CHAPTER 5: CRITERIA FOR HUMANITARIAN INTERVENTION AND ASPECTS OF INSTITUTIONAL REFORM OF INTERGOVERNMENTAL ORGANISATIONS RELATED THERETO

5.1 INTRODUCTION

This Chapter outlines the reasons for defining criteria for humanitarian intervention, discussing how and when intervention should take place, as well as who is entitled to carry out humanitarian intervention. There are minimum criteria, of a substantive nature, that ought to be met before any claim of humanitarian intervention can be deemed as legally justified.[1] Once this threshold is met, a number of other procedural criteria should be satisfied in

[1] These have been referred to in Independent Commission on Kosovo (2000) 193 as 'threshold principles'.

order to complete the legality of a claim of humanitarian intervention.[2] However, both the substantive and procedural criteria are treated in this study as being equally important.

Although the discussion on the criteria for humanitarian intervention may refer to the role of states, it should be borne in mind that it is envisaged that this role will be exercised in the context of intergovernmental organisations. As pointed out in Chapter 1, this study prefers collective as opposed to unilateral humanitarian intervention. In line with the principle of 'burden sharing', it is also preferred that regional or sub-regional intergovernmental organisations engaging in humanitarian intervention should do so under the overall supervision of the UN Security Council.

The present Chapter also looks at the various ways in which the existing institutional framework within intergovernmental organisations can be reformed or improved to enable these organisations to play a more effective role in humanitarian intervention. In this regard, reforms within the UN and the African regional or sub-regional institutions dealing with the maintenance of international peace and security (and therefore, the use of force) will be discussed.

5.2 THE NEED FOR CRITERIA FOR HUMANITARIAN INTERVENTION

Humanitarian interventions are likely to continue occurring in the foreseeable future. This is so because instances of gross violations of human rights continue to occur, especially in the context of internal armed conflicts.[3] One of the likely consequences of such humanitarian interventions is that the future of the post-Cold War legal order will entail a further 'softening' of the view of the

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[2] See Wheeler (2000) 33. In Independent Commission on Kosovo (2000) 193-195 these are referred to as 'contextual principles'.

[3] See Zacklin (2001) 924.

traditional positivist and absolute view regarding the use of force under the UN Charter. The UN's increasing involvement in peacekeeping missions world-wide bares testimony to this, as an attempt to legally embrace a new reality. Given that humanitarian interventions are likely to continue occurring, guidelines need to be sought to justify humanitarian intervention, and limit its potential abuse.[4]

Underscoring the need for clear guiding legal principles on humanitarian intervention, UN Secretary-General Kofi Annan stated thus in his 1999 address to the UN General Assembly:[5]

> Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples.

Rules and criteria for humanitarian intervention can clarify the minimum conditions to be satisfied by the intervening states. They can also help to structure the deliberations within the UN Security Council and General Assembly on specific instances of intervention. At the same time, they can provide the UN community of nations with a basis for assessing instances of unauthorised humanitarian intervention that have already taken place and for tolerating them in appropriate cases, provided that sufficient account of 'legitimacy considerations'.[6]

Rules and criteria for humanitarian intervention can also be of importance for the further development of the law relating to humanitarian intervention, as it

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[4] Charney (1999) 1243. Others who have made similar suggestions are Lillich (1967) 325 357-351 and Cassese (1999) 21.

[5] See *Report of the Secretary-General on the Work of the Organi[s]ation* UN GAOR, 54th Session, 4th Plen Mtg 1; UN Doc A/54/PV4 (1999).

[6] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 28.

offers a starting point for gaining international acceptance for a separate legal ground justifying humanitarian intervention not based on statute (in which humanitarian necessity prevails over the law banning the use of force).[7]

A set of comprehensible standards would provide for predictability, despite the *ad hoc* nature of humanitarian interventions. Admittedly, identifying criteria for justifiable humanitarian intervention does not resolve the problem of deciding automatically whether a particular case has satisfied these tests. What it does, however, establishes a common reference within which argumentation can take place.[8]

5.3 GUIDELINES FOR HUMANITARIAN INTERVENTION

This section discusses four broad criteria for humanitarian intervention, posed as four questions, and incorporating both the substantive and procedural requirements for justified humanitarian intervention. These are:[9]

- Which states should be allowed to intervene?
- When should the intervention be allowed?
- What conditions have to be met during the intervention?
- When and how must the intervention end?

However, two overarching criteria are first discussed. The one regards the primacy of preventive measures and the other concerns the primary role of the Security Council in the use of force in international relations.

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[7] As above.

[8] Wheeler (2000) 33.

[9] These questions are posed in a similar manner in Advisory Council for International Affairs & Advisory Committee on Issues of Public International Law (2000). However, this study integrates the discussions in relation to the four questions in many other studies including: Reisman & McDougal (1973); Lillich (1979); Bazyler (1987); Arend & Beck (1993); Charney (1999); Danish Institute of International Affairs (1999); Independent Commission on Kosovo (2000); ICISS (2001a); ICISS (2001b) and Zacklin (2001).

5.3.1 The Primacy of Preventive Measures

Since the use of force in international relations should always be treated as an exceptional measure and as an extremely grave matter under any circumstances, primacy should be given to preventive measures.[10] The UN Secretary-General noted in his 1999 *Report on the Work of the Organisation* that '[e]ven the costliest policy of prevention is far cheaper, in lives and resources, than the least expensive use of armed force'.[11]

Prevention of deadly conflict and attendant gross violations of human rights is first and foremost the responsibility of the international community, acting through the UN or regional or sub-regional intergovernmental organisations. The prevention can be achieved through various ways, including development assistance to prop up local initiatives for the advancement of good governance and human rights, good offices missions, mediation efforts and efforts to promote dialogue and reconciliation.[12]

The need to respond to the root causes of armed conflicts and gross human rights violations is entrenched in the UN Charter. The Charter recognises that solutions to international economic, social, health and related problems are all essential for 'the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'.[13]

For the effective prevention of gross and systematic human rights violations, there is a need for knowledge of the fragility of the situation and the risks associated with it, the so-called 'early warning.'[14]

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[10] Zacklin (2001) 938.

[11] Cited in note 5 above.

[12] ICISS (2001a) 19.

[13] See art 55, UN Charter.

[14] ICISS (2001a) 20.

Some authors have discounted the primacy of effective preventive action based on greater information gathering and early warning.[15] Their contention is based on the assumption that creation of increasingly sophisticated early warning mechanisms has not necessarily been backed by action.[16] Further, such authors argue that more often than not, what is lacking is not the basic data, but its analysis and translation into policy prescription, and the will to do something about it.[17] This means what is needed most is not early warning but early action to prevent gross violations of human rights from occurring.[18]

The above arguments, however, presuppose the existence of data, and seem to advocate for the analysis of the data and action on it. In Africa, early warning based on well-documented information on conflict situations has been lacking, and is particularly important. One cannot talk of action based on data that does not exist. In recognition of this need, the Protocol Relating to the Establishment of the Peace and Security Council of the AU envisages the establishment of a continental early warning system.[19]

The AU early warning system shall consist of two components. First, there will be an observation and monitoring centre to be known as the 'situation room', responsible for data collection.[20] Second, there will be observation and monitoring units within African sub-regional organisations to be linked through 'appropriate means of communications' to the situation room, and whose

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[15] See, for instance, Hampson & Malone (2002) 93.

