignty of the individual'.[67] He further argued that:[68]

> If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica-to gross and systematic violations of human rights that offend every precept of our common humanity? ... [S]urely, no legal principle - not even sovereignty - can ever shield crimes against humanity ... Armed intervention must always remain the option of last resort, but in the face of mass murder, it is an option that cannot be relinquished.

He added that it is essential 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.[69]

The dilemma outlined by the Secretary-General in his speech can be broadly summed up as that of competing normative values in international law. The basic question is: What deserves priority, the emphasis on preventing the use of force between states and maintaining stable relations between them or 'humanity' - the protection of citizen's fundamental rights? The relationship between these two interests, that is, of sovereignty versus humanity, is complicated and fraught with contradictions that defy easy solutions.

The one view considers any infringement of the ban on the use or threat of force, as laid down in article 2(4) of the UN Charter, as a fundamental violation of the constitution of the international state community that results in grave implications for international peace and security. These implications may be occasioned, for instance, if intervention without Security Council mandate

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[67] See also, Reisman (1990) ('International law still protects sovereignty, but-not surprisingly-it is the peoples' sovereignty rather than the sovereign's sovereignty'); But see Henkin (1990) 183-208 (arguing that the view expressed by Reisman is rejected by legal scholars).

[68] SG/SM/7136 GA/9596.

[69] As above.

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results in the permanent members of the Council distancing themselves from the intervention and the international order enshrined in the UN Charter, giving rise to dangerous tension and insecurity.[70]

The second view considers emphasises the need to uphold the 'principles of humanity'. Here, universal respect for human rights is also seen as a precondition for a stable international order, as an aspect of the 'constitution of the international community'. According to this line of reasoning, international failure to take action against large-scale violations of human rights is not only wrongful - because, for example, it violates the Genocide Convention - but also encourages repressive regimes to use or continue to use, harsh methods in order to maintain their own positions of power.[71] According to this view, any international order that tolerates genocide or other flagrant violations of human rights is by definition unstable, as national and international order are closely connected, and both largely derive their legitimacy and stability from their ability to protect individuals or groups against violence and arbitrary treatment.[72]

In international law, this dilemma has been addressed by placing a premium on the principles that protect human rights and general welfare or development of the international society in the broadest sense. Ultimately, this approach has had the effect of eroding the principle of state sovereignty in a fundamental way. The discussion below discusses five factors that have contributed to the erosion of the principle of state sovereignty in the contemporary world order.

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[70] See Advisory Council on International Affairs & Advisory Committee on Issues of Public International law (2000) 8.

[71] As above.

[72] As above.

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3.4.2 Factors Contributing to the Erosion of State Sovereignty

Notwithstanding the importance attached to sovereignty in the international legal system, developments in the last five decades or so have gradually but inevitably changed the original conception of sovereignty. The changes in the legal interpretation of the norm enshrined in article 2(7) of the UN Charter and the entire concept of state sovereignty are as a result of the fact that the material conditions under which sovereignty is exercised have dramatically changed since 1945.[73]

The developments in the field of human rights have had a far-reaching impact on the principle of state sovereignty, which was a key element of the UN Charter when it was drawn up in 1945. Furthermore, the broader process of internationalisation (that is, the growing importance of international agreements, membership of international organisations and economic interdependence as well as the increasing prominent role of international NGOs and the media) has greatly reduced state sovereignty in practical terms.[74] These factors, coupled with the changing nature of armed conflicts especially after the end of the Cold War and the changing attitudes of states towards intervention, have had the cumulative effect of making the need to strike a proper balance between the ban on the use of force between states and human rights more pressing than ever.

3.4.2.1 Internationalisation of Human Rights

First, sovereignty in the classical sense has suffered from the increasing internationalisation of human rights. The tremendous increase in the *corpus* of human rights law in the last few decades has resulted in the removal of the question of human rights from the domain of individual sovereign states, and

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[73] Kwakwa (1994) 18.

[74] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 10.

the fundamental rights and freedoms of the individual are now the concern of the international community as a collectivity.

States have entered into treaties or undertaken commitments to human rights under customary international law, resulting in a growing link between human rights and the right to intervene on human rights grounds.[75] Today, as opposed to earlier periods, the obligation to uphold human rights is accorded priority over the principle of sovereignty and the domestic jurisdiction of states.[76]

For a long time, human rights have been treated as matters essentially within the domestic jurisdiction of states. Today, human rights are an established part of international law with an institutional structure - including substantive definition of human rights and mechanisms to enforce the rights - and with universal application. Therefore, one may talk of a massive internalisation of human rights. The universal nature of human rights is clearly manifest in the title of the first global human rights instrument – the *Universal* Declaration of Human Rights[77] – and espoused in its preamble, which describes the Declaration as 'a common standard of achievement for all peoples and all nations'. The universality doctrine means that generally speaking, human rights standards defy economic, geographic, political, social and cultural barriers. They are universal and common.

Since the adoption of the Universal Declaration on Human Rights, numerous other human rights instruments, touching on all aspects of human life, have been adopted under the auspices of the UN.[78] The six main UN human rights treaties are the 1965 Convention on Elimination of all Forms of Racial

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[75] Kwakwa (1994) 19.

[76] Brownlie (1990) 564-580.

[77] Emphasis added, Adopted by the UN General Assembly as Resolution 217 (III) of 10 Dec 1948.

[78] For a compilation of these, see United Nations (1998a) and United Nations (1998b).

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Discrimination (CERD);[79] the 1966 International Covenant of Civil and Political Rights (ICCPR);[80] the 1966 International Covenant of Economic, Social and Cultural Rights (ICESCR);[81] the 1979 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW);[82] the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (CAT);[83] and the 1989 Convention on the Rights of the Child (CRC).[84] Other important UN treaties on human rights are the 1948 Genocide Convention and the 1951 Convention Relating to the Status of Refugees.[85]

The 1993 Vienna Declaration on Human Rights carries universality further by declaring in unambiguous phrases that 'human rights and fundamental freedoms are the birthright of *all* human beings' and 'the universal nature of these rights and freedoms is beyond question'.[86] The Declaration also makes it clear that all human rights are universal, and that 'the international community must treat human rights globally in a fair and equal manner on the same footing and with the same emphasis'.[87]

The internationalisation of human rights has also permeated the province hitherto the reserve of economic blocs of states, such as the European Union,

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[79] Adopted by UNGA Res 2106 (XX) 21 Dec 1965, entry into force 4 Jan 1969.

[80] Adopted by UNGA Res 2200 (XXI) of 16 Dec 1966, entry into force 23 March 1976.

[81] Adopted on 16 Dec 1966, entry into force 3 Jan 1976.

[82] Adopted by UNGA Res 34/180 of 18 Dec 1979, entry into force 1981.

[83] Adopted by UNGA Res 39/46 of 10 Dec 1984, entry into force 28 June 1987.

[84] Adopted by UNGA Res 44/25 of 20 November 1989, entry into force 2 Sep 1990.

[85] Adopted in 1951, entry into force 1954.

[86] See The World Conference on Human Rights: The Vienna Declaration and Programme of Action (1993), UN Doc A/CONF 157/23, Part 1 para 1.

[87] Part 1, para 8.

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by which European states have ceded a great deal of their sovereignty in favour of integration, human rights and regional development.[88] In Africa, the African Charter on Human and Peoples' Rights[89] has been ratified by all African states, so has the Constitutive Act of the newly launched AU.

The Constitutive Act of the AU explicitly permits the Union to intervene (obviously militarily) to stop or pre-empt situations of genocide, war crimes and crimes against humanity in member states of the Union.[90] As noted in the *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco,*[91] acceptance by a state of treaty obligations relating to a given subject has the effect of removing that subject from the purely domestic domain. Many of the principles in the Universal Declaration of Human Rights and other UN and regional human rights instruments have also been codified in domestic bills of rights, further evidencing of the universality of human rights.

Human rights have increasingly become a 'shared responsibility' of both states and the international community. While the state remains primarily responsible for securing human rights, in this respect it can be called to give an account in international forums, which have developed increasingly sophisticated monitoring mechanisms for this purpose.[92] Apart from the state and intergovernmental organisations, the institutions of global economic governance, notably the International Monetary Fund (IMF) and the World Bank, have had to abandon their concentration on economic issues in order to factor human rights in their operations.

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[88] The European Union was established through the 1992 Treaty of Maastricht.

[89] OAU document OAU/CAB/LEG/67/3/Rev 5, adopted by the OAU Heads of State and Government on 17 June 1981;entry into force 21 October 1986, reprinted in (1986) 7 *African Human Rights Law Journal* 403 and in *Human Rights Law in Africa* (1996) 6.

[90] See art 4(h) of the AU Act.

[91] 1923 PCIJ (Ser B) No 4 24.

[92] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 9.

For a long time, the IMF and the World Bank preferred restricting their activities to the promotion of economic advancement of member countries, treating issues like human rights as political issues.[93] However, these institutions began taking into consideration issues of human rights in the 1980s and 1990s, in order to achieve overall human development.[94] For example, the IMF in 1997 issued guidelines on governance, while the World Bank also began talking much more about popular participation. The World Bank now strongly advocates for incorporation of NGOs and civil society in economic, social and political issues. In 1998, the Bank issued a comprehensive policy document on the link between development and human rights.[95] The Bank's Inspection Panel ensures that the Bank's activities comply with its regulations, hence increasing transparency.[96]

But even before the incorporation of human rights considerations into the activities of the World Bank in the 1990s, both the Bank and the IMF had in the previous decade embarked on Structural Adjustment Programmes (SAPS) ostensibly to restore the 'lost decades' in developing countries. The policy characteristics of SAPS include the 'rolling back' of the state (reducing the role of the state in the economy), which in turn has contributed to the shrinking of the classical role of the state within its own territory.

The internationalisation of human rights has gained momentum in recent decades. The creation of rights and duties of the individual and the increasing

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[93] See Tomasevski (1995) 406.

[94] See, for instance, Tomasevski (1995) 406 ("The most explicit and unexpected policy change concerning human rights has occurred at the World Bank. Until recently, the Bank claimed that it was prevented by its Articles of Agreement from taking human rights into account. In 1991, the Bank stated that the aim of development was 'to increase the economic, political and civil rights of all people across gender, ethnic groups, religions, races, regions, and countries' ... [B]y 1992, however, the Bank had ventured into defining and applying criteria of good governance in its lending").

[95] See generally, Word Bank (1998).

[96] See, for instance, World Bank *Annual Report of the Inspection Panel* 1 August 2001 to 30 June 2002, generally (copy with the author. Report also available online at <http://www.inspectionpanel.com> (accessed on 30 September 2002.

role of MNCs, intergovernmental organisations, and international financial institutions in human rights-related issues have led to the situation where state sovereignty has been greatly eroded.

3.4.2.2 Globalisation

The second factor that has contributed to the erosion of state sovereignty relates to the exponential increase, over the last few decades, of global interdependence and interconnection, as exemplified by the concept of globalisation.[97] Transformations on the world scene have greatly eroded the boundaries between national economies and the world economies, which have never been as closely integrated in as many ways as it is today.[98] As Kwakwa notes:[99]

> Globali[s]ation also affects national governments by subjecting their domestic policies to greater international scrutiny and increasing the ability of foreign governments to apply pressure on them. The increasing globali[s]ation of the world economy in matters of trade, immigration, and financial flows challenges the notion that decisions are made exclusively within defined territorial boundaries ... Increased economic globali[s]ation has deprived governments of a say in financial flows and reduced them to managing the consequences of decisions made by [others].

The phenomenon of globalisation favours the advancement of a single view of social, economic, political, cultural and environmental issues, making the world a single community where the life and activities of each person are ultimately influenced by those of others across the world. Although globalisation is not an

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[97] The term 'globalisation' is a contested term and there is no generally accepted definition of it. See McCorquodale & Fairbrother (1999) 736; For example, see Garcia (1999) 56 (It is 'the process and result of interaction between different states of the world in matters of sovereignty, culture and economy') and UNDP (1999) 2 ('Globalisation represents the sum total of political, social, economic, legal and symbolic processes rendering the division of the globe into national boundaries increasingly less important for the purpose of individual meanings and social decision').

[98] Kwakwa (1994) 19.

[99] As above.

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entirely new phenomenon, the last decade of the 20th century has witnessed a tremendous acceleration of the process. Globalisation is now, more than ever, increasing the contacts between people across national boundaries in economy, technology, culture and governance.[100]

Globalisation in its present form has resulted from interplay of a number of factors.[101] Firstly, there has emerged new, deregulated, globally linked markets for goods and services. Secondly, there are now new actors in the new global order. States are no longer the primary actors. Other entities like multinational corporations (MNCs) have entered the scene with an integrated production and market system. The World Trade Organisation (WTO), the first multilateral organisation with authority to enforce national government's compliance with rules, an International Criminal Court (ICC) in the making to 'globalise' criminal justice, a booming international network of NGOs, as well as the proliferation of regional blocs such as the EU and SADC are now active actors in global affairs.

Thirdly, new rules and norms have emerged. These include market economic policies the world over, with greater privatisation and liberalisation than before, human rights conventions building up in both coverage and number of signatories and conventions on the environment, trade and the Multilateral Agreement on Investment (MAI) now being debated.[102]

Fourthly, there are now faster and cheaper means and tools of communication, notably the fax, cellular phone, the electronic mail and the internet. All the above factors combined have resulted in three elements: shrinking time,

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[100] UNDP (1999) 2.

[101] See generally, Box 1.1, UNDP (1999) 30.

[102] The MAI is a treaty being negotiated under the auspices of OECD countries. It seeks to safeguard the rights of investors in the countries where they have invested.

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shrinking space and disappearance of borders.[103] Shrinking time, shrinking space and the disappearance of borders have led to the erosion of the classical doctrine of state sovereignty.

3.4.2.3 The Role of the Media and Information Technology

The third factor contributing to an erosion of the concept of state sovereignty is the revolutionary developments in telecommunications and technology, which are also linked to the issue of human rights. These revolutions have eliminated the controls that governments exercised over the availability and dissemination of information. One author captured the role of media technology in exposing information contained in a state, including abuse of human rights, in the following terms:[104]

> Television and satellites have created an unprecedented capacity for people all over the world to watch what is happening in other countries. For example, satellite television contributed to the end of apartheid and precipitated the [US]-led intervention in Somalia... Human rights monitors and TV networks such as the CNN use video recorders to document and communicate vivid images of human rights abuses wherever they occur. The net effect of this has been to make a state's exercise of traditional sovereign functions more transparent and therefore more subject to review by the international community.

3.4.2.4 Individualisation of International Law and New Actors on the International Plane

A fourth factor leading to the erosion of state sovereignty relates to increased participation by individuals, international organisations, NGOs and other non-

[103] See UNDP (1999) 33 (stating that 'shrinking time' has led to fast-changing markets and technologies. Consequently, action at a distance in 'real time' impact on the lives of people far away. 'Shrinking space' has resulted in people's lives, jobs incomes, and health being affected by events on the other side of the globe, often by events they do not know about. 'Disappearance of borders' have led to the national borders 'breaking down', not only for trade capital and information, but also for ideas, norms, cultures and values).

[104] See Kwakwa (1994) 20.

state actors in the international arena. As a result, respect for sovereignty and jurisdictional boundaries have gradually shifted from an absolute sovereignty theory to a 'sovereignty is not that crucial' attitude.[105] There are numerous treaties, declarations of principles and other human rights instruments[106] that define the role of the individual on the international plane. Further, the increasing role of the individual in international law is manifest in the provisions relating to the optional individual complaints mechanisms of the Optional Protocol I to the ICCPR, the CERD,[107] the CAT[108] and the Optional Protocol to CEDAW.[109]

International law has traditionally been defined as the law governing the relationship between states.[110] This definition has been modified by developments in international law that increasingly accord individuals rights and duties and, therefore, the capacity to act on the international plane. An example of such developments is in the field of international criminal law that obliges individuals not to commit international crimes and protects individuals from the perpetrators of international crimes.

On this basis, the Rome Statute of the ICC provides for individual criminal responsibility,[111] and this responsibility cannot be waived by the fact that one is

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105 Kwakwa (1994) 21.

106 For a compilation of these, see for instance, United Nations (1994a), United Nations (1994b) and United Nations (1994c).

107 Art 14.

108 Art 22.

109 Adopted by UNGA Res A/54/4 of 6 October 1999, entry into force 22 Dec 2000.

110 See Bierly (1963) 1; Shaw (1991) 1; Wallace (1992) 3 and Dugard (2000) 1.

111 Art 25(1) of the ICC Statute reads as follows in part: ('The Court shall have jurisdiction over natural persons ... '. Under art 25(2) of the Statute, 'a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment'.

a head of state or government official.[112] In accordance with the principle of individual criminal responsibility under the ICTR Statute,[113] the ICTR in 1998 convicted Jean Kambanda, the former Rwandan Prime Minister for genocide and sentenced him to life imprisonment.[114]

Actors in the global order today are not only states and individuals, but also MNC's and intergovernmental organisations. Indeed, of the world's 100 biggest economies, only 49 are states, while the remaining 51 are MNCs.[115] One commentator writes:[116]

> ... Who sets the pace in automobile output, who controls the earth's computer software production ... who leads international money markets, who directs telecommunications systems is materially far more important to more individuals, households and firms, than those who holds the state leadership and Guatemala, Germany, Ghana or Greece.

The individualisation of international law has also increasingly led to arguments for liability of MNC's and other non-state actors for human rights violations.[117] At the same time, individualisation of human rights has resulted in an increased role for NGO's in enforcing human rights norms in the UN system as well as the regional human rights mechanisms.[118] The net effect of these

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[112] Art 27.

[113] Art 6 of the Statute.

[114] See *Prosecutor v Jean Kambanda* ICTR-97-23-S, summary of the case in (1998) ILM 1411, full judgment available at <http://www.ictr.org> (accessed on 30 September 2002.

[115] Mccorquodale & Fairbrother (1999) 738.

[116] Luke, T 'New World Order or Neo-world Orders: Power, Politics and Ideology in Informationalising Localities', cited in McCorquodale & Fairbrother (1999) 739.

[117] See generally Welch (1995).

[118] As above. For instance, NGOs are permitted to bring complaints on human rights violations, under art 55 of the African Charter on Human and Peoples' Rights. They do not have to show that they are the victims of the alleged violation.

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developments has been to modify the traditional situation in which the state, with its concomitant monopoly on 'sovereignty', was the main actor in international affairs.[119]

3.4.2.5 The Changing Nature of Armed Conflict

A fifth and one of the major factors that has contributed to the decline of the concept of state sovereignty is the changing patterns of armed conflict. The involvement of the international community in violent conflicts and humanitarian crises has substantially increased since the end of the Cold War.[120] At the same time the world security system has changed. Whereas the Cold War was marked by global rivalry between the superpowers, many countries are now discovering that they are no longer of sufficient strategic importance to the erstwhile foes to qualify for international assistance.[121]

The result of this state of affairs where direct superpower involvement in conflict is declining is exacerbation of armed conflicts to an extent whereby some states have disintegrated or are in the verge of doing so.[122] Consequently, governments of various countries have resulted to harsh repressive measures in an attempt to maintain national unity.[123]

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[119] See Vicunna & Pinto (1999) 4-5.

[120] This is reflected in the number of UN Security Council resolutions on humanitarian crises and the increase in the number of UN peacekeeping troops and military coalitions deployed around the globe since 1990.

[121] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 10.

[122] See Helman & Ratner (1992/1993) 5 (where a distinction is made between 'failed states' such as Somalia and Liberia, 'whose governmental structures have been overwhelmed by circumstatnces', and 'failing states' like Zaire (now DRC), 'where collapse is not imminent but could occur within several years'.

[123] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 10.

Armed conflicts have also, since the end of the Cold War, lost the traditional distinction between 'intra-state' and 'inter-state' conflicts. Conflicts within states often lead to conflicts between them and *vice versa*.[124] A good example in this regard is the conflict in the DRC, which began as an internal insurrection against the government of President Mobutu Sese Seko, but ended up involving seven other African countries.[125] Also, many national frontiers do not coincide with ethnic, religious or cultural boundaries, and this leads to a 'spill-over' of conflict.[126] Additionally, refugee flows across borders have the impact of internalisation of a hitherto intra-state armed conflict.

These new patterns of conflict means that the traditional diplomatic means of intervention may not apply where whole populations are threatened with extermination by their own governments. Economic sanctions, too, have a limited effect, as their impact only becomes apparent in the long term, whereas the prevention of genocide or mass slaughter of civilians calls for rapid, decisive action.[127] What this means is that military intervention is often the only way left to contain a catastrophe,[128] and this has substantially eroded the principle of state sovereignty as traditionally conceived.

It can therefore be concluded, on the basis of the above discussion, that although the state may not be quite ready to whither away, it is not what it used to be. The combined effects of globalisation, the role of the media and information technology, individualisation of international law, new actors on the

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[124] As above.

[125] These countries are: Angola, Namibia and Zimbabwe who sent troops to support the DRC government; Rwanda and Uganda, whose troops entered the DRC in support of the rebels; and Libya and Sudan who pledged support for the DRC government.

[126] For a discussion on the 'spill-over' effects of national armed conflicts, see Parsons (1995) especially chaps 14, 16, 17, 18 and 19.

[127] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 10-11; see also Regan (2000) 101ff.

[128] As above.

international plane and the changing nature of armed conflicts have led to substantial erosion of the doctrine of state sovereignty as traditionally conceived.

State sovereignty has been eroded further by the policy and structural conditionalities imposed on borrowing countries by the Brettonwood institutions and bilateral donor agencies. While it is conceded that external involvement with the processes of public policy formulation by independent countries of the world have been present for a long time now, external preoccupation with internal frameworks of these borrowing countries has heightened in recent years, largely due to the adoption of political and economic policy conditionalities by the institutions of global economy and foreign donor governments. It is therefore concluded that state sovereignty as understood today is different from the its original, Westphalian notion, and should be interpreted as such when addressing international legal issues such as the question of the legal basis for humanitarian intervention.

3.4.3 The Effect of the Erosion: Sovereignty as Responsibility

The effect of the erosion of the doctrine of state sovereignty on the issue of humanitarian intervention is that the interpretation of existing norms on sovereignty should be done in the context of the changes that have taken place since the norms on sovereignty were first crafted into the UN Charter and other instruments. Such interpretation, as shown in Chapter two of this study, leads one to find a legal basis for humanitarian intervention in treaty and customary international law, despite the codifications on the doctrine of state principle which entails non-intervention and the non-use of force.

Today, state sovereignty is increasingly viewed from the point of view of responsibility.[129] When a state joins a universal intergovernmental organisation such as the UN, the assumption is that the state commits itself to be a

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[129] Deng (1995) 208.

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responsible member of the community of nations. The state is treated as sovereign, on the implied condition that it will act responsibly and safeguard the safety, lives and welfare of its citizens.[130] Should the state fail in this primary duty to protect its citizens, this responsibility is transferred to the international community, who may use all means to achieve the protection of basic rights on behalf of humanity.[131]

The 'transfer' of responsibility is premised on the ground that a state that cannot protect the basic rights of its population has forfeited its sovereignty, and the international community has a duty to re-establish it.[132] It is argued here that humanitarian intervention is one of the ways through which the international community can re-establish sovereignty in a country where large-scale violations of human rights are taking place.

3.5 THE CONCEPT OF 'PUBLIC GOOD' IN GENERAL INTERNATIONAL LAW-MAKING

This section discusses the concept of 'public good', by which it is simply meant that which is of the greatest benefit for the largest proportion of the international society. Under this emerging concept, the bias is in favour of the interests of the international public against classical paradigms such as the issue of state sovereignty in international law, when developing or interpreting normative values.

The concept of 'public good' embodies utilitarian justifications and hinges on the argument that an international pursuit, such as humanitarian intervention, is justified when it is for the good of the greatest number. Public good rests on arguments that a few individuals may be sacrificed to secure the good of the

[130] See ICISS (2001a) 13.

[131] As above.

[132] Deng (1995) 208-209; Zartman (1995) 1-10.

majority. This may explain why proponents of humanitarian intervention defend it, despite the fact that a few individuals may die or be injured incidentally during a military intervention.

As seen from the discussion in the previous section, the territorial sovereignty of nation-states was initially a central, indeed a constitutive feature of the modern world.[133] However state sovereignty in international law has historically developed hand in hand with the norm of public good. The origins of the concept of public good in modern international law are traceable in the works of Grotius, who wrote that humanitarian intervention preserves the 'community interests'[134]

The concept also developed in respect of the broader, but related right to punish perpetrators of gross human rights violations committed in other states. This right, according to Meron, is an important precursor to the recognition in modern international law of universal jurisdiction over such matters as genocide, war crimes and crimes against humanity.[135]

Early international law conception of public good was not limited to human rights. For instance, Grotius wrote strikingly in 1609 in defence of the freedom of the seas.[136] He argued that 'the sea is by nature open to all men and kits use is common to all, like that of the air'.[137] Thus, he concluded that a 'sovereign will bring war upon himself, if he refuses the sea to others; and those will be justified in making war who are refused a privilege of nature'.[138]

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[133] According to Walker, sovereignty 'is the constitutive principle of modern political life'. See Walker & Mendlovitz (eds) (1990) 159.

[134] Grotius (1625) *De Jure Belli ac Pacis Libri Tres, Prolegomena,* para 38 (Kelsey Trans), cited in Lauterpatch (1946) 46.

[135] Meron (1991) 110 112.

[136] Grotius (1909) *Mare Liberum* (whellwell trans) cited in Meron (1991) 113.

[137] As above.

[138] As above.

However, it is in the field of human rights that the doctrine of common good has been emphasised. Complementing territorial sovereignty is Kantian faith in the moral autonomy of individual human beings, as manifest in their practical ability to act by themselves and in concert, for ends they have chosen.[139] Sovereignty, like autonomy, implies freedom from the interference of others.[140] Since nations are free and independent of each other as men are by nature, Vattel proclaimed in 1758, it is a general law of their society that each nation should be left to the peaceful enjoyment of that liberty which belongs to it by nature.[141]

However, non-intervention is Vattel's second general law. As he pointed out:[142]

> The first general law, which is to be found in the very end of the society of nations, is that each nation should contribute as far as it can to the happiness and advancement of other nations.

By implication, Vattel's first general law expresses a positive duty of mutual aid, limited only by duties to one's own people, and not by the possibility that such assistance may be construed as intervention.[143] The approach favours the scholarly views of a Groatian bent, usually referred to as 'international society theorists',[144] who see the world as a single collectivity with a single interest that is sometimes referred to as 'the common heritage of mankind'.

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[139] See Kant (1959) 52 (stating that a rational being belongs to the realm of ends as a member when he gives universal laws in it while also himself subject to these laws. He belongs to it as a sovereign ... he is subject to the will of no other).

[140] Onuf (1995) 43.

[141] Vattel (1758), Carnegie transl (1916) 'Introduction' sec 1 16.

[142] As above.

[143] Onuf (1995) 43.

[144] See, for example, Jackson (1995) 6; Wight (1991) Chap 1. To these, the three conceptual elements of the international society are the community of states and citizens, the community of humankind, and the world community.

Mutual aid, premised on the interconnection of the human race, is the basis of the doctrine of the common or 'public good' and has been a guiding principle in law-making in most, if not all the specialised fields of public international law. In an apparent support of integrating 'public good' in the normative structures of international law, D'Amato, a leading publicist in public international law, has called for the need to construe international legal norms in a manner that best serves the interests of the greatest section of the international public. He writes:[145]

> [T]he truly operative rules generated by the customary practice of states…are the rules that in reality, accommodate the most deeply felt interests in the community of states. If concern for human rights is one of those deeply felt interests, that concern will be manifested in the emerging rules of custom even if those new rules are at variance with received wisdom.

Farer also supports this 'realist' approach which 'seek law by foraging for it among the shifting preferences and tolerances' in international relations, as opposed to a 'classicist' view ' which searches for the law 'not down in the raw stuff of elite subjectivities but rather in received formulas and inherited forms'.[146]

To illustrate this point, this section will examine the general principles of international criminal law, international humanitarian law, law of international watercourses and the law of the sea to examine to what extent the public good of the international society has influenced the development of norms in these fields. The examination will lead to a determination of the legitimacy of humanitarian intervention in the context of the search for the 'public good' and in view of the changing value systems in international relations discussed in the previous section.

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[145] D'Amato (1987) 195.

[146] Farer (1991) 195.

The aim is to interrogate the basis of the current shape and substance of international norms, in order to address some of the crucial questions forming the theme of the present study. Is the international community still bound by narrowly defined basic principles of international law, such as those in article 2 of the UN Charter which identify non-aggression and non-intervention as the fundamental obligations of member states?

Is sovereignty still a prevailing norm in the various specialised areas of international law? Or is there evidence for the claim that a deeper and more active international community is coming into existence in which the independence of states is being curtailed by humanitarianism and other norms that promote the common good of the international public? Is the international community coming from a negative and non-interventionist regime to an interventionist one?

3.5.1 International Criminal Law

The *Pinochet* decision, the jurisprudence of the ICTY and the ICTR, and the adoption of the Rome Statute on ICC have all stimulated a new interest in international criminal law.[147] This new interest is probably most apparent in the demands that dictators and former dictators should be prosecuted before foreign national courts on the basis of the doctrine of universal jurisdiction.[148]

The principle of universal jurisdiction is one of the bases of criminal jurisdiction under international law. The principle developed under customary international law and it allows a state to prosecute foreign nationals for offences of serious concern to the international community as a whole.[149] The notion of universal

[147] Dugard (2000) 7.

[148] As above.

[149] Schairer & Eboe-Osuji (1999)12; See also Bassiouni (1992) 512 (stating that '[t]he rationale for universal jurisdiction...is that there exists certain offences, which due to their very nature, affects the interests of all states, even when committed in another state or against another state, victim or interest.').

jurisdiction developed in the context of prosecuting pirates, who were subject to universal jurisdiction because their acts were so wanton and terrible and occurred beyond the reach of any particular national jurisdiction.[150] That type of crime was deemed to be of such grave nature and to affect so many states that all states had an equal claim in prosecuting those individuals who committed such acts.[151]

Similarly, the abolition of the slave trade led to the further development of the concept of universal jurisdiction. The slave trade was deemed to be so abhorrent and of such a serious nature that it allowed all states to prosecute those alleged to have committed such crimes.[152] Slavery and slave trading now violates fundamental human rights and they are now specifically prohibited in a number of instruments.[153] Following World War II, the expansion of universal jurisdiction occurred in the context of the Nuremberg trials. Both the Charter of the Nuremberg Tribunal[154] and the common articles of the four Geneva Conventions of 1949[155] expressly oblige a state to hold

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[150] Bingham (1932); Randall (1988) 785 791-800. Although universal jurisdiction was originally only a part of customary international law, it was later incorporated into treaty law. See 1958 Convention on the High Seas, 29 April 1958, 13 UST 2312, 450 UNTS 82; and UN Convention on the Law of the Sea, 10 December 1982, UN Doc A/CONF./62/L2 (entered into force 16 November 1994).

[151] See Schairer & Eboe-Osuji (1999) 13.

[152] As above.

[153] See, for example, Convention to Suppress the Slave Trade and Slavery, 26 September 1926, 46 Stat 2183, 60 LNTS 253; Protocol Amending the Slavery Convention, 7 December 1953, 7 UST 479,182 UNTS 51; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956, 18 UST 3201, 266 UNTS 3.

[154] Agreement for the Prosecution and Punishment of the major war Criminals of the European Axis, 8 August 1945, 59 Stat 1544, 82 UNTS 279, reprinted in *American Journal of International Law* (1945) 257.

[155] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 UST 3114, 75 UNTS 31; Convention on the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of the Prisoners of War, 12 August 1949, 6 UST 3316; Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3516, 75 UNTS 287.

individuals responsible for criminal acts whether or not there is a nexus to the prosecuting state.

Article 6(c) of the Nuremberg Charter provided for the prosecution of crimes against humanity as an offence separate from war crimes, and crimes against humanity were included in article 5(C) of the Tokyo Charter as well.[156] Under article 5 of the Rome Statute of the ICC, crimes against humanity are considered to be some of 'the most serious crimes of concern to the international community as a whole'.[157] Crimes against humanity, though based on customary international law, have been incorporated into the Statute of the ICC,[158] the statute of the ICTY,[159] the Statute of the ICTR[160] and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind.[161]

Another way in which the concept of universal jurisdiction has developed is through the incorporation of the principle enshrined in the maxim *aut dedere aut judicare ou punire* (prosecute or extradite or surrender), which requires a state to extradite or prosecute a person accused of international crimes such as genocide, war crimes, crimes against humanity, torture, terrorism and

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[156] Article 6(C) defined crimes against humanity as '... murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'.

[157] See art 7 of the Rome Statute of the ICC, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc A/CONF. 183/9 reprinted in (1998) 37 ILM 999; also available online at <http://www.un.org/law/icc> in all UN languages.

[158] Art 7.

[159] Art 5.

[160] Art 3.

