LEGAL IMPLICATIONS OF HUMANITARIAN INTERVENTION: A CASE STUDY OF DARFUR (SUDAN)

BY

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A THESIS SUBMITTED IN PART FULFILMENT OF THE REQUIREMENT FOR THE MASTER OF LAWS DEGREE OF THE UNIVERSITY OF NAIROBI

NOVEMBER, 2006
DECLARATION

I, JULIE OUMA OSEKO, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED

JULIE OUMA OSEKO

This thesis is submitted for examination with my approval as University Supervisor.

SIGNED

PROF. FRANCIS D.P.SITUMA
DEDICATION

To my parents: Janet Kola and Caleb Obiero.

For a lifetime of intuition and values.
ACKNOWLEDGEMENTS

Writing a thesis may well be a solitary task, but it is rarely accomplished solitarily. I, indeed, have many people to thank.

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ABSTRACT

The issue of humanitarian intervention has generated one of the most heated debates in international relations. At its heart is the tension between the principles of state sovereignty and the evolving norms related to human rights. International principles gather momentum through widespread state recognition and practice to become international law. With formal recognition by the General Assembly and the Security Council, humanitarian intervention has developed into a nascent international norm. But the key test of any new international norm or law is recognition by states themselves that are bound to act in accordance with the obligations.

This thesis examines the legal issues surrounding the doctrine of humanitarian intervention. It uses the Darfur crisis in Sudan to examine the tension, as it is in Darfur where the gap between formal recognition and implementation is at its widest. The violent conflict that has raged in Darfur, Western Sudan, since 2003 has led to grave violations of human rights and humanitarian law, particularly by militias backed by the government of Sudan.

This study argues that such grave crimes justify humanitarian military intervention as diplomacy has failed. It discusses the apparent inability by the international community to curtail these atrocities, which inability it attributes to lack of criteria for intervention. It finally proffers suggestions towards further debate on the problem and development of international law.
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<td>AFRC</td>
<td>Armed Forces Revolutionary Committee.</td>
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<td>AMIS</td>
<td>Africa Union Mission In Sudan.</td>
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<td>AU</td>
<td>African Union.</td>
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<td>BC</td>
<td>Before Christ.</td>
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<td>CPA</td>
<td>Collective Peace Agreement.</td>
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<td>DRC</td>
<td>Democratic Republic of Congo.</td>
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<tr>
<td>ECOMOG</td>
<td>Economic Community Ceasefire Monitoring Group.</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States.</td>
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<td>EU</td>
<td>European Union.</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia.</td>
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<td>FSC</td>
<td>Foreign Affairs Select Committee.</td>
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<td>HR</td>
<td>Human Rights.</td>
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<td>ICC</td>
<td>International Criminal Court.</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights.</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty.</td>
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<td>ICJ</td>
<td>International Court of Justice.</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross.</td>
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<td>IDP</td>
<td>Internally Displaced Persons.</td>
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<td>ILA</td>
<td>International Law Association.</td>
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<td>JEM</td>
<td>Justice and Equality Movement.</td>
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<td>KLA</td>
<td>Kosovo Liberation Army.</td>
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<tr>
<td>KLMA</td>
<td>Kosovo Liberation Movement Army.</td>
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<td>MSF</td>
<td>Medicines Sans Frontiers</td>
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<td>NAM</td>
<td>Non Aligned Movement.</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization.</td>
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<td>NCP</td>
<td>National Congress Party.</td>
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<td>NFPL</td>
<td>National Patriotic Front of Liberia.</td>
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<td>Acronym</td>
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<td>NGO</td>
<td>Non Governmental Organizations.</td>
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<td>OAU</td>
<td>Organization of African Unity.</td>
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<td>RPF</td>
<td>Rwanda Patriotic Front.</td>
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<tr>
<td>RUF</td>
<td>Revolutionary United Front.</td>
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<td>SLA</td>
<td>Sudan Liberation Army.</td>
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<td>SLM/A</td>
<td>Sudan Liberation Movement/Army</td>
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<td>SPLM</td>
<td>Sudan Peoples Liberation Movement.</td>
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<td>UN</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights.</td>
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<td>ULIMO</td>
<td>United Liberation Movement of Liberia for Democracy.</td>
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<td>UNAMISIL</td>
<td>United Nations Mission in Sierra Leone.</td>
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<td>UNHCR</td>
<td>United Nations High Commission for Refugees.</td>
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<td>UNITAF</td>
<td>Unified Task Force.</td>
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*Barcelona Traction, Light and Power Company (Belgium v Spain)* (1970) ICJ Rep. 3


*Nicaragua v USA,* (1986) ICJ Rep. 14

*Town v. Eisner,* 245 US 372, 376 (1918)
INTRODUCTION

0.1 BACKGROUND OF THE STUDY

Three months after NATO concluded its 78-day air strike campaign over Kosovo in 1999, the UN Secretary General Kofi Anan made the issue of intervention the centrepiece of his annual address to the UN General Assembly in September of that year.¹ In his speech Mr. Anan focused on the tragic dilemma that confronts the international community whenever real situations arise that pitch the need to uphold human rights on the one hand against the need to uphold the doctrine of sovereignty of states on the other. The remarks by the UN Secretary General were in response to the intense debate that NATO’s military action against the former Federal Republic Yugoslavia (FRY) had generated among the international community as reflected by the plethora of articles and comments on the same. It is noteworthy that the debate has not vanished.

There are those scholars who argued, and continue to do so, that NATO’s action was illegitimate and lacked basis in international law.² The main reason advanced by this group of scholars is that the UN Charter under Article 2(4) prohibits threat or use of force against the territorial integrity or political independence of any state. They further point out that to Article 2(7) of the Charter which provides that “... [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...]”. The Charter only recognises three exceptions to the above prohibition against the use of force, namely, self-defence; enforcement action under Chapter VII; and enforcement action by regional arrangements under Chapter VIII. Accordingly opponents of NATO’s action view that action as having

² See for example Ian Brownlie and CJ Apperley, “Kosovo Crisis Inquiry: Memorandum on the International Law Aspects”, 49 International and Comparative Law Quarterly 905 (2000) where they conclude that “Forcible intervention to serve humanitarian objectives is a claim which it is only open to powerful States to make against the less powerful.” See also Antonio Cassese, International Law, 2nd ed. (Oxford University Press, Oxford, 2005), p. 375, where he asserts that “the arrival of human rights on the international scene is, indeed, a remarkable event because it is a subversive theory destined to foster tension and conflict among states.”
been illegal under international law since the action did not fall under any of the above exceptions.

On the other hand those in support of NATO’s military intervention in Kosovo argue that international community has a moral and ethical duty to end human rights violations wherever and whenever they occur even in a sovereign state where such a state has failed through lack of willingness or capacity, to protect its people.³

The above contesting views have continued to plague any debate on international humanitarian intervention without any signs of tapering off with the result that uncertainty has crept in this once settled area. The uncertainty created by the lack of a coherent international policy regarding the lawfulness or lack of it of any use of force by one state or group of states against a sovereign state for purposes of alleviating human suffering in the latter state has had, or at least it has been thought to have, a devastating effect on the willingness states to interfere when instances of gross violations of human rights exist in a given country.

No single case exemplifies the foregoing international malaise regarding the legality of use of military force to defend human rights better than the Darfur Crisis.⁴ It is noteworthy that the international community has conspicuously failed to take the steps necessary to protect the people of Darfur. Instead, while the world has been looking on, the regime in Khartoum and its proxy Janjaweed militias have continued to conduct a systematic campaign of atrocities in Darfur since early 2003, a campaign that continues to this today.

Given the lack of an accepted framework for intervention in the face of egregious abuses, the rhetorical question posed by Secretary General Kofi Annan in 1999 still stands unanswered;


"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?"

0.2. STATEMENT OF THE PROBLEM

Humanitarian intervention as a concept in international law has had a mixed and troubled history. While much ink has been spilled on the central question regarding the conditions under which unauthorized humanitarian intervention is ethically, legally, or politically justified, empirically, it is difficult to point to actual cases that demonstrate the significance of international law on this subject. States do not seem to have refrained from acting in situations like Rwanda or Kosovo, simply from fear of legal sanction, nor do any of the incidents frequently touted as examples of ‘genuine’ humanitarian intervention correspond with the principled articulation of such a doctrine by legal scholars. Determining the parameters of humanitarian intervention has, therefore, become an exercise at semantics. Practically there exists enough renditions of the doctrine to cover all cases of humanitarian intervention and it is therefore the case today that the problem facing international community with regard to humanitarian intervention is not one of whether it is legal or not but one, according to Chesterman, of an “overwhelming prevalence of inhumanitarian non intervention.”

The fact that the above assertion is true is evidenced by the fact that various arguments put forward by governments and scholars across the humanitarian intervention divide either in support or opposition of a given act are often again availed to support or reject a converse act. For example, while bombs were falling on Kosovo many international lawyers sought cover under references to the inadequacy of ‘traditional’ international

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law. Few were willing to condemn NATO for taking action against a brutal regime which clearly wished ill on the Albanian population of Kosovo. Yet even among the state actors it was still not clear to them that their actions were legal. The British Parliamentary Foreign Affairs Select Committee (FSC), a body with representatives from major parties in UK Parliament, made the admission that the NATO bombardment was illegal under international law even though it was party to the air campaign against FRY. On other hand the official British position seemed to indicate that although the intervention was not sanctioned by the UN and therefore lacking the necessary legal backing, the act was still justifiable under the principle that force may be used in extreme circumstances to “avert an immediate and overwhelming humanitarian catastrophe.”

This reticence to reach a firm position on the legality of humanitarian intervention continues to affect the international community response to human rights violation in a given state. It makes an already loaded issue difficult to tackle and has militated against humanitarian intervention and caused hesitation even where clear reasons for intervention exist. This is the scenario in Darfur. Despite the UN, at the 2005 World Summit, mainstreaming the report of the Commission for Africa entitled Our Common Interest which calls for practical steps to implement “the agreed criteria for humanitarian intervention and the use of force, drawing on the principles of the “Responsibility to Protect human life”, the world community has been reluctant to send its troops to Darfur without the consent of the belligerent Sudanese government. This is ironical considering that in Kosovo NATO intervened without the consent of the FRY government or even the UN. The reluctance of the international community to intervene

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8 Supra, note 5, at p. 165.
10 Speech by the UK Secretary of Defence, Mr. Robertson made to the House of Commons on March 1999, as quoted in Vaughan Lowe, “International Legal Issues Arising in the Kosovo Crisis” 49 International Comparative Law Quarterly 934 (2000), at p. 937.
in Sudan further raises the question of the fairness and consistency of the international policy, if any, towards humanitarian intervention.

It is in view of this mixed understanding and practice of international intervention that this study is carried out in the hope that it will help clarify certain issues that have stood in the way of a common approach to humanitarian intervention.

0.3 RESEARCH QUESTIONS

0.3.1 Are the concepts of “state sovereignty”, “non use of force” and “non intervention” absolute, or are they limited by human rights?

0.3.2 Is humanitarian intervention a breach of state sovereignty?

0.3.3 Is there an emerging norm of the doctrine humanitarian intervention?

0.3.4 What lessons can we learn from the Darfur crisis with regard to the doctrine of humanitarian intervention?

0.4 OBJECTIVES OF THE STUDY

0.4.1 To identify the various divergent views of jurists, publicists and writers as to the morality and legality of humanitarian intervention.

0.4.2 To investigate whether a norm of customary international law is beginning to emerge under which humanitarian intervention could be understood as lawful in situations where gross human rights violations occur.

0.4.3 To investigate the continuing conflict in Darfur, Sudan and the subsequent international community’s responses thereto with a view of finding out if it has attained the threshold wherein use of force is necessary to stop severe human rights violations.

0.4.4 To contribute to the ongoing debate on humanitarian intervention by using current conflicts (Darfur crisis being of primary importance) to test the dichotomy between state sovereignty and human rights discourse in the current stage of
international law and make further contributions as to the future development of international law in this area.

0.5 JUSTIFICATION FOR THE STUDY

The uncertainty of the legality and practice of humanitarian intervention puts a very high premium on justification upon those who would want to intervene with or without Security Council authorization. This has often worked to discourage intervention even in genuinely deserving cases. The risk that such hesitancy poses to international peace and security is high. In a quickly deteriorating and unfolding human rights situation it might translate to hundreds of thousands being killed as was the case in Rwanda. Defining the province of humanitarian intervention is, therefore, imperative to any world security system.

Recent humanitarian intervention efforts in Iraq and Kosovo have generated a lot of healthy debate around the concept of humanitarian intervention. These debates have unfortunately been impromptu, immediate and tied to an event with very little room for long term considerations. The resultant mass of scholarly works is, therefore, uncoordinated and poorly placed to produce a common and uniform approach towards humanitarian intervention upon which state practice might coalesce. This study aims at interrogating the various contesting views towards humanitarian intervention with a view to forging a common front towards humanitarian intervention. This we believe is a cause worthy pursuing.

Darfur Crisis is ongoing and one in which the tension between the concept humanitarian intervention and the concept of state sovereignty is at its greatest. Darfur Crisis also presents us with a better and more suitable window for scrutinizing and discussing the politics and practice of humanitarian intervention. This has often been an ignored side to the coin of humanitarian intervention and one which we believe lies at the heart of the apprehension that the third world countries have toward humanitarian intervention, hence the suitability of this study.
0.6 HYPOTHESES

0.6.1 Use of force in humanitarian intervention is illegal in international law.

0.6.2 Humanitarian intervention is a violation of state sovereignty.

0.6.4 The elevation of human rights in the international arena has eroded the traditional concept of state sovereignty.

0.7 THEORETICAL AND CONCEPTUAL FRAMEWORK

For purposes of this study, humanitarian intervention is defined as the threat or use of force by a state, group of states, or international organization for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights. This definition raises a number of issues that require some clarification.

At the outset it is clear that humanitarian intervention denigrates at Article 2(4) of the UN Charter which outlaws the threat or use of force against a sovereign state in international law. This is a fact that has called for justification for whatever position one takes. This then calls us to ask the question, is it possible to evaluate the ends and means of humanitarian intervention in terms of considerations of justice? Or does international anarchy and the difficulty in achieving a global moral consensus necessitate the subordination of all such considerations to power and expediency.

In response to the above question this study attempts to provide a conceptual framework for a legal basis for forceful humanitarian intervention to avert immediate and overwhelming human catastrophe from occurring in a sovereign state. There exist general philosophical issues surrounding the legal/legitimacy and ethics of humanitarian intervention. These sort themselves out into the various justifications for intervention or opposition thereof and range from the classical view and its various strains that extolled state sovereignty over human rights and ends with current trend that centres on the protection of human rights and dignity of the human person.
Positivism in international law argues that states need not account for their actions vis-à-vis their citizens. It underpins the construction of Article 2(4) of the UN Charter. However such theories as utilitarianism and natural law have always been in tension with this theory and have often been used to justify modern interventionist actions in international law. Modern legal positivism, on the other hand, would seem to suggest that unless an action has been sanctioned under an existing treaty or UN resolution such action is illegal and consequently humanitarian intervention unless sanctioned by the UN or unless falling under the two main exceptions to the prohibition of threat or use of force is illegal and unjustified.

0.8 LITERATURE REVIEW

A number of writers have discussed the various concepts that will be discussed in this study. While the review is not exhaustive, it will, nevertheless, help illuminate the various issues generated by humanitarian intervention.

Antonio Cassese, in International Law, provides a stimulating and authoritative account of international law and a comprehensive commentary on international law as a whole. He compares the traditional legal position with the developing and evolving law in a way that is sensitive to political and economic considerations. Of great importance to us is Part V in which he discusses contemporary issues in international law. Chapter 19 specifically addresses the issue of protecting human rights in international law. Cassese is of the view that the arrival of human rights on the international scene is, indeed, a remarkable event because it is a subversive theory destined to foster tension and conflict among states.

Cassese has a pessimistic view towards the emerging trend in support of humanitarian intervention in international law. He sees humanitarian intervention as having the potential of subverting domestic order and, consequently, the traditional configuration of the international community as well.

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Nicholas J., Wheeler in *Saving Strangers: Humanitarian Intervention in International Society*,\(^\text{13}\) examines the dilemma of what to do about strangers who are subjected to appalling cruelty by their governments. He outlines the limits set by international legal obligations written into the UN system on how governments can treat their subjects and how this has made the domestic conduct of governments subject to the scrutiny of other governments, human rights non-governmental organizations (NGOs), and international organizations.

Wheeler asserts that the gap between normative commitments and instruments allows governments to abuse human rights with virtual impunity. As a result he sees intervention by force as possibly being the only means of enforcing the global humanitarian norms that have evolved in the wake of the Holocaust. He is, however, not lost to the fact that such a recommendation might again jeopardize the established principles of non-intervention and non-use of force. After posing this dilemma the author in his conclusion concludes that a practice of humanitarian intervention can support a new solidarity in the society of state based on the reconciliation of the imperatives of order and justice. The book is however, short on discussions put forward against humanitarian intervention and thus reveals glaringly the bias of the author. The obvious problem with the empirical evidence here is the case of Rwanda where the international community failed to intervene; it also true to say that this failure can be (and has been) condemned on the basis that the relevant states did not act in accordance with the norm they themselves had set.

David Chandler in *From Kosovo to Kabul: Human Rights and International Intervention*\(^\text{14}\) takes a critical look at the way in which human rights issues have been brought to the fore in international policy-making and offers a rigorous critique of this apparently benign and progressive shift in international affairs, drawing out the worrying implications of the human rights framework.

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\(^{13}\) (Oxford University Press, Oxford, 2000).

\(^{14}\) (Pluto Press, London, 2002).
Chandler further presents several arguments regarding the undesirable implications of the interventionist approach and vividly highlights the challenges to the international order: what human rights advocates consider the strengthening of international law runs the risk of being, in fact, its abolition. The implicit denial of the sovereign equality of states, the bypassing of the Security Council and the marginalization of the UN are likely to deprive international law of its consensual basis, introduce institutionalized inequality among its subjects, raise the frequency of armed conflicts, and revive the old Westphalian order.

The rise of international criminal justice, as well as the inclination of Western powers towards the invocation of a ‘higher duty’ of fighting evil for the justification of unauthorised armed interventions are, in his view, all eloquent symptoms of this tendency. His gloomy vision of a ‘post-UN international order’ adequately identifies certain anomalies and echoes the concerns of many experts. Yet it begs the question whether it is the pursuit of an ethical foreign policy itself that endangers the present international order or the unilateralism it occasionally seems to involve. Indeed, an ethical foreign policy does not necessarily imply resort to unilateral measures, and unilateral measures are regularly taken for reasons that have little to do with ethics and values. Conversely, the goals of ethical foreign policy can be achieved by multilateral means, as well (e.g., the authorized humanitarian interventions of the 1990s). Therefore, it is not illogical to believe that the principal source of problems is unilateralism, rather than anything like a ‘people-centred’ approach to foreign relations.

Simon Chesterman in Just War or Just Peace: Humanitarian Intervention and International Law,\textsuperscript{15} gives a comprehensive account of the numerous episodes which are concerned with humanitarian intervention, or which are assumed by most scholars on the subject. Chesterman begins his book by laying out the dilemma facing international humanitarian intervention and goes through such themes as ‘just war’, scourge of war, ‘you the people’, ‘new interventionism’ and so on and lays the philosophical foundations underpinning them.

\textsuperscript{15} (Oxford University Press, Oxford, 2001).
The book concludes that there is minimal state practice and no virtually no *opinio juris* exists that supports a general right of humanitarian intervention. He further asserts that most arguments in favour of a right of humanitarian intervention rely only on a moral position, that in the face of atrocity one cannot do just nothing. This he sees as a recipe for bad policy, bad law, and a bad international order.

Peter R. Baehr, in *Human Rights: Universality in Practice*\(^\text{16}\) argues begins by defining human rights and asserts that human rights are internationally agreed values, standards, or rules regulating the conduct of states toward their own citizens as well as non-citizens. Since adoption of the Universal Declaration of Human Rights in 1948, the author states that a great number of international treaties and declarations have seen the light of day although their implementation is deficient.

The author supports humanitarian intervention aimed at alleviating gross violations human rights. This he supports despite the fact that intervention without UN Security Council authorization is illegal in international law. He, however recommends that common criteria be developed to prevent states from resorting to 'humanitarian intervention' whenever it happens to suit their foreign policy purposes.

J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*,\(^\text{17}\) is a compilation of various articles covering different themes under humanitarian intervention: Part I of the book deals with the context of humanitarian intervention. Here the humanitarian intervention debate is laid out and introduced, as well as the history of intervention before 9/11; Part II deals with the ethics of humanitarian intervention; Part III’s theme is ‘law and humanitarian intervention’; while Part IV the politics of humanitarian intervention. The book is a useful resource tool for any discussion on humanitarian intervention.

Brian D. Lepard, in *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*,\(^\text{18}\)

\(^{16}\) (Palgrave, London, 1999).


attempts to develop and apply a system for prioritizing the values that often clash when demands for humanitarian intervention arise. He ably discusses how norms derived from the UN Charter (for example, those pertaining to non-intervention, pacific settlement of disputes, and self-determination) work against humanitarian intervention and how other norms (principally, human rights and international criminal law norms) tend to support it. Lepard argues that traditional methods of legal interpretation are inadequate to resolve conflicts between competing international law norms and the various ethical principles that underpin such norms. Accordingly he undertakes to develop a “fresh approach to the identification and interpretation of legal norms relevant to humanitarian intervention.”\(^{19}\)

This he does by identifying and applying relevant ethical principles drawn from international law and supported by or consistent with passages from the revered moral texts of seven world religions and philosophies.

One major drawback with Lepard’s method is that the ethical principles he identifies are general and vague and often in tension with one another and therefore may be of little help in solving the tension between the protagonists in the humanitarian debate.

0.9 RESEARCH METHODOLOGY

The study was mainly conducted through Library research at the Parklands Campus law Library. The High Court library and other libraries were also consulted depending on the nature of information needed. A lot of information was also sourced from the Internet.

0.10 LIMITATIONS TO THE STUDY

Time and finances were a handicap in this study. Thus, the study cannot claim to cover all the relevant literature and arguments on humanitarian intervention.

\(^{19}\) Ibid., p. 33.
CHAPTER ONE

HUMANITARIAN INTERVENTION

1.1 Definition, Concept and Scope

The concept of intervention suffers from ambiguity and lack of definitional clarity. According to Winfield, intervention is a right; it is a crime; it is the rule; it is the exception; it is never permissible at all. The general notion of intervention is derived from the Latin verb ‘intervenere’ meaning to “step between”, “to disrupt”, or to “interfere”. A definitive notion or a universally acceptable definition of the term “intervention” is singularly absent making most attempts to define the term somewhat static and futile. Intervention, according to Hall:

takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. Prima facie intervention is a hostile act because it constitutes an attack upon the independence of the state subjected to it.

The actual meaning of intervention can be derived from the context in which it occurs in addition to the purposes for which it is invoked.

Since the issue of humanitarian intervention is related to several disciplines, namely international law, political science, morality and international relations, one may come across different definitions and categorizations. Humanitarian intervention is a highly

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2 P. H. Winfield, “The History of Intervention in International Law,” 3 British Year Book of International Law 130 (1922-23).
controversial matter in international law, so is its definition. According to Verwey, there may be few concepts of international law which are conceptually obscure and legally controversial as humanitarian intervention. This results from a lack agreement on the legal meaning of both the term intervention and the term humanitarian. Defining humanitarian intervention is therefore problematic and implementation is contentious.

Humanitarian intervention is “an intervention by the international community to curb abuses of human rights within a country even if the intervention infringes the country’s sovereignty.” Humanitarian intervention has also been defined as “the threat or use of force by a state, group of states, or international organization for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights”. It is a “a coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”. Teson defines humanitarian intervention as “the appropriate trans boundary help including forcible help provided by governments to individuals in another state who are being denied their basic human rights and who themselves would be rationally willing to revolt against their oppressive governments”. Garret defines humanitarian intervention as “the injection of military power- or the threat of such action- by one or more outside states into the affairs of another state that has its purpose as (or at least one of its principle purposes) the

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10 Danish Institute of International Affairs 1999, Humanitarian Intervention: Legal and Political Aspects, A Report submitted to the Minister of Foreign Affairs, Denmark, 7th December 1999 (called the Danish Institute Report, supra, note 5, p. 809.
relieving of grave human suffering. From the above definitions, the term humanitarian intervention has the following elements:

- The action must be taken against the consent of the target state. Acts do not amount to intervention if they are based on genuine request from or with the unqualified consent of the target state.

- It is invoked against a state’s abuse of its sovereignty by brutal cruel treatment of those within its power, both nationals and non nationals. It is therefore targeted at a sovereign state.

- It has to involve threat of or use of force, by a state or a group of states or an international organization with or without the consent of the United Nations.

- It is aimed at preventing, limiting or stopping serious violations of human rights on a large scale, where governments of that state is either perpetrating the violations or is unable or unwilling to allow international action to end them. It involves a concern for human welfare and it is concerned with humanity as a whole.

Humanitarian intervention does therefore indeed take a variety of forms such as: material assistance through relief, aid or sanctions which consist of coercive, but non military

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14 Supra, note 3.

pressure to end abusive practices; and the dispatch of military forces to remedy massive human atrocities.  

Humanitarian intervention can therefore be distinguished from intervention for the protection of nationals abroad. While intervention for the protection of nationals involves the injection of military force into the domestic jurisdiction of another state and suggests humanitarian motives the beneficiaries of such interventions are mainly the nationals of the state engaging in the intervention in question. Moreover, the intervention by a state to protect its nationals and ensure their humane treatment was traditionally justified on grounds of self defence. There is an unfortunate tendency in some of the literature on this subject to confuse the right of protection of nationals with the quite separate and more general right of humanitarian intervention. In Bowett’s view, it is essential to keep the two distinct. For with humanitarian intervention, the nationality of the persons to be rescued is essentially irrelevant and whatever the legal basis of such intervention might be, it is not self defence. While writing in 1985, he took the position that such intervention to protect nationals had been lawful before the Charter as self defence and remained lawful thereafter under article 51.

The International Commission on Intervention and State Sovereignty (ICISS), while exploring the meaning, concept and scope of humanitarian intervention, was of the view that part of the controversy over “intervention” derives from the potential width of


activities this term can cover, up to and including military intervention. Some would regard any application of pressure to a state as being intervention, and would include in this conditional support programs by major international financial institutions whose recipients often feel they have no choice but to accept. Others would regard almost any non-consensual interference in the internal affairs of another state as being intervention – including the delivery of emergency relief assistance to a section of a country’s population in need. Others again would regard any kind of outright coercive actions – not just military action but actual or threatened political and economic sanctions, blockades, diplomatic and military threats, and international criminal prosecutions – as all being included in the term. Yet others would confine it to military force.²²

Most peacekeeping missions authorized by the United Nations or other regional organizations profess impartiality with regard to all issues other than peace. They typically restrict military operations according to the wishes of established governments within those territories they deploy. Humanitarian intervention in contrast often openly opposes abusive policies of established governments and does not necessarily abide by governmental restrictions. This is the main point which makes an outside interference a humanitarian intervention and distinguishes it from peacekeeping which is based on the consent of warring parties. Humanitarian intervention and international peacekeeping are not necessarily the same.²³

Humanitarian intervention has also been distinguished from humanitarian access. According to K. Mills, humanitarian intervention is premised, for the most part, on the use of force for humanitarian ends.²⁴ Humanitarian access, on the other hand, does not necessarily entail use of force and is focussed on ameliorating the immediate humanitarian situation and not the broader political and military aspects.