[16] As above.

[17] ICISS (2001a) 21. See also Hampson & Malone (2002) (...[T]he real problem seems to be a failure of a comprehensive analysis combined with s lack of political will to act in risky situations').

[18] See Lund (1998) 1.

[19] See art 12 of the Protocol.

[20] Art 12(2)(a) of the Protocol.

function will be to collect and process data at the sub-regional level and transmit it to the situation room.[21]

The AU Commission shall also collaborate with the UN, its agencies, other relevant international organisations, research centres, academic institutions and NGOs, to facilitate the effective functioning of the early warning mechanism.[22] This last provision, if implemented, is likely to be a major boost to the AU's information gathering endeavours. It may avail to the AU a great amount of data that has been gathered by research centres, NGOs and academic institutional throughout Africa and elsewhere.

5.3.2 The Primary Role of the UN Security Council Should be Recognised

Under the UN Charter, the Security Council has the primary authority to sanction the use of force.[23] Therefore, in order to uphold the international rule of law, the use of force should be primarily reserved for the UN Security Council. The supremacy of the obligations of states under the UN Charter over obligations under any other treaty is spelt out in the Charter as follows:[24]

> In the event of any conflict between the obligations of the [m]embers of the [UN] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Therefore, the inability of the Security Council to fulfil this primary function because of disagreement among members, or because one or more of the

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[21] Art 12(2)(b) of the Protocol.

[22] Art 12(3) of the Protocol.

[23] See arts 2(4), 24 and 25 of the UN Charter.

[24] Art 103 of the UN Charter.

permanent members exercises its veto, must be clearly established before humanitarian intervention is carried out outside the UN framework.[25]

5.3.3 Which States Should be Allowed to Intervene?

The protection of a broadly interpreted right to life belongs to the category of *obligationes erga omnes*, that is, obligations in whose fulfilment all states are deemed to have a legal interest.[26] The obligations are not upon an individual state acting alone. This implies that at international law, collective, and not unilateral use of force, is envisaged, except if an individual state is acting in self-defence. Thus Falk has written that:[27]

> The renunciation of [unilateral] interventions does not substitute a policy of non-intervention, it involves the development of some form of collective intervention.

So long as the norm of humanitarian intervention is neither clearly articulated nor universally endorsed, collective interventions – either by the UN or by a regional organisation or even a coalition of states – will remain the most legitimate form of intervention. For this reason, preference should be given to humanitarian intervention by a group of states acting under the auspices of an intergovernmental organisation. The checks and balances contained in these guidelines for humanitarian intervention are more likely to be effective in an institutional context than when the humanitarian intervention is undertaken by an individual state.

For operational reasons, preference should be given to the involvement of the countries in the region, since it is these countries that in practice are capable of intervening or providing essential logistical support in good time. However,

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[25] Zacklin (2001) 939.

[26] See Charney (1999) 1232. However, it is interesting to note that although Charney finds that the duty to protect human rights is owed *erga omnes*, he goes on to discount that it is permissible to discharge such duty through the use of military force.

[27] Falk (1968) 339.

care must be taken to ensure that their geographical proximity does not encourage abuse.[28] Procedurally, efforts should be made to utilise existing regional intergovernmental organisations in humanitarian intervention in the context of Chapter VIII of the UN Charter.

States taking part in humanitarian intervention should be party to universal and regional instruments for the protection of human rights. In addition to ratification of or accession to human rights treaties, states should have a record of stability and respect for the rule of law and fundamental human rights. Also, the intervening states should not themselves be in any way involved in the massive violations of human rights that the intervention is designed to combat. This will enhance the integrity of the intervening states as well as their disinterestedness.

It follows that in cases where an intergovernmental organisation authorises a few states to intervene on its behalf, then the selection of the states to intervene should be guided by the above criteria. The organisation itself should be neutral and should not be seen to support the government of the target state or any insurgents or other group therein.

5.3.4 When Should Intervention be Allowed?

It is necessary to define the type of circumstances that should trigger humanitarian intervention. In defining these circumstances, this study is guided by the definition of humanitarian intervention adopted here. The situation must be grave, one in which fundamental human rights are being or are likely to be seriously violated on a large scale and there is an urgent need for intervention. This means that there should be a just cause, namely, a 'supreme

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[28] Advisory Council on International Affairs & International Council on Issues of Public International Law (2000) 28 – 29.

humanitarian emergency'[29] or 'severe violations of international human rights and humanitarian law'.[30]

The terms 'supreme humanitarian emergency' and severe violations of international human rights and humanitarian law' may be prone to subjective definitions. This leads to the question: How many people must die before humanitarian intervention can be justified? It is submitted here that it is not the numbers that get killed or tortured that matter.[31] Instead, the intervening states should be required to make convincing case to the effect that the violations of human rights within the target state have reached such a magnitude that they 'shock the conscience of humanity'.[32] On this understanding, Wheeler has stated that generally, 'a supreme humanitarian emergency exists when the only hope of saving lives depends on the outsiders coming to the rescue'.[33]

There must be proof of clear and publicly available evidence that international crimes of grave proportions, preferably amounting to the crimes of genocide, war crimes or crimes against humanity, are being committed or are about to be committed in the target state.[34] However, the lack of 'official' evidence should not be used as an excuse for not intervening on humanitarian grounds. Prior to the 1994 Rwanda genocide, for example, several warnings were issued to the UN of the imminent crisis, and NGOs and media reports could have attested to the escalating violence.[35]

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[29] Wheeler (2000) 34.

[30] Independent Commission on Kosovo (2000) 193.

[31] See also Wheeler (2000) 34.

[32] Walzer (1978) 152.

[33] Wheeler (2000) 34.

[34] Charney (1999) 1245.

[35] Prunier (1995), Chapter 7 generally.

Nevertheless, these signals were initially dismissed, with the assertion that there was insufficient evidence to predict or forestall the genocide.[36] It is desirable that early rescue be permitted, to allow intervening states to pre-empt a humanitarian emergency. Thus humanitarian intervention should be permitted where, say, a few hundred people have been killed but intelligence points to this being a precursor to a major campaign of mass killings or ethnic cleansing.[37] This happens to have been the case in Kosovo where the intervention was anticipatory.[38] Unfortunately, in all the other instances of humanitarian intervention covered in this study, military intervention came too late to protect civilians.

In order to give rise to humanitarian intervention, the violations of fundamental human rights should be grave (serious, systematic and on a large scale). This requirement includes both a qualitative element ('grave' and 'fundamental') and a quantitative one ('on a large scale'). Grave violations of fundamental rights include not only extermination by means of summary executions and deliberate armed or police attacks on arbitrary civilian targets, but also torture, taking of hostages, rape and grave infringements of the human dignity such as humiliating treatment.

It is, therefore, desirable that humanitarian intervention be restricted to the three crimes of genocide, war crimes and crimes against humanity, because these are crimes that are of 'the greatest concern to the international community'.[39] The determination that these crimes are being committed should be made on the basis of their definition in the Statutes of the Yugoslavia and Rwanda Tribunals or in the Rome Statute of the ICC.

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[36] As above.

[37] Wheeler (2000) 34. See also, Bazyler (1987) 600 ('The intervening nation or nations need not wait for the killings to start if there is clear evidence of an impending massacre').

[38] See Charney (1999) 1231.

[39] See art 2 of the Rome Statute of the ICC.