[161] Art 18.

hijacking. An expression of the *aut dedere aut judicare* principle is enshrined in the Statute of the ICC.[162] In the sixth preambular paragraph, state parties to the ICC Statute 'recall' that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. This is a new and emphatic expression of the concept of universal jurisdiction, under which states have a duty to prosecute international criminals, not just the power or the freedom to do so.[163]

The suppression and punishment of genocide in international criminal law also serves the ends of the public good. The motivation behind the Genocide Convention was to avoid repetition of the horrifying experience of World War II, in the course of which the National Socialist regime of Germany liquidated whole population groups including, above all, a large proportion of European Jewry. In the Convention, the contracting parties begin by affirming 'that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.[164] Apart from genocide itself, the Convention declares the following acts to be punishable: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.[165]

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[162] See Rome Statute of the ICC, 17 July 1998, entry into force 1 July 2002, 37 *ILM* 999 (1998).

[163] Schairer & Eboe-Osuji (1999) 14. The jurisdiction of the ICC is based on the principle of complimentarity. This is different from that of both the ICTY and the ICTR, which enjoy primacy over states. Article 17 of the Rome Statute of the ICC allows the Court jurisdiction if a state is genuinely unable or unwilling to do so. The problem with this is that the factors determining a state's inability or unwillingness to exercise criminal jurisdiction do not have clearly defined judicial standards. On the principle of complimentarily, see generally Brown (1998); See also Trifterer (ed) (1999) 12-13 (stating that '[a]s regards these crimes, the only dispute was whether there is an obligation to proceed on the basis of universal jurisdiction or on a territorial or a national basis. The paragraph was deliberately left ambiguous').

[164] Art 1.

[165] Art 3.

Reference to acts of State as justification for an offender's impunity or immunity is specifically excluded under the Convention.[166] Article 5 imposes an obligation on contracting parties to make provision for effective penalties for acts punishable under the Convention. The actual duty to punish is to be found in article 6, but in accordance with the territorial principle of jurisdiction, it is restricted to the state on whose territory the act concerned was committed. In addition, jurisdiction is also given to an international criminal court, anticipated in 1948 but only realised fifty years later in 1998.

According to article 7, acts punishable under the Convention shall not be considered as political crimes for the purpose of extradition. Moreover, contracting parties pledge themselves to grant extradition in such cases. Article 8 goes beyond the criminal law content of the Convention and gives all contracting parties, even if they are not members of the UN, the right to call upon organs of the UN to take appropriate measures to prevent and suppress acts of genocide. Finally, article 9 establishes the jurisdiction of the ICJ in disputes between contracting parties including those related to the responsibility of a state for genocide.[167]

As compared with the law before 1948, the Genocide Convention embodies a number of notable improvements. It declares genocide to be 'a crime under international law' and not 'against international law'.[168] In the light of this careful formulation, it cannot be assumed that individuals who commit acts punishable under the Convention may be punished only if provision is made for criminal liability under the national law of the state where the act was committed. On the contrary, the provision in article 6 for jurisdiction of an international criminal court, which would have to apply the Convention directly,

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[166] Art 4.

[167] This article creates a general duty to submit all disputes to the ICJ, including those related to the implementation of the Convention. In spite of a certain number of states (mostly states composing the former Soviet Union), this duty is binding on the great majority of the contracting parties.

[168] Art 1.

shows that the Convention imposes actual legal duties on everyone and establishes liability for violations by guilty individuals without references to the national criminal law of states.

The extent of liability has also been expanded under the Convention: The inclusion of acts committed in peacetime correctly extends the Nuremberg Tribunal's interpretation of crimes against humanity, which was restricted to acts committed in time of war. Of importance too is the clause in article 8 of the Convention giving all contracting parties, irrespective of whether or not they are members of the UN, the right to request the competent organs of the UN to take action under the UN Charter for the prevention and suppression of genocide and, in particular, to submit complaints about violations of that have already occurred. The clause implies that the possibility of a state accused of genocide appealing to the state sovereignty principle and non-intervention in matters essentially within the domestic jurisdiction under article 2(7) of the UN Charter is thereby excluded.

Notwithstanding these improvements, the Convention may not serve as an effective guarantee against the atrocities associated with genocide. Although the Convention acknowledges genocide as a crime under international law, liability for which stems directly from international law, it is nevertheless a shortcoming of substantial significance that the territorial principle was taken as the basis for the exercise of criminal jurisdiction whereas the 1949 four Geneva Conventions impose a duty on states to prosecute war crimes in accordance with the principle of universal jurisdiction.

Since crimes of genocide can hardly be committed without at least indirect participation of the state agencies, the Convention has been unable - in view of this basic defect - to attain any practical significance as a penal provision. This is so because states will hardly prosecute crimes committed by themselves or their organs against protected groups unless the responsible government is overthrown by a political or military defeat as happened in Germany in 1945 or in Rwanda in 1994.

Other treaties under international criminal law have established the non-applicability of statutory limitations to the crime of genocide. To give an example, article 1(b) of the Convention on the Non-applicability of the Statutory Limitations to War Crimes and Crimes Against Humanity[169] states that no statute of limitation shall apply to crimes of genocide as defined in the 1948 Genocide Convention, irrespective of the date of their commission. Clearly, the unrestricted retroactive effect of this exclusion of limitation, conflicts with the fundamental principle of the rule of law enshrined in the maxim *nulla poena sine lege* that prohibits retroactivity in criminal law matters.

A number of cases emphasise the prohibition of international crimes for the public good. In 1961, Adolf Eichmann, who shared heavy responsibility for the extermination of the Jews during World War II, was sentenced to death under Israeli law by the District Court in Jerusalem for, *inter alia*, a crime against humanity. Following the rejection of his appeal by the Israel Supreme Court,[170] he was executed on 31 May 1962. The District Court based its authority to exercise jurisdiction in this case on, *inter alia*, the view that crimes against humanity constitute *delicta juris gentium*, to which the principle of universal jurisdiction has at all times been generally applicable, and also that the Israeli law under which Eichmann was prosecuted was modelled on the genocide provision of the 1948 Convention.

Eichmann was followed in the United States in the 1985 case of *Demjanjuk v Petrovsky*.[171] In that case which involved an extradition request by Israel, the US Federal Court and both the District Court and the Sixth Circuit of the Court of Appeal accepted Israel's right to try a person charged with murder in the concentration camps of Eastern Europe. The Federal Court held that the crimes were crimes of universal jurisdiction over which any state may assume

[169] UN General Assembly Resolution 2391 (XXIII), 26 November 1968.

[170] See *Attorney-General of Israel v Eichmann* (1962) 36 ILR 5 (Supreme Court of Israel).

[171] (1985) 603 F Supp 1468 aff'd 776 F 2d 571 (6th Circuit).

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jurisdiction to try the offending enemies of mankind. In Canada, the Supreme Court in the 1994 case of *R v Finta*[172] endorsed Parliament's conferment to Canadian courts the jurisdiction to try crimes against humanity wherever in the world such crimes may have been committed.

And recently in the *Pinochet* cases,[173] the British House of Lords ultimately accepted that Spanish Courts could exercise prosecutorial jurisdiction over the former dictator of Chile for crimes against humanity. General Augusto Pinochet had been arrested in England at the behest of Spain and he was up for extradition to Spain, to stand trial for crimes against humanity allegedly committed in Chile during his rule.

The Central issue in the *Pinochet* cases was the question of immunity of former heads of state from the criminal processes of foreign national courts. The clear sentiment of the majority of the Law Lords who heard the matter agreed, in both the *Pinochet Case* No 1 and the *Pinochet case* No 3, that for former heads of state the only relevant question of immunity in the criminal processes in foreign courts is the question of subject matter immunity or immunity *ratione materiae*. This immunity, held the Court, a former head of state may not enjoy if the criminal processes in question relate to international crimes.[174]

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[172] (1994) 1 SCR 701 (Supreme Court of Canada).

[173] *R v Barte and the Commissioner of Police for the Metropolis &Ors Ex Parte Pinochet* (No 1), (1998) 3 WLR 1456; and *R v Barte and the Commissioner of Police for the Metropolis & Ors Ex Parte Pinochet* (No 3). The same appeal was heard twice, the first appeal having been set aside in the *Pinochet case* (No 2) for procedural reasons of improper constitution of the first appeal panel. In particular, Lord Hoffman, one of the Law Lords who formed the majority, had failed to disclose his relationship with Amnesty International, a human rights NGO which had intervened and made submissions against the immunity if Pinochet.

[174] Under English law, however, the second appeal panel (*in the Pinochet Case* No 3) that such immunity of former heads of state is lost only from the date when the British Parliament passed the appropriate legislation domestically aligning British law with international criminal law.

As regards incumbent heads of state, the House of Lords held in both cases (Nos 1 and 3) that their immunity is of a different order. It is a personal immunity or immunity *ratione personae*. By way of *obiter dictum,* the Law Lords held that an incumbent head of state might indeed enjoy this type of immunity from national courts, even for international crimes. The basis of this immunity, they held, is the concept of equality of sovereignty, under which a sovereign may not be subjected to the judicial processes of another sovereign.

A former prime minister was also convicted by the ICTR in 1998 for violation of international criminal law. In *Prosecutor v Jean Kambanda*[175] the ICTR sentenced Kambanda, the former Prime Minister of Rwanda, to life imprisonment for his role in the 1994 Rwandan genocide. That Kambanda held the position of Head of State during the genocide was taken into account as an aggravating factor. The ICTR stated:[176]

> The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population.

In the new order of international criminal law there may yet be no immunity for any head of state, incumbent or erstwhile, who commits crimes against humanity. The *Pinochet* cases have removed immunity for former heads of state,[177] and may have suggested *per obiter dictum* that there is immunity for incumbent heads of state, from the criminal processes of foreign national courts. At the international tribunals, such as the ICC, there may be no scope for immunity for incumbent heads of state for three reasons at least.

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[175] ICTR-97-23-5, judgment of 4 September 1998; Summary of judgment in (1998) 37 ILM 1411; full judgment available at <htpp://www.ictr.org> (accessed on 30 September 2002).

[176] Para 44.

[177] Indeed, the aspects of the Pinochet Case No 3, which are based strictly on the interpretation and application of British law, ought not to rob that case of its value in international law. Naturally, those aspects of that case may bind only British judges of lower hierarchy who must follow the decisions of the House of Lords on the point. For the international community, however, the *Pinochet Cases* will provide a useful reference on the subject whether a former head of state may enjoy immunity from prosecution for crimes against humanity and other international crimes.

First, the Rome Statute of the ICC rules out such immunity by providing in article 27 that:

> (1). The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

One must particularly note that this provision contains language limiting the removal of immunity to former heads of state or ex-officials. Second, the basis of the *ratione materiae* immunity of an incumbent head of state that is the sovereign equality of states, which makes it objectionable to subject one sovereign head (embodying the sovereignty of his country) to the processes of an equal sovereign, does not apply to an international tribunal. Arraigning an incumbent head of state before an international tribunal may well offend traditional sovereign sensibilities of nations.

But it will not amount to subjecting one sovereign to the criminal processes of another sovereign. Rather, as such courts would have been established by states, including perchance the accused or his (her) predecessor, trial by such an international tribunal could well be viewed as trial by one sovereign head by his (her) sovereign peers, as represented collectively by the international tribunal seized of the case, to whom all those sovereigns had given their complementary jurisdiction to try international criminals.

Third, there will be no rule of customary international law that may be set up as vitiating the idea of a trial by an incumbent head of state before an international criminal court. There is simply no such rule. Quite the contrary, international legal practice is replete with the idea of subjecting sovereignty to

the processes of international tribunals in non-criminal matters such as human rights matters.

Due to the repugnant nature of international crimes (genocide, war crimes and crimes against humanity), their perpetrator is regarded as a *hostis humani generis*, or in English, an enemy of humankind.[178] To address the issue of suppression and punishment of international crimes, the Statute of the ICC was adopted on the night of 17 July 1998 in Rome and consists of an eloquently worded preamble[179] and 13 parts, comprising 128 articles altogether.[180] In the Statute, the delicate balance between efficient criminal prosecution and an adequate consideration of state sovereignty interests is most evident in the more political parts of the Statute, especially the provisions of the Court's jurisdiction, on crimes and on cooperation with the Court.

Until recently, the prevailing dispensation of impunity allowed tyrants to hide under the cloak of diplomatic immunity to commit horrendous crimes and get away with it. Writing in the context of the Rwandan Genocide of 1994 and the role of the International Criminal Tribunal for Rwanda, the editors of the London-based journal *African Topics* observed the following scenario, which prevailed not too long ago:[181]

> The 'normal' course of events ... then would have run like this. The hundreds of thousands who perished would be forgotten by the world at large. Their friends and

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[178] Blacks Law Dictionary (1990) 738.

[179] The first sentence of the preamble, for example, reads as follows: 'conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time ...'.

[180] These parts are as follows: Part 1-Establishment of the Court (arts 1-4); Part 2-Jurisdiction, Admissibility and Applicable Law (arts 5-21); Part 3-General Principles of Criminal Law (arts22-33); Part 4-Composition and Administration of the Court (arts 34-52); Part 5-Investigation and Prosecution (arts 53-61); Part 6-The Trial (arts 62-76); Part 7-Penalties (arts 77-80); Part 8-Appeal and Revision (arts 81-85); Part 9-International Cooperation and Judicial Assistance (arts 86-102); Part 10-Enforcement (arts 103-111); Part 11-Assembly of States Parties (art 112); Part 12-Financing (art 113-118); Part 13-Final Clauses (art 119-128).

[181] See *African Topics* (London) October/ November 1998 3.

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> relatives and survivors would have to deal with their private pain privately. In the meantime, those who planned and executed these acts would be in power having consolidated even more power. And even in the rare cases where the organisers of the crime would be out of power they would be guaranteed a very good life in a country ruled by their friends. The UN would issue pious but weak condemnations against the 'atrocities' and call on all sides to stick to the 'cease-fire'.

Fortunately, the tide of international law is rapidly turning against the reign of impunity for international crimes. The impact of the new world order cannot but make the whole world, especially Africa, a much better place for human beings.[182] This in turn promotes the public good by protecting the public from atrocious acts of those who wield political or military power. International criminal law also promotes the public good by providing for the individual punishment of perpetrators of international crimes.

3.5.2 International Humanitarian Law

The possibility of legal regulation of warfare seems illogical because while the use of force between states is prohibited by a peremptory norm of international law,[183] it is a reality that armed conflicts occur. By providing the legal regulation of armed conflicts, international humanitarian law does not aim at the humanisation of warfare, an impossible task in itself. Instead, it attempts at the humanisation of the inevitable consequences of war, by strengthening the protection of persons affected by hostilities (the civilian population, combatants who are unable to fight on account of sickness, wounds or shipwreck and prisoners of war).[184]

There are two principal sources of international humanitarian law. The first, and the principal source, is the so-called 'Geneva law', consisting of the four

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[182] Eboe-Osuji (1999) 16.

[183] Art 2(4), UN Charter.

[184] Drzewicki (1999) 43.

Geneva Conventions of 12 August 1949[185] as modified by the two Protocols of 8 June 1977,[186] additional to those Conventions. The second source is the 'Hague Law' consisting of the rules of customary international law on the means and methods of warfare, as laid down in the various Hague Conventions.[187]

Jus in bello (the law of war) is probably as old as war itself. The importance of such regulation is two-fold. First, it manifests a common understanding of the necessity to have some kind of regulation to govern warfare. Second, it proves the existence of the feeling that under certain circumstances, human beings, whether friend or foe deserves some protection. The beginning of modern international humanitarian law dates back to the battle of Solferino, a terrible battle in Northern Italy between French, Italian and Austrian forces in 1859.[188] The atrocities committed in this battle led Henry Dunnant to spearhead a campaign for the codification of the laws and customs to govern combatants and protect non-combatants.[189]

One of the earliest documents to be adopted in the field of international humanitarian law was the 1868 St Petersburg Declaration Renouncing the

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[185] These Conventions are: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 Aug, 1949 6 UST 3114, 75 UNTS 31; The Geneva Convention for the Amelioration of the Condition Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 Aug 1949 6 UST 3173, 75 UNTS 85; The Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949 6 UST 3316, 75 UNTS 135; The Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 Aug 1949, 6 UST 3516, 7 UNTS 287. For texts, see also <http://www.icrc.org> (accessed on 1 August 2002). 188 States have ratified the four Conventions.

[186] Additional Protocol I strengthens the victims of international armed conflicts, while Additional Protocol II strengthens the victims of non-international armed conflicts.

[187] Such as the Hague Conventions of 1899 and 1907.

[188] Shaw (1991) 629.

[189] As above.

Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.[190] This Declaration provides that 'the only legitimate object which states should endeavour to accomplish is to weaken the military forces of the enemy'.[191] For this reason, the Declaration outlaws the use of explosive projectiles under 400 grammes weight, because they 'aggravate the sufferings of disabled men, or render their death inevitable'.[192]

A fundamental milestone in the development of international humanitarian law is the Hague Conferences of 1899 and 1907, at which 13 Conventions were adopted.[193] Convention number IV of 1907 concerning the laws and customs of war on land contained the famous 'Marten's Clause', drafted by the Russian Friederic de Martens.[194] The clause declares that the Convention is 'animated by the desire to serve, even in extreme cases (where war would not be preventable), the interest of humanity and the ever-progressive needs of civilisation'.[195] The clause particularly attempts to seal any loopholes in the law by providing that in cases not covered by the Convention, 'civilians and combatants remain under the protection and authority of the principles of international law derived from the principles of humanity and the *dictates of the public conscience*'.[196]

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[190] Adopted on 11 Dec 1868, entry into force 11 Dec 1868; reprinted in Roberts & Guelff (1989) 29.

[191] Preamble, para 3.

[192] Preamble, para 6.

[193] Shaw (1991) 630-631. See, for instance, the 1899 Hague Convention Concerning Asphyxiating Gases, reprinted in Roberts & Guelff (1989) 34.

[194] The 1907 Hague Convention IV Respecting Laws and Customs of War, adopted 18 Oct 1907, entry into force 26 Jan 1910, reprinted in Roberts & Guelff (1989) 43.

[195] Art 1.

[196] As above. Emphasis added.

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In 1925, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare was adopted.[197] This Convention attempts to protect the 'public good' during armed conflicts by providing that the indiscriminate use in war of asphyxiating or poisonous gases, and of 'all analogous liquids, materials or devices has been condemned by the general opinion of the civilised world'.[198] Consequently, the Convention declares that 'the prohibition of these weapons shall be universally accepted as part of international law'.[199]

Another instrument that seeks to promote the interests of the larger public during armed conflicts is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[200] The Convention prohibits the 'damage to cultural property belonging to any people whatsoever' because such property makes a 'contribution to the culture of the world'.[201] The Convention recognises that 'the preservation of cultural heritage is of very great importance to *all peoples of the world* and that it is important that this heritage should be [accorded protection]'.[202]

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[197] See, 1925 Geneva Convention for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, adopted on 17 June 1925, entry into force on 8 February 1928, reprinted in Roberts & Guelff (1989) 137.

[198] Preamble, para 1.

[199] Preamble, para 2.

[200] Adopted on 14 May 1954, entry into force on 7 Aug 1956, reprinted in Roberts & Guelff (1989) 338.

[201] Preamble, para 2.

[202] Preamble, para 3. Emphasis added.

In promotion of the 'public good' during armed conflicts, environmental modification by military means is also prohibited.[203] Environmental modification is defined as:[204]

> [A]ny technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including biota, lithosphere, hydrosphere and atmosphere or outer space.

The reason behind this prohibition is that 'scientific and technical advances may open new possibilities with respect to the modification of the environment'.[205] At the same time, military or other hostile uses of environmental modification techniques 'could have effects extremely harmful to human welfare'.[206]

In the case of mines, the Convention Relating to the Prohibition of the use of, Stockpiling, Production and Transfer of Antipersonnel Mines and Their Destruction was signed by 121 countries in Ottawa on 3-4 December 1997.[207] The Convention entirely prohibits the use of, stockpiling, production and transfer of antipersonnel mines.[208] It also provides for mine clearance and assistance to mine explosion victims.[209]

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[203] See the 1977 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted on 18 May 1977, entry into force on 5 Oct 1978.

[204] See art 2 of the 1977 Convention above.

[205] Preamble, para 3.

[206] Preamble, para 6.

[207] See Convention Relating to the Prohibition of the Use of, Stockpiling, Production and Transfer of Antipersonnel Mines and Their Destruction, Adopted in Ottawa, Canada, 3-4 December 1997, reprinted in (1997) 36 ILM 1507; and in Sassòli & Bouvier (1999) 324.

[208] Art 1.

[209] Art 6.

An 'antipersonnel mine' is defined in the Convention as a mine which can explode 'by the presence, proximity or contact of [any] person' and one that is designed to 'incapacitate, injure or kill one or more persons'.[210] A 'mine' is defined as 'munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle'.[211]

The gist of the Convention is to protect the public of the world from injury or death caused by antipersonnel landmines. State parties to the Convention express their determination 'to put an end to the suffering and casualties caused by antipersonnel mines that kill or maim hundreds of people every week'.[212] They also stress 'the role of public conscience in the furthering of the principles of humanity'.[213] The Convention itself is based on the principle of distinction, the principle that the right of the parties to a conflict to choose methods or means of warfare is not unlimited, and the principle that prohibits employment in armed conflicts of weapons that cause superfluous injury or unnecessary suffering.[214]

Generally, the provisions in the instruments of international humanitarian law discussed above seek to protect the needs of the greatest portion of the international society, which more often than not is the non-fighting population and combatants rendered *hors de combat*. In addition, the following general principles of international humanitarian law also manifest the protection of the public good during armed conflict:[215]

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[210] Art 2(1).

[211] Art 2(2).

[212] Preamble, para 1.

[213] Preamble, para 2.

[214] Preamble, Para 11.

[215] See *1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflict*, reprinted in Roberts & Guelff (1989) 314. These rules are a summary of international humanitarian law, and were formulated by the ICRC since 'the laws of war are numerous and complex'. See explanatory notes in Roberts & Guelff (1989) 314.

- Persons who are not, or are no longer taking part in hostilities shall be respected, protected and treated humanely. They shall be given appropriate care, without any discrimination.

- Captured combatants and other persons whose freedom has been restricted shall be treated humanely. They shall be protected against all acts of violence, in particular against torture. If put on trial, they shall enjoy fundamental guarantees of a regular judicial procedure.

- The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous or unnecessary suffering shall be inflicted.

- In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population on the one hand and military objectives on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks.

In light of the above analysis of the principles of international humanitarian law, it may be concluded that the aim of this branch of law is to protect the 'public good'. It does so by protecting non-combatants, prisoners of war, civilians and soldiers rendered *hors de combat* from the adverse effects of hostilities. Also, the protection of cultural property, the prohibition of hostile environmental modification techniques and the limitation of the means and methods of warfare aim at the protection of the members of the general public world-wide from the effects of war. This promotes the public good.

3.5.3 International Environmental Law

The world community is nowadays increasingly concerned with the well being of the global environment. The environment of the world best demonstrates the

interdependencies and interconnections of the international community. As Kwakwa notes:[216]

> We now live in a world which is expansive yet intimate, borderless yet fractured. It is now generally accepted that the world is a single ecosystem whose borderless habitat is shared by all races, nationalities, generations and species. The increasingly transnational aspects of environmental hazards have diminished traditional national prerogatives of sovereignty as a defence. To be sure, the environment may be the greatest threat to a state's exercise of traditional sovereign functions. Chlorofluorocarbons [CFCs] released in one country may deplete the ozone layer shared by other countries, just as the excess burning of fossil fuels in one country may contribute to a global greenhouse effect which adversely impacts even on non-fossil fuel-burning counties.

The question of intervention has been raised in the context of environmental protection. Environmental pollution typically opposes the national interests and the exercise of sovereignty by the source state against the interests of other states.[217] One author notes that:[218]

> It seems reasonable that a sovereign state should be able to engage in economically beneficial activities within its borders, using its national resources as it pleases. However, it seems even more reasonable that neighbouring states should not have to suffer for the way in which that state uses its national resources.

The above reasoning is supportable on the basis of the general principle in human rights law that a person has complete freedom to exercise individual rights, as long as the exercise of those rights does not infringe on the rights of others. Indeed, most domestic legal systems have developed the principle requiring the use of one's property in a manner that does not injure others or their property. In international environmental law, this is the 'good

[216] Kwakwa (1994) 18.

[217] Kwakwa (1994) 18.

[218] As above.

neighbourliness' principle enshrined in the maxim *sic utere tuo ut laenum ad laedas* (use your own so as not to injure your neighbour).

The Stockholm Declaration adopted at the 1972 UN Conference on the Human Environment (UNCHE) draws a judicious balance between the sovereignty of states and the interests of others (the public good). It affirms that states have a sovereign right to exploit their own resources pursuant to their own environmental policies, but also establishes the duty to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[219] The question raised by this and other provisions is how and when the international community should be able to intervene in a state whose activities are harming the environment on which other members of the international community depend.[220]

The UNCHE culminated in, *inter alia*, the adoption of a Declaration of Principles on the Human Environment, an Action Plan and recommendations on the preservation and conservation of the human environment.[221] The Declaration of Principles, known as the Stockholm Declaration, contains twenty-six principles relating to the protection, management and preservation of the environment.

Most importantly, the Stockholm Declaration laid down two duties of states in respect of the environment, namely, the duty not to cause environmental harm and the duty to co-operate in matters of environmental protection. These obligations are embodied in principle 21 and principle 24 of the Declaration respectively. The two principles are a restatement of the doctrine enshrined in the *sic utere tuo* maxim.

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[219] See Principle 21 of the Stockholm Declaration, UN Doc A/CONF.48/14 (1972).

[220] Kwakwa (1994) 19.

[221] Report of the UNCHE, Stockholm, Sweden, 5-16 June 1972 (New York: UN) UN Doc A/ CONF.48/14 (1972).

The Stockholm Conference and its products marked a departure from the view of an earth unlimited in abundance created for man's exclusive use, to a concept of the earth as a domain of life or biosphere for which humankind is a guardian.[222] On this point, Caldell writes:[223]

> The older view saw this planet as a storehouse of resources to be freely developed for human use. The post-Stockholm view saw the earth as an ultimately unified system of living species and interactive biochemical processes that may supply man's needs so long as he observed the system's rules.

The dangers posed by unregulated uses of the resources of the earth have been identified the principles relating to air pollution and the depletion of the ozone layer. These principles, for instance, ban long-range transboundary air pollution, which is defined as:[224]

> Air pollution whose physical origin is situated wholly or in part within the area under the natural jurisdiction of one state and which has adverse effects in the area under the jurisdiction of another state at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.

Under the Convention, states are obliged to limit, and as far as possible, gradually reduce and prevent air pollution, including long-range transboundary air pollution.[225]

Also banned for the 'public good' is the depletion of the stratospheric ozone layer, which has the effect of letting excessive ultraviolet radiation through to the surface of the earth.[226] Global effort to tackle the problem of ozone

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[222] Sifuna (1999) 31.

[223] Caldwell (1990) 21, cited in Sifuna (1999) 32.

[224] See art 1(b) of the 1979 UN Convention on Long-range Transboundary Air Pollution, reprinted in Kiss (1993) 519.

[225] Art 2 of the Convention.

[226] Shaw (1990) 557.

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depletion and the consequent effect of global warming led to the adoption in 1985 of Vienna Convention for the Protection of the Ozone Layer.[227] This Convention creates an institutional structure for the elaboration of protocols laying down standards concerning the production of chlorofluorocarbons (CFCs), the agents which cause the destruction of the ozone layer. Under the Convention, contracting parties agree to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.[228]

In 1987, the World Commission on Environment and Development (WCED), chaired by Gro Harlem Brundtland, presented its Report entitled 'Our Common Future', in which it devised the concept of 'sustainable development' that stresses the need to make environmental considerations in development programmes. In the Report, sustainable development is defined as 'development which meets the present needs without compromising the ability of the future generations to meet their own needs'.[229] In an apparent pursuit for 'public good' in the management and protection of the global environment, the Report devised this concept of 'sustainable development' as a means of finding a way through the impasse posed by the then apparently rigid environmentalist and pro-development positions.

'Our Common Future' marked an intellectual watershed in the evolution of international environmental norms. Although it is most often cited for its embrace of its concept of 'sustainable development', the Report also stresses the sovereign-state framework as the key to effective environmental governance. The report sets out a list of 'proposed legal principles for environmental protection and sustainable development'. Although principle 1

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[227] Reprinted in Kiss (1993) 301.

[228] Art 2(1) of the Convention.

[229] WCED (1987) 43.

asserts, 'all human beings have the fundamental right to an environment adequate for their health and well being', each of the remaining 21 principles focuses on the rights and responsibilities of nation-states. Indeed, each of the subsequent principles begins with same two words: 'states shall ...'.

In 1992, the World Conference on Environment and Development (popularly known as the Earth Summit) was held in Rio de Janeiro, Brazil.[230] Two important treaties were opened for signature at the conference. These are the UN Framework Convention on Climate Change and the UN Convention on Biological Diversity. The Rio Conference also adopted the Rio Declaration on Environment and Development, and Agenda 21.[231]

The most important contribution of these two documents is the stressing of the concept of intergenerational equity and the precautionary principle. The concept of intergenerational equity requires present generations in their activities to be mindful of future generations. On its part, the precautionary principle requires early environmental protection measures that should anticipate and prevent the causes of environmental degradation rather than wait until harm has occurred.[232]

The inextricability of environmental protection and developmental activities and the need to keep that link in mind was also emphasised in the World Summit on Sustainable Development, held in Johannesburg, South Africa from 26 August to 4 September 2002.[233] The Summit adopted the Johannesburg

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[230] *Report of the UN Conference on Environment and Development*, Rio de Janeiro, Brazil, 3-14 June 1992, Vol 1 (New York: UN) UN Doc A/CONF.151/26/Rev.1 (Vol 1) (1992).

[231] As above.

[232] Sifuna (1999) 36.

[233] For details on the delegates to the conference and logistical organisation of the Summit see <htpp://www.joburgsummit.com> (accessed on 30 September 2002).

Declaration on Sustainable Development,[234] in which the world leaders reiterated their commitment 'to build a humane, equitable and caring global society cognisant for the need for human dignity for all'.[235] The environmental challenges faced by the nations of the world were well articulated in the Declaration as follows:[236]

> The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, and adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water, and marine pollution continue to rob millions of a decent life.

The leaders emphasised that the goals of sustainable development can only be achieved through an 'effective, democratic and accountable international and multilateral institutions',[237] and committed themselves '*to act together* united by a *common* determination to save ... [the earth], promote human development and achieve *universal prosperity and peace*'.[238]

From the foregoing, it is evident that the basis for environmental management and protection strategies is the sustenance of life on earth for the common good. All existing international environmental law treaties concern environmental aspects that were previously under the control of one state or region. The human rights implications of this state of affairs is that there is more protection of the right to a clean and healthy environment through a host of treaties on virtually every aspect of the environment, from the ozone layer to

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[234] See United Nations, World Summit on Sustainable Development, 'The Johannesburg Declaration on Sustainable Development', Johannesburg, South Africa, UN Doc A/CONF.199/L.6/Rev 2, available online at <http://www.dfa.gov.za/docs> (accessed on 30 September 2002.

[235] Art 1 of the Declaration.

[236] Art 13 of the Declaration.

[237] Art 28 of the Declaration.

[238] Art 30 of the Declaration.

the marine environment, the protection of flora and fauna as well as the control of global warming. International environmental law attempts to ensure that states do not invoke their territorial sovereignty to adversely interfere with the environment, and this is done in order to promote the interests of the general international society.

3.5.4 Law of International Watercourses

What is today referred to as the law of international watercourses was initially known as international river law.[239] Today the term 'international watercourse' is usually used, and it stands for rivers and lakes parts of which are situated in different states. Rivers and lakes have always played a pivotal role in human civilisation.[240] The role that such great watercourses as the Yangtze, the Hwang-Ho, the Indus, the Ganges and the Nile played in the social and economic progress of man needs no emphasis.

Even during these early times, the central doctrine of international river law was that of freedom of navigation, propounded by Hugo Grotius and others.[241] The basis for the doctrine of freedom of navigation is that the water resources in an internationally–shared river belongs to all riparian states, for their common good. Yet portions of international watercourses form part of the territory of the state in which the portion is. This means that such portions are under the sovereignty of the state in question.

As the use of water by one riparian state may prejudice others leading to technical and judicial problems, a number of general legal principles attempt to reconcile the sovereignties of watercourse states, on the one hand, and their

[239] Early international river law dealt with navigation, because the first, and for long, the most important use of such rivers was communication with the outside world. See Godana (1985) 3.

[240] In early times, the principal uses of rivers were navigation, irrigation and cultural uses. Later developments in technology and perspectives in water utilisation brought the prominence of the non-navigational uses of international water resources.

[241] For a detailed discussion on the views of Grotius, see Vitantyi (1949), Chap 1.

common interests, on the other hand. These include the principle of territorial integrity and that of equitable utilisation.