The ICRC, on the other hand are indeed worried and concerned with the use of the term humanitarian intervention and find the same to be unhelpful and even dangerous since

²² Supra, note 11.
²³ Supra, note 12, p. 990.
such expressions lead to erroneous conclusions which blur perceptions of the distinct character of international humanitarian law and humanitarian action.\textsuperscript{25}

Ben Kioko considers the broad definitional aspect approach taken by the ICISS as being informed of a number of factors one of which is the lack of precision or common understanding of the meaning of the term "humanitarian intervention".\textsuperscript{26} Yet these methods of treating intervention are but natural consequences of the darkness which besets a subject, at no time clear, and even now in a fluid condition.\textsuperscript{27} Any analysis of humanitarian intervention inevitably raises difficult issues. In the absence of a generally accepted definition of the term, a given approach within reasonable limits-is probably just as suitable any other one.\textsuperscript{28} To borrow Holmes's lapidary dictum, "a word is not a crystal, transparent and unchanged: it is the skin of a living thought and may vary in colour and content according to the circumstances and the time in which it is used."\textsuperscript{29}

From the above definitions, it is apparent that the essence of humanitarian intervention can be said to be a coercive intervention that breaches the sovereignty of the state and the goal is to prevent or restore fundamental human rights, and/or prevent or stop human sufferings. It thus involves a situation where the humanitarian aspects are the primary factors in the decision to intervene and are the main focus of the action, including action within the sovereign realm, which may mitigate the humanitarian situation. For an action to be intervention, sovereignty of the states being intervened in must be breached through the use or threat of use of force. For an intervention to be humanitarian the desire to address violations of human rights should be the driving force in that decision. The


\textsuperscript{26} Supra, note 5, p. 808, unpublished.

\textsuperscript{27} Ibid., p. 130.


intervention may be unilateral (by a single state) or collective (by a group of states) through a regional organization or the United Nations.

For the purposes of this study, I will adopt the definition given by the Danish Institute Report to wit: “a coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”.

Interventions on account of humanitarian assistance, humanitarian action, traditional peacekeeping, protection of nationals abroad, interests other than protection of human rights, coercive actions not involving use of armed force and actions involving use of armed force on the invitation of the lawful government are excluded.

1.2 State Sovereignty and Human Rights

If there is to be a principle of intervention it will have ramifications for the notions of sovereignty, as these are flipsides of the same coin. Classic unitary conception of sovereignty is the doctrine that sovereign states exercise both internal supremacy over all other authorities within a given territory, and external independence of outside. Traditionally sovereignty has two aspects: freedom from outside interference and freedom to act as the sovereign sees fit within agreed borders. Humanitarian intervention exposes the conflict between human rights and state sovereignty. The normative question is whether humanitarian intervention should be permitted in a society of states constituted by rules of sovereignty, non intervention and non use of force.

According to the traditional positivist theory of international law, states are the primary subjects of international law. International law is principally the practice of states and is

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concerned with their rights and obligations. Human beings do not have direct representation in international law; their interests are represented by the state. Individuals were under the exclusive jurisdiction of the states of which they were nationals and where they lived. No other state could interfere with the authority of that state, which in a way had a sort of life and death over those individuals.  

States are sovereign in that they are independent legal entities free to conduct their own affairs. As Hall succinctly puts it “the right of independence is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community”.  

The present foundations of international law with regard to sovereignty were shaped by agreements concluded by European states as part of the treaties of Westphalia in 1684. After almost thirty years of war, the supremacy of sovereign authority of the state was established within a system of independent equal units as a way of establishing peace and order in Europe. The core elements of state sovereignty were codified in the 1933 Montevideo Convention on the Rights and Duties of States. They include three main requirements namely: a permanent population, a defined territory and a functioning government. An important component of sovereignty has always been adequate display of the authority of states to act over their territory to the exclusion of other states. The system of public international law of Europe reflected and reinforced this conception by insulating from legal scrutiny and competence a broad category of events that were later enshrined as “matters solely within the domestic jurisdiction”. If another political power entered the territory of the sovereign (whatever the reason) without his permission, his sovereignty was violated. In such matters, the sovereign’s will was the only one legally

34 Supra, note 25.
35 Supra, note 4.
37 Supra, note 18.
relevant. Sovereign states therefore, are by international law, equal and sovereign equality is the basis upon which the United Nations operates.

This principle of sovereign equality is what guarantees equal participation by all states in international relations. The sovereign equality has its contents in the following elements: 1) states are juridically equal; 2) each state enjoys the rights inherent in full sovereignty; 3) every state has the duty to respect the personality of other states; 4) territorial integrity and political independence of a state are inviolable; 5) each state has the right to freely choose and develop its own political social, economic, cultural systems; and 6) each state is obligated to carry out its international obligations fully and conscientiously and to live in peace with other states. A sovereign state is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders, and other states have the corresponding duty not to intervene in its internal affairs. The principle of non intervention is part of customary international law and founded upon the concept of respect for territorial sovereignty of states. Ian Brownlie epitomizes sovereignty and equality of states as representing the basic constitutional doctrine of the law of nations.

According to Lyman, the question to be asked is 'What right has the international community to intervene across borders to halt gross violations of human rights?' In his view, the answer, in purely legal terms, is none. As a consequence, 'humanitarian concerns and human rights still take a back seat to the rights and legitimate interests of

38 Supra, note 26, p. 867.
39 Article 1(1) of the UN Charter.
sovereign states'. Sovereignty remains 'the foundation of international law and non-intervention expresses the correlative duty to respect the sovereignty of other states.'

Richard Falk points to the possible abuse of the doctrine of intervention. He argues that any intervening state may claim to protect human rights so as to hide its dominant motive which is remote from altruism. He gives the example that Hitler explained his invasions of Czechoslovakia and Poland by the need to rescue German minorities from oppression. To him, the duty to refrain from interference with the internal autonomy of other states is a logical sequel of the almost universal acceptance of the state as the fundamental political unit in the world. Whitman is of the view that military intervention in the domestic affairs of a sovereign state nations no matter how well intended the intervening power may be rarely if ever serve the cause of human rights.

The ideas of sovereignty, therefore, have a long history and are seen to be legally obligatory and not a practice of comity. They have found expression in numerous international instruments of universal, regional and bilateral kind. They are affirmed in the Charter are reflected firmly in post Charter declarations and find favour in international case law.

1.3 Limitation of State Sovereignty

Human rights are a broad area of concern. Its scope and potential subject range from the question of torture and fair trial to the so called third generation of rights which includes the right to economic development and the right to health The United Nations Charter

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46 Ibid., p.163.
48 Supra, note 3, p. 41.
provides a baseline of human rights. The issue of human rights is directly addressed and the Charter for the first time employs the terminology of human rights.  

Ideas about sovereignty have not stood still and these verities are now nothing like so clear-cut as they once seemed. The arrival of human rights in the international scene is indeed a remarkable event because it is a subversive theory destined to foster tension and conflict among states. Essentially it is meant to tear aside the veil that in the past protected sovereignty and gave each state the appearance of a fully armoured titanic structure, perceived by other states only as 'whole', the inner mechanisms of which could not be tampered with.  

There is developing a school of thought which holds that freedom from outside interference is contingent upon certain conduct within the state; the traditional freedom to act within borders is becoming circumscribed, most obviously in cases of genocide. Whereas there is a general agreement that by virtue of its personal and territorial authority, a state can treat its own nationals according to discretion, a substantial body of opinion and of practice supports the view that there are limits to that discretion. That when a state commits cruelties against and persecution of its nationals in such a way as to shock the conscience of mankind, the matter ceases to be the sole concern of the state and even intervention in the interest of humanity might be legally permissible. Literature on the 'withering away' of sovereignty has poured forth from international lawyers, political scientists, scholars of international relations and human rights advocates. In this brave new world order, many championed humanitarian intervention albeit with honourable intentions as a sort of deux ex machina for human rights.

The non-intervention principles sustain values such as national independence, diversity and mutual restraints that are fundamental to the international order. But the duty of

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50 Ibid., p. 531.
51 Supra, note 33, p. 375.
governments to respect and protect what today is called human rights is also an accepted international principle, and because the worst violations of human rights are often those perpetrated by governments against their own subjects, there are times when outside interventions are warranted.  

Despite the doctrine of absolute sovereignty, which generally insulated a state from interference by the international community in its treatment of its own nationals, a decent respect for human dignity permitted the imposition of some minimum limitations upon this concept.  

According to Reisman, states have consented to the varying degrees of interference by other states and the international community in general. In his view,  

Although the term “sovereignty” continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty – but not surprisingly – it is the people’s sovereignty rather than the sovereign’s sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign state could arguably constitute violation of sovereignty by its “invasion” of the sovereign’s domain reserve. The United Nations Charter replicates the domestic jurisdiction-international concern, but no serious scholar still supports the contention that internal human rights are “essentially within the domestic jurisdiction of any state” and hence insulated from international law.  

Levitt notes that there has been a progressive shift from traditional prohibition against forcible intervention in the internal affairs of states towards the recognition of a right to humanitarian intervention by groups of states and regional actors in internal conflict.  

As Kirgs acknowledges, a great many governmental policies and courses of conduct that were widely thought to be within the “domestic jurisdiction” of states in 1945 are no longer so regarded. The primary examples are found in the category of human rights.

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55 Supra, note 21.

56 Supra, note 26, p. 869.


After the cold war and apparent triumph of liberal democracy, issues of human rights and democratisation have become part of the humanitarian intervention debate.

In addition to these direct effects and consequences, there have evolved in the international system certain principles which are recognized as unchanging. These fall under the term *jus cogens* or principles from which there can be no derogation. These include among others prohibitions against torture, slavery and genocide. They are manifestly illegal under international law and therefore would not fall under domestic jurisdiction. They are codified in various treaties and conventions. Regardless of whether or not a state has ratified these conventions it is still bound by its principles. Not all governments have ratified these conventions (although all members of the UN have accepted the Universal Declaration of Human Rights (UDHR)). It has been argued that the Universal Declaration of Human Rights has authority beyond a "common standard of achievement for all peoples and nations". Reisman notes that "it is now an accepted as declaratory customary law". In 1993, the 171 states at the world Conference on Human rights reaffirmed, in the Vienna Declaration, the Universality of human rights. The declaration recognized "the promotion and protection of all human rights is a legitimate concern of the international community. It further declared in unambiguous phrases that 'human rights and fundamental freedoms are the birthrights of all human beings and 'the universal nature of these rights and freedoms is beyond question."

The UN Security Council has also become more flexible in defining threats to international peace and security to include refugee flows, humanitarian disasters and human rights abuses in places like Somalia, Liberia, Northern Iraq and former Yugoslavia. The fact that the principle of non-intervention is a corollary to the right of sovereignty therefore rests uneasily with international protection of human rights and others. It is possible that the legal principle of sovereign equality is now, quietly but

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59 Supra, note 26, p. 867.


61 Supra, note 3, p. 46.

resolutely under attack. The doctrine of national sovereignty in its absolute and unqualified form, which gave rulers protection against attack from without while engaged within in the most brutal assault on their own citizens, has gone with the wind.

1.4 Humanitarian Intervention and the UN Charter

Decisions about international military intervention take place in the very real tension between international “statist” norms of non-intervention, the non-use of force and the primacy of international order based on state sovereignty laid down in the UN Charter on one hand and, on the other hand, on the high value placed on individual human rights also found in the Charter plus the growing array of human rights law that flow from it. The establishment of the United Nations created a new legal situation in the international community, in one of the most important aspects by generally prohibiting the use of force between states. The Charter seriously restricted the “jus ad bellum” as a customary right to warfare held by sovereign states. Although there is no higher authority than the state, the UN Charter and other international conventions, such as the Convention for the Prevention and Punishment of the Crime of Genocide, have been regarded as international law.

Article 2(4) adopts the rule of non-intervention of the military sort by one member state against the other. It provides:

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 other manner inconsistent with the purposes of the United Nations.


65 Supra, note 14.

The question must, therefore, be, if an exception regarding humanitarian intervention can be found by interpretation of the Charter. The debate among international lawyers pertaining to the provisions of the Charter of the UN regarding use of force displays considerable disparity as to how these provisions should be interpreted. Various scholars and diplomats have searched for exceptions to the UN Charter prohibition on the use of force, principally through liberal interpretations of the phrases “territorial integrity” and “inconsistent with the purposes of the Charter” contained in Article 2(4).

1.4.1 Classical (Narrow) Interpretation of the UN Charter

Those who seek to limit the scope of Article 2(4) argue that humanitarian intervention should not be permitted as a further exception to the rule prohibiting use of force in Article 2(4) of the UN Charter. They argue that the exception contained in the rule of self defence was already vulnerable to abuse without adding another escape clause that might further weaken the restraint found in Article 2(4). Because humanitarian concerns will be manipulated by intervening states, a doctrine of humanitarian intervention becomes a weapon that the strong will use against the weak. To Brownlie, “there is little or no reason to believe that humanitarian intervention is lawful within the regime of the Charter.” Some argue that Article 2(4), as a provision of the United Nations Charter, is addressed to all members of the United Nations. However, the provision on the use of force is now regarded as a principle of customary law, which has attained the character of jus cogens and, as such, is addressed to all members of the international community.

Jonathan Charney argues that the first purpose of the Charter is “to save succeeding generations from the scourge of war by maintaining international peace and security.” He further states that various scholars and diplomats have searched for exceptions to the

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UN Charter on the use of force, principally through liberal interpretations of the phrases “territorial integrity” and “inconsistent with the purposes of the Charter” contained in Article 2(4). To him those arguments are unfounded. The use of force by bombing the territory of a state violates its territorial integrity regardless of the motivation. Furthermore, the first purpose of the Charter is to save “save succeeding generations from the scourge of war” by “maintain[ing] international peace and security”. The protection of human rights is also among the primary purposes of the Charter, but is subsidiary to the objective limiting war and the use of force in international relations, as found in the express prohibitions of the Charter. He adds that this interpretation is supported by the travaux preparatoires of the Charter. They establish that the phrases “territorial integrity” and “inconsistent with the purposes of the Charter” were added to Article 2(4) to close all potential in its prohibition on the use of force rather than open new ones.

On the question concerning the formulation ‘against the territorial integrity or political independence of any state’, Brownlie states that some writers have relied on this language to produce substantial qualifications of the prohibition of the use of force. His argument is that the United Kingdom employed this type of argument to defend the mine sweeping operation to collect evidence in the Corfu Channel Case. However, the preparatory work of the Charter is clear that this phrasing was introduced precisely to provide guarantees to small states and was not intended to have a restrictive effect.

To sum up the position of the anti interventionists, there is no right to humanitarian intervention under international law.

The General Assembly has adopted several resolutions concerning the use of force. Such Resolutions are of course not legally binding, but they are important guidelines for the General Assembly and the Security Council when deciding what amounts to use of force and breach of the Charter. General Assembly Resolution 2131 (XX) states in paragraph 1 that:

72 (United Kingdom of Great Britain and Northern Ireland vs. Albania), (1949) ICJ Reports, 94, para 176.
73 Supra, note 49, p. 700.
74 Supra, note 15, p. 18.
No state has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of another state. Consequently, armed interventions...against its political economic and cultural elements are condemned.

General Assembly Resolution 2625 (XXV) restates this principle and adds that:

Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by any other state.

General Assembly Resolution 3314 (XXIX) in Article 3(a) that:

The invasion or attack by armed forces of a state...or any military occupation however temporary...shall qualify as an act of aggression

These texts seem to unconditionally prohibit the act of humanitarian intervention. Though it might be argued that protection of basic human rights is not an internal affair, Arend and Beck have noted that:

{The} restrictionist theory most accurately reflects both the intentions of the Charter’s framers and the “common sense” meaning of the Charter texts.  

1.4.2 Liberal Interpretations of the UN Charter

Pro-interventionists on the other hand reason differently. They argue that Article 2(4) limits the prohibition against the use of force to only those cases where a state’s “territorial integrity” or “political independence” is at risk, concluding that unless a portion of a state’s territory is permanently lost the articles does not apply. Yoram Dinstein argues that the dual idioms, “territorial integrity” and “political independence,” when standing alone, may invite a rigid interpretation blunting the edge of Article 2(4). That the use of force within the boundaries of a foreign state does not amount to a violation of the state’s territorial integrity, unless a portion of the state’s territory is

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permanently lost.\textsuperscript{76} Since humanitarian intervention seeks neither territorial change nor a change to the political independence of the state involved and is not inconsistent with the purposes of the UN Charter, but is rather in conformity with most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).

Article 2(4) also prohibits "the threat of or use of force in any other manner inconsistent with the purposes of the United Nations." The first statement is found in the Charter's preamble, which lists the following among the United Nations purposes:

\ldots to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...[and] to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained\ldots

These purposes and principles can be interpreted to imply an obligation to intervene in cases where gross human rights violations are imminent or ongoing. The purposes of the UN include the development of the principle of equal rights and self determination of peoples and the promotion and encouragement of respect for human right and people's freedoms for all without distinction as to race, sex, language or religion.\textsuperscript{77} The General Assembly initiates studies and makes recommendations in order to assist in the realization of human rights and fundamental freedoms for all.\textsuperscript{78} On international economic and social cooperation, UN members pledge to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction,\textsuperscript{79} and accept to take joint and separate actions in cooperation with the Organization for the achievement of the purposes set out in Article 55.\textsuperscript{80} The Economic and Social Council is authorized to set up commissions in economic and social spheres for the promotion of


\textsuperscript{77} Article 1(2) and (3) of the UN Charter.

\textsuperscript{78} Article 13 of the UN Charter.

\textsuperscript{79} Article 55 of the UN Charter.

\textsuperscript{80} Article 56 of the UN Charter.
One of the basic objectives of the International trusteeship system is to encourage respect for human rights and fundamental freedoms for all without distinction. Fernando Tesón, a leading proponent of the legal right to unilateral humanitarian intervention, argues as follows:

The human rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting human rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore not a use of force inconsistent with the purposes of the United Nations. 82

The underlying assumption is that human rights constitute self-evident truth, and a natural law which has primacy over any notion of state sovereignty or positive international law.

Wil Vervey is of the view that the arguments supporting an liberal interpretation of Article 2(4) of the UN Charter are more convincing on the whole than those supporting a narrow interpretation. In dismissing the narrow interpretation, he states that:

It would seem that the advocates of a narrow interpretation, in fact have put forward only one argument which may have convincing merits. This is the right to invoke the clausula rebus sic stantibus, which is implicitly included in the thesis that that pre-existing rights to resort to force may revive when the justification for their abolishment, the UN enforcement machinery, does not work. The problem even with this argument is, however, that its validity would entail the conclusion that Article 51 – permitting resort to force, as it does, when the UNCS’s reaction to an armed attack takes too long, i.e. when U.N machinery aimed at maintaining peace does not work – would in fact

81 Article 68 of the UN Charter.
have been superfluous. If reference is made to the intentions of the
drafters and the objectives of the system they devised, as well as to the
letter of the Charter, a comprehensive interpretation of Article 2(4)
seems to be a more tenable one.\textsuperscript{83}

Despite arguments against intervention, Article 2(7) establishes that the prohibition
against intervention is not absolute. It provides thus:

\begin{quote}
Nothing contained in the present Charter shall authorise the United
Nations to intervene in matters which are essentially within the
domestic jurisdiction of any state or shall require the members to
submit such matters to settlement under the present Charter; but this
principle shall not prejudice the application of enforcement measures
under Chapter VII.
\end{quote}

Article 2(7) should not be confused with Article 2(4) with regard to permissibility of
intervention. Article 2(7) refers to the UN organization itself and precludes the
organization from intervening in matters essentially within the jurisdiction of any
member state with certain important exceptions regarding threats to peace and breaches
of the peace, and acts of aggression. In stating that non-intervention should not prejudice
any enforcement measures taken in accordance to with Chapter VII, this Article promotes
the idea of community will (in the form of Security Council) over state sovereignty. An
argument can therefore be made that the Security Council has authority to engage in
collective humanitarian intervention. The language of Article 2(7) contains a qualifying
clause where the promotion and protection of human rights under article 1(3) is given
primacy over respect for state sovereignty. It can, therefore, be argued that Article 2(7)
of the Charter, which precludes the United Nations from interfering in matters which are
‘essentially within the domestic jurisdiction of any state’ may not be interposed because
the member states have obliged themselves to promote fundamental human rights.

Article 2(7) does not prejudice the right of the Security Council to adopt an intrusive,
coercive approach in order to safeguard international peace and security.\textsuperscript{84} Article 2(7)
thus gives an expression to the principles of state sovereignty and appears as intended to

\begin{footnotesize}
\textsuperscript{83} Wil D. Verwey, “Humanitarian Intervention,” in Antonio Cassese (ed.), The Current Legal Regulation of

\textsuperscript{84} Kiho Cha, “Humanitarian Intervention by Regional Organizations under the Charter of the United
\end{footnotesize}
strengthen the protection of states against incursions into their domestic affairs. It should also be noted that under Article 2(7) the United Nations definitely has the legal right to use forcible measures for humanitarian purposes if the state violating the norms of human rights causes an actual threat to the peace. Moreover, the growing realization that international peace and security and the protection of human rights are inter-dependent purposes of the United Nations gives the added support to the argument that the domestic jurisdiction clause no longer shields states in matters of human rights.

Article 2(3) and Chapter VI of the UN Charter encourage states to settle their disputes peacefully and counsel against the resort to force. Article 2(3) provides:

All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This, too, is subject to the Security Council's direction and is considered in tandem with enforcement action. Humanitarian intervention can be inferred from the goals of the UN to maintain international peace and security and to advance universal respect for human rights and fundamental freedom for all. The Charter also establishes as a purpose of the UN, the development of "friendly relations among nations based on respect for the principle of equal rights and self determination of peoples." The promotion of human rights is therefore as important a purpose in the Charter as is the prevention of international conflict.

There are also numerous other sources of international law promoting the existence of an obligation to uphold human rights. Human rights that were broadly stated in the UN Charter were spelt out in the Universal Declaration of Human Rights which was

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85 Articles 41, 42 of the United Nations Charter.
87 That is, Articles 33 - 38.
88 Chapter VII of the UN Charter.
89 Article 1(1) of the UN Charter.
90 Articles 1(3), 55 and 56 of the UN Charter.
91 Article 1(2).
approved by the General Assembly without a dissenting vote.92 It has since been reaffirmed in numerous conventions, declarations and resolutions of the UN and other international organizations. It has been adopted in the constitutions of new states and regional conventions. The International Covenant on Civil and Political Rights93 and the International Covenant on Economic, Social and Cultural Rights94 were unanimously adopted in 1966 and came into force in 1976. They further elaborate on human rights in legally binding documents. These and other customary law arguments contend that intervention to prevent gross violations of human rights is justified. Hence, protection of human rights and prohibition of use of force are both consistent with the purposes of the United Nations. Humanitarian intervention in promoting such basic rights is not held to be in violation of the Charter, but in accordance with its most fundamental peremptory norm.

Recent UN resolutions have authorised humanitarian intervention under Chapter VII in response to large scale violations of human rights, thus giving a broad interpretation of Article 39 of the Charter.95 Thus, there appears to be emerging a body of law with numerous Security Council resolutions as its underpinning, to treat humanitarian intervention as valid enforcement measures contemplated under Chapter VII.96

Inger Osterdahl is of the view that there exists a repeated, if not consistent, practice on the part of the Security Council on humanitarian intervention.97 Indirectly, the practice of the Security Council on humanitarian intervention may also have an impact on general international law on the use of force. Thus, when the Security Council adopts resolution after resolution authorizing the use of force to protect human rights and other humanitarian values even when it tries not to set a precedent, it establishes a practice

92 Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, USSR and Yugoslavia Abstained.
94 Annex to GA, Res. 2200 A/63, at p. 49.
96 Supra, note 10, p. 137.
based on certain interpretation of the UN Charter which gradually affects the scope and import of the latter. Then it becomes even easier to argue that the practice of the Security Council, although still 'ad-hoc', does make law. With regard to Iraq, Resolution 678 (1990) authorized member states to use ‘all necessary means to ensure Iraq immediately and unconditionally withdrew all its forces from Kuwait and to restore international peace and security in the area.’ The Security Council in Resolution 755 charged NATO with the task to “create the necessary conditions with unimpeded delivery of humanitarian supplies” in particular with supplying food, supporting the besieged city of Sarajevo and establishing a security zone encompassing Sarajevo and its airport. 98 This example was later followed by adoption of resolutions authorizing Chapter VII operations in Rwanda, 99 Haiti 100 and Somalia. 101 In 2003 it authorized three more such forces in Africa: in Liberia, the DRC and Cote d’Ivoire. It has also authorized longer term operations in Kosovo and Afghanistan, and most recently a new multinational force in Iraq. 102

Such interventions, using the words of Sean D. Murphy, may stand as examples of “acceptance or tolerance by the international community of humanitarian intervention” and further emphasize the role of the Security Council in possible future interventions on humanitarian grounds. 103 Wolf concludes along the same lines that:

The argument against a right of humanitarian intervention is based primarily on an absolute interpretation of the article 2(4) prohibition of the use of force and the fear of abusive invocation of the doctrine. The reality of the current state practice, however, has rendered the absolute prohibition of the Charter meaningless. Thus, there exists a compelling need for a contemporary and realistic interpretation of article 2(4)

100 S/RES/940 (1994).
based on state practice that recognizes an exception to the Charter prohibition when force is required to prevent mass slaughter.\footnote{104}

To sum up, the above discussion suggests that despite the centrality of the doctrine of sovereignty and the concomitant principles of non intervention in internal affairs and non use of force the same is no longer absolute. Human rights issues are no longer matters within the domestic jurisdiction of states. The protection of human rights has become a shared responsibility between the state and the international community. Under international law the state remains the prime actor responsible for the protection of individuals on its territory, but under international supervision. There are indeed scholarly differences with regard to definition scope as well as interpretation of humanitarian intervention including its relationship with the concept of state sovereignty. These scholarly differences are not easy to reconcile. Their different interpretations are perhaps influenced by their convictions that humanitarian intervention should or should not be lawful. The correct view is held by Fonteyne, namely, that:

\begin{quote}
While divergences certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention, ...the principle itself was widely, if not unanimously, accepted as an integral part of customary international law.\footnote{105}
\end{quote}

Lauterpatcht equally convincingly argues that the human rights provisions of the UN Charter were adopted as part of the philosophy of the new international systems, the absence of sufficient means of implementation and lack of definition do not detract from their legality.\footnote{106} It is also considered that the inchoate rights in the Charter have been

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\begin{enumerate}
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concretised in developments since 1945 that make the provisions legally binding.\textsuperscript{107} Equally convincing is Brownlie’s assertion that while it can be doubtful whether states can be called to account for every alleged infringement of the rather general Charter provisions with regard to human rights, there can be little doubt that responsibility exists under the Charter for any substantial infringement of the provisions especially when a class of persons, or a pattern of activities is involved.\textsuperscript{108} The vast majority of states and authoritative writers would now recognize that fundamental principles of human rights form part of customary or general international law, although they would not necessarily agree on the identity of the principles. He cites the 1970 \textit{Barcelona Traction Case}\textsuperscript{109} wherein the international court, delivering judgment referred to obligation \textit{erga omnes} in contemporary international law, and these were stated to include "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."\textsuperscript{110}

An ILA Report stated that "the doctrine of humanitarian intervention appears to have been so clearly established under customary law that only its limits and not its existence is subject to debate."\textsuperscript{111}

The UN Charter does not expressly prohibit humanitarian intervention neither does it expressly provide for the same. Brownlie correctly points out that "it must be admitted that humanitarian intervention has not been expressly condemned by either by the League Covenant, the Kellog-Briand Pact, or the United Nations Charter."\textsuperscript{112}

Indeed, humanitarian intervention is not prohibited by the UN Charter. Human rights provisions are, admittedly phrased in general terms. Members accept to respect, promote, encourage and realize the enjoyment of human rights. They are nevertheless legally

\textsuperscript{108} Supra, note 49, p. 532.
\textsuperscript{109} (1970) \textit{ICJ Rep.} 3, at 32.
\textsuperscript{110} Supra, note 49, p. 536.
\textsuperscript{111} Supra, note 83, p. 60.
\textsuperscript{112} Supra, note 69, p. 342.
binding and can be relied upon by states that are sufficiently interested in their enforcement. While isolated case of breach may not be cause for international concern, large scale breach of the provision cannot be swept under the carpet as a matter of domestic jurisdiction. Such issues are *ipso jure* taken beyond the domestic jurisdiction of the states in question.\(^\text{113}\) It is also clear that when the Charter is interpreted liberally use of force to protect human rights becomes equally important as is the protection of state sovereignty. Human rights in my view therefore rank along side peace and security in the hierarchy of UN Charter principles.

