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

3.1 INTRODUCTION

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

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

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

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

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

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

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

[2] Kwakwa (1994) 30.

3.2 LEGAL OBJECTIONS TO HUMANITARIAN INTERVENTION

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

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

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

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[3] Abiew (1999) 23.

[4] As above.

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

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

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

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

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

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

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

[9] See Brownlie (1998) 287.

[10] Chigara (2000) 58 62.

[11] Henkin (1995) 11.

[12] As above.

[13] 165 LNTS 19, art 8.

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

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

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

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

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

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

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

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

[19] Art 2(1).

[20] Art 1(2).

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

[22] Art 3.

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

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

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

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

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

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

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

[26] (1949) ICJ Rep 4 35.

[27] (1949) ICJ Rep 4 35.

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

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

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

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

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

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[28] As above.

[29] Hassan (1980/81) 859.

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

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

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

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

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

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

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[32] Para 208.

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

[34] Otte & Dorman (1995) 197.

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

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of United Nations.

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

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

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

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[35] Schatcher (1991) 63 65.

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

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

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

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

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

[37] Brownlie (1989) 22.

[38] Franck & Rodley (1973) 285.

3.3 POLICY OBJECTIONS TO HUMANITARIAN INTERVENTION

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

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

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[39] Kritsiotis (1998) 1014.

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

[41] Kritsiotis (1998) 1015.

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

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

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

3.3.1 Humanitarian Intervention is Prone to Abuse and is Selectively Applied

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

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[43] Kritsiotis (1998) 1016.

[44] As above.

[45] As above.

[46] Kritsiotis (1998) 1020.

[47] Franck & Rodley (1973) 284.

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

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

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

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[48] Falk (1959) 163 167.

[49] Henkin (1972) 96.

[50] As above.

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

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

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

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

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

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

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

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

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[54] As above.

[55] Wheeler (2000) 38.

[56] As above.

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

[58] As above.

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

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

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

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

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

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[59] As above.

[60] Kwakwa (1994) 31.

[61] As above.

[62] Weiss (1994) 59 62.

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

3.3.3 A 'Humanitarian War' is a Contradiction in Terms

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

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

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

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

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

[64] Douzinas (2000) 130-131.

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

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

3.4 THE CHANGING NATURE OF STATE SOVEREIGNTY

3.4.1 Sovereignty Versus Humanity: The Dilemma

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

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

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

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

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

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

He added that it is essential for the international community to reach a consensus, not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when and by whom.[69]

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

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

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

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

[69] As above.

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

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

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

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

[71] As above.

[72] As above.

3.4.2 Factors Contributing to the Erosion of State Sovereignty

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

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

3.4.2.1 Internationalisation of Human Rights

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

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[73] Kwakwa (1994) 18.

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

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

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

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

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

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[75] Kwakwa (1994) 19.

[76] Brownlie (1990) 564-580.

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

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

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

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

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

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

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

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

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

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

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

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

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

[87] Part 1, para 8.

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

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

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

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

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

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

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

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

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

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

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

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[93] See Tomasevski (1995) 406.

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

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

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

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

3.4.2.2 Globalisation

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

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

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

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

[98] Kwakwa (1994) 19.

[99] As above.

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

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

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

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

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[100] UNDP (1999) 2.

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

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

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

3.4.2.3 The Role of the Media and Information Technology

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

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

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

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

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

[104] See Kwakwa (1994) 20.

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

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

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

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[105] Kwakwa (1994) 21.

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

[107] Art 14.

[108] Art 22.

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

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

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

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

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

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

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

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[112] Art 27.

[113] Art 6 of the Statute.

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

[115] Mccorquodale & Fairbrother (1999) 738.

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

[117] See generally Welch (1995).

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

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

3.4.2.5 The Changing Nature of Armed Conflict

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

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

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

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

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

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

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

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

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

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

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[124] As above.

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

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

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

[128] As above.

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

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

3.4.3 The Effect of the Erosion: Sovereignty as Responsibility

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

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

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[129] Deng (1995) 208.

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

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

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

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

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

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[130] See ICISS (2001a) 13.

[131] As above.

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

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

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

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

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

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

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

[135] Meron (1991) 110 112.

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

[137] As above.

[138] As above.

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

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

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

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

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

[140] Onuf (1995) 43.

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

[142] As above.

[143] Onuf (1995) 43.

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

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

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

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

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

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[145] D'Amato (1987) 195.

[146] Farer (1991) 195.

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

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

3.5.1 International Criminal Law

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

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

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[147] Dugard (2000) 7.

[148] As above.

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

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

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

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

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

[152] As above.

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

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

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

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

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

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

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

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

[158] Art 7.

[159] Art 5.

[160] Art 3.

[161] Art 18.

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

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

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

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

[164] Art 1.

[165] Art 3.

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

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

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

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[166] Art 4.

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

[168] Art 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[176] Para 44.

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

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

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

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

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

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

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

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

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

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

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[178] Blacks Law Dictionary (1990) 738.

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

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

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

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

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

3.5.2 International Humanitarian Law

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

There are two principal sources of international humanitarian law. The first, and the principal source, is the so-called 'Geneva law', consisting of the four

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[182] Eboe-Osuji (1999) 16.

[183] Art 2(4), UN Charter.

[184] Drzewicki (1999) 43.