Briefly, the doctrine of territorial integrity espouses the old common law doctrine of water rights whereby a lower riparian (watercourse state) has the right to the full and uninterrupted flow of water of natural quality. The upper riparian may not interfere with the natural flow without consent of downstream riparians. To a great extent, this is the neighbourship doctrine that finds expression in the maxim *sic utere tuo* referred to earlier on.

The principle of territorial integrity is reflected in the 1997 UN Convention on the Non-navigational Uses of International watercourses, which reads as follows:[242]

> Before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse state, it shall provide those states with timely notification thereof.

In an attempt to balance the need to protect the rights of lower riparians with those of upper riparians for the 'common good', the 1997 Convention goes further to provide that a state so notified shall reply to the notification.[243] In the absence of a reply to notification within the prescribed time, the notifying state may proceed with the planned measures.[244]

Several contemporary international legal documents and case law reiterate the need for equitable utilisation of international watercourses. The International Law Association (ILA) Resolution of 1958 recognises every co-riparian state's right to a reasonable and equitable share in the beneficial uses of the waters of

[242] Art 12.

[243] Art 13.

[244] Art 16.

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an international watercourse.[245] This provision was echoed in the 1966 International Law Commission (ILC)'s 'Helsinki Rules'[246] and the 1997 UN Convention on Non-navigational Uses of International Watercourses.[247]

In terms of case law, the *Trial Smelter Arbitration*[248] is a well-known decision of an international tribunal where it was observed that 'no state has a right to use or permit the use of its territory' so as to cause damage 'by fumes in or to the territory of another or to the properties of the persons therein'.[249] In *the Lac Lannoux Case*[250] between Spain and France the arbitral tribunal held that a state undertaking works in an international waterway has to take into account the interests of other riparian states. Similarly, in the *River Order Case,*[251] the PCIJ invoked the exegesis of justice and considerations of utility and favoured a 'community of interest' doctrine in navigation among all the riparians based on the equality of rights over the whole navigable course of the River Order.

The gist of the law of international watercourses is the advancement of the interests of all riparian states. This militates against an individual state making claims based on an absolute notion of sovereignty over the resources of an internationally shared watercourse. As a result disputes are avoided, and the species of flora and fauna are preserved for the common good.

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245 Resolution of the ILA adopted on 6 September 1958, New York (Report 48th Conference) 99.

246 Art IV.

247 Art 6.

248 RIAA 3 (1938) 1905.

249 In this case (between the US and Canada), Sulphur Dioxide from a smelting factory on Canadian side of the border caused environmental harm in the form of acid rain which destroyed crops in the Colombian valley in the State of Washington, US.

250 RIAA 12 (1957) 281; 24 ILR (1957) 119.

251 RIAA 10 (1955) 211.

3.5.3 International Law of the Sea

The seas have historically performed two important functions: First, as a medium of communication and second, as a vast reservoir of resources.[252] Both these functions have stimulated the development of legal rules to further the public good in the utilisation of the seas and their living and non-living resources.

International law of the sea emerged in the seventeenth century and was characterised by the notion of exclusive sovereignty, in relation to all activities aboard a ship, of the country under whose flag the ship was sailing. This sovereignty, based on the notion of *mare liberum* (freedom of the seas/freedom of navigation), was however curtailed by two exceptions. The suppression of the slave trade and piracy, both premised on customary international law, allowed other states to violate the sovereignty of the flag states. The criminalisation of the slave trade and piracy found its way into the four conventions adopted by the 1958 Geneva Conference on the Law of the Sea.[253]

According to article 22 of the Convention on the High Seas, states have the right to visit a foreign merchant ship on suspicion of piracy or of slave trade. Should the ship be engaged in piracy, states have the right to seize the ship,[254] whereas in the case of slave trade, states only have the right to visit the foreign vessel so that the slaves shall *ipso facto* be free, once they have taken refuge in the boarding vessel.[255] Supposing citizens of third states are in the

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[252] Churchill & Lowe (1991) 1; Shaw (1991) 293; Wallace (1992) 128.

[253] These conventions are: The Convention on the Territorial Seas and the Contiguous Zone, 516 UNTS 205; The Convention on the Continental Shelf, 499 UNTS 311; The Convention on the High Seas, 45 UNTS 82; and the Convention on Fishing and the Conservation of the Living Resources of the High Seas, 599 UNTS 285.

[254] Article 19.

[255] Articles 13 and 33(1).

hands of pirates or slave traders, the norms regulating the suppression of piracy and slave trade allow armed action to be taken.[256]

From the point of view of humanitarian intervention on grounds of humanity, the rules on the suppression of the crime of piracy have a useful part to play when it is a question of resorting to force in places outside the jurisdiction of any state, such as the Antarctic or the ice islands in the Artic circle. As far as jurisdiction is concerned, both the Antarctic and the ice islands are equated to a *terra nullius* (no man's land),[257] and acts of violence committed by the crew of a ship or by passengers on that ship against foreign persons or property in those areas are to be considered as acts of piracy.[258]

In an article on humanitarian intervention, Brownlie, though advocating the illegality of the resort to force for protecting human rights, states:[259]

> ... [I]intervention [i.e. the threat or use of armed force for protecting human rights] may be lawful, in the sense of 'not prohibited' but a part of the competence of states, in areas outside national, i.e., exclusive territorial jurisdiction. Thus intervention may be lawful to prevent atrocities by insurgents, pirates, terrorists and others not acting on behalf of a state or organisation of states, in control of ships, aircraft or spacecraft, on or over the high seas, in space or over Antarctica or areas with a similar regime.

Having confined his remarks within the limits of a short article, Brownlie did not elaborate further on this point. Yet he has drawn attention to areas in which forcible intervention could be lawfully exerted.[260] High seas are, by definition, areas outside of national jurisdiction except where piracy and the slave trade are being committed. These exceptions are found not only in the 1958

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[256] Ronzitti (1985) 137.

[257] See Brownlie (1998) 266; Ronzitti (1985) 138.

[258] Art 15(1)(b), 1958 Convention on the High Seas; art 101(a)(ii).

[259] Brownlie 'Humanitarian Intervention' 227, cited in Ronzitti (1985) 138.

[260] Ronzitti (1985) 135.

Convention on the High Seas but also in the 1982 UN Convention on the Law of the Sea.[261] The 1982 Convention goes further and prohibits the trafficking, in the high seas, in narcotic drugs and psychotropic substances.[262]

The above provisions limiting the jurisdiction of states even in the high seas are largely motivated by the search for the public good in maritime activities. Moreover, the adoption of the 1982 Convention was catalysed by the need to preserve the resources of the seabed beyond the limits of national jurisdiction as common heritage of mankind and the danger of a scramble for the sea.[263] Thus the Convention provides details on how the resources of the seabed beyond national jurisdiction can be exploited for the benefit of the entire human race.[264] It also contains a comprehensive legal regime of 46 articles, relating to the protection of the marine environment for the public good.[265]

The state parties to the 1982 Convention express that they are 'conscious that the problems of the ocean space are closely interrelated to be considered as a whole'.[266] The Conventions establishes a legal regime that affords an opportunity for all the states of the world to benefit from the utilisation of the seas. In the territorial sea for instance, the coastal state may exercise

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261 UN Convention on the Law of the Sea, adopted on 10 December 1982 in Montego Bay, Jamaica, UN Doc A/CONF.62/L2, 21 ILM 1261 (1982) (entry into force 16 November 1994), reprinted in Rummel-Buska & Osafo (1994) 10; see arts 105, 109 and 99.arts 99, 105 and 109; Cf art 13,19 and 33 of the 1958 Convention on the High Seas.

262 Art 108.

263 The Preamble to the Convention, para 1 states that the Convention is 'prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea'.

264 The Convention creates the International Seabed Authority (ISBA) to control virtually every aspect of deep seabed mining, see art 140 ff.

265 See Part XII of the Convention entitled 'Protection and Preservation of the marine Environment', arts 192-237.

266 Preamble, para 3.

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complete sovereignty.[267] At the same time though, other states are have the right of innocent passage within the territorial sea.[268] Even internal waters which legally form part of the territory of the coastal states may be entered by foreign ships for the common good, but only in cases of *force majeure* or distress at sea or for purposes of rendering assistance to persons, ships or aircraft in danger at sea.[269]

In the Exclusive Economic Zone, states have rights to the economic utilisation of the living resources of the sea.[270] However the states are enjoined, for the 'public good', to 'have due regard to the rights of other states'.[271] The other duties of states in the Exclusive Economic Zone include the duty to:[272]

- Remove any installations or structures which are abandoned or disused to ensure the safety of navigation.

- Give due notice of any construction of artificial islands, installations or structures and to maintain permanent means of giving warnings of their presence.

- Give appropriate publicity to the depth, position and the dimensions of any installations or structures.

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267 See art 2 of the 1982 Convention. The territorial sea is a zone in the sea extending up to 12 nautical miles from the baseline.

268 Art 17 of the 1982 Convention. Innocent passage is defined in the Convention to mean navigation through the territorial sea for the purpose of either traversing the territorial sea without entering the internal waters, or proceeding to or from internal waters.

269 See art 18(2) of the 1982 Convention.

270 See art 56(1) of the 1982 Convention.

271 Art 56(2) of the 1982 Convention.

272 See art 60(3) of the 1982 Convention.

The high seas, which are *res communis* are for the use of all.[273] The limitations that are put on states in their exercise of the freedom of the seas in the high seas are for the public good. The limitations require states, when traversing the high seas, to have regard to the interests of other states,[274] and to use the high seas for peaceful purposes.[275] For the common good, all states have certain rights in the high seas. Any state has a right to seize a pirate ship as well as to arrest and seize any person or property therein.[276] Also, any state may seize a ship in the high seas which is reasonably suspected to be involved in the slave trade,[277] the traffic of narcotic drugs or psychotropic substances,[278] or unauthorised broadcasting.[279]

In the high seas, nuclear testing is prohibited for the public good. In the *Nuclear Tests Cases,*[280] Australia and New Zealand sued France on the ground that it was carrying out nuclear tests on Murorua, A French atoll 4 000 nautical miles off the Australian coast. Australia and New Zealand complained that the tests were causing radioactive fallout in their respective territories. The ICJ did not address the legality of nuclear tests in the high seas. The cases were withdrawn following assurances by France that the tests would cease. However, it is plausible to conclude that nuclear tests in the high seas are

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[273] Art 87(1) of the 1982 Convention provides that 'the high seas are open to all states, whether coastal or land-locked'. The article further provides that all states may enjoy the freedoms of the sea, which are the freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law; freedom of fishing and freedom of scientific research.

[274] Art 87(2) of the 1982 Convention.

[275] Art 88 of the 1982 Convention.

[276] Art 105 of the 1982 Convention.

[277] Art 99 of the 1982 Convention.

[278] Art 108 of the 1982 Convention.

[279] Art 110 of the 1982 Convention.

[280] ICJ Rep (1974) 253 (*Australia v France*) and ICJ Rep (1974) 457 (*New Zealand v France*).

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illegal because the 1982 Convention on the Law of the Sea provides that the high seas shall be used for peaceful purposes.[281]

Provisions of the 1982 Convention on the Law of the Sea have relevance for the public good in the protection and preservation of the marine environment. There is a general obligation on all state parties to preserve and protect the marine environment.[282] States are also enjoined to take, individually or jointly as appropriate, all measures consistent with the Convention, that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.[283]

The 1982 Convention on the Law of the Sea also offers a regime for the exploration and exploitation of the resources of the deep seabed area for the benefit of humanity.[284] The Convention declares the deep seabed area and its resources 'the common heritage of mankind'.[285] Consequently, no state, or person can claim or purport to assert sovereignty over any part of the area or its resources.[286] All seabed exploration and exploitation is to be 'carried out for the benefit of mankind, by the International Seabed Authority.[287]

The above analysis of the law of the sea shows a recurrent theme; that of public good in this area of international law. Consequently, the analysis leads us to conclude that the normative values underlying the international law of the

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[281] Art 88 of the 1982 Convention.

[282] Art 192 of the 1982 Convention.

[283] Art 194(1) of the 1982 Convention.

[284] See part XI of the 1982 Convention, arts 133 to 183.

[285] Art 136 of the 1982 Convention.

[286] Art 137 of the 1982 Convention.

[287] Art 153 of the 1982 Convention.

sea and its developments are heavily influenced by the need to achieve public need. Rights and obligations of states are balanced so as to cater for the interests of all states, including land-locked states and geographically disadvantaged states.[288]

3.5.6 What Public Good does Humanitarian Intervention Serve?

Instead of the view that intervention in internal conflicts must be presumptively illegitimate, the prevailing trend today is to take seriously the claim that the international community ought to intercede to prevent bloodshed by whatever means are available.[289] This point was aptly summarised by the *Wall Street Journal*, when it editorialised that sovereignty is no longer an absolute right, that starvation and wanton killing are 'everybody's business', and that in such cases, 'any absolute principle of non-intervention becomes a cruel abstraction indeed'.[290] And reviewing, as we have done here, a wide range of contemporary changes, an editor of the *Economist* Magazine wrote as follows:[291]

> [We] are increasingly concerned not just to see countries well governed but also to ensure that the world is not irreparably damaged-whether by global warming, by the loss of species, by famine or by war...Increasingly, world opinion, when confronted by television pictures of genocide or starvation, is unimpressed by those who say, 'we cannot get involved, national sovereignty must be respected'.

Early writings in international law defended the concept of humanitarian intervention that it protects the public good. The works of Grotius, regarded by

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[288] See, for instance, art 69 and 70 of the 1982 Convention, providing respectively for the rights of land-locked states and geographically disadvantaged states.

[289] For detailed discussions on this point see Reed & Kaysen (eds) (1993), Damrosch (ed) (1993), Gottlieb (1993), Weiss (ed) (1993), Henkin *et al* (1991), and Damrosch & Scheffer (eds) (1991).

[290] See 'Everybody's Business' *Wall Street Journal* (New York) 24 August 1992 8.

[291] See 'New Ways to Run the World' *The Economist* (New York) 5 November 1991 11.

some as containing 'the first authoritative statement of the principle of humanitarian intervention',[292] reveal that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.[293] Grotius argued that humanitarian intervention serves 'community interests'.[294] He concluded that if 'some tyrant should inflict upon his subjects such treatment as no other is warranted in inflicting, the exercise of the right vested in humanity [of humanitarian intervention] is not precluded',[295] and other states may take up arms to help the persecuted.

The ICJ in the *Barcelona Traction case*[296] echoed the words of Grotius significantly. The Court fell short of expressly stating that states could result to war in response to gross human rights violations, but it nevertheless held that third states had a right in such situations, to either make representations to, or to make claims against, a state breaching obligations to the international community as a whole, primarily regarding human rights.[297]

The public good served by permitting humanitarian intervention may be illustrated in a number of ways. First, mass refugee flows are pre-empted.[298] Second, human rights and international peace and security, both of which are

[292] See Lauterpatch (1946) 1 46.

[293] As above.

[294] Grotius (1625) *De Jure Belli ac Pacis Libri Tres, Prolegomena,* para 38 (Kelsey Trans), cited in Lauterpatch (1946) 46.

[295] As above.

[296] ICJ Rep 1970 3.

[297] Para 32.

[298] However, it may be true that humanitarian intervention may itself lead to refugee flows, but such flows are likely to be of a lesser magnitude and would consist those running away from the area around the battle lines. Moreover such refugees are of a temporary nature and would ordinarily return after the military operation. In contrast, massive human rights violations leading or likely to lead to mass loss of lives in most cases lead to massive refugee flows and these would not be willing to return until the violations have been stopped completely and assurance of safety given.

of interest to all states, are secured. The inability of individual states to deal with intra-state conflicts is not simply an internal matter. The proliferation of rebel movements, small arms, and refugees[299] all threaten regional peace and security. It also negates international progress made so far in relation to the protection of human rights.

The doctrine of public good is based on a solidarist understanding of international relations. The solidarist view may be used to support the basis for humanitarian intervention in normative interpretation, by defending its commitment to justice. Solidarism has been defined as the 'solidarity or potential solidarity of the states comprising the international society, with respect to the enforcement of the law'.[300] According to Wheeler, this conception recognises that individuals have rights and duties in international law, but also acknowledges that individuals can have these rights enforced by states.[301] Consequently, the defining character of solidarism is that states accept not only the responsibility to protect the security of their own citizens, but also the wider one of 'guardianship of human rights everywhere'.[302]

Solidarism is important for the preservation of international peace and security and the pre-emption of armed conflicts. As I argue above, international peace and security is necessary for the public good. I agree with Sollenberg and Wallensteen, who argue that a striking feature of conflict in Africa and, to some extent, in Asia and South America, is the link between armed conflicts and a

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[299] As of August 2002, there were 6.5 million 'people of concern' to the Office of the United Nations High Commissioner for Refugees (UNHCR) in Africa, which included 3.3 million refugees, 2.1 million internally displaced persons and 1.1 recent returnees. However, the problem is much bigger than these figures suggest, as UNHCR handles a relatively small number of internally displaced persons. See <htpp://www.reliefweb.int> (accessed on 30 September 2002).

[300] Wheeler (2000) 11.

[301] As above.

[302] As above.

weak state.[303] All the conflicts in Africa at the moment are occurring in severely underdeveloped and weakened states.

While the existence of a weakened state is not a guarantee that conflict will occur (just as strong states also experience conflict), the correlation is noticeable and is of interest to the international community as a whole. Unless the international community can rally in solidarity with the masses in the collapsed state, for example by engaging in humanitarian intervention, the effects of conflict and lawlessness that characterise such states are likely to spill over into other states, for instance through trans-border refugee flows. Humanitarian intervention may help in pre-empting refugee flows, and it mal also result in the return of refugees to their own country once normalcy has been attained.

I have also argued that humanitarian intervention serves the public good by protecting human rights, and those human rights issues are of concern to all. Damrosch shares this view and recent developments in international law as favouring a recognition humanitarian intervention under international law. According to him, we are 'currently witnessing the emergence and a recognition of a legitimate right to intervene in the domestic affairs of [other] states in the name of [international] community norms, values or interests'.[304]

He concludes that in situations of genocide or other human rights atrocities, a state's claim to sovereignty should be set aside and the public good be promoted by intervening on humanitarian grounds.[305] Parekh, who contends that the citizens of any nation are not 'moral orphans', endorses Damrosch's position, and states that the international community has a right to intervene in

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303 Sollenberg & Wallensteen (1998) 23.

304 Damrosch (1993) 91 93.

305 As above.

a state engaged in genocide, massive exploitation of minorities or the perpetration of 'a reign of terror against its citizens'.[306]

To conclude this section, I argue that humanitarian intervention serves the public good by preserving international peace and security and pre-empting refugee flows, and by halting gross human rights violations. Moreover, humanitarian intervention is an expression of solidarism, a phenomenon resulting from the interconnectedness of humanity. This interconnectedness is evident not only in the economic field, but also in the emergence of shared duties and values among the states and citizens of the world.

3.6 CONCLUSION

The greatest challenge for the legal scholars of the future is to address effectively the conceptual conflict that reflects two contradictions and tensions running through the UN Charter: sovereignty and human rights. The contradiction is apparent in the following questions: Are human rights exclusively within the domestic jurisdiction of states, or are they an international concern with community jurisdiction? Which authority is superior, a state's jurisdiction over individuals within its boundaries, or international jurisdiction over inalienable human rights? In addition, there is the perennial tension between peace and justice, stability and change that needs to be resolved.

This Chapter has demonstrated a continued conceptual erosion of state sovereignty in favour of human rights and the general 'public good'. The implications for this development is that the meaning of sovereignty as codified in the various instruments of international law has changed in order to accommodate the changing circumstances in the world. Increasingly, sovereignty is regarded as accruing where there is a responsible government in place, one that protects the rights of its citizens. Failure to offer the

[306] See Parekh (1995) 23.

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protection of these rights shifts the responsibility to the international community, who may offer the protection in various ways, including humanitarian intervention.

This Chapter has also demonstrated that major aspects of international law-making have for a long time been driven by the desire to attain the public good. General principles of International criminal law, international humanitarian law, international environmental law, law of international watercourses and international law of the sea have been used to illustrate this point. Humanitarian intervention should be allowed under international law because it is in line with both the development of an eroding conception of state sovereignty and that of the promotion of the public good. It challenges the reliance on state sovereignty in order to commit gross human rights violations, and it serves the public good by halting human rights violations and pre-empting mass exoduses of refugees.

CHAPTER 4: THE PAST AND FUTURE ROLE OF AFRICAN INTERGOVERNMENTAL ORGANISATIONS IN HUMANITARIAN INTERVENTION: CHALLENGES AND PROSPECTS

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4.1 INTRODUCTION

The international society is completing a transition from the Westphalian order to the global characteristics of the twenty-first century. This transition has

manifested itself in at least two aspects of a normative and institutional nature. The first change is that major contemporary developments are inspired by the need to ensure human dignity, freedom and welfare. The second and important change and one that is relevant in this chapter is that while the international society keeps its universal nature, regionalism has become its main driving force, to such an extent that centralised action is no longer possible unless it relies on effective regional co-operation.[1]

In terms of normative developments, the above-mentioned changes have precipitated an impressive *corpus* of international law relating to human rights, peace and security and therefore, by extension, to humanitarian intervention. The primary role in the enforcement of these norms still remains, to a large extent, with the UN, which has an obvious comparative advantage in taking the leading role in these matters. But the role of regional and sub-regional intergovernmental organisations remains pivotal.[2]

In the context of African regional and sub-regional organisations, there appears to be an increasing realisation that these organisations have an important role to play in the promotion of human rights, peace and security on the continent. Against this background, this Chapter examines the role or potential role of African intergovernmental organisations, generally in issues of human rights, and particularly in humanitarian intervention on a continent from where horrendous statistics of inhumanity and atrocity have emanated. An analysis of the role of African intergovernmental organisations in humanitarian intervention is also done against the background of internal armed conflicts in Africa.[3]

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[1] Pinto & Vicunna (1999) 16-17.

[2] See Boutros Ghali, B 'Improving Preparedness for Conflict Prevention and Peace-keeping in Africa: Report of the Secretary-General,' 1 November 1995, UN Doc A/50/711 and S/1998/318, para 4; Annan, K 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General', 13 April 1998, UN Doc A/52/871 and S/1998/318, para 41.

[3] For an overview of internal armed conflicts in Africa, see OAU (1998) 24-82 and Mekenkamp *et al* (1999), generally.

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4.2 THE SUBSIDIARY ROLE OF AFRICAN INTERGOVERNMENTAL ORGANISATIONS IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY IN AFRICA: IMPLICATIONS FOR HUMANITARIAN INTERVENTION

During the 1990s, successive UN Secretaries-General Javier Perez de Cueller, Boutros Boutros-Ghali and Kofi Annan put forward proposals for a greater contribution by regional organisations with regard to issues of conflict resolution and the maintenance of international peace and security.[4] The proposals demonstrate the increasing willingness of the Security Council to authorise regional and sub-regional intergovernmental organisations to carry out operations relating to the maintenance of international peace and security, sometimes at the initiative of the concerned regional or sub-regional organisation.

What has been missing, though, is an outright endorsement by the Security Council permitting these organisations to venture into such operations without Council authorisation.[5] Yet, a few regional or sub-regional organisations have in the last decade or so taken the liberty of undertaking enforcement action involving the use of force without prior authorisation of the Security Council. Some notable examples of such undertakings are the ECOWAS intervention in Liberia and in Sierra Leone, and the NATO military attack on Kosovo in 1999. These examples have already been discussed in Chapter 2.

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[4] See de Cueller, JP (1990) *Report of the Secretary-General on the Work of the Organisation* 21; Boutros-Ghali, B (1992) 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping' *Report of the Secretary-General Pusuant to Security Council Statement of 17 June 1992* UN Doc A/47/277-S/24111 Paras 60-65; Boutros-Ghali, B (1992) *A Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* UN Doc A/50/60-S/1995/1 of 3 January 1995 paras 79-96; Annan, K (1997) 'Renewing the United Nations: A Programme for Reform' *Report of the Secretary-General* UN Doc A/51/950 of 14 July 1997.

[5] Deen-Racsmany (2000) 297.

This section focuses on the subsidiarity debate on restructuring the operational relationship for the use of force between the UN and regional and sub-regional intergovernmental organisations in Africa. In the search for subsidiarity, two agendas appear to be competing.[6] The first of these is based on 'burden sharing', and seeks to build a new co-operative and complementary division of labour between the UN on the one hand and regional and sub-regional organisations on the other.

The second agenda is based on 'burden shifting', and it seeks to devolve responsibility for action to the concerned regional or sub- regional organisation, without due concern for whether the capacity exists for effective response. Burden shifting appeals to Western governments that are either reluctant to commit military or civilian personnel to politically volatile and physically dangerous situations, or are unwilling to underwrite the costs of assistance in regions where their rarely defined 'national interests' do not lie.[7]

However, this self-centred approach undermines the very aspiration on which the international community of nations is founded, and is therefore undesirable in this era of shrinking time, shrinking space and shrinking borders. Instead, burden sharing should guide the normative and institutional improvements within and outside the UN framework, recognising that the UN lacks the capacity, resources and expertise to tackle all problems related to the maintenance of international peace and security.

In particular, burden sharing should encourage recognition of an increased role of regional and sub-regional intergovernmental organisations in humanitarian intervention. These organisations should play a prominent role in humanitarian intervention because it is the countries of the region or sub-region that are the most likely to be affected by refugee flows or other consequences of gross

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[6] For a fuller discussion of these, see Deen-Racsmany (2000) 298 ff.

[7] Deen-Racsmany (2000) 298.

human rights violations. In addition, these countries are as a result of their proximity better placed to undertake fact finding before a decision to intervene is made. They are also capable of a more rapid response.

Chapter VIII of the UN Charter governs the role of regional and sub-regional organisations in the use of force. Under this Chapter, the Security Council has the 'primary responsibility for the maintenance of international peace and security'.[8] However, regional and sub-regional organisations - which the Charter refers to as 'regional arrangements or agencies[9] - may exist 'for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'.[10] However, such regional arrangements or agencies and their activities must, according to article 52, be consistent with the objectives of the UN.

The Security Council is obliged to utilise the regional and sub-regional organisations for actions related to the Council's mandate, that is, the maintenance of international peace and security, provided that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the ... Council'. [11] The above provision contains significant ambiguities concerning the use of force by regional organisations under the auspices of the UN Charter. These are briefly outlined below.

First, the term 'enforcement action' employed in the UN Charter is not defined. Article 53 merely obliges the Security Council to utilise regional or sub-regional organisations in carrying out 'enforcement action' where appropriate. The ICJ

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[8] Art 24.

[9] What constitutes a 'regional arrangement or agency' is not defined in the UN Charter. The meaning of the term is quite controversial. For definitions,see, for instance, Kelsen (1951) 161-145 and Akehurst (1967) 177-180.

[10] Art 52.

[11] Art 53.

gave some guidance on this issue in the *Certain Expenses Case*,[12] when it concluded that peacekeeping operations conducted with the purpose of the maintenance of international peace and security, and based on the consent of the parties concerned or clearly not directed against the sovereignty and territorial integrity of any state, should not be considered as enforcement measures.

This means that only action contrary to the sovereignty and territorial integrity of the target state amounts to an 'enforcement action' if the action is authorised by the UN or other intergovernmental organisation. According to Moore, this argument should apply not only to measures authorised by the Security Council, but also to those sanctioned by the General Assembly in the Uniting for Peace Resolution[13] and to those undertaken in the context of regional and sub-regional organisations.[14] What is not clear is the question of whether or not 'enforcement action' entails humanitarian intervention.

A second ambiguity relating to the use of force by regional or sub-regional organisations in the context of the UN Charter relates to the time when the Council authorisation must be obtained. The formulation 'without the authorisation of the Security Council' in article 53, does not provide any guidance as to whether prior or *ex post facto* authorisation is required and whether it needs to be express or tacit.

In the proposals for amendment of article 53 contained in the *travaux préparatoires,* states differed on the issue of the nature of authorisation and of when, if at all, Security Council authorisation should be obtained. Bolivia, for

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[12] *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, *ICJ Rep* (1950) 151 paras 170-175.

[13] The Uniting for Peace Resolution, UN Doc A/Res/5/377 (1950).

[14] See Moore, JN 'The Role of Regional Arrangements in the Maintenance of World Order' Black, CE & Falk, RA (eds) (1971) *The Future of the International Legal Order* Vol III, cited in Racsmany (2000) 302.

instance, advocated the necessity of express approval.[15] France objected to this view, calling for the recognition of the right of regional arrangements or agencies to undertake enforcement action without prior approval of the Security Council in urgent cases.[16] Venezuela on its part called for Security Council's 'revision' rather than the 'authorisation' of the enforcement action by the regional arrangement or agency, arguing that seeking authority from the Council may cause delay.[17]

The debate on the nature of authorisation required under article 53 of the Charter has continued to dominate the literature on the subject matter. Concerning this issue, Moore, while admitting that any regional enforcement action without prior authorisation is illegal, sees no reason why it is not possible to obtain the Council's *ex post facto* legitimisation of the action.[18]

In contrast, Wolf argues that an *ex post facto* authorisation undermines the Charter's implicit aim of exercising effective control over enforcement action by regional organisations.[19] It has further been argued, in relation to the argument that under strict Security Council control regional action becomes impossible due to the use of veto, that without the support of the five permanent members of the Security Council such action would be undesirable anyway.[20] Akehurst shared this view against *ex post facto* authorisation, stating that:[21]

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[15] See UNCIO Vol XII para 767, reproduced in (1948) *Yearbook of the International Law Commission* 211.

[16] As above, para 844.

[17] As above, para 837.

[18] Moore, cited in Deen-Racsmany (2000) 305.

[19] Wolf (1993) 293.

[20] See, for instance, Deen-Racsmany (2000) 305.

[21] Akehurst (1967) 214.

> [T]he Security Council's authori[s]ation is a decision taken to the detriment of the state against whom the enforcement action is directed, and it is a general principle of law that a legislative text (like the [UN] Charter) should, if possible, not be interpreted to permit retroactive decisions to be taken to the detriment of a party concerned.

No consensus exists on the question whether the UN Charter requires express or tacit approval of enforcement action by regional organisations. It has been argued that lack of condemnation (that is, acquiescence) or express commendation of an armed intervention by the Security implies the Council's view that the action did not require authorisation, and this conduct amounts to tacit approval of the intervention.[22] Logical as this argument may be, it falls short of outlining on a theoretical basis what specific action or reaction by the Security Council would underlie tacit approval, and the criteria that may be used to assess such approval.

The third ambiguity relates to the interpretation of the formulation that action by regional arrangements or agencies must only be permitted to act in situations that are 'appropriate for regional action'.[23] The Charter provides no clear limitation of the freedom on action specific to regional organisations, as the principle of non-intervention codified in article 2(7) deals with that norm only in the relationship between states and the UN.[24] Also, this issue has not been discussed in relation to regional organisations existing before 1945.

In spite of the ambiguities outlined above, the complementary role of regional and sub-regional intergovernmental organisations in the maintenance of peace and security in their respective areas of jurisdiction has become increasingly important, especially in Africa and in the context of *burden sharing*. With the Security Council becoming more and more keen on returning the UN's role as peacemaker in Africa, and in the presence of unending armed conflicts on the

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[22] See, for instance, Levitt (1998) 347.

[23] Art 53.

[24] Deen-Racsmany (2000) 308.

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continent, it may well be concluded that in the future, the one glimmering sign of hope will come not from New York or Geneva but from Addis Ababa or Lagos or from elsewhere within Africa.[25]

While there is some evidence of greater regional co-operation in Africa, applying subsidiarity to the debate on humanitarian intervention will require the strengthening of capacities African intergovernmental organisations in the context of increasing limits of global multilateral commitment to Africa and the decline of Western engagement. This decline of Western involvement means that African intergovernmental organisations will be more involved in intervening in armed conflicts in African states where massive violations of fundamental human rights are taking place.

4.3 THE ORGANISATION OF AFRICAN UNITY (OAU), HUMAN RIGHTS AND INTERVENTION: CHALLENGES AND ACHIEVEMENTS IN HISTORICAL PERSPECTIVE

This section examines the role of the OAU in intervention and in addressing massive human rights violations in Africa. The OAU, in its 39 years of existence, did not involve itself with humanitarian intervention proper. However, it did intervene militarily or diplomatically in member states on occasions of gross violation of fundamental human rights in those states. These interventions are discussed here, not because they constitute precedents for humanitarian intervention, but because they presented opportunities for the OAU to engage in humanitarian intervention.

The OAU's failure to engage in humanitarian intervention can best be understood by looking at the historical circumstances in which the Organisation was founded. This section outlines this history, and then looks at the OAU's normative and institutional framework for addressing massive violations of fundamental human rights. The discussion here looks at the

[25] See O'Brien (2000) 60.

strengths and weaknesses of that framework, as well as its implementation, with a view to identifying lessons that the newly established AU can learn from the OAU's experiences.