By its authorisations, the Security Council has implicitly stated that humanitarian intervention is permitted under Chapter VII of the Charter. It has further shown that matters that might just as well have been regarded as matters internal to the state, like protection of human rights, are not only matters the Security Council is entitled to deal with under Chapter VII, but matters that may justify the authorisation of military measures.

Humanitarian intervention, in spite of the divergent views and its controversial nature, can safely be concluded to be an exception to the principle of non use of force. In the next chapter consider the evolution of this concept of humanitarian intervention.

\(^{113}\) Supra, note 106, p. 148.
CHAPTER TWO

THE EVOLUTION OF THE DOCTRINE OF HUMANITARIAN INTERVENTION

2.1 Introduction

The debate between the proponents of non intervention and the supporters of intervention in defense of human rights (humanitarian intervention), as elucidated in the previous Chapter, is sometimes presented as a struggle between a cadre of reactionary lawyers (classicists) and authoritarian rulers on one hand and liberalist lawyers (liberalists) and enlightened humanitarians on the other. But this can be both misleading and unfair. In fact it is best understood as a choice between two important value clusters based on the principle of sovereignty. This principle, which is usually traced to the treaty of Westphalia of 1648, has been the basis of a rich body of rules and practices associated with non recourse to force, the legal equality of states and respect for differing cultural traditions within countries. The second cluster value can also be traced back four centuries as a principle in international law to Hugo Grotius assertion of a “right vested in human society” to intervene in the event that a tyrant “should inflict upon its subjects such treatment as no one is warranted to inflict”, and beyond in the Natural law theory. Thus, it becomes pertinent that we trace the evolution of this doctrine from its theoretical underpinnings including the practice of states over time to date.

Prior to the 20th Century, no prohibition of the use of force existed, so that states were free to resort to war. The medieval theory of bellum justum had been developed by theologians and was never a valid rule of public international law.1

2.2 The Law of Nature

Natural law thinking has occupied a pervasive role in the realms of ethics, politics, and law from the time of ancient Greek civilization.2 Natural law is the naturalist doctrine that

human beings have certain moral duties by virtue of their common humanity. Its basic precepts are discovered through reason and, therefore, available to anyone capable of rational thought. Like human nature, they are universal and immutable. For natural law theorists, our common human nature generates common moral duties, including in some versions, the right of humanitarian intervention. Greek philosophers began arguing that there existed a universal law of nature, which everybody was obliged to obey and which all positive law had to conform to. According to Cicero, a Roman orator (106 B.C-43 B.C), natural law is

Right reason in harmony with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibition ... we cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it.

Natural law, dependent on its theological basis was gradually replaced by other theories on the basis for international law. One was that law between sovereign and equal entities must be based on their consent combined with some identifiable general principles. The essence of this approach was that the assumption of legal obligations and observance of rules were a matter of choice. Its development can be seen in the works of a succession of writers like Hugo Grotius, Alberico Gentili, Emmerich Vatel and others whose theories we shall delve into hereunder.
2.3 Just War Theories

The just war doctrine corresponds to the view that engagement in war may be justifiable, and must be justified.\(^6\) The doctrine was prefigured in classical Greek and Roman thought, but is essentially a product of Christian theology and of the changing circumstances of the church under the Roman Empire.\(^7\) The States efforts to regulate the conduct and impact of the use of force were an early impetus to the development of international law.\(^8\) The primary ethical machinery for considering whether aggressive war can be humanitarian must at least begin with the ‘just war’ tradition. This tradition has been criticized in various ways, but suitably understood, it provides a reasonable apparatus for tackling the question of war and intervention.\(^9\)

As early as can be traced, people, princes and states have taken arms and always stated that they were doing so for a just cause. It must be noted that during the medieval times for the purposes of human rights, the waging of war was regarded as legitimate resort to use of force.\(^10\) Essentially the just war theory argues that a war can only be considered legitimate if it is both justified (*jus ad bellum*) and conducted in an ethical manner (*jus in bello*). Two of the essential conditions for waging of such a war, are that it must be for a just cause, and that it must be fought with good intentions. Traditionally, the only just causes were in response to an armed attack or to redress a grave wrong suffered. In addition, only a war lawfully declared by a government of a sovereign state could be considered a just war. The issue of intervention on humanitarian grounds is therefore not new, as may be seen in the writings of some of the ‘founding fathers’ of international law as well as some of the more recent doctrinal statements on what has come to be called humanitarian

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\(^7\) Ibid.


intervention. The idea that a just war theory is merely “Western” or “European” is a rough approximation to the truth in terms of origin of these explicit intellectual practices, but this says nothing of their validity or relations to parallel theories from other cultures. There is also a great deal of Chinese philosophical tradition that addresses the question that a moral theory about resort to war and conduct of war must address.

2.3.1 Roman Origins

The medieval era falls around the time of the reign of the Roman empire. Consequently they espoused the practice of the Romans that was enshrined in the *corpus juris civilis.* At this time, the doctrine of just war (*bellum justum*) was developing because jurists had also taken elements of the Greeks and Roman philosophy thus just war could be used for the maintenance of ordered society. During this period, Rome was also expanding its empire and among the expansion is that Christianity was also being enshrined into part of their administration. As early as this time, the development of *bellum justum* was influenced by Christian theology and Canon law. At this time the Romans came up with college of priests known as the *jus fetiale* and their roles were to develop rules governing inception of war, this included an official demand for satisfaction or warning and a declaration of war to be made and according to Cicero, all this time the church had a pacific attitude towards war of any nature. Amongst other things, it did not allow

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13 “Corpus Juris”, The Columbia Encyclopedia, 6th ed., (Columbia University Press, New York, 2006). Corpus *juris civilis* was the most comprehensive of the Roman practices and laws. It was compiled under Justinian I, the Byzantine emperor. The first three parts can be traced to the years between 529 and 535 BC and they were as a result of the work of jurists who wanted to systematize the Roman jurisprudence and reduce it to order after one hundred thousand years of development.


16 Ibid., p. 62.

Christians to enlist as soldiers but during the reign of Emperor Constantine, Christianity was made the official religion of the empire; thus the church was forced to alter its beliefs and teachings about war. This was when Emperor Constantine’s conversion paved the way for Christianity to become the official religion of the empire instead of a subversive sect. The church thus dropped its early pacifism.  

The doctrine of just war consequently arose as a consequence of the Christianization of the Roman Empire and the ensuing abandonment by Christians of their pacifism. The question as to when a Christian could participate in a war without committing a sin was answered by St Augustine. Fighting was permissible, he said if the war was just, that is, if one fought on the just side of war. The “just war” was thus founded on theological doctrine, but with the breakdown of the church’s authority, power was assumed by the sovereign nation state and the right to use force was recognized as an inherent right of every independent sovereign state. International law placed no restraints on use of force; factors other than legal considerations affected a state’s decision to resort to force and the use of force was regarded as a legitimate action for all states to adopt.

2.3.2 Christian Theology

All arguments in the intervention literature fit in the framework of the just war theories; however, there is little reference directly to the theories. Literature draws implicitly on considerations and arguments that have been discussed in the just war traditions since its early medieval period. Specifically though, literature on just war can be traced to St. Augustine of Hippo in the 5th century. The theme was revived in the twelfth century and, later in the thirteenth century; it was made systematic by St Thomas Aquinas. The European theologians were primarily responsible for formulating the specific just war theories.
criteria for judging the morality of war. The principles of a just war originated with classical Greek and Roman philosophers, but in the Christian tradition it was St. Augustine (354-430), and later St. Thomas Acquinas (1225-74), who laid the modern foundations of the just war theory.

St. Augustine tried to bridge the gap between the Christian ideals and pacifism. He revived the *justum bellum* doctrine as a moral tenet. He introduced criteria that could make the waging of war justifiable. He contended that one’s own life or property was never a justification for killing one’s neighbour, but that whenever one speaks of rules of nations, they had the obligation to maintain peace which gave them the right to wage war. The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority. The crux of this theory was that it also extended the concepts of just cause and intention. The justness of an action could not be judged without evaluating its propelling intention.

St Augustine defined the just war in terms of avenging injuries suffered where the guilty party had refused to make amends. War was to be embarked on to punish wrongs and restore peaceful status quo and no further. According to him, the only reason for waging war was to defend the nations’ peace against serious injury. He stated that “a just war is want to be described as one that avenges wrongs when a nation or state has refused to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly.”

The theologians and canonists who followed St. Augustine accepted this approach and expanded upon the theme of the just war. The most influential contribution was made by St. Thomas Acquinas. St. Thomas Acquinas in the thirteenth century took the definition

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22 Ibid., p. 3.
24 Supra, note 14, p.778.
26 Supra, note 15, p. 62.
of the just war a stage further by declaring that it was the subjective guilt of the wrongdoer that had to be punished rather than the objectively wrong activity. Although he emphasized St. Augustine’s thoughts and ideas, he also synthesized Greek classic writings and Christian theories. He held that reason and faith were two complimentary methods of investigation. His theories about just war could be broken down into three basic tenets, namely, authorized authority, a just cause, and a right intention. Writing about authorized authority, he emphasized that the sovereign had the responsibility for the common good of those committed to his care, only he could declare war, and had the lawful recourse to the ‘sword’ to defend the common good against enemies by having recourse to arms.27

2.3.3 Medieval Era

The classical origins of what became known as humanitarian intervention lie in the emergence of a substantive doctrine of the just war in the middle ages.28 Definitions of the requirements of justice in what came to be known as the medieval theory of just war varied considerably and were seldom worked out. It was after all, a moral doctrine rather than a legal code and broad principles were in some respects preferable to fine rules. The most important features of the typical medieval definition of just war was its breadth; just war theories took quite a generous view of the circumstances that might justify a ruler resorting to war, and the vagueness of the definition tended to enhance its breadth. In short, the traditional doctrine of just war came very close to the proposition that injustice, broadly conceived and left largely undefined, confers legitimacy upon those who react militarily to it.29

There have been other promulgators of the just war theories which can be traced to the sixteenth and seventeenth centuries. These promulgators rose at a time when nation states and modern international law was beginning to crystallize. They are the jurists and

27 Ibid.
29 Supra, note 6, p. 88.
scholars of that particular era, but mostly referred to as the fathers of international law. In this respect, an important contribution was made by a number of imaginative and forward looking jurists, such as the Spaniards Fransisco De Vitoria (1483-1608) and Fransisco Suarez (1548-1617), the Italian Alberico Gentili (1552-1608), a protestant who fled to England where he taught at Oxford and, above all, the Dutchman Hugo Grotius (1583-1645). They set out to lend a lucid legal justification to the interests of emerging states in general and of their own countries in particular. It is during this era that a complete theory which included the proper waging of war was established. They acknowledged pacifism as a theory, but held that war had to be waged according to certain basic requirements for it to be justified.

Suarez held that the defense of innocent people, no matter where in the world, would be a just cause. According to him, God does not will the evils for which war is waged, but merely permits them; and therefore he does not forbid that they should be justly repelled. From this, it was deduced that denying the right of innocent passage; denial of freedom of the sea; piracy and killing of innocent humans, all had to be just causes for war. Gentilli held that it was the nature of wars for both sides to maintain that they are supporting a just cause. However, admitting that all just causes for war as part of the law of nature cannot be so easily be presented, in general, it may be true that in nearly every kind of dispute, that neither of the two disputants is unjust. From earlier times through to the fathers of international law, arguments and interpretations had escalated and compounded resulting to a situation where one could not identify a specific authority, to this Gentili states:

30 Supra, note 12, p. 160.
33 Fransisco Suarez, De Bello (1583) I paragraph 5
It is the nature of wars for both sides to maintain that they are supporting a just cause. In general, it may be true in nearly every kind of dispute, that neither of the two disputants is unjust.\(^{35}\)

Vitoria added to this argument by saying that although war could only be just to one party on the objective sense but that the other party acted in good faith but also other invisible ignorance either of the fact or of the law making it just cause to him, but in a subjective sense.\(^{36}\) The same position was taken by Hugo Grotius.\(^{37}\) According to Emmerich Vattel:

> War cannot be just on both sides, that one party claims a right the other side disputes the justice of the claim, one complains of an injury, the other denies having done it. When two persons dispute over the truth, a proposition it is impossible that the two contrary opinions should be at the same time true.\(^{38}\)

Even though he went further than his predecessors in upholding the independence of a nation and its sovereignty, he too recognized a right of intervention in the event of extreme inhumanity. He stated:

> When a form of religion is being oppressed in any country, foreign nationals professing that form may intercede for their brethren; but that is the extent to which they may lawfully go, unless the persecution is carried to an intolerable degree, when it becomes a case of evident tyranny, against which all nations may give help to an unfortunate people...National lines all break down when there is a question of uniting against fanatics who seek to destroy all who do not unhesitatingly receive their doctrines.\(^{39}\)

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35 Ibid.
Winfield, while tracing the history of intervention, finds that “intervention” is a word of modern growth. But the group of ideas which it represents is, as old as Vattel. He argues that Vattel himself states it as a corollary from the state independence rule followed by an exception. Regardless of their fundamental assertions concerning sovereign independence, the fathers of international law were not hesitant in asserting a right of what could today be called humanitarian intervention if they considered the circumstances warranted it. As early as 1625, the Dutch jurist Hugo Grotius asserted:

[T]he right to make war may be conceded against a king who openly shows himself the enemy of the whole people...[T]he kingdom is forfeited if a king sets out with a truly hostile intent to destroy a whole people...[T]hough it were granted that subjects ought not, even in the most pressing necessity, to take up arms against their prince...we should not yet be able to conclude from thence, that others might not do it for them...The fact must be recognized that kings, and those who possess the rights equal to those of kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them, but excessively violate the law of nature or of nations in regard to any persons whatsoever. For liberty to serve the interests of human society through punishments, which originally rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities...Truly it is more honorable to avenge the wrongs of others rather than one’s own...[K]ings, in addition to the particular care of their own state, are also burdened with a general responsibility for human society...41

It should be noted that the principles of Grotian thinking are similar to the liberal perspective discussed in the previous Chapter of this study.


40 P. H. Winfield, “The History of Intervention in International Law,” 3 British Year Book of International Law 136 (1922-23).

Vitoria went so far as to claim the right to wage war or assert one’s own sovereignty on humanitarian grounds. When considering the rights of Spaniards to acquire a lawful title over the North American Indians, he stated:

Another possible title is founded either on the tyranny of those who bear rule among aborigines of America... [A]ny one may defend them from such tyrannical and oppressive acts, and it is especially the business of princes to do so...And if they refuse [to abstain from such activities], it is a good ground for making war on them and proceeding against them under the law of war, and if such sacrilegious rites cannot otherwise be stopped, for changing their rulers and creating a new sovereignty over them.42

Grotius is noted for having divorced the law of nature from God. He thought that it was not necessary to use God as the explanatory factor. To this effect, he stated that the law of nature should have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God.43 Grotius based this right on the natural law of societas humana - the universal community of human kind.44 He wrote down the conditions of a just war for everybody, Christian and non Christian alike. Note that Grotius talks of the right, not the duty, of humanitarian intervention. States have a discretionary right to intervene on behalf of the oppressed. But they do not have to exercise such the right if their own citizens are unduly burdened in doing so.45 Grotius’ most valuable contribution to legal theory is that he applied the concept of natural law to international law. His law of nations was built on his law of nature.46 His view was that the individual possessed some inherent right that a state was supposed to secure and this represented the limits of nation states internal sovereignty. Such that if the sovereign

42 Supra note 36, p. 159.
46 Supra, note 1. Also see supra, note 25. International law as originally conceived by the man sometimes labeled its father was based less in legal doctrine than it was in a body of principles rooted in the laws of nature.
violated these basic rights he had transgressed his jurisdiction and other states should have the right to intervene and re-establish order of the law of nature.

By and large, all the classical writers to whom reference has been made drew their examples from mythology, Greek, Roman and Church history and to a lesser extent from recent state practice. The issue of the right to intervene for humanitarian reasons became a matter of state policy particularly during the 19th century, especially on behalf of co-religionist minorities. To sum up, the authorities on the natural law in the 16th and 17th Centuries clearly considered humanitarian intervention, as a part of the doctrine *bellum justum*, to be in conformity with the law of nature. Wars were not prohibited *per se*, but had to fulfil certain requirement in order to be legal. In this way the natural law put limitations on the independence of states, in that their sovereignty was restricted by the principle of humanity and their external sovereignty by the rules of *bellum justum*.

### 2.4 Towards *jus ad bellum* for the Sovereign State

Medieval notion of the just war was succeeded by the traditional international legal position; the doctrine that sovereign states have an unqualified right to resort to war. As J. L. Kunz has put it, “under general international law, as it stood up to 1914, any state could at any time and for any reason go to war without committing an international delinquency. The *jus ad bellum* [right to war] remained unrestricted”. Thus, the change in political and legal theory that started with Grotius, with a shift away from the influence of Christian doctrines, resulted in a more realistic view on the theory of sovereignty and law of war. Bodin was one of the first scholars to write systematically about the principle of sovereignty. He held that the sovereign, as the supreme legislator, was free from the restraints of positive law. The sovereignty of the nation was therefore virtually unlimited. In this respect Bodin was a predecessor of Hobbes, who held that the people

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had formed societies to protect them from anarchy of all against all.\textsuperscript{50} As long as the government protects the majority of the people, the people have to obey the laws, no matter. This absolute sovereignty also applied externally; therefore no other state had the right to interfere with the sovereign’s treatment of its own people. Locke, even though he argued for a somewhat weaker principle of sovereignty, also saw the social contract as the foundation of society, giving the sovereign very wide discretionary powers both externally and internally.\textsuperscript{51} This right to resort to war was usually explained as emanating from that mysterious thing called sovereignty; war was in itself an act of the sovereign will, which stands haughtily above necessity of explaining itself or defending its actions.\textsuperscript{52} This doctrine of the sovereign right of states to go to war without necessity of justification stood essentially unchallenged in the eighteenth century and nineteenth centuries. From the nineteenth century and twentieth century, the attempts to distinguish between just and unjust wars in positive international law were discredited and abandoned. States continued to use the rhetoric when they went to war. However, the justification produced no legal reverberations.\textsuperscript{53}

These theories of sovereignty must be seen against the background of the religious wars of the sixteenth and seventeenth centuries which had caused constant disorders in Europe. It is therefore no surprise that the principle of sovereignty got its legal confirmation in the Peace of Westphalia 1648 which inaugurated the modern European state system and established the nation state as the principal actor in international law.\textsuperscript{54} Before this period fully fledged states, in the modern sense, did not exist. Centralized structures, which had gradually come into being in Europe between 1100 and 1300, did not assume the features of a modern state until 1450.\textsuperscript{55}

\textsuperscript{50} Supra, note 2, p. 88.
\textsuperscript{51} Ibid.
\textsuperscript{52} Supra, note 6, p. 89.
\textsuperscript{54} Supra, note 49, p. 29.
\textsuperscript{55} Supra, note 31, p. 23.
2.4.1 The Peace of Westphalia

The origin of the international community in its present structure and configuration is usually traced back to the 16th century. It largely crystallized at the time of the Peace of Westphalia (1648), which concluded the ferocious and sanguinary Thirty Years War which had caused great effusion of Christian blood and desolation of several provinces’ (preamble to the Treaty of Munster). The major countries of Europe had been involved; the conflict had started in 1618 for religious reasons, namely the struggle between catholic and protestant countries, but it soon turned out into an all out struggle for military and political hegemony in Europe. The treaties of peace were signed in the Westphalian towns of Munster and Osnabruck.

The Peace of Westphalia of 1648 inaugurated the modern European state system and established the nation state as the principal actor in international law. The Peace of Westphalia provided the foundation for the balance of power policies that remained substantially unchanged until the French Revolution and the Napoleonic wars and marked the transition of Europe from the medieval period of vertically structured hierarchies under Pope and Emperor to the horizontal organized system of sovereign states. The treaty affirmed the right of rulers to determine the allegiance of their states and subject and the corresponding secular supremacy of territorial rulers over their dominions. These treaties marked the end of the Holy Roman Empire as an effective institution and inaugurated the modern European state system. The treaties constitute a watershed in the evolution of the modern international community. They recognized the existence of independent states of other religions, they also granted members of the holy Roman Empire (some three hundred small states) the *jus foederationis*, that is the right to enter into alliances with foreign powers and to wage war, provided that those alliances or wars were neither against the empire nor against public peace and the Treaty (Treaty of Munster, Art. 65). They also crystallized a political distribution in Europe. In short the peace of Westphalia testified to the rapid decline of the church and to the de facto

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56 Ibid.
57 Ibid., p. 34.
58 Supra, note 28, p. 12.
disintegration of the Empire. By the same token it recorded the birth of an international system based on a plurality of independent States, recognizing no superior authority over them. 59 The two treaties also set up a scheme for collective security, which in Cassese’s view remained, however, a dead letter. 60

2.4.2 The 1899 and 1907 Hague Conventions

The Hague Conventions of 1899 and 1907 marked the beginning of the attempts to restrict the liberty to resort to war. 61 The first steps designed to curtail somewhat the freedom of war in general international law (through multilateral treaties) were taken in the two Hague Peace Conferences of 1899 and 1907. 62 Article 1 of the Hague Convention III of 1907 relating to the Opening of Hostilities, the contracting powers recognized that hostilities between them must not commence without a prior and unambiguous warning in the form of either a reasoned declaration of war or an ultimatum containing a conditional declaration of war. 63 Convention III was more than anything a formalization of the liberty a formalization of liberty to resort to war. 64

Under article 2 of the Hague Convention (No. 1 of both the 1899 and 1907) for the Pacific Settlement of International Disputes, contracting parties agreed that in case of a serious dispute before making an appeal to arms, they would resort (as far as circumstances allowed) to good offices or mediation of friendly states. The liberty to go to war was circumscribed here in an exceedingly cautious way, leaving to the discretion of parties the determination whether to employ force or search for amicable means of settling disputes. It also obligated contracting parties not to have recourse to armed force

60 Ibid.
62 Supra, note 28, p. 76.
63 The Hague Convention III of 1907 relating to the Opening of Hostilities.
64 Ibid.
for the recovery of contract debts unless the debtor state refused to an offer of arbitration, prevented agreement on a *compromis* or rejected an arbitral award.\textsuperscript{65}

A similarly modest restriction on the liberty to resort to war was introduced by the so-called Byran treaties concluded from 1913 onward between the United States and a number of states. Nineteen of such treaties existed in 1916. The contracting parties were obliged to submit all their disputes to a conciliation commission and not to begin hostilities prior to the commission’s report, which had to be delivered within a year at latest.\textsuperscript{66}

### 2.4.3 The 1919 League of Nations Covenant

Following the First World War the victors decided up an international institution designed to prevent the recurrence of worldwide armed conflict.\textsuperscript{67} The experience of the First World War gave rise to a more comprehensive effort to restrict war within the framework of the League of Nations.\textsuperscript{68} Its unprecedented devastation prompted states to establish an international forum in which it was hoped states would discuss their problems rather than resort to force. Consequently the League of Nations was founded. The creation of the League of states was dedicated to the maintenance of peace.\textsuperscript{69} The Covenant of the League of Nations, signed in 1919, did not prohibit was but rather placed limitations on the use of force.\textsuperscript{70} It thus established a partial prohibition of war. There was no ban on resort to force short of war. This qualification manifestly induced states to engage in war operations while claiming they were merely using coercion short of war and were therefore not breaking any provision of the covenant. An instance is the case of

\textsuperscript{65} Article I of the Hague Convention (No. II of 1907).

\textsuperscript{66} Ibid.

\textsuperscript{67} Supra, note 31, p. 36.

\textsuperscript{68} Supra, note 5, p. 115.


\textsuperscript{70} Supra, note 10, p. 277.
Manchuria, when Japan attacked China (1932)\textsuperscript{71} In the event of a dispute which was potentially disruptive, member states agreed under the Covenant to submit the dispute to arbitration, judicial settlement, and inquiry by the Council of the League. War was not to be resorted to until three months after the award by the arbitrator.\textsuperscript{72} Members also agreed not to go to war with fellow members of the League who complied with either arbitral award, judicial decision or with a unanimous report of the Council. However, once this process failed to produce a settlement the disputants remained free to “take such action as they shall consider necessary for the maintenance of right and justice” (Art. 10). Recourse to war was definitely forbidden only against a state complying with the award on a report that had been unanimously adopted by Council.\textsuperscript{73} It has been argued by Bruno Simma that in practice, most disputes submitted to the Council were not dealt with unanimously, this mechanism of the Covenant did not prove to be an effective prohibition of war, as the United States never belonged to the league and the Soviet Union, Germany, Japan and Italy were members only for a short period of time.\textsuperscript{74} According to Cassese USA held aloof and its absence undisputedly weakened the institution from the outset.\textsuperscript{75} The Covenants prescriptions remained treaty law and did not bind states outside the league.

2.4.4 The 1924 Geneva Protocol

The Geneva Protocol for the Pacific Settlement of International Disputes (1924) was an attempt to overcome the shortcomings of the League Covenant by stipulating in Article 2, the obligation of states in no case to resort to war, except in self defense or in case of collective enforcement measures. The Protocol however never became binding law.\textsuperscript{76}

\begin{small}
\begin{itemize}
  \item \textsuperscript{71} Supra, note 31, p. 36.
  \item \textsuperscript{72} Article 10 of the Covenant of the League of Nations (1919).
  \item \textsuperscript{73} Articles 13(4) and 15(6) of the Covenant.
  \item \textsuperscript{74} Supra, note 68, p. 115.
  \item \textsuperscript{75} Supra, note 31, p. 36.
  \item \textsuperscript{76} Supra, note 68, p. 116.
\end{itemize}
\end{small}
2.4.5 The 1924 Locarno Treaties

The agreement on the terms of the Pact was reached at Locarno in October, 1925. It was formally signed in London in December by France, Great Britain, Germany, Italy and Belgium. These were a series of agreements wherein the five countries mutually agreed to guarantee peace in Europe. The first was the Treaty of Mutual Guarantee whereby all the five powers guaranteed the existing frontiers between Germany, France and Belgium. They also provided for the demilitarization of the Rhineland. The three countries also agreed not to resort to war with one another unless the terms of the agreement were grossly breached or under the directions of the League against the aggressor. The Locarno treaty of 1925 prohibited every attack, invasion or war, subject to narrow expectations. However, this treaty became void in 1935.

