# CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS



## 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

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

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[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.

### 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

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[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 ).

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.