4.3.1 The Evolution and Consolidation of African Unity

Pan-Africanism, or African unity has occupied the minds of individuals of African descent and has been an emotive subject in literature since the end of the 19th century. This idea was eloquently expressed by pan-Africanists in the diaspora such as William Dubois and George Padmore.[26] At the end of the World War II, the idea of pan-Africanism entailed the demands for self-government for Africans.

The first concrete steps towards the realisation of African unity were made in the early 1960s when most African countries had gained their independence.[27] Efforts to unite the newly independent countries led to the formation of two rival groups ('Brazzaville' and 'Casablanca').[28] These groups had differing opinions as to the ends and means of achieving African unity.[29] On the one hand, the Brazzaville group (which later became the Monrovia group), made up mostly of ex-French colonies, represented a gradualist approach and advocated a loose unity, under one umbrella, while retaining national unity.

On the other hand, the Casablanca group, composed of countries such as Ghana, Morocco, Guinea and Algeria had a more radical approach involving

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[26] Chanda (1989-1992) 1. For details on the Pan-african Movement, see generally, Cervenka (1968); Wolfers (1970); Andemicael (1976); El-Ayaouty & Zartman (1984); and Amate (1986).

[27] Baimu (2001) 301.

[28] The 'Brazaville Group' met from 15 to 19 December and signed the 'Brazaville Declaration'. The Declaration was signed by representatives of Cameroon, Central African Republic, Chad, Congo Brazaville, Dahomey (now Benin), Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta (now Burkina Faso). 'The African Charter of Casablanca' was signed after a conference from 3 to 7 January 1961 by the representatives of Algeria, Ghana, Guinea, Mali, Morocco, and Libya. See Cervenka (1968) 1-3 and Wolfers (1970) 2-3.

[29] Naldi (1999) 2.

the creation of a federation of African states with joint institutions and even a joint military command. King Haile Sellasie of Ethiopia managed to get these two groups in Addis Ababa to discuss the best way to realise African unity.[30] The outcome of this meeting of 32 African heads of state was a compromise in the form of an institution named the OAU.[31]

Despite the creation of the OAU, some African leaders, particularly Kwame Nkrumah of Ghana, felt that Africa needed a stronger union than the one that had been realised in the OAU.[32] Nkrumah made his last efforts to influence his fellow leaders to establish a union government for the whole of independent Africa during the OAU Summit held in Accra, Ghana in 1965. The idea evoked suspicion and animosity from a substantial number of African heads of state.[33] African leaders were not about to give up their hard-fought independence and recently acquired presidential status for the sake of a continental union. The removal of Nkrumah from power through a military *coup d'etat* in 1966 seemed to have sealed the discussion about one government for African states for a while.[34]

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[30] Baimu (2001) 301.

[31] The OAU was established by the OAU Charter, which was adopted by a conference of Heads of State and Government in Addis Ababa on 25 may 1963. See OAU Charter, reprinted in (1963) 3 *ILM* 1116.

[32] It should be noted that on the eve of the founding of the OAU, Nkrumah made an impassioned speech in which he argued for the formation of a union government of African states with a common market, currency, monetary zone, central bank, system of defence, citizenship, foreign policy and continental communication system. The speech is reproduced in the *New African* January 2000 18-25.

[33] After a failure to establish a union government at the Accra Summit, President Nyerere of Tanzania said he had heard one head of state expressing relief that he was happy to be returning home to his country while still the head of state. See *New African* January 2002 28-31.

[34] Cervenka (1968) 3.

From 1966 onwards, the OAU directed its efforts on the eradication of colonialism and the fight against the apartheid regime in South Africa.[35] Also in this period, efforts were made to realise African unity through the means of economic integration. This was expressed theoretically through a number of OAU declarations, resolutions and plans of action that were adopted between 1968 and 1980,[36] and in concrete terms in the formation of several sub-regional economic blocs, some with overlapping mandates. These blocs include the ECOWAS in West Africa, the ECCAS in Central Africa, the COMESA in Eastern and Southern Africa, the EAC in East Africa, the SADC (previously SADCC) in Southern Africa and the AMU in North Africa.

The idea of continental economic integration was concretised in the Treaty Establishing the African Economic Community (Abuja Treaty),[37] which was adopted under the auspices of the OAU on 3 June 1991 and entered into force on 12 May 1994. The Treaty envisages the establishment of an African Economic Community as an integral part of the OAU. The anticipated period for the establishment of the African Economic Community (AEC) is 34 years.[38]

The Treaty envisions the establishment of the AEC as a goal that should be achieved through encouraging the formation of sub-regional economic bodies, which would eventually amalgamate to form the African Economic Community.[39] The institutions established under the Treaty are the Assembly

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[35] The OAU's Charter art 2 provided that that the Organisation would, *inter alia*, be involved in the fight against colonialism in all its forms.

[36] For an analysis of law-making within the OAU from 1963 to 1998, see Maluwa (2000) 201, generally. . Between 1963 and 1998, the OAU adopted 20 treaties. Of these, 14 are currently in force, see Maluwa (2000) 201 202.

[37] See the Treaty Establishing the African Economic Treaty (the 'Abuja Treaty'), OAU CAB/LEG/28.1; reprinted in (1991) 3 *African Journal of International and Comparative Law* 792. See also, <http://www.oau-oua.org/generalinfo> (accessed on 1 August 2002). 52 signatures, 45 ratifications.

[38] Art 6(1) of the AEC Treaty.

[39] As above.

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of Heads of State and Government, the Council of Ministers, the Pan-African Parliament, the Economic and Social Commission, the Court of Justice, the Secretariat and the Specialised Technical Committees.[40]

The entry into force of the Abuja Treaty created a situation whereby the OAU co-existed with the African Economic Community. In a way, the OAU started operating on the basis of both the OAU Charter and Abuja Treaty.[41] This eventually created a need for an institution that would combine the OAU's political nature and the African Economic Community's economic nature. At the same time, the end of the millennium led to a sense of unity among African leadership to reposition the OAU in order to set the African continent as a whole on a firm path to development and peace in the new millennium. It was in this context that the Libyan Leader Muammar Gaddafi called a meeting to discuss the formation of a 'United States of Africa'.

On 8 and 9 September 1999, 44 Heads of State and Government of the OAU met in Sirte, Libya, in an extraordinary session of the OAU Assembly requested by Libyan leader Muammar Gaddafi, to discuss the formation of a 'United States of Africa'.[42] The theme of this summit, 'strengthening OAU capacity to enable it to meet the challenges of the new millennium', was intended to provoke the leaders to seek solutions for the myriad political, economic and social problems confronting the continent.[43]

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[40] See art 7 of the AEC Treaty.

[41] For instance, the 38th OAU Summit held in Lusaka, Zambia in 2001 was at the same time the 4th Summit of the AEC. The activities of the OAU, however, overshadowed those of the AEC.

[42] See <htpp://www.oau-oua.org/generalinfo> (accessed on 1 August 2002).

[43] As above.

At this meeting the leaders adopted the 'Sirte Declaration',[44] which called for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-African Parliament.[45]

The details regarding the designing of this Union was to be left to the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Abuja Treaty.[46] The Declaration further stated that the decision to establish the AU had been reached after 'frank and extensive discussions'.[47] The OAU legal unit then drafted the Constitutive Act of the African Union (the 'Act'). The draft Act was debated at a meeting of legal experts and parliamentarians and later at a ministerial conference held in Tripoli from 31 May to 2 June 2000.

The involvement of parliamentarians was intended to ensure that the AU becomes more closely connected with the people.[48] The OAU Assembly of Heads of State and Government in Lomé, Togo, on 11 July 2000, adopted the Act.[49] All members of the OAU had signed the Act by March 2001,[50] and

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[44] OAU Doc EAHG/ Dec 1(IV) REV 1, reprinted in (1999) 7 *African Yearbook of International Law* 411.

[45] Para 8(II), Sirte Declaration. The Sirte Declaration was adopted perhaps because African states had finally come to accept that only a strong regional organisation properly equipped to deal efficiently and expeditiously with the peculiar problems of the continent, could entitle them to the benefits of globalisation. See Daniel & Musungu (2002) 84.

[46] Para 7, Sirte Declaration.

[47] Para 8, Sirte Declaration.

[48] However, the process leading to the drafting of the Act may be criticised for not involving civil society.

[49] 36th Ordinary Session of the Assembly of Heads of State and Government.

[50] OAU ' Decision on the African Union' 5th OAU extraordinary session of the Assembly of the Heads of State and Government 1-2 March 2001, Sirte, Libya EAHG/Dec 1-4 (V).

therefore the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001 declared the establishment of the AU.[51]

However, to fulfil the legal requirements for the Union, the Constitutive Act had to be ratified by two-thirds of the member states of the OAU[52] This was achieved on 26 April 2001 when Nigeria became the 36th member state of the OAU to deposit its instrument of ratification of the Constitutive Act of the AU with the OAU Secretary-General.[53] The AU became legal and political reality a month thereafter, on 26 May 2001, when the Constitutive Act entered into force.[54] The Union was eventually launched in Durban, South Africa, on 10 July 2002.

4.3.2 The OAU, Human Rights and Intervention

The discussion below is concerned with the role of the OAU in human rights and general intervention. Although the study focuses on humanitarian intervention, the OAU, as stated earlier, did not engage in humanitarian intervention as defined in the present study. However, the Organisation's role in addressing massive violations of fundamental rights and in general intervention is relevant for the study because humanitarian intervention is linked to massive human rights violations and to general intervention: Humanitarian intervention is a particular kind of intervention, and is a response to massive violations of fundamental rights.

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[51] As above.

[52] See art 28 of the Act.

[53] OAU 'The Constitutive Act of the African Union attains the legal requirement for entering into force' Press Release No 52/2001 available at <http://www.oau-oua.org/oauinfo/pressrelease> (accesed on 1 August 2002).

[54] As at 31 July 2001, all OAU member states, with the exception of the Democratic Republic of Congo (DRC) and Madagascar, had ratified the Act. See OAU CAB/LEG 23.15/Vol.IX paras 1-3.

Violations of human rights - whether during warfare or in peacetime - have been documented from all corners of the African continent over the years.[55] However, the most egregious of these violations have occurred in the context of armed conflict, between and within states. There have been reports of application of prohibited means and methods of war,[56] indiscriminate attacks against civilians, amputation of limbs and denial of humanitarian relief to civilian populations and prisoners of war.

The culture of impunity and violence is an appropriate description for most of the entire experience of the African people.[57] Of particular importance in understanding this widespread culture is one central and overriding fact: Virtually all governments regarded how they treated those under their control and the policies they pursued as a matter exclusively within their jurisdiction.

This culture of human rights violations may be attributable to colonialism, although African leaders themselves helped create the problem. Even as the rest of the world continues to enjoy the advancements of the twenty-first century, Africa is still reeling from some of the deadliest conflicts ever witnessed anywhere in the globe. Sierra Leone, Guinea, Mali, Somalia, Sudan, Rwanda, Burundi, the DRC, Congo Brazzaville, and Angola have experienced war for the better part of their independence era.[58]

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[55] For a discussion on this point, see Solomon (1999) 34 ff.

[56] Certain methods of warfare e.g. the use of 'dum-dum bullets' are prohibited under the laws and customs of warfare, see art 35 of Protocol II Additional to the Geneva Conventions of 12 August 1949.

[57] Especially in the 1960s and 1970s, many African states experienced internal conflicts, military takeovers and systematic violations of human rights.

[58] For a fuller treatment of armed conflicts in Africa, see *Mekenkamp et al* (1999), generally.

4.3.2.1 The 1963 OAU Charter

When it was formed in 1963, the OAU[59] embraced among its main governing principles respect for sovereign equality of all member-states,[60] respect for the sovereign and territorial integrity of each state and its inalienable right to independent existence,[61] and the peaceful settlement of disputes.[62] Although these were established principles of general international law, their adoption as the principal purposes of the OAU coupled with the creation of the Commission on Mediation, Conciliation and Arbitration (CMCA) demonstrates the importance to the OAU of the need to have an effective dispute resolution process.[63]

Unfortunately, the CMCA did not materialise. Under the terms of the Protocol elaborating the structure and functions of the CMA, the Commission was to consist of 21 elected individuals.[64] The Commission members were elected at the 1968 OAU Summit in Algiers, but its permanent nature was revoked two years later at the Addis Ababa Summit, and it has since fallen into disuse.[65] The 1977 *ad hoc* Committee on Inter-African Disputes, which despite its name was intended as a permanent body, suffered a similar fate.[66] Instead, the OAU

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[59] Charter of the OAU, adopted on 25 May 1963 Addis Ababa 479 UNTS 39; 2 ILM 766.

[60] Art 3(1).

[61] Art 3(3).

[62] Art 3(4).

[63] For background, see Gutto (1996) 314.

[64] Art 2, Protocol of the Commission of Mediation, Conciliation and Arbitration, 24 July 1964, reprinted in 3 ILM 1116 (1964).

[65] Wolfers (1985) 176.

[66] Berman & Sams (2000) 4.

has relied on *ad hoc* committees of member states and eminent personalities to mediate disputes.[67]

4.3.2.2 Examples of OAU's Role in Post-Independence Conflicts

The OAU's role in the 1964 conflict between Ethiopia and Somalia as well as the continuing civil unrest in the Congo was at best disastrous.[68] The conflict was occasioned by the Western Somalia Liberation Front's (WSLF) decision to step up the guerrilla campaign in the Ogaden, and evidence of Somali support for WSLF.[69] A few years later, the Organisation failed to intervene meaningfully in the Nigerian civil war (1967-1970), after which African countries largely eschewed the Organisation's involvement in attempting in attempting to resolve their differences and increasingly turned to countries outside the continent for their security needs.[70]

Another armed conflict which the OAU was unable to resolve was that involving the Western Sahara. The OAU was seized of the conflict in 1976, although no concrete action was taken for the next three years.[71] During the OAU Monrovia Summit of 1979, an *ad hoc* committee was established, which recommended withdrawal of Moroccan troops and the autonomy of Western Sahara.[72] Subsequently, the OAU in 1984 passed a resolution recognising Western Sahara, leading to Morocco's pullout from the OAU. Morocco has never rejoined the Organisation. Mainly, the UN has handled resolution of the Western Sahara conflict especially since the end of the Cold War.

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67 Kouassi (1984) 45 49; Berman & Sams (2000) 67.

68 As above.

69 For a detailed discussion of this conflict see Legum & Lee (1977) 33ff; Gorman (1981) 62ff and and Olonisakin (2000) 54ff.

70 Berman & Sams (2000) 97.

71 Olonisakin (2000) 54.

72 As above.

The OAU took its first step towards intervention by military means in the Chad civil unrest (1981-1982). Although the crisis dates back to the 1960s,[73] it was not until the 31st Session of the OAU Council of Ministers, held in Khartoum in 1978, that the possibility of intervention under the auspices of the OAU was first entertained.[74] The Assembly of Heads of State and Government then passed a resolution authorising a multinational peacekeeping force for Chad.[75]

After the experience in Chad, the OAU has been involved in the resolution of many other conflicts in Africa. Examples of countries where the OAU has been involved in conflicts in Africa are Algeria, Angola, Congo Brazaville, Burundi, Congo Kinshasa (now DRC), Djibouti, Eritrea, Ethiopia, the Gambia, Ghana, Mozambique, Niger, Nigeria, Rwanda, Uganda and Zimbabwe.[76]

However, the OAU has no experience in actual military intervention to pre-empt or halt massive violations of fundamental human rights, perhaps with the exception of the intervention in Chad. But even in Chad, the intervention was of a peacekeeping nature, and not an instance of humanitarian intervention.

4.3.2.3 Human Rights Norm-setting under the OAU

None of the five specialist commissions established under article 20 of the OAU Charter was devoted to human rights.[77] Nevertheless, the OAU

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[73] Abass & Baderin (2002) 10.

[74] As above.

[75] See AHG/ RES 102 (XVIII) Rev 1. The force went into Chad with the consent of Chadian President Guokouni. However, the consent was later withdrawn after the OAU forces maintained neutrality, in the midst of increasing rebel advancements against the Government of Chad. Apparently President Guokouni had thought that the OAU forces would support his Government. For an analysis of the OAU's involvement Chad (1981–1982), see Naldi (1999) 595.

[76] For a complete list, see OAU (1998).

[77] The Commissions established in 1963 under the Charter were: The Economic and Special, the Educational and Cultural, and the Sanitation and Nutrition Commissions. In 1964, the Commission on Transport and Communication. In 1964, the Commission on transport and Communications and another on Jurists were added.

accomplished four notable successes between 1963 and 1981, relating to:[78] Eradication of colonialism; self-determination of African peoples; the collective efforts to rid Africa of apartheid in South Africa and Namibia; and the adoption of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

In spite of the above, human rights abuses in independent African states, especially violations involving their own citizens, were largely overlooked by the OAU.[79] The principle of non-intervention is entrenched in article 3(2) of the OAU Charter. For a long time, strict adherence to the state sovereignty and non-interference rule made it difficult for the OAU to acquire much credit for the protection of human rights in the continent.[80] According to Chanda:[81]

> [D]espite the well publicised atrocities of Idi Amin ... in Uganda, ... Bokassa in the Central African Republic, Marcias Nguema in Equatorial Guinea, Mobutu Sese Seko in Zaire, Jaafar el-Nimeiry and Omar Bashir in Sudan, Said Barre in Somalia, Mengistu Haile Mariam in Ethiopia, Samuel Doe in Liberia, Kamuzu Banda in Malawi, Arap Moi in Kenya and General Sani Abacha in Nigeria, the OAU has never criticised these leaders.

However, in the 1980s, there was a significant shift by the OAU in favour of human rights protection. In June 1981, the OAU Heads of State and Government meeting in Nairobi unanimously adopted the African Charter on Human and Peoples' Rights.[82] The Charter came into force on 21 October

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[78] Viljoen (1997) 47.

[79] Chanda (1989-1992) 1.

[80] As above.

[81] Chanda (1989-1992) 18.

[82] (1982) 21 ILM 58. Adopted on 27 June 1981 in Nairobi, and entered into force on 21 October 1986. Most meetings for the Drafting of the African Charter took place in Banjul, the Gambia. Thus the African Charter is often referred to as 'the Banjul Charter'.

1986 and has been ratified by all OAU member states.[83] The body tasked with implementing the Charter is the African Commission on Human Rights and Peoples' Rights ('the Commission').[84] The Protocol on the establishment of the African Court on Human and People's Rights is yet to enter into force.[85]

In the formative years of its operation, the Charter was hardly complied with by member states. The Commission had little to show in terms of accomplishment in the first ten years.[86] In many instances, ratification of the Charter was used by repressive governments to whitewash human rights abuses, or to serve as a smoke screen to hide the reality of repression.[87]

The Commission may entertain individual and inter-state communications.[88] In emergency cases or where there are gross violations of human rights in a state party, the Commission may, under article 58, draw the attention of the Chairman of the OAU Assembly of Heads of State and Government to the matter.[89] The Chairman may then request the Commission to undertake an in-

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[83] All 53 member states of the OAU have ratified the Charter. Morroco, was a member of the OAU until 1984, when it pulled out following its differences with the AOU in relation to the latter's recognition of Western Sahara as a sovereign state. Morrocco is also not a party to the African Charter.

[84] For a detailed discussion on the composition. and mandate of the Commission, see Viljoen (1997a).

[85] OAU/LEG/AFCHPR/PROT(III)(1998). The OAU Assembly of Heads of State and Government at its thirty-fourth Ordinary Session in Ouagadougou, Burkina Faso in 1998 adopted the Protocol. Article 34 (3) of the Protocol requires that 15 ratifications are needed for the Protocol to come into force. As at 30 September 2002, six countries had ratified the Protocol. These are Burkina Faso, The Gambia, Mali, Senegal, South Africa and Uganda.

[86] For a fairly thorough discussion on the performance of the Commission in the first ten years of its existence (1986-1987), see Viljoen (1997), generally.

[87] Viljoen (1997) 47 49. See also, Ondinkalu (1998), and Murray (2000).

[88] See arts 47-56.

[89] Art 58 reads as follows:
(1). 'When it appears after deliberations of the Commission that one r more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases'.

depth study of the situation and make a report, accompanied with the necessary recommendations to the Assembly.[90]

In order to define its mandate under article 58, the Commission held a consultation on mechanisms for urgent response in case of mass violations of human rights and emergency situations.[91] This consultation recommended, *inter alia*, that there is a need for permanent as opposed to *ad hoc* mechanisms for dealing with emergency situations and cases of gross violation of human rights. There was also agreement that appropriate means be put in place to get data about human rights situations in all state parties, and that focal points be established within each party for the purposes of alerting the Commission of emergencies of gross violations.[92]

The recommendations of the consultation were discussed and adopted during the Commission's 27th Ordinary Session held in Algiers, Algeria, from 27 April to 11 May 2000.[93] The inter-state communication procedure, and the proposed mechanism for the Commission's response to emergency situations and cases of gross violation of human rights, indicates that the doctrine of state sovereignty may not be as rigid as it was when the OAU was founded in 1963. However, calls have been made for a dynamic interpretation of article 58 of the African Charter such that the Commission could implement and apply article 58 'with imagination and vigour', with a view to preventing serious and massive

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(2). The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations…'.

[90] Art 58 (2).

[91] See, African Commission on Human and Peoples' Rights (1996) 155.

[92] African Commission on Human and Peoples' Rights (1996) 10.

[93] As above.

violations of human rights.[94] The Commission has seldom invoked article 58 or acted under its provisions.[95]

Besides the African Charter, the other notable human rights treaties are the African Charter on the Rights and Welfare of the Child,[96] the Convention on the Ban of the Import into Africa of Trans-boundary Hazardous Waste,[97] and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.[98] The OAU has also been deliberating on a draft protocol to the African Charter relating to the rights of women.[99]

The end of the Cold War provided the impetus for the OAU and many of its member states to attempt to redress the failings of the organisation in protecting human rights, especially in grave situations. This dispensation also marked the start of a new epoch, where Africa lost the strategic value it had to the world superpowers and thus became increasingly marginalized both politically and economically.[100] The post-Cold War era also ushered in globalisation, a process involving a complex set of factors often operating in a contradictory manner.[101] While the 'supporters' of globalisation promised

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[94] See, for instance, Odinkalu & Mdoe (1996), generally.

[95] As above.

[96] OAU Doc CAB/LEG/153/REV. 2; reprinted in Heyns (1997) 38.

[97] Popularly known as the 'Bamako Convention'. Adopted in 1991 and entered into force in 1998. See text in (1991) 30 ILM 773; (1993) 1 *African Yearbook of International Law* 269; and Heyns (1997) 108.

[98] UNTS Vol 1001 45, adopted on 10 September 1969 and entered into force on 20 June 1974. For text, see Heyns (1997) 34.

[99] See Draft Protocol, OAU Doc CAB/LEG/66.6, reprinted in (2001) 1 *African Human Rights Law Journal* 53.

[100] Baimu (2001) 299.

[101] Oloka-Onyango (1999) 'Globalisation in the Context of Increased Racism, Racial Discrimination and Xenophobia' *Working Paper of the UN Sub-Commission on the Protection and Promotion of Human Rights* (E/CN 4/ Sub 2/1999/8), para 2.

progress and prosperity for all, it became evident that globalisation was also a major factor behind Africa's marginalisation and the undermining of the continent's development prospects.

The disengagement of Western support during this era also led to a resurgence of deadly armed conflicts in Africa. As a result, Africa has been plagued in recent years by highly destructive armed conflicts between and within states. This fact, which weighs heavily upon the peoples of Africa in many ways including, notably, the arrest of Africa's development, moved the OAU member states to relax somewhat the OAU's standards on intervention in the internal affairs of states. This in turn strengthened the Organisation's role in regional peace and security.

4.3.2.4 The 1990 OAU Declaration on the Political and Socio-economic Situation in Africa

In July 1990, the OAU Assembly of Heads of State and Government met in Addis Ababa and adopted the Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World.[102] Broadly speaking, the wording of the Declaration reflects a radical approach, by the OAU, to conflict resolution, management and resolution. According to the Declaration, the OAU commits itself towards the peaceful and speedy resolution of all conflicts in Africa, including internal ones.[103] The Declaration was informed by the proliferation of conflicts in Africa and the growing concern within the OAU, over the suffering the conflicts had brought to the peoples of Africa, as well as their adverse security and socio-economic repercussions.[104]

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[102] Declaration AHG/Decl.1/(XXVI) of 11 July 1990, adopted unanimously.

[103] Naldi (1999) 32.

[104] As above.

However, the African leaders noted in the same Declaration 'that the possibilities of achieving the objectives' set in the Declaration 'will be constrained so long as an atmosphere of lasting peace and stability does not prevail in Africa'.[105] They therefore pledged their 'determination to work together towards the peaceful and speedy resolution of all the conflicts' on the continent.[106]

While they did not openly challenge the OAU's cherished principles of state sovereignty and non-intervention in domestic affairs of states, the leaders indicated a willingness to become somewhat transparent.[107] According to one commentator, the 1990 Declaration is tantamount to the Heads of State and Government saying that that non-intervention should not mean indifference.[108] Following the Declaration, the OAU sent, in the same year, a military observer group in Rwanda to help promote reconciliation and put an end to hostilities in the Rwandan crisis.[109]

The 1990 initiative bore fruit two years later at the 28th Meeting of Heads of State and Government held in Dakar between June and July 1992 when it was decided to endorse the report of the Secretary-General in which he proposed the establishment of a mechanism to deal with the prevention, management and resolution of conflicts in Africa.[110] The leaders also decided to charge the Secretary-General with the preparation of a study on the institutional and

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[105] Para 10.

[106] As above.

[107] Berman & Sams (2000) 57.

[108] Ibok (1997) 70.

[109] Burundi, Uganda and Zaire agreed to take part in this undertaking, known as the Military Observer Team (MOT).

[110] The Secretary General's Report is reprinted in (1992) 4 *African Journal of International and Comparative Law* 1072.

operational aspects of his proposal. The Secretary-General's report had explored a number of radical options, including:[111]

- An African Security Council within the OAU should be created.
- The Bureau of the Assembly should assume responsibility for dealing with intra-state and inter-state disputes at the diplomatic and political level.
- The Court of Justice of the African Economic Community (AEC) could be generally available for judicial settlement of disputes.
- The OAU member states could earmark units within their armed forces for an African Peace-keeping Force.

The proposals were too radical and many states did not accept them. At the Dakar Summit, a clear consensus emerged against the involvement of the OAU in peacekeeping and related issues.[112] Further, a proposal that the OAU's Defence Commission be tasked with advisory functions to strengthen member-states' peacekeeping policies received little support.[113] The proposal received scant reference in both the debate and the written responses, and even in the consultations.[114]

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[111] Naldi (1999) 32.

[112] Djinnit, S Speech delivered at the 'Meeting on Enhancing Africa's Peacekeeping Capacity', 5 December 1997, cited in Berman & Sams (2000) 57.

[113] Berman & Sams (2000) 60.

[114] As above.

4.3.2.5 *The 1993 Mechanism for Conflict Prevention, Management and Resolution*

Despite the rejection of some of the proposals made by the OAU Secretary-General in 1992, his fundamental proposition of a special Mechanism for Conflict Prevention, Management and Resolution ('the Mechanism') was accepted in principle. Subsequently, the 29th Ordinary Session of OAU Heads of State and Government, held in Cairo in 1993, formally endorsed the Mechanism.[115]

The decision-making body of the Mechanism, the Central Organ, was modelled on the Bureau of the Assembly of Heads of State and Government. Despite the establishment of the Mechanism, serious armed conflicts have occurred in Africa, notably in Rwanda that broke out in April 1994.[116] Consistent civil wars have been going on in Burundi,[117] Zaire,[118] Sudan and elsewhere. The adequacy of the Mechanism has, therefore, been rightly queried.[119]

The mandate of the Mechanism presents a stark contradiction between the declared objectives and the institutional and operational structure. This is more so when one recognises, as the Heads of State and Government did in

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[115] See Assembly of Heads of State and Government, Twenty-ninth Ordinary Session: *Declaration ... on the Establishment Within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution* Declaration AHG/Decl. 3 (XXIX) (Rev 1) of 29 June 1993, reprinted (1994) 6 *African Journal of International and Comparative Law* 158.

[116] See Final Report of the Committee Established Pursuant to UN Security Council Resolution 935 (1994), S/1994/1405 of 9 December 1994; and the Reports of the UN Special Rapporteur on the Situation of Human Rights in Rwanda, documents E/CN.4/1995/7 and E/CN.4/1996/68.

[117] See, for example, Reports of the UN Special Rapporteur on the Situation of Human Rights in Burundi, documents E/CN.4/1995/66 and E/CN.4 1996/16.

[118] See, for example, reports of the UN Special Rapporteur on the Situation of Human Rights in Zaire, documents E/CN.4/1995/67 and E/CN.4/1996/66.

[119] For a good, critical summary of the content of the mandate of the Mechanism, see generally, Packer (1997).

Paragraphs 6-8 of the 1993 Declaration, that there are root causes and structural deficiencies in their states which add stress to the normal situation. Important among these root causes is said to be 'certain internal human factors and policies which have negatively contributed to the present state of affairs on the [c]ontinent'.[120] The leaders also correctly summarised the problem in paragraph 9 that continent's socio-economic problems had been caused by conflicts between and within states.

In paragraph 12 of the 1993 Declaration, the African leaders declare that they saw in the Mechanism 'the opportunity to bring to the processes of dealing with conflicts on our continent a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur'. However, in the first operational paragraph,[121] the Heads of State and Government placed formidable obstacles in the way of dynamic, speedy or ultimately successful action.

In this paragraph, the declaration emphasised that any action under the auspices of the Mechanism must respect the principles of sovereign equality, and non-interference in 'internal affairs'. It must also respect the principles of territorial integrity, 'the inalienable right to independent existence', 'peaceful settlement of disputes' and 'the inviolability of borders inherited from colonialism'. Paragraph 14 also made it a requirement that the consent of the parties to the conflict be obtained before the Mechanism could take any action.

The leaders were realistic to declare that the Mechanism will simultaneously be an instrument of peacemaking to stop conflicts 'where they inevitably occur'.[122] However, in the same paragraph, emphasis was clearly placed on prevention of conflict, which the leaders believed would 'obviate the need to resort to the complex and resource-demanding peacekeeping operations'.

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[120] Para 8.

[121] Para 14.

[122] Para 15.

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With regard to the technical organisation of the Mechanism, it is constituted principally by the Central Organ, composed of the state members of the Bureau of the Assembly of Heads of State and Government.[123] This evidently political body is required to function at the levels of Heads of State as well as that of Ministers and Ambassadors.[124] The Rules of Procedure of the Central Organ are, according to paragraph 20 of the 1993 Declaration, those of the Assembly of Heads of State and Government. The Mechanism is required to meet once a month and to make decisions 'guided by the principle of consensus',[125] a provision that essentially accords some sort of 'veto power' to each and every member state of the Mechanism.

Other provisions in the Declaration, which are an impediment to dynamic, speedy and successful action include the requirement that the agenda for the Central Organ should 'be prepared by the Secretary-General in consultation with the Chairman',[126] thereby politicising even the agenda.[127] Also, the requirement that the Mechanism should 'closely coordinate its activities with the African regional and sub-regional organisations,[128] had the effect of slowing the process further.

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[123] Para 18.

[124] Para 18.

[125] Para 20.

[126] Para 21.

[127] This provision imposes restrictions on the Secretary- General by requiring that he should consult with the Chairman before setting the agenda. The provision implies that the Chairman must endorse every item on the agenda. Being a political leader, the Chairman is likely to be guided by political preferences in deciding the agenda to be discussed. Preferably, he should. have been free to set the agenda for and the Mechanism's work would be to deliberate on the agenda

[128] Para 23.

Even the relatively limited flexibility of the Secretary-General to bring in eminent African personalities was undermined by the requirement that he must first consult with the authorities of the person's state.[129] Finally, the ultimate action of the Central Action is only to 'report on its activities to the Assembly of heads of State and Government'.[130] To add to the numerous 'internal' obstacles to effective action by the Mechanism, there have been from the start inadequate financial resources and an uncertain legal status for the entity.

Although the regime of the Mechanism proved unable to forestall and mitigate the effects of the 1994 Rwandan genocide, Gutto has described the Mechanism as a bold normative, institutional and procedural attempt by the OAU to rethink the manner in which its member states should individually and collectively respond to conflicts within and across their national territories.[131] Furthermore, he argues that in light of the institutionalisation of the Mechanism, there is a real prospect that the principle of non-interference in the internal affairs of states within Africa, and as between the African states and communities themselves, will be re-examined and modified so as to promote legitimate humanitarian intervention to prevent and resolve conflicts.[132]

According to former OAU Secretary-General Salim Ahmed Salim, the 'progress' made by the Mechanism is attributable to the member states' broadening consensus on widening the definition of the non-intervention principle, amounting to an acceptance by the member states that the OAU should concern itself not only with inter-state conflicts but also with internal

[129] Para 22.

[130] Para 20.

[131] See Gutto (1996) 314.