Four arbitration treaties followed the pact made between Germany on the one hand and France, Poland and Czechoslovakia on the other hand. In each of the agreements the parties pledged to settle all disputes peacefully. The treaties were mutually interdependent. This meant that in the event of any one of the signatories failing to keep to the terms of the pact, the others would assist the aggrieved party. The shortcomings of the Locarno Treaties is that they were parallel diplomatic channel outside the League employed by the major European powers. In so doing, they compromised and made ineffective the League’s disarmament goals and its collective arrangements.

2.4.6 The 1928 Kellog Briand Pact

The decisive turning point in the development away from the freedom to wage war and towards a universal and general prohibition of war was constituted by the Kellog Briand Pact. (1928). Codification of a norm banning the use or threat of the use of force in

78 Supra, note 15, p. 77.
80 Available http://www.yale.edu/lawweb/avalon/imt/kbpact.ht. (Visited on 10/10/06).
81 Supra, note 68, p. 116.
relations between states was seen as a major achievement on the way to creating a new transnational order of peaceful co-existence among nations. The international community was successful in agreeing to a comprehensive ban on war as an instrument of national policy. Sixty three states signed the General Treaty for Renunciation of War\textsuperscript{82} (also known as the Kellog-Briand Pact or the Pact of Paris) in which parties agreed to seek a peaceful solution to all disputes arising between them. A general prohibition was formulated, subject to the right of self defense. This latter exception is not expressly mentioned in the text of the treaty, but undoubtedly represents a tacit agreement between parties.\textsuperscript{83}

In Article 1 of the Pact, the High Contracting parties solemnly declared “that they condemn the recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”. Its preamble proclaims an outright renunciation of war as an instrument of policy. With the Kellog Briand Pact, international law progressed from \textit{jus ad bellum} to \textit{jus contra bellum}, but although generally prohibited under the Pact, war remained lawful either in the case of self defense or as an instrument of international policy. This was the first time, a general prohibition of war was formulated but again there was no provision for enforcement mechanism. Nearly all states existing at the time became parties to the treaty (only some states of South America stood to one side, they however were bound by the Saavedra Lamas Treaty signed on October 10, 1933 at Rio de Jeneiro. Article 1 is worded almost identical to the Kellog Briand Pact. The condemnation of war was not restricted to the relations between the Saavedra Lamas Treaty, but also extended to their relations with other states). The regulations of the Kellog Briand Pact soon became part of general customary international law and are still valid today.\textsuperscript{84} Although of utmost importance, the Kellog Briand Pact was not without its deficiencies. The prohibition of war was not linked to any system of sanctions. The preamble only stated that a state violating the Pact “should be denied the benefits furnished by this treaty.


\textsuperscript{83} Supra, note 68, p. 116.

\textsuperscript{84} Supra, note 79.
2.4.7 The 1945 UN Charter

In 1945 on June 26 the Charter of the United Nations was signed in San Francisco (it came into force on 24 October, 1945) Although the order of peace as represented by the League of Nations was not of a durable nature, with the whole system collapsing in the conflagration of the Second World War, the abrogation of the *jus ad bellum* was upheld during the reconstruction of the international system since 1945. One of the major reactions to the devastations of the Second World War and the unfettered recourse to violence marking those dark years was the keen desire to set up a world organization that would be capable of preventing ‘the scourge of war’ and peacefully settling of all major disputes between states. Thus the UN was created. The Charter banned the use or threat of use of force and at the same time granted the Security Council the power to take sanctions and measures involving the use of force against any state breaking the ban. For the first time the Carter prohibited not just war, but any threat of or resort to use military force.

The United Nations Charter incorporates the principle earlier formulated in the Kellog Briand Pact and explicitly stipulates in Article 2(4), that “all members shall refrain in their international relations from threat or use of force against the territorial integrity of or political independence of any state. Article 2(4) of the UN Charter is today the basis for discussion of the problem in the use of force. Its predominant significance is emphasized by authors who have called it the “cornerstone of peace in the Charter”, the “heart of the United Nations”, or “the basic rule of today’s public international law”.

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85 Supra, note 31, p. 40.
86 Ibid.
87 Supra, note 79.

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Article 2(7) stipulates:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

It opens a window for humanitarian intervention by allowing the UN to intervene in domestic affairs of states. War was therefore not completely outlawed.

It can therefore be said that state sovereignty has co-existed with intervention for the cause of humanity since the inception of the state system. Twentieth Century writers such Lauterpatcht \(^8^8\) maintained that a right of humanitarian intervention existed in international law. Seeking objective criteria for defining humanitarian intervention as an exception, and drawing upon the *just war* theories it can be argued that states possess the inherent rights to use force above and beyond the restrictions imposed by the UN Charter. The rights of states are ultimately derived from the rights of individuals then the principle of sovereignty has a human right component to it, hence if the right of the individual is blatantly disregarded, then one must question the status of the sovereign claim just as natural law and subsequent fathers of international law did. Even if the present day idea of state sovereignty, and its corollary of non intervention, has its roots in the Peace of Westphalia (1648) after a political compromise reached in the aftermath of the Reformation and wars of religion, \(^8^9\) it can also be argued that in practice the concept of sovereignty has always been frayed at the edges.

It is therefore clear that the ethical and legal origins of this doctrine stretch much further to the moral impetus to war over religious differences, and the legal restraints that came to be placed on intervention as sovereignty emerged as the axiom of international


society of equals. Having sketched out its pedigree, it is now possible to consider the content of this right in customary international before the advent of the UN Charter.

2.5 Humanitarian Intervention as Customary International Law

Rules and norms of any legal system derive authority from their source. The sources articulate what the law is and where it can be found. In a developed municipal system, sources may readily identifiable in the form for example, of Parliamentary legislation and judicial decisions. However in international plane there is neither an international legislature passing international legislation nor is there an international court to which all members of the international community are requested to submit. Furthermore the international legal system does not posses a written constitution identifying principal organs of government. In the absence of such law giving sources, article 38 of the Statute of the International Court of Justice has provided an answer on how the lawfulness of alleged rules of international law can be assessed. It provides:

The Court whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:
(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.
(b) International custom, as evidence of a general practice accepted as law,
(c) The general principles of law recognized by civilized nations;
(d) Subject to the provisions of Article 59, judicial decisions and the teachings of most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38(1) of the Statute of the ICJ lists among the basic sources of international law “international custom, as evidence of a general practice accepted as law.” It is perhaps the most fundamental source, particularly when treaty law is scarce or non existent. Thus, even if the UN Charter prohibits the use of force as propounded by those who classically interpret the Charter provisions, it can be argued that rules regarding the use of force can be found outside the Charter in the realm of customary law. In the Nicaragua Case, while considering the right of intervention by invitation, the ICJ observed:

There are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own. 91

Thus, customary law can be a source of rules regarding humanitarian intervention even if Article 2(4) is seen as prohibiting the use of force on a general basis.

The customary practice is the oldest source of international law. 92 In the absence of an international executive and legislature, custom has exercised an influential role in the formation of international law. Custom ought to be distinguished from mere usage, such as behaviour which may be done out of courtesy, friendship or convenience rather than out of a legal obligation or a feeling that non-compliance would produce legal consequences, such as sanctions imposed by other members of the international community. 93 Brierly remarks that "what is sought for is a general recognition among states of a certain practice as obligatory." 94 Customary international law is an informal, unwritten body of rules that derives from the practice of states together with opinio juris that is a belief on the part of governments, that the practice is required by law or is at least of relevance to its ongoing evolution. 95

According to Cassese, the main feature of custom is that normally it is not a deliberate lawmaking process, as in the case of treaties where states come together to willingly agree upon legal standards of behaviour acceptable to all those participating in the law.

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93 Supra, note 10, p. 9
making process. States, when participating in the norm making process in the case of custom, do not act in the primary purpose of laying down international rules; their primary concern is to safeguard some economic, social or political interest. He cites Kelsen who defines custom as ‘unconscious and unintentional law making.’

Nevertheless, procedural accounts of international legitimacy are predicated on the assumption that the test of legitimacy is state practice.

Notwithstanding the clear wording of Article 2(4) of the UN Charter which prohibits the use of force, it can be argued that rules regarding the use of force can be found outside the Charter in the realm of customary law. The development of new customary law allowing act of humanitarian intervention cannot be ruled out as was highlighted by the ICJ in the Nicaragua Case of 1986: “Reliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend to towards a modification of customary law”. The Court declared itself prepared to examine “whether there might be indications of a practice illustrative of belief in a kind of a general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state whose cause appeared particularly worthy by reason of political and moral values with which it was identified.”

Court could not find evidence for such new rule, but by posing the question it left open the possibility to return to this matter at a future date. Subsequent interventions as we shall explore in part of this Chapter and in the next Chapter will therefore shed light as to whether a new norm has emerged.

The Court also opined that:

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96 Supra, note 31, p. 156.
98 Supra, note 91, p. 109, para 207.
[T]here are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter “supervenes” the former so that the customary international law has no further existence of its own.\textsuperscript{101}

Customary law can therefore be a source of rules regarding humanitarian intervention even if article 2(4) is seen as prohibiting the use of force on a general basis.

2.5.1 \textit{Opinio Juris}

The necessity of \textit{opinio juris} was expressed in the \textit{North Sea Continental Shelf Cases} in this way:

Not only must the acts concerned amount to a settled practice, but they must also... be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.\textsuperscript{102}

This may seem a difficult requirement to meet, and a serious barrier for the establishment of customary law, but it is not so in practice. In the Nicaragua case customary rules regarding the illegality of use of force were established. The court noted the General Assembly resolutions such as the Declaration Concerning Friendly Relations had gained widespread support and said that

The effect of consent to the text of such resolutions ...may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.\textsuperscript{103}

What the Court seems to be saying here is that state practice does not really matter when there is a clear consensus about the content of the rule, at least when it comes to norms of fundamental value, such as the principle of use of force. This reflection was elaborated by Kirgis, who asserted that customary law is established on a sliding scale. He wrote that

On this sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative

\textsuperscript{101} Supra, note 91.

\textsuperscript{102} Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands, (1969), ICJ Rep. 3 at para. 77

\textsuperscript{103} Supra, note 91, at para 188.
showing of an opinio juris... At the other end of the scale, a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule. ¹⁰⁴

It thus suffices to note that humanitarian intervention is a norm, though emerging, of fundamental value and the practice of states as we will note in the later, makes it a settled rule of law. We now look at the practice of states during the period at hand.

2.6 Humanitarian Intervention – Pre-Charter Practice

An analysis of pre Charter state practice illustrates the paucity of evidence of a general right of humanitarian intervention in customary international law. ¹⁰⁵ In the 19th Century, humanitarian intervention was often only undertaken by a group of states rather than individually. Intervention for the protection of human rights was an important political legal concern in the 19th century. In most cases, the protection of human rights was centred on the prevention of persecution of religious minorities. The 19th Century witnessed military and diplomatic interventions to protect Christian minorities, often in the Muslim dominated Ottoman Empire, which stretched from the Middle East to the Balkans. ¹⁰⁶ The term intervention came into use over the course of the 19th century, but its meaning remained imprecise. ¹⁰⁷

One of the earliest known instances akin to humanitarian intervention occurred in 480 BC. The Prince of Syracuse, after defeating the Carthagians, laid down as one of the conditions of peace that they refrain from the barbarous custom of sacrificing their children to Saturn. ¹⁰⁸

¹⁰⁷ Supra, note 28, p. 8.
¹⁰⁸ Supra, note 56, p. 21.
2.6.1 1827 Intervention in the Ottoman Empire

The three powers, France, Russia and the United Kingdom intervened to protect the Greek Christians from the oppressive rule of the Turks, following a number of massacres.\footnote{Ibid.} The London Treaty\footnote{Treaty between Great Britain and France and Russia for The Pacification of Greece, signed at London, 6 July 1827.} which formally authorized the intervention stated that it was undertaken by “sentiments of humanity”. The three powers invoked inter alia humanitarian motives. The outcome of that intervention was the independence of Greece, which had arisen against the Ottoman Empire and whose population had been victims of bloody repression.\footnote{Supra, note 92, p. 21.}

This intervention is frequently cited in the literature as the earliest example of true humanitarian intervention.\footnote{Ellery C. Stowell, Intervention in International Law (John Byrne & Co. Washington DC, 1921, p. 126 cited in Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, (Oxford University Press, Oxford, 2001), p. 28.} Stowell notes that some writers classify it as a defense of the right of self-determination, but concludes that it has ‘usually’ been classified as an instance of humanitarian intervention motivated by the uncivilized methods in which war was being conducted.\footnote{Supra, note 28, p. 28.}

2.6.2 The French Intervention in Ottoman Lebanon to Protect the Marionite Christians

Throughout the 1840s and 1850s tensions between the Druze and the Marionites under Ottoman rule in Lebanon rose due to social and economic changes, pitting the more populous, poorer, but upwardly mobile Marionite Christians against the politically strong aristocratic and feudal Druze Muslims.\footnote{John P. Spanglo, France and Ottoman Lebanon: 1861-1914, 1-55 (1977), cited in Ravi Malingham, “The Compatibility of the Principle of Non Intervention with the Right of Humanitarian Intervention,” I (1) Journal of International Law and Foreign Affairs 238 (1996).} In June and July 1860, thousands of Marionite Christians were killed by Druzes and Muslims on Mount Lebanon and Damascus, then
part of the greater Syria but within the Ottoman Empire. There was no response from the Ottoman government to quell the violence. It was this apparent abdication of Ottoman Government will to end the uprising that drove the French into action. The French had initially warned the Ottoman Government to restore order. The Conference of Paris in 1860 by leading European states had sanctioned the intervention. Although the French troops later stayed on and behaved like an occupier force, it was regarded as humanitarian intervention.

Perhaps the most important element of the incident as a possible instance of humanitarian intervention is the relative disinterestedness of the acting parties. Despite occurrences within the context of the French colonialism in the region, the occupying force did arrive under the mandate of five European powers and departed when that mandate concluded. They did not seek any territorial change, advantage, exclusive influence or concession under the pretext of the occupation. In Chesterman’s view, humanitarian concerns of the powers, albeit only for the well being of Christians, appear to have been genuine. In addition, it suggests that humanitarian intervention and sovereignty are not necessarily in conflict and can be reconciled.

2.6.3 The US intervention in Cuba, 1898

The United States intervention in Cuba is perhaps the closest example to unilateral humanitarian intervention. Stowell refers to it as one of the most important instances of humanitarian intervention. In Stowell’s words the intervention took place “to put an end the shocking treatment which military authorities were inflicting upon the non-

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115 Supra, note 28, p. 32.
118 Supra, note 28, p. 33.
119 Supra, note 106, p. 239.
combatant population in their futile efforts to suppress insurrection”. In literature it is less often than the preceding two examples presumably because of numerous other less altruistic motives behind the action which was but the flashpoint of the broader war with Spain. This intervention substantially succeeded in halting the barbarities attributed to the Spanish colonial rule and therefore amounts to state practice of humanitarian intervention. Brownlie disagrees his view is that states have failed to agree on a characterization of the action. Jean Pierre Fonteyne, who cites six instances of humanitarian intervention in the period, excludes the intervention of Cuba as lacking a clearly humanitarian motive. Walzer characterizes the action as being perhaps an example of ‘benevolent imperialism, given the “piratical times” but is not an example of humanitarian intervention.

The initial intervention followed reports of atrocities committed by Spanish military authorities attempting to suppress the insurrection that commenced in 1895. The Spanish policy of forcing the disaffected population into concentration camps in order to identify revolutionaries caused genuine outrage in the United States. Some 200,000 Cubans were estimated to have died in the camps. In his special message to congress of 11 April 1898, President McKinley outlined four justifications for US intervention in the conflict: the cause of humanity to put to an end the barbarities, bloodshed, starvation and horrible miseries now existing there; protection of US Citizens and their property in Cuba; protection of US commercial interests and self defense. A joint resolution was subsequently passed; authorizing intervention on the basis of “The abhorrent conditions which…have shocked the moral sense of the people United States have been

121 Ibid.
122 Ibid.
126 Supra, note 28.
127 Supra, note 54, p. 51.
128 Ibid.
A disgrace to Christian civilization, culminating, as they have in the destruction of a United States battleship."\(^{129}\)

The stated goals of intervention were to guarantee Cuban independence and compel Spain to relinquish its authority over the island.\(^{130}\)

The intervention in Turkey, originally by Austria, Hungary and Russia and later by Greece, Bulgaria and Serbia (1903 – 1912) constitutes a relevant precedent.\(^{131}\) According to the justification given by Greece, these states resorted to force in order put an end to the alleged mistreatment of the Christian populations in Macedonia.\(^{132}\) In an attempt to convert the Christian population in Macedonia, Turkish troops had reportedly committed atrocities by attacking the civilian population and destroying villages.\(^{133}\)

In summary, it is apparent that acts of humanitarian intervention were an infrequent occurrence in the 19\(^{th}\) century and pre Charter period. This era was marked with a few incidences of humanitarian intervention. It is to be noted that some of the gravest atrocities against humanity, not to mention the occurrences within the world wars, happened during this epoch. These include forced starvation of 4 million Ukrainians by the Soviets in the 1930’s and the massacres of hundreds of thousands of Chinese during the Manchurian War and the succeeding period between 1931 to 1945, the invasion of Ethiopia by Italy and the Spanish Civil war between 1936 and 1939. The First World War itself saw the massacre of about 1 million Armenians by the Turks. The Second World War likewise saw the massacre of about 6 million Jews by the Nazis.\(^{134}\) On the basis of this strict principle of sovereignty, the 19\(^{th}\) century was dominated by unrestricted right of war and recognition of conquests.\(^{135}\) War was, however, only regarded as a last option

\(^{129}\) Ibid.

\(^{130}\) Ibid.

\(^{131}\) Supra, note 92, p. 22.

\(^{132}\) Supra, note, 117, cited in supra, note 92, p. 22.

\(^{133}\) Ibid.


\(^{135}\) Supra, note 116, p. 52.
when peaceful measures not successful in solving conflict. State practice during the period under review also reveal that even though states were generally subject to no external restraint upon the manner in which they treated their nationals, other states have occasionally have asserted a right to intervene on behalf of minority groups that were subjected to shocking cruelty, persecution and mass slaughter. Great Britain, France and Russia jointly intervened in the Greek revolution against Turkey in 1827 because of the barbaric cruelty used in the fighting. There were a number of interventions to stop persecutions of Christians in Turkey.\textsuperscript{136}

Publicists have attested that humanitarian intervention by a number of powers to prevent a state from committing atrocities against its own subjects, or suppressing religious liberties, such as happened in the Turkish Empire in the 19\textsuperscript{th} century, was recognized by international law.\textsuperscript{137} Some authors, most notably Brownlie, hold that these interventions were not carried out solely on the basis of humanitarian considerations, but the power politics between Western and Eastern states were also in play, and therefore that ‘no genuine case of humanitarian intervention has occurred.\textsuperscript{138} Regarding the Ottoman interventions Fenwick states that “the alleged humanitarian motives were...influenced or affected by the political interests of the intervening state”\textsuperscript{139} It is also argued that several of the interventions in Syria and Greece were based on treaties, and not carried out unilaterally.\textsuperscript{140} The 20\textsuperscript{th} century saw less willingness to intervene for the sake of humanity. This was as a result of the restriction on use of force provided for in the League of Nations inclusive of several treaties renouncing war altogether.

Nevertheless, the language used by the intervening states clearly indicates some sort of \textit{opinio juris} regarding the right of humanitarian intervention, and there is a little doubt


\textsuperscript{138} Supra, note 116, p. 340.


\textsuperscript{140} Supra, note 116, p. 340.
that a permissive custom of intervention existed at the time condoned by the powers in Europe who had special weight and if they decided to have a matter regulated in a certain way this in itself constituted a customary position. When states assembled in general European congress are in agreement regarding certain measures, such measures become obligatory for all European states. Even if other considerations were also motivating, the states were attaching primacy to that principle of humanitarian intervention over their treaty rights as justification for intervention.  

States then were clearly of the conviction that humanitarian intervention was lawful and drawn from international customary law. We look at humanitarian intervention under the Charter and the practice of states from 1945 to date in the next chapter.

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CHAPTER THREE

HUMANITARIAN INTERVENTION UNDER THE UN CHARTER

3.1. The United Nations Charter

The UN Charter was established as a consequence of the Conference on International Organization held at San Francisco and was brought to force on 24 October, 1945. Membership of the UN has reached 191 states. Thomas M. Franck, writing in 1970, stated thus:

Twenty five years ago, the allied nations gathered at San Francisco in the warming glow of victory and signed a solemn treaty giving effect to their determination "to save succeeding generations from the scourge of war..." and to ensure, by the acceptance of principle and institutions of methods, that armed force shall not be used, save in the common interest...\(^2\) Specifically they undertook in Article 2(4) to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..." They also committed themselves to "settle their international differences by peaceful means...\(^3\)"

The Charter has been the subject of a good deal of academic and judicial interpretation in the sixty one years of its existence. Numerous UN resolutions of the organs of the UN have also helped to clarify some of the provisions of the Charter. The most persistent question that normally arises concerning the right of humanitarian intervention is whether or not it has survived the ban on the use of force under the United Nations Charter.\(^4\) Answering this question is troublesome, given the diversity of opinions and the practices of states. When does a state’s recourse to force violate its legal obligations under the UN Charter? Does the answer lie exclusively with the black letter text of Article 2(4), or is

\(^2\) UN Charter, Preamble.
\(^3\) U.N Charter, Art. 2(3).
the practice of UN Organs and of the constituent states also relevant? The bulk of the arguments are centred on two methods of interpretation, textual and contextual interpretations.

### 3.1.1 Textual Interpretation

The major thrust in the argument is that Article 2(4) and 2(7) of the Charter preclude any intervention note expressly provided for under the Charter, and this exclusion applies to humanitarian intervention. It is argued that the Charter does not expressly provide for the right or duty of humanitarian intervention. Article 2(4) provides thus:

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

The only exceptions are self defense, collective operations (Chapter VII) and measures taken against enemy states. Opponents of the right of humanitarian intervention argue that any other use of force thereof is illegal, as it contravenes the flat ban enshrined in article 2(4). Proponents of the right of humanitarian intervention play down such interpretation and reject what they call the simple reading of article 2(4). One of the most vigorous authorities who defended the right of the state to use force postulates that article 2(4) must be interpreted with reference to article 1(1), 51 and certain general provisions of the Charter. He argues that since Article 51 reserved the inherent right of a state to use force in cases of self defense, states could employ this right “far beyond that reserved in article 51.” As such, Stone affirms that all customary rights of self help could be enjoyed by a state as long as not directed against territorial integrity and political

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6 Art. 51.
7 Art. 53.
9 Ibid., p. 24.
independence of a state as stated in article 2(4).\textsuperscript{10} Similar arguments are well articulated in the previous Chapter.

3.1.2 \textbf{Contextual Interpretation}

This method of interpretation is entirely dependent not on one provision of a treaty, but rather on its purposes and overall provisions. Article 2(4) prohibits use of force that "is consistent with the purpose of the United Nation's Charter" indicating that the Charter permits interventions that are in conformity with these purposes. The purposes of the UN Charter can never be a source of rights in its own respect, but they can be an important factor when interpreting the legal content of the Charter.\textsuperscript{11} Teson identifies in these purposes a "congenial tension between the concern for human rights and the notion of state sovereignty, two pillars of international law."\textsuperscript{12} The issue of interpretation and arguments thereof is articulated in chapter one and hence need not be repeated in detail herein.

3.2 \textbf{State Practice in the post Charter period}

In this Chapter we examine humanitarian intervention under the Charter regime. We will look at several instances of humanitarian intervention, the Charter's system response to them and assess the lessons learned and its effects on evolution of law. We will look at the historical outline of state practice on humanitarian intervention, treaty law having been dealt with in Chapter 1. The purpose is to assess the practice of states by surveying non-consensual military interventions that were conducted for alleged humanitarian purposes. It should be said at the outset of this section that reasons of space prohibit a substantial review of all situations allegedly justifying humanitarian intervention. Instead, we will confine ourselves to a very concise description of the most relevant aspects of these situations and the most obvious reasons for the interventions taking place therein. We shall deal with those cases which were actually justified by the interveners

\textsuperscript{10} Ibid.

\textsuperscript{11} See Art. 31(1) of Vienna Convention of the Law of Treaties (1969) which states that treaties shall be interpreted 'in the light of their objective and purposes'.

themselves on alleged grounds of humanitarian intervention. The specific cases have been selected where a humanitarian justification was actually employed by the intervening states or where the intervention resulted in clearly beneficial impacts on humanitarian conditions in the target state. In some of these cases humanitarian motives are present but not primary; and sometimes though not expressly used as a justification, the humanitarian impact is undeniable. This is in view of the fact that for any intervention, other motives will always come into play and that intervention for ‘purely humanitarian’ grounds may not exist, whether expressly admitted or not. In each case, information is included on the nature of the crisis and the subsequent events on the ground, pertinent developments at the Security Council and in regional bodies, the justifications employed by the intervening forces, and the views of other states and publicists. The latter are particularly significant, for the evidence of the legitimacy or illegitimacy in behaviour resides in the claims and counterclaims of states as they debate the propriety of various interventions. The focus will be on the value each has as evidence of state practice and opinio juris in the emergence of a norm of customary international law.

In its judgment in the Nicaragua case, the ICJ set out its view on the interaction between practice and the legal norm pertaining to armed intervention. It stated:

The significance of for the court of cases of State conduct prima facie inconsistent with the principle of non intervention lie in the nature of the ground offered as justification. Reliance by a state on a novel right or an unprecedented exception to the principle might, if shared by other states, tend towards modification of customary international law.13

This judgment has been criticized for establishing custom on a too thin basis.14 But as Lauterpacht has noted:

What matters is not so much the number of states participating in its creation and length of the period within which that change takes place, as the relative importance, in any particular sphere, of states inaugurating the change.  

Thus customary law can be a source of rules regarding humanitarian intervention, even if article 2(4) is seen as prohibiting the use of force on a general basis.