The legitimate government of the country may be perpetrating the violations (Iraq, Kosovo), may acquiesce in them (East Timor) or may be unable to control them (Somalia). This means that grave and systematic violations of human fundamental human rights committed by non-state players can also constitute grounds for humanitarian intervention. What must be proved is the 'failure' or 'collapse' of the target state, which entails the complete breakdown of governance, law and order.[40]

It should also be established that the internationally recognised government is unable or unwilling to provide the victims with appropriate protection from the violations. The fact that authorities are willing but unable to uphold the rule of law and also prevent large-scale violations of human rights has been identified by the UN Secretary-General as one of the factors that the Security Council should consider when reaching a decision on the subject.[41]

Thus one may envisage a situation where any form of government, or other authority is totally absent. In such cases, the authorisation required under international law in order for foreign troops to enter the target state's territory cannot be validly granted.[42] If violations of human rights are as a result of a breakdown in the organs of the state, it must be ascertained that the governmental authorities are incapable of ending these violations.[43] In addition, it is important to show that the government has failed or refused to appeal to third states or international organisations for assistance, and it refuses them access to its territory.

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[40] See Deng (1991) 207 ('In most cases, the collapse of the state is associated with humanitarian tragedies, resulting from armed conflict, communal violence, and gross violations of human rights that culminate in the massive outflow of refugees and internal displacement of the civilian populations').

[41] See Report of the SG to the SC on the Protection of Civilians in Armed Conflict, S/1999/957, para 40.

[42] See generally, Helman & Ratner (1992 –1993).

[43] Zacklin (2001) 938.

The kind of crisis in which humanitarian intervention may be invoked may be an entirely internal conflict or one with international implications (flows of refugees across borders or extensive regional destabilisation). The demonstrable threat of an internal or international armed conflict is not in itself sufficient to justify the conditions for humanitarian intervention. At the same time, a threat to international peace and security owing to grave, large-scale violations of fundamental human rights is not a separate condition for intervention.[44]

A number of other conditions must also be satisfied. It must be established that the violations can only be reversed, contained or pre-empted by deployment of military personnel and equipment. In that case, however, the primary objective of the intervention must be humanitarian. This means that the operation must be aimed at preventing or ending the humanitarian emergency involving the gross violations of human rights referred to.[45]

The intervening states must make the humanitarian objectives of the intervention clearly known in advance to the international community, in order to minimise the risk of article 51 of the UN Charter being used to counter the intervention.[46] Such prior and clear information would also help in the international monitoring of the intervention. Even if national, strategic or other interests may influence the decision to intervene, these must be clearly subordinate to the humanitarian objective of the intervention. Ideally, the promotion of the international rule of law (including the promotion of human rights) and national interests should, at least, coincide.

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[44] See Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 30.

[45] Zacklin (2001) 939 ('The use of force must be limited to the purpose of halting the violations and restoring respect for human rights').

[46] Art 51 of the UN Charter provides ('Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs ...).

The intervening state should also show that it has exhausted all the non-military means of action against the state that is violating the human rights, without success.[47] These non-military means may include attempts to end the humanitarian crisis with the support from civil society in the target state, as well as efforts through regional or other international organisations responsible for monitoring the upholding of human rights. Such efforts should, for instance, include the submitting (or arranging for submission of) a draft resolution to the UN Security Council. If the permanent members of the Security Council cannot reach agreement, the one logical step is to initiate a General Assembly debate on the basis of the procedure laid down in the Uniting for Peace Resolution.

Other non-military means of compelling the target state to address the violations warranting humanitarian intervention include negotiations and non-forcible countermeasures such as sanctions. This will leave humanitarian intervention as a measure of last resort. At the same time, however, a clear deadline must be set for peaceable measures, to ensure both that the non-forcible measures are favoured to outright intervention, and that in the case of failure of these measures to alleviate the situation, a humanitarian intervention is promptly undertaken.

The target state should be called upon to prevent or end the gross and systematic violations of human rights either by itself or with the assistance of other states or intergovernmental organisations.[48] The initial warning should be issued to the state, either through a forum of the UN, perhaps in a Security Council or General Assembly resolution. In conjunction with such UN action, a regional intergovernmental organisation in the same region as the target state, if it has the capacity to do so, should assume the responsibility of warning and assisting the target state.

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[47] Independent Commission on Kosovo (2000) 194 ('[t]here must be a serious attempt to find a peaceful solution to the conflict. This solution must ensure that the pattern of abuse is terminated in a reliable and sustainable fashion, or the process of restoring adequate governance is undertaken').

[48] Charney (1999) 1247.

If the target state fails or is unwilling to comply within a reasonably short period, then a final warning should be issued to the target state. Doing so will give the target state an opportunity to either halt the violations if it is complicit in them, or to challenge the intended collective action before the Security Council or General Assembly.

This should be the case because of a possible rapid deterioration of the humanitarian emergency, which may necessitate immediate military action. Waiting to see whether the full range of non-military alternatives has been exhausted may actually prove counterproductive, as it may create the impression in the areas affected by the crisis that the international community cannot make its mind up to intervene. Once a crisis has escalated into uncontrollable chaos, even military action will no longer have any effect.[49]

The above procedural requirements regarding exhaustion of peaceful remedies and the use of force as a last resort should be reconciled with the need for speedy action to address a humanitarian emergency. In this connection, it is suggested that intervening states should be required to exhaust all peaceful remedies, except where they can show that delay would result in irreparable harm.[50]

In such cases, such states may be allowed to intervene, on condition that they undertake to be held liable for damages if it is thereafter established that the intervention was not justified. Unless this balance is maintained, it may turn out that while policy makers are trying to achieve a halt to the abuses through non-violent means, massacres and expulsions might be continuing on the ground.[51]

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[49] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 30.

[50] See Rodley (1992).

[51] Wheeler (2000) 35.

Finally, it is desirable that potential humanitarian interventions should be decided on a case-by-case basis. In the current geopolitical context, maintaining flexible support for the mitigation of human suffering is the most realistic approach to humanitarian intervention. On this point, Chinkin writes that so long as the necessary enforcement machinery and international capacity in place do not expressly support a legal 'norm of obligatory humanitarian intervention', a case-by-case approach is the most viable option.[52] Again, it should be emphasised that although the above criteria makes reference to 'intervening states', it is presumed that the intervention is to take place in the context of an intergovernmental organisation.

5.3.5 Which Conditions have to be met during the Intervention?

A number of substantive and procedural criteria must also be met during the actual intervention. These relate to the concept of proportionality, the respect for international humanitarian law, compliance with the purposes of the UN and with those of the intervening intergovernmental organisation. These are explained briefly below.

5.3.5.1 Proportionality

Humanitarian intervention must be proportional to the gravity of the situation. This largely concerns purpose and means of the intervention. While the intervention is being undertaken, it must be limited in scope to actions necessary and proportionate to the objectives of halting gross and systematic violations of human rights.

According to Rodley, the principle of proportionality requires 'that the gravity and extent of the violations be on a level commensurate with the reasonably calculable loss of life, destruction of property [and] expenditure of resources'.[53]

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[52] Chinkin (1999) 471.

[53] Rodley (1992) 37.