[132] As above.

conflicts.[133] Salim further explained the likely impact of the activities of the Mechanism on sovereignty and non-intervention rules as follows:[134]

> Within the context of general international law as well as humanitarian law, Africa should take the lead in *developing* the notion that *sovereignty can legally be transcended* by the 'intervention' of 'outside forces' and by their will to facilitate prevention and/ or resolution, particularly on humanitarian grounds. In other words, given that every African is his brother's keeper and that our borders are at best artificial, we in Africa need to use our own cultural and social relationship to interpret the principle of non-interference in such a way that we are enabled to apply it to our own advantage in conflict prevention and resolution.

4.3.2.6 The 1999 OAU Declaration on Security, Stability, Development and Co-operation

One of the most notable declarations of the OAU in the post-Cold War that encapsulate the idea of a continued erosion of the doctrine of non-intervention in favour of human rights is the 1999 Heads of State and Government's Declaration on the Ministerial Conference on Security, Stability, Development and Co-operation in Africa (the 'CSSDCA Declaration').[135] It traces several decisions of the OAU from the 1980s to 1999.

In particular, it 'recalls' the 1990 Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes in the World, which aimed at 'promoting stability in Africa'.[136] It also recalled the OAU Assembly's 1997 Harare Summit, where a 'stand was taken against unconstitutional changes of government'.[137] Also recalled was the 1999 Algiers

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[133] See *West Africa*, 12-18 July 1993 1197. Emphasis added.

[134] *West Africa* 7-13 July 1992 1524.

[135] AHG/Dec 4 (XXXVI).

[136] Para 1.

[137] Para 4.

Declaration on the Unconstitutionality of Governments, the Reinforcement of the Respect for Democracy, the Rule of Law, Good Governance and Stability.[138]

The CSSDCA reaffirms the commitment on the part of the OAU to uphold these past declarations, and to move towards their implementation. The Declaration then goes on to declare that the OAU, while recognising the primacy of the UN Security Council in the maintenance of international peace and security, will strive, in co-operation with the UN and sub-regional intergovernmental organisations in Africa, strive to act as the premier organisation in these matters.[139] This Declaration set the stage for the transformation of the OAU into the AU, which forms the subject of analysis in the following section.

4.3.2.7 General OAU Norms on Conflict Prevention, Management and Resolution

Traditionally, fundamental norms underpin OAU responses to conflict situations: non-interference in the internal affairs of member states, territorial integrity and the inviolability of the borders inherited at independence, and 'African solutions to African problems'.[140] The first of these is a standard feature of virtually all intergovernmental organisations, although the norm has been enforced by the OAU with greater intensity, resulting in great inefficiency of the OAU mechanisms for dealing with conflicts.

The principle of territorial integrity and the preservation of borders as inherited at independence no matter how arbitrary they may have been drawn may

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[138] As above.

[139] As above.

[140] See Foltz (1991) 347 353.

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reflect a point of criticism for the OAU.[141] The borders of African states were drawn during the colonial times by European powers, without due regard to ethnic or anthropological interrelationships. In traditional Africa, it was commonplace to find that a particular community related well with certain other communities, but not others. Had the drawing of boundaries between African states taken these anthropological 'affiliations' into consideration, perhaps most armed conflicts that are of an ethnic nature in Africa would have been pre-empted.

The OAU norm of 'African solutions to African problems' is a well-established norm in matters of inter-state conflict and proceeds from the 'try OAU first' (before going to the UN Security Council) attitude that the OAU adopted during its 39 years of existence.[142] In furtherance of this norm, the OAU adopted unique African methods of dispute prevention and resolution. For example, it frequently used the intervention of other African heads of states or some other imminent personalities to carry out mediation in inter-state as well as intra-state conflicts. This practice is based on Africa's respect for elders.

This norm has legal foundation in the UN Charter, which obliges states that are also members or regional organisations to make every effort to settle local disputes peacefully through that organisation before referring them to the UN Security Council.[143] Because of this Charter endorsement, and in line with the burden sharing principle advocated for earlier in this Chapter, I am of the view that the norm of 'African solutions to African problems' may be a good legacy that the OAU left for the AU to further.

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141 As above.

142 See Andemichael (1976).

143 See art 52(2) of the UN Charter.

4.3.2.8 Conclusion

The OAU has played a role subsidiary to that of the UN in the maintenance of international peace and security in Africa. During the 39 years of its existence, the OAU concentrated on achieving complete decolonisation in the continent, and in the dismantling of the racist regime in South Africa. The organisation was also concerned with economic integration on the continent.

For a long time, the OAU strictly adhered to the principle of non-intervention in the internal affairs of its member states. As a result, the OAU did not condemn massive violations of fundamental human rights in its member states. In the 1980s, the OAU started adopting continental human rights instruments. This process gained momentum after the end of the Cold War, during which period Africa also lost its strategic position with regard to Western governments. The desire for solidarity in Africa in tackling the continent's problems culminated in the adoption of the AU Act in 2001. The AU replaced the OAU in 2002.

One of the major achievements of the OAU in terms of establishing a normative and institutional framework for addressing massive violations of fundamental human rights was the adoption of the 1993 Mechanism for Conflict Prevention, Management and Resolution. However, the Mechanism did not succeed in its work due to its restricted mandate. The lessons learned from the work of the Mechanism will no doubt inform the AU, in order for the AU to engage in humanitarian intervention and in addressing massive violations of fundamental human rights.

4.4 THE AFRICAN UNION (AU)

4.4.1 Background

By the middle of the 1990s, the dangerous drift of several African states into armed conflicts became a source of concern for African leaders and the broader international community. This concern was reflected by the myriad

conferences and summits held by the OAU to discuss the issue of conflicts and the array of treaties, protocols, declarations, and communiqués that emanated from these meetings.[144] It was soon realised that amidst armed conflicts, it would be difficult to achieve the objectives of the 1991 Abuja Treaty, which was intended to set the stage for greater co-operation amongst African states.[145]

The Abuja Treaty was swiftly followed, in 1993, by the Mechanism for Conflict Prevention, Management and Resolution. Despite any normative and institutional developments that the regime of the Mechanism may have brought, it has been criticised for the apparent failure to halt the genocide in Rwanda, stop the civil war in Liberia, mitigate the crisis in Burundi or put an end to the conflict in the DRC.[146] It was against this background that the Libyan leader, Muammar Gadhafi, convened the Summit of African Heads of State and Government in Sirte in 1999, setting in motion a process that led to the establishment of the AU in July 2002.

4.4.2 The AU Act, Human Rights and Humanitarian Intervention

4.4.2.1 Human Rights Mechanisms and Structures under the AU Act

The AU Act clearly departs from the regime of the OAU Charter in the area of human rights.[147] The importance of human rights was sparingly recognised under the OAU Charter by reference to the UN Charter and to the UDHR, but further established through the adoption of the African Charter on Human and

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[144] For a discussion on all the legal instruments adopted by the OAU since its establishment, see Maluwa (2000), generally.

[145] See Naldi (1999) 240-262; Abass & Baderin (2002) 1 5.

[146] See, for instance, Abass & Baderin (2002) 1 5.

[147] For an examination of the process leading to the transformation of the OAU into the AU, see generally, Baimu (2001); Gutto (2001) and Magliveras & Naldi (2002).

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Peoples' Rights in 1981.[148] The OAU 4th Extraordinary Summit held in Sirte did not specifically address the issue of human rights.

However, the protection of human rights was captured in the Summit's general determination to, *inter alia*, 'eliminate the scourge of conflicts' in Africa and to 'effectively address the new social, political and economic realities in Africa and the world'. The summit also pledged 'to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances'.[149] The above provisions of the Sirte Declaration was a reaffirmation of the OAU Ministers' Grand Bay Declaration of 16 April 1999, which acknowledged that:[150]

> Observance of human rights is a key tool for promoting collective security, durable peace and sustainable development as enunciated in the Cairo Agenda for Action on relaunching Africa's socio-economic transformation.

The AU Act confirms growing attachment to the importance of human rights in Africa by providing that it shall be the objective of the AU to 'encourage international co-operation, taking due account of the [UN Charter] and the Universal Declaration of Human Rights'.[151] The Act provides that the AU shall strive to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".[152] The principles of the AU include, *inter alia*, 'promotion of

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148 However, in order to give due credit to the African Charter, it is worth noting that the Charter was the first human rights instrument ever to make reference to the UDHR, see Robertson & Merrills (1996) 242.

149 See para 9, OAU Sirte Declaration, 2 September 1999.

150 The Grand Bay Declaration and Plan of Action on Human Rights in Africa was adopted after the first OAU Ministerial Conference on Human Rights, 12 – 16 April 1999, Grand Bay, Mauritius.

151 Art 3(e).

152 Art 3(h).

gender equality, respect for democratic principles, human rights the rule of law and good governance'[153] as well as 'respect for the sanctity of human life'.[154]

The human rights provisions of the AU Act are more far-reaching than what obtained under the OAU Charter in respect of the guarantee of human rights. The provisions reinforce the earlier mentioned declarations made by African leaders to respect human rights, and suggests *bona fide* commitment to pursue an effective guarantee to pursue human rights in Africa under the Act.[155] The consequence of the obligations of the AU regarding human rights is that apart from the individual obligations of member states to ensure the guarantee of human rights within their jurisdictions, the AU itself has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa generally.

In order to achieve its aim of ensuring the protection and promotion of human rights, the AU requires an institutional framework with specific organs empowered to further the human rights mandate of the AU Act. Unfortunately, none of the nine organs established under the Act has defined tasks specifically relating to human rights.[156] This raises the question of how and through which organ the AU can fulfil its specific objective to protect and promote human rights.[157]

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153 Art 4(m).

154 Art 4(o).

155 See, Abass & Baderin (2002) 1 29.

156 The Act currently establishes the following organs: The Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions. None of the 8 specialised committees established under article 14(1) relate to human rights.

157 See Abass & Baderin (2002) 1 32.

One way to address this question would be to utilise the Economic, Social and Cultural Council (ECOSOCC) of the AU, established under article 22 of the AU Act. The functions and powers of the AU ECOSOCC are not yet determined.[158] In determining these powers and functions, lessons may be drawn from the UN Economic and Social Council (ECOSOC), whose functions include the making of 'recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms'.[159] Adopting such a function would easily make the AU ECOSOCC a human rights organ.

Another important area from which the AU ECOSOCC can benefit from the UN ECOSOC relates to the role of NGOs. NGOs accorded observer or consultative status with the UN ECOSOC play an important role in monitoring how the UN ECOSOC discharges its obligations of furthering the protection and promotion of human rights.[160] Equally, NGOs participate in the activities of the African Commission on Human and Peoples' Rights.

However, neither the OAU Charter nor the AU Act contains any provision on the role of NGOs. It is proposed that the in defining the mandate of the AU ECOSOCC, a provision should be made to allow NGOs to get observer or consultative status in order to participate in the activities of ECOSOCC. In this way, the AU will benefit from the experiences of the NGOs and this in turn would lead to a more participatory process of protecting and promoting human rights on the continent.

In order to achieve its human rights related objectives, the AU has incorporated the OAU human rights organs into the AU framework. The AU

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[158] See art 22 of the AU Act.

[159] See art 62(2), UN Charter.

[160] Such NGOs can avail information to the thematic and special rappoteurs of the Sub-Commission on Human Rights, which is a subordinate organ of ECOSOC. The NGO with observer status also can attend and participate in ECOSOC sessions, in which recommendations of both the sub-Commission and the Commission on Human Rights are discussed and adopted.

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Assembly in its Lusaka Summit in July 2001 adopted a declaration incorporating the 1993 Mechanism on Conflict Prevention, Management and Resolution as an organ of the AU. The Assembly particularly noted that the Mechanism was an organ within the OAU that constituted 'an integral part of the declared objectives and principles of the [AU]', and thus reached a decision to incorporate it 'as one of the [o]rgans of the [AU] …'[161] Despite this positive move, the Assembly surprisingly failed to incorporate two OAU institutions that are directly concerned with promotion and protection of human rights, namely, the African Commission on Human and Peoples' Rights,[162] and the African Committee of Experts on the Rights of the Child.[163]

After a year of uncertainty[164] regarding the fate of the above two institutions, the Assembly of Heads and State and Government incorporated the institutions into the AU framework in the Durban Summit held in July 2002.[165] According to the 2001 and 2002 AU declarations incorporating the above three OAU human rights institutions into the AU structure, the incorporation was done under article 5(2) of the AU Act, which gives the Assembly the power to establish new organs besides those already established under the Act.

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[161] See 'Decisions on the Implementation of the Sirte Summit Decision on the African Union' OAU Doc AHG/Decl 1 (XXXVII), para 8.

[162] Established under art 30 of the African Charter on Human and Peoples' Rights, (1982) 21 ILM 58; For a discussion on the establishment, mandate, functions and an evaluation of the Commission see Viljoen (1998) for the period up to 1 October1997; and Murray (2001), for the period up to February 2001. Other general works that are relevant Claude (1992), Ondinkalu (1998) and Murray (2000).

[163] Established under art 32 of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/153/REV 2 (1999), reprinted in Heyns (1997) 38, adopted in 1991, entered into force on 29 November 1999.

[164] The uncertainty was expressed in various fora, including through scholarly publications. Abass & Baderin, or instance, writing in March 2002, expressed the concern that the failure to adopt the OAU institutions was undesirable, because it caused anxiety regarding the fate of those institutions. See Abass & Baderin (2002) 1 33.

[165] See AU 'Decision on Interim Period' *1st Ordinary Session of the AU Assembly of Heads of State and Government* 9-11 July 2001, AU DOC ASS/AU/Dec 1(I) para 9.

It is contended that on a literal interpretation of article 5(2), the Assembly could not have acted under this provision because the institutions in question already existed. Instead, the OAU human rights institutions should have been regarded as having been intergrated into the AU through article 3(h) of the AU Act, which provides that the AU will "promote and protect human and peoples' rights *in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments*".[166]

The latter assertion is based on the interpretation that these institutions were created either in accordance with the Charter, or under the provision for 'other relevant human rights instruments'. The human rights mandate of the AU may be realised by invoking articles 5(2) and 9(2) of the AU Act, which gives the AU Assembly the power to create new organs for the purposes of ensuring that the AU realises its objectives.

Ostensibly, this means that the Assembly can, in addition to the incorporation of the already existing organs, also decide to establish new organs for the protection and promotion of human rights. Besides being tedious, the latter approach is likely to undo the progress that the above-mentioned OAU human rights institutions have achieved so far.[167] The OAU institutions already exist, and it would be beneficial to build on their past experiences. It is also not prudent to set up too many new organs under the AU because of the financial implications.[168]

In a recent study, Baimu has warned of a likelihood of proliferation of human rights institutions under the AU, especially considering that the 'developmental arm' of the AU - the New Partnership for Africa's Development (NEPAD) -

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[166] Emphasis added.

[167] Abass & Baderin (2002) 1 34.

[168] Recent studies have shown that the African Commission on Human and Peoples' Rights, for instance, has been heavily underfunded by the OAU. Sometimes, the Commission has had to rely on external donors to discharge its obligations. See, for example, Viljoen (1997) and Murray (2000).

envisages the creation of other human rights institutions.[169] The ideas in the NEPAD were conceived and are being implemented under the auspices of the AU.[170] NEPAD seeks to address Africa's underdevelopment through promoting democracy, human rights, accountability, transparency and participatory governance.[171] The structure of NEPAD consists of the Heads of State and Government Implementation Committee,[172] the Steering committee, which comprises the representatives of the Heads of State and Government of the five countries that have been at the forefront of promoting NEPAD,[173] and a secretariat based at Midrand, South Africa.

Two proposed institutions of NEPAD of relevance to human rights are the African Peer Review Mechanism (APRM), whose mandate is to evaluate compliance by states of NEPAD principles including human rights, and the position of the Commissioner for Democracy, Human Rights and Good Governance.[174] Baimu has argued for a cautious approach in the establishment of parallel human rights organs under the auspices of the AU.[175] Instead, he prefers integration of these institutions into the mainstream AU

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169 See generally, Baimu (2002). The NEPAD document is available at <htpp//www.nepad.org> (accessed on 30 September 2002).

170 See Baimu (2002) 7, where he discusses the linkage between NEPAD and the OAU/AU.

171 Para 49 of the NEPAD Document.

172 Para 60. This Committee will consist of 20 Heads of State and Government.

173 Para 202. The five countries are Algeria, Egypt, Nigeria, Senegal and South Africa.

174 The proposal for the establishment of the APRM was made by the Heads of State and Government Implementation Committee in October 2001, and was endorsed by the AU in its Durban Summit in July 2002. See AU 'Declaration on the Implementation of ... NEPAD' 1st Ordinary Session of the Assembly of Heads of State and Government of the AU, 9 – 10 July 2002, Durban, South Africa. Concerning the proposal or the creation of the position of the Commissioner for Democracy, Human Rights and Good Governance, see Communiqué issued at the end of the Second Meeting of the Heads of State and Government Implementation Committee, Abuja, Nigeria, 26 March 2002, para 12.

175 Baimu (2002) 12 – 15.

framework.[176] This cautious approach is advisable, considering that the number of the organs under the AU Act is numerous. In the long run, this could result in the cumbersome operation of the AU and also present a financial burden.[177]

4.4.2.2 Prospects for Humanitarian Intervention under the AU Act

During the OAU Council of Ministers Session held in Lusaka, Zambia, in July 2001, the OAU Secretary-General stated that the AU was designed to be a new institution, completely different from the OAU. He said:[178]

> It is important to point out that when African leaders decided to establish the [AU] when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organisation which was going to be a continuation of the OAU by another name.

Although only time will tell whether or not the AU will be more effective than its predecessor, the OAU, it is noteworthy that the provisions of the AU Act, especially those concerning intervention, radically depart from those of the OAU Charter. The Act contains a number of general provisions of the AU Act on collective security, and these provisions envisage an interventionist organisation.

The provisions state that the AU shall 'promote peace, security and stability on the continent'.[179] Also, it is provided that the AU shall function in accordance with the principles of the 'establishment of a common defence policy for the

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176 As above.

177 Magliveras & Naldi (2002) 419.

178 See *Report of the Secretary-General*, CM/2210 (LXXIV), Council of Ministers, 74th Ordinary Session/9th Ordinary Session of the AEC, 2-7 July 2001, 10.

179 Art 3(f).

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African Continent',[180] the right of member states 'to live in peace and security',[181] and the right of any member state of the AU 'to request intervention from the [AU] in order to restore peace and security'.[182]

A cursory evaluation of the above provisions prompts an impression that they contradict the time-honoured customary international law principle of non-intervention that also forms part of the AU Act.[183] Article 4(g) enshrines the non-intervention principle, stating that the AU shall function according to the principle of 'non-interference by any member state in the internal affairs of another'. One may argue that this provision completely negates those discussed in the previous paragraph.

However, a closer examination of the wording of article 4(f) reveals otherwise. The AU provision differs fundamentally from its UN Charter 'equivalent' contained in article 2(7) of the UN Charter, which provides, *inter alia*, that:[184]

> Nothing contained in the present Charter shall authori[s]e *the [UN]* to intervene in matters which are essentially within the domestic jurisdiction of any state.

The UN Charter provision above is addressed to the UN acting as such, and not to the member states. In contrast, article 4(f) of the AU Act is directed at member states, by requiring that no member state should interfere in the 'internal affairs of another'. Thus it is argued that article 4(f) does not have the same effect as article 2(7), because the former provision does not restrain the AU from intervening in the internal affairs of individual states.

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[180] Art 4(d).

[181] Art 4(i).

[182] Art 4(j).

[183] See art 4(g) and 4(f).

[184] Emphasis added.

An additional argument to support the view that the AU provisions permitting intervention do not contradict article 4(f) is that human rights issues are not matters falling within the description of 'internal affairs'. This is the position adopted in this study in the discussion concerning the legal basis for humanitarian intervention under the UN Charter.[185]

A provision of the AU Act that is of prime relevance to this study is article 4(h), which gives the AU the 'right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Article 4(h) is couched in terms of a 'right', meaning that the AU Assembly will have the discretion to decide whether or not to intervene. The consent of the target state will not be required. It would have been better if the provision required the AU to intervene as a matter of 'duty' because a sense of obligation to intervene is more likely to move the AU into action. Nevertheless, the provision raises at least two general legal issues, which are discussed below.

First, a question might arise whether or not article 4(h) is in conflict with article 2(4) of the UN Charter, which states that:[186]

> All members [of the UN] 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 UN.

It may be argued that the above provision precludes any consent that African states have given the AU to intervene in their internal affairs. In such a situation, then article 4(h) would be void for incompatibility with article 2(4), which is regarded as *jus cogens*.[187] Such a view would be strengthened by the

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[185] See Chapter 2.

[186] Scholarly opinion is sharply divided on the meaning of article 2(4) of the UN Charter. Frank (1970), for instance, 'declared' article 2(4) 'dead', concluding that this provision is so permissive that 'only the words remain'. On the other hand, Henkin (1971) replied that 'the reports of the death of article 2(4) were greatly exaggerated'.

[187] See, *inter alia*, Schatcher (1985), Charney (1999) and Abass & Baderin (2002).

fact that the UN Charter provides that obligations of member states under the UN Charter supersede their obligations under any other treaty.[188] Furthermore, the Vienna Convention on the Law of Treaties provides that:[189]

> A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law.

A response to such a concern would be that the kind of force prohibited by article 2(4) is that which is 'against the territorial integrity or political independence of states'. Intervention under article 4(h) would not be against the territorial integrity or political independence of the African states that are members of the AU. Had the provision been designed to allow such interference, the member states would not have agreed to allow the provision in the Act. The provision in article 4(h) presumes prior consent by every member state of the AU to the effect that the Union is allowed to intervene in their respective territories. One recent study adopts this reasoning, and argues as folows:[190]

> What the AU members contracted out by giving their consent to intervention by the AU is the principle of 'non-intervention'. ... By ratifying the AU Act, African states must be understood to have agreed that the AU can intervene in their affairs accordingly. In empowering the [AU] to that effect under article 4(h), the states must be taken to have conceded a quantum of their legal and political sovereignty to the [AU].

Second, article 4(h) does not clarify who determines when to intervene and by what means the AU may intervene. Of course, the article is quite clear that it is the AU Assembly of Heads of State and Government that will make a decision for intervention. The means of intervention are not stated, but considering that the intervention under this provision will be responding to 'grave circumstances', which are specified as 'war crimes, genocide and crimes

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[188] Art 103.

[189] Art 53.

[190] See Abass & Baderin (2002) 1 18.

against humanity', one may plausibly presume that the intervention will be by use of armed force. War crimes, genocide and crimes against humanity are most likely to be committed in the context of armed conflicts. Therefore, only proportional use of armed force is likely to address these 'grave circumstances'.

It must be accepted that it is the AU Assembly of Heads of State and Government that is to decide when to intervene, and that the intervention is likely to involve the use of armed force. Two subsidiary issues arise from this proposition. The first is that the Assembly's power to determine the existence of war crimes, genocide and crimes against humanity may be 'hijacked' by more powerful states within the AU. These states may want to politicise the interpretation of these terms.

Fortunately, these terms have already been defined in the 1998 Rome Statute of the International Criminal Court.[191] This means that it will not be easy to come up with other definitions. Furthermore, a decision to intervene will only require an endorsement of two-thirds of the member states, and no single member of the AU has the power to veto.[192] This will ensure that no single state can control the decision making process in respect of the operation of article 4(h) and the AU Act in general.

The second subsidiary issue arising from the above concern is that the AU Act does not envisage the AU's supervision by the Security Council, yet the UN Charter provides that the UN Security Council has 'primary responsibility' concerning the maintenance of international peace and security.[193] Indeed, the UN Security Council in exercising its primary responsibility has the mandate to

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[191] (1998) 37 *ILM* 999.The Rome Statute of the International Criminal Court entered into force on 1 July 2002, 60 days after the 60th ratification, pursuant to article 126 of the Statute. The definitions are in art 6 (genocide), art 7 (crimes against humanity) and art 8 (war crimes).

[192] Art 11 of the AU Act.

[193] Art 24, UN Charter.

supervise the AU, which is a regional arrangement or agency within the meaning of article 52 of the UN Charter.[194] Under such supervision, the AU would be bound by article 53 of the UN Charter, which states as follows:[195]

> The Security Council shall, where appropriate, utili[s]e such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies *without the authori[s]ation of the Security Council* ...

The above provision restrains all activities of regional organisations with regard to the use of force, unless the Security Council has authorised such action. Yet, the AU Act in article 4(h) purports to authorise the AU to intervene without the authority of the Security Council. The AU Act does not anticipate the supervision of the UN Security Council, at least with regard to intervening in AU member states where war crimes, genocide or crimes against humanity are being committed. This may imply that the AU considers that it will not be expedient to wait for UN Security Council authorisation before responding to situations of war crimes, genocide and crimes against humanity.

The omission by the AU Act of the requirement that the Security Council should supervise article 4(h) interventions can only be interpreted as being deliberate. This is because only one year before the AU Act was adopted, the CSSDCA Declaration of the OAU had expressly recognised that 'the *primary* responsibility for the maintenance of international peace and security [was] with the [UN] Security Council [but] the OAU in close co-operation with the [UN] and [sub-regional intergovernmental organisations], remains the *premier* organi[s]ation for promoting security, stability, development and co-operation in

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[194] Nothing in the AU Act states that the AU is a regional arrangement or agency. According to Abass & Baderin (2002) 1 20, the status of the AU as a regional arrangement or agency can only be assumed from its composition (African states only), the bond between the members (common historical, cultural and political values) and the territorial scope of its operation (the African continent). In any case, they argue, the OAU, whose member states have now formed the AU have been treated in the past by the UN and the general international community as constituting a regional arrangement or agency.

[195] Emphasis added.

Africa'.[196] In this Declaration, the 'primacy' of the UN Security Council in matters of international peace and security was recognised, although even then, the framers carefully added that the OAU remained the 'premier' organisation for the same purpose when it comes to the OAU's region of competence – Africa.

An approach similar to that of the AU had been taken in the past. ECOWAS intervened in Liberia and in Sierra Leone in 1990 and 1997 respectively, without the authority of the Security Council. In both cases, ECOWAS authorities invoked the doctrine of humanitarian intervention, as well as the provisions of the Protocol on Mutual Assistance and Defence.[197] ECOWAS is likely to continue with this trend under the provisions of the 1999 Mechanism for Conflict Prevention, Management and Resolution. Similarly, NATO's use of force in Kosovo was not authorised by the Security Council.

The reason behind the increasing tendency by regional organisations to seize for themselves the powers to intervene in member states, to use the words of the AU Act, in 'grave circumstances', arises from the fact that the UN Security Council's bureaucratic procedures cannot guarantee a quick response in cases of gross human rights violations. Furthermore, the Council has either ignored some conflicts or has shown discrepant standards in those conflicts to which it has responded. Weller, for instance, notes that in Liberia, the Council first declined to intervene, then intervened, only after ECOWAS did, with considerably less vigour than it did in the Former Yugoslavia.[198] Thus, an argument may be made that where the UN Security Council refuses to intervene in a crisis of a UN member state, this frees the concerned regional arrangement or agency to undertake whatever actions it deems necessary.[199]

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[196] See AHG/Decl 4 (XXXVI), principle 4(g). Emphasis added.

[197] See, *West Africa* 4–10 February 1991, 140; *West Africa* 2– 8 March 1992 210; Kufuor (1993) 529.

[198] Weller (1994) 'Foreword' IX.

[199] See Abass & Baderin (2002) 1 24.

The right conferred upon the AU under article 4(h) can serve to complement the powers of the African Commission under article 58 of the African Charter. Under this article, the Commission may draw to the attention of the Assembly of Heads of State and Government any 'existence of a series of serious or massive violations of human and peoples' rights' that may be revealed by communications before the Commission.[200] The Assembly may then request the Commission to 'make an in-depth study' of these cases and thereby make a report of the findings and recommending specific action.[201]

However, the mandate of the Commission under article 58 is limited, in so far as it can only be exercised with the consent of the state where the violations are reportedly occurring.[202] Under the AU dispensation, article 4(h) will enable the Assembly to intervene, without the consent of the target state, in situations of gross violations of human rights, so long as the violations constitute the 'grave circumstances' specified in the article.

Having discussed the provisions of the AU Act relating to human rights, collective security and intervention, we conclude that the Act presents an opportunity for the AU to engage in treaty-based humanitarian intervention without the authority of the UN Security Council. The AU Act, unlike the OAU Charter, has clear provisions relating to the protection and promotion of human rights. The AU has taken the right decision in incorporating into the AU framework, the main OAU human rights organs. This not only ensures continuity, but also avoids duplicity and the dissipation of resources.

Article 4(h), which permits intervention to pre-empt or stop war crimes, genocide and crimes against humanity, envisages humanitarian intervention under the auspices of the AU. The restriction of the circumstances in which the

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[200] Art 58(1).

[201] See art 58(2).

[202] Art 58(2).

AU can intervene to the three crimes considered to be of 'the greatest concern to the international community',[203] supports this position. As stated earlier, humanitarian intervention responds to rare and atrocious circumstances such as those described in article 4(h).

Finally, it is fundamental to note that it is likely that the norm of humanitarian intervention may be espoused by further enactments by the AU in the future. This is so because of the fundamental difference between the contents of article 3 and that of article 4 of the AU Act. The provisions of the former article are expressed, as 'objectives' while those of the latter are 'principles'. Maluwa has stated that 'principles' form the main process by which the OAU embarked on lawmaking.[204] This trend is likely to continue under the new dispensation of the AU.

4.4.2.3 *The Protocol Relating to the Establishment of the Peace and Security Council of the AU, 2002*

The Protocol Relating to the Establishment of the Peace and Security Council of the AU presents a bold normative and institutional framework and may be a relevant source of authority for humanitarian intervention in Africa once it enters into force.[205] The Protocol seeks to establish an African Peace and Security Council to take over the work of the OAU Mechanism for Conflict Prevention, Management and Resolution,[206] which, as stated earlier, is now part of the institutional structure of the AU.

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[203] See art 2, Rome Statute of the ICC.

[204] See Maluwa (2000) 201.

[205] Pursuant to art 22(5), the Protocol shall enter into force after ratification by a simple majority of the members of the AU.

[206] Art 22(1) of the Protocol provides that the Protocol 'replaces' the 1993 Cairo Declaration, which establishes the Mechanism for Conflict Prevention, Management and Resolution. Under art 22(2), the provisions of the Protocol shall supersede the resolutions and decisions of the OAU relating to the Mechanism.

The Peace and Security Council of the AU shall be composed of fifteen member states of the AU elected for a term of two years in due regard to equitable geographical representation, and provided that five of the members shall be elected for a term of three years to ensure continuity.[207] To qualify for election, the prospective member state shall manifest, *inter alia*, commitment to uphold the principles of the Union, which include humanitarian intervention.[208]

Such member state should also show a commitment to the respect for the rule of law and human rights.[209] If this criteria is followed, it is likely that the humanitarian intervention envisaged in article 4(h) of the AU Act will be realised the states that may constitute the Peace and Security Council are bound to be the more democratic states in Africa. Such states may not shield states involved in massive violations of fundamental human rights, as was the case during the existence of the OAU.

Moreover, the provision in the Protocol for decisions to be made by a simple majority if they concern procedural matters and by two-thirds majority if they relate to any other matter,[210] will empower the Council to make decisions which may be contested by some members. One of the obstacles on the functioning of the 1993 OAU Mechanism, as stated earlier, is the requirement that decisions are to be made by consensus.

The AU Protocol also provides that decisions of the Peace and Security Council shall be guided by the principle of consensus, but in cases where consensus cannot be reached, decisions will be made in the manner described

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[207] Art 5(1)(a) and (b) of the Protocol.

[208] Art 5(a) of the Protocol.

[209] Art 5(2)(g).

[210] See art 5(13) of the Protocol.

above.[211] Each member of the Peace and Security Council shall have one vote.[212] The Peace and Security Council shall meet at the Addis Ababa Headquarters of the AU at the level of Permanent Representatives, Ministers or Heads of State and Government.[213]

The Council is required to be so organised as to be able to function continuously.[214] For this purpose, the Council shall, at all times, be represented at the Headquarters of the AU.[215] This provision envisages that most of the decisions of the Council will be made at the level of Permanent Representatives for referral to the Council of Ministers and Heads of State and Government who, according to the Protocol will meet less frequently.[216] With regard to humanitarian intervention, the continuity of the work of the Peace and Security Council is particularly important. The Council may be required to take decisions to intervene to pre-empt mass loss of lives or massive violations of human rights on short notice.

The objectives of the Peace and Security Council will include the anticipating and pre-empting of armed conflicts,[217] and the attendant massive violations of fundamental human rights. It will also aim at the promotion of democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law.[218]

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[211] As above.

[212] Art 5(12) of the Protocol.

[213] Art 8(2) and (3) of the Protocol.

[214] Art 8(1) of the Protocol.

[215] As above.