### 3.2.1 Belgian Intervention in the Congo (1960)

Shortly after achieving independence from Belgium, the Republic of the Congo (Leopoldville) was the object of the UN’s largest military assistance operation directed by the organization itself. There was a breakdown of law and order, national celebration was short-lived. The army mutinied causing widespread looting and raping. Much of this was directed against the 100,000 remaining residents of Belgian nationality. Without the permission of either the Congo or the United Nations, Brussels deployed its paratroopers to restore order. The Congolese government appealed for assistance to the United Nations. The Security Council passed a resolution on 13th July, 1960 authorizing the Secretary General to provide Congo with military assistance and calling upon Belgium to withdraw its troops. In the Security Council debate elsewhere Belgium asserted that it had decided to intervene with the sole purpose of ‘ensuring the safety of European and other members of the population and of protecting human lives in general,’ that it was under a sacred duty to take measures required by morality and public international law. During the debate, France made references to ‘intervention on

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18 Ibid.
humanitarian grounds.' This was in response to accusations that Belgian action constituted aggression.21

3.2.2 India’s Intervention in East Pakistan/Bangladesh (1971)

The Indian intervention in East Pakistan in 1971 is commonly held up as one of the more promising examples of alleged humanitarian intervention.22 Teson calls it an almost perfect example.23 Fonteyne observes that it probably constitutes the clearest case of forceful individual humanitarian intervention in the last century.24

In December 1971, India’s armed forces invaded East Pakistan and thereby facilitated the province’s cessation from Pakistan. New Delhi acted after its neighbor had used severe military repression for nine extremely violent months in an effort to end civil insurrection. Already in April, the Indian government had advised the United Nations that the scale of human suffering in central Pakistan eastern province had grown to the point that it had ceased to be a matter only of domestic concern.25 Thousands of Bengalis were killed and over 10 million of them fled from the hands of ravaging government troops.26 During this period an estimated 8 million refugees fled to India in response to the draconian measures taken against them. New Delhi’s representatives spoke of gross violations of “basic human rights” by the Pakistani military “amounting to genocide, with the object of stifling democratically expressed wishes of the people.”27 The International Commission of Jurists summarizes the brutality of the military operation thus:

21 Supra, note 16, p. 66.
22 Ibid., p. 71.
25 Supra, note 17, p. 139.
27 Supra, note 17, p.140.
The principle features of this ruthless operation were the indiscriminate killing of civilians including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of Hindu population; the arrest torture and killing of Awami league activists, students, professional and businessmen and other potential leaders among the Bengalis and raping of women; the destruction of villages and towns and the looting of property. All this was done in a scale which is difficult to comprehend.  

Prior to the invasion, Prime Minister Gandhi had appealed to foreign governments and the UN to do something about the situation in which 'the general and systemic nature of inhuman treatment inflicted on the Bangladesh population was evidence of a crime against humanity.' This appeal to justice fell on deaf ears in the debating chambers of the society of states, where Indian action was widely viewed as a breach of the rules that jeopardized the pillars of interstate order. The UN did not censure India; neither did it give approval to its action. In the face of mass killings in Eastern Pakistan, the overwhelming reaction of the society of states was to affirm Pakistan's right to sovereignty and the rule of non intervention. Since no international action was taken, India invoked the right of humanitarian intervention when both Houses of the Indian Parliament adopted a resolution describing the repression in Pakistan as 'amounting to genocide.' India first claimed self defense based on Pakistani incursions into Indian Territory, and second, it drew attention to the human rights situation in East Pakistan and its impact on the Indian state of Bengal.

28 International Commission of Jurists, Events in East Pakistan 1972 pp 12 - 14, in supra, note 16, p. 72
29 Ibid., pp 92-93.
30 Infra, note 40, p. 56.
31 Ibid. Britain and France took the view in statements in March and late April respectively, China lined up behind its ally Pakistan emphasizing the importance of keeping Pakistan unified. Similarly, the non Arab Muslim powers are among the first to give public support to Pakistan, and at the end of June, a conference of twenty two Muslim states in Jiddah expressed the common view that Pakistan' territorial integrity should be maintained.
32 Ibid., p. 57.
India forcibly intervened in the conflict in December 1971.\textsuperscript{34} A two week war ensued between India and Pakistan in which India was the decisive victor and East Pakistan secured independence as Bangladesh was immediately recognized by India and later by much of the world community.\textsuperscript{35} Six days after the Indian invasion, the Pakistani troops surrendered and the \textit{de facto} independence of Bangladesh was a fact.\textsuperscript{36} In discussions within the United Nations, such humanitarian concerns appear to have tampered criticism of India but were not accepted as a justification for its intervention.\textsuperscript{37} India's motives were not beyond suspicion. The dismemberment of Pakistan and the carving out of a new state reliant on it did undoubtedly serve India's most important national security concerns and strengthened its dominance of the subcontinent.\textsuperscript{38} Thus although India's intervention in East Pakistan is generally referred to as one of the better instances of humanitarian intervention, there are relatively few writers who actually claim that it was legal for this reason. For even if one accepts that India's action constitutes state practice for the purposes of establishing customary international law, Chesterman argues that there is very little evidence of \textit{opinio juris}.\textsuperscript{39}

\subsection*{3.2.3 Tanzania's Intervention in Uganda (1979)}

Tanzania's use of force against Uganda in early 1979 removed a barbaric regime that had become an embarrassment to other African governments.\textsuperscript{40} By the time of his overthrow in April 1979, the government of President Idi Amin was believed to have been responsible for the murder of "at least 100,000 and possibly as many as half a million people."\textsuperscript{41} His eight-year regime was marked from the very beginning by repression and

\begin{itemize}
  \item[\textsuperscript{34}] Ibid., p. 241.
  \item[\textsuperscript{35}] Supra, note 23, pp. 182-3.
  \item[\textsuperscript{36}] Supra, note 26, p. 64.
  \item[\textsuperscript{37}] Supra, note 16, p.73.
  \item[\textsuperscript{38}] Supra, note 1, p. 142.
  \item[\textsuperscript{39}] Supra, note 16, p. 75.
\end{itemize}
brutality. In the early period, the victims were primarily soldiers from the Acholi and Langi ethnic groups because they were assumed to be in favour of the re-establishment of the government of Milton Obote, whom Amin had overthrown in the January 1971 coup d'état. A number of massacres of the Acholi and Langi occurred between 1971 and 1973, but in the ensuing years the lack of discipline of the army and other armed agents of the regime was such that by 1977 the violence "had become almost random."

The conflict between Uganda and Tanzania began in October 1978, with a series of border incursions by Field Marshall Idi Amin’s forces into Tanzanian territories. Amin asserted that the occupation was an act of self defence in response to Tanzania’s support for Ugandan dissidents, but on 1st November he announced that all territory north of Kagera River was now part of Uganda. Tanzania seized this provocation to end Amin’s atrocious rule. The Tanzania’s army penetrated into Uganda joined by organizations of Ugandans who had lived in exile and opposed Amin. Amin’s regime was overthrown when Uganda’s capital, Kampala fell on 10-11 April 1979. Amin fled Uganda and a new government was formed.

International reaction to Tanzania’s intervention was surprisingly muted. Amin wrote to UN Secretary-General Waldheim to ask for a Security Council meeting, but the request was withdrawn some days later. No other member state requested a Security Council meeting. As a result, there was no debate at the UN on the validity of the Tanzanian and Ugandan claims and counterclaims concerning the self-defense argument or humanitarian intervention issue. The OAU discussed the Tanzanian intervention on three separate occasions — the February and July meetings of the Council of Ministers, and then the

42 Ibid.
43 Supra, note 1, p. 143.
44 Supra, note 16, p. 77.
46 Supra, note 16, p. 77.
48 Ibid.
July meeting of the Heads of State and Government — but with no condemnation of the Tanzanian action. Four front-line states (Angola, Botswana, Mozambique, and Zambia) argued that Tanzania had legitimately used force in self-defence. Only African states with substantial Muslim populations were prepared to offer some support to Uganda's interpretation of events. Libya, Nigeria, and Sudan did not accept the Tanzanian claim of self-defence and accused the government of aggression.\(^49\)

Intervention appears to have been tolerated by the majority of the international community. The clearest evidence of this was the quick recognition of the new regime in Kampala.\(^50\) Undoubtedly, this case must be appreciated in the context of an un-usually widespread contempt for the extravagant human rights abuses of the Amin regime. Some 300,000 deaths have been attributed to it.\(^51\) This crisis is noteworthy not only for lack of outrage expressed by states on the violation of the principles of the UN Charter, but also for the way the system expressed its assent in silence.\(^52\) Teson concludes from this that 'on the whole, the Tanzanian action was legitimized by the international community.'\(^53\)

Despite the regime's egregious violations of human rights and responsibility for the murder of tens of thousands of people, at no time did Tanzania advance the claim that its military action was humanitarian. Rather, Nyerere continuously emphasized that there were two wars being fought: "First there are Ugandans fighting to remove the Fascist dictator. Then there are Tanzanians fighting to maintain national security."\(^54\) By this logic, Tanzania was using force in self-defence and Ugandan exiles were fighting in an attempt to overthrow Amin in an exercise of self-determination.

\(^{49}\) Ibid.

\(^{50}\) Supra, note 16, at p. 78. Also see, supra, note 1, at p.144. The UK, the US, Zambia, Mozambique, India China, the Soviet Union and Ethiopia — soon extended formal diplomatic recognition.

\(^{51}\) Supra, note 23, p.144.

\(^{52}\) Ibid., p.145.

\(^{53}\) Supra, note 23, p. 137.

\(^{54}\) Supra, note 41.
3.2.4 Operation Provide Comfort – Northern Iraq (1990)

The first crisis in which intervention could be characterized as humanitarian was the relief operation in Northern Iraq following the Gulf war in 1990-1991. In February, 1991, both Kurdish groups in northern Iraq and Shi’ite Muslim groups in southern Iraq, rebelled against the Saddam Hussein regime. Saddam Hussein was able to suppress the insurrections in March 1991. The result was a massive refugee crisis, especially among the Kurds of the North, many of whom fled to Turkey and Iran.\(^{55}\) Reports of widespread extrajudicial killings, torture whose cruelty defies imagination, prolonged detention without trial or charge, mass disappearances, persecution of the Shi’a of the south and genocidal acts against the Kurdish minority have been abundantly documented.\(^{56}\)

Reports of the deaths of over 1000 Kurdish refugees a day fleeing Iraqi troops,\(^{57}\) and a growing concern in international political circles that this was largely a man made disaster prompted the UN Security Council to pass Resolution 688(1991). The resolution condemned the repression of the Iraqi civilian population and insisted that Iraq allow immediate access by international humanitarian organizations to those in need of assistance. Resolution 688 triggered a response from the US, the UK and France to set up “safe havens” in Northern Iraq to protect the Kurdish people. Responsibility for protecting these safe havens was subsequently assumed by the UN. The creation of ‘no fly zones’ was also the initiative of the US, and the UK. The US dispatched 10,000 troops along with British and French contingents to organize and secure UN protected zones.\(^{58}\) Operation provide comfort was not based on the Resolution 688 nor was it sanctioned by the UN Security Council, but was founded rather “in exercise of customary international

\(^{55}\) Supra, note 34, p. 253.


law principle of humanitarian intervention." Subsequent events demonstrated that the humanitarian crisis in northern Iraq was not an isolated incident.

3.2.5 The US and UN intervention in Somalia (1991)

The cumulative costs of poverty and a pattern of corrupt rule came together in tragedy shortly after the end of the Cold War in Somalia. In the power vacuum that followed the January 1991 ousting of President Mohammed Siad Barre, this ethnically, linguistically, and religiously homogeneous country exploded into clan-based civil war. Talks held in June and July 1991 led to the Djibouti Accords and the appointment of Ali Mahdi Mohamed as interim President. But the leader of a rival faction, General Mohamed Farah Aideed, rejected the Accords. From November 1991 onward, heavy fighting persisted in the capital, Mogadishu. Civil war tore the country apart and left it without any effective government whatsoever. Marauding soldiers from various factions seized food supplies from an already starving civilian population, contributing to a famine crisis, which in turn precipitated large scale population movements into neighboring Kenya, Ethiopia and Djibouti.

On December 23, 1991, ICRC President Cornelio Sommaruga wrote to outgoing UN Secretary-General Javier Pérez de Cuéllar, requesting UN action, and followed it up with a visit to newly elected Secretary-General Boutros Boutros-Ghali early in January. In mid-January, the ICRC publicly reported that hundreds of thousands of refugees from the conflict were on the brink of starvation in camps south of the capital. The office of the UN High Commissioner for Refugees (UNHCR) reported in late January that 140,000 Somali refugees had reached Kenya, with another 700 arriving each day.

63 Ibid.
On January 23, 1992, the Security Council expressed its grave alarm “at the rapid
deterioration of the situation in Somalia and heavy loss of human life” and its awareness
of the “consequences on stability and peace in the region”. It adopted Resolution 733 that
“the continuation of this situation constitutes...a threat to international peace and
security” and imposed a Chapter VII arms embargo against Somalia.64

By March, an effective cease-fire had not been implemented. In light of the immediate
threat posed by severe food shortages to a large proportion of Somalia's population, the
Secretary-General reported that implementation of a planned relief programme should
proceed, with the consequences of obstructing it made clear to the leaders of the two
main armed factions.65 On March 17, 1992, the Security Council unanimously adopted
Resolution 746 (1992) which, though not under Chapter VII, stated that the Council was
"deeply disturbed by the magnitude of the human suffering caused by the conflict and
concerned that the continuation of the situation in Somalia constitutes a threat to
international peace and security." In the discussion on Resolution 746, the Council's
primary concern appears to have been the effect of the war on the provision of
humanitarian assistance to the starving population, with only passing reference to the
massive flow of refugees.66 Three months later, the Council decided to establish a UN
Security Force to protect humanitarian activities, the United Nations Operation in
Somalia (UNOSOM I).67

The situation continued to deteriorate throughout 1992. The first UN operation in
Somalia (UNOSOM I) was deployed with the consent of the two leading factions in
April. Because the force was comprised of only 500 soldiers and there existed no
governing authority capable of maintaining law and order, the force was unable to
implement its basic peacekeeping mandate. The provision of 3,500 UNOSOM security
personnel for the protection of humanitarian relief efforts was approved in August,
through Resolution 775 (1992), but deployment was slow and the situation worsened by

64 S.C Res. 733 (1992).
66 UN Doc. S/PV. 3060.
the day. By October 1992, the Secretary-General reported that almost 4.5 million of Somalia's 6 million population were threatened by severe malnutrition and related diseases. Of those, at least 1.5 million were at immediate mortal risk. An estimated 300,000 had already died in the preceding 11 months.68

By November 1992, the situation had continued to worsen. The Secretary General Boutros Boutros Ghali persuaded the Council to act decisively, after he presented the Council with five options three of which involved military action under Chapter VII.69 The Council opted to accept an offer from President George Bush of The United States to send troops to protect delivery of food supplies. In Resolution 794, adopted on 3, December 1992 the Council determined “that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to distribution of humanitarian assistance, constitutes a threat to peace and security” In response, the Council, acting under Chapter VII, authorized the Secretary General and member states cooperating to implement the offer to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia. Twenty four hours later, President George Bush ordered 28,000 troops into Somalia in Operation Restore Hope (also Known as Unified Task Force, or UNITAF).70 UNITAF was able to undertake its humanitarian purposes with relative success.71

The primary concern of the Security Council, as expressed in statements before and after the vote, was the delivery of humanitarian aid. In explanation of its vote, Washington stressed the essentially peaceful and limited character of the operation and that the action represented an important step toward a "post-Cold War world order."72 China, which had cast its first affirmative vote for an enforcement resolution, and the Non-Aligned Movement (NAM), emphasized the unique character of the crisis and the role given to

69 See letter dated 29 November 1992 from Secretary General to the President of the Security Council UN Doc. S/24868 (1992)
70 ICISS Report, supra, note 47.
71 Supra, note, 62.
72 UN Doc. S/PV.3145 (1992) P. 36(US)
the Secretary-General and the Security Council.\textsuperscript{73} Secretary-General Boutros-Ghali later stated that the Security Council had "established a precedent in the history of the United Nations: it decided for the first time to intervene militarily for strictly humanitarian purposes."\textsuperscript{74}

On May 4, 1993, the US formally handed over to a second UN operation, UNOSOM II. The prior military operation, led by the remaining superpower, had been narrowly conceived. Now the UN's expanded mandate in Resolution 814 of 1993 specified a host of activities categorically rejected by the US, including nation-building, disarming the factions, and arresting leaders such as General Aideed. Twenty-four Pakistani soldiers were killed on June 5 while inspecting weapons dumps in accordance with the expanded mandate. The next day, the Security Council passed Resolution 837 (1993), reaffirming that the Secretary-General was authorized to "take all necessary measures against those responsible for the armed attacks to establish the effective authority of UNOSOM II throughout Somalia, including to secure the investigation of their actions and their arrest and detention for prosecution, trial and punishment."\textsuperscript{75}

This was tantamount to a declaration of war against Aideed's militia. A series of confrontations between a heavily reinforced UNOSOM II and the militia continued through the summer. The most infamous was the "Olympic Hotel battle" on October 3, 1993, when US Rangers and Delta commandos, who remained under US command and control, made an unsuccessful attempt to capture Aideed. Three US Black Hawk helicopters were downed and 18 Americans died, as did one of the Malaysians who came to extract them. At least 500 and as many as 1,000 Somalis, many of them civilians, were killed in the firefight. The dead US pilots being dragged through the streets to jeering crowds of onlookers became an enduring image of the risks of humanitarian impulses.

\textsuperscript{73} \textsuperscript{74} \textsuperscript{75}
Those who saw a "CNN effect" encouraging intervention also saw the impacts of unpalatable images forcing the withdrawal of military forces.\textsuperscript{76}

Within days, President Clinton set a pullout date for US troops for the following March. UNOSOM II was more ambitious than the earlier US-led UNITAF effort, but it had fewer war fighting resources. And by March 28, 1995, the complete withdrawal of UN troops had been completed, although few of UNOSOM II's mandated objectives had, in fact, been achieved.\textsuperscript{77}

The mission was not without its successes. The impact of the famine was alleviated, as probably only 50,000 to 100,000 of the 1.5 million menaced by starvation actually died. Virtually the entire population of 5 million people received assistance. Half of the 1.5 million people driven from their homes returned a year later. The estimated 400-500,000 who died in the two years preceding these operations were not replicated, although there were an estimated 10,000 Somali casualties during the UNITAF and UNOSOM II operations.\textsuperscript{78}

\subsection*{3.2.6 ECOMOG Intervention - Liberia (1990-1992)}

An often overlooked example of the Security Council invoking its Chapter VII powers, is what was arguably an internal armed conflict is Liberia in 1990.\textsuperscript{79}

In December, 1989, the National Patriotic Front of Liberia (NFPL), led by Charles Taylor, invaded the Ivory Coast to overthrow a Samuel Doe regime guilty of massive human right abuses in the preceding years. Samuel Doe, (a master Sergeant in the Armed Forces of Liberia (AFL)) led a successful coup against the government of William Tubman in April 1980 killing him and in the process ending a 135 year legacy of diplomacy in Liberia. Doe was subsequently toppled and killed in September 1990, after

\textsuperscript{76} Ibid.
\textsuperscript{78} ICISS Report, supra, note 47.
\textsuperscript{79} Supra, note 16, at p. 134.
a violent uprising by Charles Taylor under the banner of the National Patriotic Front of Liberia (NPFL).\textsuperscript{80} By August, the conflict was thought to have claimed 5000 lives and caused 500,000 refugees to flee Liberia, with a further million displaced persons within Liberia, this amounted to 60\% of Liberia’s 2.5 million.\textsuperscript{81} These events were noted by the regional organization to which Liberia belonged, namely, the Economic Community of West African States (ECOWAS), which had been established in 1975.\textsuperscript{82} Its governing Authority of Heads of States initiated negotiations among Liberia’s warring parties, but to no avail. In June 1990, President Doe asked the Organization to send peacekeeping force to help him re-establish control.\textsuperscript{83}

A meeting was convened in Banjul on August 7 1990 by the ECOWAS Standing Mediation Commission. The Committee justified intervention on the ground that:

\begin{quote}
[There] is a state of anarchy and total breakdown of law and order in Liberia.\ldots These developments have traumatized the Liberian population and greatly shocked the people of the sub-region and the rest of the international community.\textsuperscript{84}
\end{quote}

The Commission established the ECOWAS Ceasefire Monitoring Group (ECOMOG), whose “objectives were to institute a ceasefire, form an interim government and hold democratic elections in [Liberia].”\textsuperscript{85} This was not what Doe had requested and neither was it approved by the Taylor faction. ECOWAS decided to proceed, nevertheless, imposing itself by force if necessary. Such a mission, by strict construction of Article 53 of the UN Charter requires approval by the Security Council. However, such permission was neither sought for nor given as ECOMOG beginning August 24, 1990, deployed

\begin{footnotes}
\item[81] Supra, note 16, at p. 135.
\item[83] Supra, note 1, p. 156.
\item[85] ICISS, p. 81, quoted in supra, note 47, p. 9.
\end{footnotes}
15,000 troops, tanks and bombers in an effort to bring the parties to a settlement. Their role was to stop the senseless killing of Liberian nationals and foreigners and to restore democratic institutions. Due in large part to the non-compliance on large part of Taylor’s NPFL with the agreement, fighting resumed in August 1992, including the emergence of the United Liberation Movement of Liberia for Democracy (ULIMO), loyal to the memory of President Doe who had died after being captured by the UNFPL. ECOWAS decided to impose an embargo on Liberia. To make it effective, however, international cooperation was needed, so for the first time, the West African states approached the Security Council for formal authorization. The Council agreed, finding that the situation was a threat to peace and security and decided again to "commend" ECOWAS for its efforts. It thereupon invoked Chapter VII of the Charter to impose complete embargo on all military shipment except supplies for ECOMOG. By mid 1993, the Council unanimously created a UN Observer Mission (UNOMIL), to monitor ECOMOG’s peacekeeping and peace building operations.

It would take another four years of sporadic conflict for ECOMOG to bring the situation under control. Peace talks led to elections in July 1997. Having sent observers to the elections, the UN called upon all parties to allow the democratic will of the people to prevail after it was established that Taylor had won by a landslide. UNOMIL began withdrawing its personnel from Liberia following the end of its mandate on 30 September 1997, while ECOMOG stayed on to help "consolidate and strengthen security in [Liberia]". According to the ICISS Report:

86 Supra, note 5, p. 156.
88 Supra, note 16, p. 137.
Over the course of the conflict 785,000 of Liberia’s 2.5 million citizens became refugees (420,000) in Guinea, 320,000 in Cote d’Ivoire, 20,000 in Sierra Leone, and 5000 in Nigeria) and at least 200,000 Liberians were killed between the start of the conflict in 1989 and signing of the peace accord in August 1995. In total, ECOMOG operations cost Nigeria more than $ one billion and 500 of its troopers lost their lives. At the same time, it set a precedent for humanitarian intervention by African sub regional organizations

In Thomas Franck’s view, The ECOWAS intervention in Liberia and as we shall see later in Sierra Leone (1997) can thus be said to have equally demonstrated the reticent UN systems increasing propensity to let regional organizations use of force, even absent specific Security Council authorizations, when that seemed the only way to respond impending humanitarian disasters.

3.2.7 Operation Torquoise Rwanda (1994)

In April 1994, UN member states were called upon to decide, whether, legally or ethically, they could or should or indeed were required to use military force to oppose one of the worst outbreaks of genocide since the holocaust. The killings in Rwanda in 1994 confronted the society of states with the first case of genocide since the holocaust.

In mid 1993 the UN had deployed an observer mission in Uganda to monitor the border between Rwanda and Uganda, which had been the scene of incursions by mainly Tutsi Rwandan Patriotic Front (RPF). The Security Council had also authorized, in October 1993, the establishment of a United Nations Assistance Mission for Rwanda (UNAMIR) to assist Rwanda in constituting a new government in accordance with a peace agreement negotiated in Arusha, Tanzania. Since 1973, Rwanda been governed by a single party headed by Major General Juvenal Habyarimana, who was a Hutu. Ethnic violence

96 ICISS Report, p. 84, cited in supra, note 80, p.14
97 Supra, note 5, p. 162.
98 Supra, note 62, p. 9.
99 Supra, note 40, p. 208.
between the Tutsi and Hutu plagued Rwanda sporadically since its independence from Belgium. 100

The crisis in Rwanda was ignited by a surface to air missile that shot down the plane carrying Rwandan president Juvenal Habyarimana and his Burundian counterpart Cyprien Ntaryamira. 101 It set in motion a humanitarian tragedy of enormous proportions. Within 4 months 800,000 people died in Rwanda as part of a well coordinated genocide. As the slaughter unfolded, the Security Council reduced rather than strengthened the existing the existing UN Military presence in the country and appeals for the killings to stop fell on deaf ears in the Council and elsewhere including the US. Permanent members of the UNSC made every effort to avoid acknowledging the events on the ground in Rwanda and their own responsibility under the Genocide Convention to act.

The response of the UNSC was to say the least ineffectual. 102 In the middle of the crisis the UNSC voted to reduce the Number of peacekeepers (UNAMIR) from 2,500 to 270. 103 The decision was condemned by the OAU and aid agencies who accused the Council of applying different standards to Africa from those applied in Europe. 104 On 17th May, the Council adopted Resolution 918 (1994) which authorized the expansion of UNAMIR forces up to 5,500 105 When the inferno of genocide had almost burnt out France requested a mandate from the Security Council under Chapter VII provisions of the Charter. 106 The Council adopted Resolution 929 on 22 June 1994. Recognizing that the situation constitutes ‘a unique case which demands an urgent response by the international community determining the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region’ France was thus authorized to intervene.

100 Supra, note 98, p. 9.
101 Supra, note 98, p. 144.
102 Ibid.
104 Supra, note 16, p.145.
105 Ibid., para. 5.
106 Supra, note 61, p. 209.
Frances role in arming and training the predominantly Hutu government forces\textsuperscript{107} was viewed with suspicion as it was said to be a cloak for pursuit of selfish interests.\textsuperscript{108}

### 3.2.8 Intervention in Sierra Leone (1997)

Civil war broke out in Sierra Leone in 1991, when the revolutionary United Front (RUF) launched its insurgency against President Joseph Momoh. Led by Foday Sanko and funded by Liberian warlord Charles Taylor, the RUF exploited "criminality, torture, drugs, plunder, and rape in battle" using terror and mutilation as tools against the population.\textsuperscript{109} It has been suggested that the former NPFL warlord Charles Taylor supported rogue elements inside Sierra Leone which began a rebel movement in March 1991.\textsuperscript{110}

In May 1997 the recently elected government of Sierra Leone was overthrown by the Armed Forces Revolutionary Committee (AFRC).\textsuperscript{111} President Kabbah was forced to flee to Guinea. The \textit{coup} met with a hostile reaction throughout the region and internationally, including a rebuke by the president of the Security Council.\textsuperscript{112} ECOWAS, which already had troops in a peacekeeping role in Sierra Leone made clear its determination to reverse the \textit{coup}.\textsuperscript{113} A week later, the OAU unanimously condemned the coup and implicitly authorized ECOWAS to take military action to restore the elected government, urging Sierra Leone and its neighbours "to take all necessary measures "to return President Kabbah to office" In its Ministers sixty sixth – Ordinary Session in Harare in My 1997, it strayed far away from its from its historically strict adherence to the principles of non intervention in the internal affairs of a country, stating that it "strongly and unequivocally condemns, the \textit{coup d'etat} and calls for immediate restoration of constitutional order

\textsuperscript{107} Supra, note 25, p.147.

\textsuperscript{108} Supra, note 61, p. 209.


\textsuperscript{111} Supra, note 16, p. 155.

\textsuperscript{112} Statement by the President of the Security Council, UN SCOR, 52\textsuperscript{nd} Session 2693rd meeting.

\textsuperscript{113} Ibid.
appeals to leaders of ECOWAS to assist the people of Sierra Leone to restore constitutional order to the country. President Kabbah who had fled to Guinea, requested the intervention of Nigeria

In May, 1997, Nigeria sent forces to Sierra Leone to protect Nigerian citizens, prevent further bloodshed, and restore order. On June 27, 1997, Nigeria transmitted to the UNSC President the text of the final communiqué on the situation in Sierra Leone (Conakry, Guinea, 26 June):  

The Ministers agreed that the following objectives should be pursued by ECOWAS: early reinstatement of legitimate Government of President Kabbah; the return of peace and security; and the resolution of the issues of refugees and displaced persons. They recommended a combination of three measures to be applied in the pursuit of those objectives: dialogue; the imposition of sanctions and enforcement of an embargo; and use of force.

