CHAPTER 2: THE LEGAL BASIS FOR HUMANITARIAN INTERVENTION

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.

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.

- 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

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[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.

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.

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.

> 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.

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.

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.

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.

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

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[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.

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.

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

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[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.

> 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.

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.

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.

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

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[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

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[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.

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.

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.

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.

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.