[216] See art 8(2) of the Protocol. The Council of Ministers and the Heads of State and Government shall meet at least once a year, respectively, or as often as required.

[217] Art 3(b) of the Protocol.

[218] Art 3(f) of the Protocol.

Among the principles to govern the Peace and Security Council is the principle in article 4(h) of the AU Act, by which the AU may intervene pursuant to a decision of the Assembly of Heads of State and Government, in member state in respect of genocide, war crimes and crimes against humanity.[219] Also, the functions of the Council shall include, *inter alia*, 'intervention, pursuant to article 4(h) of the [AU Act]'.[220]

In order to enable the Peace and Security Council to perform this and other responsibilities, the Protocol provides for the establishment of the African Standby Force, composed of standby contingents 'for rapid deployment at appropriate notice.[221] Such standby contingents shall be established by member states of the AU, in terms of 'standard operating procedures' of the AU.[222] It appears from these provisions that the African Standby Force shall be *an ad* hoc force, constituted as need arises. The functions of the African Standby Force shall include 'intervention in member state in respect of grave circumstances ... in order to restore peace and security, in accordance with article 4(h) [of the AU Act]'.[223]

The Protocol defines the rôle of the AU Chairperson with regard to conflict prevention and resolution as well as the maintenance of peace, security and stability on the continent. His role includes bringing to the attention of the AU Peace and Security Council or the Panel of the Wise, any matter that is relevant for the promotion of peace, security and stability in Africa.[224] He may also use his good offices to prevent potential conflicts, resolve actual conflicts

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[219] See art 4(j) of the Protocol.

[220] Art 6(d) of the Protocol.

[221] Art 13(1) of the Protocol.

[222] As above.

[223] Art 13(3)(c) of the Protocol.

[224] Art 10 of the Protocol.

and promote peace-building and post-conflict reconstruction.[225] The Protocol requires the Chairperson to use the information gathered the Protocol's 'early warning system' to advise the AU Peace and Security Council on potential conflicts and threats to peace and security in Africa and recommend the best course of action.[226]

The Protocol, once in force, will clarify at least three issues that the AU Act has left open for interpretation. First, as stated earlier, the Act is silent on who determines when the 'grave circumstances' justifying intervention in a state, and by what means is the intervention to be carried out. We argued that the specified 'grave circumstances of genocide, crimes against humanity and war crimes have already been defined in the Rome Statute of the ICC, and that these definitions may offer guidance. The Protocol supports this view, by providing that the AU Peace and Security Council will have the power to recommend to the AU Assembly of Heads of State and Government, intervention pursuant to article 4(h) of the AU Act in respect of 'war crimes, genocide and crimes against humanity as defined in relevant international conventions and instruments'.[227]

Concerning the means of intervention under article 4(h) of the AU Act, we argued earlier that the use of force is envisaged. This position is supported by the provision of the Protocol requiring the establishment of an African Standby Force with both 'military and civilian contingents' for purposes of 'rapid deployment at appropriate notice'.[228]

Second, we observed in the discussion of article 4(h) of the AU Act that neither the provision nor the rest of the Act clarifies the relationship between the AU

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[225] As above.

[226] Art 12(5) of the Protocol.

[227] Art 7(e) of the Protocol.

[228] Art 13(1) of the Protocol.

and the UN when it comes to issues touching on international peace and security. We concluded that the drafters of the Act deliberately left out any definition of this relationship, in order to ensure that the AU can act in emergency cases of the 'grave circumstances' and the attendant massive violations of fundamental rights. The Protocol appears to discount this assumption by detailing out how the Peace and Security Council of the AU will work together with the UN Security Council.

In its preamble, the Protocol recognises the 'provisions of the Charter of the [UN], conferring on the Security Council primary responsibility for the maintenance of international peace and security'.[229] It also takes cognisance of the 'provisions of the [UN] Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer co-operation and partnership between the [UN], other international organisations and the [AU], in the promotion and maintenance of international peace ... [and] ... security in Africa'.[230]

Also, the Peace and Security Council of the AU shall be guided by the principles of the AU Act, those of the *UN Charter*, and the Universal Declaration of Human Rights.[231] The AU Council also has power to 'promote and develop a strong partnership for peace and security between the [AU] and the [UN] and it agencies ...'[232] Furthermore, the AU Peace and Security Council is enjoined by the Protocol to 'co-operate and work closely with the [UN] Security Council, which has the primary responsibility for the maintenance of international peace and security'.[233]

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229 Preamble to the Protocol, para 4.

230 As above.

231 Art 4 of the Protocol. Emphasis added.

232 Art 7(k) of the Protocol.

233 Art 17 of the Protocol.

The above provisions manifest a sustained effort by the drafters of the Protocol to provide for an African regional mechanism for the maintenance of international peace and security that is subservient to the UN Security Council. Therefore, it may be argued that the Protocol clarifies that the AU will only intervene militarily in member states with the approval and under the supervision of the UN Security Council. However, it is possible that the drafters of the Protocol were either oblivious of the relevant provisions of the AU Act, or they intended to define the relationship between the AU and the UN Security Council, which the AU Act had omitted.

It is interesting to note that there exists an internal contradiction regarding the provisions of the Protocol on the relationship between the AU Peace and Security Council and the UN Security Council. The Protocol states that the AU 'has the *primary* responsibility for promoting peace, security and stability *in Africa*.[234]

Despite the elaborate provisions by the Protocol recognising the primacy of the UN Security Council in the promotion of international peace and security, that primacy only relates to peace and security in other parts of the world. Within Africa, the Protocol adopts the position taken the AU Act – that of according the AU the primary role in matters of international peace and security, including the use of force in the maintenance thereof. This argument is supported by the fact that the Protocol does not provide anywhere that the AU Peace and Security Council or the AU Assembly of Heads of State and Government will require the authorisation of the UN Security Council before engaging in humanitarian intervention under article 4(h) of the AU Act.

The third and final issue in respect of the AU Act which the Protocol clarifies relates to the relationship between the Peace and Security Council of the AU and the African Commission on Human and Peoples' Act. The Protocol

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[234] Art 16(1) of the Protocol. Emphasis added.

provides that the Council 'shall seek close co-operation' with the Commission in all matters relevant to the mandate of the Council.[235]

The Commission is obliged under the Protocol to bring to the attention of the Council 'any information relevant to the objectives of the [Council]'.[236] These provisions are likely to 'give teeth' to the Commissions mandate under article 58 of the African Charter on Human and Peoples' Rights, by which it may bring the attention of the Council situations of gross and systematic violations of human rights. Information provided by the Commission under the Protocol may be a basis of a recommendation by the Council to the AU Assembly for humanitarian intervention under article 4(h) of the AU Act.

Finally, it is noteworthy that the role of eminent personalities that was prominent in the functioning of the AU has also been recognised in the Protocol. A 'Panel of the Wise' is established with the mandate to 'advise the [Peace and Security Council of the AU] and the Chairperson of the [AU] Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa'.[237] The Panel of the Wise is to be composed of 'five highly respected African personalities form various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent'.[238]

The advise of the Panel of the wise is likely to be headed by the AU machinery, and the personal intervention of the Panel in situations of armed conflicts where massive violations of fundamental human rights are taking place may succeed in reconciling the warring parties, given Africa's respect for elders. The provision for the 'Panel of the Wise' is an important development,

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235 Art 19 of the Protocol.

236 As above.

237 Art 11(1) of the Protocol.

238 Art 11(2) of the Protocol.

as it will ensure that the use of force will only be resorted to if the Panel's mediation, conciliation and other peaceful methods of intervention have failed.

4.4.2.4 Conclusion

The analysis of the provisions of the AU Act lead us to the conclusion that the AU Act represents a major normative and institutional departure form that obtaining in the OAU regime. The AU Act, unlike the OAU Charter, has an express provision mandating it to deal with human rights issues in member states. This suggests that human rights issues will not be treated as matters within the domestic jurisdiction of AU member states.

Article 4(h) provides for treaty-based humanitarian intervention as defined in this study. The intervention will be exercised through the recommendations of the Peace and Security Council of the AU to the Assembly of Heads of State and Government. The Protocol Relating to the Establishment of the Peace and Security Council, unlike the AU Act, provides for the relationship between the AU and the UN Security Council relating the use of force by the AU. However, the provisions of the Act, as well as those of the AU Act, fall short of expressly requiring that the AU shall have to prior or *ex post facto* obtain authorisation of the UN Security before engaging in the use of force under article 4(h) of the AU Act.

4.5 THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) AND HUMANITARIAN INTERVENTION: PROSPECTS

The transformation of ECOWAS from an economic to a political organisational scheme started with the adoption in 1978 and 1981, respectively, of the Protocol on Non-Aggression and the Protocol on Mutual Assistance and Defence. The revision of the ECOWAS Treaty in 1993 was an important event in the history of the Organisation. The Treaty not only allows ECOWAS to forge a strong and economic and monetary union to meet the challenges of

globalisation, but reinforces within its provisions the need to protect fundamental human rights and threats to international peace and security.[239]

Despite the opportunities created by these protocols and the 1993 revised ECOWAS Treaty, the ECOWAS responses to massive violations of fundamental human rights have not been based on the hypothetical institutions provided for.[240] The protocols provided for the establishment of diverse institutional mechanisms and administrative processes to be made operative during situations of mass violations of fundamental human rights.[241] The Protocol on Mutual Assistance and Defence, for instance, envisaged the creation of an Allied Armed Force of the Community (AAFC), Defence Council as well as a Defence Commission.[242]

However, by the time ECOWAS intervened in Liberia, none of these institutional and administrative mechanisms had been established. As a result, ECOWAS intervention in Liberia, and the subsequent one in Sierra Leone were justified, not on the Protocol of Mutual Assistance and Defence but on the Protocol on Non-Aggression.[243] Also, as a result of lack of the proper functioning of some of the institutions provided for under the protocols and 1993 Treaty, ECOWAS had to resort to *ad hoc* mechanisms, such as ECOMOG, as well as mediation initiates of imminent personalities.[244]

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239 See art 4 of the 1993 Revised Treaty.

240 See, for instance, Aning (2000) 5 (stating that rather, the responses have been based on the actual experiences of ECOWAS in addressing the conflicts in the region, notably those in Liberia and Sierra Leone).

241 Aning (2000) 5.

242 Art 12(i) of the Protocol.

243 Aning (2000) 6; Didigu (2001) 1.

244 Didigu (2001) 1.

Despite institutional shortcomings, ECOWAS successfully intervened on humanitarian grounds in Liberia and Sierra Leone. In Sierra Leone, for instance, ECOMOG addressed the conflict effectively, leading to the return of civilian power to a civilian head of state in 1998. ECOWAS troops continued to monitor events in Sierra Leone when ECOMOG withdrew as a result of financial constrains – troop contributing member states could no longer afford to maintain the forces in Sierra Leone.[245]

The failure of the UN to submit the interventions by ECOWAS in Liberia and Sierra Leone to serious scrutiny in terms of the legality of the operations, reinforces the view that post Cold-War Africa holds little interest for the major players in the international community.[246] Thus the interventions appear to have been convenient for the UN, and the US in particular, given its reluctance to intervene militarily in Sierra Liberia, and the UN's reluctance to take decisive action in Sierra Leone.[247] On the basis of this experience, the role of ECOWAS in humanitarian intervention in West Africa is bound to be more prominent in the 21st century.

4.6 THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC) AND HUMANITARIAN INTERVENTION: PROSPECTS

While SADC is essentially an intergovernmental organisation devoted to economic and development integration in Southern Africa, it has become clear that its role cannot be achieved without peace, security and respect for fundamental human rights. This realisation caused the drafters of the SADC

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[245] See <http://www.reliefweb.int> (accessed on 20 September 2002).

[246] Olonisakin (2000) 144.

[247] As above.

Treaty to commit the Organisation to, *inter alia*, the principles of human rights, democracy and the rule of law.[248]

The human rights provisions in the SADC Treaty were strengthened by the adoption on 7 August 2000 of the Protocol on the SADC Tribunal ('SADC Tribunal Protocol') and the Rules of Procedure Thereof.[249] The Protocol will enter into force 30 days upon ratification by two-thirds of the member states of SADC.[250] The Protocol establishes a SADC Tribunal, pursuant to article 16 of the SADC Treaty.[251] The Tribunal will be composed of not less than 10 judges[252] to be elected from among nationals of SADC member states for a five-year term.[253] The Tribunal 'shall have its seat at a place designated by the [SADC] Council, provided it may in any particular case sit and exercise its functions anywhere within [SADC] if it considers it desirable'.[254]

The Tribunal shall have jurisdiction over all disputes and applications relating to the interpretation and application of the SADC Treaty or Protocols or other instruments adopted under the auspices of SADC, as well as other instruments binding upon SADC member states.[255] Since the SADC Treaty provides for the observance of human rights and the rule of law as one of the principles

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[248] See art 4 of the SADC Treaty.

[249] See SADC, *Protocol on Tribunal and the Rules of Procedure Thereof*, adopted at Windhoek, Namibia on 7 August 2000 (copy with the author).

[250] Art 38 of the SADC Tribunal Protocol.

[251] See art 2 of the SADC Tribunal Protocol.

[252] Art 3 of the SADC Tribunal Protocol.

[253] Art 6(1) of the SADC Tribunal Protocol.

[254] Art 13 of the SADC Tribunal Protocol.

[255] Art 14 of the SADC Tribunal Protocol.

that guides SADC,[256] it is arguable that human rights matters are likely to be litigated before the SADC Tribunal once it is established.

This argument is supported by the fact that the SADC Tribunal Protocol provides that individuals may access the Tribunal for redress.[257] Both inter-state and individual petitions may be brought against states that are SADC members because the SADC Tribunal Protocol will have jurisdiction over 'disputes between states and between natural or legal persons and states'.[258]

The 1998 SADC military interventions in the DRC and in Lesotho were justified on an array of grounds. Of these grounds, intervention with the consent of the target state seems to be documented reason for both interventions.[259] However, the two interventions have set precedents for military intervention under the auspices of SADC, in response to situations of armed conflicts in member states. The experiences gained through the interventions will undoubtedly inform future military interventions in the region specifically on the basis of humanitarian intervention.

4.7 THE POTENTIAL ROLE OF OTHER AFRICAN SUB-REGIONAL ORGANISATIONS IN HUMANITARIAN INTERVENTION

Although the OAU (now the AU), ECOWAS and SADC have presented the most significant articulation regarding peace, security and human rights issues, the other sub-regional organisations in Africa are often mentioned as potentially playing a similar role. The other sub-regional organisations are:

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[256] Art 4 of the SADC Treaty.

[257] Art 15 of the SADC Tribunal Protocol.

[258] Art 15 of the SADC Protocol.

[259] The different justifications for the interventions are discussed in Chapter 2 of this study.

Common Market of Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the inter Governmental Authority on Development (IGAD), the East African Community (EAC) and the Arab Maghreb Union (AMU). The potential role in humanitarian intervention of these intergovernmental organisations is now discussed briefly.

4.7.1 The Common Market For Eastern and Southern Africa (COMESA)

COMESA was established in 1993,[260] replacing the Preferential Trade Area of East and Southern African States (PTA) of 1981.[261] One of the institutions of COMESA is the Court of Justice, which has a contentious and advisory jurisdiction on matters relating to the application of the COMESA Treaty.[262] Member states and legal and natural persons have standing before the Court.[263]

The COMESA Court definitely does not have a specific human rights mandate. However, a number of provisions in the Treaty establishing COMESA concern human rights, and have an implied relevance to peace and security. The preamble refers to 'the principles of liberty, fundamental freedoms and the rule of law'.[264] By Article 6, the fundamental principles of COMESA include the promotion and sustenance of a democratic system of governance in each

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[260] See COMESA Treaty (1994) 33 ILM 1067.

[261] The PTA was the immediate predecessor of COMESA. It consisted of 23 member states.

[262] Art 19 COMESA Treaty.

[263] Art 26 COMESA Treaty.

[264] See Preamble COMESA Treaty.

member state,[265] the recognition and observance of the rule of law,[266] and the recognition, promotion and protection of human and peoples' rights.[267]

4.7.2 The Economic Community for Central African States (ECCAS)

ECCAS has been largely moribund since its creation in 1981.[268] The members of ECCAS are Burundi, Rwanda, the DRC, Cameroon, Central African Republic, Chad, Congo, Gabon, Guinea, São Tomé and Principé, and Angola. In May 1992, the Standing Advisory Committee on Security Questions in Central Africa was established[269] in response to a UN General Assembly Resolution.[270] Through this UN Standing Committee, ECCAS member states have taken a number of initiatives to promote regional peace and security. For instance, a non- aggression pact was concluded in 1996.[271]

In 1999, ECCAS Heads of State and Government created a mechanism for the promotion and maintenance of sub regional peace and security- the Council of Peace and Security in Central Africa.[272] The aim of this Council is to prevent, manage and settle conflicts in Central Africa, and the undertaking of activities

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[265] Art 6 (h) COMESA Treaty.

[266] Art 6 (g) COMESA Treaty.

[267] Art 6 (e) COMESA Treaty.

[268] Berman & Sams (2000) 201.

[269] As above.

[270] UN DOC A/ RES/ 46/ 37 B, 6 December 1991.

[271] UN DOC A/ 51/ 274- S/ 1996/ 631 Annex Final Declaration of Heads of State and Government of Countries Members of the United Nations Standing Advisory Committee on Security Questions in Central Africa 8 July 1996, August 1996, Para 4.

[272] UN DOC A/ 53/ 868- S/ 1999/ 303, 17 March 1999.

aimed at promoting, maintaining and consolidating of peace and security in the sub region.[273]

4.7.3 The Intergovernmental Authority on Development (IGAD)

The origins of IGAD differ from those of most other African sub-regional organisations. The organisation began in 1986 as the Inter-Governmental Authority on Drought and Development (IGADD), mainly to address humanitarian disasters in the sub-region.[274] Its name changed to IGAD in 1996. IGAD's member states, at present, are the seven states of East Africa and the Horn of Africa - Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda. IGAD's attention has subsequently turned to peace and security issues. The organisation has mediated a number of conflicts in the sub region, usually in collaboration with the OAU and the UN. The division of political and humanitarian affairs includes a conflict prevention, management and resolution section.[275] The organisation has also developed a five element 'programme on conflict prevention, management and resolution'.[276]

4.7.4 The East African Community (EAC)

The EAC was re-launched in 1996, after the initial Community collapsed in 1977.

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[273] See Art 1 Decision on the Creation and of a Mechanism for Promotion, Maintenance and Consolidation of Peace and Security in Central Africa; Annex II Yaounde Declaration on Peace, Security and Stability in Central Africa, adopted on 25 February 1991.

[274] Berman & Sams (2000) 207.

[275] Berman & Sams 209; see also <http://www.igad.org/generalinf> (accessed on 1 August 2002).

[276] The programme entail: (1) developing capacity building for conflict prevention; (2) documenting demobilization and post- conflict peace- building experience; (3) elaborating a culture of peace and tolerance; (4) developing a conflict early warning mechanism, and; (5) creating an emergency relief fund.

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In November 1997 and January 1998, the three EAC countries held high-level meetings to discuss possible cooperation for undertaking in peace support operations. These discussions led to the signing of a memorandum of understanding between the armed forces of the three countries on defence matters.[277] In addition, the EAC countries have severally participated in joint military exercises, whose aim is to create confidence and to prepare the forces for peacekeeping activities or deployment in the case of a humanitarian disaster in the region.[278]

The Treaty establishing the EAC, concluded between Kenya, Uganda and Tanzania[279] in 1999 expands the objectives of the Community from economic cooperation envisaged in the defunct EAC, to issues of human rights, peace and security.[280] Under the new Treaty, the member states pledge themselves to ensure, *inter alia*, gender equity, and the promotion of peace, security and stability within the Community.[281] The 'fundamental principles' of the Community include:[282]

> Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights

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[277] Berman & Sams (2000) 200.

[278] *The East African* 29 June-5 July 1998, 11; See also 'East African Countries Sign Pact on Joint Military Training' *Pan African News Agency*, 19 June 1998, available at <http://www.africanews.org/archives> (accessed on 1 August 2002).

[279] Applications for membership from Rwanda and Burundi are still pending for consideration by the EAC Heads of State and Government.

[280] See art 3, *Treaty of the East African Community*, 30 November 1999, reproduced in (1999) 7 *African Yearbook of International Law* 418.

[281] Art 3 (e) and 3 (f).

[282] See art 6(d).

The Treaty also provides for 'operational principles of the Community',[283] and these include good governance, democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.[284] The East African Court of Justice established under article 23 of the Treaty initially has jurisdiction over the interpretation and application of the EAC Treaty.[285] However, the Treaty provides that the Court shall have such other original, appellate, human rights or other jurisdiction as may be determined by the EAC Council of Ministers at a suitable subsequent date.[286] To this end, EAC member states are required to conclude a protocol to operationalise this extended jurisdiction.[287]

Considering that the Treaty is not clear on the use of force or methods of compelling member states to comply with the principles and objectives of the Community, these issues may be clarified by the Court upon a request for an advisory opinion. Under the Treaty, the Summit of Heads of State and Government, the Council of Ministers or any member state of the Community may request the Court to give an advisory opinion regarding a question of law arising from the Treaty.[288]

The EAC Treaty acknowledges that peace and security in the region are pre-requisites to social and economic development.[289] In this regard, member states undertake to establish common mechanisms for the management of

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283 Art 7.

284 Art 7(2).

285 Art 27(1).

286 Art 27(2).

287 As above.

288 Art 36.

289 Art 124.

refugees,[290] and to periodically review the region's security.[291] This ostensibly means that there exists a legal basis for humanitarian intervention under the EAC treaty, as a response to human rights violations that disturb regional peace and security.

4.7.5 The Arab Maghreb Union (AMU)

The very creation of the AMU in February 1989 represented a notable accomplishment, given the level of distrust among some of its member states.[292] Previously, the Organisation's member states had concentrated their energies on concluding bilateral and trilateral political agreements with one another.[293] The AMU was established through the Treaty of Marrakech, concluded in 1989 between Mauritania, Morocco, Algeria, Tunisia and Libya.

The main aims of the Union are to promote regional security, to create viable sub-regional economic integration and to develop trade and other links with the European Union.[294] A Maghreb Court of Justice with its seat at Nouakchott, Mauritania, is to be established. The Court will adjudicate issues arising from the Treaty of Marrakech, but will not have any human rights mandate.[295] This means that the potential for humanitarian intervention under the auspices of the AMU is very limited considering that the organisation's mandate at the moment does not include human rights matters.

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[290] Art 124(5)(h).

[291] Art 124(6).

[292] Berman & Sams (2000) 193.

[293] Mohamedou (1997) 2-6.

[294] See in general on the Maghreb Arab Union E I Kahiri *Union du Maghreb Arab* (1994).

[295] Viljoen (1999) 208.

4.7.6 Conclusion

Two sub-regional African intergovernmental organisations – ECOWAS and SADC – have been involved in actual use of military force in respective member states as a response to massive violations of fundamental human rights. In the case of ECOWAS's interventions in Liberia and Sierra Leone, we conclude after analysis that they constitute humanitarian intervention. The interventions by SADC in the DRC and Lesotho were based on the consent of the government of the respective state.

However, the SADC interventions are relevant for humanitarian intervention because they were undertaken in countries where massive violations of fundamental human rights were taking place. For this reason, we conclude that the experiences of SADC in the DRC and Lesotho interventions will provide lessons for future humanitarian intervention under the auspices of SADC.

The other African sub-regional intergovernmental organisations - the AMU, the COMESA, the EAC, the ECCAS and the IGAD - have not been involved in actual humanitarian intervention. However, their mandates as described in their respective treaties increasingly include the protection of fundamental human rights, the rule of law and democratic principles. Human rights norm-setting in the context of these African sub-regional organisations, coupled with the experiences of ECOWAS and SADC in military interventions, provides a basis for concluding that these organisations are likely to engage in actual humanitarian intervention in the future.

4.8 CONCLUSION

The debilitating effects of abuse of power by political leadership and authority have been particularly felt in Africa, where the principle of accountability was for many years simply non-existent. One of the consequences of the abuse of power in Africa has been the problem of armed conflicts that has plagued the

continent since independence and the resultant massive violations of human rights.

However, there is increasing political will, both at the continental and sub-regional level, to end a culture of human rights violations and impunity. This political will is manifest in the adoption of the AU Act, an instrument which recognises the 'right' of humanitarian intervention to halt acts of genocide, war crimes and crimes against humanity. The provisions of the AU Act permitting humanitarian intervention will be given 'teeth' once the Protocol on the establishment of the Peace and Security Council enters into force.

At the African sub-regional level, ECOWAS militarily intervened in Liberia and Sierra Leone for humanitarian purposes in respect of purely internal conflicts in the respective countries. These interventions, which constitute treaty-based humanitarian interventions, will serve as an important benchmark in relation to the role of African sub-regional organisations in humanitarian intervention.

Indeed, greater potential for humanitarian intervention lies with sub-regional intergovernmental organisations, because such groups of states not only share common interests and borders, but also common security problems.[296] The analysis in this chapter has shown that there are treaty bases for humanitarian intervention by African intergovernmental organisation. This finding leads us to conclude that in the future, African intergovernmental organisations need not invoke customary international law to justify humanitarian intervention.

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[296] Olonisakin (2000) 52.

CHAPTER 5: CRITERIA FOR HUMANITARIAN INTERVENTION AND ASPECTS OF INSTITUTIONAL REFORM OF INTERGOVERNMENTAL ORGANISATIONS RELATED THERETO

5.1 Introduction
5.2 The Need for Criteria for Humanitarian Intervention
5.3 Guidelines for Humanitarian Intervention
5.3.1 The Primacy of Preventive Measures
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5.4.2.3 The Southern Africa Development Community (SADC)
5.4.2.4 Other African Sub-regional Organisations
5.5 Conclusion

5.1 INTRODUCTION

This Chapter outlines the reasons for defining criteria for humanitarian intervention, discussing how and when intervention should take place, as well as who is entitled to carry out humanitarian intervention. There are minimum criteria, of a substantive nature, that ought to be met before any claim of humanitarian intervention can be deemed as legally justified.[1] Once this threshold is met, a number of other procedural criteria should be satisfied in

[1] These have been referred to in Independent Commission on Kosovo (2000) 193 as 'threshold principles'.

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order to complete the legality of a claim of humanitarian intervention.[2] However, both the substantive and procedural criteria are treated in this study as being equally important.

Although the discussion on the criteria for humanitarian intervention may refer to the role of states, it should be borne in mind that it is envisaged that this role will be exercised in the context of intergovernmental organisations. As pointed out in Chapter 1, this study prefers collective as opposed to unilateral humanitarian intervention. In line with the principle of 'burden sharing', it is also preferred that regional or sub-regional intergovernmental organisations engaging in humanitarian intervention should do so under the overall supervision of the UN Security Council.

The present Chapter also looks at the various ways in which the existing institutional framework within intergovernmental organisations can be reformed or improved to enable these organisations to play a more effective role in humanitarian intervention. In this regard, reforms within the UN and the African regional or sub-regional institutions dealing with the maintenance of international peace and security (and therefore, the use of force) will be discussed.

5.2 THE NEED FOR CRITERIA FOR HUMANITARIAN INTERVENTION

Humanitarian interventions are likely to continue occurring in the foreseeable future. This is so because instances of gross violations of human rights continue to occur, especially in the context of internal armed conflicts.[3] One of the likely consequences of such humanitarian interventions is that the future of the post-Cold War legal order will entail a further 'softening' of the view of the

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[2] See Wheeler (2000) 33. In Independent Commission on Kosovo (2000) 193-195 these are referred to as 'contextual principles'.

[3] See Zacklin (2001) 924.

traditional positivist and absolute view regarding the use of force under the UN Charter. The UN's increasing involvement in peacekeeping missions world-wide bares testimony to this, as an attempt to legally embrace a new reality. Given that humanitarian interventions are likely to continue occurring, guidelines need to be sought to justify humanitarian intervention, and limit its potential abuse.[4]

Underscoring the need for clear guiding legal principles on humanitarian intervention, UN Secretary-General Kofi Annan stated thus in his 1999 address to the UN General Assembly:[5]

> Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples.

Rules and criteria for humanitarian intervention can clarify the minimum conditions to be satisfied by the intervening states. They can also help to structure the deliberations within the UN Security Council and General Assembly on specific instances of intervention. At the same time, they can provide the UN community of nations with a basis for assessing instances of unauthorised humanitarian intervention that have already taken place and for tolerating them in appropriate cases, provided that sufficient account of 'legitimacy considerations'.[6]

Rules and criteria for humanitarian intervention can also be of importance for the further development of the law relating to humanitarian intervention, as it

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[4] Charney (1999) 1243. Others who have made similar suggestions are Lillich (1967) 325 357-351 and Cassese (1999) 21.

[5] See *Report of the Secretary-General on the Work of the Organi[s]ation* UN GAOR, 54th Session, 4th Plen Mtg 1; UN Doc A/54/PV4 (1999).

[6] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 28.

offers a starting point for gaining international acceptance for a separate legal ground justifying humanitarian intervention not based on statute (in which humanitarian necessity prevails over the law banning the use of force).[7]

A set of comprehensible standards would provide for predictability, despite the *ad hoc* nature of humanitarian interventions. Admittedly, identifying criteria for justifiable humanitarian intervention does not resolve the problem of deciding automatically whether a particular case has satisfied these tests. What it does, however, establishes a common reference within which argumentation can take place.[8]

5.3 GUIDELINES FOR HUMANITARIAN INTERVENTION

This section discusses four broad criteria for humanitarian intervention, posed as four questions, and incorporating both the substantive and procedural requirements for justified humanitarian intervention. These are:[9]

- Which states should be allowed to intervene?
- When should the intervention be allowed?
- What conditions have to be met during the intervention?
- When and how must the intervention end?

However, two overarching criteria are first discussed. The one regards the primacy of preventive measures and the other concerns the primary role of the Security Council in the use of force in international relations.

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7 As above.

8 Wheeler (2000) 33.

9 These questions are posed in a similar manner in Advisory Council for International Affairs & Advisory Committee on Issues of Public International Law (2000). However, this study integrates the discussions in relation to the four questions in many other studies including: Reisman & McDougal (1973); Lillich (1979); Bazyler (1987); Arend & Beck (1993); Charney (1999); Danish Institute of International Affairs (1999); Independent Commission on Kosovo (2000); ICISS (2001a); ICISS (2001b) and Zacklin (2001).

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5.3.1 The Primacy of Preventive Measures

Since the use of force in international relations should always be treated as an exceptional measure and as an extremely grave matter under any circumstances, primacy should be given to preventive measures.[10] The UN Secretary-General noted in his 1999 *Report on the Work of the Organisation* that '[e]ven the costliest policy of prevention is far cheaper, in lives and resources, than the least expensive use of armed force'.[11]

Prevention of deadly conflict and attendant gross violations of human rights is first and foremost the responsibility of the international community, acting through the UN or regional or sub-regional intergovernmental organisations. The prevention can be achieved through various ways, including development assistance to prop up local initiatives for the advancement of good governance and human rights, good offices missions, mediation efforts and efforts to promote dialogue and reconciliation.[12]

The need to respond to the root causes of armed conflicts and gross human rights violations is entrenched in the UN Charter. The Charter recognises that solutions to international economic, social, health and related problems are all essential for 'the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'.[13]

For the effective prevention of gross and systematic human rights violations, there is a need for knowledge of the fragility of the situation and the risks associated with it, the so-called 'early warning.'[14]

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[10] Zacklin (2001) 938.

[11] Cited in note 5 above.

[12] ICISS (2001a) 19.

[13] See art 55, UN Charter.

[14] ICISS (2001a) 20.

Some authors have discounted the primacy of effective preventive action based on greater information gathering and early warning.[15] Their contention is based on the assumption that creation of increasingly sophisticated early warning mechanisms has not necessarily been backed by action.[16] Further, such authors argue that more often than not, what is lacking is not the basic data, but its analysis and translation into policy prescription, and the will to do something about it.[17] This means what is needed most is not early warning but early action to prevent gross violations of human rights from occurring.[18]

The above arguments, however, presuppose the existence of data, and seem to advocate for the analysis of the data and action on it. In Africa, early warning based on well-documented information on conflict situations has been lacking, and is particularly important. One cannot talk of action based on data that does not exist. In recognition of this need, the Protocol Relating to the Establishment of the Peace and Security Council of the AU envisages the establishment of a continental early warning system.[19]

The AU early warning system shall consist of two components. First, there will be an observation and monitoring centre to be known as the 'situation room', responsible for data collection.[20] Second, there will be observation and monitoring units within African sub-regional organisations to be linked through 'appropriate means of communications' to the situation room, and whose

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[15] See, for instance, Hampson & Malone (2002) 93.

[16] As above.

[17] ICISS (2001a) 21. See also Hampson & Malone (2002) (...[T]he real problem seems to be a failure of a comprehensive analysis combined with s lack of political will to act in risky situations').

[18] See Lund (1998) 1.

[19] See art 12 of the Protocol.