On October 8, 1997, the Security Council unanimously adopted Resolution 132 (1997). Determining that the 'situation constituted a threat to international peace and security, the Council demanded that military junta relinquish power or make way for restoration of democratically elected government. It authorized ECOWAS to ensure [their] strict implementation including 'halting inward maritime shipping in order to inspect and verify their cargoes destinations....'

South Korea's representative on the Council gave the remarkable explanation that the coup had a destabilizing effect on the whole region by reversing a new wave of democracy which was spreading across the African continent. Nigeria the lead

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participant in the operation ambiguously observed that “although ECOWAS was sufficiently seized of the matter, the support and endorsement of the United Nations was needed”. It was apparent that while the regional group in violation of strictly construed Charter text had proceeded on its own authority, no member of the Security Council chose to object. This was a case of the Council purporting to give retrospective validation to acts that had already taken place.

What ECOMOG troops did, in the week of 6-13 February, went far beyond effecting a “peaceful resolution.” They forcibly ousted the military junta, seized control of Freetown and invited exiled President Kabbah to return. On March 10, President Kabbah returned to Free Town to resume his position as President of Sierra Leone. The leaders of Nigeria, Guinea and Niger and the Vice President of Gambia accompanied him. On April 17, 1998, the Security Council adopted Resolution 1162, which commended ECOMOG for restoring peace to Sierra Leone. The UNSC would pass Resolution 1181 establishing the UN Observer Mission in Sierra Leone (UNOMISIL). UNOMISIL’s monitory mandate was to be replaced by the UN Mission in Sierra Leone (UNAMISIL) which had a wider mandate to protect civilians from physical threat. UNAMISIL comprising manly Indian, Kenyan and Guinea troops, still remains in Sierra Leone to date, having replaced ECOMOG forces.

3.2.9 Operation Allied Force - The former Yugoslavia (1999)

Kosovo provided another litmus test during the late 1990s of the international community’s attitudes towards the legality and ethics of humanitarian intervention. The history of the Kosovo crisis has been told and retold again and has brought about a flurry

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120 Supra, note 5, p. 157.
121 Ibid.
122 Supra, note 16, p. 156.
126 Supra, note 80.
127 Supra, note 98, p. 12.
of contribution in legal literature suggesting the need to take a completely different stance towards the controversial subject of humanitarian intervention.\textsuperscript{128} The facts are well known.\textsuperscript{129} A short outline shall suffice here. Kosovo, a province of Serbia, had been home of ethnic (and primary Muslim) Albanians, who constituted 90 per cent of the population. Nevertheless, Kosovo had been considered by the Serbs an integral part of Serbia and contained numerous sites regarded as holy by the largely Orthodox Serb community. After the rise of Yugoslav President Milosevic to power in the late 1980s, the Serbian government stripped Kosovo of the limited autonomy it had allowed and launched a systematic campaign of discrimination of discrimination against Kosovo Albanians, depriving them of jobs and reasserting firm Serb control over the province. At the same time, many members of the Albanian community pressed for independence from Serbia, and the Kosovo Liberation Movement Army (KLA) undertook a violent campaign of self determination.\textsuperscript{130}

The first protests of the Albanian Kosovars against Serb oppression after the death of Tito date back to 1991 and continued to grow with the accelerating decay of the Yugoslav state entity at the end of the 1980s. In 1989, the autonomous status of Kosovo granted in 1974 was revoked and in 1990 the regional parliament was dissolved. Systematic discrimination in public service as well as injustice and administration worsened the relationship between the Albanian and Serb ethnic groups even further. Large scale discrimination and persecution became virulent in 1990s, when Albanians were subjected to outright persecution by police forces which led hundreds of thousands of people to flee their country. The discriminated group saw their only possibility to survive in having recourse to violence, while the central power interpreted this as proof justifying their fears and as legitimation to increase violence in order to regain control of the situation. In 1998, Serb police units started an offensive against the militant resistance and committed atrocities against the civil populations. Belgrade responded by deploying troops attacking


\textsuperscript{130} Supra, note 98, p. 13.
villages with helicopters and using tanks and armoured personnel carriers in a manner
designed to cow any civilians supporting the insurgents.\textsuperscript{131} Now a civil war broke out.

The international community was slow to act. The UN Secretary General in October 1998, reported that the ‘level of destruction’ by Serb forces ‘points clearly to an indiscriminate and disproportionate use of force against civilian populations,’\textsuperscript{132} and to ‘appalling atrocities, reminiscent of recent past events in the Balkans’. The ‘great majority’ of these were ‘committed by security forces... of the Federal Republic of Yugoslavia.’\textsuperscript{133} As the situation continued to deteriorate the Security Council condemned one action after another in vain.\textsuperscript{134} Yugoslav army units continued their campaign against an increasingly hostile civilian population, torching 300 villages, burning down mosques and driving out another 300,000 civilians.\textsuperscript{135} As Resolution 1199 brought no immediate results, NATO Secretary General Javier Solana proclaimed on 9 October, 1998 that NATO saw sufficient factual and legal grounds to threaten the use of force and if necessary, to use force.\textsuperscript{136} Efforts to promote peace failed as Serb forces continued with the massacres. On the 24th March 1999, Javier Solana ordered the carrying out of air strikes against the FRY. Simultaneously, Yugoslav troops began a well planned campaign of ethnic cleansing. By then more than 600,000 Kosovars had fled into neighbouring states and an additional 850,000 persons were internally placed and homeless.\textsuperscript{137}

States were divided in their response. There were those who defended NATO action as a necessary response to extreme humanitarian disaster, those who considered NATO to be

\textsuperscript{131} Supra, note 5, p. 164.
\textsuperscript{133} S/1998/912; 3 October 1998. See also S/1999/99, 30 January 1999, annex II, Table 1 for documentation of atrocities of which the Secretary General attributed to Serb forces.
\textsuperscript{134} S/RES/1160 of 31 March 1998, para 5, 8, and 19; S/RES1199 of 23 September 1998, para 2, 5, 16.
\textsuperscript{136} For the text of this statement which is part of a letter from Solana, addressed to the Permanent Representatives to the North Atlantic Council, see Brunno Simma, “NATO, the UN and the Use of Force: Legal Aspects”, 10 European Journal of International Law 7 (2001).
\textsuperscript{137} Supra, note 5, p. 166.
in flagrant violation of the UN Charter and those who somehow managed to hold both these positions simultaneously. The arguments in favour cited excessive indiscriminate use of force, violations of international law, refusal to negotiate peace and threat of stability of the region.

This reluctance has been attributed to political unwillingness to take action but to a legal impediment which seemed to permit help to the oppressed Albanians only through Yugoslav Government and not against its will. The international response nevertheless fell short of a full scale military action under Chapter VII, leading many to conclude that far from establishing a legal basis for humanitarian intervention, the crisis affirmed the inviolability of the principles of sovereignty and non interference regardless of human suffering concerned.

Brownlie is quite skeptical that this incident had humanitarian motives. In his view there is a preliminary difficulty in classifying the action as the threats of force was linked to collateral political agenda. He concludes that the position in 1999 when the operations took place was that there was little or no authority and little or no state practice to support the right of individual states to use force for humanitarian grounds in international law. He further notes that state practice has been overwhelmingly hostile to the concept of humanitarian intervention on such selective and subjective basis. He nevertheless concedes that the legal situation may be different in cases where Security Council or regional organization takes such action with the provisions of the Charter. The NATO action in Kosovo revealed even more clearly the fundamental split as to the legality of humanitarian intervention. Jonathan Charney is of the view that the doctrine of humanitarian intervention is not well defined and the evidence does not establish a rule of

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138 Ibid.
139 Ibid.
140 Supra, note 128, p. 439.
141 Supra, note 60, p. 7.
law permitting the use of force against a state in situations like Kosovo.144 While analyzing other intervention in the post cold war era he is convinced that few if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention. In the absence of such linkage by the intervening states, the actions can hardly serve as *opinio juris* in support of such a right.145 He concedes nevertheless that perhaps the Kosovo intervention sets a precedent for the development of new international law to protect human rights. That after all, general law may change through breach of international law and the development of new state practice and *opinio juris* supporting change.

The Independent Commission on Kosovo concluded that NATO's action, while not strictly legal, was legitimate. Such a conclusion, they stated was related to the controversial idea that the "right" of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but that it may depending on the context, nevertheless reflect the spirit of the Charter as it relates to the overall protection of the people against gross abuse. They further stated that even if humanitarian intervention is authorized by the Security Council, it will often be challenged legally from the perspective of the Charter obligations to respect the sovereignty of the states. In their opinion, to allow the gap between legality and legitimacy to persist is not healthy. The reasons they advanced were that first, the tension with most interpretations of international law either inhibits solidarity with civilian victims of severe abuse by territorial governments, or seriously erodes the prohibition on the use of force that the World Court and other authorities have deemed valid. Closely related to this effect, second; recourse to force without proper UN authorization tends to weaken the authority of, and respect for, the United Nations, especially the UNSC, in the domain of international peace and security, and third; that a failure to act on behalf of the Kosovars, or a repetition of the Bosnian or Rwandan experience of an insufficient UN mandate and capabilities, would have also weakened the United Nations, probably to a greater degree.

145 Ibid.
They underscored the need to work diligently in future to close the gap between legality and legitimacy.\textsuperscript{146}

3.3 Lessons Learned

Humanitarian intervention, as traced in this chapter and the previous one, can safely be identified as an ancient phenomenon, although it has always been subject to only intermittent theoretical interest. It had already formed part of the natural doctrine of *bellum justum* as a frequently appearing just cause. The principle eventually entered the categories of positive international law, and was located in the context of prohibition of intervention. In 19\textsuperscript{th} Century literature, one would have some difficulty finding works which do not, in one way or another, address the issue of ‘intervention on grounds of humanity’. Following World War I, however, attention to the issue significantly faded and remained scant for nearly four decades, although few distinguished scholars did touch upon the subject. Crises flaring up in the 1960s and 1970s revived interest to a certain extent, but it was only in the 1990s that humanitarian intervention was pushed to the centre of attention again. It is fair to say that intellectual attraction for the subject of Humanitarian Intervention reached its climax in the wake of Kosovo crisis in 1999.

These cases illuminate emerging trends in the use of coercive measures to address humanitarian needs. The willingness of outside actors as well as the resources devoted to aiding and protecting severely affected local populations have increased dramatically. Practice after 1945, during the cold war was very sparse. This was at a time when the Security Council was likely to be deadlocked due to the fact that both the US and the Soviet Union as neither had the will nor possibilities to intervene collectively for humanitarian purposes, especially with regard to countries in the sphere of influence of one or the other side of the cold war. The fear of a third world war at this time prevented

a forceful protection of human rights. Moreover, the majority of UN members, which
by the 1960s consisted of non western nations and former colonies, considered the notion
of humanitarian intervention to be a relic of colonialism and violation of the fundamental
doctrine of the sovereign equality of state, leading to the silence of many nations in the
face of massive human rights violations of the time, e.g. (Uganda 1971-1979), Central
African Republic (apartheid in South Africa), Sudan (1952-72), East Pakistan/Bangladesh (1971), Cambodia, (1975-1979) and Iraq since the beginning of the rule of
Saddam Hussein till 2003.

It may be argued that no new custom can be said to have arisen, especially as when
instances of humanitarian intervention did take place, the accompanying protests and
condemnation by third states were vociferous. Most instances in which states referred to
humanitarian objectives in justifying the use of force prior to the Cold War's demise
actually turned on claims of self-defense (as is the case of India and Tanzania) or the
consent of the government of the state on whose territory the intervention took place.
Nevertheless, the absence of any clear reliance on humanitarian intervention during this
period does not mean that the practice of this period rejects the existence of such a right,
merely that there were no clear or express manifestations.

In contrast to the cases of humanitarian intervention during the Cold War, the cases
examined from the 1990s are remarkable for their legitimacy. With the threat of an all out
war between the East and West removed, the apparently "lesser" problem of human
rights could gain some more importance. Interventions for humanitarian reasons
increasingly took place under the auspices of the United Nations. The Security Council
was seized by each case and made decisions about coercion; the conscience-shocking and
truly humanitarian dimensions of each case were more central to international actions;
and military responses were more multilateral. The Security Council was quite slow in its
response which could be attributed to the objections by some states.

147 See Danish Institute of International Affairs 1999, Humanitarian Intervention: Legal and Political
Aspects, (submitted to the Minister of Foreign Affairs, Denmark, 7 December 1999) (called the "Danish
Institute Report"), p. 12.

From the state practice reviewed above it appears that there may be no absolute consensus among states as to the legality or legitimacy of humanitarian intervention. This is in light of opposing views of states in their reasoning for and against humanitarian interventions; it could be arguable to conclude that this Chapter reveals lack of state practice and virtually no *opinio juris* that supports a right to humanitarian intervention. On the other hand, is argument supporting humanitarian intervention that there is sufficient uniform consistent state practice accompanied by *opinio juris* (belief of existence of a law) to establish a customary principle in customary international law an exception to the Charter. State practice has to be considered according to whether or not an instance of humanitarian intervention was authorized by the Security Council.

Viewed from its historical context, the changes that have taken place after the Cold War can only be described as revolutionary. It became possible for the first time in modern history for the international community to take joint action for protection of international peace and security as well as for human rights. The international community and the United Nations, in particular, now recognize a clear mandate to become involved in situations of large scale imminent or on-going human rights violations. This period also witnessed an urge for humanitarian intervention to sort out problems of civil strife. It can also be discerned from the state practice that the UNSC practice is chiseling away at, first, the mantle of state sovereignty by sanctioning humanitarian intervention even those taken outside its authority (Liberia), and secondly, the UN Charter principle of non intervention by, *ex post facto* authorizing such interventions.149 Franck is of the view that the ECOWAS interventions in Liberia and Sierra Leone can be said to have demonstrated the reticent UN systems' increasing propensity to let regional organizations use force, even absent specific prior Security Council authorizations, when that seemed the only way to respond to impending humanitarian disasters.150 While both interventions were eventually ratified and adopted by the Council, first in the form of resolutions “commending” them, and then by decisions making the United Nations a partner in those operations. That reinterpretation is further evident in the Councils response to the civil

150 Supra, note 5, p. 162.
conflict in the Central African Republic and in Kosovo. It can confidently be asserted that the Security Council practice has extended the concept of what constitutes international peace and security and thus conditions for intervention to cover humanitarian catastrophes. Resolution 688 of 5th April 1991 with regards to the Kurds in Iraq and Resolution 794 of 3 December, 1992 with regard to Somalia is testimony to this assertion. So is the case of Rwanda. The trend of unilateral intervention (without prior authorization) by states and regional organizations also supports the notion of the existence of the doctrine of humanitarian intervention and that the UN condones it.

We do not think that state practice is sufficient to conclude definitely that the right to use force for humanitarian reasons have become absolutely part of customary international law. Our view is that the most that can be asserted is that there is an emerging concept of humanitarian intervention based upon the purposes of the Charter of course with the exception of genocide. This norm is still its developmental stages.

We are also of the view that the state practice enumerated above, also lend credence to the fact that in cases in which the UN has intervened to protect human rights, it is usually the UNSC that authorizes such intervention. The reason is that the UNSC bears the primary responsibility for the maintenance of peace and security, and exercises overall control over the use of force in contemporary international law. As the ICISS puts it:

There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but make the Security Council work better than it has.

State practice after the Cold war especially the latter part is replete with intervention under the auspices of the UN and regional organizations. Nevertheless, considering the consistent practice of states, there appears to be an emerging norm of humanitarian intervention.

151 Ibid.
152 Article 24 UN Charter.
153 ICISS Report, supra, note 62, at xii.
3.4 Towards a Legal Framework

Although principles of sovereignty and non intervention are essential values of the international society, a state forfeits its domestic legitimacy when it perpetrates outrages against humanity. Sovereignty only confers primary competence upon a nation. It is not and never was an exclusive competence. While it is true that the principle of national sovereignty is eroding, this is happening very slowly. Recent developments as is evidenced by state practice, have shown that such a right is emerging and can be best interpreted as an indication that humanitarian intervention through military force is becoming more acceptable. The basis of the right to undertake forceful action on the part of the international community to protect human rights is established. It is apparent that even as normative revolution is taking place with regard to rights and responsibilities inherent in claims of sovereignty the will of the international community to adjust to this re-orientation has not kept up in a coherent and principled manner. There is a critical gap between, on one hand, needs and distress being felt and seen to be felt in the real world and, on the other hand, the codified instruments and modalities for managing world order. There has also been the parallel gap between the codified best practice on international behavior articulated in the UN Charter and actual state practice as it evolved over time, hence the need to set parameters for justification of humanitarian intervention. The argument here is that this gap is facilitated by the failure of the UN Charter to provide specifically for circumstances in which humanitarian intervention is to apply. This has led to lack of cogent decision making. The United Nations, being a body comprising states, is thus wrought with lack of specificity and direction as we have seen in the cases above. This lack of clarity is what is causing crises like the one presently being experienced in Darfur, to continue unabated while the world continues to watch helplessly as massacres escalate, unable to decide when and how to intervene.

If we conclude with the proposition that the UN Charter did not remove the customary international law practice of humanitarian intervention, and that Articles 2(4), 2(7) and 51 could be read to allow intervention under certain circumstances, then the next major task
is to define criteria for appraisal of the legality of alleged cases that require humanitarian intervention. In other words, it becomes imperative that we outline parameters for intervention that would help the international community to define the permissible forms of instances of humanitarian intervention.

It must be noted that capriciousness of state interest is a theme that runs through the troubled history of humanitarian intervention. While much ink has been spilt on the question of legality of using military force to defend human rights it is difficult to find actual cases that demonstrate the significance of intervention on the issue. States do not appear to have refrained from acting in situations like Rwanda or Kosovo simply from fear of legal sanction. Nor do any of the incidents frequently touted as examples of genuine correspond with principled articulation of such doctrine by legal scholars. The problem is not legitimacy, but overwhelming prevalence of *inhumanitarian non intervention* (emphasis mine).

Thus, if the international community does wish to establish new law permitting humanitarian intervention, it should apply only to situations of widespread gross violations of human rights as necessary remedial action as in Kosovo, Sierra Leone, Liberia have shown. Antonio Cassese, while agreeing with Brunno Simma that NATO’s action was illegal under international law, is also of the view that that action may nevertheless be taken as evidence of an emerging doctrine of international law allowing the use of forcible countermeasures to impede a state from committing large scale atrocities on its own territory in circumstances where the Security Council is incapable of adequately responding to the crisis. He further suggests that where a number of stringent conditions are met, a customary rule may emerge which would legitimize use of force by a group of states in the absence of Security Council authorization. He therefore proceeds to set out six “strict” conditions under which armed fore may gradually become justified. One of the most authoritative catalogues dates back to the year 1974 and has

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been elaborated within the International Law Commission.\textsuperscript{156} The just war theories, as earlier seen, also identify the most common criteria in the just war tradition that have come down to us from the medieval times from Acquinas who, who argued that they were necessary conditions for a war to be deemed just: right (legitimate) authority; just cause; right intention; last resort; proportionality and reasonable hope. The last three were made explicit after Acquinas, but were implicit in his writings.\textsuperscript{157} Other writers have tried to draw up a list of criteria which should be fulfilled to justify intervention.\textsuperscript{158} This approach has gained popularity since Kosovo crisis which has reignited the debate over humanitarian intervention.

The lack of an accepted framework for intervention in the face of egregious abuses led Kofi Anan to issue a challenge to the General Assembly he asked:

\begin{quote}
If humanitarian intervention is indeed an unacceptable assault on sovereignty; how should we respond to Rwanda, to a Srebrenica, to gross and systematic violations of human rights?\textsuperscript{159}
\end{quote}

The time is, therefore, ripe, according to the UN Secretary General, for the international community to reach a consensus, not only on the principle that massive and systematic violations of human rights must be checked, but also on ways of deciding what action is necessary, when and by whom.\textsuperscript{160} To meet this challenge, the Canadian government set up an Independent International Commission on Intervention and State Sovereignty


chaired by the President of the International Crisis Group, Gareth Evans. The Commission handed in its report, ‘The Responsibility to Protect’. In that Report the thresholds for intervention was proposed. Another model system was also proposed by the UK Government and the Goldstone Report. All these provide a benchmark for humanitarian intervention and principles for intervention. These are minimum threshold/standards which, when attained, would provide justification for states to intervene in the internal affairs of a state militarily.

After considering the various criteria proposed by the fathers of international law, scholars and various eminent independent reports, there is need for a consensus on a rationale for and selection criteria that is representative of and common to all the proposals to be used as a benchmark for justification of humanitarian intervention,¹ a threshold which, if found to have been obtained, would give a right to states or group of states to intervene in the internal affairs of the target state without seeking its consent. The only addition would be with regard to post intervention period, on the issue of ability to reconstruct after the intervention. This would deter those states who would wish to intervene for the sake of intervening or on account of reprisal. These criteria would include the following:

1) An overwhelming humanitarian catastrophe;

2) Inaction or inability of the state to address the humanitarian catastrophe in issue;

3) Intervention as a last resort;

4) The theme of intervention primarily motivated by humanitarian concerns;

5) The need for collective intervention;

6) Proportionality in the use of force during the intervention;

7) Compliance with international law during the course of intervention; and

8) Ability to reconstruct after intervention.

¹ Supra, note 80, p. 23.
For the past three years, the conflict in Sudan has captured the attention of the international community. Sudanese government forces and the janjaweed have been carrying on attacks against black African tribes suspected of harboring rebels resulting in the deaths of 300,000 people and the removal of two million people from their homes and villages. Thousands of women and young girls have been raped; entire villages have been destroyed to prevent certain tribes from returning home. The crisis has been exacerbated by Sudan’s refusal to allow unrestricted humanitarian access and also UN force into Darfur. The United States has been in the forefront of calls for humanitarian intervention. The UN has yet to respond with decisive action and has done very little to stop the violence. The African Union force is completely overwhelmed and has thrown in the towel. In The next chapter we shall use the crisis in Darfur, Sudan to test these criteria as justification for humanitarian intervention.
CHAPTER FOUR

THE DARFUR CONFLICT IN SUDAN

4.1 Introduction

Since early 2003, the world has watched with both shock and apathy as Sudan’s Arab dominated government ethnically cleanses the vast western region of Darfur by arming, encouraging and giving air support to mostly Arab militias who kill, maim and rob black Africans. The Darfur crisis combines the worst of everything: armed conflict, extreme violence, sexual assault, great tides of desperate refugees, hunger and disease, all uniting with an unforgiving desert climate. Evidence from numerous sources, governmental and non governmental, suggests a tragedy that, in nature and scale, follows in the example of the holocaust. Such atrocious, terrorizing, present grave challenges to contemporary international law and institutions that the international community has painstakingly fashioned to preserve modern civilization.\(^1\)

4.2 The Sudan

In order to understand the current crisis in Darfur, it is important to place the situation in Darfur within a broader context. Sudan is the largest country in Africa, slightly more than one quarter size of the United States.\(^2\) Sudan is rich in minerals including petroleum, small reserves of iron ore, copper, chromium ore, zinc tungsten, mica, silver, gold and hydropower.\(^3\) The Sudan covers an area of about 2.5 million square kilometers bordering Egypt in the North, the Red Sea, Eritrea and Ethiopia in the East, Uganda, Kenya and the Democratic republic of Congo in the South, and the Central African Republic, Chad and Libya in the west. The Sudan has an estimated population 39 million inhabitants. About 32% of the population is the North, while Christianity and animist traditional religions are more prevalent in the South. The Sudan is a republic with a federal system of

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\(^3\) Ibid.
government. There are multiple levels of administration with 26 states (Wilayaat) subdivided into approximately 120 localities (Mahaliyaat).  

Sudan was ruled by Turko-Egyptians for much of the 19th Century (1820-1885), by the British during the first half of the 20th Century (1859-1956) and gained its independence in 1956. Since it gained independence, the country has been embroiled in a civil war between Arab dominated north and the Animist South, a war that is rooted in economic political social factors. The Sudanese conflict is the longest in Africa with serious human rights abuses and humanitarian disasters. 

Sudan has been embroiled in civil war for most of its nearly 50 years as an independent country, with the longest conflict between the Muslim north and the Christian and Animist south, beginning in 1983. Following the discovery of oil in the South during the 1980’s, the government of Colonel Muammar Gaafar Mohamed Al-Numeiri implemented measures to tie the oil rich areas of the south closer to the north. For example, Nimieri cancelled the 1973 Addis Ababa Agreement which provided the south with autonomy, and instituted Sharia rule despite the fact that the south was predominantly non Muslims. These measures provoked a backlash in the south which ultimately led to civil war in 1983. Since then the Sudanese civil war has been the longest running conflict in Africa. This war which was recently ended by an historic peace agreement has, nevertheless, devastated the south’s infrastructure and created a deep mistrust of the government in Khartoum on the part of the southerners. Under the agreement, Islamic law is to apply only in the north and Sudan’s oil reserves are to be shared between the north and the south. The Comprehensive Peace Agreement marks the end of two decades of civil war and calls for a six year interim period which will end with

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6 Supra, note 4, para 50.


8 Supra, note 5, p. 9.
a referendum on the right to self determination in southern Sudan. President Omar Al Bashir hailed the peace deal as the beginning of a new Sudan.\textsuperscript{9} Sudan has thus known little peace since gaining independence in 1956.\textsuperscript{10}

\textbf{4.3 Darfur}

Despite the achievements of peace accord between the government in Khartoum and the rebels in the south, ethnic violence continues in the western Darfur region of the country.\textsuperscript{11}

Darfur is Sudan’s largest region.\textsuperscript{12} Darfur, which covers a 150,000 square mile expanse of desert and savannah, is about the size of France. The long history of internal conflict among various ethnic groups, often characterized as Arab versus non-Arab is politically and socially complex but reflects an underlying tension over scarce resources.\textsuperscript{13} The processes of desertification, drought and population growth have fostered increased competition for scarce water sources, grazing areas and arable land.\textsuperscript{14} Darfur borders with Libya, Chad and the Central African Republic. The crisis in the western Sudan is normally referred to as a “Darfur” crisis\textsuperscript{15} although since 1994 the region has been divided administratively into three states of North, South and West Darfur.\textsuperscript{16} Like all other states in Sudan, each of the three states in Darfur is governed by a governor (\textit{Wali}) appointed by the central government in Khartoum, and supported by the local administration. Major centres include the capitals of three darfur states, Nyala in South...
Darfur, El Geneina in West Darfur and the capital of North Darfur, El Fashir which is also the historical capital of the region.\textsuperscript{17}

West Darfur has a population of approximately 1.7 million, predominated by sedentary African farmers such as the Fur, Masalit, and Zaghawa tribes. The rest of the population of Darfur consists of Arab nomadic tribes. Although both the black African and the Arab tribes are Muslim, they have a long-standing history of clashes over land, crops, and resources.\textsuperscript{18}

4.4 The Conflict

Ethnic violence began to affect the Darfur region as early as the 1980s. In 1986 the government of Sudan armed Arab militias to fight against rebel forces. After helping the government defeat rebels, some Arab groups took it upon themselves to continue attacking civilian populations, including the Zagawa, Massalit and Fur tribes. These militia groups launched a campaign resulting in destruction of 600 Arab villages and the deaths of roughly 300 people. The government encouraged the formation of an “Arab alliance” in order to prevent the tribes of black Africans from revolting once more. When the current President of Sudan, Omar al-Bashir, seized power in 1989, he forcibly disarmed all non Arab ethnic groups while allowing politically loyal Arabs to keep their arms.\textsuperscript{19}

The conflict in West Darfur began in February 2003 when two rebel groups, the Sudan Liberation Army (SLA) and the Justice Equality Movement (JEM), took arms and attacked government installations. The SLA and the JEM accused the Arab-ruled Sudanese government of oppressing black Africans in favour of Arabs. Khartoum responded by launching air attacks against civilian populations from which the rebels were drawn. The aerial bombings were followed by ground attacks by militiamen

\textsuperscript{17} Ibid.


recruited among the Arab tribes, known as the Janjaweed. There is evidence that Janjaweed attacks are supported and aided by the Sudanese military, although the Sudanese Government denies the charge and has described the militia as "criminals." In September 2003, the SLA and the Sudanese government reached a fragile cease-fire agreement mediated by the U.S., Italy, Britain and Norway. However, both sides soon accused the other of breaking the agreement, and attacks by Janjaweed militias intensified in December 2003.\textsuperscript{20}

The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and the other factors noted above, deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people.