Therefore intervening states should eschew the use of force if there are indications that it will lead to a worse situation than the one prevailing in the target state. It is likely that where the violations of human rights or their consequences do not constitute a threat to international peace and security, the very act of humanitarian intervention may itself constitute a threat to international peace and security.[54]

Again, there is need to strike a balance in relation to the need not to aggravate the situation in the target state. On the one hand, the use or threat of force must be firm enough to produce the desired effect. On the other, such use or threat of force must be sufficiently controlled to avoid destabilising conditions in the region, since that may result in even greater loss of life than that which led to the actual intervention.

The impact of the humanitarian intervention on the national structure of the country against which the intervention is directed must be limited to what is necessary in order to attain the humanitarian objective. This may nevertheless mean that the intervention is designed to the structure of a state and forms of authority in order to ensure that human rights are upheld in the future (for example through fair elections). In the 1990s, the part played by national governments in large-scale violations of fundamental human rights was in some cases so great that attacking the regime in power could only end the violations.

Another proportionality requirement concerns the implications for international peace and security. If, in themselves or because of their consequences, the grave, large-scale violations of fundamental human rights constitute a threat to international peace and security, the humanitarian intervention must not itself constitute an even greater threat to international peace and security.

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[54] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 31.

5.3.5.1 *Respect for International Humanitarian Law*

The rules of international humanitarian law should apply during any instance of humanitarian intervention. In this connection, the Geneva Conventions of 1949 form part of customary international law and must therefore be complied with whether or not a state is a party.[55] Also, they are almost universally ratified; meaning that invoking their customary international law status may not be necessary.[56] If the intervention is carried out by states that are not party to the additional Protocols of 1977, the rules of customary international law in the field of international humanitarian law should be adhered to.[57]

Violation of international humanitarian law may entitle the target state not only to invoke article 51 of the UN Charter, but also to sue for damages. If humanitarian intervention takes place without UN Security Council authorisation, the states involved should agree to be subject to the jurisdiction of the ICJ. The intervening state should be ready to be sued by any directly harmed state for possible violations of international law.[58] This agreement should be in the form of a written declaration made by the intervening states prior to the intervention, deposited with the UN Security Council and competent organ of the relevant regional intergovernmental organisation.

This requirement would reduce the abuse of humanitarian intervention because even if there is no institutional framework at the moment for the enforcement of the decisions of the judgments of the ICJ, the moral weight of an ICJ ruling, in a world of increasingly democratic states, is considerable.[59]

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[55] See Schindler (1999) and Wembou (1997) 685ff.

[56] As on 30 September 2002, the Geneva Conventions had been ratified by 188 states. See, <http://www.icrc.org/genevaconvnetions.html> (accessed on 30 September 2002).

[57] The rules of customary international law of armed conflicts are codified in a number of 'Hague Conventions'. These have been discussed in Chapter 3.

[58] Charney (1999) 1247.

[59] Damrosch (1987) 1; Gross (1987) 19ff.

The effect of the requirement is to increase the legitimacy of humanitarian intervention.

Similarly, individual military personnel should be prepared to be subject to the jurisdiction of the ICC, once it is in operation.[60] Individual accountability for violations of international humanitarian law is an important factor towards legitimisation of humanitarian intervention. It also recognises a well-articulated new norm of enforcing individual responsibility for violations of international criminal and humanitarian law.[61]

5.3.5.3 Compliance with the Purposes of the UN

The intervention must not contravene the purposes of the UN. For instance, the intervention must preserve the territorial integrity and political independence of the target state. The purpose of the military intervention should be limited exclusively to alleviating the widespread gross violations of human rights. It should not seek to enforce any other objectives that are not directly associated with the humanitarian purpose of the intervention. Throughout the humanitarian intervention process, the UN Security Council should supervise the intervening states. They should report to the Security Council immediately before the operation, stating the reason for the intervention. Thereafter, they should update the UN Security Council on the scale, progress and likely duration of the intervention.

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[60] However, the ICC will only have jurisdiction over individuals who are citizens of the state parties to the Statute of the Court, unless a prosecution is brought by the Security Council *suo motu* (on its own motion) under article 60 of the Statute.

[61] This principle has been codified in a number of instruments. See for instance, art 6 of the Statute of the ICTR, available online at <htpp://www.ictr.org/english/legaltexts/statute.htm.> (accessed on 30 September 2002).

5.3.5.4 Compliance with the Purposes of the Intervening Intergovernmental Organisation

States and individuals engaging in humanitarian intervention should respect the purposes and governing principles of the intervening intergovernmental organisation. Humanitarian intervention seeks to address massive human rights violations and, therefore, by extension, seeks to restore the rule of law. It follows that those seeking to restore the rule of law should themselves be subjected to the rule of law.

5.3.6 When and How Must the Humanitarian Intervention End?

The intervening states must undertake in advance to suspend the humanitarian intervention as soon as the state concerned is willing and able to end the large-scale violations of human rights itself, or when the Security Council or a regional intergovernmental organisation with the authorisation of the Security Council takes enforcement measures involving the use of force for the same humanitarian purposes.[62]

The intervening states should also end the intervention when its objective, namely the cessation of the violations of human rights, has been attained. Here again, the proportionality requirement must be taken into account, although much will depend on the specific circumstances. In situations involving gross, large-scale violations of human rights, the conditions for safeguarding those rights effectively in the short term are often lacking. On the one hand, therefore, the intervention must not be ended prematurely, and the conditions for a post-conflict peace-building process must be in place. For instance, the intervention should end after ensuring that there is a government in effective control of law and order in place. Such a government could be a transitional government charged with running the affairs of the country until elections are conducted. However, in order to avoid jeopardising the

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[62] Zacklin (2001) 939.

attainment of the humanitarian objective, the operation must not exceed a reasonable length of time.[63]

Once a humanitarian intervention has been undertaken, the onus is on the international community – or at least those states supportive of the intervention – to ensure the bare minimum conditions in the target state to forestall any foreseeable perpetration of gross and systematic violations of human rights. Such post-war reconstructions almost necessarily include a funding commitment, along with an armed or unarmed presence of neutral monitors, to provide both state and non-state actors with the resources to create a capacity for the police and judicial processes, to rehabilitate the economy, and to support and strengthen civil society.

Post-conflict reconstruction strategies may also include creating the conditions necessary for national reconciliation, as well as a longer-term commitment of the international community to help rebuild the civil, political and economic institutions of a territory necessary to sustain the target state.[64] The nature of such complex and multidimensional peace-building operations, usually referred to as 'follow-up of a humanitarian intervention', has been controversial, but it remains separate for the legality of humanitarian intervention.

Any 'follow-up' of a humanitarian intervention must exclude any attempts to alter the geographical borders of the target state, or to alter the political structures of the target state, including damaging any civilian structures associated with the state's legitimate functions. Any use of force deemed above and beyond the scope of the two customary international law principles of 'necessity' and 'proportionality' should be challenged in the ICJ, ICC or regional for a. In respect of African intergovernmental organisations, a suit

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[63] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2001) 32.

[64] Murphy (1996) 323.

could ensue before the African Court of Justice once established. Also, a complaint could be made before the African Commission on Human and Peoples' Rights or to the proposed African Peer Review Mechanism.