Geneva Conventions of 12 August 1949[185] as modified by the two Protocols of 8 June 1977,[186] additional to those Conventions. The second source is the 'Hague Law' consisting of the rules of customary international law on the means and methods of warfare, as laid down in the various Hague Conventions.[187]

Jus in bello (the law of war) is probably as old as war itself. The importance of such regulation is two-fold. First, it manifests a common understanding of the necessity to have some kind of regulation to govern warfare. Second, it proves the existence of the feeling that under certain circumstances, human beings, whether friend or foe deserves some protection. The beginning of modern international humanitarian law dates back to the battle of Solferino, a terrible battle in Northern Italy between French, Italian and Austrian forces in 1859.[188] The atrocities committed in this battle led Henry Dunnant to spearhead a campaign for the codification of the laws and customs to govern combatants and protect non-combatants.[189]

One of the earliest documents to be adopted in the field of international humanitarian law was the 1868 St Petersburg Declaration Renouncing the

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[185] These Conventions are: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 Aug, 1949 6 UST 3114, 75 UNTS 31; The Geneva Convention for the Amelioration of the Condition Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 Aug 1949 6 UST 3173, 75 UNTS 85; The Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949 6 UST 3316, 75 UNTS 135; The Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 Aug 1949, 6 UST 3516, 7 UNTS 287. For texts, see also <http://www.icrc.org> (accessed on 1 August 2002). 188 States have ratified the four Conventions.

[186] Additional Protocol I strengthens the victims of international armed conflicts, while Additional Protocol II strengthens the victims of non-international armed conflicts.

[187] Such as the Hague Conventions of 1899 and 1907.

[188] Shaw (1991) 629.

[189] As above.

Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.[190] This Declaration provides that 'the only legitimate object which states should endeavour to accomplish is to weaken the military forces of the enemy'.[191] For this reason, the Declaration outlaws the use of explosive projectiles under 400 grammes weight, because they 'aggravate the sufferings of disabled men, or render their death inevitable'.[192]

A fundamental milestone in the development of international humanitarian law is the Hague Conferences of 1899 and 1907, at which 13 Conventions were adopted.[193] Convention number IV of 1907 concerning the laws and customs of war on land contained the famous 'Marten's Clause', drafted by the Russian Friederic de Martens.[194] The clause declares that the Convention is 'animated by the desire to serve, even in extreme cases (where war would not be preventable), the interest of humanity and the ever-progressive needs of civilisation'.[195] The clause particularly attempts to seal any loopholes in the law by providing that in cases not covered by the Convention, 'civilians and combatants remain under the protection and authority of the principles of international law derived from the principles of humanity and the *dictates of the public conscience*'.[196]

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[190] Adopted on 11 Dec 1868, entry into force 11 Dec 1868; reprinted in Roberts & Guelff (1989) 29.

[191] Preamble, para 3.

[192] Preamble, para 6.

[193] Shaw (1991) 630-631. See, for instance, the 1899 Hague Convention Concerning Asphyxiating Gases, reprinted in Roberts & Guelff (1989) 34.

[194] The 1907 Hague Convention IV Respecting Laws and Customs of War, adopted 18 Oct 1907, entry into force 26 Jan 1910, reprinted in Roberts & Guelff (1989) 43.

[195] Art 1.

[196] As above. Emphasis added.

In 1925, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare was adopted.[197] This Convention attempts to protect the 'public good' during armed conflicts by providing that the indiscriminate use in war of asphyxiating or poisonous gases, and of 'all analogous liquids, materials or devices has been condemned by the general opinion of the civilised world'.[198] Consequently, the Convention declares that 'the prohibition of these weapons shall be universally accepted as part of international law'.[199]

Another instrument that seeks to promote the interests of the larger public during armed conflicts is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[200] The Convention prohibits the 'damage to cultural property belonging to any people whatsoever' because such property makes a 'contribution to the culture of the world'.[201] The Convention recognises that 'the preservation of cultural heritage is of very great importance to *all peoples of the world* and that it is important that this heritage should be [accorded protection]'.[202]

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[197] See, 1925 Geneva Convention for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, adopted on 17 June 1925, entry into force on 8 February 1928, reprinted in Roberts & Guelff (1989) 137.

[198] Preamble, para 1.

[199] Preamble, para 2.

[200] Adopted on 14 May 1954, entry into force on 7 Aug 1956, reprinted in Roberts & Guelff (1989) 338.

[201] Preamble, para 2.

[202] Preamble, para 3. Emphasis added.

In promotion of the 'public good' during armed conflicts, environmental modification by military means is also prohibited.[203] Environmental modification is defined as:[204]

> [A]ny technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including biota, lithosphere, hydrosphere and atmosphere or outer space.

The reason behind this prohibition is that 'scientific and technical advances may open new possibilities with respect to the modification of the environment'.[205] At the same time, military or other hostile uses of environmental modification techniques 'could have effects extremely harmful to human welfare'.[206]

In the case of mines, the Convention Relating to the Prohibition of the use of, Stockpiling, Production and Transfer of Antipersonnel Mines and Their Destruction was signed by 121 countries in Ottawa on 3-4 December 1997.[207] The Convention entirely prohibits the use of, stockpiling, production and transfer of antipersonnel mines.[208] It also provides for mine clearance and assistance to mine explosion victims.[209]

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[203] See the 1977 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted on 18 May 1977, entry into force on 5 Oct 1978.

[204] See art 2 of the 1977 Convention above.

[205] Preamble, para 3.

[206] Preamble, para 6.

[207] See Convention Relating to the Prohibition of the Use of, Stockpiling, Production and Transfer of Antipersonnel Mines and Their Destruction, Adopted in Ottawa, Canada, 3-4 December 1997, reprinted in (1997) 36 ILM 1507; and in Sassòli & Bouvier (1999) 324.

[208] Art 1.

[209] Art 6.