In addition, the members of the rebel movements were mainly drawn from local village defense groups, from particular tribes which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially the SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its agenda on a type of manifesto—the "Black Book", published in 2001—which essentially seeks to prove the disparities in the distribution of power and wealth, by noting that Darfur and its populations, as well as

\textsuperscript{20} Supra, note 4.
some populations of other regions, have been consistently marginalized and not included in influential positions in the central Government of Khartoum. It is noteworthy that the two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that with regard to policy formulation, the new Sudan policy of the SPLM/A in the South had an impact on the SLM/A, while JEM seemed more influenced by trends of political Islam. It should be recalled that despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes: The Fur, the Massalit and the Zaghawa.21

In the current conflict in Darfur, Sudanese military forces and Janjaweed militias have systematically assaulted, raped and tortured tens of thousands of civilians belonging to the Fur, Masalit, Zaghawa and other non-Arab ethnic groups who have lived in the western region of Sudan for generations. They have also destroyed their homes and villages. Although tension among the populations that inhabit Darfur has longstanding historical roots, the present phase began in early 2003, when two rebel groups, the Sudan Liberation Movement/Army (SLA) and the Justice and Equality Movement (JEM), attacked outposts of the Arab government. The rebels, who are largely members of the non-Arab Fur, Masalit and Zaghawa tribes, had demanded greater political and economic representation by the Arab-controlled Sudanese Government. The insurgency began just as it appeared that negotiations in Sudan’s decades-old civil war between the central government and the South could finally bring that conflict to a close.22

War in the southern Sudan was ended by a peace agreement in 2005. Incorporated into the final text of the CPA are a set of agreements known as the Naivasha Protocols, which had been mediated by the Intergovernmental Authority for Development and concluded between warring parties in 2004. These Protocols specify how wealth and power is to be shared by the north and south during an interim period of six years, grant the southern

21 Ibid.
22 Ibid.
Sudan autonomy and possible independence following a referendum, and indicate how military forces might be redeployed. 23

Currently the Sudanese government is fighting wars on two major fronts. The predominant conflict, commonly referred to as the north south divide, involves a rebel movement, known as the Sudanese Peoples Liberation Movement/Army (SPLM/A) and the government of Sudan. This war divides the Arab Muslims in the North where Sudan's vast resources and policy making are guided by the Khartoum government and the African Christian and animists in the South, who remain excluded from power sharing and are ignored by the government. The second conflict, the war in Darfur region, is analogous in that it involves rebel faction fighting against individuals contracted by the Sudanese government, but it is distinguishable in that the Sudanese government in Darfur has been implicated in harming and displacing innocent civilians on a massive scale. 24

4.5 The State of Humanitarian Crisis in Darfur

As at 2004 since the beginning of the 18-month conflict, human rights groups estimate that the Janjaweed militias are responsible for the death of at least 30,000 black Africans. 25 The militias have been accused of raping women and girls, destroying villages and crops, and polluting water supplies. More than 1 million Africans villagers have been forced from their homes, and have fled to refugee camps in Sudan and in Eastern Chad. According to the U.N. Office for the Coordination of Humanitarian Affairs, about 2.2 million civilians are in urgent need of food, medicine and shelter. The humanitarian consequences of the conflict have been further aggravated by the Sudanese government's refusal to allow unrestricted humanitarian access to Darfur. Senior officials from U.N. agencies have described the Darfur situation as "one of the worst humanitarian crises in the world." 26 A report of the U.N. High Commissioner for Human Rights on the situation

24 Supra, note 19, p. 5.
26 Statement by the UN World Food Programme, Executive Director, James Morris, May 4, 2004; available at http://www.wfp.org/index.asp?section=2 (click on “Press Releases”) (visited on 20/10/06).
of human rights in Darfur "identified disturbing patterns of massive human rights violations in Darfur perpetrated by the Government of Sudan and its proxy militia, many of which may constitute war crimes and/or crimes against humanity." The pattern of repression has been described as follows:

First, aircraft would come over a village, as if smelling the target, and then return to release their bombs. The raids were carried out by Russian-built four-engine Antonov An-12s, which are not bombers but transports. They have no bomb bays or aiming mechanisms and the bombs they dropped were old oil drums stuffed with a mixture of explosives and metallic debris. These were rolled on the floor of the transport and dropped out of the rear ramp which was kept open during the flight. The result was primitive free-falling cluster bombs, which were completely useless from a military point of view since they could not be aimed but had a deadly efficiency against civilian targets. . . . After the Antonovs had finished their grisly job, combat helicopters and/or MiG fighter-bombers would come, machine gunning and firing rockets at any large targets such as a school or warehouse which might still be standing . . . When the air attacks were over, the Janjaweed would arrive, either by themselves or in the company of regular Army units . . . They would surround the village and what followed would vary. In the same pattern they would cordon off the place, loot personal belongings, rape the girls and women, steal the cattle and kill the donkeys. They would then burn the houses and shoot all those who could not run away. Small children, being light, were often tossed back into the burning houses. In the same pattern, the militiamen would beat up people, loot, shoot a few recalcitrant men, and rape the females, often scarring them or branding them with a hot iron so that they would become recognizable as spoilt women in the future. 28

Such atrocities soon resulted in widespread displacement and humanitarian crisis. As of June 2004, it was estimated that out of a pre-conflict population of 4.7 million, an estimated 1.3 million were displaced within Sudan, some 150,000 had fled into Chad and 10.30,000 had died in the conflict. Given its remoteness and the media’s concentration on the North/South peace negotiations, the crisis in Darfur at first went almost unreported. 29

27 The Report is available at http://www.ochr.org/english/ (visited on 20/9/06)
29 Ibid.
In May 2004, Human Rights Watch reported that they had found credible evidence that the government of Sudan had purposely sought to remove by violent means the Masalit and Fur populations from large parts of Darfur in operations that amount to ethnic cleansing. The attacks directed against the civilians, the burning of their villages, the mass killings of persons under their control, the forced displacements of populations, the destruction of their food stocks, livelihoods and the looting of their livestock by government and militia forces are not merely scorched earth tactic or an element of counterinsurgency strategy. Their aim appears to be to remove those ethnic groups from large areas of the region and redistribute this population, mainly into the vicinity of government controlled towns where they can be concentrated, confined and controlled.\textsuperscript{30} The subsequent denial of humanitarian assistance to this population by the government of Sudan, in conditions where the population has been rendered entirely dependent on relief can also be considered as part of a strategy to weaken and destroy a large proportion of the displaced population and prevent their return to their home villages. The situation has been exacerbated by the occupation and apparent resettlement of some Masalit areas by Janjaweed and related Arab ethnic groups. The ethnic make up of the region will be permanently altered if the large scale displacement that has occurred is not urgently addressed and reversed.\textsuperscript{31}

The non governmental organization Coalition for International Justice estimates that in just over two years about 250,000 civilians have died in the IDP camps from disease, starvation or exposure and estimates that about 15,000 deaths are continuing to occur each month.\textsuperscript{32}

According to the Commission’s findings, at the time of the establishment of the Commission upon its arrival in the Sudan in November 2004, two irrefutable facts about the situation in Darfur were immediately apparent. Firstly, there were more than one


\textsuperscript{31} Ibid.

million internally displaced persons (IDPs) inside Darfur (1.65 million according to the United Nations), and more than two hundred thousand refugees from Darfur in neighbouring Chad. Secondly, there were several hundred destroyed and burnt villages and hamlets throughout the three states of Darfur. While the exact number of displaced persons remain to be determined, the massive displacement and destruction of villages are facts beyond dispute. All the actors and observers agree on this, and it was also confirmed to the Commission during its mission in November by all its interlocutors, be it the Government of Khartoum, the local administration in the three Darfur states, tribal leaders, international organizations and others.

On July 22, 2004, the U.S. Congress passed a resolution declaring the attacks on the African villagers to be "genocide." U.N. officials have also compared the Darfur situation to the Rwandan genocide of 1994, but the U.N., the Bush administration and the African Union have so far refused to define the Darfur killings as "genocide." On August 9, 2004, a European Union fact-finding mission found that there was "widespread, silent and slow killing going on, and village burning of a fairly large scale," but rejected use of the term "genocide." Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." If the situation in Darfur is indeed genocide, Article 1 of the Genocide Convention says that the state parties undertake to prevent and to punish it as a crime under international law. It does not matter that Sudan is not a party to the Genocide Convention, since genocide is an international crime under customary international law, and since states that are parties to the Convention have undertaken to

33 Supra, note 4, para 226.
34 Ibid.
35 Press Briefing by Pieter Feith, Personal Representative for Sudan of the Secretary General of the Council of the EU, on August 9, 2004; available at http://www.consilium.eu.int/uedocs/cmsUpload/concordia.pdf
prevent and punish it wherever it may occur. If there is a dispute between states parties as to whether genocide as defined in the Convention has been committed, any party to the dispute may refer the matter to the International Court of Justice.

While it is impossible to know exactly how many people have died in Darfur since early 2003, the estimated number ranges from a low of between 60,000 and 120,000 to a high of 380,000 to 4000,000. The estimates include both those slaughtered in the assaults and those who died later from starvation, exposure or disease. Nearly two million people have been uprooted and displaced, and an estimated 90 percent of non-Arab villages in the region have been attacked, looted, or razed to the ground. Survivors have been forced to flee their homes: currently 2.5 million are living in over 2000 camps in Darfur itself, while another 200,000 are subsisting in refugee camps in neighbouring Chad.

Aerial attacks on villages had all but ended and the number of GOS and Janjaweed ground attacks on villages were very limited by the spring and summer of 2005, perhaps because so few intact targets remained. But it would be wrong to interpret a decrease in assaults as a sign of acceptable overall safety. Refugees and IDPs are still liable to attacks once they step outside the camp boundaries and the security climate inside, and outside the camp continues to deteriorate. People are not returning to the site of their homes to rebuild. Analysts have referred to the conflict in Darfur as “genocide in slow motion.”

While large-scale attacks on Darfurian villages were rare in the second half of 2005, the security situation continues to deteriorate. African Union troops have been killed and kidnapped, humanitarian aid workers have been attacked and incidents of rape are on the rise. Crucial supply routes have been closed, which means that hundreds of thousands of Darfurians are beyond the reach of humanitarian aid. Many humanitarian aid groups

36 Supra, note 5, p. 13.
37 Ibid.
38 Supra, note 5, p. 13.
39 Ibid.
40 Ibid.
report serious difficulties in receiving and renewing visas from Khartoum, and the United Nations has withdrawn some of its staff in west Darfur because of the rising violence. The situation has been made worse as a result of in-fighting among the two main rebel groups, the JEM and the SLA, which has caused serious disruptions for the AU-sponsored Darfur peace talks between GOS and rebels in the Nigerian capital of Abuja.  

4.6 Complicity of the Sudanese Government

The Government of Sudan has long held the position that whatever violence has occurred in Darfur was initiated by the rebels who, therefore, bear the brunt of the blame for the crisis. Any retaliation by the Janjaweed is, therefore not only at least originally a form of self defense, but does not receive any support from Khartoum.  

Available evidence refutes the government’s position. Not only does Khartoum have a history of supporting ethnically based militias to wipe out opponents, particularly in the south, the Nuba mountains and the Southern Blue Nile, but reports from refugees and displaced persons show a consistent pattern of collusion between the Janjaweed and the army. Targeted villages are first bombarded from the air by government warplanes and attack helicopters and then attacked from the ground by bands of Janjaweed on horseback, killing, beating and raping villagers, looting possessions and burning homes, and even chasing civilians as they search flee in search of protection.  

After conducting interviews with victims and investigators in the region, Human Rights Watch concluded that the government of Sudan is responsible for the ethnic cleansing and crimes against humanity in Darfur. They found that “the government of Sudan responded to rebel activities in Darfur by allowing free reign to the Janjaweed, who began attacking villages, killing, raping, abducting people, destroying homes and other property. At times, government troops also attacked villages alongside the Janjaweed and government aircraft have been bombing villages sometimes just before Janjaweed attacks

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41 Ibid.
43 Ibid.
suggesting that these were coordinated. They come together, they fight together, they leave together". They described links between the Sudanese armed forces and the Janjaweed as incontrovertible.  

4.7 Response of the International Community

It is only fair to say that the international community has made some attempts at solving the Darfur crisis though these attempts are less than satisfactory. As early as 30 June 2003, the UN Secretary General, Kofi Anan, visited Khartoum for a three day mission focused on the Darfur situation. He also visited neighbouring Chad where there are thousands of refugees.

4.7.1 The United Nations

In April 2004, the UNHCR took up the Darfur crisis, but could only manage a softly worded draft resolution of concern which Sudan supported because there was no naming and shaming of Khartoum. UNHCR has also shown concern with regard to Darfur as it has borne the great humanitarian burden of catering for huge numbers of refugees and internally displaced persons.

On 2nd April 2004 the UNSC issued a Presidential Statement expressing its concern about the "massive humanitarian crisis" in Darfur and called on all parties to protect civilians, to allow humanitarian agencies full access to Darfur and to reach a ceasefire.

On 26th May 2004, in a second Presidential Statement, the Security Council expressed grave concern over the deteriorating humanitarian and human rights situation in the Dafur

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45 Supra, note 1
46 Ibid.
47 Supra, note 7, p. 15.
49 The full text of the statement is available on the UN website at www.un.org. (Visited on 9/11/06).
The Council demanded that those responsible be held accountable for large scale violations of human rights law reported and called on the government of Sudan to neutralize and disarm the Janjaweed militias.

On July 3, 2004, after a four-day visit to Chad and Sudan by United Nations Secretary-General, Kofi Annan, the GOS agreed to a joint communiqué that contained a commitment to improve humanitarian access. However, over the next several weeks, the situation deteriorated further and reports of ongoing attacks continued.

On July 30, 2004, the United Nations Security Council adopted Resolution 1556 by a vote of 13 in favour, with China and Pakistan abstaining. The US-drafted resolution was co-sponsored by Britain, France, Germany, Chile, Spain and Romania. The Resolution stated that the situation in Sudan constituted a threat to international peace and security, and acting under Chapter VII of the UN Charter, the Council demanded that:

The government of Sudan fulfils its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and humanitarian law violation and other atrocities...

It acknowledged steps taken towards humanitarian access, but expressed concerns at the reports of violations of the Ceasefire Agreement signed in Djamena on 8 April 2004. It expressed the determination of the UNSC to “do everything possible to halt a humanitarian catastrophe”. In the event of non-compliance the Council expressed a willingness to consider further action including resort to its powers under article 41 of the Charter (measures not involving use of armed force). It endorsed the deployment of international monitors, including the protection force envisioned by the AU to Darfur, and urged the international community to continue to support these efforts and, in

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52 Ibid., para. 2.
particular, to enforce the AU monitoring team by providing other assistance including financing, supplies, vehicles, transport, command support communication, and headquarters as needed for monitoring the operation. The resolution set a 30-day deadline for Sudan to comply with the Security Council's demands. The Sudanese Army called the resolution a declaration of war and vowed to fight any 'crusader' army that sets an impious foot on Sudanese soil. Subsequently the UNSC demanded that the Sudanese government stop the hostilities by December 18, 2004 or 'face having the matter to go to the United Nations Security Council' for consideration of enforcement measures. The day after the Security Council’s deadline expired Sudanese air strikes were again reported in Southern Darfur.

In September 2004, the Security Council determined that the Government of Sudan had not fulfilled its commitments under an earlier resolution to disarm the Janjaweed and to bring those leaders responsible for atrocities to justice. It did not impose any sanctions; instead it passed Resolution 1556 and requested that:

The Secretary General establish an International Commission of Inquiry in order to immediately investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

The Secretary General established the Commission under the Chairmanship of Professor Antonio Cassese and required it to report by 25 January 2005. All parties to the conflict were called upon to cooperate fully with the Commission.

The signing of a Comprehensive Peace Agreement on January 9, 2005, formally brought the North-South conflict to an end, and on July, 9, 2005, SPLA/M leader John Garang

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53 Ibid., para., 3.
54 Supra, note 7, p. 15.
55 Ibid.
56 UNSC Res.1564 (2004); UN Doc. S/RES/1564 para. 1.
57 Supra, note 4, para. 1. The other members of the Commission were Mr. Mohamed Fayek, Ms. Hina Jilani, Mr. Dumisa Ntsebeza and Ms Theresa Striggner-Scot.
was sworn in as first Vice President of the “Government of National Unity.” Garang’
died in a helicopter crash a few weeks later and was succeeded by Salva Kiir, who was
Garang’s second in command and the SPLA/M’s deputy leader. The effectiveness of the
new government in resolving the crisis remains to be seen. As at the time of writing, the
internally displaced persons in Darfur and Sudanese refugees in Chad and elsewhere
remain threatened by an ongoing climate of insecurity in the region.

The Commission visited the Darfur region in November 2004 and January 2005 and held
extensive meetings with UN and government officials, members of the armed forces and
police, rebel leaders, internally displaced persons, and victims and witnesses of
atrocities. In the first and largest section of its report, the Commission considered
whether any of the actions by either side amounted to breaches of human rights or
constituted war crimes or crimes against humanity. With respect to international human
rights law, the government of Sudan is bound, inter alia by the International Convention
on Civil and Political Rights, 1996 (ICCPR), the Convention on the Rights of the
Although Sudan has officially been in a state of emergency since 1999, to the
Commission’s knowledge it has not taken steps to derogate from these treaties, but would
in any case be bound to respect the non-derogable provisions of these treaties at all times.

With respect to international humanitarian law, the Commission found that there has been
a non-international armed conflict taking place in Darfur since at least February 2003. It
confirmed that the Government was in control or at least acquiesced in the activities of
the Janjaweed. The Commission also declared that the customary rules, breaches of
which amounted to war crimes, included the following prohibitions: deliberate or
indiscriminate attacks on civilians; attacks aimed at terrorizing civilians; attacking

58 Supra, note 4.
59 Ibid., paras. 73-78.
60 999 UNTS 171.
61 1577 UNTS 3.
63 Supra, note 4, paras. 125-126.
civilian objects; the destruction of objects indispensable to the survival to the civilian population; forcible transfer of civilians; outrages against personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence and pillage. While examining in depth the reports it had gathered of the murder of civilians, destruction of villages, forced displacements of civilians, rape, torture and pillage On the whole it considered that the treatment of the civilian population by the Government of Sudan through its armed forces and the Janjaweed militia amounted to breaches of their human rights, war crimes and crimes against humanity. In particular the Commission commented that this treatment also amounted to persecution as a crime of humanity of the Fur, Massalit, Zaghawa and other African tribes on political grounds.

The 176 page Report of the Commission of Inquiry was delivered to the Secretary General of the United Nations on 25 January, 2005. It recommended inter alia, that the Government of Sudan end impunity for the war crimes and crimes against humanity taking place in Darfur. It also recommended that the Security Council refers the situation in Darfur to the ICC as alleged documented crimes meet all the threshold of the Rome Statute for the International Criminal Court. This Report has been widely praised for its contribution to efforts to bring to end grave violations of human rights and humanitarian law in Darfur. Secretary General Kofi Annan characterized it as 'one of the most important documents in recent history of the United Nations.

UN Security Council Resolution 1593, adopted in March, 2005, referred the situation in Darfur adopted in March, 2005, referred the situation in Darfur to the International Criminal Court. Despite its long established opposition to the ICC, the United States abstained from voting on the Security Council’s referral allowing the ICC to initiate an

64 Ibid., para. 166-7.
65 Ibid., paras 237-418.
66 Ibid.
67 Ibid at para 295, 321, 332, 360, 379 and 393.
68 Ibid., para. 650.
69 Ibid.
investigation in June. The ICC’s involvement opens the door to potential international indictments of accused war criminals.

On 29th March 2005, the UNSC adopted Resolution 1591, which imposes “smart sanctions” on all persons found to:

Impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities, violate the measures implemented by Member States in accordance with paragraph 7 and 8 of Resolution 1556 (2004) and paragraph 7 of this resolution as implemented by a state, or are responsible for offensive military over flights described in paragraph 6 of this resolution, shall be subject to the measures identified in sub paragraph (d) and (e) below.71

The sanctions include travel ban on perpetrators of the Darfur mayhem,72 freezing of all funds, financial assets, and economic resources belonging to such persons73 and ensuring that no resources are made available by their nationals or by any persons within their territories or for the benefit of such persons or entities.74

Prior to Resolution 1591, the UNSC had adopted Resolution 1590 on 24 March 1995 to establish the United Nations Mission in Sudan (UNAMIS) for an initial period of six months75

The UN Security Council Resolution 1706,76 passed on 31 August 2005, extended to Darfur the mandate of the UN Mission in Sudan (UNAMIS), which currently has 10,000 in country personnel monitoring the North South Comprehensive Peace Agreement.77

The Resolution invited Khartoum’s consent to the deployment of 20,600 UN peacekeepers to the region. A reinforced UNAMIS would take over from the African

72 Ibid.
73 Ibid.
74 Ibid.
Union's currently overstretched African Mission in Sudan (AMIS) which, although threatened with expulsion in September, has now been extended to the end of the year. The ruling National Congress Party (NCP) in Khartoum continues to strongly reject the proposed deployment. More egregious provocations continued. It took another year before any individuals were specifically targeted and then only four of them, a low level air force commander, a janjaweed commander and two rebels.

In August 2006, the Security Council finally passed a resolution providing for the deployment of UN peacekeeping forces to Darfur by the end of the year, but effectively conditioned deployment on the consent of Khartoum, ensuring that the deployment would not take place any time soon, and almost certainly, not by the end of 2006.

Under a limited mandate, approximately 7,300 African Union peacekeeping troops, military observers, civilian police, and civilian staff have been deployed to Darfur. The United Nations Mission in Sudan (UNMIS), while established to monitor and support the peace process in southern Sudan, has also been tasked with providing political and logistical support to the AU Mission in Darfur.

On March 10, 2006, the African Union Peace and Security Council decided to support tentatively the transition of the current African Union Mission in the Sudan (AMIS) to a U.N. operation and to extend the mandate of AMIS until September 30, 2006. The body confirmed that decision on May 14, 2006 with a firm endorsement of a transition to a U.N. Force in Darfur after September 30. On May 16, 2006, the U.N. Security Council unanimously adopted Resolution 1679 calling “for the deployment of a joint African Union and United Nations technical assessment mission within one week of the adoption of this resolution.

78 Ibid.
The resolution was passed under Chapter VII of the U.N. Charter which requires all U.N. member states to accept decisions of the Security Council. However, Khartoum has refused to permit U.N. military planners into Darfur in the past, and Russia, China and Qatar continue to insist that a U. N. peacekeeping operation in Darfur must have Sudan’s agreement. The resolution fails to identify consequences if the Sudanese government fails to comply, although the Council did state that it would consider banning travel and freezing assets of individuals or groups blocking implementation of the Darfur peace agreement.

4.7.2 The African Union

The lead international actor on Darfur has been the African Union. It has done as much as could be expected within its limited resources and mandate, but its limitations are now being cruelly exposed.\(^{82}\)

In April, 2004, Chad and the African Union (AU), Africa’s main intergovernmental body, supported by the US and European Union (EU), facilitated the negotiation of a 45-day ceasefire between the rebel groups and the GOS. The agreement included a commitment from the GOS to disarm the Janjaweed. The AU sent 400 soldiers to monitor the ceasefire.

Like the UN and its agencies, African intergovernmental institutions and human rights bodies have reacted with concern to the Darfur crisis. At its 35\(^{th}\) session in Banjul, The Gambia, The African Union adopted a resolution on the situation of human rights in Darfur Sudan.\(^{83}\) The resolution expressed deep concern over the “continuing humanitarian crisis and the reported human rights violations committed in that region since the beginning of the crisis, such as mass killings and sexual violence as a means of warfare and the abduction of women and children.”\(^{84}\) It called on “all parties to the armed conflict to immediately cease using military force to interfere with the delivery of


\(^{84}\) Ibid.
humanitarian assistance to the civilian population and allow such assistance to be delivered unhindered." It concluded with a promise by the Commission "to send a fact finding mission to Darfur to investigate reports on human rights violations in Darfur and to report back".

The AU Assembly on its part does not seem to have a clearly defined position on Darfur crisis. In its decision on Darfur, adopted in July 2004, the Assembly expressed the need to address the crisis "with utmost urgency to avoid further escalation." Though it acknowledges that "the humanitarian situation in Darfur is serious", it has been reluctant to use forceful measures to end the crisis.

To its credit, the AU has brokered several intra-Sudanese peace talks comprising the Government of Sudan, the SLA and the JEM, all aimed at reaching peaceful solutions to the Darfur crisis. These talks have led to several agreements including the two Protocols signed in Abuja, Nigeria on 9 November 2004. On 1 September 2004, the parties again agreed on "The Protocol on the Improvement on the Humanitarian Situation in Darfur which the AU believes constitutes an important step in the efforts aimed at alleviating the suffering of the civilian population in Darfur and paving way for a comprehensive and lasting political settlement of the conflict in this region."

To monitor and observe compliance with all the ceasefire agreements, in particular the N'Djamena Ceasefire Agreement, the AU/PSC established the African Mission in the Sudan (AMIS). AMIS has the additional mandate of assisting in the process of confidence building; contributing to secure environment for delivery of humanitarian relief, and ultimately the return of IDPs to their homes, and contributing generally to the

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85 Ibid., paragraph 2.
86 Ibid., paragraph 3.
88 Ibid.
improvement of security situation throughout Darfur.\(^91\) Within the framework of its mandate, AMIS is further tasked to monitor and verify the provision and security for returning IDPs and in the vicinity of existing IDP camps; monitor and verify the cessation of all hostile acts by all parties to the conflict; monitor and verify efforts by the GOS to disarm militias; investigate and report allegations of violation of ceasefire agreements; and protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capabilities.\(^92\)

When the scale of the devastation became too overwhelming to ignore, in mid 2004, the AU established a small monitoring mission consisting of some 60 monitors and 300 troops to protect them.\(^93\) By the spring of 2005 there were approximately 3,000 AU troops in Darfur. However, the relatively small number of troops and the weakness of their mandate impedes the forces’ efficacy. By October 2005, the African Union was warning that it would soon run out of funds, and that, while the international community had provided transport for troops, accommodation and military hardware, only $79 million of the $252 million needed for a year of operations had actually been pledged.\(^94\)

The AU’s original deployment time-frame, beyond the 7,000 originally intended to be in place by the fall of 2005, called for a force of 12,000 by spring 2006. The proof that the foreign military presence in Darfur has reached an adequate level will be when the Darfurians who have lost their homes can be assured that they can return home without being attacked. Whatever the final size of the AU force, an additional robust international presence on the ground is essential to ensure peace and security. Moreover, the AU will be able to protect Darfurians more effectively when its mandate is expanded to explicitly include protecting civilians and facilitating the return to their villages.\(^95\)

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91 Ibid.
92 Ibid.
93 Supra, note 82, p. 625.
94 Ibid.
95 Ibid.
AMIS as constituted in April 2005 was said to be “overstretched to address security concerns’ in Darfur and lacked “the basic elements of a balanced military force.” A critical limitation of the AU is its mandate. It does not have a mandate to go out and proactively protect civilians. In fact, it can only protect civilians when they are being attacked in its presence, and only then if it feels it has enough troops, and too often it does not. And an already fraught situation is rapidly deteriorating for the AU and those it is supposed to help protect. The government of Sudan launched a new military campaign late August 2006 to wipe out the remaining rebel groups in Darfur. Funding and support for the AU mission is drying up. Many of its soldiers have been unpaid in recent months and for an already grossly overstretched unit it is still being told under the Darfur Peace Agreement, to do more with less.