5.4 ASPECTS OF INSTITUTIONAL REFORMS

5.4.1 The Security Council

According to the UN Charter, the Security Council has the primary responsibility for the maintenance of international peace and security.[65] In discharging this mandate, the Council has proved willing, especially in the 1990s, to interpret its powers under Chapter VII of the Charter broadly. As a result, it has come to view not only the use of force between states but also large-scale violations of human rights as threats to international peace and security justifying armed intervention.[66]

It was against this background that the Council took measures during the 1990s regarding internal situations in Iraq, the Former Yugoslavia, Liberia, Somalia, Sierra Leone and other countries. Destabilisation and disorder in these countries were purely internal, although some of them had an international dimension in the form of refugee flows or threat of hostilities spreading to other countries.

In its resolutions on the subject, the Security Council sometimes – but in no means always - referred to this dimension. It can even be argued that in the course of the 1990s, the Security Council distanced itself from the argument that the threat to international peace and security can only be invoked in cases where the conflict has an 'international dimension'. The operation in Somalia

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[65] Art 24, UN Charter.

[66] Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law (2000) 34.

was the first in which the Security Council authorised intervention in an internal conflict on the basis of Chapter VII of the UN Charter.[67]

In this resolution, the Council referred to the 'the unique character' of the crisis in Somalia. The Council then stated that it was 'mindful' that the crisis 'required an immediate action' because it was 'deteriorating, complex and of an extraordinary nature, requiring an exceptional response'.[68] Similar words were subsequently used in the Chapter VII humanitarian interventions in Rwanda (1994)[69] and in Haiti (1994).[70] Evidently, the Council nowadays sees internal conflicts with large-scale humanitarian implications as threats to international peace and security in their own right thus giving a broad interpretation of article 39 of the UN Charter.[71]

By emphasising the unique nature of the circumstances surrounding each of these operations, the Security Council, perhaps, hoped to avoid creating precedents, whereby it may be obliged to intervene in every internal conflict. However, the more often the Council invokes 'exceptional circumstances', the less easily it can maintain that its decision is incidental. The Council perhaps recognised this, and in more recent resolutions on the use of force, the Council sometimes does not refer to the 'unique' nature of the situation. Instead, it simply notes, without stating any reasons, that 'the situation demands an urgent response by the international community'.[72]

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[67] Res S/794 of 1992.

[68] Preamble, para 2, 4 and 5.

[69] Res 929 of 1994 ('...The current situation in Rwanda constitutes a unique case which which demands urgent response by the international community').

[70] Res 940 of 1994) ('The unique character ... its deteriorating, complex and extraordinary nature, requiring an exceptional response').

[71] Art 39 States that ('[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with [a]rticles 41 and 42, to maintain or restore international peace and security').

[72] See, for instance, Res S/1080 (1996) on Zaire.

Despite the above positive development within the operations of the Security Council in the 1990s, it is apparent that the political nature of the decision-making process within the Security Council has hampered the efficacy of the Council. Moreover, the Council's dependence on the willingness of member states to make troops available has resulted in a selectiveness that makes the Council unable or unwilling to intervene in every humanitarian emergency to an equal degree.

Economically powerful states have become less financially and politically responsible supporting UN troops on humanitarian missions since the end of the Cold War.[73] Even where these states have supported UN operations relating to the use of force, their 'pervasive interests have led to a limited utilisation of the powers of the ... Council'.[74] These states are even less willing to contribute their troops for UN missions.[75] This attitude has been occasioned by the view of these states that the peace and security of 'small states' is a non-issue in international relations.[76]

The efficacy of the Security Council has also been hampered by regionalism. *De jure*, the UN Charter does not permit regionalism to be paramount over globalism.[77] However, the Charter does permit regional arrangements and agencies to deal with matters pertaining to the maintenance of international peace and security 'as are appropriate for regional action'.[78] The interventions

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[73] See Damrosch (2002) 60 61.

[74] White (1989) 15.

[75] Damrosch (2002) 15.

[76] See Rajan (1994) 287–305. According to Duke (1994) 375–398, the US, for instance, has little enthusiasm for involvement in domestic conflicts. Damrosch (1993) 429 433 concurs with this view, and adds that even where economically powerful states like Japan and Germany have been involved in providing or supporting UN troops for humanitarian interventions, this involvement has become entangled with the issue of changing the composition of the Security Council. These two countries have been seeking a permanent seat in the Security Council.

[77] White (1989) 21.

[78] Art 53, UN Charter.

by ECOWAS in Liberia and Sierra Leone and that by NATO in Kosovo were all taken by regional organisations without involving the Security Council.

It is noteworthy that the Council itself has used the Charter provision mentioned above as a basis for steering off situations where the Council members have no political or strategic interest. A case in point is the three-year long Nigerian civil war (1967-1970). The UN Secretary-General pre-empted the possibility of the Security Council seizing of the matter by declaring that 'the OAU should be the most appropriate instrument for promoting peace in Nigeria'.[79]

It is important that the Security Council remains the primary guarantor of international peace and security and therefore the use of force. This is what the Charter provides, and the law should be upheld in this regard. The use of force by regional organisations without involving the UN Security Council negates the very basis of international law on the use of force as codified in the UN Charter.[80] It is submitted that regional organisation should only surpass the UN Council when the humanitarian emergency is so grave that any delay would lead mass of loss of lives in a manner that shocks the conscience of mankind.

The influence of economically powerful states in the Security Council and the increasing 'competition' from regional organisations have led to proposals for reforming the Security Council to make it more effective in humanitarian intervention.[81] The discussions on the reform of the Security Council have

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[79] UN Press Release SG/SM/998, 13 Sep 1968, cited in White (1989) 21.

[80] Arts 52(4) and 53(1) of the UN Charter together mean that the Security Council retains supremacy over matters of international peace and security. These provisions are strengthened by art 103 which provides that the UN Charter is supreme over any other treaty (including the treaties establishing regional organisations).

[81] According to Nicholas (1971) 72, of the all the organs of the UN, 'none has shown a greater discrepancy between promise and performance than the Security Council'. See also Leigh-Phippard (1997) 419.

focussed on increasing the Council's membership and limiting the right of veto.[82]

Such adjustments may increase the legitimacy of the Security Council among the UN member states. Moreover, an increasingly ineffective Security Council may threaten international peace and security. It may result in a situation whereby the UN members come to see the Security Council as an increasingly unsuitable forum for agreeing on possible action. This may have the effect of jeopardising international peace and security, given the immense military power possessed by states like Germany, Canada, Australia and Italy.

The permanent membership of the UN has been described as 'a historical anachronism' and 'a condominium of the victorious major allies, who would jointly keep the rest [of the world] in order'.[83] The fact that the Council is not an accurate reflection of the current distribution of power between states undermines the legitimacy of its decisions and contributes to such criticisms. The Security Council could be reformed to ensure more equitable geographical representation, to reflect political reality in the distribution of power, or both.[84]

Unlike any other organ of the UN, the decisions of the Security Council are binding on all states.[85] It follows that the legitimacy of the Security Council derives from the special responsibility conferred upon it, pursuant to article 24(1) of the UN Charter by the membership of the UN as a whole. Thus the fifteen members of the Security Council act on behalf of all the UN members. In order that decisions of the Council have broad-based support and legitimacy, there is strong reason to enlarge the Security Council.

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[82] For a collection of general works on reforming the Security Council, see generally, Taylor *et al* (eds) (1997).

[83] Leigh-Phippard (1997) 420. For other criticisms, see Claude (1991) 143.

[84] Leigh-Phippard (1997) 420.

[85] Art 25 of the UN Charter.