An 'antipersonnel mine' is defined in the Convention as a mine which can explode 'by the presence, proximity or contact of [any] person' and one that is designed to 'incapacitate, injure or kill one or more persons'.[210] A 'mine' is defined as 'munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle'.[211]
The gist of the Convention is to protect the public of the world from injury or death caused by antipersonnel landmines. State parties to the Convention express their determination 'to put an end to the suffering and casualties caused by antipersonnel mines that kill or maim hundreds of people every week'.[212] They also stress 'the role of public conscience in the furthering of the principles of humanity'.[213] The Convention itself is based on the principle of distinction, the principle that the right of the parties to a conflict to choose methods or means of warfare is not unlimited, and the principle that prohibits employment in armed conflicts of weapons that cause superfluous injury or unnecessary suffering.[214]

Generally, the provisions in the instruments of international humanitarian law discussed above seek to protect the needs of the greatest portion of the international society, which more often than not is the non-fighting population and combatants rendered *hors de combat*. In addition, the following general principles of international humanitarian law also manifest the protection of the public good during armed conflict:[215]

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[210] Art 2(1).

[211] Art 2(2).

[212] Preamble, para 1.

[213] Preamble, para 2.

[214] Preamble, Para 11.

[215] See *1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflict*, reprinted in Roberts & Guelff (1989) 314. These rules are a summary of international humanitarian law, and were formulated by the ICRC since 'the laws of war are numerous and complex'. See explanatory notes in Roberts & Guelff (1989) 314.

- Persons who are not, or are no longer taking part in hostilities shall be respected, protected and treated humanely. They shall be given appropriate care, without any discrimination.

- Captured combatants and other persons whose freedom has been restricted shall be treated humanely. They shall be protected against all acts of violence, in particular against torture. If put on trial, they shall enjoy fundamental guarantees of a regular judicial procedure.

- The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous or unnecessary suffering shall be inflicted.

- In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population on the one hand and military objectives on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks.

In light of the above analysis of the principles of international humanitarian law, it may be concluded that the aim of this branch of law is to protect the 'public good'. It does so by protecting non-combatants, prisoners of war, civilians and soldiers rendered *hors de combat* from the adverse effects of hostilities. Also, the protection of cultural property, the prohibition of hostile environmental modification techniques and the limitation of the means and methods of warfare aim at the protection of the members of the general public world-wide from the effects of war. This promotes the public good.

3.5.3 International Environmental Law

The world community is nowadays increasingly concerned with the well being of the global environment. The environment of the world best demonstrates the

interdependencies and interconnections of the international community. As Kwakwa notes:[216]

> We now live in a world which is expansive yet intimate, borderless yet fractured. It is now generally accepted that the world is a single ecosystem whose borderless habitat is shared by all races, nationalities, generations and species. The increasingly transnational aspects of environmental hazards have diminished traditional national prerogatives of sovereignty as a defence. To be sure, the environment may be the greatest threat to a state's exercise of traditional sovereign functions. Chlorofluorocarbons [CFCs] released in one country may deplete the ozone layer shared by other countries, just as the excess burning of fossil fuels in one country may contribute to a global greenhouse effect which adversely impacts even on non-fossil fuel-burning counties.

The question of intervention has been raised in the context of environmental protection. Environmental pollution typically opposes the national interests and the exercise of sovereignty by the source state against the interests of other states.[217] One author notes that:[218]

> It seems reasonable that a sovereign state should be able to engage in economically beneficial activities within its borders, using its national resources as it pleases. However, it seems even more reasonable that neighbouring states should not have to suffer for the way in which that state uses its national resources.

The above reasoning is supportable on the basis of the general principle in human rights law that a person has complete freedom to exercise individual rights, as long as the exercise of those rights does not infringe on the rights of others. Indeed, most domestic legal systems have developed the principle requiring the use of one's property in a manner that does not injure others or their property. In international environmental law, this is the 'good

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[216] Kwakwa (1994) 18.

[217] Kwakwa (1994) 18.

[218] As above.

neighbourliness' principle enshrined in the maxim *sic utere tuo ut laenum ad laedas* (use your own so as not to injure your neighbour).

The Stockholm Declaration adopted at the 1972 UN Conference on the Human Environment (UNCHE) draws a judicious balance between the sovereignty of states and the interests of others (the public good). It affirms that states have a sovereign right to exploit their own resources pursuant to their own environmental policies, but also establishes the duty to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[219] The question raised by this and other provisions is how and when the international community should be able to intervene in a state whose activities are harming the environment on which other members of the international community depend.[220]

The UNCHE culminated in, *inter alia*, the adoption of a Declaration of Principles on the Human Environment, an Action Plan and recommendations on the preservation and conservation of the human environment.[221] The Declaration of Principles, known as the Stockholm Declaration, contains twenty-six principles relating to the protection, management and preservation of the environment.

Most importantly, the Stockholm Declaration laid down two duties of states in respect of the environment, namely, the duty not to cause environmental harm and the duty to co-operate in matters of environmental protection. These obligations are embodied in principle 21 and principle 24 of the Declaration respectively. The two principles are a restatement of the doctrine enshrined in the *sic utere tuo* maxim.

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[219] See Principle 21 of the Stockholm Declaration, UN Doc A/CONF.48/14 (1972).

[220] Kwakwa (1994) 19.

[221] Report of the UNCHE, Stockholm, Sweden, 5-16 June 1972 (New York: UN) UN Doc A/CONF.48/14 (1972).

The Stockholm Conference and its products marked a departure from the view of an earth unlimited in abundance created for man's exclusive use, to a concept of the earth as a domain of life or biosphere for which humankind is a guardian.[222] On this point, Caldell writes:[223]

> The older view saw this planet as a storehouse of resources to be freely developed for human use. The post-Stockholm view saw the earth as an ultimately unified system of living species and interactive biochemical processes that may supply man's needs so long as he observed the system's rules.