[20] Art 12(2)(a) of the Protocol.

function will be to collect and process data at the sub-regional level and transmit it to the situation room.[21]

The AU Commission shall also collaborate with the UN, its agencies, other relevant international organisations, research centres, academic institutions and NGOs, to facilitate the effective functioning of the early warning mechanism.[22] This last provision, if implemented, is likely to be a major boost to the AU's information gathering endeavours. It may avail to the AU a great amount of data that has been gathered by research centres, NGOs and academic institutional throughout Africa and elsewhere.

5.3.2 The Primary Role of the UN Security Council Should be Recognised

Under the UN Charter, the Security Council has the primary authority to sanction the use of force.[23] Therefore, in order to uphold the international rule of law, the use of force should be primarily reserved for the UN Security Council. The supremacy of the obligations of states under the UN Charter over obligations under any other treaty is spelt out in the Charter as follows:[24]

> In the event of any conflict between the obligations of the [m]embers of the [UN] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Therefore, the inability of the Security Council to fulfil this primary function because of disagreement among members, or because one or more of the

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[21] Art 12(2)(b) of the Protocol.

[22] Art 12(3) of the Protocol.

[23] See arts 2(4), 24 and 25 of the UN Charter.

[24] Art 103 of the UN Charter.

permanent members exercises its veto, must be clearly established before humanitarian intervention is carried out outside the UN framework.[25]

5.3.3 Which States Should be Allowed to Intervene?

The protection of a broadly interpreted right to life belongs to the category of *obligationes erga omnes*, that is, obligations in whose fulfilment all states are deemed to have a legal interest.[26] The obligations are not upon an individual state acting alone. This implies that at international law, collective, and not unilateral use of force, is envisaged, except if an individual state is acting in self-defence. Thus Falk has written that:[27]

> The renunciation of [unilateral] interventions does not substitute a policy of non-intervention, it involves the development of some form of collective intervention.

So long as the norm of humanitarian intervention is neither clearly articulated nor universally endorsed, collective interventions – either by the UN or by a regional organisation or even a coalition of states – will remain the most legitimate form of intervention. For this reason, preference should be given to humanitarian intervention by a group of states acting under the auspices of an intergovernmental organisation. The checks and balances contained in these guidelines for humanitarian intervention are more likely to be effective in an institutional context than when the humanitarian intervention is undertaken by an individual state.

For operational reasons, preference should be given to the involvement of the countries in the region, since it is these countries that in practice are capable of intervening or providing essential logistical support in good time. However,

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[25] Zacklin (2001) 939.

[26] See Charney (1999) 1232. However, it is interesting to note that although Charney finds that the duty to protect human rights is owed *erga omnes*, he goes on to discount that it is permissible to discharge such duty through the use of military force.

[27] Falk (1968) 339.

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care must be taken to ensure that their geographical proximity does not encourage abuse.[28] Procedurally, efforts should be made to utilise existing regional intergovernmental organisations in humanitarian intervention in the context of Chapter VIII of the UN Charter.

States taking part in humanitarian intervention should be party to universal and regional instruments for the protection of human rights. In addition to ratification of or accession to human rights treaties, states should have a record of stability and respect for the rule of law and fundamental human rights. Also, the intervening states should not themselves be in any way involved in the massive violations of human rights that the intervention is designed to combat. This will enhance the integrity of the intervening states as well as their disinterestedness.

It follows that in cases where an intergovernmental organisation authorises a few states to intervene on its behalf, then the selection of the states to intervene should be guided by the above criteria. The organisation itself should be neutral and should not be seen to support the government of the target state or any insurgents or other group therein.

5.3.4 When Should Intervention be Allowed?

It is necessary to define the type of circumstances that should trigger humanitarian intervention. In defining these circumstances, this study is guided by the definition of humanitarian intervention adopted here. The situation must be grave, one in which fundamental human rights are being or are likely to be seriously violated on a large scale and there is an urgent need for intervention. This means that there should be a just cause, namely, a 'supreme

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[28] Advisory Council on International Affairs & International Council on Issues of Public International Law (2000) 28 – 29.

humanitarian emergency'[29] or 'severe violations of international human rights and humanitarian law'.[30]

The terms 'supreme humanitarian emergency' and severe violations of international human rights and humanitarian law' may be prone to subjective definitions. This leads to the question: How many people must die before humanitarian intervention can be justified? It is submitted here that it is not the numbers that get killed or tortured that matter.[31] Instead, the intervening states should be required to make convincing case to the effect that the violations of human rights within the target state have reached such a magnitude that they 'shock the conscience of humanity'.[32] On this understanding, Wheeler has stated that generally, 'a supreme humanitarian emergency exists when the only hope of saving lives depends on the outsiders coming to the rescue'.[33]

There must be proof of clear and publicly available evidence that international crimes of grave proportions, preferably amounting to the crimes of genocide, war crimes or crimes against humanity, are being committed or are about to be committed in the target state.[34] However, the lack of 'official' evidence should not be used as an excuse for not intervening on humanitarian grounds. Prior to the 1994 Rwanda genocide, for example, several warnings were issued to the UN of the imminent crisis, and NGOs and media reports could have attested to the escalating violence.[35]

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[29] Wheeler (2000) 34.

[30] Independent Commission on Kosovo (2000) 193.

[31] See also Wheeler (2000) 34.

[32] Walzer (1978) 152.

[33] Wheeler (2000) 34.

[34] Charney (1999) 1245.

[35] Prunier (1995), Chapter 7 generally.

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Nevertheless, these signals were initially dismissed, with the assertion that there was insufficient evidence to predict or forestall the genocide.[36] It is desirable that early rescue be permitted, to allow intervening states to pre-empt a humanitarian emergency. Thus humanitarian intervention should be permitted where, say, a few hundred people have been killed but intelligence points to this being a precursor to a major campaign of mass killings or ethnic cleansing.[37] This happens to have been the case in Kosovo where the intervention was anticipatory.[38] Unfortunately, in all the other instances of humanitarian intervention covered in this study, military intervention came too late to protect civilians.

In order to give rise to humanitarian intervention, the violations of fundamental human rights should be grave (serious, systematic and on a large scale). This requirement includes both a qualitative element ('grave' and 'fundamental') and a quantitative one ('on a large scale'). Grave violations of fundamental rights include not only extermination by means of summary executions and deliberate armed or police attacks on arbitrary civilian targets, but also torture, taking of hostages, rape and grave infringements of the human dignity such as humiliating treatment.

It is, therefore, desirable that humanitarian intervention be restricted to the three crimes of genocide, war crimes and crimes against humanity, because these are crimes that are of 'the greatest concern to the international community'.[39] The determination that these crimes are being committed should be made on the basis of their definition in the Statutes of the Yugoslavia and Rwanda Tribunals or in the Rome Statute of the ICC.

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[36] As above.

[37] Wheeler (2000) 34. See also, Bazyler (1987) 600 ('The intervening nation or nations need not wait for the killings to start if there is clear evidence of an impending massacre').

[38] See Charney (1999) 1231.

[39] See art 2 of the Rome Statute of the ICC.

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The legitimate government of the country may be perpetrating the violations (Iraq, Kosovo), may acquiesce in them (East Timor) or may be unable to control them (Somalia). This means that grave and systematic violations of human fundamental human rights committed by non-state players can also constitute grounds for humanitarian intervention. What must be proved is the 'failure' or 'collapse' of the target state, which entails the complete breakdown of governance, law and order.[40]

It should also be established that the internationally recognised government is unable or unwilling to provide the victims with appropriate protection from the violations. The fact that authorities are willing but unable to uphold the rule of law and also prevent large-scale violations of human rights has been identified by the UN Secretary-General as one of the factors that the Security Council should consider when reaching a decision on the subject.[41]

Thus one may envisage a situation where any form of government, or other authority is totally absent. In such cases, the authorisation required under international law in order for foreign troops to enter the target state's territory cannot be validly granted.[42] If violations of human rights are as a result of a breakdown in the organs of the state, it must be ascertained that the governmental authorities are incapable of ending these violations.[43] In addition, it is important to show that the government has failed or refused to appeal to third states or international organisations for assistance, and it refuses them access to its territory.

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[40] See Deng (1991) 207 ('In most cases, the collapse of the state is associated with humanitarian tragedies, resulting from armed conflict, communal violence, and gross violations of human rights that culminate in the massive outflow of refugees and internal displacement of the civilian populations').

[41] See Report of the SG to the SC on the Protection of Civilians in Armed Conflict, S/1999/957, para 40.

[42] See generally, Helman & Ratner (1992 –1993).

[43] Zacklin (2001) 938.

The kind of crisis in which humanitarian intervention may be invoked may be an entirely internal conflict or one with international implications (flows of refugees across borders or extensive regional destabilisation). The demonstrable threat of an internal or international armed conflict is not in itself sufficient to justify the conditions for humanitarian intervention. At the same time, a threat to international peace and security owing to grave, large-scale violations of fundamental human rights is not a separate condition for intervention.[44]

A number of other conditions must also be satisfied. It must be established that the violations can only be reversed, contained or pre-empted by deployment of military personnel and equipment. In that case, however, the primary objective of the intervention must be humanitarian. This means that the operation must be aimed at preventing or ending the humanitarian emergency involving the gross violations of human rights referred to.[45]

The intervening states must make the humanitarian objectives of the intervention clearly known in advance to the international community, in order to minimise the risk of article 51 of the UN Charter being used to counter the intervention.[46] Such prior and clear information would also help in the international monitoring of the intervention. Even if national, strategic or other interests may influence the decision to intervene, these must be clearly subordinate to the humanitarian objective of the intervention. Ideally, the promotion of the international rule of law (including the promotion of human rights) and national interests should, at least, coincide.

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[44] See Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 30.

[45] Zacklin (2001) 939 ('The use of force must be limited to the purpose of halting the violations and restoring respect for human rights').

[46] Art 51 of the UN Charter provides ('Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs ...).

The intervening state should also show that it has exhausted all the non-military means of action against the state that is violating the human rights, without success.[47] These non-military means may include attempts to end the humanitarian crisis with the support from civil society in the target state, as well as efforts through regional or other international organisations responsible for monitoring the upholding of human rights. Such efforts should, for instance, include the submitting (or arranging for submission of) a draft resolution to the UN Security Council. If the permanent members of the Security Council cannot reach agreement, the one logical step is to initiate a General Assembly debate on the basis of the procedure laid down in the Uniting for Peace Resolution.

Other non-military means of compelling the target state to address the violations warranting humanitarian intervention include negotiations and non-forcible countermeasures such as sanctions. This will leave humanitarian intervention as a measure of last resort. At the same time, however, a clear deadline must be set for peaceable measures, to ensure both that the non-forcible measures are favoured to outright intervention, and that in the case of failure of these measures to alleviate the situation, a humanitarian intervention is promptly undertaken.

The target state should be called upon to prevent or end the gross and systematic violations of human rights either by itself or with the assistance of other states or intergovernmental organisations.[48] The initial warning should be issued to the state, either through a forum of the UN, perhaps in a Security Council or General Assembly resolution. In conjunction with such UN action, a regional intergovernmental organisation in the same region as the target state, if it has the capacity to do so, should assume the responsibility of warning and assisting the target state.

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[47] Independent Commission on Kosovo (2000) 194 ('[t]here must be a serious attempt to find a peaceful solution to the conflict. This solution must ensure that the pattern of abuse is terminated in a reliable and sustainable fashion, or the process of restoring adequate governance is undertaken').

[48] Charney (1999) 1247.

If the target state fails or is unwilling to comply within a reasonably short period, then a final warning should be issued to the target state. Doing so will give the target state an opportunity to either halt the violations if it is complicit in them, or to challenge the intended collective action before the Security Council or General Assembly.

This should be the case because of a possible rapid deterioration of the humanitarian emergency, which may necessitate immediate military action. Waiting to see whether the full range of non-military alternatives has been exhausted may actually prove counterproductive, as it may create the impression in the areas affected by the crisis that the international community cannot make its mind up to intervene. Once a crisis has escalated into uncontrollable chaos, even military action will no longer have any effect.[49]

The above procedural requirements regarding exhaustion of peaceful remedies and the use of force as a last resort should be reconciled with the need for speedy action to address a humanitarian emergency. In this connection, it is suggested that intervening states should be required to exhaust all peaceful remedies, except where they can show that delay would result in irreparable harm.[50]

In such cases, such states may be allowed to intervene, on condition that they undertake to be held liable for damages if it is thereafter established that the intervention was not justified. Unless this balance is maintained, it may turn out that while policy makers are trying to achieve a halt to the abuses through non-violent means, massacres and expulsions might be continuing on the ground.[51]

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[49] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 30.

[50] See Rodley (1992).

[51] Wheeler (2000) 35.

Finally, it is desirable that potential humanitarian interventions should be decided on a case-by-case basis. In the current geopolitical context, maintaining flexible support for the mitigation of human suffering is the most realistic approach to humanitarian intervention. On this point, Chinkin writes that so long as the necessary enforcement machinery and international capacity in place do not expressly support a legal 'norm of obligatory humanitarian intervention', a case-by-case approach is the most viable option.[52] Again, it should be emphasised that although the above criteria makes reference to 'intervening states', it is presumed that the intervention is to take place in the context of an intergovernmental organisation.

5.3.5 Which Conditions have to be met during the Intervention?

A number of substantive and procedural criteria must also be met during the actual intervention. These relate to the concept of proportionality, the respect for international humanitarian law, compliance with the purposes of the UN and with those of the intervening intergovernmental organisation. These are explained briefly below.

5.3.5.1 Proportionality

Humanitarian intervention must be proportional to the gravity of the situation. This largely concerns purpose and means of the intervention. While the intervention is being undertaken, it must be limited in scope to actions necessary and proportionate to the objectives of halting gross and systematic violations of human rights.

According to Rodley, the principle of proportionality requires 'that the gravity and extent of the violations be on a level commensurate with the reasonably calculable loss of life, destruction of property [and] expenditure of resources'.[53]

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[52] Chinkin (1999) 471.

[53] Rodley (1992) 37.

Therefore intervening states should eschew the use of force if there are indications that it will lead to a worse situation than the one prevailing in the target state. It is likely that where the violations of human rights or their consequences do not constitute a threat to international peace and security, the very act of humanitarian intervention may itself constitute a threat to international peace and security.[54]

Again, there is need to strike a balance in relation to the need not to aggravate the situation in the target state. On the one hand, the use or threat of force must be firm enough to produce the desired effect. On the other, such use or threat of force must be sufficiently controlled to avoid destabilising conditions in the region, since that may result in even greater loss of life than that which led to the actual intervention.

The impact of the humanitarian intervention on the national structure of the country against which the intervention is directed must be limited to what is necessary in order to attain the humanitarian objective. This may nevertheless mean that the intervention is designed to the structure of a state and forms of authority in order to ensure that human rights are upheld in the future (for example through fair elections). In the 1990s, the part played by national governments in large-scale violations of fundamental human rights was in some cases so great that attacking the regime in power could only end the violations.

Another proportionality requirement concerns the implications for international peace and security. If, in themselves or because of their consequences, the grave, large-scale violations of fundamental human rights constitute a threat to international peace and security, the humanitarian intervention must not itself constitute an even greater threat to international peace and security.

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[54] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 31.

5.3.5.1 Respect for International Humanitarian Law

The rules of international humanitarian law should apply during any instance of humanitarian intervention. In this connection, the Geneva Conventions of 1949 form part of customary international law and must therefore be complied with whether or not a state is a party.[55] Also, they are almost universally ratified; meaning that invoking their customary international law status may not be necessary.[56] If the intervention is carried out by states that are not party to the additional Protocols of 1977, the rules of customary international law in the field of international humanitarian law should be adhered to.[57]

Violation of international humanitarian law may entitle the target state not only to invoke article 51 of the UN Charter, but also to sue for damages. If humanitarian intervention takes place without UN Security Council authorisation, the states involved should agree to be subject to the jurisdiction of the ICJ. The intervening state should be ready to be sued by any directly harmed state for possible violations of international law.[58] This agreement should be in the form of a written declaration made by the intervening states prior to the intervention, deposited with the UN Security Council and competent organ of the relevant regional intergovernmental organisation.

This requirement would reduce the abuse of humanitarian intervention because even if there is no institutional framework at the moment for the enforcement of the decisions of the judgments of the ICJ, the moral weight of an ICJ ruling, in a world of increasingly democratic states, is considerable.[59]

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[55] See Schindler (1999) and Wembou (1997) 685ff.

[56] As on 30 September 2002, the Geneva Conventions had been ratified by 188 states. See, <http://www.icrc.org/genevaconvnetions.html> (accessed on 30 September 2002).

[57] The rules of customary international law of armed conflicts are codified in a number of 'Hague Conventions'. These have been discussed in Chapter 3.

[58] Charney (1999) 1247.

[59] Damrosch (1987) 1; Gross (1987) 19ff.

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The effect of the requirement is to increase the legitimacy of humanitarian intervention.

Similarly, individual military personnel should be prepared to be subject to the jurisdiction of the ICC, once it is in operation.[60] Individual accountability for violations of international humanitarian law is an important factor towards legitimisation of humanitarian intervention. It also recognises a well-articulated new norm of enforcing individual responsibility for violations of international criminal and humanitarian law.[61]

5.3.5.3 Compliance with the Purposes of the UN

The intervention must not contravene the purposes of the UN. For instance, the intervention must preserve the territorial integrity and political independence of the target state. The purpose of the military intervention should be limited exclusively to alleviating the widespread gross violations of human rights. It should not seek to enforce any other objectives that are not directly associated with the humanitarian purpose of the intervention. Throughout the humanitarian intervention process, the UN Security Council should supervise the intervening states. They should report to the Security Council immediately before the operation, stating the reason for the intervention. Thereafter, they should update the UN Security Council on the scale, progress and likely duration of the intervention.

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[60] However, the ICC will only have jurisdiction over individuals who are citizens of the state parties to the Statute of the Court, unless a prosecution is brought by the Security Council *suo motu* (on its own motion) under article 60 of the Statute.

[61] This principle has been codified in a number of instruments. See for instance, art 6 of the Statute of the ICTR, available online at <htpp://www.ictr.org/english/legaltexts/statute.htm.> (accessed on 30 September 2002).

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5.3.5.4 Compliance with the Purposes of the Intervening Intergovernmental Organisation

States and individuals engaging in humanitarian intervention should respect the purposes and governing principles of the intervening intergovernmental organisation. Humanitarian intervention seeks to address massive human rights violations and, therefore, by extension, seeks to restore the rule of law. It follows that those seeking to restore the rule of law should themselves be subjected to the rule of law.

5.3.6 When and How Must the Humanitarian Intervention End?

The intervening states must undertake in advance to suspend the humanitarian intervention as soon as the state concerned is willing and able to end the large-scale violations of human rights itself, or when the Security Council or a regional intergovernmental organisation with the authorisation of the Security Council takes enforcement measures involving the use of force for the same humanitarian purposes.[62]

The intervening states should also end the intervention when its objective, namely the cessation of the violations of human rights, has been attained. Here again, the proportionality requirement must be taken into account, although much will depend on the specific circumstances. In situations involving gross, large-scale violations of human rights, the conditions for safeguarding those rights effectively in the short term are often lacking. On the one hand, therefore, the intervention must not be ended prematurely, and the conditions for a post-conflict peace-building process must be in place. For instance, the intervention should end after ensuring that there is a government in effective control of law and order in place. Such a government could be a transitional government charged with running the affairs of the country until elections are conducted. However, in order to avoid jeopardising the

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[62] Zacklin (2001) 939.

attainment of the humanitarian objective, the operation must not exceed a reasonable length of time.[63]

Once a humanitarian intervention has been undertaken, the onus is on the international community – or at least those states supportive of the intervention – to ensure the bare minimum conditions in the target state to forestall any foreseeable perpetration of gross and systematic violations of human rights. Such post-war reconstructions almost necessarily include a funding commitment, along with an armed or unarmed presence of neutral monitors, to provide both state and non-state actors with the resources to create a capacity for the police and judicial processes, to rehabilitate the economy, and to support and strengthen civil society.

Post-conflict reconstruction strategies may also include creating the conditions necessary for national reconciliation, as well as a longer-term commitment of the international community to help rebuild the civil, political and economic institutions of a territory necessary to sustain the target state.[64] The nature of such complex and multidimensional peace-building operations, usually referred to as 'follow-up of a humanitarian intervention', has been controversial, but it remains separate for the legality of humanitarian intervention.

Any 'follow-up' of a humanitarian intervention must exclude any attempts to alter the geographical borders of the target state, or to alter the political structures of the target state, including damaging any civilian structures associated with the state's legitimate functions. Any use of force deemed above and beyond the scope of the two customary international law principles of 'necessity' and 'proportionality' should be challenged in the ICJ, ICC or regional for a. In respect of African intergovernmental organisations, a suit

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[63] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2001) 32.

[64] Murphy (1996) 323.

could ensue before the African Court of Justice once established. Also, a complaint could be made before the African Commission on Human and Peoples' Rights or to the proposed African Peer Review Mechanism.

5.4 ASPECTS OF INSTITUTIONAL REFORMS

5.4.1 The Security Council

According to the UN Charter, the Security Council has the primary responsibility for the maintenance of international peace and security.[65] In discharging this mandate, the Council has proved willing, especially in the 1990s, to interpret its powers under Chapter VII of the Charter broadly. As a result, it has come to view not only the use of force between states but also large-scale violations of human rights as threats to international peace and security justifying armed intervention.[66]

It was against this background that the Council took measures during the 1990s regarding internal situations in Iraq, the Former Yugoslavia, Liberia, Somalia, Sierra Leone and other countries. Destabilisation and disorder in these countries were purely internal, although some of them had an international dimension in the form of refugee flows or threat of hostilities spreading to other countries.

In its resolutions on the subject, the Security Council sometimes – but in no means always - referred to this dimension. It can even be argued that in the course of the 1990s, the Security Council distanced itself from the argument that the threat to international peace and security can only be invoked in cases where the conflict has an 'international dimension'. The operation in Somalia

65 Art 24, UN Charter.

66 Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 34.

was the first in which the Security Council authorised intervention in an internal conflict on the basis of Chapter VII of the UN Charter.[67]

In this resolution, the Council referred to the 'the unique character' of the crisis in Somalia. The Council then stated that it was 'mindful' that the crisis 'required an immediate action' because it was 'deteriorating, complex and of an extraordinary nature, requiring an exceptional response'.[68] Similar words were subsequently used in the Chapter VII humanitarian interventions in Rwanda (1994)[69] and in Haiti (1994).[70] Evidently, the Council nowadays sees internal conflicts with large-scale humanitarian implications as threats to international peace and security in their own right thus giving a broad interpretation of article 39 of the UN Charter.[71]

By emphasising the unique nature of the circumstances surrounding each of these operations, the Security Council, perhaps, hoped to avoid creating precedents, whereby it may be obliged to intervene in every internal conflict. However, the more often the Council invokes 'exceptional circumstances', the less easily it can maintain that its decision is incidental. The Council perhaps recognised this, and in more recent resolutions on the use of force, the Council sometimes does not refer to the 'unique' nature of the situation. Instead, it simply notes, without stating any reasons, that 'the situation demands an urgent response by the international community'.[72]

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[67] Res S/794 of 1992.

[68] Preamble, para 2, 4 and 5.

[69] Res 929 of 1994 ('...The current situation in Rwanda constitutes a unique case which which demands urgent response by the international community').

[70] Res 940 of 1994) ('The unique character ... its deteriorating, complex and extraordinary nature, requiring an exceptional response').

[71] Art 39 States that ('[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with [a]rticles 41 and 42, to maintain or restore international peace and security').

[72] See, for instance, Res S/1080 (1996) on Zaire.

Despite the above positive development within the operations of the Security Council in the 1990s, it is apparent that the political nature of the decision-making process within the Security Council has hampered the efficacy of the Council. Moreover, the Council's dependence on the willingness of member states to make troops available has resulted in a selectiveness that makes the Council unable or unwilling to intervene in every humanitarian emergency to an equal degree.

Economically powerful states have become less financially and politically responsible supporting UN troops on humanitarian missions since the end of the Cold War.[73] Even where these states have supported UN operations relating to the use of force, their 'pervasive interests have led to a limited utilisation of the powers of the ... Council'.[74] These states are even less willing to contribute their troops for UN missions.[75] This attitude has been occasioned by the view of these states that the peace and security of 'small states' is a non-issue in international relations.[76]

The efficacy of the Security Council has also been hampered by regionalism. *De jure*, the UN Charter does not permit regionalism to be paramount over globalism.[77] However, the Charter does permit regional arrangements and agencies to deal with matters pertaining to the maintenance of international peace and security 'as are appropriate for regional action'.[78] The interventions

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[73] See Damrosch (2002) 60 61.

[74] White (1989) 15.

[75] Damrosch (2002) 15.

[76] See Rajan (1994) 287–305. According to Duke (1994) 375–398, the US, for instance, has little enthusiasm for involvement in domestic conflicts. Damrosch (1993) 429 433 concurs with this view, and adds that even where economically powerful states like Japan and Germany have been involved in providing or supporting UN troops for humanitarian interventions, this involvement has become entangled with the issue of changing the composition of the Security Council. These two countries have been seeking a permanent seat in the Security Council.

[77] White (1989) 21.

[78] Art 53, UN Charter.

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by ECOWAS in Liberia and Sierra Leone and that by NATO in Kosovo were all taken by regional organisations without involving the Security Council.

It is noteworthy that the Council itself has used the Charter provision mentioned above as a basis for steering off situations where the Council members have no political or strategic interest. A case in point is the three-year long Nigerian civil war (1967-1970). The UN Secretary-General pre-empted the possibility of the Security Council seizing of the matter by declaring that 'the OAU should be the most appropriate instrument for promoting peace in Nigeria'.[79]

It is important that the Security Council remains the primary guarantor of international peace and security and therefore the use of force. This is what the Charter provides, and the law should be upheld in this regard. The use of force by regional organisations without involving the UN Security Council negates the very basis of international law on the use of force as codified in the UN Charter.[80] It is submitted that regional organisation should only surpass the UN Council when the humanitarian emergency is so grave that any delay would lead mass of loss of lives in a manner that shocks the conscience of mankind.

The influence of economically powerful states in the Security Council and the increasing 'competition' from regional organisations have led to proposals for reforming the Security Council to make it more effective in humanitarian intervention.[81] The discussions on the reform of the Security Council have

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[79] UN Press Release SG/SM/998, 13 Sep 1968, cited in White (1989) 21.

[80] Arts 52(4) and 53(1) of the UN Charter together mean that the Security Council retains supremacy over matters of international peace and security. These provisions are strengthened by art 103 which provides that the UN Charter is supreme over any other treaty (including the treaties establishing regional organisations).

[81] According to Nicholas (1971) 72, of the all the organs of the UN, 'none has shown a greater discrepancy between promise and performance than the Security Council'. See also Leigh-Phippard (1997) 419.

focussed on increasing the Council's membership and limiting the right of veto.[82]

Such adjustments may increase the legitimacy of the Security Council among the UN member states. Moreover, an increasingly ineffective Security Council may threaten international peace and security. It may result in a situation whereby the UN members come to see the Security Council as an increasingly unsuitable forum for agreeing on possible action. This may have the effect of jeopardising international peace and security, given the immense military power possessed by states like Germany, Canada, Australia and Italy.

The permanent membership of the UN has been described as 'a historical anachronism' and 'a condominium of the victorious major allies, who would jointly keep the rest [of the world] in order'.[83] The fact that the Council is not an accurate reflection of the current distribution of power between states undermines the legitimacy of its decisions and contributes to such criticisms. The Security Council could be reformed to ensure more equitable geographical representation, to reflect political reality in the distribution of power, or both.[84]

Unlike any other organ of the UN, the decisions of the Security Council are binding on all states.[85] It follows that the legitimacy of the Security Council derives from the special responsibility conferred upon it, pursuant to article 24(1) of the UN Charter by the membership of the UN as a whole. Thus the fifteen members of the Security Council act on behalf of all the UN members. In order that decisions of the Council have broad-based support and legitimacy, there is strong reason to enlarge the Security Council.

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82 For a collection of general works on reforming the Security Council, see generally, Taylor *et al* (eds) (1997).

83 Leigh-Phippard (1997) 420. For other criticisms, see Claude (1991) 143.

84 Leigh-Phippard (1997) 420.

85 Art 25 of the UN Charter.

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Thukur, advocating greater geographical distribution in the Council, argues that, 'although the principle of equitable geographical distribution has been brought into disrepute, ... it is essential to the philosophy of the [UN] and adds to its legitimacy'.[86] I am in agreement with the view that the Security Council should be reformed to afford equitable geographical representation.[87]

Japan is widely regarded as having the strongest case for permanent membership, by virtue of both its international economic importance and its significant financial contributions to the UN budgets.[88] There are other potential candidates, including, for example, Nigeria, Brazil and India, all with apparently strong claims to the seat.[89] Most candidates for permanent seats base their claims on the principle of geographical representation, Japan and Germany being the only exceptions.[90]

It is proposed here that the membership of the Security Council should be increased from the current fifteen to twenty states: five from each of the UN regions. The permanent seats in the Council should be increased from five to eight. Should the permanent seats be increased, at least one seat should be reserved for Africa. This should be done because Africa is the one region where due to the frequency of massive human rights violations, the involvement of the Security Council is likely to continue in the foreseeable future.

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[86] Thukur (1993) 7 12.

[87] Various proposals have been made on how the membership of a reconstituted Security Council would look like. See, for instance, IPA (1994) and Leigh-Phippard (1997) 425-433.

[88] See Leigh-Phippard (1997) 330. Assessments of financial contributions of members to the UN kitty show that Japan compares favourably to the permanent members, contributing about 12% of the total UN budget. This amount exceeds any other contribution by a UN member, apart from the US. See Annex II, *Status of Contributions*, UN Doc ST/ADM/SER B/387, reprinted in Taylor *et al* (1997) 430.

[89] Damrosch (2002) 62. See also Leigh-Phillard (1997) 425.

[90] As above.

5.4.2 Reforms within African Intergovernmental Organisations

5.4.2.1 The African Union (AU)

It may be too early to gauge the performance of the institutions of the newly formed AU. Also, talking of reforming the institutions of the AU, some of which are not yet in place, may be even more speculative.[91] In this section, we will comment on the reforming of the relevant organ of the AU which is already in place, namely, the 1993 OAU Mechanism for Conflict Prevention, Management and Resolution. As stated earlier, this Mechanism is now part of the AU institutional framework.[92] If the Mechanism is going to be effective in the AU dispensation, then a number of reforms, based on the experiences of this organ so far, should be explored.

One of the decisions of the July 2002 1st Ordinary session of the AU Heads of State and Government concerned the adoption of the Protocol on the establishment of an African Peace and Security Council.[93] Once the requisite number of states has ratified the Protocol,[94] it will create an African Peace and Security Council, which will replace the Mechanism.

Therefore, the Durban Declaration clearly provides that the Mechanism will only continue to operate until such a time as the Protocol is in force. In line with the argument against duplicity and the creation of multiple institutions that may create a financial burden for the AU, it is a welcome idea that the Peace

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[91] For instance, during the recent 1st Ordinary Session of the AU held in Durban South Africa, on 9 – 10 July 2002, the Assembly of Heads of State and Government of the AU adopted a Protocol for the Establishment of an African Peace and Security Council, see ASS/AU/Dec 3 (I).

[92] See Chapter 4 of this study.

[93] See ASS/AU/Decl 3(I).

[94] According to art 22(5), the Protocol shall enter into force upon the ratification by a simple majority of the member states of the AU.

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and Security Council should take over the work of the Mechanism, instead of the two organs existing side by side.[95]

Despite the fact that the African Peace and Security Council will replace the Mechanism,[96] we should explore how the Mechanism's efficacy can be improved in the interim period. In any case, it is hoped that the Mechanism's experiences will inform the Peace and Security Council when it starts operating. Such institutional link is useful, especially if the experiences of the former institution can assist the new institution in achieving better results.

It should be clarified here that conceptually, the AU might, like its predecessor the OAU, envisage a peacekeeping role of the troops constituted under a decision of the Mechanism. Peacekeeping, as traditionally conceived entails a military intrusion characterised by impartiality, with the consent of the target state, and involving a very limited use of force. This contrasts with peace enforcement operations, which may involve the use of force, although the consent of the target state is also required here.

The AU is likely to be faced with increasingly volatile conditions that require peace enforcement or humanitarian intervention. This is so because many of the internal conflicts involving gross violations of human rights are characterised by actual warfare. The use of arms by the AU troops will therefore be inevitable. Better still, it is proposed that the requirement of the consent of the target state be waived, and the Mechanism be allowed to authorise actual humanitarian intervention, without the consent of the target state, in extreme and rare situations of widespread, gross violations of human rights.

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[95] Among those who have argued against a multiplicity of institutions under the AU are Abass & Baderin (2002), Baimu (2002) and Magliveras & Naldi (2002).

[96] Art 22(1) of the Protocol.