Thukur, advocating greater geographical distribution in the Council, argues that, 'although the principle of equitable geographical distribution has been brought into disrepute, ... it is essential to the philosophy of the [UN] and adds to its legitimacy'.[86] I am in agreement with the view that the Security Council should be reformed to afford equitable geographical representation.[87]

Japan is widely regarded as having the strongest case for permanent membership, by virtue of both its international economic importance and its significant financial contributions to the UN budgets.[88] There are other potential candidates, including, for example, Nigeria, Brazil and India, all with apparently strong claims to the seat.[89] Most candidates for permanent seats base their claims on the principle of geographical representation, Japan and Germany being the only exceptions.[90]

It is proposed here that the membership of the Security Council should be increased from the current fifteen to twenty states: five from each of the UN regions. The permanent seats in the Council should be increased from five to eight. Should the permanent seats be increased, at least one seat should be reserved for Africa. This should be done because Africa is the one region where due to the frequency of massive human rights violations, the involvement of the Security Council is likely to continue in the foreseeable future.

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[86] Thukur (1993) 7 12.

[87] Various proposals have been made on how the membership of a reconstituted Security Council would look like. See, for instance, IPA (1994) and Leigh-Phippard (1997) 425-433.

[88] See Leigh-Phippard (1997) 330. Assessments of financial contributions of members to the UN kitty show that Japan compares favourably to the permanent members, contributing about 12% of the total UN budget. This amount exceeds any other contribution by a UN member, apart from the US. See Annex II, *Status of Contributions*, UN Doc ST/ADM/SER B/387, reprinted in Taylor *et al* (1997) 430.

[89] Damrosch (2002) 62. See also Leigh-Phillard (1997) 425.

[90] As above.

5.4.2 Reforms within African Intergovernmental Organisations

5.4.2.1 The African Union (AU)

It may be too early to gauge the performance of the institutions of the newly formed AU. Also, talking of reforming the institutions of the AU, some of which are not yet in place, may be even more speculative.[91] In this section, we will comment on the reforming of the relevant organ of the AU which is already in place, namely, the 1993 OAU Mechanism for Conflict Prevention, Management and Resolution. As stated earlier, this Mechanism is now part of the AU institutional framework.[92] If the Mechanism is going to be effective in the AU dispensation, then a number of reforms, based on the experiences of this organ so far, should be explored.

One of the decisions of the July 2002 1st Ordinary session of the AU Heads of State and Government concerned the adoption of the Protocol on the establishment of an African Peace and Security Council.[93] Once the requisite number of states has ratified the Protocol,[94] it will create an African Peace and Security Council, which will replace the Mechanism.

Therefore, the Durban Declaration clearly provides that the Mechanism will only continue to operate until such a time as the Protocol is in force. In line with the argument against duplicity and the creation of multiple institutions that may create a financial burden for the AU, it is a welcome idea that the Peace

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[91] For instance, during the recent 1st Ordinary Session of the AU held in Durban South Africa, on 9 – 10 July 2002, the Assembly of Heads of State and Government of the AU adopted a Protocol for the Establishment of an African Peace and Security Council, see ASS/AU/Dec 3 (I).

[92] See Chapter 4 of this study.

[93] See ASS/AU/Decl 3(I).

[94] According to art 22(5), the Protocol shall enter into force upon the ratification by a simple majority of the member states of the AU.

and Security Council should take over the work of the Mechanism, instead of the two organs existing side by side.[95]

Despite the fact that the African Peace and Security Council will replace the Mechanism,[96] we should explore how the Mechanism's efficacy can be improved in the interim period. In any case, it is hoped that the Mechanism's experiences will inform the Peace and Security Council when it starts operating. Such institutional link is useful, especially if the experiences of the former institution can assist the new institution in achieving better results.

It should be clarified here that conceptually, the AU might, like its predecessor the OAU, envisage a peacekeeping role of the troops constituted under a decision of the Mechanism. Peacekeeping, as traditionally conceived entails a military intrusion characterised by impartiality, with the consent of the target state, and involving a very limited use of force. This contrasts with peace enforcement operations, which may involve the use of force, although the consent of the target state is also required here.

The AU is likely to be faced with increasingly volatile conditions that require peace enforcement or humanitarian intervention. This is so because many of the internal conflicts involving gross violations of human rights are characterised by actual warfare. The use of arms by the AU troops will therefore be inevitable. Better still, it is proposed that the requirement of the consent of the target state be waived, and the Mechanism be allowed to authorise actual humanitarian intervention, without the consent of the target state, in extreme and rare situations of widespread, gross violations of human rights.

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[95] Among those who have argued against a multiplicity of institutions under the AU are Abass & Baderin (2002), Baimu (2002) and Magliveras & Naldi (2002).

[96] Art 22(1) of the Protocol.

Of course, the Mechanism will still be seized with powers to intervene through mediation, conciliation, and even by authorising peacekeeping operations. Reforms enabling the Mechanism to authorise humanitarian intervention will make the powers of the Mechanism a real supplement of those of the Assembly of Heads of State and Government under article 4(h).[97] We now turn to proposals for making the Mechanism achieve better results in its responses to gross violations of human rights that may lead to threats to peace, security and stability on the continent.

First, it is not clear at what level of the Central Organ of the Mechanism (Summit, Ministerial or Ambassadorial), interventions (which may include the sending of troops) should be approved. The decision to terminate the OAU Observer Mission to Burundi in the wake of the military *coup d'état* in Burundi in 1996, and the decision to deploy the OAU Observer Mission to the Comoros, were both taken at the ambassadorial level.[98]

The ambassadorial level is the most efficient and practical level for this kind of decision. It enables the Central Organ to meet and take decisions in Addis Ababa at any time, within hours, if the need arises.[99] The Burundi and Comoros decisions have may have set precedents, but there is need for a policy clarification on this matter. Such clarification would pre-empt any policy dispute in future resulting in the delay or hindrance in the operation of the Mechanism in responding to a humanitarian crisis or gross violations of human rights.

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[97] This has already been done in the Protocol Relating to the Establishment of the Peace and Security Council of the AU whose powers in art 5 of the Protocol include recommending to the AU Assembly when to intervene under art 4(h) of the Act, and approving the modalities of such intervention.

[98] See the Communiqué of the 40th Session of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, 6 November 1997 (copy with the author).

[99] De Coning (1999) 1 2.

Second, policy procedures with regard to the type of decision that will result in the sending of troops to address a humanitarian crisis where gross violations of human rights are being committed need to be clarified. A decision of the Central Organ authorising the sending of troops should preferably be in the form of a UN Security-Council type resolution, which clearly stipulates the objectives of the intervention; the level of force that may be used; the size, composition and management of the troops; administrative, logistical and financial guidelines and the duration of the mandate.[100]

Third, the issue of financing of the Mechanism, and the Peace and Security Council should be revisited. Military operations are, by their nature, costly affairs. They usually require the movement of heavy equipment and large numbers of people, and costly supply lines to maintain them in hostile circumstances.[101] The cost implications for military operations, even when they are relatively small and less logistically intensive, are significant.[102] The OAU has been depending on donor funds to finance its military deployments, as member states are in arrears with regard to their annual contributions.[103]

The Protocol Relating to the Establishment of the Peace and Security Council of the AU provides for the establishment of a special fund to be known as 'the Peace Fund', which will be used to finance the AU's expenses in the maintenance of peace and security.[104] The Fund shall be made up of financial appropriations from the regular budget of the AU, voluntary contributions from member states and from other sources within Africa, including the private

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[100] As above.