The dangers posed by unregulated uses of the resources of the earth have been identified the principles relating to air pollution and the depletion of the ozone layer. These principles, for instance, ban long-range transboundary air pollution, which is defined as:[224]

> Air pollution whose physical origin is situated wholly or in part within the area under the natural jurisdiction of one state and which has adverse effects in the area under the jurisdiction of another state at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.

Under the Convention, states are obliged to limit, and as far as possible, gradually reduce and prevent air pollution, including long-range transboundary air pollution.[225]

Also banned for the 'public good' is the depletion of the stratospheric ozone layer, which has the effect of letting excessive ultraviolet radiation through to the surface of the earth.[226] Global effort to tackle the problem of ozone

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[222] Sifuna (1999) 31.

[223] Caldwell (1990) 21, cited in Sifuna (1999) 32.

[224] See art 1(b) of the 1979 UN Convention on Long-range Transboundary Air Pollution, reprinted in Kiss (1993) 519.

[225] Art 2 of the Convention.

[226] Shaw (1990) 557.

depletion and the consequent effect of global warming led to the adoption in 1985 of Vienna Convention for the Protection of the Ozone Layer.[227] This Convention creates an institutional structure for the elaboration of protocols laying down standards concerning the production of chlorofluorocarbons (CFCs), the agents which cause the destruction of the ozone layer. Under the Convention, contracting parties agree to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.[228]

In 1987, the World Commission on Environment and Development (WCED), chaired by Gro Harlem Brundtland, presented its Report entitled 'Our Common Future', in which it devised the concept of 'sustainable development' that stresses the need to make environmental considerations in development programmes. In the Report, sustainable development is defined as 'development which meets the present needs without compromising the ability of the future generations to meet their own needs'.[229] In an apparent pursuit for 'public good' in the management and protection of the global environment, the Report devised this concept of 'sustainable development' as a means of finding a way through the impasse posed by the then apparently rigid environmentalist and pro-development positions.

'Our Common Future' marked an intellectual watershed in the evolution of international environmental norms. Although it is most often cited for its embrace of its concept of 'sustainable development', the Report also stresses the sovereign-state framework as the key to effective environmental governance. The report sets out a list of 'proposed legal principles for environmental protection and sustainable development'. Although principle 1

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[227] Reprinted in Kiss (1993) 301.

[228] Art 2(1) of the Convention.

[229] WCED (1987) 43.

asserts, 'all human beings have the fundamental right to an environment adequate for their health and well being', each of the remaining 21 principles focuses on the rights and responsibilities of nation-states. Indeed, each of the subsequent principles begins with same two words: 'states shall ...'.

In 1992, the World Conference on Environment and Development (popularly known as the Earth Summit) was held in Rio de Janeiro, Brazil.[230] Two important treaties were opened for signature at the conference. These are the UN Framework Convention on Climate Change and the UN Convention on Biological Diversity. The Rio Conference also adopted the Rio Declaration on Environment and Development, and Agenda 21.[231]

The most important contribution of these two documents is the stressing of the concept of intergenerational equity and the precautionary principle. The concept of intergenerational equity requires present generations in their activities to be mindful of future generations. On its part, the precautionary principle requires early environmental protection measures that should anticipate and prevent the causes of environmental degradation rather than wait until harm has occurred.[232]

The inextricability of environmental protection and developmental activities and the need to keep that link in mind was also emphasised in the World Summit on Sustainable Development, held in Johannesburg, South Africa from 26 August to 4 September 2002.[233] The Summit adopted the Johannesburg

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[230] *Report of the UN Conference on Environment and Development*, Rio de Janeiro, Brazil, 3-14 June 1992, Vol 1 (New York: UN) UN Doc A/CONF.151/26/Rev.1 (Vol 1) (1992).

[231] As above.

[232] Sifuna (1999) 36.

[233] For details on the delegates to the conference and logistical organisation of the Summit see <htpp://www.joburgsummit.com> (accessed on 30 September 2002).

Declaration on Sustainable Development,[234] in which the world leaders reiterated their commitment 'to build a humane, equitable and caring global society cognisant for the need for human dignity for all'.[235] The environmental challenges faced by the nations of the world were well articulated in the Declaration as follows:[236]

> The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, and adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water, and marine pollution continue to rob millions of a decent life.

The leaders emphasised that the goals of sustainable development can only be achieved through an 'effective, democratic and accountable international and multilateral institutions',[237] and committed themselves '*to act together* united by a *common* determination to save ... [the earth], promote human development and achieve *universal prosperity and peace*'.[238]

From the foregoing, it is evident that the basis for environmental management and protection strategies is the sustenance of life on earth for the common good. All existing international environmental law treaties concern environmental aspects that were previously under the control of one state or region. The human rights implications of this state of affairs is that there is more protection of the right to a clean and healthy environment through a host of treaties on virtually every aspect of the environment, from the ozone layer to

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[234] See United Nations, World Summit on Sustainable Development, 'The Johannesburg Declaration on Sustainable Development', Johannesburg, South Africa, UN Doc A/CONF.199/L.6/Rev 2, available online at <http://www.dfa.gov.za/docs> (accessed on 30 September 2002.

[235] Art 1 of the Declaration.

[236] Art 13 of the Declaration.

[237] Art 28 of the Declaration.