4.7.3 Other international Organizations

The EU and NATO are the remaining key international players. The EU approach has been largely to stand behind the AU as the lead international player in Darfur. Its role is to primarily support an African solution to an African problem, by funding the AU Mission, though that funding support is dwindling as the AU pushes for more funding for its mission.

More recently, NATO has been providing expertise and logistical support to the AU Mission. But NATO has no intention of going beyond its limited support and logistical role and actually putting troops on the ground in any significant numbers.

4.8 International Reluctance/Inaction

Despite the well documented humanitarian situation in Darfur, most governments and major international organizations have been reluctant to designate the events in Darfur as acts of genocide. The German Foreign Minister Joschka Fischer called it a ‘humanitarian

97 Ibid.
98 Ibid.
catastrophe with genocidal potential. Sam Ibok, the Director of the African Union’s Peace and Security Council, said in July 2004 that what was happening in Darfur was not yet genocide, but ‘did have the potential of deteriorating into something serious’. The Report of the Commission reveal that an estimated 30,000 to 50,000 people had been killed and well over one million displaced; given these figures and complete with evidence of widespread rape and sexual violence, one could be excused for wondering what would be considered quite serious.

4.9 The Sovereignty Shield – Sudans’ Response

Sudan’s response to UN Security Council Resolution 1556 was mixed. Sudan’s government initially rejected the resolution, but later stepped back from its rejection. On August 4, 2006, the Sudanese government finalized an agreement with the U.N. Secretary General Special Representative Jan Pronk, which contained detailed steps and policy measures to be taken within the next 30 days to begin to disarm the Janjaweed. On the same day, a spokesman for the African Union said the organization would boost from 300 to 2,000 the number of troops it would deploy to protect its cease-fire monitors. On August 7, 2006, Khartoum announced that Sudan would accept African troops to protect observers, but that any peacekeeping role would be limited to Sudanese forces. Finally, Sudan agreed on August 9, 2006 to participate in peace talks with rebel groups. The talks were scheduled to be held in Nigeria on August 23, 2006.

UN resolutions calling upon for the government of Sudan to disarm the Janjaweed and stabilize the Darfur region have, to date, been ignored and the UN Secretary-General Kofi Annan, reported in early December that the Government had made no progress in disarming the Janjaweed. President Bashir termed the resolution as a western invasion and attempt to reconolize Sudan. He was reported as opposing the UN force. He was quoted as saying Sudan had “options and plans to confront international intervention.”

100 Supra note 4.
Their argument was that presence of foreign troops is an “imperial invasion.” It is seen as intention to create a regime change with a view to overthrowing the government of Sudan.\textsuperscript{103}

An increase in diplomatic pressure and worldwide attention to the situation in Darfur has forced the GOS to loosen its constraints on humanitarian access. However, the May 2005 arrest of two workers from \textit{Medicines sans Frontières} (MSF), in response to their organization’s report on rape and sexual violence in Darfur, demonstrated the GOS ongoing resistance to efforts to stop violations and ease suffering in the region. The forbidding countryside and intermittent obstruction, which has included attacks on humanitarian convoys by GOS military and Janjaweed forces, have continued to make it very difficult for NGOs to move through the area and maintain uninterrupted deliveries of aid to people in need.\textsuperscript{104}

The government’s response to the Commission is that the conflict is tribal and they always sorted them out through traditional reconciliation conferences which the government claims it is trying to promote\textsuperscript{105} The government also denied that there were no any ethnic dimension to the conflict. Their argument is that the conflict is not new and there are various ethnic movements within the area who are involved.

The government attributes the conflict to competition between tribes, weak local administrative set up, weak presence of police, presence of foreign actors, arms proliferation, political oppression and lack of infrastructure.\textsuperscript{106}

Sudanese government officials have been quoted as saying that some of the countries passing resolutions are also killing innocent civilians. This is in reference to the war in Iraq\textsuperscript{107}

\textsuperscript{103} Serah Flounders “Why Sudan Rejects UN Troops,” Global Research Centre for Research and Globalization 21/10/06. available at http://globalresearch.ca/index.php?content=viewarticle&code=fl20060907&article.

\textsuperscript{104} Supra, note 5, p. 13.

\textsuperscript{105} Supra, note 4, para. 201

\textsuperscript{106} Ibid, paragraph 203
Sudan has also rejected a proposal to transfer peacekeeping in Darfur from a weak African force to a larger, stronger UN mission, saying that it would put the nation under control of foreign powers. Sudanese President Omar Al Bashir’s National Congress Party lashed out at the western efforts and rejected the proposed UN force. He was quoted as saying that “the draft resolution is worse than the previous ones because it constitutes an attempt to impose complete guardianship on the Sudan.” The upshot of the matter is that Sudan has wilfully and flagrantly rejected any attempts to intervention in its affairs forcefully. It has failed to respond to any resolution by the UNSC.

4.10 Is There a Case for Humanitarian Intervention in the Darfur Crisis?

Clearly there is much discussion by the UNSC but these discussions have not resulted into actions. The measures adopted have been short of invocation of Article 42, use of force which explains why they have failed to persuade Khartoum to change its behaviour in Darfur. Rather than end abuses and provide security to the targeted villages and displaced persons, the Government of Sudan remains entrenched and continues to recruit new mentors, displace civilians and burn villages under the watchful eyes of the international community. There is already a finding that the crisis constitutes a threat to international peace and stability in the region. This should provide a legal basis for tougher measures in Sudan, which in this case mean humanitarian intervention, because non forceful ones have failed. The situation in Darfur is ripe for humanitarian intervention on the basis of the criteria below.

4.10.1 An Overwhelming Humanitarian Catastrophe

Failure to authorize collective military intervention in Darfur has been subject to controversy within the UN. This is due to reluctance to recognize the atrocities as genocide. The massacres in Iraq, Somalia or Yugoslavia did not amount to genocide, but the Security Council promptly responded to these issues by authorizing military

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108 Ibid.
intervention as a result of which international law has come to recognize, as we have seen legitimacy of intervention for purposes of preventing serious violation of human rights and international humanitarian law. In Sudan, 300,000 Darfurians have lost their lives with death toll estimated to be rising by about 10,000 per month, 2 million displaced, more than 200,000 refugees in neighbouring Chad, as well as large-scale destruction of villages. The situation has been said to be genocide in slow motion. This constitutes overwhelming humanitarian catastrophe. The Commission chaired by Antonio Cassese has had a first hand account of the crisis. Our argument, therefore, is that the situation has reached the threshold of humanitarian catastrophe and there is absolutely no reason why intervention should not be carried out.

4.10.2 Inaction/Inability to Address the Humanitarian Catastrophe

Khartoum has the primary responsibility to protect its own citizens against atrocities but has wilfully and frequently flouted this responsibility. It has been the prime mover behind the campaign of ethnic cleansing by the Janjaweed militia on the people of Darfur. Despite undertaking on six occasions, to disarm the Janjaweed militia, most recently in several Darfur Peace Agreements, and having been repeatedly directed to do so by the Security Council, the Sudanese government has yet to make even token efforts to meet its commitments. Even now Khartoum continues to recruit and support its own militias and support their continued attacks and all the while it has skilfully played the various rebel groups and tribes in Darfur and eastern Chad against each other, allowing it to claim vindication for its disingenuous and self fulfilling assertions that Darfur is all about tribal rivalries and long standing ethnic hatreds. Apart from failing to address the conflict, the Sudanese government is in complicity in widespread atrocities. Reports from Amnesty International, Human Rights Watch, and various other international organizations or news agencies as well as branches of the UN and US State Department indicate that the Sudanese government bears direct responsibilities for mass

110 The N'Djamena ceasefire agreement of 8 April 2004; N'Djamena agreement of 25 April 2004; the 3 July 2004 communiqué signed with the UN; the 5 August 2004 plan of report signed with UN and the 9 November 2004 Protocol on Security at AU led Abuja talks.
111 UNSC Resolutions 1556 (30 July 2004), 1564 (18 September 2004), 1574 (19 September 2004) 1591 (29 March 2005), and 1706 (31 August 2006).
atrocities perpetrated by the Janjaweed militia alongside the Sudanese military. The government of Sudan has allowed free reign to Arab militias. Government troops have been accused of attacking villages alongside the Janjaweed and government aircraft have been bombing villages just before the Janjaweed attacks, suggesting that these were co-coordinated. The link between the janjaweed forces and the Sudanese government is incontrovertible.\textsuperscript{112} The government of Sudan is therefore not only unable to address the conflict, but is also the direct cause of the conflict.

\textbf{4.10.3 Intervention as a Last Resort}

Any form of intervention utilizing military forces must be an option of a last resort. It is obvious that diplomacy by the international community, in particular the UN and the AU has failed, is failing and will fail to prize Khartoum into ending its policy of ethnic cleansing, a euphemism for genocide, in Darfur and in particular to hem the Janjaweed militias.\textsuperscript{113} Appealing to the government of Sudan to honour past commitments has clearly also not worked and will not work. It is, therefore not beneficial for both the Security Council and the PSC to repeat the same stale rhetorical demands with little hope of enforcement. It is overwhelmingly improbable that peace can be imposed on Darfur without a much larger more robust foreign military intervention.\textsuperscript{114}

Despite all the measures that have been taken over the past three years violence continues to escalate as the Sudanese government digs in its heel and arrogantly refuses to allow a more robust force, Peace agreements have not been respected abided by. Sanctions have been scoffed at. Access has been denied and humanitarian deliveries have been disrupted. Diplomatic efforts have been thwarted. The UN Special Envoy, Jan Pronk, has been recently expelled from Sudan. Ceasefires have been violated. There is, indeed, a threat to regional peace and security. It is not that the U.N. has used kid’s gloves on Sudan, it has tried its best to cajole Sudan into accepting even a robust peacekeeping force, but as seen from Sudan’s response above, there does not appear to be a breakthrough in the near


\textsuperscript{113} Supra, note 1, p. 1189.

\textsuperscript{114} Ibid.
future. The threshold of last resort is exhausted. Threats to use force have been applied; the only other option left to save the Darfurians is military intervention. Forcible humanitarian intervention is the most viable option open to international community to bring to an end the killings, rapes, and pillages in Darfur. Such intervention would send a clear message to Khartoum to respect international law and, in particular, to fulfil its primary obligation to protect all persons under its territory without discrimination of any kind.

4.10.4 Intervention to be Primarily Motivated by Humanitarian Concerns

Humanitarian intervention must be primarily motivated by humanitarianism. The chief intent behind such action must be the protection of rights and livelihoods of refugees, civilians and internally displaced persons of the Darfur region. In the case of Sudan, there are three main sets of proponents advocating humanitarian intervention namely, the U.N., A.U, and individual states such as the U.S and the U.K. It has been alluded from the response of Sudan that intervention is not being prompted by the humanitarian situation, but by self interest and national security agendas. But the A.U. and the U.N cannot be said to want to colonize Sudan. They do not want to change the regime. True, self interest may not be ruled out, but the situation smirks of glaring humanitarian catastrophe. Precedent shows that U.N, the AU and other regional organizations have intervened on mostly humanitarian grounds. The fact that UNSC is pleading with Sudan to allow in the stronger UN force is in itself an exhibition of the humanitarian intent.

The question is whether an analysis of the motives behind an act of humanitarian intent makes any sense. What really matters is whether that act of intervention has brought relief to the endangered and to what extent pursuit of self interest, an element present in any act of intervention, in a more or less accentuated form, constitutes a real threat to peace and order as established in the Charter.

4.10.5 Right Authority

Humanitarian intervention in Sudan should be endorsed by the United Nations Security Council acting under Chapter VII provisions or the African Union under the Section 4 of
its Constitutive Act, with post facto endorsement by the Council. Chapter VII of the UN Charter deals with regional arrangements for the maintenance of peace and security. It allows for such arrangements “as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the Charter”. The Charter, thus, blesses regional arrangements. The current legal framework of the AU leaves no one in doubt of the legality of humanitarian intervention in Africa, whatever may be the position within the UN Charter framework and elsewhere.\textsuperscript{115} Thus, both the Charter and the AU Act provide the parameters of authority for intervention.

The adoption of the AU Act was a turning point in the collective desire of African leaders to chart a new course for the continent.\textsuperscript{116} Among other things, its architects promised to “promote and protect human and peoples rights, consolidate democratic institutions and culture, and to ensure good governance and rule of law”.\textsuperscript{117} The Act makes respect for sanctity of human life and condemnation and rejection of impunity one of its operational principles.\textsuperscript{118} Most importantly, the Act permits humanitarian intervention in respect of breaches of international criminal law. It vests in the AU the right:

To intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely; war crimes; genocide and crimes against humanity as well as serious threat to legitimate order to restore peace and stability to the member states of the Union upon the recommendation of Peace and Security Council.

The Act also permits member states to request intervention from the Union. It is therefore clear that the right authority can be discerned and provided for in law. There is also the possibility, in event of a failure of the UNSC to exercise due authority in Sudan, for a coalition of willing states to mobilize a force and intervene to stop ongoing crimes in Darfur without prior approval of the UNSC.

\textsuperscript{115} Supra, note 1, p.1167.

\textsuperscript{116} Ibid.


\textsuperscript{118} Ibid. Art. 4.
4.10.6 Proportionality in the Use of Force During the Intervention/Respecting and Compliance with International law and International Humanitarian Law

If military intervention is to be resorted to in Sudan, the international community must be confident that it will not do more harm than good. Use of force during the act of intervention must at all times be restrained, proportionate to the threat encountered and in strict compliance with the demands of the laws of war and general international law. This can be discussed from the already present AU and AMIS force in Sudan. There do not seem to be present any adverse reports that the personnel have committed any acts contrary to international humanitarian law. Most U.N. member states are parties to international humanitarian law treaties and therefore capable of abiding by the rules as there are adequate enforcement mechanisms to deal with any breaches.

4.10.7 Ability to Reconstruct after the Intervention

Rebuilding of economic and social fabric of the state in which an act of intervention has occurred as well as facilitating an unbiased environment for political development is as important as initial prevention of the humanitarian catastrophe. This should be done under supervision of the UN or a regional body and must be the immediate objective after the conflict has been brought under control. In the case of Sudan there is already a peacekeeping force that can continue reconstruction work. The UN and the AU are also bodies capable of reconstruction after the intervention.

4.11 Way Forward

In summary, this case study has clearly brought out the tension between state sovereignty and human rights. It has shown that human rights are matters of international concern breach of which limits state sovereignty and justifies humanitarian intervention. The lack of consensus among states as to whether or not to intervene, is also equally exposed. This is in addition to the fact that there, indeed, is lack of agreed criteria for intervention. Like in the previous chapters, it confirms the legitimacy of humanitarian intervention and affirms the existence of an emerging norm of humanitarian intervention. This is exhibited in the international community’s revulsion against the atrocities in Darfur as evidenced
by way of UN resolutions and pronouncements. The study reveals the gap between formal recognition and implementation of humanitarian intervention. It has identified the universally accepted criteria and, pitting them against the situation in Darfur, finds that the required threshold for intervention has been achieved yet no action has been taken.

The international community, on the other hand, has done little to stop the violence in Darfur. The Security Council has condemned the violence and handed over the names of war crimes suspects to the Chief Prosecutor of the International Criminal Court, but no collective military action has been authorized to prevent violence and protect the civilians. By refusing to authorize the use of force in Darfur, the Security Council has failed to live up to its obligations under international law. This failure is inconsistent with the pattern of humanitarian interventions of the 1990s and its moral commitment to ensure that the mass slaughter of civilians evident in Rwanda and Kosovo, where the UN failed to respond never happens again. The Darfur crisis presents both the UN and AU with a unique opportunity to demonstrate their commitment to humanity and to rebuild confidence in the legitimacy of global governance that broke down after disillusionment in Rwanda and to showcase their seriousness regarding moving Africa which bears the most brunt civil conflicts in the direction of peace, and stability and rejection of impunity.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study has demonstrated that despite the legal and policy objections that are often raised against humanitarian intervention, the doctrine has a basis under both the Charter law and customary international law. However, this legal basis can only be defended if current international law is liberally interpreted. In this regard, we reviewed the writings of various scholars and their arguments for and against humanitarian intervention, inclusive of their dichotomized interpretations of the UN Charter and international law. Most opponents of humanitarian intervention tended to hinge their opposition on a fear that allowing such a practice would offer stronger countries an excuse they could use to overrun other governments in pursuit of their own selfish goals. They consider this to be too heavy a cost to pay even for human rights, hence their suspicion toward the practice of humanitarian intervention. After considering the liberal approach we concluded that while divergences certainly exist as to circumstances in which resort could be had to humanitarian intervention, the principle was widely, if not universally, accepted as an integral part of customary international law. The study also found that the UN Charter does not prohibit use of force for the prohibition of massive abuses of human rights, neither does it expressly provide for the same and that the use of force to protect human rights is as equally important as the protection of state sovereignty.

The study also shows that, despite the centrality of the doctrine of state sovereignty and the concomitant principles of non-intervention in internal affairs, and non use of force, contemporary developments have very much led to the erosion of these doctrines as traditionally conceived. In this regard, we examined the development of the doctrine of humanitarian intervention from the early times till the advent of the UN Charter. Here, we found that intervention for the protection of human rights is not a recent phenomenon, but has been in practice for a considerable period of time. It fits into the concept of the doctrines of the just war theories of the medieval times and confirms that a permissive custom existed at the time and that states then attached primacy to the principle over their
treaty rights as justification, and were clearly of the conviction that humanitarian intervention was lawful and drawn from international customary law. At this point, the assumption that the principle of non intervention is paramount to human rights protection starts to weaken at a very early stage. It also confirms that argument that the protection of human rights does, indeed, limit the concept of state sovereignty.

An analysis of state practice in the post 1945 period to date, further reveals that although the principles of sovereignty and non-intervention are essential values of the international society, a state forfeits its domestic legitimacy when it perpetuates outrages against humanity. This period affirms the fact that sovereignty only confers primary competence upon a nation, and that it is not an exclusive competence. This period also shows that humanitarian interventions are becoming more frequent and acceptable. While it is true that the principle of national sovereignty is eroding, this is happening very slowly with the resultant effect that a normative revolution is taking place with regard to the rights and responsibilities inherent in claims of sovereignty. In the post Cold War period, states have exhibited the propensity to intervene in form of collective measures. The basis of the right to undertake forceful action on the part of the international community to protect human rights has been established. The international community and the United Nations in particular, now recognizes a clear mandate to become involved in situations of imminent or actual human rights violations. The upshot of this state of affairs is that humanitarian intervention is not only legal today, but also a legitimate option for achieving the protection of fundamental human rights.

The challenge which this study has identified is that though humanitarian intervention is now established as legitimate, there are no agreed rules to guide the international community in responding to individual situations as they arise or to judge the legitimacy and legality of intervention in each case. This reticence to reach a firm position on the legality of this nascent norm continues to affect the international community’s ability to tackle effectively situations where gross violations of human rights are occurring. Scholarly arguments for and against humanitarian intervention and state practice studied herein clearly brings out this lack of consensus. This is the scenario that Darfur finds itself in. The international community has been reluctant to intervene in Darfur without
the consent of the belligerent Sudanese government. The same applied to Kosovo, Rwanda and Somalia, among other cases studied, wherein intervention came too late after massive deaths and violations of human rights had long occurred. These tragedies have fostered a need to re-examine the tools available to respond to human catastrophes. Even when the international community was willing to act in Somalia, Bosnia and Kosovo, its fumbled efforts demonstrated the dire need to understand what strategies to use and what effects those actions would have.

The study has shown that there is lack of an accepted framework for intervention in the face of egregious abuses. The Darfur crisis has clearly illuminated this point by exhibiting the situation on the ground and the international response thereto. It has concluded that the situation in Darfur is ripe for humanitarian intervention and satisfies general criteria for intervention. The international community's response, vide the United Nations Security Council and the African Union, has clearly confirmed that the elevation of human rights in international arena has eroded the traditional concept of state sovereignty and that no state can hide under the veil of state sovereignty. The threat to use force by sending into Darfur a UN force to protect civilians is a clear indication of the legality of humanitarian intervention. This case study, therefore, reveals the gap between formal recognition and enforcement of humanitarian intervention.

The Darfur crisis also brings out the tension between state sovereignty and human rights. This is with regard to Sudan's obstinate refusal to allow a UN force. This lends credence to the arguments against humanitarian intervention, which arguments cannot be wished away, hence the dilemma faced by the international community to balance these competing interests. It tests the argument that humanitarian intervention is a violation of state sovereignty. This study, having concluded that humanitarian intervention is legitimate under both customary international law and Under the UN Charter, puts this argument to rest in the negative.

This study placed at the heart of the humanitarian intervention debate the tension between the principles of state sovereignty and the evolving norms related to human rights. It may be argued that the conflict between the two principles should always be resolved in
favour of humanitarian principles, especially as humanitarian intervention presupposes egregious violations that should be exceptional events in the field of international law. A glance at the events discussed in this study shows that such patterns of violence yield no simple answer and that the conflict between these two principles is real and omnipresent, not an exceptional occurrence. The need to find solutions within the parameters of international law is therefore pertinent.

5.2 Recommendations

In light of the above conclusion, the following recommendations are considered viable:

1. Innovative efforts to reconceptualise the responsibility of states can contribute to the changing attitudes. Most notable here is the International Commission on Intervention and States Sovereignty Report\(^1\) which argues that sovereignty entails a responsibility to protect citizens from atrocities and other human rights emergencies. If this responsibility is not met and efforts fail, the international community has a responsibility to react and ultimately rebuild following an intervention.\(^2\) The Commission’s Report contains a perceptive discussion of principles that should inform decisions to intervene with force of humanitarian purposes.\(^3\) The Commission provides guidance on the best sequence to pursue to ultimately reflect consensus on this principle. It suggests the possibility of a General Assembly resolution centred around the concept of “Responsibility to Protect”. Whether pursuit of such initiatives could yield political agreement on core principles or guidelines on humanitarian intervention remains to be seen. But by keeping the issue of protecting the victims of humanitarian emergencies front and centre, by offering relevant guiding principles, such efforts do contribute to longer term projects of shaping political attitudes and encourage states to ensure better protection of human rights. Such efforts more over cumulatively may

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\(^2\) Ibid., Chapter 2-5.
\(^3\) Ibid., pp. 74-75
contribute over time to a greater international consensus on when intervention for humanitarian purposes is warranted.

2. Humanitarian intervention crises such as genocide or crimes against humanity rarely occur spontaneously. The international community must value initiatives to identify potential sources of conflict and strategies designed to redress them. There are significant advantages in pursuing measures to avert humanitarian crisis and any effort to do so should be supported and encouraged. In particular, the good offices role of the UN Secretary General, in article 99 of the UN Charter, could be affirmed and enhanced possibly through a consensus UN General Assembly declaration. The Secretary General should have an agreed mandate to monitor and report impending humanitarian tragedies to the UN Security Council and receive financial and political support to establish the structure and processes to facilitate this increased capacity.

3. One possible vehicle for clarification of the norms of humanitarian intervention would be to formulate and negotiate a General Assembly resolution, similar to Resolution 2625 (XXV), adopted in 1970, without vote. This resolution represents an elaboration (and arguably an updating) of many Charter principles. It makes clear, however, that it does not supersede the Charter: “Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in the Declaration.” While such a resolution would have no ‘hard’ legal status, it represents an interpretation/clarification of the UN Charter principles and would therefore constitute a step forward.

4. The UN Charter only sanctions the use of force in self-defense under article 51 or when authorized by the Security Council to maintain or restore international peace and security under Chapter VII (and then only if the Council considers that

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measures not involving the use of armed force would be or have proved to be inadequate. If a country or countries were to intervene under the remit of the UN again, they would require a Security Council resolution that, depending on the circumstances, could be vetoed by one or more of the five permanent members. The threat of veto hangs over the Council. The problem is that the Security Council’s decision to intervene or not in a particular conflict does not reflect internationally agreed objective criteria and legal norms, but the domestic and global imperatives of the permanent five. Although the Security Council has primary responsibility for the maintenance of international peace and security, under the Uniting for Peace procedures (UN Resolution 377) the General Assembly can take collective action, as needed, when the Security Council is blocked by the veto or the threat of a veto. The purpose of uniting for peace is to ensure that any stalemate on the Security Council does not prevent the international community from meeting its responsibility for maintaining peace in the world. The idea is that there is still a second body in the United Nations, in the form of the General Assembly, which can take over this responsibility. Specifically, the resolution states that

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace in any case where there appears to be a threat to the peace, breach of peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression, use of armed force when necessary, to maintain or restore international peace and security.

5. A basic restructuring of the UN could provide another solution to avoid delays in the process of responding to humanitarian crises after the Security Council has passed a resolution authorizing use of force. For example, when the Security Council passed Resolution 918 in May 1994 which increased the UN strength in

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Rwanda to 5,500 troops, nearly six months passed before the force was eventually deployed by which point approximately 500,000 Rwandan civilians had already been killed. A standing army trained and deployed directly by the UN becomes necessary. The army which would be permanently at the disposal of the Security Council could be able to respond quickly to an emerging humanitarian crisis and be deployable for a limited time while traditional peacekeeping force was being mustered. A permanent rapid response force would circumvent UN states reluctance to send their troops thereby increasing UN reliability and legitimacy. The suggestion, though not immediate, is sensible. It could be established under Article 42 of the UN Charter. However, presently there does not seem to be political will to implement this recommendation, but as Simon Chesterman states, "the relevant Charter provisions are hardly dead letters" and in view of the changing attitude of states positively towards humanitarian intervention in exceptional circumstances, this recommendation is viable.

6. There is need to broaden the mandate of regional organizations and give them rights under certain conditions to use force. For example, the Constitutive Act of the African Union does confer a right to intervene forcibly without the consent of the target state in certain specified situations. The Security Council should be encouraged to make use of such bodies with such explicit constitutions and if such intervention is undertaken without authority of the UNSC then as has happened in the past, like in Kosovo, the action should ex post facto be authorized or be sought.

The above recommendations would, to a certain extent, ameliorate humanitarian crises in the face of lack of consensus which, as this study has shown, will not be a permanent condition. As conflicts continue to erupt, as states continue increasingly to abhor human rights abuses and as human rights issues continue to take a centre stage in international

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relations, collective interventions are the best way forward, and the liberal approach is more accommodative of human rights and humanitarian intervention. International law is, therefore, most likely to develop in that direction.
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