[101] De Coning (1999) 3; Berman & Sams (2000) 66.

[102] (For instance, 'it cost the OAU approximately US $ 300 000 per month to maintain 64 military observers in Burundi'. This translated to US $7.2 million over two years (1994 - 1996). See De Coning (1997).

[103] Berman & Sams (2000) 66.

[104] Art 21(1) of the Protocol.

sector, civil society and individuals, as well as through appropriate fundraising activities.[105] The Chairperson of the AU Commission may also accept voluntary contributions from sources outside Africa, so long as this is done in conformity with the objectives and principles of the AU.[106] This trend is likely to continue under the dispensation of the AU, unless member states show a better commitment to paying up their dues to the AU.

The AU should be wary of reliance on donor funds to fund its operations, as this may compromise the organisation's independence. If the AU cannot fund the military interventions it authorises, whoever funds it will have a large influence on the objectives and implementation of the military operation. Donors can determine the duration of the operation, and can influence a mission's mandate by placing terms and conditions on continued funding, or by withdrawing funding if the AU wishes to amend the scope of the operation.

To combat this, the AU needs to develop clear and transparent policies that describe under what circumstances it will accept donor funds in respect of a military deployment. At the same time, the policies should attempt, as far as possible, to build a firewall between the need to receive donor support for such operations on the one hand, and undue influence on the organisation's ability to execute those operations as it deems fit, on the other.[107]

The relationship between the Mechanism with the UN should de clarified to achieve optimum results. While the OAU and the UN have from both sides repeatedly stressed the need to improve the co-ordination of efforts, exchange of information and joint initiatives,[108] the one unclear issue has been the OAU's

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[105] Art 21(2) of the Protocol.

[106] Art 21(3).

[107] De Coning (1999) 3.

[108] With regard to joint initiatives, OAU and its member states have been relying more on bilateral initiatives such as the African Crisis Response Initiative (ACRI) funded by the US Government.

stance on article 53 of the UN Charter, which specifies that regional organisations may not engage in forcible operations without UN Security Council authorisation.

Perhaps, the reason why the OAU in its 39 years of existence remained non-committal regarding its view on article 39 of the UN Charter is that it considered that it would need to intervene in situations which, from an African perspective, require intervention, while the UN was uncertain of the need or unwilling to intervene. For instance, the situation in Burundi immediately after the 1994 genocide in Rwanda was extremely precarious and the OAU's assessment indicated the need for a military deployment in Burundi to prevent another genocide from taking place.

The attitude taken by the OAU regarding the requirements of article 53 of the UN Charter seems to have been adopted at the formation of the AU. Article 4(h) of the AU Act empowers the Assembly of Heads of State and Government to intervene in a member state to pre-empt or halt the commission of war crimes, genocide and crimes against humanity. Neither article 4(h), nor the rest of the provisions of the AU Act, subject this power of the Assembly to the supervision of the Security Council.[109]

Rather than avoid clarifying the issue of the relationship between the AU and the UN Security Council with regard to the maintenance of international peace and security, this issue should be clearly addressed. It is desirable especially that the UN Security Council retains the primary in the any military interventions, pursuant to its Charter-given powers. However, in the event that the UN Security Council defaults in discharging its mandate, it should be permissible for the AU to authorise military intervention, on the basis of the criteria set forth earlier in this Chapter.

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[109] Abass & Baderin (2000) 18; Magliveras & Naldi (2002) 418 – 419.

The relationship between the AU and other regional intergovernmental organisations such as the European Union (EU) and the Organisation of American States (OAS) has also been defined by the Protocol Relating to the Establishment of the Peace and Security Council of the AU.[110] According to the Protocol, the Peace and Security Council of the AU shall 'co-operate and work closely with other relevant international organisations on issues of peace, security and stability in Africa'.[111] Such organisations may be invited to address the AU Peace and Security Council on issues of common interest, if the latter considers that the efficient discharge of its responsibilities does so require.[112]

The AU should develop close relationships with other regional intergovernmental organisations so that these organisations can all share their mutual experiences, and learn from each other in the process.[113] An organisation like the OAS may have experiences in dealing with inter-state war over disputed territory that may be useful for the AU in similar disputes. Similarly, other organisations like NATO have expertise in military interventions, and they may offer useful lessons to the AU in regarding the potential operation of article 4(h) of the AU Act.

It is a welcome development that the Protocol Relating to the Establishment of the Peace and Security Council of the AU defines the relationship between the AU on the one hand and the UN and other intergovernmental organisations on the other.[114] In this regard, the Protocol requires the Peace and Security Council of the AU to co-operate with the UN Security Council and with 'other relevant organisations' in the maintenance of peace and security in Africa.[115]

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[110] Art 17(4) of the Protocol.

[111] As above.

[112] As above.

[113] De Coning (1999) 6.

[114] Art 17 of the Protocol.

[115] Art 17(1) of the Protocol.

Where necessary, recourse will be made to the UN to 'provide the necessary financial, logistical and military support for the [AU's] acitvities' in the maintenance of peace and security.[116]

The AU, unlike the OAU, needs to clearly define its relationship with African sub-regional intergovernmental organisations. In this regard, procedures should be established for the AU to control and sanction military interventions by sub-regional organisations. It is proposed that sub-regional intergovernmental organisations should seek authorisation from the AU when engaging in the use of force. This will serve as check over the use of force in the region. In the past, no such procedures have been in place. For instance, neither of the two recent military interventions under the auspices of SADC, the Lesotho and DRC interventions in 1998, sought prior authorisation of the OAU or the UN.

One area where the AU can co-operate with sub-regional organisations and even the UN regards the development of a standing army. In June 1996, the OAU Central Organ Chiefs of Staff recommended that each sub-region in Africa should develop a brigade strength stand-by capacity.[117] If it were implemented, this would have enabled the OAU to have six brigades available on stand-by, one from each sub-region. The issue of a standing army was recently raised by Libyan Leader Muammar Gadhaffi during the July 2002 Durban Summit.[118] The Assembly of Heads of State and Government of the AU 'welcomed' the initiative' of Colonel Gadhaffi 'on the establishment of one single African army'.[119]

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[116] Art 17(2).

[117] See, Report of the Chiefs of Staff of the Member States of the Central Organ, OAU Mechanism for Conflict Prevention, Management and Resolution, OAU Doc CO/C.STAFF/RPT (I), June 1996.

[118] See, 'Decision on a Common African Defence and Security' ASS/AU/Decl 8 (I), 10 July 2002.

[119] See Document ASS/AU/Decl 3(1) of 10 July 2002.

Stressing 'the need for a common African defence and security in the context of the Constitutive Act of the African Union',[120] the Assembly requested 'the Chairman of the Assembly to establish a group of experts to examine the aspects related to the establishment of a common African defence and security and submit recommendations for the consideration of the next ordinary session of the Assembly'.

While it remains to be seen whether the idea of a common African army can be achieved, it is submitted here that the idea is worth pursuing. An AU army, drawn in equal numbers from each of the sub-regions and also available on the UN stand-by roster, would be the ideal way of achieving co-operation, in the area of the maintenance of international peace and security between the UN, the AU and African sub-regional intergovernmental organisations.