[238] Art 30 of the Declaration.

the marine environment, the protection of flora and fauna as well as the control of global warming. International environmental law attempts to ensure that states do not invoke their territorial sovereignty to adversely interfere with the environment, and this is done in order to promote the interests of the general international society.

3.5.4 Law of International Watercourses

What is today referred to as the law of international watercourses was initially known as international river law.[239] Today the term 'international watercourse' is usually used, and it stands for rivers and lakes parts of which are situated in different states. Rivers and lakes have always played a pivotal role in human civilisation.[240] The role that such great watercourses as the Yangtze, the Hwang-Ho, the Indus, the Ganges and the Nile played in the social and economic progress of man needs no emphasis.

Even during these early times, the central doctrine of international river law was that of freedom of navigation, propounded by Hugo Grotius and others.[241] The basis for the doctrine of freedom of navigation is that the water resources in an internationally–shared river belongs to all riparian states, for their common good. Yet portions of international watercourses form part of the territory of the state in which the portion is. This means that such portions are under the sovereignty of the state in question.

As the use of water by one riparian state may prejudice others leading to technical and judicial problems, a number of general legal principles attempt to reconcile the sovereignties of watercourse states, on the one hand, and their

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[239] Early international river law dealt with navigation, because the first, and for long, the most important use of such rivers was communication with the outside world. See Godana (1985) 3.

[240] In early times, the principal uses of rivers were navigation, irrigation and cultural uses. Later developments in technology and perspectives in water utilisation brought the prominence of the non-navigational uses of international water resources.

[241] For a detailed discussion on the views of Grotius, see Vitantyi (1949), Chap 1.

common interests, on the other hand. These include the principle of territorial integrity and that of equitable utilisation.

Briefly, the doctrine of territorial integrity espouses the old common law doctrine of water rights whereby a lower riparian (watercourse state) has the right to the full and uninterrupted flow of water of natural quality. The upper riparian may not interfere with the natural flow without consent of downstream riparians. To a great extent, this is the neighbourship doctrine that finds expression in the maxim *sic utere tuo* referred to earlier on.

The principle of territorial integrity is reflected in the 1997 UN Convention on the Non-navigational Uses of International watercourses, which reads as follows:[242]

> Before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse state, it shall provide those states with timely notification thereof.

In an attempt to balance the need to protect the rights of lower riparians with those of upper riparians for the 'common good', the 1997 Convention goes further to provide that a state so notified shall reply to the notification.[243] In the absence of a reply to notification within the prescribed time, the notifying state may proceed with the planned measures.[244]

Several contemporary international legal documents and case law reiterate the need for equitable utilisation of international watercourses. The International Law Association (ILA) Resolution of 1958 recognises every co-riparian state's right to a reasonable and equitable share in the beneficial uses of the waters of

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[242] Art 12.

[243] Art 13.

[244] Art 16.

an international watercourse.[245] This provision was echoed in the 1966 International Law Commission (ILC)'s 'Helsinki Rules'[246] and the 1997 UN Convention on Non-navigational Uses of International Watercourses.[247]

In terms of case law, the *Trial Smelter Arbitration*[248] is a well-known decision of an international tribunal where it was observed that 'no state has a right to use or permit the use of its territory' so as to cause damage 'by fumes in or to the territory of another or to the properties of the persons therein'.[249] In *the Lac Lannoux Case*[250] between Spain and France the arbitral tribunal held that a state undertaking works in an international waterway has to take into account the interests of other riparian states. Similarly, in the *River Order Case,*[251] the PCIJ invoked the exegesis of justice and considerations of utility and favoured a 'community of interest' doctrine in navigation among all the riparians based on the equality of rights over the whole navigable course of the River Order.

The gist of the law of international watercourses is the advancement of the interests of all riparian states. This militates against an individual state making claims based on an absolute notion of sovereignty over the resources of an internationally shared watercourse. As a result disputes are avoided, and the species of flora and fauna are preserved for the common good.

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[245] Resolution of the ILA adopted on 6 September 1958, New York (Report 48th Conference) 99.

[246] Art IV.

[247] Art 6.

[248] RIAA 3 (1938) 1905.

[249] In this case (between the US and Canada), Sulphur Dioxide from a smelting factory on Canadian side of the border caused environmental harm in the form of acid rain which destroyed crops in the Colombian valley in the State of Washington, US.

[250] RIAA 12 (1957) 281; 24 ILR (1957) 119.

[251] RIAA 10 (1955) 211.

3.5.3 International Law of the Sea

The seas have historically performed two important functions: First, as a medium of communication and second, as a vast reservoir of resources.[252] Both these functions have stimulated the development of legal rules to further the public good in the utilisation of the seas and their living and non-living resources.

International law of the sea emerged in the seventeenth century and was characterised by the notion of exclusive sovereignty, in relation to all activities aboard a ship, of the country under whose flag the ship was sailing. This sovereignty, based on the notion of *mare liberum* (freedom of the seas/freedom of navigation), was however curtailed by two exceptions. The suppression of the slave trade and piracy, both premised on customary international law, allowed other states to violate the sovereignty of the flag states. The criminalisation of the slave trade and piracy found its way into the four conventions adopted by the 1958 Geneva Conference on the Law of the Sea.[253]

According to article 22 of the Convention on the High Seas, states have the right to visit a foreign merchant ship on suspicion of piracy or of slave trade. Should the ship be engaged in piracy, states have the right to seize the ship,[254] whereas in the case of slave trade, states only have the right to visit the foreign vessel so that the slaves shall *ipso facto* be free, once they have taken refuge in the boarding vessel.[255] Supposing citizens of third states are in the

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[252] Churchill & Lowe (1991) 1; Shaw (1991) 293; Wallace (1992) 128.