Of course, the Mechanism will still be seized with powers to intervene through mediation, conciliation, and even by authorising peacekeeping operations. Reforms enabling the Mechanism to authorise humanitarian intervention will make the powers of the Mechanism a real supplement of those of the Assembly of Heads of State and Government under article 4(h).[97] We now turn to proposals for making the Mechanism achieve better results in its responses to gross violations of human rights that may lead to threats to peace, security and stability on the continent.

First, it is not clear at what level of the Central Organ of the Mechanism (Summit, Ministerial or Ambassadorial), interventions (which may include the sending of troops) should be approved. The decision to terminate the OAU Observer Mission to Burundi in the wake of the military *coup d'état* in Burundi in 1996, and the decision to deploy the OAU Observer Mission to the Comoros, were both taken at the ambassadorial level.[98]

The ambassadorial level is the most efficient and practical level for this kind of decision. It enables the Central Organ to meet and take decisions in Addis Ababa at any time, within hours, if the need arises.[99] The Burundi and Comoros decisions have may have set precedents, but there is need for a policy clarification on this matter. Such clarification would pre-empt any policy dispute in future resulting in the delay or hindrance in the operation of the Mechanism in responding to a humanitarian crisis or gross violations of human rights.

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[97] This has already been done in the Protocol Relating to the Establishment of the Peace and Security Council of the AU whose powers in art 5 of the Protocol include recommending to the AU Assembly when to intervene under art 4(h) of the Act, and approving the modalities of such intervention.

[98] See the Communiqué of the 40th Session of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, 6 November 1997 (copy with the author).

[99] De Coning (1999) 1 2.

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Second, policy procedures with regard to the type of decision that will result in the sending of troops to address a humanitarian crisis where gross violations of human rights are being committed need to be clarified. A decision of the Central Organ authorising the sending of troops should preferably be in the form of a UN Security-Council type resolution, which clearly stipulates the objectives of the intervention; the level of force that may be used; the size, composition and management of the troops; administrative, logistical and financial guidelines and the duration of the mandate.[100]

Third, the issue of financing of the Mechanism, and the Peace and Security Council should be revisited. Military operations are, by their nature, costly affairs. They usually require the movement of heavy equipment and large numbers of people, and costly supply lines to maintain them in hostile circumstances.[101] The cost implications for military operations, even when they are relatively small and less logistically intensive, are significant.[102] The OAU has been depending on donor funds to finance its military deployments, as member states are in arrears with regard to their annual contributions.[103]

The Protocol Relating to the Establishment of the Peace and Security Council of the AU provides for the establishment of a special fund to be known as 'the Peace Fund', which will be used to finance the AU's expenses in the maintenance of peace and security.[104] The Fund shall be made up of financial appropriations from the regular budget of the AU, voluntary contributions from member states and from other sources within Africa, including the private

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[100] As above.

[101] De Coning (1999) 3; Berman & Sams (2000) 66.

[102] (For instance, 'it cost the OAU approximately US $ 300 000 per month to maintain 64 military observers in Burundi'. This translated to US $7.2 million over two years (1994 - 1996). See De Coning (1997).

[103] Berman & Sams (2000) 66.

[104] Art 21(1) of the Protocol.

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sector, civil society and individuals, as well as through appropriate fundraising activities.[105] The Chairperson of the AU Commission may also accept voluntary contributions from sources outside Africa, so long as this is done in conformity with the objectives and principles of the AU.[106] This trend is likely to continue under the dispensation of the AU, unless member states show a better commitment to paying up their dues to the AU.

The AU should be wary of reliance on donor funds to fund its operations, as this may compromise the organisation's independence. If the AU cannot fund the military interventions it authorises, whoever funds it will have a large influence on the objectives and implementation of the military operation. Donors can determine the duration of the operation, and can influence a mission's mandate by placing terms and conditions on continued funding, or by withdrawing funding if the AU wishes to amend the scope of the operation.

To combat this, the AU needs to develop clear and transparent policies that describe under what circumstances it will accept donor funds in respect of a military deployment. At the same time, the policies should attempt, as far as possible, to build a firewall between the need to receive donor support for such operations on the one hand, and undue influence on the organisation's ability to execute those operations as it deems fit, on the other.[107]

The relationship between the Mechanism with the UN should de clarified to achieve optimum results. While the OAU and the UN have from both sides repeatedly stressed the need to improve the co-ordination of efforts, exchange of information and joint initiatives,[108] the one unclear issue has been the OAU's

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[105] Art 21(2) of the Protocol.

[106] Art 21(3).

[107] De Coning (1999) 3.

[108] With regard to joint initiatives, OAU and its member states have been relying more on bilateral initiatives such as the African Crisis Response Initiative (ACRI) funded by the US Government.

stance on article 53 of the UN Charter, which specifies that regional organisations may not engage in forcible operations without UN Security Council authorisation.

Perhaps, the reason why the OAU in its 39 years of existence remained non-committal regarding its view on article 39 of the UN Charter is that it considered that it would need to intervene in situations which, from an African perspective, require intervention, while the UN was uncertain of the need or unwilling to intervene. For instance, the situation in Burundi immediately after the 1994 genocide in Rwanda was extremely precarious and the OAU's assessment indicated the need for a military deployment in Burundi to prevent another genocide from taking place.

The attitude taken by the OAU regarding the requirements of article 53 of the UN Charter seems to have been adopted at the formation of the AU. Article 4(h) of the AU Act empowers the Assembly of Heads of State and Government to intervene in a member state to pre-empt or halt the commission of war crimes, genocide and crimes against humanity. Neither article 4(h), nor the rest of the provisions of the AU Act, subject this power of the Assembly to the supervision of the Security Council.[109]

Rather than avoid clarifying the issue of the relationship between the AU and the UN Security Council with regard to the maintenance of international peace and security, this issue should be clearly addressed. It is desirable especially that the UN Security Council retains the primary in the any military interventions, pursuant to its Charter-given powers. However, in the event that the UN Security Council defaults in discharging its mandate, it should be permissible for the AU to authorise military intervention, on the basis of the criteria set forth earlier in this Chapter.

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[109] Abass & Baderin (2000) 18; Magliveras & Naldi (2002) 418 – 419.

The relationship between the AU and other regional intergovernmental organisations such as the European Union (EU) and the Organisation of American States (OAS) has also been defined by the Protocol Relating to the Establishment of the Peace and Security Council of the AU.[110] According to the Protocol, the Peace and Security Council of the AU shall 'co-operate and work closely with other relevant international organisations on issues of peace, security and stability in Africa'.[111] Such organisations may be invited to address the AU Peace and Security Council on issues of common interest, if the latter considers that the efficient discharge of its responsibilities does so require.[112]

The AU should develop close relationships with other regional intergovernmental organisations so that these organisations can all share their mutual experiences, and learn from each other in the process.[113] An organisation like the OAS may have experiences in dealing with inter-state war over disputed territory that may be useful for the AU in similar disputes. Similarly, other organisations like NATO have expertise in military interventions, and they may offer useful lessons to the AU in regarding the potential operation of article 4(h) of the AU Act.

It is a welcome development that the Protocol Relating to the Establishment of the Peace and Security Council of the AU defines the relationship between the AU on the one hand and the UN and other intergovernmental organisations on the other.[114] In this regard, the Protocol requires the Peace and Security Council of the AU to co-operate with the UN Security Council and with 'other relevant organisations' in the maintenance of peace and security in Africa.[115]

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[110] Art 17(4) of the Protocol.

[111] As above.

[112] As above.

[113] De Coning (1999) 6.

[114] Art 17 of the Protocol.

[115] Art 17(1) of the Protocol.

Where necessary, recourse will be made to the UN to 'provide the necessary financial, logistical and military support for the [AU's] acitvities' in the maintenance of peace and security.[116]

The AU, unlike the OAU, needs to clearly define its relationship with African sub-regional intergovernmental organisations. In this regard, procedures should be established for the AU to control and sanction military interventions by sub-regional organisations. It is proposed that sub-regional intergovernmental organisations should seek authorisation from the AU when engaging in the use of force. This will serve as check over the use of force in the region. In the past, no such procedures have been in place. For instance, neither of the two recent military interventions under the auspices of SADC, the Lesotho and DRC interventions in 1998, sought prior authorisation of the OAU or the UN.

One area where the AU can co-operate with sub-regional organisations and even the UN regards the development of a standing army. In June 1996, the OAU Central Organ Chiefs of Staff recommended that each sub-region in Africa should develop a brigade strength stand-by capacity.[117] If it were implemented, this would have enabled the OAU to have six brigades available on stand-by, one from each sub-region. The issue of a standing army was recently raised by Libyan Leader Muammar Gadhaffi during the July 2002 Durban Summit.[118] The Assembly of Heads of State and Government of the AU 'welcomed' the initiative' of Colonel Gadhaffi 'on the establishment of one single African army'.[119]

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[116] Art 17(2).

[117] See, Report of the Chiefs of Staff of the Member States of the Central Organ, OAU Mechanism for Conflict Prevention, Management and Resolution, OAU Doc CO/C.STAFF/RPT (I), June 1996.

[118] See, 'Decision on a Common African Defence and Security' ASS/AU/Decl 8 (I), 10 July 2002.

[119] See Document ASS/AU/Decl 3(1) of 10 July 2002.

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Stressing 'the need for a common African defence and security in the context of the Constitutive Act of the African Union',[120] the Assembly requested 'the Chairman of the Assembly to establish a group of experts to examine the aspects related to the establishment of a common African defence and security and submit recommendations for the consideration of the next ordinary session of the Assembly'.

While it remains to be seen whether the idea of a common African army can be achieved, it is submitted here that the idea is worth pursuing. An AU army, drawn in equal numbers from each of the sub-regions and also available on the UN stand-by roster, would be the ideal way of achieving co-operation, in the area of the maintenance of international peace and security between the UN, the AU and African sub-regional intergovernmental organisations.

As it has been pointed out, the Protocol Relating to the Establishment of a Peace and Security Council of the AU provides for the creation of an 'African Standby Force', which will be an *ad hoc* force to deployed rapidly in furtherance of the objectives of the AU Act and of the AU Peace and security Council.[121] For this reason, consideration should be made whether the African standing army advocated for by Gadhaffi or the *ad hoc* force to be established under the Protocol should be established. Because a standing, permanent AU army would require a lot of funding, it is preferable that the AU goes by the *ad hoc* force proposed in the Protocol.

The issue of the relationship between the AU and African sub-regional mechanisms for conflict prevention, management and resolution has also been tackled in the Protocol.[122] Under the Protocol the Chairperson of the Commission of the AU (formerly the Secretary-General under the OAU regime)

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[120] Para 1 of the Declaration.

[121] Art 13 of the Protocol.

[122] Art 16 of the Protocol.

shall 'harmonise and co-ordinate' the activities of the sub-regional mechanisms relating to the maintenance of peace and security.[123] He is also to 'work closely' with these mechanisms.[124] On their part, the sub-regional mechanisms are required to 'keep the Peace and Security Council of the [AU] fully and continuously informed of their activities and ensure that these activities are closely co-ordinated and harmonised with those of the Peace and Security Council of the [AU]'.[125]

5.4.2.2 The Economic Community of West African States (ECOWAS)

In obvious disregard to instability in the sub-region, the 1975 ECOWAS Treaty did not contain security protocols. However, this situation was rectified first in 1978 and then in 1981 when the Protocol on Non-aggression (PNA) and the Protocol on Mutual Assistance and Defence (PMAD) were adopted respectively. Diverse institutional mechanisms and administrative arrangements were established under these protocols to be made operative during crises.[126]

The entry into force of these two protocols was envisaged to introduce a tradition of war-free intergovernmental relationship within the framework established by ECOWAS.[127] However, the period that followed was characterised by increasing intra-state and inter-state conflicts. This state of affairs led to the deployment of ECOMOG troops in Liberia (1990 -1998) and in Sierra Leone (1997-1999). The establishment of the 1999 Mechanism has now overshadowed the operation of the two protocols for Conflict Prevention, Management Resolution, Peace and Security ('the ECOWAS Mechanism').

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[123] Art 16(1)(a) of the Protocol.

[124] Art 16(1)(b) of the Protocol.

[125] Art 16(3) of the Mechanism.

[126] Aning (1999) 2.

[127] For a general analysis on the envisaged and actual achievements of the two protocols see Conteh-Morgan (1993);Olonisakin (1998), Aning (1999) and Olonisakin (2000)

Although the ECOWAS Mechanism is supposed to be an improvement from the failures experienced in the trial process of ECOMOG intervention and managements of conflicts in West Africa, it has at least two inherent defects. First, the structure, organs, rules and procedures of the new Mechanism are too cumbersome, practically and financially, to implement.[128] The new fundraising models are not generic and are therefore difficult to effect, given the poor economic performance in the region.[129]

Second, the New Mechanism envisages that ECOMOG would be its stand-by force for military interventions. While this would ensure that the Mechanism benefits from ECOMOG's experiences in Liberia and Sierra Leone, it may entangle the Mechanism with the old ECOMOG military doctrine. This doctrine, as Yoroms writes, was based on a reactive rather than proactive approach.[130] It is proposed that a new ECOMOG be raised, with a different orientation, doctrine and strategy.

Despite the above defects, the ECOWAS Mechanism has infused dynamism into the maintenance of sub-regional peace and security in West Africa. It is hoped that the Mechanism will contribute to the management and resolution of conflicts in the region, and that ECOWAS' experiences can inform other sub-regional initiatives in the region.

5.4.2.3 The Southern Africa Development Community (SADC)

The SADC institution charged with issues of relevance to human rights, peace and security is the SADC Organ for Politics, Defence and Security. The

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[128] The organs established under the Mechanism are the Authority of Heads of State and Government; the Mediation and Security Council (which operates at three levels, namely, the Committee of Ambassadors, the Committee of Ministers of Foreign Affairs, Defence, Internal Affairs and Security and the Heads of States of the ECOWAS Mediation and Security Council), the Defence and Security Commission, the Council of Elders, and the Executive Secretary).

[129] Yoroms (1999) 6.

[130] As above.

operation of this Organ has been greatly curtailed. Zimbabwe, which has held the Chair of the Organ, has been arguing that the Organ should operate independent of SADC, insisting that in any case SADC is a donor-funded organisation that can not be entrusted with the control of sensitive issues like regional peace and security. On the other hand, South Africa has been arguing that the role of the Chair of the Organ is so sensitive that it should not be de-linked from the control of SADC.[131]

The South African position seems to have a legal basis. The SADC Treaty provides that the Summit is the supreme body within SADC sub-region.[132] This means that all other organs established under the Treaty or under Protocols adopted under the auspices of the Treaty should be subordinate to the Summit.

The impasse regarding the legal status of the institutions of the SADC Organ and how they should operate is a great undoing of the sub-region's efforts aimed at providing an effective mechanism for combating gross human rights violations and breaches of peace and security. However, the fact that SADC member-states continue to discuss ways to make the Organ effective suggests that political will does exist to address previous shortcomings.[133]

5.4.2.4 Other African Sub-regional Organisations

Apart from ECOWAS and SADC, the other African sub-regional organisations have not developed norms that can allow for military intervention in member states. However, the human rights norms in the constitutive treaties of these organisations, as well as the direction taken by ECOWAS and SADC are a

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[131] Berman & Sams (2000) 190; Neethling (2000) 209. But see De Coning (1999) 5, arguing that actually, Zimbabwean President Robert Mugabe is opposed to the integration of the Organ SADC because he would want to control exercising the influential functions of the Chair of the Organ.

[132] Art 4 of the SADC Treaty.

[133] Berman & Sams (2000) 190.

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pointer that in the future, these organisations may engage in humanitarian intervention.

At the moment, AMU, COMESA, EAC, ECCAS and IGAD should concentrate in expanding their human rights mandate. This can be done by either creating separate human rights conventions, or incorporating the normative framework of the African Charter on Human and Peoples' Rights as a whole into their respective constitutive treaties.[134]

5.5 CONCLUSION

In this Chapter, we have argued that there is need for procedural and substantive criteria for humanitarian intervention. Such criteria are important because it will clarify the law on humanitarian intervention and will provide a reference for assessing the validity of claims of humanitarian intervention. We have argued that in defining these criteria, preventive measures should be prioritised and the primacy of the UN Security Council should be recognised.

We have also presented what we consider as criteria for humanitarian intervention, based on attempts to answer questions relating to which countries or international organisations are to intervene, when and how they should intervene, and when and how they should end the intervention. We have argued that humanitarian intervention should be carried out through regional intergovernmental organisations to which the target state belongs, supervised by the UN.

The use of force should not contravene the requirements of proportionality and necessity, and it should comply with international humanitarian law. Unless the humanitarian emergency in question does not permit, the intervening states should exhaust peaceful means and should seek endorsement of the use of force by the UN Security Council or General Assembly. Finally, we have

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[134] On the pros and cons of either of these options, see Viljoen (1999) 185, especially, 208-212.

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discussed ways in which the UN Security Council and African intergovernmental organisations may be reformed. Some of the proposals for reforming the AU Mechanism for Conflict Prevention, Management and Resolution have already been effected in the Protocol Relating to the Establishment of the Peace and Security Council of the AU.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

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6.1 INTRODUCTION

The term 'humanitarian intervention' in this study 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 rights violations, especially those leading to massive loss of lives in the target state.

The study has been guided by the need for legal certainty regarding humanitarian intervention. In this regard, it has examined the issue of whether there is a legal foundation for humanitarian intervention in contemporary international law. The role of intergovernmental organisations in humanitarian

intervention in Africa has also been examined, with a view to make legal and institutional reforms concerning humanitarian intervention. After analysis of the above issues, the study makes the following conclusions and recommendations.

6.2 CONCLUSIONS

6.2.1 Conclusion 1: The UN Charter offers a treaty law basis for humanitarian intervention

There is a treaty law basis for humanitarian intervention in international law. Under the UN Charter, invoking the provision that the purposes of the UN include the 'protection of fundamental human rights and freedoms of the individual'[1] can support humanitarian intervention. This provision is strengthened by the obligation placed on UN members to 'take joint and separate action' for the 'promotion of equal rights and self-determination of peoples' including 'universal respect for and observance of human rights'.[2]

Pursuant to the human rights mandate under the UN Charter, member states have concluded treaties on human rights, which have diverse monitoring and supervision mechanisms. The ICJ has held that certain human rights obligations are obligations *erga omnes*, and every state of the world has an interest in their enforcement.[3] One of the ways in which these obligations may be enforced is through humanitarian intervention wherever there are large-scale violations of human rights leading or likely to lead to massive loss of lives.

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[1] Art 1(1) and 1(2) of the UN Charter.

[2] Art 55 and 56 of the UN Charter.

[3] See the *Barcelona Traction Case (Belgium v Spain)* ICJ Rep 1970 53 para 33.

Institutionally, the use of force under the UN Charter system should be exercised with the authorisation of the Security Council. The view taken in this study is that not all Security Council resolutions authorising the use of force in pursuance of the Council's mandate of maintaining international peace and security amounts to humanitarian intervention. A Council authorisation of the use of force on humanitarian grounds must, apart from the Council's determination that the situation in the target state is a threat to international peace and security, expressly refer to a 'humanitarian crisis', 'humanitarian emergency', gross human rights violations' or similar terms that are constitute the definitive elements of humanitarian intervention. The existence of gross human rights violations must objectively exist, and mere declaration that there are violations is not sufficient.

6.2.2 Conclusion 2: The Genocide Convention and certain treaties adopted under the auspices of African intergovernmental organisations also provide for a legal basis for humanitarian intervention

Apart for the UN Charter, several other treaties provide a legal basis for humanitarian intervention. The first of these is the 1948 Genocide Convention, which obliges state parties to prevent and punish perpetrators of genocide wherever it occurs.[4] The Convention provides a legal basis for humanitarian intervention since prevention of genocide - a crime committed in the context of an armed conflict - can only be prevented or stopped by the use of force. Such use of force amounts to humanitarian intervention because it is in response to massive loss of life and gross human rights violations committed or likely to be committed in the context of genocide.

Certain treaties adopted under the auspices of African intergovernmental organisations also provide a legal basis for humanitarian intervention. The Act establishing the AU underscores the AU's determination to promote human

[4] See art 1, Genocide Convention.

rights.[5] It also provides that the AU shall pursue the objective of promoting and protecting human rights in Africa,[6] besides requiring the AU to be guided by the principles relating to the promotion of human rights, the rule of law, peace and security in Africa.[7]

The Act specifically provides that the AU has a right to intervene in a member state in respect of 'grave circumstances', namely, genocide, war crimes and crimes against humanity.[8] These provisions read together, as well as the provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the AU, constitute a treaty basis for humanitarian intervention under the AU Act.

Humanitarian intervention may be based on the ECOWAS Treaty, as well as the following protocols additional to the Treaty: Protocol on Non-Aggression, 1978; Protocol on Mutual Assistance and Defence, 1981; and the Protocol Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace and Security, 1999. The SADC Treaty and the 1997 SADC Protocol on Politics, Defence and Security enjoin SADC to be involved in the promotion of human rights, peace and security in Southern Africa, and this provides a basis for humanitarian intervention.

6.2.3 Conclusion 3: States have in the past invoked treaties to justify humanitarian intervention

States have on occasion relied on treaties to justify their claims of humanitarian intervention. The analysis in this study has led me to conclude that five interventions are examples of state practice on humanitarian

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[5] Preamble para 9.

[6] See arts 3(f), 3(g) and 3(h) of the Act.

[7] See arts 4(m), 4(n), 4(o) and 4(p) of the Act.

[8] Art 4(h) of the Act

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intervention under the auspices of the UN Charter. These interventions were in Iraq (1991), Somalia (1992-1993), Bosnia (1992), Rwanda and Eastern Zaire (1994-1996), and Haiti (1994-1997). In each of these cases, a study of the relevant resolutions of the Security Council show that in addition to finding that the situation in the target state was a threat to international peace and security, the Security Council also made repeated references to massive violations of human rights as being the reasons for authorising military action.

In addition, the ECOWAS Treaty was invoked to justify the intervention in Liberia (1990-1998) and Sierra Leone (1997-2000). Although the SADC interventions in the DRC (1998) and Lesotho (1994) took place in the context of human rights violations affecting large portions of the population in the respective target state, my analysis of these interventions leads me to conclude that they are not instances of humanitarian intervention because the target state had respectively consented to intervention.

6.2.4 Conclusion 4: There is an emerging customary international law basis for humanitarian intervention

Both state (*usus*) practice and *opinio juris*, that is a belief that the practice engaged in is in accordance with the law, are the two elements that should be proved before establishing the existence of a rule of customary international law.[9] In the present study, I arrive at the conclusion that there is an emerging norm of customary international law permitting states to use force for humanitarian purposes.

This conclusion is based on the analysis of the interventions in Cuba (1898), Macedonia (1903-1912), Pakistan (1971), Kampuchea (1978), Central African Republic (1979), Uganda (1979) and Kosovo constitute state practice on humanitarian intervention under customary international law. The *opinio juris* with respect to these interventions can be inferred from the express or tacit

[9] See Shaw (1991) 59-60; Wallace (1992) 3-4 and Brownlie (1998) 4.

approval that the interventions were accorded, or the acquiescence of states following the interventions.

Another subsidiary argument in favour of finding a legal basis for humanitarian intervention relates to the 'link theory'. Under this theory, it is argued that a pre-UN Charter customary norm on humanitarian intervention is revived whenever it can be proved that the UN mechanism has failed or is unwilling to address a humanitarian emergency.[10] However, my analysis of the customary international law doctrines of 'distress' and 'state of necessity' have led me to conclude that they can not be a basis for humanitarian intervention.

6.2.5 Conclusion 5: The legal and policy objections to humanitarian intervention can be addressed through a progressive interpretation of the UN Charter and by the inherent deficiencies in the objections themselves

Legal objections to the recognition of the doctrine of humanitarian intervention in international law relate to the relationship between humanitarian intervention on the one hand and the doctrine of state sovereignty and the concomitant principles of non-intervention and non-use of force on the other. In the literature, criticisms against humanitarian intervention are not solely predicated on legal principles. The line of attack also comprises of policy objections.[11] The policy objections are that humanitarian intervention is prone to abuse and is selectively applied, that humanitarian intervention complicates the situation in the target state, and that 'humanitarian intervention' is a contradiction in terms.

In this study, I have argued that on a progressive interpretation of the UN Charter, the norms on the ban of the use[12] of force and non-intervention[13]

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[10] For a discussion on the link theory, see Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 19.

[11] For a study solely devoted to policy objections to humanitarian interventions, see generally, Kritsiotis (1998).

[12] See art 2(4) of the UN Charter.

should be balanced with the Charter obligations on states to promote and protect human rights.[14] A balance between these two sets of normative values supports the view that humanitarian intervention under the UN Charter is not unlawful.

The policy objection to the effect that humanitarian intervention is prone to be abused is based on a motives-first approach, which is not ascribed to in this study. The motives-first approach attaches primary importance to the actual reasons why states engage in humanitarian intervention. My argument is that the motives of the intervener should not be accorded primacy, unless it can be shown that they are inconsistent with a positive humanitarian outcome.[15]

Concerning the argument that humanitarian intervention results in short term complications and no long-term benefits, I have argued that the complications that come with humanitarian intervention are common to any state pursuit, and that what is needed is to develop criteria for minimising these complications. Finally, with regard to the contention that humanitarian intervention contradicts itself by destroying or adversely affecting lives in the guise of saving others, I advocate for a utilitarian approach. I have argued that on the whole, humanitarian intervention may be justified from a utilitarian perspective if it serves to save more lives that those lost incidentally during the military intervention.

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[13] Art 2(7) 0f the UN Charter.

[14] Arts 1(3), 13, 55, 56, 62, 68, 76 of the UN Charter.

[15] For authorities on this point, see Teson (1988) 106-108, Walzer (1992) 102; Kritsiotis (1998) 1034 and Wheeler (2000) 38.

6.2.6 Conclusion 6: State sovereignty in the classical sense has been eroded significantly, and should be interpreted as such in order to reinforce the emergence of a norm of humanitarian intervention

The dilemma between the classical doctrine of state sovereignty, on the one hand, and the principles on the protection of human rights, on the other, may be also be addressed in two ways. First, if the concept of state sovereignty is viewed from a contemporary standpoint, it is arguable that notwithstanding its importance in international law, developments in the last few decades have gradually but inevitably changed its original conception. The combined effects of the internationalisation of human rights, globalisation, the revolutionary developments in telecommunications and technology, the individualisation of international law and emergence of new actors on the international plane, and the changing nature of armed conflicts have contributed to the erosion of the concept of state sovereignty.

Second, those who object to the legal endorsement of humanitarian intervention fail to take into account humanitarian intervention serves the 'public good'. The concept of 'public good' is the basis of the normative framework in international law. Briefly put, this concept comprises of normative values that achieve the interests of the greatest section of the international community.

I have used five specialised fields of international law (international criminal law, international humanitarian law, international environmental law, law of international watercourses and international law of the sea) to show that the international normative framework is dominated by values that serve the public good. If the principles of international law related to the use of force and those on human rights are interpreted with due consideration to the public good, it may be seen that humanitarian intervention serves the public good by pre-empting massive loss of life, breach of peace and security, as well as trans-border refugee flows.

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6.2.7 Conclusion 7: The OAU did not play any role in humanitarian Intervention but there are prospects for a greater role in this regard under the AU

Due to a restrictive normative framework and lack of political will, the OAU did not play any role in humanitarian intervention. There were many instances of gross violations of fundamental human rights on the continent, which constituted justifiable cases for humanitarian intervention. The non-intervention principle has been highly upheld within the OAU. However, there was a paradigm shift in the 1980s, when the OAU began adopting regional human rights instruments. After the end of the Cold War, the OAU's role in human rights and conflict prevention, management increased. The Organisation, however, did not engage in actual humanitarian intervention.

After 39 years of existence, the OAU was wound up in 2002, and was replaced by the AU. The Constitutive Act of the AU has elaborate provisions on the protection of human rights and the promotion of peace and security in Africa.[16] Moreover, it provides for military intervention by the AU to forestall or halt genocide, war crimes and crimes against humanity.[17] Should the AU invoke this provision, then the intervention will be a clear example of treaty-based humanitarian intervention.

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[16] See especially arts 3 and 4 of the Act.

[17] Art 4(h) of the Act.

6.3 RECOMMENDATIONS

6.3.1 Recommendation 1: There is need to expand the meaning of 'humanitarian intervention' to include the use of force for breach of socio-economic rights if such breach leads or is likely to lead to massive loss of life

Generally, writers understand humanitarian intervention to mean the armed response of states in other states in order to address gross violations of fundamental civil and political rights, in particular the right to life.[18] However, it is recommended that the meaning of humanitarian intervention be expanded to encompass armed responses to gross violations of socio-economic rights if the violations lead or are likely to lead to massive loss of life.

If military force were used, for instance, to secure the delivery of food or the provision of health services to large sections of the population in a country where the government of the target state is unwilling to allow local or international humanitarian assistance, then such use of force would amount to humanitarian intervention. It should be clarified that if food or medical supplies are delivered without threat or use of force, then that would be an instance of humanitarian assistance and not humanitarian intervention.[19]

6.3.2 Recommendation 2: While the primacy of the UN Security Council in the use of force should be retained, a greater role in humanitarian intervention should be played by regional organisations

The UN Charter accords the primary responsibility of the Security Council in matters involving the use of armed force for the maintenance of international peace and security. In order to uphold the international rule of law, this primacy

[18] See, for instance, Verwey (1986) 57 58-59; Teson (19888) 5; and Charney (1999) 1231 1245-1246.

[19] See conceptual clarification in Chapter 1 (section 1.3.1.4).

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of the Council should be recognised. The implication of such recognition to humanitarian intervention is that the Council should supervise all humanitarian interventions. The Security Council should authorise all instances of humanitarian intervention. Where the Council authorises a regional or sub-regional organisation to intervene, the intervening organisation should keep the Council updated on all developments relating to the intervention, until the end of the intervention.

Operationally, it is preferable that countries constituting a regional or sub-regional intergovernmental organisation be mandated and supported financially and logistically to intervene on behalf of the UN or on behalf of the respective organisation but under the supervision of the UN Security Council. Regional or sub-regional organisations are suitable for a rapid response to a humanitarian emergency due to geographical proximity to the target state.

Moreover, such countries are likely to be affected most by the gross human rights violations in the target state. The effects may, for instance, be in the form of trans-border refugee flows or proliferation of illegally held arms. It follows that states in a regional or sub-region organisation to which the target state belongs are more likely to be interested in addressing the gross human rights violations in the target state. The involvement of regional and sub-regional organisations in humanitarian intervention within the areas of their jurisdiction also enhances subsidiarity and 'burden sharing' in the maintenance of international peace and security, and consequently makes the UN Security Council more effective.

6.3.3 recommendation 3:There is need to reform the Security Council by enlarging its membership

The membership of the Council should, in order to provide equitable geographical distribution, be increased to twenty states, five from each of the UN regions. At least one of the permanent seats in the Council should be reserved for Africa. Reforms in the Security Council are likely to increase the legitimacy of the Council among UN member states. Also, decisions of a

reformed Council relating to humanitarian intervention will most likely attract broad-based compliance

6.3.4 Recommendation 4: There is need to define criteria for humanitarian intervention

Although I have argued that humanitarian intervention has a legal basis in international law, it has no defined criteria. In this study proposes that such criteria should take into account the need to recognise the primacy of the UN Security Council in matters involving the use of force. Also the criteria should prioritise preventive measures before force is actually used to pre-empt or end gross human rights violations in the target state. Such preventive measures include mediation or conciliation with the authorities of the target state, as well as the utilisation of 'good offices'.

Humanitarian intervention should be engaged in where there is evidence gross human rights violations leading or likely to lead to mass loss of life. The use of force should be proportionate and should only be sufficient to address the gross human rights violations. The intervening states should not change the political conditions in the target state, although they may be involved in necessary post-conflict reconstruction. The intervening troops should be subjected to individual criminal responsibility for violations of international humanitarian intervention in the target state, and their states or the intervening intergovernmental organisation should be subjected to suits in the ICJ for breach of the territorial integrity of the target state.

As soon as the objective of the intervention is realised, that is, when the gross human rights violations in the target state cease, the intervening states should withdraw their troops immediately or as soon as the necessary post-conflict reconstruction is complete.

6.3.5 Recommendation 5: The institutions provided for in the Protocol Relating to the Establishment of the Peace and Security Council of the AU should be established as soon as the Protocol enters into force

Given the speedy process through which the AU Act entered into force,[20] it is likely that the Protocol Relating to the Peace and Security Council of the AU will equally enter into force soon. It is recommended that the Protocol be given full effect, by establishing not only the Peace and Security Council of the AU but also the other institutions established thereunder. Particularly, the continental early warning mechanism should be established to monitor conflict situations and collect data on conflict prevention, management and resolution. This mechanism should be linked to African sub-regional conflict management mechanisms, as the Protocol requires. The Panel of the Wise should also be established. Their role in conflict resolution is likely to be significant, considering Africa's respect for elders.

[20] The Act entered into force within one year of adoption.

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