As it has been pointed out, the Protocol Relating to the Establishment of a Peace and Security Council of the AU provides for the creation of an 'African Standby Force', which will be an *ad hoc* force to deployed rapidly in furtherance of the objectives of the AU Act and of the AU Peace and security Council.[121] For this reason, consideration should be made whether the African standing army advocated for by Gadhaffi or the *ad hoc* force to be established under the Protocol should be established. Because a standing, permanent AU army would require a lot of funding, it is preferable that the AU goes by the *ad hoc* force proposed in the Protocol.

The issue of the relationship between the AU and African sub-regional mechanisms for conflict prevention, management and resolution has also been tackled in the Protocol.[122] Under the Protocol the Chairperson of the Commission of the AU (formerly the Secretary-General under the OAU regime)

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[120] Para 1 of the Declaration.

[121] Art 13 of the Protocol.

[122] Art 16 of the Protocol.

shall 'harmonise and co-ordinate' the activities of the sub-regional mechanisms relating to the maintenance of peace and security.[123] He is also to 'work closely' with these mechanisms.[124] On their part, the sub-regional mechanisms are required to 'keep the Peace and Security Council of the [AU] fully and continuously informed of their activities and ensure that these activities are closely co-ordinated and harmonised with those of the Peace and Security Council of the [AU]'.[125]

5.4.2.2 The Economic Community of West African States (ECOWAS)

In obvious disregard to instability in the sub-region, the 1975 ECOWAS Treaty did not contain security protocols. However, this situation was rectified first in 1978 and then in 1981 when the Protocol on Non-aggression (PNA) and the Protocol on Mutual Assistance and Defence (PMAD) were adopted respectively. Diverse institutional mechanisms and administrative arrangements were established under these protocols to be made operative during crises.[126]

The entry into force of these two protocols was envisaged to introduce a tradition of war-free intergovernmental relationship within the framework established by ECOWAS.[127] However, the period that followed was characterised by increasing intra-state and inter-state conflicts. This state of affairs led to the deployment of ECOMOG troops in Liberia (1990 -1998) and in Sierra Leone (1997-1999). The establishment of the 1999 Mechanism has now overshadowed the operation of the two protocols for Conflict Prevention, Management Resolution, Peace and Security ('the ECOWAS Mechanism').

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[123] Art 16(1)(a) of the Protocol.

[124] Art 16(1)(b) of the Protocol.

[125] Art 16(3) of the Mechanism.

[126] Aning (1999) 2.

[127] For a general analysis on the envisaged and actual achievements of the two protocols see Conteh-Morgan (1993);Olonisakin (1998), Aning (1999) and Olonisakin (2000)

Although the ECOWAS Mechanism is supposed to be an improvement from the failures experienced in the trial process of ECOMOG intervention and managements of conflicts in West Africa, it has at least two inherent defects. First, the structure, organs, rules and procedures of the new Mechanism are too cumbersome, practically and financially, to implement.[128] The new fundraising models are not generic and are therefore difficult to effect, given the poor economic performance in the region.[129]

Second, the New Mechanism envisages that ECOMOG would be its stand-by force for military interventions. While this would ensure that the Mechanism benefits from ECOMOG's experiences in Liberia and Sierra Leone, it may entangle the Mechanism with the old ECOMOG military doctrine. This doctrine, as Yoroms writes, was based on a reactive rather than proactive approach.[130] It is proposed that a new ECOMOG be raised, with a different orientation, doctrine and strategy.

Despite the above defects, the ECOWAS Mechanism has infused dynamism into the maintenance of sub-regional peace and security in West Africa. It is hoped that the Mechanism will contribute to the management and resolution of conflicts in the region, and that ECOWAS' experiences can inform other sub-regional initiatives in the region.

5.4.2.3 The Southern Africa Development Community (SADC)

The SADC institution charged with issues of relevance to human rights, peace and security is the SADC Organ for Politics, Defence and Security. The

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[128] The organs established under the Mechanism are the Authority of Heads of State and Government; the Mediation and Security Council (which operates at three levels, namely, the Committee of Ambassadors, the Committee of Ministers of Foreign Affairs, Defence, Internal Affairs and Security and the Heads of States of the ECOWAS Mediation and Security Council), the Defence and Security Commission, the Council of Elders, and the Executive Secretary).

[129] Yoroms (1999) 6.

[130] As above.

operation of this Organ has been greatly curtailed. Zimbabwe, which has held the Chair of the Organ, has been arguing that the Organ should operate independent of SADC, insisting that in any case SADC is a donor-funded organisation that can not be entrusted with the control of sensitive issues like regional peace and security. On the other hand, South Africa has been arguing that the role of the Chair of the Organ is so sensitive that it should not be de-linked from the control of SADC.[131]

The South African position seems to have a legal basis. The SADC Treaty provides that the Summit is the supreme body within SADC sub-region.[132] This means that all other organs established under the Treaty or under Protocols adopted under the auspices of the Treaty should be subordinate to the Summit.

The impasse regarding the legal status of the institutions of the SADC Organ and how they should operate is a great undoing of the sub-region's efforts aimed at providing an effective mechanism for combating gross human rights violations and breaches of peace and security. However, the fact that SADC member-states continue to discuss ways to make the Organ effective suggests that political will does exist to address previous shortcomings.[133]

5.4.2.4 Other African Sub-regional Organisations

Apart from ECOWAS and SADC, the other African sub-regional organisations have not developed norms that can allow for military intervention in member states. However, the human rights norms in the constitutive treaties of these organisations, as well as the direction taken by ECOWAS and SADC are a

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[131] Berman & Sams (2000) 190; Neethling (2000) 209. But see De Coning (1999) 5, arguing that actually, Zimbabwean President Robert Mugabe is opposed to the integration of the Organ SADC because he would want to control exercising the influential functions of the Chair of the Organ.

[132] Art 4 of the SADC Treaty.

[133] Berman & Sams (2000) 190.

pointer that in the future, these organisations may engage in humanitarian intervention.

At the moment, AMU, COMESA, EAC, ECCAS and IGAD should concentrate in expanding their human rights mandate. This can be done by either creating separate human rights conventions, or incorporating the normative framework of the African Charter on Human and Peoples' Rights as a whole into their respective constitutive treaties.[134]

5.5 CONCLUSION

In this Chapter, we have argued that there is need for procedural and substantive criteria for humanitarian intervention. Such criteria are important because it will clarify the law on humanitarian intervention and will provide a reference for assessing the validity of claims of humanitarian intervention. We have argued that in defining these criteria, preventive measures should be prioritised and the primacy of the UN Security Council should be recognised.

We have also presented what we consider as criteria for humanitarian intervention, based on attempts to answer questions relating to which countries or international organisations are to intervene, when and how they should intervene, and when and how they should end the intervention. We have argued that humanitarian intervention should be carried out through regional intergovernmental organisations to which the target state belongs, supervised by the UN.

The use of force should not contravene the requirements of proportionality and necessity, and it should comply with international humanitarian law. Unless the humanitarian emergency in question does not permit, the intervening states should exhaust peaceful means and should seek endorsement of the use of force by the UN Security Council or General Assembly. Finally, we have

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[134] On the pros and cons of either of these options, see Viljoen (1999) 185, especially, 208-212.

discussed ways in which the UN Security Council and African intergovernmental organisations may be reformed. Some of the proposals for reforming the AU Mechanism for Conflict Prevention, Management and Resolution have already been effected in the Protocol Relating to the Establishment of the Peace and Security Council of the AU.