[253] These conventions are: The Convention on the Territorial Seas and the Contiguous Zone, 516 UNTS 205; The Convention on the Continental Shelf, 499 UNTS 311; The Convention on the High Seas, 45 UNTS 82; and the Convention on Fishing and the Conservation of the Living Resources of the High Seas, 599 UNTS 285.

[254] Article 19.

[255] Articles 13 and 33(1).

hands of pirates or slave traders, the norms regulating the suppression of piracy and slave trade allow armed action to be taken.[256]

From the point of view of humanitarian intervention on grounds of humanity, the rules on the suppression of the crime of piracy have a useful part to play when it is a question of resorting to force in places outside the jurisdiction of any state, such as the Antarctic or the ice islands in the Artic circle. As far as jurisdiction is concerned, both the Antarctic and the ice islands are equated to a *terra nullius* (no man's land),[257] and acts of violence committed by the crew of a ship or by passengers on that ship against foreign persons or property in those areas are to be considered as acts of piracy.[258]

In an article on humanitarian intervention, Brownlie, though advocating the illegality of the resort to force for protecting human rights, states:[259]

> ... [I]ntervention [i.e. the threat or use of armed force for protecting human rights] may be lawful, in the sense of 'not prohibited' but a part of the competence of states, in areas outside national, i.e., exclusive territorial jurisdiction. Thus intervention may be lawful to prevent atrocities by insurgents, pirates, terrorists and others not acting on behalf of a state or organisation of states, in control of ships, aircraft or spacecraft, on or over the high seas, in space or over Antarctica or areas with a similar regime.

Having confined his remarks within the limits of a short article, Brownlie did not elaborate further on this point. Yet he has drawn attention to areas in which forcible intervention could be lawfully exerted.[260] High seas are, by definition, areas outside of national jurisdiction except where piracy and the slave trade are being committed. These exceptions are found not only in the 1958

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[256] Ronzitti (1985) 137.

[257] See Brownlie (1998) 266; Ronzitti (1985) 138.

[258] Art 15(1)(b), 1958 Convention on the High Seas; art 101(a)(ii).

[259] Brownlie 'Humanitarian Intervention' 227, cited in Ronzitti (1985) 138.

[260] Ronzitti (1985) 135.

Convention on the High Seas but also in the 1982 UN Convention on the Law of the Sea.[261] The 1982 Convention goes further and prohibits the trafficking, in the high seas, in narcotic drugs and psychotropic substances.[262]

The above provisions limiting the jurisdiction of states even in the high seas are largely motivated by the search for the public good in maritime activities. Moreover, the adoption of the 1982 Convention was catalysed by the need to preserve the resources of the seabed beyond the limits of national jurisdiction as common heritage of mankind and the danger of a scramble for the sea.[263] Thus the Convention provides details on how the resources of the seabed beyond national jurisdiction can be exploited for the benefit of the entire human race.[264] It also contains a comprehensive legal regime of 46 articles, relating to the protection of the marine environment for the public good.[265]

The state parties to the 1982 Convention express that they are 'conscious that the problems of the ocean space are closely interrelated to be considered as a whole'.[266] The Conventions establishes a legal regime that affords an opportunity for all the states of the world to benefit from the utilisation of the seas. In the territorial sea for instance, the coastal state may exercise

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[261] UN Convention on the Law of the Sea, adopted on 10 December 1982 in Montego Bay, Jamaica, UN Doc A/CONF.62/L2, 21 ILM 1261 (1982) (entry into force 16 November 1994), reprinted in Rummel-Buska & Osafo (1994) 10; see arts 105, 109 and 99.arts 99, 105 and 109; Cf art 13,19 and 33 of the 1958 Convention on the High Seas.

[262] Art 108.

[263] The Preamble to the Convention, para 1 states that the Convention is 'prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea'.

[264] The Convention creates the International Seabed Authority (ISBA) to control virtually every aspect of deep seabed mining, see art 140 ff.

[265] See Part XII of the Convention entitled 'Protection and Preservation of the marine Environment', arts 192-237.

[266] Preamble, para 3.

complete sovereignty.[267] At the same time though, other states are have the right of innocent passage within the territorial sea.[268] Even internal waters which legally form part of the territory of the coastal states may be entered by foreign ships for the common good, but only in cases of *force majeure* or distress at sea or for purposes of rendering assistance to persons, ships or aircraft in danger at sea.[269]

In the Exclusive Economic Zone, states have rights to the economic utilisation of the living resources of the sea.[270] However the states are enjoined, for the 'public good', to 'have due regard to the rights of other states'.[271] The other duties of states in the Exclusive Economic Zone include the duty to:[272]

- Remove any installations or structures which are abandoned or disused to ensure the safety of navigation.

- Give due notice of any construction of artificial islands, installations or structures and to maintain permanent means of giving warnings of their presence.

- Give appropriate publicity to the depth, position and the dimensions of any installations or structures.

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[267] See art 2 of the 1982 Convention. The territorial sea is a zone in the sea extending up to 12 nautical miles from the baseline.

[268] Art 17 of the 1982 Convention. Innocent passage is defined in the Convention to mean navigation through the territorial sea for the purpose of either traversing the territorial sea without entering the internal waters, or proceeding to or from internal waters.

[269] See art 18(2) of the 1982 Convention.

[270] See art 56(1) of the 1982 Convention.

[271] Art 56(2) of the 1982 Convention.

[272] See art 60(3) of the 1982 Convention.

The high seas, which are *res communis* are for the use of all.[273] The limitations that are put on states in their exercise of the freedom of the seas in the high seas are for the public good. The limitations require states, when traversing the high seas, to have regard to the interests of other states,[274] and to use the high seas for peaceful purposes.[275] For the common good, all states have certain rights in the high seas. Any state has a right to seize a pirate ship as well as to arrest and seize any person or property therein.[276] Also, any state may seize a ship in the high seas which is reasonably suspected to be involved in the slave trade,[277] the traffic of narcotic drugs or psychotropic substances,[278] or unauthorised broadcasting.[279]

In the high seas, nuclear testing is prohibited for the public good. In the *Nuclear Tests Cases,*[280] Australia and New Zealand sued France on the ground that it was carrying out nuclear tests on Mururoa, A French atoll 4 000 nautical miles off the Australian coast. Australia and New Zealand complained that the tests were causing radioactive fallout in their respective territories. The ICJ did not address the legality of nuclear tests in the high seas. The cases were withdrawn following assurances by France that the tests would cease. However, it is plausible to conclude that nuclear tests in the high seas are

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[273] Art 87(1) of the 1982 Convention provides that 'the high seas are open to all states, whether coastal or land-locked'. The article further provides that all states may enjoy the freedoms of the sea, which are the freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law; freedom of fishing and freedom of scientific research.

[274] Art 87(2) of the 1982 Convention.

[275] Art 88 of the 1982 Convention.

[276] Art 105 of the 1982 Convention.

[277] Art 99 of the 1982 Convention.

[278] Art 108 of the 1982 Convention.

[279] Art 110 of the 1982 Convention.

[280] ICJ Rep (1974) 253 (*Australia v France*) and ICJ Rep (1974) 457 (*New Zealand v France*).

illegal because the 1982 Convention on the Law of the Sea provides that the high seas shall be used for peaceful purposes.[281]

Provisions of the 1982 Convention on the Law of the Sea have relevance for the public good in the protection and preservation of the marine environment. There is a general obligation on all state parties to preserve and protect the marine environment.[282] States are also enjoined to take, individually or jointly as appropriate, all measures consistent with the Convention, that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.[283]

The 1982 Convention on the Law of the Sea also offers a regime for the exploration and exploitation of the resources of the deep seabed area for the benefit of humanity.[284] The Convention declares the deep seabed area and its resources 'the common heritage of mankind'.[285] Consequently, no state, or person can claim or purport to assert sovereignty over any part of the area or its resources.[286] All seabed exploration and exploitation is to be 'carried out for the benefit of mankind, by the International Seabed Authority.[287]

The above analysis of the law of the sea shows a recurrent theme; that of public good in this area of international law. Consequently, the analysis leads us to conclude that the normative values underlying the international law of the

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[281] Art 88 of the 1982 Convention.

[282] Art 192 of the 1982 Convention.

[283] Art 194(1) of the 1982 Convention.

[284] See part XI of the 1982 Convention, arts 133 to 183.

[285] Art 136 of the 1982 Convention.

[286] Art 137 of the 1982 Convention.

[287] Art 153 of the 1982 Convention.

sea and its developments are heavily influenced by the need to achieve public need. Rights and obligations of states are balanced so as to cater for the interests of all states, including land-locked states and geographically disadvantaged states.[288]

3.5.6 What Public Good does Humanitarian Intervention Serve?

Instead of the view that intervention in internal conflicts must be presumptively illegitimate, the prevailing trend today is to take seriously the claim that the international community ought to intercede to prevent bloodshed by whatever means are available.[289] This point was aptly summarised by the *Wall Street Journal*, when it editorialised that sovereignty is no longer an absolute right, that starvation and wanton killing are 'everybody's business', and that in such cases, 'any absolute principle of non-intervention becomes a cruel abstraction indeed'.[290] And reviewing, as we have done here, a wide range of contemporary changes, an editor of the *Economist* Magazine wrote as follows:[291]

> [We] are increasingly concerned not just to see countries well governed but also to ensure that the world is not irreparably damaged-whether by global warming, by the loss of species, by famine or by war...Increasingly, world opinion, when confronted by television pictures of genocide or starvation, is unimpressed by those who say, 'we cannot get involved, national sovereignty must be respected'.

Early writings in international law defended the concept of humanitarian intervention that it protects the public good. The works of Grotius, regarded by

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[288] See, for instance, art 69 and 70 of the 1982 Convention, providing respectively for the rights of land-locked states and geographically disadvantaged states.

[289] For detailed discussions on this point see Reed & Kaysen (eds) (1993), Damrosch (ed) (1993), Gottlieb (1993), Weiss (ed) (1993), Henkin *et al* (1991), and Damrosch & Scheffer (eds) (1991).

[290] See 'Everybody's Business' *Wall Street Journal* (New York) 24 August 1992 8.

[291] See 'New Ways to Run the World' *The Economist* (New York) 5 November 1991 11.

some as containing 'the first authoritative statement of the principle of humanitarian intervention',[292] reveal that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.[293] Grotius argued that humanitarian intervention serves 'community interests'.[294] He concluded that if 'some tyrant should inflict upon his subjects such treatment as no other is warranted in inflicting, the exercise of the right vested in humanity [of humanitarian intervention] is not precluded',[295] and other states may take up arms to help the persecuted.

The ICJ in the *Barcelona Traction case*[296] echoed the words of Grotius significantly. The Court fell short of expressly stating that states could result to war in response to gross human rights violations, but it nevertheless held that third states had a right in such situations, to either make representations to, or to make claims against, a state breaching obligations to the international community as a whole, primarily regarding human rights.[297]

The public good served by permitting humanitarian intervention may be illustrated in a number of ways. First, mass refugee flows are pre-empted.[298] Second, human rights and international peace and security, both of which are

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[292] See Lauterpatch (1946) 1 46.

[293] As above.

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

[295] As above.

[296] ICJ Rep 1970 3.

[297] Para 32.

[298] However, it may be true that humanitarian intervention may itself lead to refugee flows, but such flows are likely to be of a lesser magnitude and would consist those running away from the area around the battle lines. Moreover such refugees are of a temporary nature and would ordinarily return after the military operation. In contrast, massive human rights violations leading or likely to lead to mass loss of lives in most cases lead to massive refugee flows and these would not be willing to return until the violations have been stopped completely and assurance of safety given.

of interest to all states, are secured. The inability of individual states to deal with intra-state conflicts is not simply an internal matter. The proliferation of rebel movements, small arms, and refugees[299] all threaten regional peace and security. It also negates international progress made so far in relation to the protection of human rights.

The doctrine of public good is based on a solidarist understanding of international relations. The solidarist view may be used to support the basis for humanitarian intervention in normative interpretation, by defending its commitment to justice. Solidarism has been defined as the 'solidarity or potential solidarity of the states comprising the international society, with respect to the enforcement of the law'.[300] According to Wheeler, this conception recognises that individuals have rights and duties in international law, but also acknowledges that individuals can have these rights enforced by states.[301] Consequently, the defining character of solidarism is that states accept not only the responsibility to protect the security of their own citizens, but also the wider one of 'guardianship of human rights everywhere'.[302]

Solidarism is important for the preservation of international peace and security and the pre-emption of armed conflicts. As I argue above, international peace and security is necessary for the public good. I agree with Sollenberg and Wallensteen, who argue that a striking feature of conflict in Africa and, to some extent, in Asia and South America, is the link between armed conflicts and a

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[299] As of August 2002, there were 6.5 million 'people of concern' to the Office of the United Nations High Commissioner for Refugees (UNHCR) in Africa, which included 3.3 million refugees, 2.1 million internally displaced persons and 1.1 recent returnees. However, the problem is much bigger than these figures suggest, as UNHCR handles a relatively small number of internally displaced persons. See <htpp://www.reliefweb.int> (accessed on 30 September 2002).

[300] Wheeler (2000) 11.

[301] As above.

[302] As above.

weak state.[303] All the conflicts in Africa at the moment are occurring in severely underdeveloped and weakened states.

While the existence of a weakened state is not a guarantee that conflict will occur (just as strong states also experience conflict), the correlation is noticeable and is of interest to the international community as a whole. Unless the international community can rally in solidarity with the masses in the collapsed state, for example by engaging in humanitarian intervention, the effects of conflict and lawlessness that characterise such states are likely to spill over into other states, for instance through trans-border refugee flows. Humanitarian intervention may help in pre-empting refugee flows, and it mal also result in the return of refugees to their own country once normalcy has been attained.

I have also argued that humanitarian intervention serves the public good by protecting human rights, and those human rights issues are of concern to all. Damrosch shares this view and recent developments in international law as favouring a recognition humanitarian intervention under international law. According to him, we are 'currently witnessing the emergence and a recognition of a legitimate right to intervene in the domestic affairs of [other] states in the name of [international] community norms, values or interests'.[304]

He concludes that in situations of genocide or other human rights atrocities, a state's claim to sovereignty should be set aside and the public good be promoted by intervening on humanitarian grounds.[305] Parekh, who contends that the citizens of any nation are not 'moral orphans', endorses Damrosch's position, and states that the international community has a right to intervene in

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[303] Sollenberg & Wallensteen (1998) 23.

[304] Damrosch (1993) 91 93.

[305] As above.

a state engaged in genocide, massive exploitation of minorities or the perpetration of 'a reign of terror against its citizens'.[306]

To conclude this section, I argue that humanitarian intervention serves the public good by preserving international peace and security and pre-empting refugee flows, and by halting gross human rights violations. Moreover, humanitarian intervention is an expression of solidarism, a phenomenon resulting from the interconnectedness of humanity. This interconnectedness is evident not only in the economic field, but also in the emergence of shared duties and values among the states and citizens of the world.

3.6 CONCLUSION

The greatest challenge for the legal scholars of the future is to address effectively the conceptual conflict that reflects two contradictions and tensions running through the UN Charter: sovereignty and human rights. The contradiction is apparent in the following questions: Are human rights exclusively within the domestic jurisdiction of states, or are they an international concern with community jurisdiction? Which authority is superior, a state's jurisdiction over individuals within its boundaries, or international jurisdiction over inalienable human rights? In addition, there is the perennial tension between peace and justice, stability and change that needs to be resolved.

This Chapter has demonstrated a continued conceptual erosion of state sovereignty in favour of human rights and the general 'public good'. The implications for this development is that the meaning of sovereignty as codified in the various instruments of international law has changed in order to accommodate the changing circumstances in the world. Increasingly, sovereignty is regarded as accruing where there is a responsible government in place, one that protects the rights of its citizens. Failure to offer the

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[306] See Parekh (1995) 23.

protection of these rights shifts the responsibility to the international community, who may offer the protection in various ways, including humanitarian intervention.

This Chapter has also demonstrated that major aspects of international law-making have for a long time been driven by the desire to attain the public good. General principles of International criminal law, international humanitarian law, international environmental law, law of international watercourses and international law of the sea have been used to illustrate this point. Humanitarian intervention should be allowed under international law because it is in line with both the development of an eroding conception of state sovereignty and that of the promotion of the public good. It challenges the reliance on state sovereignty in order to commit gross human rights violations, and it serves the public good by halting human rights violations and pre-empting mass exoduses of refugees.